

NEWSLETTER

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Constitution

As notified in our March newsletter, a General meeting was held on the 20th April 2004, to approve, by special resolution, amendments to the Constitution requested by the Department of Fair Trading. The whole Constitution, as amended, was unanimously approved by the meeting.

The meeting then discussed a variety of other matters of interest to residents, some of which are reflected in topics in this newsletter.

Forrester Kurts Villages

"Originally, in this space, under this heading, we took Forrester Kurts to task for what we regarded as unfair practices. We referred to what we see as the impropriety of leasehold residents being required by their leases or otherwise to pay for anything to do with termites. We also referred to quite substantial Insurance excesses which we see as being in themselves excessive and not to be charged to residents by "special levy" in the event of a claim. There was nothing new in those topics; members and others will know that we have aired them before, at considerable length, in previous newsletters.

However, mistakenly and very regrettably, we also described how in villages run by Forrester Kurts, directors' fees were being charged to residents' General Services Funds. We completely retract and apologise to Forrester Kurts for everything we wrote on that subject because it is simply not true of Forrester Kurts villages.

Equally mistakenly and equally regrettably, we also said that the village bus in Forrester Kurts villages was leased instead of being purchased as a capital item and that the lease payments were being charged to residents' General Services Funds. This too was completely inaccurate; it does not happen in Forrester Kurts villages. We retract and apologise for everything we said on that subject too.

Forrester Kurts were naturally aggrieved and justifiably protested to us most strongly. We unreservedly withdraw what we wrote on those last two subjects and equally unreservedly apologise to Forrester Kurts for having mistakenly attributed those practices to them.

President
ARQRV.

Hibiscus Villages

Reported in the Chancellor Park village newsletter is an interview by a member of the residents' committee with the Hibiscus general manager, in relation to Hibiscus' appearance as respondent at a Tribunal hearing. The general manager is reported as stating that **“At no time had any of the residents at Chancellor been intentionally cheated”**. We are pleased to hear that but such claim does not sit well with attempts to make improper deductions from what is due to be paid to departing residents

Section 15 of the Retirement Villages Act quite clearly states that except for contracts entered into before 1 July 2000, Exit Fees (also known as deferred management fees) must be calculated as at the day the Unit is vacated. The Act also states, at Section 68(3), that in post 1 July 2000 contracts the operator must not charge a commission, however described, (camouflaged is a better word) for selling the right to reside in the Unit.

Nevertheless, a departing resident was given a statement showing that a further whole year's Exit Fee would be charged on the next anniversary of the date the resident signed the contract. That is contrary to Section 15 of the Act. The statement also quite blatantly charged the resident a sales commission, contrary to Section 68(3). This is a case which has come to our attention; how many more are there which we do not know about?

In the above case the deductions from the Exit Entitlement are clear breaches of the Act for which the Department of Fair Trading should prosecute; but pigs will fly before the Department does anything of the sort. It is pertinent to quote, for the Department's guidance, an extract from Section 3 (Main Objects) of the Act: -

3(b) To promote fair trading practices in operating retirement villages and in supplying services to residents.

3(e) To encourage the adoption of best practice standards by the retirement village industry.

Why such Unfair Bad Practices

Why, you might ask, do scheme operators deal so unfairly with residents. The answer is that they do so because they are allowed to get away with it by a Department of Fair Trading and, one has to say, successive Governments, which cannot be bothered to ensure that elderly retirement village residents are treated fairly. They seem not to regard us as consumers of services supplied to us by retirement village scheme operators.

Many of the common unfair practices are discernible from the annual financial statements which scheme operators are required, by Section 113(3) of the Act, to submit to the Department of Fair Trading but it has to be doubted that the Department bothers to look at them or even ensure that scheme operators send them in.

Inaccurate PIDs

Many residents will have had, from time to time, notices from their scheme operator about what are claimed to be inaccuracies in their Public Information Documents. It is a rather ineptly worded requirement of Section 36 and 37(2) of the Act. Many residents have expressed concern that their contracts are being unilaterally changed; a misapprehension that owners are not generally anxious to dispel. As we have said before, your scheme operator simply cannot, on whatever pretext, change your contract without your written agreement, which you should never give without competent advice. Following is something else that the General Manager of the Hibiscus group of villages is reported as having said in the interview from which we have already quoted:

“Residents should remember that the lease they signed when they purchased can never be changed, so any new lease only applies to those who signed it.”

Amen to that! It’s just a little short of being accurate because it’s not only the lease that cannot be changed but the whole contract including the PID forming part of the contract.

Review of the Retirement Villages Act

There is nothing official to report but there is a bit of information resulting from a leak by former Fair Trading Minister Judy Spence during her election campaign earlier this year. We should let you know of it. We cannot reproduce here all of the nine pages of Departmental proposals and our responses but [they are all on our web-site](#). What, in short, the Department is proposing is in italics and our responses in ordinary print:

(1) Operators may be excluded from attending residents’ meetings .

We are opposed to scheme operators having a right to attend residents’ meetings. It should be attendance by invitation of residents only.

(2) Operators will no longer be able to act as proxies for residents.

We have long campaigned for this.

3) Residents will be entitled to have explanatory information to accompany quarterly financial statements.

But will the Department enforce it if we complain that such information is not being supplied or will it advise us to get our own legal advice or that we may have a case for the Disputes Tribunal.

(4) Residents will be entitled to receive a copy of the draft budget, and to then make comment on it. To facilitate this, the operator will be required to hold the annual meeting prior to the budget being finalised.

That is ludicrous, what is the Department thinking about? The annual Section 131 meeting cannot be called until the Section 113 financial statements are made available to residents.

That is often as late as November and could be as late as the thirtieth of November. That means that the S.131 meeting could be as late as 21st December. So are we then to be finalising the budget for the year when half the year has passed?

(5) Deficits, as well as surpluses, may be carried forward to the following year.

No Way will we agree to deficits being carried forward unless we have agreed the budget in the first place and been consulted about any inescapable and unforeseeable expense that arises during the year. To allow otherwise would make residents responsible for deficient accounting practices and give scheme operators a way of escaping the provisions of Division 7 of the Act.

The Department of Fair Trading will have to think of fairer trading than that. Let them not believe that surpluses are always carried forward. They have a nasty habit of disappearing in some villages with less than scrupulous bookkeeping practices.

6) Capital and maintenance. Guidelines for classifying items of expenditure will be introduced and the definitions of key terms in the Act will be expanded.

Guidelines, like any voluntary code of conduct, are unenforceable and scheme operators will pay them scant attention. Guidelines should first be the subject of consultation with this Association and then be made mandatory and enforceable Regulations under the Act.

(7) The liability of a former resident to continue paying the GSC will cease after nine months from vacation of the unit. There has been strong operator stakeholder objection to such a cap (wouldn't you know!) as it is claimed that unsold units continue to accrue costs which should fairly be borne, at least partly, by the former resident.

We, ARQRV, fought very hard over this and will continue to do so. We do not see why the period should be longer than six months, as is the case in most if not all Church run Villages. However, down from ad infinitum to nine months is an improvement for departing residents.

Unleased Units do, of course, continue to incur costs, as does any unoccupied accommodation. But why should those costs not be borne by the owner, which in any other situation is what happens when tenants, with due notice, vacate the premises.? Why should any part of the costs be borne by the ex-tenant? The owner, the scheme operator, should re-lease unoccupied Units without delay or accept the loss of failing to do so.

It is to be noticed that there is not a word about scheme operators having to pay out a resident's Exit Entitlement within a certain period of time after the resident has left the Unit even if he has not found a new lessee. To get their own money back it seems that residents will still have to wait ad infinitum!

(8) It will be clarified that the purpose of reinstatement is to bring the Unit to a marketable condition.

What is a marketable condition? Scheme operators will define it as pristine condition. That they are already doing so is evidenced by some of the costs they are attempting to

charge to vacating residents. Costs which are clearly repairs chargeable to residents' Maintenance Reserve Fund (S.97) or replacements chargeable to the Capital Replacement Fund (S91) or Capital Improvements which are a charge to neither but payable by the scheme operator. (S90).

9) *Once the unit is sold, the time within which the operator must pay the resident their exit entitlement will be changed from 28 days to 14.*

Why not seven days, which is the most it takes to clear a cheque? Why is the scheme operator to be allowed a margin for dragging his feet in paying ex-residents their Exit Entitlement ?

(10) It will be clarified that a PID must be specific to the village to which it relates, and therefore an operator with more than one village will no longer be permitted to use a generic PID.

As scheme operators are required to notify the Department of Fair Trading of new PIDs, you would think the Department would be well aware that a PID is not specific to even one village. There is always more than one edition of the PID in any village. But does the Department always get notified? If it does, does it take any notice? A PID can be specific only to those residents of whose contracts it forms part.

So, after almost three years of review, that is all that we have; a woefully inadequate leaked document. All of the above Departmental proposals and our replies to them are on our web-site in full and if any one would like a hard copy of them please let us know and we will send one.

Capital Replacement and Repair

It is a fact that in commercially operated leasehold villages, PIDs are becoming steadily more oppressive in improperly requiring residents to be personally responsible for replacing and repairing practically everything in or on their Unit. They use expressions in the contract such as “ *agree to regularly maintain and properly repair or replace any equipment, appliances fittings, fixtures etc... that are **made available** by the scheme operator*”

Lawyers Minter Ellison are fond of sending letters emphasising the above to scheme operators for distribution to their residents. As we have said in earlier newsletters, do not be taken in by such obvious attempts to dissuade us from challenging contract provisions which contravene the Act.

The expression “made available” is but a prostitution of the English language. Everything in and on the Unit is leased from the owner and the cost of maintenance and repair of all such fixtures and fittings etc. are a proper charge to the fees we pay each month. And replacements of them are a proper charge to the scheme operator's Capital Replacement Fund. The Retirement Villages Act 1999 is quite clear on that. For scheme operators or their lawyers to assert otherwise is reprehensible in the extreme and perhaps fraudulent. If you get any such letters or representations from owners or their lawyers do please send us a copy.

Community Ambulance Levy

We wrote about this in our October 2003 newsletter and were pretty scathing of the Minister's (which means the Department's) indifferent attitude. We had correspondence with the Department on the subject, some of which has been on our web-site, and after being initially given some plainly wrong information in reply to our enquiry, we were later informed by the Department that a Government decision in November 2003 provided for exemption for retirement villages. Our lobbying on this exemption matter has borne some fruit.

Disputes Tribunal

Once again we have no results to report to you. The length of time it takes to get cases heard is frustrating but the Tribunal has often to deal with challenges to its jurisdiction by scheme operators' lawyers. Successful or not, that often causes much delay. Nevertheless, we are expecting some decisions in the near future. We are also aware of other cases which have been or are soon to be the subject of applications to the Disputes Tribunal but it would be improper of us to describe the subject matter or reveal the identity of the applicants.

I shall be "away from the office" for three weeks from mid May till about the 5th of June. Telephone calls to me will be diverted to Bill Runciman's line but please send e-mails intended for me to Bill's e-mail address instead of mine. I shouldn't like to return to an e-mail-box bursting at the seams. Moreover you would have to wait a while for a reply. Talk to you later.

Phil Phillips

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