

# Association of Residents of Queensland Retirement Villages (Inc)

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ARQRV

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No 54

NEWSLETTER

October 2005

## A.G.M. 2005

More than a hundred members attended the AGM, which was our best AGM attendance yet. The following members from the villages indicated were elected to the Committee:

President	Phil Phillips	Edenlea
Secretary	Bill Runciman	Life member
Vice Pres.	Keith Topham	Immanuel
Vice Pres.	John Sullivan	Caloundra
Member	Jim Leech	Wishart
Member	Ivy Laundon	Hibiscus Buderim Meadows
Member	Margaret Carnegie	Oasis Sippy Downs
Member	Mary Woodhead	Hibiscus Tewantin
Member	Les Armstrong	Kawana Island

All but the last two were re-elected from last year. Mary Woodhouse replaces husband Ken who has been on the committee for quite a number of years. Les is really the only new boy on the block and we welcome him.

The special resolution to ban scheme operators, their relatives and employees from membership of our Association was carried. The Constitution will be amended as soon as the amendment is registered by the D of FT. The meeting also renewed its authority for the Committee to commit funds in the pursuit of successful Tribunal outcomes and to hire paid clerical assistance at its discretion. As a review

of the past year, this newsletter will now be devoted very largely to the President's annual report given to the AGM held on the 30th September 2005 at Beenleigh.

## The Minister's letter

First however, we reproduce below the Ministers letter to us on the occasion of our AGM.:

*Dear Phil and Association members,  
Congratulations on another successful year for your Association. In particular I congratulate Phil and the other ARQRV office bearers for their hard work on behalf of retired Queenslanders. I also thank Phil for agreeing to present this message to you all on my behalf at your AGM. Most of you will be aware that the Beattie Government is currently reviewing the retirement village legislation. A preliminary draft consultation Bill was released for further consultation some months ago and since then I have met with a large number of retirement village residents and their representatives. My staff and I have met or had discussions with Mr Phillips a number of times in recent weeks. I have also received a very large number of letters, phone calls and personal representations from residents sharing firm views about the shape the legislation should take. I have been very fortunate in receiving feed-back from so many retirement village residents. I try to learn something from every one I meet. Speaking to hundreds of residents and their representatives*

*during the review has strengthened my resolve to ensure the legislation I bring to the Parliament next year contains better consumer protection and more certainty for residents than you currently have.*

*In progressing the Retirement Villages Amendment Bill I intend that Queenslanders who retire and invest significant funds in a retirement village Unit have:*

*\*clearer and more detailed information about your investment*

*\*better involvement in decision-making processes*

*\*more certainty about future fees and charges; especially after vacation of a Unit*

*\*stronger protection against coercion or duress in the exercise of your rights*

*\*More clarity and certainty in the categorisation of maintenance, capital and rectification costs*

*I am also committed to ensuring a fairer deal for those who bought into retirement villages prior to the commencement of the Retirement Villages Act and have not up until now the benefit of many of its protections.*

*There are complex issues and competing interests at stake in this review. No individual or group will get everything they desire in the amendments.*

*I assure you that your interests as retirement village residents are my first priority on all the issues in the review.*

*However, it will only be with your continued support that I will be able to deliver much needed consumer protection reform of our retirement village industry.*

*I look forward to your on-going support as we continue to work together for the benefit of retired Queenslanders.*

*I wish the ARQRV and all its members a successful AGM.*

*Yours sincerely,  
Margaret Keech.*

I think it would be appropriate for individual 2

Residents to write to the Minister expressing appreciation of her support for the interests of retirement village residents.

## ANNUAL REPORT

Here we are once again reviewing the events and lessons, successes and failures, of the past year and trying to predict where we are going and what will happen during the coming year. Perhaps we can wryly, if a bit unfairly, comment on the speed with which we conduct our reviews when compared with the pace of the Department of Fair Trading's reviews. Today is the fifth annual general meeting of the ARQRV taking place at a time when the Retirement Villages Act 1999 is the subject of review. I don't for a moment suppose that anyone here will imagine that that means that the Department keeps reviewing the Act, it means that it has taken over four years on one review.

Despite voluminous and frequent submissions to Government, your Association has not been very much involved in consultations with either the Department of Fair Trading or representatives of scheme operators. There were five meetings between November 2001 and May 2002. Nothing of any substance was achieved; some of the issues were canvassed but in broad terms. No nitty-gritty. Our representatives at those meetings did not include any members of the Committees which have been in office since September 2002. Since then and until July of this year we have had a total of about seven hours of meetings, mostly with the Department's officers alone; only one at which owners' representatives, including Aged Care Queensland, were present.

At the end of August this year I had a meeting with the Minister, the Honourable Margaret Keech. That meeting was productive in the sense that the Minister acknowledged the depth of concern of residents generally, which she had discovered from listening to residents. Instrumental in that was the

splendid attendance we had at the meeting in Maroochydore in April of this year, at which the Minister was present. Questions and comment were thick and fast and very much to the point. It was a local meeting of course but we had over two hundred residents from villages around the Sunshine Coast at the meeting. We were in danger of running out of chairs.

In June we had another meeting in Maroochydore. It was only of residents of villages around the Sunshine Coast but there were over a hundred present. It was simply a discussion and questions and answers but it was certainly worthwhile.

In talking to the Minister at that end of August meeting, I remarked that we should have had many meetings with the Department and representatives of owners. She agreed that that might have been a good idea and said she would arrange some such meetings before the amendment Bill was prepared for Parliament. She was true to her word and a meeting was arranged for Friday 23rd September, a week ago. At that meeting there were 3 people from the Department of Fair Trading, including the Deputy Director-General, 3 people from Aged Care Queensland, the scheme operators' 'lobby group' together with their legal adviser, from Minter Ellison wouldn't you know, plus an advisor to the Minister, not from the Department, and yours truly. Those of you here from Hibiscus villages may be interested to know that one of the Aged Care Queensland representatives was none other than Fiona Campbell, an erstwhile Hibiscus general manager. We had another meeting the following Tuesday, that is 3 days ago.

I can assure you that I was not at all overwhelmed by the scheme operators outnumbering me four to one! At both meetings I was unrelenting on your behalf in opposing proposed amendments which we believe are counter to residents' best interests. I gave no ground; I did not sell you out. But nobody should be too carried away by the fact of these meetings. The proof of the pudding will be in the eating. We are all far too experienced and justifiably cynical to count any chickens before they are hatched. They will not

be hatched until well into next year. That does not mean that we should now sit on our haunches and await Government's pleasure. You should all, as individual residents, keep up the pressure. Continue to badger your local State member, continue to air your individual concerns in any way that you can. We, that is this Committee, certainly if you re-elect us, will continue to advocate your interests in a centralised way.

So much for the legislation. Now to some events which have been based on the legislation. There have been quite a few cases before the Commercial and Consumer Tribunal during the last twelve months and there are several in the pipe-line. Progress is slow, there can be many, many months between sending a dispute notice to the Tribunal and having a decision handed down from a Tribunal hearing. From the Tribunal decisions that have been handed down during the last year, several things have emerged to our advantage:

### **Phillips v. Edenlea**

One is that if the Tribunal rules that an increase in a charge for a certain service is invalid (Section 106) and orders the scheme operator to refund to residents he has to pay from his own pocket. He cannot plead, not successfully anyway, that it has been spent and there is not sufficient money in the general services account to refund it. Neither can he refund from the General Services Fund by using funds that residents have subscribed for other services. He must pay up from other resources.

### **Sarah Leary & others V. Primelife, Robina**

Another is that if there is a significant surplus at the end of the financial year the Tribunal is likely, depending on circumstances of course, to order it refunded to residents. That means that we can stop scheme operators from accumulating large surpluses which they can then use as a buffer to cover future deficits or increases in our fees.

## **Phillips v. Edenlea**

If the scheme operator imposes increases in fees without going through the proper process of comparing last year's budget, last year's actual expenditure with the proposed next year's budget, or if the financial papers presented to residents are less than transparent, the Tribunal is likely to order the scheme operator to do his sums all over again in the proper manner. They cannot legally just compare their budget for this year with that for last year and say the difference is the increase which you will have to pay, which is what very many of them do.

Many villages just ignore that ruling and still do budget to budget comparisons. Some scheme operators say that as the decisions haven't been ratified by a District Court or the Supreme Court or that the Act hasn't yet been amended, those rulings do not count. Let me tell them that they jolly well do, they become law, as they will discover if they transgress.

## **Buderim Gardens (Hodges and others v. Coastal Buildings)**

In that case the scheme operator was ordered, amongst other things, to repay into the Maintenance Reserve Fund over \$100,000 which he had improperly used on capital improvement. This decision relied on Tax Rulings, which as you will have read from our submissions on the proposed amendments to the Act, we are anxious to preserve and not have them supplanted by 'codes of conduct' or industry authored 'guidelines'. It was also ruled in that case that Scheme Operator's membership of Aged Care Queensland was not to be charged to residents. This was all pursued by Peter Boyce of Butler, McDermott and Egan.

## **J. Wales v. Laurel Springs Management Co.**

In a case which we can refer to as the Laurel Springs case, Council Rates collected from residents which were not in the event required to

be paid to the local Council were ordered to be repaid to residents. There is an analogy here with a very early case, the Schintler case.

This Laurel Springs case was also pursued by Peter Boyce.

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As we all know, some scheme operators try to increase fees by stealth. What we have to watch out for now is overspending. If a Section 106 item is overspent, the operator is likely to say: "Oh well, it has been spent for your benefit so you have to pay. They then carry forward that deficit and make you pay the following year. They will also say that in framing next year's budget we have to start from actual expenditure in the previous year. We say: generally yes, that is what the law requires, but not if there was a substantial overspending in the previous year. That would just compound their overspending. We must make them justify overspendings.

One of their malpractices is their surreptitious increases in our Maintenance Reserve Fund fees. Because of the structure and purpose of that fund, there should very seldom be any justification for increasing our MRF fees. There will be a fairly comprehensive article on that subject in our next newsletter, which should issue toward the end of October.

## **Ivy Laundon & others v. Hibiscus**

Another case, settled only a couple of weeks ago, (Ivy Laundon and others v. Hibiscus Buderim Meadows) was about capital replacement. The Hibiscus group of villages replaced a carpet in a community hall and charged it to the maintenance Reserve Fund. Three residents went to the Tribunal and, to cut a long story short, Hibiscus capitulated at a Tribunal directions hearing and agreed to reimburse the expenditure to the residents' MRF. They also agreed to

remove the replacement of carpets and curtains from the quantity surveyor's MRF forecasts. The residents concerned told the Tribunal that they wished the agreement not to be confidential so the Tribunal made the agreement a 'consent order'. It is thus an order for all to see and use to advantage. There is a lesson here: never agree to a settlement being confidential, always have it made an order of the Tribunal. So, look at your village's MRF long term estimates and, if they include the replacement of carpets or curtains, or the replacement of anything else, politely let your management know that they must be removed from the MRF. Any difficulty, let us know.

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Another issue which concerns us greatly is about residents' right to meet in or on the common areas, notably the community hall, to use facilities and to establish a residents' committee without having to get specific permission from the management as to whether residents may meet, what they may discuss and whom they can invite. We see it as a right, implicit in the Act, not a privilege to be exercised at management's discretion. There will be a case before the Tribunal on that issue but for the present it is sub-judice so we should not say more about it.

But I ought also to say that we, that is residents, have had some setbacks at the Tribunal. Some decisions have gone against the interests of residents. We believe that some of those decisions have been grossly unfair. So am I saying that the Tribunal has been unfair? Well, perhaps. But we must remember that the Tribunal has to consider and make its decisions within the constraints of the Retirement Villages Act 1999, which brings us back to the real culprit: the Act itself, which we all recognise as being heavily cast against residents. One of the bigger loopholes in the Act, through which scheme operators' lawyers can drive a London omnibus, is at Section 12(3) of the Act. Most of us think of general services as gardening, facilities, wages, rates and the like but 'management and administration' is so wide and imprecise that all sorts of charges can creep into the General Services Fund budget under

that heading. They can be difficult to challenge.

Perhaps I ought to reiterate here that if you think you have a case for the Tribunal, please let this committee know. We do not pretend to be lawyers, we do not pretend to a knowledge or expertise we do not have, but we do have a fair experience of the Tribunal and how cases should be presented and we get our own legal advice when it seems necessary. Our knowledge and experience are at your disposal. It's for that, amongst other things, for which you pay your subscription. Helping residents to prepare cases to take to the Tribunal and sometimes representing them is a very time consuming exercise and we spend a lot of time on that. We do not begrudge the time one little bit but other things also need doing and the pressure can be significant. We are all aware of how old we are and how our drive and endurance diminishes with our advancing years.

As our accounts will reveal, we spend about \$1500 a year for somebody outside the Association to keep our membership lists up to date and to produce labels for the parcels in which we send out newsletters. We think we really need more paid help than that. We really ought to employ a competent person to do the actual work involved in not only keeping membership lists up to date and printing labels but to take over the whole process of despatch of newsletters to members. And also to attend to our bookkeeping and record keeping. It would not be full-time and we should of course have a members of the Committee monitoring those activities.

You have, at previous AGMs, authorised us to spend what we think is necessary on legal expenses incurred in bringing cases to the Tribunal and on legal representation at the Tribunal. As our accounts will also reveal, we have not spent a great deal on those matters; we have been very much a do it yourself outfit and have been quite frugal with your money.

However, there will be a need to spend more. We have in the past year committed the Association to meeting residents' reasonable legal costs to a provisional limit of \$5,000 in a couple of quite complicated cases which are still in progress. We don't want residents to shy away from going to the Tribunal for want of financial support and it is likely that on occasions we shall have to get good legal advice on the likelihood of succeeding in the more complicated cases. We keep in mind that a successful Tribunal outcome benefits residents throughout the State, not just that village whose residents pursued the case. We shall ask you a little later to confirm your authority for that sort of expenditure and also for such administrative expenditure as we deem necessary. A few little snippets of information which you might like to hear about. Buderim Gardens Village, on the Sunshine Coast has been sold to a Property Trust controlled by Primelife Corporation. Primelife is now also managing the village; they also manage several other villages in Queensland. This Primelife Property Trust has now bought four of the Hibiscus Group's six villages. It is Primelife's stated aim to become market leader in the retirement village field.

*Phil Phillips, President.*

## **Maintenance Reserve Fund**

Most scheme operators treat this like the 'operational' budget and increase contributions each year. There is no good reason why they should do that. When the first quantity survey was done, back in 2000, the surveyor produced a ten year prediction of what was likely to be spent in each of those years. As can be seen from those surveys, and from more recent ones, expenditure was expected to fluctuate year by year, depending on what exactly was done in which year.

What scheduled works were not done in one year would be done the following year. If any work was brought forward (which really

should not happen) less would be spent the following year. Residents' contributions, also forecast by the quantity surveyor, were pitched so that they would not fluctuate from year to year but over that ten year period would be sufficient to cover the aggregate expenditure. Many surveys included a cash flow chart showing the fluctuation in expenditure from year to year but clearly indicating the steadiness of our contributions. Given the way our contributions allow for an annual 3% increase, in most cases, there can be very few reasons to increase our contributions by more than the amounts forecast in the survey.

The plain fact of course, as we already know, is that scheme operators are swinging more and more of what is patently day to day operational expenditure on to the MRF. Gardening and landscaping, mulching and flower planting, once regarded as operational expenditure, are being regarded by management as a charge to the MRF. We must resist that by resisting those unwarranted annual increases.

One more thing: if you live in other than a freehold village, that is if your village is leasehold or loan/licence, your MRF contributions, like your other General Service Fund contributions do not attract the GST. Nor does expenditure have to have GST added. You pay the gross cost of things and those things contain any GST that is payable. Nothing to be added. Indeed, if you live in a Church run village, which is a tax exempt village, any GST included in what you pay for can be recovered from the ATO. This should have the effect of reducing your fees below what they would otherwise be.

## **Independent auditors & surveyors**

As you will all know, we have often drawn attention to the sort of audit reports that we generally get: special purposes reports which make only very cursory examinations. and are full of reservations and disclaimers, not worth the paper they are written on - "We do not take responsibility for" they usually state. "This

report is to satisfy the requirements of the Retirement Villages Act” they claim, (does it really?). “This is to satisfy the requirements of residents” they also claim! When were residents ever consulted about their requirements?

We have expressed similar doubts about quantity surveyors, who are commissioned by, paid by (although charged to us) and instructed by scheme operators. We are never consulted about the nature or substance of the quantity survey reports and in the Buderim Gardens case the surveyor was found to be at fault in his view of what should be charged to the MRF and what should not. Following are a couple of extracts from the Tribunal's findings in that case:

*“94. We find that the audit of the financial accounts for the year 2000/01 undertaken by Kelly (auditor) was neither thorough nor independent. Kelly says in his affidavit that in preparing his report his firm test-checked a selection of invoices from each month of the audit period to ascertain compliance with subsections 3 and 4 of Section 97 of the Act. He says that in carrying out the audit he was satisfied there was no evidence of capital expenditure being misclassified as repairs or maintenance. When Kelly was cross-examined with respect to the detail of what individual invoices were actually checked as part of the audit process, he said that in relation to invoices classified by Dzufer (scheme operator) as maintenance reserve fund invoices he could find only two invoices from the MRF which had been checked with respect to the six month period from July to December 2000. This is clearly unsatisfactory. If Kelly had checked a proper sample of invoices it is likely he would have discovered that insufficient detail as to the work undertaken was provided. Our scrutiny of the disputed invoices reveals that most disputed invoices lacked basic details such as how substantial claims for labour were calculated. There were no details as to hours worked or hourly rates.*

*“97 Because Lukins (quantity surveyor) advised McGovern and Dzufer (scheme operators) during the period in question on the basis of the latter's misleading instructions and because Lukins does not appear to have questioned those instructions, we have concerns as to whether the MRF budget prepared by Lukins was an independent report in the same way as we have concerns about Kelly's audit report. The applicants' concerns about the standard of financial accounting in the village during the relevant period were in our view well founded.*

The above is not the ARQRV holding forth. No, it is the considered opinion of the Commercial & Consumer Tribunal.

It is to be noted that the Tribunal referred to the instructions given to the surveyor by the scheme operator. As we have remarked in the past, including to the Department of Fair Trading, quantity surveyors are seldom independent, as required by S.98(1) of the Act. The scheme operator's ability to manipulate and control the Maintenance Reserve Fund is clear from Sections 98 (2),(3) and (6) of the Act. For that reason, if for no other, the MRF should not be a Section 107 item but a S.106 item, subject to the same limitation in respect of increases in our contributions to it as are other S.106 items.

## Transparency

Both we and the Tribunal have often been critical of the lack of transparency exhibited by scheme operators in their dealings with residents. At a meeting of the Business Council of Australia last year, His Excellency the Governor-General delivered the following words on business ethics. He defined them as :

*“accountability, honesty, trust, openness and fairness”*

There is precious little evidence of business ethics in retirement village operators' dealings with their residents and no evidence thus far of the Department of Fair Trading's will to embrace those ethics and ensure adherence to them.

## Resident Satisfaction

From time to time, scheme operators and their lobby groups conduct a 'survey' of their member villages in order to gauge the level of satisfaction that residents have with the village in which they live. Of course, they always find a very high level of satisfaction. This is true, unfortunately of only comparatively few villages. In almost whichever village one looks, there is only a minority of village residents who are really aware of and troubled by what goes on and are prepared to raise their voices in protest. For some, as we all know, the scheme operator or village manager can do no wrong. The majority, however, know that all is not well but feel unable to take up cudgels.

The review of the Retirement Villages Act should reveal at least some measure of that satisfaction or, more to the point perhaps, a measure of dissatisfaction. We haven't seen any figures in relation to the review of the Queensland retirement villages Act but there are some statistics in relation to the New South Wales review of their Retirement Villages Act, which is currently under way. They can be found on the NSW Dept. of Fair Trading web-site.

An industry 'survey' of residents of villages in NSW found that 94% of residents had their expectations satisfied or more than satisfied. That is really at odds with some statistics which can be found on the NSW Department of Fair Trading's web-site.

A total of 322 submissions were received by the NSW Department. Of that number there were only 21 from scheme operators or industry groups and 280 from residents. All of the submissions from residents called for improvements to the law to better protect residents. It cannot be just coincidence that we in Queensland have been campaigning for exactly the same thing - improved consumer protection.

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For those of you with internet access to our web-site, we have now put an index ('Subject Index') there which shows a list of all the subjects about which we have written in our newsletters. Each subject listed has the numbers of the newsletters in which it has appeared shown alongside it. We hope it will be a useful tool for researching the history

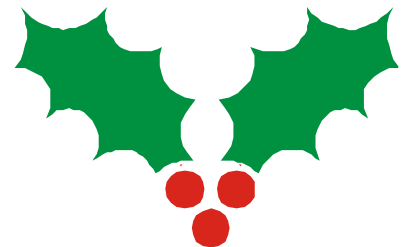
## Membership

It's the time of the year for renewing our membership of the Association. Anybody renewing or joining now will be paid up until the end of December 2006. Renewal can be made by paying your \$10.00 to your village liaison officer or by sending it direct to our Secretary whose address appears at the head of the newsletter.

This newsletter has been a bit late issuing, mainly because we wanted to encompass the AGM and the annual report but it is a bumper edition so we hope that makes up for it. We have attempted to review the events of the last year and the lessons we believe can be drawn from those events. We hope it has been as informative as you would wish.

It is now the end of October and it is unlikely that we shall issue another newsletter before Christmas. That being so, the new Committee wishes you a Merry Christmas and a Happy New Year.

*Till 2006 then.*



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