

# Retirement Villages Tribunal

*Retirement Villages Act 1999*

--- REASONS FOR DECISION ---

**APPLICATION NO:** V001-01

**BETWEEN** (Applicant):

**SCHINTLER Kevin Charles**

167/52 University Road

CHANCELLOR PARK Qld 4556

**AND** (Respondent):

**CHANCELLOR PARK RETIREMENT VILLAGE PTY LTD**

Lakehead Drive

CHANCELLOR PARK Qld 4556

1. This is an application by Kevin Charles Schintler ("Mr Schintler") against Chancellor Park Retirement Village Pty Ltd ("the Respondent") under section 170 of the Retirement Villages Act 1999 ("the Act") in which he relies upon contraventions of section 86 of the Act.

2. Section 170 provides as follows:

**Resident may apply for order if given false or misleading documents**

**170.(1)** This section applies if-

(a) a scheme operator of a retirement village contravenes section 86; and

(b) a resident of the retirement village is materially prejudiced by the contravention.

**(2)** The resident may apply to the chief executive for an order by a Tribunal to have the resident's residence contract set aside.

3. Section 86 provides as follows:

**False or misleading documents**

**86.(1)** A scheme operator must not give the chief executive or a resident a document containing information the scheme operator knows is false or misleading.

Maximum penalty-200 penalty units.

**(2)** A complaint against a scheme operator for an offence against subsection (1) is sufficient if it

states the information was false or misleading to the scheme operator's knowledge.

4. Mr Schintler seeks an order under section 193 on the basis that he alleges he is materially prejudiced by the various contraventions to which he refers in his application.

5. Section 193 provides as follows:

**Tribunal orders under section 170**

**193.(1)** This section applies if a resident applies for a Tribunal order under section 170.

**(2)** In setting a contract aside, the Tribunal may make the orders it considers appropriate including, for example, the following-

(a) an order that the scheme operator refund to the resident the ingoing contribution or another amount paid under the contract;

(b) an order that the scheme operator compensate the resident for damages or loss caused by the contravention.

6. Mr Schintler seeks an order by the Tribunal that the Respondent refund to him the ingoing contribution and an order that the Respondent compensate him for the damages or loss caused by the contravention. The Tribunal is satisfied that Mr Schintler brings this application on behalf of himself and Mrs Schintler, who attended both days of the hearing, but did not give evidence.

7. In relation to the contraventions under section 86, the major documents upon which Mr Schintler relies are as follows:

1. the lease dated 1 September 1997 in relation to clause 5.01 which refers to 167 units for calculating outgoing contributions (Respondent's document No JR 1);
2. the Respondent's solicitors letter of 29 September 2000 to the Office of Fair Trading regarding the 2000/2001 (Applicant's document No 2);
3. the Respondent's letter of 5 October 2000 to Residents' Committee (Applicant's document No 7);
4. the Respondent's letter of 14 July 2000 regarding the costs of cleaning on termination (Applicant's document No 14);
5. the audited report of outgoing contributions account to 30 June 1999 (Applicant's document No 3);
6. the audited report of outgoing contributions account to 30 June 2000 (Applicant's document No 4);
7. the annual budget for the year ending 30 June 2000 (Applicant's document No 4);

8. the annual budget for the year ending 30 June 2001 (Respondent's document No RN3);.

## **Representation**

8. Mr Schintler represented himself at the hearing and the Respondent was represented by Mr McHugh, a solicitor from Thompson McNicol.

## **Proceedings**

9. A hearing was held at Maroochydore on 2 August and at Brisbane on 9 August 2001. The parties were given an opportunity to attempt to settle the matter at Maroochydore and were encouraged to do so before the matter resumed in Brisbane.

10. Mr Schintler was the only witness for the Applicant and Mr Rodney Nunn ("Mr Nunn"), the manager of the village at the relevant time, and Ms Julie Roberts ("Ms Roberts"), the former General Manager of the Respondent, were the only witnesses on behalf of the Respondent required by Mr Schintler for cross examination.

## **Jurisdiction**

11. The parties entered into a written lease on 1 September 1997. The lease and the schedule to the lease were attachments to the statement of Ms Roberts marked JR1. The public information document which, by virtue of the Retirement Villages Act 1988 ("the repealed Act"), forms part of the lease was an attachment to Mr Schintler's statement at document No 15.

12. The Act commenced on 1 July 2000. By section 23 of the Act, the Act applies to an existing residence contract such as that entered into by the parties here. By virtue of Sections 21 and 22 of the Act, the dispute between the parties constitutes both a retirement village dispute and a retirement village issue.

13. All actions by the parties prior to 1 July 2000 were required to comply with the repealed Act and the Tribunal is not given any specific powers to deal with matters which arose before 1 July 2000.

## **The Law**

14. In applying section 86, the first question is whether the document contains information which is false or misleading. Then the second question is did the scheme operator know that the information was false or misleading at the time it was given. The third question involves determining whether or not the resident was materially prejudiced by the contravention.

15. The character of the document said to be false or misleading is to be tested at the date of giving it, not with the benefit of hindsight. (applying *Bill Acceptance Corporation Ltd. v. GWA Ltd* (1983) 78 FLR 171).

16. Conduct is misleading or deceptive if it induces or is capable of inducing error - *Keehn v Medical Benefits Fund of Australia Ltd*

(1977) 14 ALR 77;

*Weitmann v Katies Ltd*

(1977) 29 FLR 336; *Parkdale Custom Built Furniture Pty*

*Ltd v Puxu Pty Ltd*

(1982) [149 CLR 191](#) at 198 (Gibbs J); *Rhone-Poulenc Agrochimie SA v UMI Chemical Services Pty*

*Ltd*

(1986) 12 FCR 477. By analogy a document is misleading if it induces or is capable of inducing error.

17. False is defined in the *Macquarie Pocket Dictaurus* as not true or correct, apocryphal, erroneous, fallacious, unhistorical, untrue, wrong or used to deceive or mislead, bodgie, bogus, counterfeit, dummy, fake, phoney, sham, not genuine, artificial, imitation.

18. Mislead is defined in the same *Dictaurus* as to lead or guide wrongly, bamboozle, bluff, bull, catch, cheat on, come the raw prawn, deceive, delude, dupe, equivocate, fast-talk, fool, fox, gull, handle, have, have someone on, hoodwink, humbug, lead astray, lead up the garden path, take for a ride, take in or trick.

19. There is an evaluative judgment involved in determining this issue. As the Full Court said in *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* (1999) 169 ALR 1 at 14:

*"The characterisation of conduct as "misleading or deceptive or likely to mislead or deceive" involves a judgment of a notional cause and effect relationship between the conduct and the putative consumer's state of mind. Implicit in that judgment is a selection process which can reject some causal connections, which, although theoretically open, are too tenuous or impose responsibility otherwise than in accordance with the policy of the legislation."*

20. Where it is necessary, as here, to prove that a document is knowingly false or misleading, regard should be had to the meaning intended by the giver if the explanation is not so unreasonable or unrealistic as to not be fairly open. The critical question is whether, having regard to the finding that the document was objectively false or misleading, it was given deliberately knowing it to be false or misleading.

21. These two concepts involve a mental element. The scheme operator giving the document must either know the document is false if given but still give it or, realising it may be wrong, gives it without caring whether it is true or false. If the scheme operator asserts it has neither of these states of mind but the true facts are widely divergent from what has been said, a tribunal of fact may be persuaded that the inference should be drawn that one or other of the states of mind exists.

22. The third question involves determining whether or not the resident was materially prejudiced by the contravention and will depend upon the resident being able to establish the prejudice and the causal connection. "Material" is defined in the *CCH Macquarie Concise Dictionary of Modern Law* as meaning "substantial; significant".

23. While the phrase "materially prejudiced" is used in several Queensland statutes it is not defined and does not appear to have been judicially considered. However, whether parties have been "materially prejudiced" has been considered in several cases involving applications to proceed after considerable delay and in those cases it is clear that being "materially prejudiced" can result from a range of matters and is not limited to financial considerations (See *Brisbane South Regional Health Authority v. Taylor* (1986) 186 CLR 541) A similar approach was taken by the High Court in *The Commonwealth v Verwayen*, (1990) 170 CLR 394, where "materially

disadvantaged" and "detriment" were being considered and the judges' statements make it clear that it must be "material" or "real" although pecuniary loss may not be necessary. Dawson J. at 461-2 observed that justice cannot always be measured in terms of money. Deane J. was of a similar view (see 448-9). Applying that logic here would suggest that pecuniary loss may not be necessary.

24. The reference to "document" in section 86 must be read widely as it is not defined as in section 85 to mean a "relevant document". That definition is said to apply only to section 85. Therefore, subject to the surrounding circumstances, any document may qualify and certainly the documents to which the section refers are not limited to the residence contract or the public information document.

## 1. The lease of 1 September 1997

25. Mr Schintler's evidence in relation to the lease involved the fact that it referred to 167 units, plus the manager's unit, giving 168 units, in relation to the calculation of the outgoing contributions payable by Mr Schintler. He then directed the Tribunal's attention to the budgets for the years ending 30 June 1999, 30 June 2000 and 30 June 2001 where the Respondent used 324, 408 and 404 units for calculating the outgoing contributions payable by Mr Schintler.

26. Clause 5 of the lease refers to the Outgoings Contribution and states as follows:

### 5. OUTGOINGS CONTRIBUTION

5.01 The Owner shall notify the Resident prior to the execution of this Lease and prior to each 1st day of July of the Resident's fair proportion of the Owner's estimate of the total operating expenses of the Owner in respect of the running, maintenance and management of the Village for the financial year under review. The Residents proportion of the aforesaid estimate shall be determined by having regard to **there being 167 units** (excluding the Resident Manager's unit) **in the Village** and taking into account costs and expenses which are attributable directly or indirectly to the Unit and such other matters as the Owner considers relevant. The Owner will make available to the Resident, upon request, full details of how the Resident's fair proportion of the Owner's estimate of total operating expenses was calculated. **(The Tribunal's Highlighting)**

5.02 For the purposes of this Clause 5 the term "total operating expenses" shall include:

5.02.1 all rates, taxes (excluding any income, gift or capital gains tax), charges, duties, assessments, outgoing contributions and impositions of any kind properly levied in respect of the Village by any Government body or department, whether State or Federal, or any local authority provided that if the same relate to or include any other land as well as that comprising the Village, the Owner shall apportion the amount thereof between the Village and such other land on the basis of the relevant values of the land as adopted by the government body or department or the local authority for the purpose of imposing such rates, taxes, charges, duties, assessments, outgoing contributions and impositions;

5.02.2 all charges for water, gas, oil, electricity, light, power, fuel, telephone, sewerage, garbage, heating, cooking, ventilation and other services or requirements furnished or supplied to the common property of the Village, and for the maintenance and repair of all electrical, plumbing, filtration and sewerage installations at the Village;

5.02.3 all costs of repairs and maintenance which are necessary to keep the Village and all buildings, structures, roadways, improvements, plant, machinery, equipment, apparatus and appliance on the Village, the property of the Owner, which is used in connection with the Village, in good order and condition Including provision at the discretion of the Owner, for future repairs or other contingencies provided that where an expenditure is made out of such provision such expenditure shall not be included in the calculation of operating expenses for the financial year in which such expenditure is incurred;

5.02.4 to the extent that such costs are not met from the Sinking Fund Account of the Village, the cost of such external painting, repairs, replacements and maintenance as are necessary to keep the units together with all other buildings, structures and improvements at the Village in good order, condition and appearance;

5.02.5 all insurance premiums payable by the Owner in respect of the Village and the buildings and other improvements at the Village and of such of the contents in the buildings and other improvements as are the property of the Owner against loss or damage generally and all premiums for insurance against public liability, workers compensation and such other insurable risks as the Owner may from time to time determine;

5.02.6 all management secretarial, legal and accounting charges reasonably required in connection with the running, administration and maintenance of the Village;

5.02.7 all charges, fees, wages and other emoluments, including superannuation, paid to contractors, agents, employees and others at any time engaged in or about the conduct of affairs of the Village.

5.02.8 all costs of cleansing and maintenance of buildings and other improvements in common use by Residents of the Village including all necessary cleansing and maintenance of internal and external passages, rooms, garages, paths and gardens;

5.02.9 all costs of lawn mowing, gardening, maintaining and landscaping the common property of the Village;

5.02.10 all costs associated with the provision and maintenance of any medical, nursing, transport or any security, caretaking or other service for the benefit of residents at the Village;

5.02.11 such sum in each financial year as the Owner may reasonably determine to set aside in the Sinking Fund Account of the Village to cover repairs, refurbishing, renovations, replacements and maintenance of a capital or substantial but irregular or infrequent nature to the Village;

5.02.12 any other expenditure properly incurred by the Owner in managing, operating or administering the Village;

5.02.13 any items of expenditure carried forward from any

previous financial year,

5.02.14 the costs of any arbitration proceedings between the residents' committee and the Owner.

5.02.15 all costs of or in connection with the Owner complying with the requirements of any Government or statutory authority concerning the operation, maintenance or management of the Village including the costs of the annual audit;

5.03 Upon receiving notice from the Owner of the Resident's fair proportion of the Owner's estimate of the total operating expenses for any financial year the Resident thereafter shall pay to the Owner on the first day of each month during that financial year an outgoing contribution being an amount adjusted to the nearest cent equal to one twelfth (1/12) of the Resident's fair proportion of the Owner's estimate of total operating expenses as notified by the Owner to the Resident.

5.04 If the Owner for the time being fails to give to the Resident notice in writing of the outgoings contribution payable by the Resident in accordance with the provisions of this Clause 5, the Resident shall pay to the Owner on account thereof on the due date the same outgoings contribution as is payable during the relevant immediately preceding financial year and any deficiency shall be payable within fourteen (14) days of request therefore made by the Owner.

5. ...

6. ...

27. Both Mr Nunn and Ms Roberts explained the numbers 324, 408 and 404 by saying that the Respondent was required to calculate the budget on the basis of a completed retirement village. Ms Roberts referred to the fact that the Office of Fair Trading had approved an increase in the size of the village to 404 units.

28. While the Tribunal accepts that this approval may have been given, it considers it to be irrelevant to the exercise of calculating the outgoings contributions payable by Mr Schintler. Further, the Tribunal considers that the Respondent's use of these numbers resulted from a confusion of two different obligations. The Respondent has a duty to inform potential residents in the public information document of the amount of outgoings contributions they may expect to have to pay upon entering the village. This is a different obligation to the Respondent's duty to realistically estimate the amount that the residents will be required to pay by way of outgoings contributions for the next 12 months. The latter is the purpose of the annual budget.

29. The use of these numbers by the Respondent also ignored the Respondent's obligation under Mr Schintler's residence contract to use the number of 168 referred to in that contract. The Respondent provided no submissions on the law to justify its submissions that the approval of an alteration of the size of the village should over-ride the terms of the residence contract.

30. The Tribunal rejects the Respondent's reference to the public information document, provided to Mr Schintler at the time the lease was entered into, as justifying an increase in the number by the Respondent. It does so because the lease refers specifically to the calculation of the outgoings contributions by use of 168 whereas the public information document refers vaguely to possible increases in that the number of units in the village in the future. The wording in the public information document is appropriate to warn of possible future increases but the wording does not substitute for the specific words of the lease relating to calculating the outgoings contributions.

31. However, despite that the above comments, the Tribunal finds that the document does not contain information which is false or misleading. The Respondent's actions may have subsequently been incorrect but that does not make the information false or misleading. It follows that the Tribunal further must find that Mr Schintler has not proved that the Respondent knew at the time that it gave him the lease that it containing information which was false or misleading.

## **2. The Respondent's solicitor's letter of 29 September 2000 to the Office of Fair Trading regarding the 2000 /2001 budget**

32. This two and a ½ page letter is fairly wide ranging and Mr Schintler alleges that it contains information which is false or misleading.

In paragraph 2 it states:

"We would first like to point out that all moneys paid by residents on account of outgoings are paid into an outgoing account which account is used solely for paying outgoings which is contemplated in the lease."

33. Mr Schintler gave evidence, which the Tribunal accepted, that this account was used for paying outgoings in relation to both the education centre and the nursery which were not contemplated in the lease. Mr Nunn confirmed that payments were made in relation to the both the education centre and the nursery, but he stated that all payments had been promptly reimbursed by the owner. On the basis of the audited statements for the years ending 30 June 1999 and 2000, the Tribunal is not satisfied that all payments made on behalf of the education centre were reimbursed by the owner. Mr Nunn's statement at paragraph 20 does not account for full reimbursement by the owner which confirms Mr Schintler's evidence. Mr Nunn, when questioned by the Tribunal, could not explain the discrepancies but simply restated that, in his opinion, all monies had been reimbursed.

34. Likewise the Tribunal is satisfied that, in relation to the nursery, the outgoings contributions account was not promptly reimbursed because Mr Nunn failed to bank a reimbursement cheque before the end of the financial year ended 30 June 2000.

35. Regrettably, the Tribunal also finds that the Respondent misled the Tribunal in its response filed in the Tribunal when it stated "all moneys have in any event been repaid by 30 June 2000". The owner may have written out a cheque but the outgoings contributions account had not received that cheque by 30 June 2000 so the Tribunal finds that the residents' account had not been repaid.

36. The Tribunal finds that this information in relation to the education centre and the nursery is false and misleading and that, on the balance of probabilities, the Respondent knew that it was false and misleading on 29 September 2000.

37. The next question is whether or not Mr Schintler has been materially prejudiced by the Respondent's contravention of the Act in this way. There was no evidence before the Tribunal as to when, or for that matter, if the education centre costs had been fully reimbursed in 2000/2001, as Mr Nunn had wrongly claimed in regard to previous years. For this reason, the Tribunal is unable to conclude that Mr Schintler has been prejudiced, let alone materially prejudiced. The Tribunal is satisfied that all known expenditure on the nursery was reimbursed to the outgoings account by August 2000 and for that reason the Tribunal concludes that Mr Schintler has not been materially prejudiced by the contravention.

38. Further in paragraph 2 the solicitor's letter states:

"If the residents pay more than required for a particular item in any particular year, any excess remains in the outgoings account and a credit may be applied for that particular item in then next year's budget. Likewise, if there is a shortfall for a particular outgoing in any year then the contributions for the next year may increase to make up that shortfall. The point is though, if the years any excess, it is not paid to our client but remains in the general outgoings account for the benefit of all residents."

39. Mr Schintler alleges that this information is false and misleading and that the Respondent knew that it was false and misleading on the basis of its previous behaviour as shown in its audited statements for the years ending 30 June 1999 and 2000. The audited statements for the year ending 30 June 2001 were not available to the Tribunal at the time of the hearing.

40. If the Respondent were to follow the practice which it has adopted in previous years, the Tribunal would have no hesitation in finding that these claims in that the solicitor's letter were false and misleading, but in view of the changes which in the Act has required of village operators, the Tribunal is not able to find the information is false and misleading on the basis of the evidence before it.

41. In paragraph 3 the letter states:

"Pursuant to clause 5.01 of the lease, our client is entitled to calculate and notify the residents of the residents' Fair proportion of the owner's estimate of the total operating expenses of the village. For the financial year ended 30 June 2001, each resident's proportion of the aforesaid estimate is determined by having regard to their being 404 units in the village and taking into account costs and expenses which are attributable directly or indirectly to each unit and such other matters as the owner considers relevant.

Therefore our client is entitled to estimate the annual rates bill having regard to the there being for 404 units in the village even though the village has not yet been fully completed."

42. The Tribunal finds that this information to be false and misleading because clause 5.01 of Mr Schintler's lease clearly refers to 168 units. The Respondent failed to put any convincing evidence before the Tribunal in relation to its contention that 404 should be used to calculate the outgoings contributions for residents of the village. The Tribunal is unconvinced that an approval by the Office of Fair Trading of an increase in the number of units in a retirement

village alters the contractual relationship between the residents and the village operator in relation to the method of calculating outgoing contributions.

43. The Tribunal finds that, on the balance of probabilities, the Respondent knew that it was false and misleading on 29 September 2000. Where it is necessary, as here, to prove that a document is knowingly false or misleading, regard should be had to the meaning intended by the giver. The Tribunal finds the explanation is so unreasonable or unrealistic as to not be fairly open to the Respondent because of both reference to 168 units in the lease and the number of actual units existing in the village on which expenditure was required.

44. The next question is whether or not Mr Schintler has been materially prejudiced by the Respondent's contravention of the Act in this way.

On page 3 of the letter it is stated:

"Our client then works backwards and multiply as the levy per unit by 404 to come up with a total figure of \$423,000.00."

45. Mr Schintler submits that the figure \$423,000 is false and misleading and that the Respondent knew it was false and misleading. Mr Schintler provide the Tribunal with Exhibit 1, based on information he attained from Maroochy Shire Council as to the rates paid by the Respondent for the years ending 30 June 1999, 2000 and 2001. Based on that exhibit, Mr Schintler submitted that the Respondent paid rates of \$127,475 in the year ending 30 June 1999, \$201,289 to the year ending 30 June 2000 and \$346,093.99 to the year ending 30 June 2001.

46. It is clear from the evidence that despite paying \$127,475 in the year ending 30 June 1999, the Respondent budgeted for the sum of \$423,000 for the year ending 30 June 2000. Then having paid \$201,289 in the year ending 30 June 2000 budgeted \$423,000 the year ending 30 June 2001.

47. On the basis of this evidence, the Tribunal finds that the figure \$423,000 was false and misleading and on the balance of probability, the Respondent knew it was false and misleading. Further, the Tribunal finds that if the rates payable to Maroochy Shire Council for Lot 1 are divided by 168 units, Mr Schintler and the other 166 residents in stage one, would have been required to pay \$758.32 to the year ending 30 June 2000 and \$987.65 to the year ending 30 June 2001. The Respondent's use of the figure of \$423,000 which it divided by 408 and 404 in those two years resulted in the residents contributing \$1,036.76 and \$1,047.03 in relation to rates in those two years.

48. The next question is whether or not Mr Schintler has been materially prejudiced by the Respondent's contravention of the Act. Provided that the Respondent does for what is referred to in its solicitors letter of 29 September 2000, and credits any overpayments of rates to Mr Schintler and the other residents, Mr Schintler will not be materially prejudiced. The Tribunal is not prepared, under the circumstance of the Act coming into effect on 1 July 2000, to find that the Respondent's prior behaviour which materially prejudiced Mr Schintler, and the other 166 residents of Lot 1, is likely to continue.

49. Mr Schintler submits that the Respondent's actions with regard to rates are to avoid the effects of sections 106 and 107 of the Act.

50. These sections provide as follows:

**Increasing general services charges**

**106.(1)** A scheme operator may increase charges for general services for a retirement village only under this section or as allowed under section 107.

(2) The scheme operator must not increase the general services charge above the percentage increase in the CPI for a particular year, unless the increase is approved by the retirement village residents by special resolution at a residents meeting.

Maximum penalty-200 penalty units.

(3) If the retirement village residents, by special resolution at a residents meeting, approve an increase in the general services charge for the retirement village above the percentage increase in the CPI for a particular year, the general services charge may be increased only by the amount of the approved increase.

(4) For applying this section, the percentage increase in the CPI for a particular year is the percentage increase between the CPI last published before the start of the particular year and the CPI published for the quarter ending immediately before the residents meeting is held.

(5) In this section-

"CPI" means the all groups consumer price index for Brisbane published by the Australian statistician.

### **Resident's responsibility for paying increased general services charge**

107. A resident is not required to pay a charge for a general service under a residence contract to the extent that the charge is more than that payable under the contract and increased under section 106, unless the excess is attributable to an increase in-

(a) rates, taxes or charges levied under an Act in relation to the retirement village land or its use; or

(b) the salary or wages of a person engaged in the retirement village's operation and payable under an award, certified agreement, enterprise flexibility agreement, industrial agreement, Queensland workplace agreement or other industrial agreement made,

approved, certified, or continued in force under-

(i) the *Industrial Relations Act 1999*; or

(ii) a Commonwealth Act; or

© insurance premiums in relation to the retirement village or its use;

or

(d) maintenance reserve fund contributions.

51. Section 106 caps any increase in the general services charge to the CPI, "unless the increase is approved by the retirement village residents by special resolution as the rest at the residents meeting". Section 107 provides that "a resident is not required to pay a charge for general services under a residence contract to the extent that the charge is more than that payable under the contract and increased under section 106, unless the excess is attributable to an increase" in things such as rates, salary or wages or insurance premiums.

52. It is important to note that while "rates, taxes or charges" may be increased beyond the CPI increase without resident approval, section 107 only applies to those rates, taxes or charges "levied under an Act". It is also relevant to refer to sub-clause 5.02.1 of the residence contract which in similar terms states:

"5.02.1 all rates, taxes (excluding any income, gift or capital gains tax), charges, duties, assessments, outgoings and impositions of any kind **properly levied in respect of the Village** by any Government body or department, whether State or Federal, or any local authority..." (The Tribunal's Highlighting)

53. The sum of \$423,000 was not a realistic estimate of what was going to be levied by the Maroochy Shire Council under and Act "in relation to the retirement village land or its use". Of course, it is only the "retirement village land" which is to be included here and the make up of that land will depend upon the residence contracts. It will not include land owned by the operator for future expansion of the village. On the basis of Mr Schintler's residence contract, the village, as defined, also does not include land on which subsequent stages of the village have been built, such as Lots 2 and 3 here.

54. It should be stated here that by virtue of section 105, the scheme operator must pay its proportion of the general services charges. That section provides as follows:

**General services charges for unsold right to reside in accommodation**

**units**

**105.** A scheme operator must pay the proportion of the general services charges relating to the right to reside in an accommodation unit in the village-

(a) that has not been occupied under a resident contract; or

(b) for which there is no residence contract in force.

Maximum penalty-200 penalty units.

55. Mr Schintler submits, and the Tribunal finds, that the Respondent has increased rates beyond that which will actually be levied and required to be paid in the year ending 30 June 2001 and, at the same time, has reduced capped items such as the village running costs. In the years prior to 1 July 2000, it would appear that the Respondent's method of calculating rates for budget purposes should have resulted in a significant credits for the residents for rates but these would appear to have been consumed by cross-subsidization of the deficits in other items.

56. Sections 106 and 107, by implication, require operators to present their budgets in such a way as will separately identify percentage increases in the uncapped items referred to in section 107 and the percentage increases in the capped items referred to in section 106 so that where the latter exceed the CPI, residents' approval is required and obtained.

57. The next question is whether or not Mr Schintler has been materially prejudiced by the Respondent's contravention of the Act. Once again, the Tribunal is not in a position to make a finding since the commencement of the Act, because the Respondent may avoid any material prejudice to Mr Schintler and the other 166 residents by giving them credits for any amounts over budgeted for rates.

**3. The Respondent's letter of 5 October 2000 to Residents' Committee**

58. While Mr Schintler is a resident and the giving of this letter to the Residents' Committee may have resulted in him being given a copy, section 86 only refers to a document being given

to "the chief executive or a resident" and because it attracts a monetary penalty and, by virtue of section 170 and 193, may result in the residence contract being set aside, the Tribunal is of the opinion that the section must be interpreted narrowly.

59. For this reason the Tribunal finds that the giving of the document to the Residents' Committee, in these circumstances, does not contravene section 86.

#### **4. The Respondent's letter of 14 July 2000 regarding the costs of cleaning on termination**

60. Mr Schintler alleges that this information is false and misleading and that the Respondent knew that it was false and misleading.

61. The Tribunal finds this information to be false and misleading because of Mr Schintler's public information document and, on the balance of probabilities, that the Respondent knew this information to be false and misleading at 14 July 2000. Mr Robert Sandes, gave evidence in regard to this issue on behalf of the Respondent and the Tribunal is satisfied that the Respondent corrected the false and misleading information by issuing a Notice on 10 July 2001.

62. Mr Schintler has not been materially prejudiced by the Respondent's contravention of the Act because he has not terminated his lease and the false and misleading information, therefore, has not been put into effect.

#### **5. The audited report of outgoings contributions account to 30 June 1999**

63. All actions by the parties prior to 1 July 2000 were required to comply with the repealed Act and the Tribunal is not given any specific powers to deal with matters which arose before 1 July 2000.

#### **6. The audited report of outgoings contributions account to 30 June 2000**

64. This document was prepared after 1 July 2000 and given to the residents after that date. Mr Schintler alleges that the information in relation to street lighting is false and misleading and that the Respondent knew that it was false and misleading.

65. Mr Nunn gave evidence that the annual financial statements were prepared by and audited by the auditor and that the amount shown for street lighting was higher than it should have been. This, of course, means that some other item (or items) in the accounts was less than it should have been.

66. On 2 August 2000, Mr Nunn gave evidence that he first became aware of this error the day before the annual meeting and that he discussed this with Ms Roberts and because the Respondent would look bad and because it was too late to cancel the meeting, the Respondent had to proceed with the meeting. Because of the significance of what he had to say, it is set out in full below:

What happened then was that there was the AGM, I researched this matter that afternoon, I went and immediately across to Head Office and saw, ah, I produced some written notes obviously. Just to substantiate what I had found, and I went straight across and I saw Mrs Roberts and I saw Mrs Poulsen at the same time. Mrs Poulsen being the Accountant, and the Staff Accountant. I left the matter in her hands immediately to check out because there was an obvious challenge there with one Accountant talking to another and professional ah matters and so forth. **And I expressed at that stage fact that the whole company would look like a damn fool, with something like this being put in front of the residents.**

What actually occurred with that meeting was that I spoke to Mrs Roberts on the afternoon when I

got those accounts, which was approximately 4pm. **That was the day before the meeting**, and we had two options. One was to continue with the meeting, and the other one was to call it off. Calling it off was not really an option, because at that time of afternoon there was no way of notifying a large retirement village, with people all in their homes at that time of day, **so we decided to proceed with it.** (The Tribunal's highlighting)

What then happened was I met, while I was away getting those accounts, I had a message go out to the Residents Committee calling as many of them as were available in. The Residents Committee then came in, I met with them, I showed them the Budget. I showed them the papers, I said 'There hot off the press, I haven't had time to go through them", I gave them each a copy. In fact I was talking to them while the copies were being printed, I pinned a copy on the Notice Board outside. We printed copies so that the residents coming to the meeting next day could get them. The residents were already upset in relation to matters of GST etc., so they were justifiably angry before this occurred.

It could only be described as a pretty hostile meeting, and after that Mrs Roberts instructed me to make myself available for residents to come and talk to. I put a notice up for the residents, saying they could come and talk to me, and I would sit down and explain what had happened to them. I would give them, try to answer all of their queries. If I could not answer their queries I would take their questions and get answers provided for them.

67. It is also clear from his evidence that the Respondent did not make what the Tribunal would regard as full and proper disclosure of the errors, but he said that he did acknowledge that the accounts were not accurate if the residents asked. Mr Nunn was asked by Member Toohey:

Excuse me. If I just interrupt. Did you tell them though that you acknowledge the accounts were not accurate? Was that acknowledgement given?

To which Mr Nunn replied:

If they asked the question. Yes.

68. On 9 August 2000, Mr Nunn gave different evidence in that he said he first became aware of this error the afternoon after the audited statements were presented to the residents at the Annual General Meeting.

69. Mr Nunn's evidence of 2 August 2001 was delivered by Mr Nunn as set-out above as a little monologue and it was all entirely consistent. He was not led or interrupted. The Tribunal considers that this evidence was more reliable than his evidence of 9 August 2001, which the Tribunal rejects.

70. On the basis of Mr Nunn's evidence, the Tribunal finds that the document, i.e. the audited statement, was false and misleading and on the basis of Mr Nunn's evidence of 2 August 2001, the Tribunal finds that the fact that this information was false and misleading was known to the Respondent before the audited statements were given to the residents, including Mr Schintler, at the annual meeting. The Tribunal is of the opinion that this was a very serious breach of the Respondents obligations to all of the residents of the village.

71. This giving of a document to Mr Schintler, as one of the residents, differs from the giving of the document to the Residents Committee because here the Respondent was required to comply with the Act. While a document given to the Residents Committee should not contain information which is false and misleading, it is not specifically given in compliance with the Act and the document does not come within section 86 for the reasons given above.

72. Mr Nunn blamed the auditor for the mistake and attempted to absolve himself and, by implication, the Respondent of blame for the false and misleading audited statements. In the High Court in *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)*, 18 March 1997, McHugh J. discussed the role of the auditor and the client and said:

... the accounts are ordinarily prepared by the client and, in any event, are that person's responsibility (Bily 834 P 2d 745 at 762 (1992)). Each case must be judged on its own facts. But it would have to be an exceptional case for the client and all its servants and agents to be innocent of fraud or negligence in relation to the publication of accounts that are false or misleading.

73. In this regard, the Tribunal notes with surprise, Mr Nunn's evidence that the Respondent's directors were not required to certify the accuracy of the financial statements presented to the residents at the meeting. The Tribunal rejects the suggestion that the certification of the auditor absolves the Respondent from liability for giving the residents false and misleading financial statements. Mr Nunn, in evidence, frequently referred to the auditor's certification of the accounts when he could not explain a difficulty arising from them. It was clear to the Tribunal that the Respondent relied upon the auditor's certification to deflect criticism of how it dealt with the residents' financial affairs. Also, it is clear from Mr Nunn's evidence to the Tribunal that he was aware of how the auditor's certification of false financial statements would leave the Respondent exposed to criticism.

74. The Tribunal finds that Mr Schintler has been materially prejudiced by the Respondent's contravention of the Act because he was denied the benefit required by the Act of having audited statements, which could be relied upon. Further, because of the Respondents failure to make full and proper disclosure of the errors, he was denied the opportunity to properly question the scheme operator about the accounts. This also has relevance to the payments required by the Budget for the year ending 30 June 2001.

75. The fact that the meeting is required to be held by the Act and is only required to be held once each year is significant for Mr Schintler's rights. The annual meeting is the only formal opportunity where Mr Schintler and the other residents have the financial statements given to them by the Respondent, when the Respondent is then available to publicly respond to questions in relation to the statements. The resident's ability to realistically assess the Budget depends upon the expenditure actually incurred and the income actually received in the previous year. Once the budget is presented, and approved, where that is required under section 106, that is the one and only time Mr Schintler had an opportunity to formally question the Respondent in relation to the Budget at a public meeting. It is the denial of Mr Schintler's rights in all of these regards that the Tribunal considers amounts to material prejudice.

76. If further proof was necessary of the material prejudice suffered by Mr Schintler in relation to the presentation of these false and misleading financial statements, it comes from the Respondents refusal to hold another annual meeting when requested by the residents to do so.

77. Mr Schintler, therefore, was denied his one and only opportunity to exercise his rights in a meaningful way by the Respondent's contravention of the Act. The prejudice was substantial and significant and resulted directly from being given the false and misleading document by the Respondent when it knew it was false and misleading.

78. The problem with the presentation of the annual financial statements arose in August 2000 because of the Respondent's failure to comply with sections 113 and 131 of the Act. Those sections provide as follows:

**Annual financial statements**

**113.(1)** A scheme operator must ensure a financial statement showing the following particulars about the retirement village's operation is given, on request, to a resident within 5 months after the end of each financial year—

(a) income and expenditure during the financial year, including income and expenditure of the capital replacement fund and the maintenance reserve fund;

(b) amounts received for insurance claims relating to the village during the financial year;

(c) assets and liabilities relating to the village as at the end of the financial year;

(d) interests, mortgages and other charges affecting the village's property as at the end of the financial year.

Maximum penalty—200 penalty units.

**(2)** The statement must be audited and an audit report issued under Australian Auditing Standards by either of the following—

(a) a member, who holds a public practice certificate, of—

(i) the Australian Society of Certified Practising Accountants; or

(ii) the Institute of Chartered Accountants in Australia;

(b) a registered company auditor.

Maximum penalty—200 penalty units.

**(3)** The scheme operator must give a copy of the statement to the chief executive within 5 months after the end of each financial year.

Maximum penalty—200 penalty units.

### **Annual meeting**

**131.(1)** In each year, a scheme operator must call an annual meeting of the residents of the retirement village as soon as reasonably practicable after the annual financial statements mentioned in section 113 are available.

Maximum penalty—100 penalty units.

**(2)** However, the scheme operator must give each resident at least 21 days written notice of the meeting.

**(3)** The annual meeting may not be held simultaneously with a meeting that must be held under another Act.

*Example—*

The meeting may not be held simultaneously with a meeting that is required under the *Body Corporate and Community Management Act 1997*.

**(4)** The scheme operator must present the statements to the meeting.

Maximum penalty for subsection (4)—100 penalty units.

79. The combined effect of these two sections is that the scheme operator "as soon as reasonably practicable after the annual financial statements mentioned in section 113 are available" must call an annual meeting. In relation to the annual financial statements for the year ended 30 June 2000, the Respondent called the meeting before the statements were available and by so doing denied the residents the period of 21 days in which to request the financial statements prior to the annual meeting.

80. It is clear from Mr Nunn's evidence, that the result of the Respondent's failure to follow the requirements of the Act resulted in the Respondent also having insufficient time to examine the annual financial statements. This resulted in the Respondent presenting annual financial statements at the meeting which were false and misleading. Likewise the Respondent's failure to follow the requirements of the Act resulted in the residents being denied a reasonable opportunity to request the annual financial statements prior to the meeting and, therefore, a reasonable opportunity to prepare for that meeting.

## **7. The annual budget for the year ending 30 June 2000**

81. All actions by the parties prior to 1 July 2000 were required to comply with the repealed Act and the Tribunal is not given any specific powers to deal with matters which arose before 1 July 2000.

## **8. The annual budget for the year ending 30 June 2001**

82. With regard to the information to be contained in the Budget and the timing of its presentation to residents it is appropriate to once again look to Mr Schintler's lease at clause 5.01 which states:

5 01 The Owner shall notify the Resident ... prior to each 1st day of July of the Resident's fair proportion of the Owner's estimate of the total operating expenses of the Owner in respect of the running, maintenance and management of the Village for the financial year under review.

83. The Respondent, at least in regard to the Budget for the year ending 30 June 2001, did not present the Budget to residents until 17 August 2000 at the annual meeting and in doing so the Tribunal finds that the Respondent has again failed to comply with its contractual obligations.

84. Sections 103 to 108 all relate to charges for general services and sections 106 to 108 inclusive, all relate to increasing the general services charge. Section 107 imposes a liability on the scheme operator to show in the Budget that any increase is validly payable under the contract or is valid under section 106. If the scheme operator fails to do so the resident is not required to pay the increase in the charge.

85. The Tribunal rejects the Respondent's submission that the general services charge did not exceed the CPI increase for the year ending 30 June 2001. That submission is only true if you compare the Budget with the previous year's Budget. If you compare the Budget with the actual expenditure for the previous year the increase is 43 per cent.

86. Because of the way in which the Budget was presented by the Respondent to residents, easy comparison with either the previous year's Budget or actual expenditure was not possible and the increase of 43 per cent would not have been readily apparent. The Respondent did not make the audited financial statements available until after 4pm on 16 August, the day before the annual meeting on 17 August, which commenced at 9 am that day. The Budget was provided to residents at that meeting and not prior to 1 July as required by the Mr Schintler's residence contract.

87. The Respondent's Budget increased wages by 49 per cent, superannuation by 80 per cent, Workcover by 109 per cent and rates by 110 per cent. Because of the considerable increases in these expenditure items covered by section 107, without explanation for the magnitude of the increases, it is impossible to make any realistic assessment of whether or not the Budget required resident approval under section 106.

88. The Tribunal accepts Mr Schintler's evidence, confirmed as it was by Mr Nunn, that the

residents requested that the Respondent hold a further meeting 21 days later to approve the Budget. Under these circumstances, natural justice required the holding of another annual meeting where the Respondent complied with its obligations under the residence contracts and the Act and the meeting should have been held. This also would have given the Respondent the opportunity to overcome the problem it created by the presentation of the false and misleading audited accounts.

89. The Tribunal accepts Mr Nunn's evidence that the residents were justifiably angry with the Respondent's behaviour at this meeting and in relation to the accounts.

90. During the course of the hearing, the Tribunal formed the view that the Respondent continually denied any wrong doing until the wrong doing was proved. The proving of wrong doing by a scheme operator is considerably difficult if the operator is able to deny the residents access to the supporting documents behind the accounts and to obfuscate by presenting accounts and budgets in the way in which this Respondent has done over the years ending 30 June 1998 to 30 June 2001, which were placed before the Tribunal.

91. The Tribunal has already made findings above in relation to the issue of rates which were significantly overestimated by the Respondent in this Budget. It cannot make any findings on the increases in wages, superannuation and Workcover because it simply does not know if the increases are justified under section 107.

92. The Tribunal finds this information in the Budget to be false and misleading and, on the balance of probabilities, that the Respondent knew this information to be false and misleading at 17 August 2000 when it gave it to Mr Schintler and the other residents.

93. The next question is whether or not Mr Schintler has been materially prejudiced by the Respondent's contravention of the Act in regard to the Budget document. Once again, the Tribunal does not have the 2000/01 audited statements. While, the Respondent may avoid some of the material prejudice to Mr Schintler and the other 166 residents by giving them credits for any amounts for which it over budgeted, the question still arises as to whether or not he has been materially prejudiced. The Tribunal is aware that many residents of retirement villages are on limited and fixed incomes. For this reason any contribution beyond that which is legally justifiable, even if it results in a credit for the next year may result in hardship or "prejudice".

94. If the actual expenditure for 1999/2000 had been used for the purpose of the Budget, would the annual outgoings contribution required to have been paid by Mr Schintler and the other residents have been affected? Given that the actual expenditure of \$511,911 related to the units then built on the entire village (i.e. Lots 1, 2 and 3) the Budget will depend on how many units this involved. The Tribunal rejected the Respondents use of 404 and has no way of calculating the cost to each of the 168 units in Lot 1.

95. According to the Quantity Surveyor's Report from Graham Lukins Partnership Pty Ltd of 20 July 2000 there were "320 completed independent living units" at that time. On this basis, and using the expenditure attributable to Lots 1, 2 and 3, it would appear to the Tribunal that this number could be reliably used to calculate a realistic estimate of expenditures for the year ended 30 June 2001. If further units are completed in the year, any expenditure will be paid for either by the scheme operator or the new resident.

96. Dividing \$511,911 by 320 results in an annual outgoings contribution required to have been paid by Mr Schintler and the other residents of \$1,599.72. Even allowing for the residents' contribution to the Maintenance Reserve Fund of \$30.50 each and, where their residence contracts provided for payments to the Capital Replacement Fund under sub-section 94(1)(d), which the Tribunal assumes the Respondent to have correctly calculated ( there was no evidence on this point), at \$8.50 per resident, that would result in an annual outgoings contribution required to have been paid by Mr Schintler and the other residents of \$1,638.72 for the year ending 30 June 2001. According to the Respondent's Annual Budget for the year ending 30 June 2001 (Document RN3) residents were required to pay \$1,857.05 for that year. That is residents were required to pay \$209.82 more than appears justified by a reasonable method of assessing the contribution. This is 12.8 per cent more than the amount which the Respondent was entitled to charge.

97. Section 106 of the Act sets the CPI as a reasonable increase which does not warrant resident approval. On this basis the Tribunal finds that the increase of 12.8 percent resulted in Mr Schintler (and the other residents) being materially prejudiced as a result of the Respondent giving him the false and misleading Budget document. The Tribunal considers that the prejudice to Mr Schintler is such that even if he is credited with the amounts of any over-budgeted items that he has still been materially prejudiced.

### **Problems arising from the Format of the Accounts**

98. During the course of the hearing several other issues were raised that relate to the efficient and proper functioning of a retirement village.

99. The Tribunal has commented on the fact that there was no consistency between the headings for Budget purposes and the Audited Statement headings or between budget headings from year to year. The Budget document for the year ended 30 June 2001 did not show the actual income received and expenditure incurred in the previous year or the budget for the previous year. In fact, it did not show any anticipated income. It also failed to show any total percentage increase let alone comply with the requirements of sections 106 and 107 as referred to above.

100. Even the Notes to the Audited Statements for the year ended 30 June 2000 did not use the same headings as were used in the Audited Statement making cross referencing difficult. It was obvious from Mr Nunn's evidence that he had no idea to which headings the auditor allocated some expenditure and monies expended on behalf of the scheme operator were not considered sufficiently significant to warrant similar identification on the income side of the ledger. While the Respondent was wrong in paying for expenses for which the owner was liable e.g. the Nursery and the Education Centre, preparing the accounts in this way may have ensured that the scheme operator reimbursed the Outgoings Contributions account, in the same financial year, and that the residents could see that this had occurred.

101. The apparent lack of availability to the residents of an Assets Register for assets purchased by and for the residents of the village is also causing difficulties when the Respondent owns 4 villages and assets, especially equipment, appear to be moved to and used

at other villages.

## **Conclusion**

102. The Tribunal is aware that it is necessary for scheme operators and village residents to have an on-going relationship and, for that reason, wherever possible it attempts to improve rather than exacerbate that relationship by its orders. However, here the relationship has broken down entirely. On the basis of the evidence the Tribunal has seen and heard of the Respondent's inappropriate behaviour as referred to above and for the reasons set-out above the Tribunal accepts that the setting aside of the residence contract is the appropriate remedy. The Tribunal accepts that Mr Schintler has satisfied the requirements of sections 170 and 86 and intends to exercise its discretion to make the orders available to it under section 193.

103. While the Tribunal can only make orders binding the parties to this application, it is acutely aware that the Respondent's inappropriate behaviour also impacts upon the other residents of the village. An order requiring that the Respondent comply with the Act should be unnecessary but is made for clarity and completeness. The Tribunal is unaware as to when the Respondent intends to hold the annual meeting required under section 113. On the assumption, that the meeting is held before 4pm 28 September 2001, when the Tribunal's order setting aside Mr and Mrs Schintler's residence contract takes effect, the Tribunal makes the following order:

1. that Chancellor Park Retirement Village Pty Ltd in relation to the next annual meeting of residents:
  - a. ensure that the financial statements for 2000/01 and the budget for 2001/02 comply with the requirements of the residence contracts and the Act;
  - b. ensure that the financial statements are available, as required by section 113 of the Act, before the annual meeting notices are sent out under section 131;
  - c. provide the residents with a budget for 2001/02 which also shows, on the same document, the budget for 2000/01 and the actual income and expenditure for 2000/01;
  - d. ensure that all of the figures in the budget for 2001/02 are realistic estimates of the amounts which will be paid or received by the village over the period 2001/02.

104. The Tribunal, in making this order, is aware that if the annual meeting occurs after 4pm 28 September 2001, some parts of it may have no binding effect but hopes that, even then, it may have persuasive authority.

## **Orders**

105. For the above reasons the Tribunal makes the following orders:

1. That the residence contract between Mr and Mrs Schintler and Chancellor Park Retirement Village Pty Ltd dated 1 September 1997 be set aside with effect from 4pm 28 September 2001; and
2. that Chancellor Park Retirement Village Pty Ltd refund to Mr and Mrs Schintler the ingoing contribution in the sum of \$95,882.00 paid under the contract. Such sum to be paid to Mr and Mrs Schintler by 4pm 28 September 2001;
3. that Chancellor Park Retirement Village Pty Ltd compensate Mr and Mrs Schintler for

damages or loss caused by the contravention in a sum to be agreed or assessed by the Tribunal and leave is given for either party to approach the Registry for a further Tribunal hearing for that purpose;

4. that Chancellor Park Retirement Village Pty Ltd immediately advise Mr and Mrs Schintler of Mr and Mrs Schintler's fair proportion of the Chancellor Park Retirement Village Pty Ltd's estimate of the total operating expenses of Chancellor Park Retirement Village Pty Ltd in respect of the running, maintenance and management of the Village for the year ending 30 June 2002 as it was required to do by his residence contract by 1 July 2001.
5. that Chancellor Park Retirement Village Pty Ltd certify that the only funds which were paid out of the outgoings contributions account for the village for the year 2000/01 were in relation to expenditures for residents as provided for under their residence contracts and the Act.
6. That this decision and its reasons be published.
7. that Chancellor Park Retirement Village Pty Ltd in relation to the next annual meeting of residents:
  - a. ensure that the financial statements for 2000/01 and the budget for 2001/02 comply with the requirements of the residence contracts and the Act;
  - b. ensure that the financial statements are available, as required by section 113 of the Act, before the annual meeting notices are sent out under section 131;
  - c. provide the residents with a budget for 2001/02 which also shows, on the same document, the budget for 2000/01 and the actual income and expenditure for 2000/01;
  - d. ensure that all of the figures in the budget for 2001/02 are realistic estimates of the amounts which will be paid or received by the village over the period 2001/02.

for the **RETIREMENT VILLAGES TRIBUNAL**

Barry Cotterell  
Chairperson

Joan Petherick  
Member

Peter Toohey  
Member

Dated: 4 September 2001