

# NEWSLETTER

## No. 45 March 2004

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### Constitution

At a general meeting of the Association last year, a special resolution to change the Association's Constitution was approved by the meeting. The new Constitution was submitted to the Department of Fair Trading and they presented a couple of objections. Nothing of any moment, absence of a statement as to where the Common seal was kept, failure to provide for what would happen to the Association's assets if the Association were wound up. We have complied and it's all pretty well settled with the Department of Fair Trading now but we need the formality of a special resolution approving the Constitution as amended. For this purpose we have convened a meeting to be held on :

Tuesday      20th      April      2004      at      2.00      pm      at      the  
Maroochydore      RSL      Club      (Ripples      Room)  
Memorial      Avenue  
Maroochydore 4558

The agenda will be:

- (1) Special resolution to approve the amended Constitution .
- (2) Other business.

Having dealt properly with the Constitution there seems to us to be no reason why we should not discuss other matters that the meeting may care to raise. We could not, however, adopt resolutions on any business that had not been previously notified via this newsletter.

### Unfair Contracts

The Ministerial Council on Consumer Affairs (MCCA) directed the Standing Committee of Officials of Consumer Affairs (SCOCA) - (hope that's impressive!) to examine policy options to address unfair terms in increasingly complex consumer contracts. It was agreed that there should be a national regulatory response to unfair contract terms. In examining the issues and possible responses, other regulatory regimes were examined - NSW Contracts Review Act, recent amendments to Victorian Consumer legislation and to regimes in the United Kingdom and the European Union.

A long and comprehensive (130 pages) discussion paper was produced by SCOCA in order to canvass the views of the wider community on the need for regulation of unfair contract terms, especially standard form contracts, where the consumer is just expected to sign, not negotiate any of the terms. Your Association was invited to make a submission and we have been pleased to do so.

It is instructive to read some of the observations that SCOCA made, they are so true of the retirement village situation. In what follows in italics just substitute "village owner" for "supplier" and "resident" for "purchaser:"

*However, standard form contracts do pose problems. These types of contract will usually have been drafted by professionals on behalf of the supplier. Generally, the purchaser has no time or opportunity to read the contract before signing, let alone obtain the same standard of advice as the supplier. If there is time to read it, it is doubtful whether the purchaser will understand the meaning and impact of each term in the light of the whole contract. Even if the putative purchaser did read and understand the contract, the supplier may not be prepared to change clauses at their request. This 'take it or leave it' attitude places purchasers in a difficult position: agree to the terms or forgo the product or service. Although, at law, there may not be a circumstance of duress, for example, or unconscionable conduct on the part of the supplier prior to or at the time that the contract is made, the purchaser may have no option but to agree if he or she wants the product.*

*It has become increasingly clear that many such standard form contracts contain clauses which are unfair or unnecessarily one-sided to the detriment of the purchaser. One reason that these have become so prevalent is that there is little, if any, competition in this regard. Purchasers do not usually "shop around" on the basis of the best contract terms; it would be too impractical an exercise for the vast majority of people to decide."*

We shall have to wait and see whether anything much comes of it. Suppliers, in our case village owners and their lawyers, will fight tooth and nail to deny consumers (residents) equitable contracts. But the initiative is to be commended. It is the first such initiative we have seen since the Queensland Dept. of Fair Trading formulated, in 1996, a discussion paper on "*Emerging Issues concerning Queensland Consumers*" but nothing of any moment emerged from that.

## Retirement Villages Act Review

The last meeting we had with the Department of Fair Trading was back in September 2003, a whole hour and a half! Nothing since then. However, in the run up to the election there were one or two leaks telling us how excited we should be by the amendments which will emerge from the review. Firstly by former Minister for Fair Trading, Judy Spence, who should know better, and from other MLAs who could not perhaps be expected to know any better.

It is possible that a draft Bill will emerge within a couple of months which will be produced for "public discussion". You will know from what we have reported in earlier newsletters that we do not expect it to be a cause for residents' celebration. We suppose it is just possible that the Department and therefore the Government will be influenced by

the SCOCA unfair contracts study to which we have already referred. We shall of course tell you as much as we can as soon as we can about the review. You may be sure that your Association will make comments, congratulatory or critical or perhaps both, on the draft Bill when it emerges.

## Who owns Whom - or What!

As we have remarked before, we never know for certain who owns us; our village that is. In many cases, whoever purports to be the owner, the village is mortgaged to a bank, or banks, so they are effectively the owner .

Forest Place villages, at Albany Creek, Taringa and Durack, all in the greater Brisbane area, are in process of being bought by Forrester Kurts Properties. It is not all yet cut and dried. Tricare, another Village owner group, which has a shareholding in Forest Place, seems to be not entirely happy with the arrangement and, to the best of our knowledge, is holding out. The residents will no doubt be the last to know. Prime Retirement and Aged Care Property Trust opened for business in 2001. Obviously Primelife Corporation are involved. The trust is seeking investors to provide \$16 million dollars to fund further acquisitions of retirement villages. The Trust will, it seems, own the villages and then lease them to Primelife to operate. The Trust will expect a very healthy return on investors' funds, which Primelife will, as operators, be expected to provide! It's all very complicated to most of us residents but financiers amongst us can learn more from Primelife's website. What is certain is who eventually pays. Residents !

Primelife at present operates seven villages in Queensland but does not own any - yet. It seems likely that Buderim Gardens Village on the Sunshine Coast will be the Trust's first acquisition in Queensland.

## Grey Power

Having mentioned Forest Place villages, we really should congratulate residents of Forest Place, Durack. For quite a few years a company which owned land adjacent to the village were seeking to carry out sand-mining on it. Can you imagine how that would affect village residents and others living in the area. The company persisted with applications to Brisbane City Council but making assurances that they would institute procedures to mitigate the effect of the mining operations on residents.

Village residents were not satisfied with those assurances and more than three quarters of them submitted individual objections to the Council.

The Council rejected the sand-mining application whereupon the landowner lodged an appeal. The case did not get to Court because Brisbane City Council, to its credit and not inconsiderable cost, reached agreement with the owner to purchase the land that was to be mined. When that is accomplished it will solve the problems for residents. It is possible to win battles, as did Forest Place Durack residents, but not without spirited opposition to those who would bring disadvantage to us.

# Insurance

We reported in our January newsletter that Forrester Kurts were not insuring their villages to the "greatest practicable extent" because they had a \$10,000 excess. We were wrong, they do not have a \$10,000 excess clause, they have a \$25,000 excess! The Department of Fair Trading has declined to pursue the issue on the grounds that excesses are normal Insurance practice. We regard this as an unsatisfactory answer.

Be that as it may, the decision to avail itself of the reduced premium was a commercial decision by FKP on which the residents were not, to the best of our knowledge, consulted. In our view it is then the scheme operator, in this case FKP, who should bear the consequences of that commercial decision. The Act does not prescribe a process for recovery of such excesses from residents.

There being no specific provision in the Act allowing a levy to be imposed on residents in those circumstances, its ability to recover any excess from residents is doubtful. If the scheme operator attempts to recover the excess from residents in that manner then preliminary advice to us is that residents should pursue the issue in the Commercial and Consumer Tribunal.

# The High Court of Australia

Down in New South Wales, a decade ago, residents started an action against a scheme operator alleging they had been misled, when signing their lease contract, as to the level of General Service Fund payments. It became a very complicated affair which involved the Residential Tenancies Tribunal, the Local Court, the District Court, the Supreme Court (NSW), the Australian Federal Court (twice) and, eventually, the High Court of Australia. That's as high as you can get!

It would be too tedious to go into all the legal ramifications and arguments but there were decisions and appeals and more decisions and appeals. Eventually the full bench of the High Court decided in the resident's favour, on the grounds that the village had misled the resident at the time of becoming a resident, thus contravening the Trade Practices Act. The case is not quite finished as the matter of compensation for the resident has been sent back to the original trial judge to determine

The costs of this saga have been enormous, far exceeding the amounts which were in dispute. Its continuance by the resident was made possible only because the NSW "Aged Care Rights Service Inc." pursued the case. This would not have been possible in Queensland because the more or less equivalent organisation in Queensland, the "Aged and Disability Advocacy Inc." is generally precluded from any involvement in cases of dispute between residents and owners of retirement villages.

We report this NSW village case because of the wider significance of some of the decisions reached, particularly by the NSW Supreme Court regarding Codes of Conduct. Both the residents who were a party to the proceedings, and the NSW Department of Fair Trading, pleaded in the NSW Supreme Court that the village owner had breached the Retirement Village Industry Code of Conduct. That Court ruled that that Code did not

override obligations set out in the residents' leases.

This Association has always insisted that Industry Codes of Conduct are pretty useless because they are unenforceable at law. The NSW Supreme Court's decision vindicates our view. It is to be hoped that the Queensland Department of Fair Trading will now drop all attempts, in the review of its Retirement Villages Act, 1999, to regulate by Codes of Conduct. Only legislation, that is Acts of Parliament, will be of any use in providing for the regulation of conduct and pursuit of those who breach them. And only vigilance and determination by the responsible Government Department will ensure that breaches of it are pursued.

## Disputes Tribunal

The only recent development is that the Tribunal has made a ruling on something which might seem to be obvious. However, it is of potential significance for us all. Sections 6 and 169(1)(c) of the R V Act refer to village land. They do not actually refer to common facilities built on it. The Tribunal has therefore ruled, in a case it is dealing with, that restriction of the use of village land is also a restriction of the use of common facilities built on it. And, vice versa, restriction of the use of facilities is also a restriction of the use of the land on which they are built.

## Annual General Meeting

A bit quick off the mark, aren't we. Until last year, all our annual general meetings had been held in Brisbane. Last year, for the first time, it was held elsewhere, on the Sunshine Coast, at the Maroochydore RSL. Although there is a limit, mostly financial, to the range of venues to which one can travel, this year it will be held in the Wide Bay area. It has already been booked, as follows:

Returned Quay Bundaberg, Qld. 4670	Services	League	Club Street
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Monday 27th September at 10.00 am.

The meeting room will be open earlier and tea, coffee and biscuits etc. will be available there from 9.00 am.

We shall, of course, remind you much nearer the time but here's an opportunity to book a couple of days up at Bundaberg. Come to the AGM and get in some whale watching while you're there - on a boat of course, not actually at the AGM!!

## Newsletter

The difficulty the Editor has in writing newsletters is to convey and explain complex matters in an easily readable way. The last thing he wants to do is confuse readers with what might seem to be puzzling technical or legal jargon but that is sometimes impossible;

remember the GST explanations a few years ago?

And it has to be said that it is virtually impossible to convey some information without references to sections of the Retirement Villages Act., which the Editor readily agrees is a sometimes baffling and imprecise document. So, do forgive him if he sometimes falls from grace and let him know if he does so too often.

*Editor*

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