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MR. C.J ALLSWORTH

BY: LACA

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The Committee Secretary  
Legal and Constitutional Affairs Committee  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600

Submission No.....	32
Date Received.....	

26 November 2006

Dear Sir

**ADEQUACY OF CURRENT LEGISLATIVE REGIMES IN ADDRESSING THE LEGAL NEEDS OF OLDER AUSTRALIANS**

Enclosed is my submission containing some matters that I believe should be brought to the attention to the House of Representatives Legal and Constitutional Affairs Committee in looking at the current legislative regimes addressing the legal needs of older Australians.

I have attempted to keep the submission short and limited to just a few of the very many problems that I have encountered whilst living in a retirement village and whilst compiling a very lengthy submission to the Western Australian Government concerning its current review of the retirement village legislation applicable to the State of Western Australia.

If you should wish discuss any queries that you may have with the enclosed submission or require further supportive information please do no hesitate to contact me through the telephone numbers, fax number or e-mail address as shown in the letterhead above.

Yours faithfully

C. J. Allsworth

**SUBMISSION**  
**TO**  
**THE SECRETARY**  
**HOUSE OF REPRESENTATIVES**  
**LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE**

**MADE BY**  
**MR. CLEMENT JAMES ALLSWORTH**

**RELATING TO THE**  
**LEGAL NEEDS OF OLDER AUSTRALIANS**

**FOR**  
**CLOSING DATE 1 DECEMBER 2006**

## INTRODUCTION

This submission is made by Mr. Clement James Allsworth of  
and is based upon his experiences as a resident of a Retirement Village in Western  
Australia and as a member of the Western Australian Retirement Complexes Residents  
Association ("WARCRA").

The main thrust of this submission attempts to identify what might be termed financial  
abuse of Retirement Village Residents generally being exercised by the Developers  
and/or the Managers of Retirement Villages within the state of Western Australia.

It does however extend to include reference to other excesses of village Developers and  
Operators and includes evidence of the increased exposure of Retirement Village  
Residents to the legal pressure of Developers and Managers and the reduction in  
protection enacted by the Western Australian Government.

## RETIREMENT VILLAGES

### 1. TYPES OF RETIREMENT VILLAGES

By way of basic introduction to the various types of Retirement Villages to which this submission refers, villages are developed under the following categories –

- Lease-for-Life where the occupant/s do not own their residential premises.
- Strata Title where the resident/s own their residential unit and the land it stands on and the Developer owns the community centre and the roads and other areas are common areas
- Purple Title where the residents purchase an undivided share in the whole of the village including the land and improvements, such that each resident owns an undivided share in all of the other residents units, the community centre and all of the common property usually described as "common areas", such that the residents are jointly and severally liable in respect to all of the benefits and burdens attaching to the "share title". It is therefore necessary for each of the residents to grant to each other resident an exclusive licence to occupy their particular unit.

Another type of village, often described as a "Life style Village" is one where the resident has a lifetime lease of the land upon which their unit is situated and the unit itself is owned by the resident/s and is usually of a "transportable" type construction.

As a general rule of thumb, residents must be 55 years of age or over to qualify for purchase for residency of their units. Most residents however are retirees having attained the age of 65 or over before entering a village. The expression "residents" as used in this submission must therefore be taken to mean older Australians of 65 year or older and in any event will in due course include those under the age when entering the village but very likely to be over that age when exiting the village.

### 2. RETIREMENT VILLAGE LEGISLATION

The retirement village legislation, which is supposed to provide a degree of protection to the residents, consists of a number of acts and regulations, the primary ones of which are-

- The Retirement Villages Act 1992 (the "Act")
- The Fair Trading (Retirement Villages Code) Regulations 2003 (the "Code")
- The Retirement Villages Regulations 1992 (the "Regulations")
- The State Administrative Tribunal Act 2004

The first three pieces of legislation are supposed to be administered by the Department of Employment and Consumer Protection ("DOCEP"), but in most cases the Department seems to fail to provide adequate protection to residents.

The Act and the Code are currently being reviewed and have been the subject of very many submissions by many residents of retirement villages and other involved parties including WARCRA whose submission is 98 pages long. A copy of this can be provided if needed.

The initial process of this review has been for DOCEP to conduct public meetings throughout the State to elicit residents views on a variety of issues including their expectations before entering into retirement village life and how those expectations were met or otherwise. Responses were many and varied but some of the most contentious issues related to matters such as budgeting and expenditure, exit fees, refurbishment contributions and deficiencies in disclosure information.

The Act was clearly written without properly taking into account the various different ownership/responsibilities attaching to each kind of different development, especially as applied to the Purple Title Village. Even the result of an appeal against a decision given by the District Court failed to look across the whole spectrum of retirement village titles. The result is that even where the root of title is a shared title with joint and several rights and responsibilities that cannot be contracted out of, it advocates that Developers and Managers can enter into contracts with residents under such regime but in different terms as between the shareholder residents. Such ruling is clearly in error and does nothing but help the Developers and Managers exploit the more vulnerable older Australians.

The Regulations sets out a number of disclosure requirements that are clearly not properly enforced as it is a matter of concern that many residents only find out after having living within a retirement village that information was either not disclosed or was fudged to the extent that the real information was not easily ascertainable at the time prior to committing to live in the village.

The State Administrative Tribunal Act 2004 took over the duties of the Tribunal as originally constituted under the Act itself and further addressed within the Code (recently re-issued as the Fair Trading (Retirement Villages Code) Regulations 2006.

Supposedly all of the provisions as they related to the Tribunal under the Retirement Villages Act were carried over to the State Administrative Tribunal Act under the guise of "enabling legislation", but which the government without any consultation or notification to the residents then forthwith repealed. The basic result of that was that residents are now exposed to the full power of the legal profession being brought to bear against them that could not happen before. Also questions asked of the State Administrative Tribunal concerning the risk of legal cost being awarded against a resident went unanswered. It gave the same response as DOCEP namely, go and get legal advice and don't come to us for your legal advice. All of this puts the retirees pensions and investments at risk, or otherwise a resident must, as a lay person, try and fight the far greater financial and legal resources available to the Developers and Managers. Another ploy used by Developers and Managers when in dispute is to use every trick available to them to stretch out the process of dispute and wear down the residents either until they get so desperate to have some peace that they give up, or in fact until they die. We have seen this happen.

## PUPPLE TITLE OWNERSHIP

The title is issued under the Transfer of Land Act 1893.

Purple Title is a "Share Title" where in the case of our Village the owner is all of the people who own the 160 undivided shares.

No single person is an owner in their own right. By reason of the root of title established under the Transfer of Land Act the "share holders" are therefore jointly and severally liable for the benefits and burdens attaching to the land and improvements. Any default by one (undivided) shareholder becomes the responsibility of the other shareholders who may subsequently initiate action to recover from a defaulting shareholder

Therefore no single shareholder can enter into any contract/s with another person for that other person to do anything affecting the joint and several property (the land and the buildings) or the rights, duties and obligations attaching to the ownership of all of the other shareholders.

According to section 3 of the Act, "all laws statutes Acts Ordinances rules regulations and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to land whether Crown, freehold or leasehold which shall be under the operation of the Act". **That means that no one may contract out of the Act.**

The Developer claims that as each residents has entered into a separate contract with itself and the Manager, there can be different amendments according to circumstances which is patently at odds with the basic ownership of the title. It has also, by changing its disclosure information effectively created different contracts as between different residents according to the relevant period of time that they entered into residency within the village.

The Developer also refuses to acknowledge the inequity of very many issues sufficient for us to believe that there has been a deliberate intent on the part of the Developer to suppress the rights of the Residents by means amounting to unconscionable conduct or by exploitation of the Residents.

There is evidence to show that the Developer did not originally intend to develop Retirement Village under Purple Title, as evidenced in its early disclosure information. Also, there is no evidence to show that when the Developer changed its mind it ever notified those to whom the representations were made, either when the decision to change was first made or at any later stage. It is further understood that the Developer will establish any future retirement villages that it develops on the Purple Title system and not Strata Title as it has done with earlier villages.

A good reason for this is that **there is no complimentary legislation applicable to Purple Title, as there is for Strata Title.** This therefore relieves the Developer of any constraints that apply under Strata title. This in itself has already identified a serious issue where, without complimentary legislation, would seem to require a 100% affirmative or negative vote for any decision to be made for anything to be done, or not done.

The manner in which the Developer has constructed the Deed has further ensured that the Residents have no right to remove and replace the Manager at any time even if they

should have good reason to do so. The Developer has also, in various areas, created an agent/principal relationship between each Resident and the Manager, but which arrangement denies the Resident any rights that normally accrue to a principal. Then there is a denial of any agency/principal relationship to add to the confusion.

All of this more clearly indicates that there is a serious legal need for older Australians to be protected from the exploitation being indulged in by corporations such as the Developer and its subsidiary company the Manager, in the case of our retirement village.

## FINANCIAL ISSUES

### 1. EXIT FEES

Using the village of which I am a resident as an example, a resident must upon leaving the village and selling his Estate, which is his 160<sup>th</sup> undivided share under the Purple Title and the exclusive licence to occupy his particular unit, pay or incur what amounts to five different costs. Three of these are clearly for the benefit of the Developer and one would appear to be for the benefit of the village for the improvement or upgrading of the village, including the unit to which the sale relates and the last one is quite inexplicable. The final is GST payable by the resident for NO goods or services of any kind

**Firstly**, upon the sale the departing resident must pay to the Developer what is called a **Deferred Facilities Fee** equal to 2.5% of the Estate Sale Price multiplied by the number of days that the resident have been entitled to occupy the Villa and then divided by 365.

If the resident has been entitled to occupy the unit for more than 3,650 days, the Deferred Facilities Fee shall then be the greater of:

- (a) 25% of the Estate Sale Price; or
- (b) 50% of the amount by which the Estate Sales Price exceeds the Estate Purchase Price.

**Secondly**, on top of that the resident must pay a **Refurbishment and Improvements Contribution** being an amount equal to 0.5% (or some other percentage as may be determined under Clause 20.12) of the Estate Sale Price multiplied by the number of days that the resident has been entitled to occupy the Villa up to a maximum of 3,650 days and then divided by 365. The Refurbishment and Improvements Contribution amount shall not, however, in any case exceed 5% of the Estate Sale Price.

**Thirdly**, although the contract is expressed to allow the resident to sell his Estate, such right is subject to the resident and his agent complying with the requirements of the Deed for that sale. Experience has however shown that sales are done through the Developer's selling agent, which results in the Developer, through its selling agent, obtaining more income by way of the **sale commission**.

**Fourthly**, there is a provision in the contract that provides for the Manager of the village, which is a subsidiary company of the Developer, which gives the Manager the power to require the resident to **upgrade the unit at the resident's cost** in order to both achieve its optimum selling price and to ensure that the Village continues to be maintained in a first-class modern condition. Such upgrade works may include any renovation works that the Manager may reasonably require at its discretion. The words "Reasonably" and "at its discretion" do not give us any comfort as reports from other villages would seem to indicate that reasonableness is not much of a consideration.

The refurbishment and Improvements Contribution is defined as having the meaning given to it in Schedule 6 of the contract, but Schedule 6 is as expressed above as the second portion of the exit fees, and is therefore not defined. This fourth imposition clearly evidences a case of double dipping on top of the Refurbishment and Improvements



Contribution and can amount to many thousands of dollars. Also, equally as clearly, is the fact that in the exercise of such power, the Manager is acting as the agent of the Developer.

But that's not all. **Fifthly** each departing resident is charged GST on the amount of Deferred Facilities Fee paid to the Developer, even though no goods or services are provided by the Developer because the Deferred Facilities Fees is very simply an "agreed Share of Sales Proceeds" payable to the Developer upon settlement of the resale of the Estate. A former resident apparently obtained a ruling from the ATO stating that he was not eligible to pay GST but the Developer claims that it has an ATO ruling saying that it has to pay GST on the amount of the Deferred Facilities Fee received by it following the **sale by the resident** of his Estate and the Developer is refusing to refund the GST amount deducted from the proceeds of the sale of the Estate. This issue was also not highlighted in the original disclosure information supplied to prospective residents during the early marketing of the village. **THIS IS A MATTER THAT NEEDS TO BE FULLY AND PROPERLY INVESTIGATED.**

The Deferred Facilities Fee and the Refurbishment and Improvement Fund are obviously evident and are disclosed in accordance with the disclosure information required under the legislation. The right of the Manager is not so evident and by experience has not been recognised by residents until after they have purchased their Estate and taken up residency in the village. The Developer does not disclose this additional cost exposure when marketing Estates within the village.

Similarly, the difficulties of a resident undertaking the selling of his Estate are not patently obvious and are not disclosed in the disclosure information.

There is no doubt that the above contains clear evidence of the Developer is exploiting the residents financially to an extreme degree.

Another known example is of a village, being a lease-for-life village and promoted as a "not for profit village" having its exit fee percentage increase by over 100% and with the owner apparently looking for even more. See Issue No. 2 below regarding the

## 2. THE

The is a "self regulatory" organisation comprising of the Developer and Managers of retirement villages representing themselves and not the residents. There is an annual membership fee and they also run an "accreditation scheme" for their retirement villages, which costs a few thousand dollars each village. In many villages, including our village, the annual fees and accreditation fees are taken out residents' contributions to the day-to-day running of the village against the wishes of the residents as they see no real benefit to themselves, but residents are not allowed to be involved in the business of the association. *This is quite inequitable and is another example of the Developers and Managers taking financial advantage of older Australians.*

The association is also not averse to publishing or having published misleading and deceptive information to suit its own ends. An ideal example of this is contained in a quarterly publication of the Hospital benefit fund wherein it states that -

***“Charging an exit fee allows a village to lower the cost of entry, provide for long-term liabilities and may be used to pay for some of the services provided”, when -***

**Firstly**, upon the exit of a resident the “re-marketing “ of their unit is done at the maximum market price obtainable such that the exit fee is not applied to reducing the incoming resident’s cost. It is for that reason also why retirement village operators have no concern for the wellbeing of disgruntled residents by merely responding that they are welcome to sell and leave, because it puts more money into the relevant members pockets.

**Secondly**, all residents pay into what are known as Refurbishment Funds or Sinking Funds, the proceeds of which are or should be applied to covering the long-term liabilities of repair, replacement etc. Another less frequently used method is that a percentage of monthly contributions, mostly for the running of the village, is budgeted for such long-term liabilities. The exit fees are therefore not for long term contingencies. And there is, in some cases, the additional power to make a resident expend a large sum of money remodelling a kitchen or other parts of a unit.

**Thirdly**, no service is provided to residents that the residents do not pay for.

In fact there is clear evidence, including in one village originally promoted as a “not-for-profit”, that the original exit fee level is being increased by over 100%. There are also marketing agents fees (often levied by a selling agents related to or controlled by parties who obtain financial benefits from any resales) which add to such costs.

Clearly the \_\_\_\_\_ is engaging in misleading and deceptive conduct on behalf of its members.

### **3. ANNUAL BUDGETS AND OTHER VILLAGE COSTS**

This is an area of much concern to residents of all of the types of village in so far as the Managers prepare annual budgets which they present to the residents and, notwithstanding any objection, implement those budgets with contentious costs still contained within them. The only obligation they have toward the residents is to hear what they have to say or consider what they have to say, but no obligation to implement any changes required of the residents who have to pay the money required to meet contentious budgeted items.

There is nothing which gives the residents any right of veto or other form of control over the implementation of a budget prepared by the Manager. There is little or nothing

- to give the residents any power to approve budgets
- to require the administering body to accept or reject input from the residents
- to require the administering body to justify any proposed expenditure
- that gives the residents any power to be involved in the letting of contracts for goods or services to be paid out of residents' contributions, or conversely to require the administering body to disclose any such contract prices before the letting of such contracts or
- to prevent administering bodies from placing percentage mark-ups on goods or services required for the administration and maintenance of the village, in addition to any income they derive from village contributions and/or residence re-sales

- to stop Developers and Managers from contracting with "captive" contractors and not obtaining the best quotes from other independent contractors

Another area of concern is the maintenance of Refurbishment Funds or Sinking Funds and the transparent accounting for such funds. In some cases Managers or Owners have placed such funds into bank accounts that are private accounts and therefore are unaccountable to the residents. Such funds have the risk of being lost to the residents where a Developer sell its interest in the village and walks away with the cash or if such Developer goes bankrupt there is nothing to stop the sequestration of the funds for the benefit of creditors.

## CONTRACTUAL ISSUES

There are also a great number of contractual abuses engineered into the contract by the Developer before they commenced to market the village. Whilst some of the provisions may not have any specific or direct monetary reference, others do. The following are some examples –

- The Residents have no right to remove any of their Advisory Board representatives, irrespective of whether they become unfit to or otherwise unsuitable to represent the Residents.
- **The Developer has a right, under certain circumstances, to appoint Residents Representatives of its choice to the Advisory Board.**
- The contractual obligation of the Manager to the Residents is one of only being required to “hear” any representation made by the Council.
- Any decision of the Council can be negated by the Manager’s representative having the right to take the matter to the Advisory Board. This can also apply to a resident on the Council who does not agree with their fellow “resident representatives” as is quite evident can occur.
- Under certain circumstances the Deed can be amended by the Advisory Board and the Developer without consultation with the Residents. In other circumstances the Developer can prevent an amendment even if the Residents were 100% in favour of a change.
- **The Developer has a unilateral right to make any improvement, refurbishment, modernisation, extension, variation or reduction of the village without consultation with the owner shareholders. It could demolish the Clubhouse and build more apartments, as an extreme example, or build new apartment where the bowling green.** And all this can be done by it first putting money into the Refurbishment and Improvement Fund and thereby creating a debt upon which it can then charge interest
- Although the Manager is the agent of the Residents, the Residents cannot exercise proper Principal rights over or against the Manager as applicable. The Principal cannot dismiss the agent such that general law relating to principal and agent is negated.
- As a related body to the Developer, the Manager is more clearly the agent of the Developer and therefore has a conflict of interest in its purported agency relationship with the Residents.
- The Manager is appointed in perpetuity and cannot be removed for any reason whatsoever
- The Developer and the Manager can sell their rights and interests under the Deed to any other entity without any reference to the Residents.
- In addition to having to pay several thousand dollars to the Refurbishment and Improvements fund, the Manager can require the resident to upgrade their Villa at their cost. Such upgrade works may include any renovation works that the Manager may reasonably require at its discretion. This results in a double dipping exercise. Experience in older villages indicates that “reasonableness” is not applied.
- Control of what you pay when selling your Villa is made to be your absolute responsibility, even with respect to such costs as may be payable by the purchaser.
- Eviction of a Resident for “health” reasons differs from that as set out in the legislation.
- The Resident is responsible for any loss damage injury or death caused or arising from any action or inaction of any invitee of the Manager or the Developer.
- An indemnity given by a Residents means a Resident must insure his own Villa, in addition to it being insured by the Manager.

By comparison with another Deed for another village developed and managed by the same Developer and Manager and of slightly earlier vintage than our own Deed we find that the Developer has written our Deed so as to increase its control and domination of the residents to an even greater degree than should be acceptable. The following are some examples.

OUR DEED	THE OTHER DEED
Unilateral right of the Manager to make structural changes to the village	No such right
Right of the Developer to appoint "Resident Representatives to Advisory Board under certain circumstances	No such right
The right to take a decision of the Council to the Advisory Board	No such right
Appoint Staff as the employees of the Residents	No such provision
Attachment of awnings subject only to the approval of the Manager (No Resident involvement)	Subject to the approval of the Council, providing some Resident involvement
No alteration to the Villa except with written permission of the Manager (No Resident involvement)	Subject to approval of the Council providing some Resident involvement
Resident's Contribution determined by the Manager of the Advisory Board only. (Resident participation has been reduced)	<b>Determined by the Manager, the Advisory Board and the Council</b>
The Manager is only obliged to comply with the directions of the Advisory Board and only <b>hear</b> any representation made by the Council (Contractual responsibility toward the Residents removed)	<b>Manager required to comply with directions of the Advisory Board and directions of the Council</b>

There is no doubt that there are very many provisions within our retirement village Deed that go well beyond that which is necessary to protect the legitimate interests of the Developer and the Manager and thereby evidencing a high degree of unconscionable conduct.