



# Association of Residents of Queensland Retirement Villages (Inc)

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## ARQRV

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### No 70

### NEWSLETTER

### February 2009

## From the President

In recent months a number of events have impacted on the Retirement Village industry, each having a significant effect on Residents.

- New owners for a Sunshine Coast village
- Expressions of Interest (or more) in FKP by Lend Lease and then by Stockland
- The emergence of Lend Lease Prime Life as a management agency for Prime Trust
- The Retirement Village Association's entry into Queensland
- The rapid growth of the Assisted Living Concept as opposed to pure ILU-style villages
- The entry by some smaller Operators into the Service Provider arena

The Saunders Exit Fee case and the Sunnymead Case, both discussed in detail later in this Newsletter, are especially significant, each highlighting a disturbing trend in the Dispute resolution process. These disputes illustrate that some Operators are prepared to expend whatever resources are necessary to protect their profit margins, and are engaging high-profile Counsel to do so. Few, if any, residents can fund similar representation, and are thus at considerable disadvantage. The ARQRV often assists in these matters, but also has limited resources. Nonetheless, the Association will continue to oppose the Operators' "Win at any Cost" approach and will support unreservedly major cases, especially those watershed issues likely to result in removal of, or changes to, unfair terms in Residence Contracts.

Currently, the regulation of retirement villages is primarily the responsibility of the States and Territories. However, there is a need for some Federal legislation to ensure that all Australians are entitled to the same protection under the law. Planning is under way to form a National Residents' Organisation which

will provide a collective voice for residents and enable that body to reinforce the push for Australia-wide legislation. More details will follow in the next issue.

On 20 September 2007 the House of Representatives Standing Committee on Legal and Constitutional Affairs tabled a report entitled "Older people and the Law", which considered the adequacy of current laws addressing the needs of older Australians. The report made a number of recommendations with respect to retirement villages, including that the Standing Committee of Attorneys-General examine ways to advance greater harmonisation of retirement village legislation.

On 2 October 2008, the Council of Australian Governments agreed to the development of a new national consumer law, which would include a provision addressing unfair terms in standard form contracts. Many retirement village contracts are likely to be in a standard form and would be covered by the new provision. An unfair term is one that causes a significant imbalance in the parties' rights and obligations, but is not reasonably necessary to protect the legitimate interests of the supplier. A consumer suffering detriment as a result of being subject to an unfair term would be entitled to a remedy.

Undoubtedly, there will be many members who believe that their residence contract contains at least one unconscionable clause or unfair conditions. If so, they should act now and write to their Local Member requesting remedial action. Remember, 2009 is an election year for the State Government and a flood of letters from concerned constituents may generate some action.

The Retirement Villages Association is now active in Queensland, and is working in conjunction with Age Care Qld, especially in promoting Accreditation. Not surprisingly, full membership of the RVA is now conditional upon the village becoming accredited. Whether or not a village is accredited is of no particular significance to Residents, notwithstanding the claims that most prospective residents ask whether the Village is accredited, and that accredited villages will generate higher re-sale values. Did you ask this

question? Did the Sales staff raise the matter with you before your entry? Remember, accreditation is primarily a Marketing ploy of limited value to Residents. The cost of achieving this status cannot be passed on to Residents.

## Membership

**Reminder:** Annual Membership renewals are now overdue. There are approximately 900 Members who have not renewed. If you are unsure of your standing, either contact your village Liaison Officer, or call 54937112, or email your enquiry to [vi.lesarm38@bigpond.com](mailto:vi.lesarm38@bigpond.com) Shortly, after the delivery of this Newsletter, the names of unfinancial members will be removed from the mailing list, so renew now or this will be your last Newsletter.

## Newsletter by Email

The Association publishes 20000 copies annually of our Newsletter, over four issues of 5000. Production and mailing costs are approximately \$23000, ie. about one quarter of the annual budget. Effective from this issue, electronic distribution has been introduced for members who elect to receive their copy via Email. Should you wish to support this major cost-saving initiative, send an Email to the Association: [vi.lesarm38@bigpond.com](mailto:vi.lesarm38@bigpond.com)

**Subject: "Yes please, Newsletter via Email". Remember to include your name & Village title.**

**Every emailed Newsletter saves \$1.15 !!!!**

## Liaison Officers Required

When representing Members, the Association relies on Village Liaison Officers as the initial point of contact. Our Liaison Officers coordinate ARQRV Membership in the village, contact new residents and collect annual subscriptions. **The following Villages require Liaison Officers:**

- Bridgeman Downs
- Canossa
- Coolum Waters
- Coral Sea Gardens
- Forest Place, Clayfield
- Heritage Gardens
- Hibiscus Nambour
- Kensington Gardens
- Mt Gravatt
- Pine Lake
- The Plains
- Robertson Park
- Runaway Bay
- The Residence
- Torbay

Interested members should contact Dave Lavis by email [dave.arqrv@villagers.org.au](mailto:dave.arqrv@villagers.org.au) or 54389770 for further details.

## Tribunal Matters

### Tew & Kelly vs Masonic Care VH005-08

This case concerned the adequacy or otherwise of financial management processes at Corinthian Court RV in Townsville. Specific issues were whether the accounting procedures were appropriate for a retirement village; the calculation process for the general services levy; the need for separate bank accounts for MRF and CRF, identification of Section 106 and Section 107 line items; and correct presentation of Section 112 and Section 113 Financial statements. The Tribunal findings supported every element of the Applicants' claim and re-inforced the need for Openness and Transparency in the conduct of financial matters. Particular emphasis was placed on separate trust accounts for the MRF and CRF, and on the format and content of reports issued under RV Act Sections 112 & 113. VH005-08 is an essential reference for all finance sub-committees, who should now ensure that these procedures are applied in their village.

### Saunders vs Paraqon VH002-06

This case deals with a very important issue for all residents of those Villages that persist with calculating exit fees on yearly rests, rather than a more equitable daily basis. Joan Saunders resided in the Bellcarra Retirement Resort in Caloundra from 22 October 2003 until 23 October 2005; a period of 2 years and one day. Her exit fees amounted to \$9900 per year of occupation "or part thereof". The operator of the Village charged Ms Saunders an exit fee for 3 years of occupation. So her final day in the Village cost her \$9900.

Section 15(2) of the Act states that exit fees must be "calculated as at the day" the resident ceases to reside. We have long argued that this provision requires a calculation of exit fees on a pro-rata daily basis, rather than on the yearly basis. Ms Saunders took this matter to the Tribunal with the assistance of the ARQRV and, surprisingly, was unsuccessful. The Tribunal ruled that S15(2) can be read in two ways, one of which is not inconsistent with the operator's conduct. We had argued that our interpretation better achieves the objects of the Act, particularly the object referring to "fair trading". The Tribunal acknowledged that the fee charged to Ms Saunders was "harsh" but said that it served another object of the Act, namely to promote the "viability of the industry".

It seemed to us though, that the Tribunal may have erred, because the viability of the industry as a

whole could not depend on operators being able to extract "harsh" charges. The Tribunal's position assumes that the industry would cease to be viable if every resident left their village just before the cusp of an exit fee year, and that the industry depends on windfall profits.

Ms Saunders appealed the decision to the District Court with our assistance, and she was successful. The judge ruled that S15(2) does require exit fees to be calculated on a pro-rata daily basis rather than a yearly basis. The judge indicated that that was the most natural reading of the provision, and also the reading that best achieved the objects of the Act. The decision was very clear, and resoundingly in our favour.

However that is not the end of the matter. Minter Ellison have now stepped in for the scheme operator, and has filed a further appeal against the District Court's decision. Their appeal will be heard by the Court of Appeal, which is one step below the High Court. They are going to remarkable lengths to defend a fee the Tribunal described as "harsh". Ms Saunders will be resisting the new appeal with assistance from the ARQRV.

It is unlikely that there will be a hearing before June this year, and then the decision itself may take another month or more to be delivered.

### **Powers vs Jomal VH003-07 (Sunnymeade)**

This is a case about the meaning of "capital items" under the Act, and responsibility for the repair and maintenance of operator-owned fixtures within leasehold units.

A number of hot water systems in Units within Sunnymeade Park Retirement Village needed their sacrificial anodes replaced at a cost of \$140 per system. After the work was performed, the operator advised the residents that their leases required them to meet the cost of such repairs personally. The residents resisted, on the basis that the hot water systems were owned by the scheme operator, and were therefore "capital items" under the Act, and must be maintained using the Maintenance Reserve Fund.

The residents took the issue to the Tribunal, with assistance from the ARQRV. The residents relied on a number of arguments, but most importantly they referred to clause 1.1.10 of their PIDs (which is a standard clause in all PIDs issued since 2000). That clause advises all prospective residents that their accommodation units are "capital items", and therefore covered by the MRF and CRF. The residents argued that the PID prevails over the lease terms relied on by the scheme operator.

In March 2008, the Tribunal ruled in favour of the residents, finding that the scheme operator cannot

use the lease as a means of "contracting out" of the provisions in the Act regarding the MRF and CRF.

However the scheme operator, represented by Minter Ellison, applied to the Supreme Court for a judicial review of the Tribunal's decision. Minter Ellison filed almost 60 pages of submissions as to why they believed the Tribunal's 25 page decision was wrong. The residents defended the application, again with assistance from the ARQRV.

The hearing was in November 2008, and the Supreme Court handed down its decision on 6 February this year. Unfortunately the scheme operator was successful. The Court held that the Act allows scheme operators to contract with residents to exclude operator-owned capital items from the ambit of the MRF and CRF.

We think the reasons given by the Court are disappointing. They do not address a number of the arguments that were put to the Court on behalf of the residents. For instance, the Court did not consider the critical consumer protection function of the PID in the retirement village context. Residents cannot leave a village without incurring a significant capital loss (ie exit fees) and so it is critical for all costs to be disclosed 'up front' so residents can ensure the Village is affordable before they enter. Any hidden costs could force them to leave (and incur exit fees) prematurely.

In this case the PIDs suggested to the residents that their entire Units were capital items covered by the MRF and CRF, and nowhere else did it suggest that they would be personally responsible for repairs and maintenance of operator-owned fixtures. The only clauses to that effect were in the 'fine print' of the Lease. So the Court effectively found that residents cannot rely on their PID as disclosing all costs of residing in a Village, and allowed the lease to prevail over the PID.

The Court also seemed to accept the scheme operator's argument that it makes no difference to residents whether repair costs are paid by them personally or from the MRF, because the MRF is resident-funded. That argument forgets that many residents live on limited, fixed incomes and can manage a fixed monthly contribution to the MRF far more easily than unpredictable, sporadic repair costs that can significantly upset their budget. The barrister representing the residents believes they would have reasonable prospects on appeal, and this is now under consideration.

In the meantime, our main concern is that all residents who have entered a leasehold Village since 2000 will have been presented with a PID containing clause 1.1.10 which suggests their accommodation unit is a capital item to be covered

by the MRF and CRF. However the Supreme Court's ruling means that PID clause will not prevail over a lease which provides otherwise.

Given that the State Government drafted clause 1.1.10, and required all operators to include it in their PIDs, any residents who feel that they were misled by that clause should write to their local State Member as soon as possible. An election is likely to be called very soon, so many members are already in 'campaign mode', and are likely to be particularly attentive to your concerns.

## FAQ's

### **Q. Do you need legal advice, but can't afford the cost?**

**A.** Help may be available. The Department of Justice and Attorney General has advised that the Public Trustee may provide some legal assistance where a person has been refused, or is ineligible for Legal Aid. Similarly, the Queensland Public Interest Law Clearing House (QPILCH) will consider referring matters to legal practitioners and law firms who provide pro bono services. However, similar to the Public Trustee, QPILCH only provides assistance where a person has been refused, or is ineligible for Legal Aid. Therefore, if a Resident intends to seek assistance from either the Public Trustee or QPILCH, an application must be submitted beforehand to Legal Aid, Qld, who can be contacted on 1300651188.

### **Q. Can a deficit accumulating from previous years be carried over and recovered from residents in the next financial year?**

**A.** Example: In FY05/06 staff at Village X were awarded an increase in hourly pay rates. The increase was not applied until late in FY07/08 and the lump sum back pay was then carried over as a deficit into FY08/09. A similar situation existed in Village Y where the deficit arose from deferred payments of Long Service Leave/Superannuation. RV Act Section 102A prescribes that an Operator must adopt a budget for **each** financial year, which determines the amount necessary to fund the general services for that year; and to then fix the contributions necessary to cover that amount. Additionally, the Operator **must** carry over any surplus or deficit at the end of the previous financial year and take that surplus or deficit into account when adopting the budget for the following year. Clearly, these prescriptions refer only to one financial year and do not allow for any carry-over

From other than the previous financial year. Amounts accruing from other than the previous financial year cannot be recovered from residents. They are the Operator's responsibility.

### **Q. Can residents agree to elect a Committee before they have adopted a Constitution for the Village?**

**A.** RV Act Sections 127 and 128 deal with elections of committees and constitutions respectively, and should be read in isolation. S127 prescribes that residents may elect, by election conducted among themselves, a residents' committee. No mention here of the requirement to have a Constitution. S128 provides that residents **may** by majority vote at a **residents** meeting adopt a constitution. No mention here that the residents must have previously elected a committee. Therefore, residents may elect a committee without reference to a constitution; and a constitution may be adopted, notwithstanding that a committee may not have been elected.

### **Cost of Selling**

### **Q. Can a Resident be charged Cost of Sale on Departure?**

**A.** For post 1JUL2000 contracts, the Cost of Selling must not be passed on to the Resident, regardless of how Operator identifies them. Any fee related to the sale which the Operator may legitimately pass on must be correctly identified as a third party expense and must then be shared in accordance with RV Act S68 in the same ratio as the Exit Entitlement.

## STOP PRESS

Retirement Villages in New South Wales may sell alcohol without a Liquor Licence, subject to certain conditions. The ARQRV will be preparing a submission to the Office of Liquor Gaming and Racing seeking a similar concession for Retirement Villages in Queensland.

## **DON'T FORGET**

**[Renew your membership with the ARQRV for 2009 or this will be your last NEWSLETTER](#)**