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Submission No. 143
Date Received.....

RECEIVED
30 JUL 2007

BY: LACA

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29 July 2007.

Dr. Nicholas Horne
Inquiry Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Sir,

Submission on behalf of Retirement Village Association Limited to House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into "Older people and the law".

Introduction.

This submission letter is provided on behalf of the above named company (herein called "RVA") which I am authorised to represent both as an associate member and as its honorary solicitor primarily to answer some of the claims and assertions made in submissions numbered 21 and 32 received by the Committee and incidentally to assist the Committee's understanding some of the laws governing retirement villages in Western Australia.

I also refer the Committee to the Department of Consumer and Employment Protection's ("DOCEP") recently published "Issues Paper" dated June 2007 ("2007 Issues Paper") by which DOCEP discusses issues arising out of its recent review of the operation and effectiveness of retirement villages legislation in Western Australia.

DOCEP has invited submissions on its Paper by stakeholders and the general public to assist it in preparing a Statutory Review Report required by section 83 of the Retirement Villages Act 1992 (WA). The RVA will, by submission closing date 31 August 2007, be making detailed submissions on the issues raised in the Paper and will supply a copy to the Committee. Attached to this letter for the Committee's further information is a copy of the RVA's initial submission paper supplied to DOCEP on 15 September 2006.

I shall respond to key issues raised in submissions 21 and 32 by way of general comments rather than in a particularised manner.



1. **Assertion - Residents have little or no voice in the process of reviewing the law.**

As can be seen from the 2007 Issues Paper, the WA Government has engaged in an extensive public consultation process which retirement residents have been encouraged to participate in. That process is currently ongoing.

The previous legislative review as required by section 83 of the Retirement Villages Act 1992 (RV Act), not at the instigation of the RVA, was conducted from January 1999 until February 2002 by means of establishing a "Retirement Villages Reference Group" which worked with DOCEP and which included key organisations in the industry, consumers and relevant government departments including the Office of Seniors Interests and the Department of Health and Family Services. Residents as consumers were represented by Mrs Joy Sands of the Consumers Association of WA and by the late Mr. Charles Ittershagen the then President of the Western Australian Retirement Complexes Resident's Association Inc. (WARCRA). The writer was the RVA's Reference Group representative.

The Reference Group firstly prepared a discussion paper including preliminary recommendations for changes in the law which paper was distributed to interested parties including WARCRA. Also DOCEP invited public comments on the paper and supplied a submission guide to assist persons in making submissions. Twenty four submissions were received on the discussion paper which included submissions from the Office of Seniors Interests, the Council on the Aging (WA) Inc. and the Retirement Villages Disputes Tribunal Referee. These were considered by the Reference Group after which it made changes to and finalised its 50 recommendations made to the Government in the Final Report of February 2002 ("2002 Review") compiled by DOCEP.

2. **Assertion - The 2002 Review removed from the legislation most avenues of redress then available to residents.**

The 2002 Review contained many recommendations for legislative improvements which were "resident friendly" and included requirements for more rigorous and understandable financial reporting by village proprietor's to residents. The 2002 Review did not result in the removal of any avenues of redress available to residents. Many of the recommendations were subsequently incorporated on the revised Code of Fair Practice for Retirement Villages 2003 which by way of the current 2006 Code of Fair Practice for Retirement Villages ("2006 Code") still apply.

3. **Assertion - Legal expertise in this area is sparse.**

It is correct to say that there are not a large number of solicitors with expertise in retirement village law in WA . There are practitioners who do have the required expertise but they may be difficult for the general public to identify. It is suggested that this problem could be alleviated by the Law Society of WA maintaining a list of practitioners able to advise to which the public may be referred to. Part of the problem in accessing legal advice appears to be consumer resistance to legal costs. Those costs cannot be minor due to the detail necessarily involved in retirement scheme documentation and the time taken to give sound advice thereon. The Government is addressing this issue in its current review.

4. Assertion - Most of the grounds for State Administrative Tribunal jurisdiction have been removed from the legislation.

No changes have been made to the RV Act so as to reduce the jurisdiction of the State Administrative Tribunal. It is fair to say however that the Tribunal has narrowly interpreted the RV Act and thereby limited or caused uncertainty as to the ambit of its jurisdiction. This issue has been identified in the 2007 Issues Paper which has also raised the possibility of establishing a more specialised industry specific tribunal.

5. Assertion - Opportunities for Manager's to fudge the books for their financial benefit.

The 2006 Code contains extensive provisions requiring consultation with residents on village budgeting and providing access to "administrative or operating financial arrangements" so as to ensure transparency in the ongoing financial management of a village (see clauses 5.2 and 5.3 of Code). This includes a specific requirement that when expenditure that relates to more than one village the method by which the expenditure is apportioned to the village must be disclosed in budget material supplied to residents. Also a separate budget must be made for each village.

6. Comment on Pre-contractual disclosure.

The RV Act and 2006 Code impose substantial pre-contractual disclosure obligations on village proprietors which are intended to ensure that prospective residents are reasonably informed of the essentials of the retirement village scheme they are considering. A compulsory question and answer form contains 44 questions which must be answered accurately as the RV Act provides that the information given in the answers will prevail over any inconsistent contractual term and will be binding on the village proprietor. In addition the disclosure material, apart from the "residence contract", must include budget information, details of services and their costs, checklists, a Notice of Rights form, copy of village rules, and a copy of the 2006 Code. A prospective resident may not enter into a residence contract until 5 working days elapse after receipt of the disclosure material. Having entered into the contract the prospective resident has a further 5 working days within which that contract may be rescinded by the resident provided the resident has not entered into occupation of the village residence.

It is fair to say that a substantial amount of information and contract material is given to prospective residents. It should be written in plain English but this does not necessarily simplify the terms which by necessity can be detailed since there are many issues that need to be governed by a residence contract. Although there are, and rightly should be, various obligations to supply this information, prospective residents may not read and understand it fully or take advice. DOCEP has identified these problems in the 2007 Issues Paper.

Consideration is being given to introducing standard approved contractual terms. However due to the diversity of schemes offered to the public, standardisation has its limitations. Furthermore it should be recognised that the current flexibility in the law which enables various types of village schemes to be offered also facilitates competition and innovation in the industry to the benefit of consumers.

DOCEP has always recognised that one of its major roles is consumer education and the 2007 Review suggests that this must be enhanced further.

7. Issue of RVA fees recovery in Village budgets.

Some RVA members include their membership fees as a business expense which is charged on to residents as an operating cost under the village scheme. It is not correct to say that the residents do not benefit by this membership. The RVA has been instrumental in establishing the Jardine (Retirement Village Association) Mutual Discretionary Insurance Trust Fund which operates as "VillageWise". As well as offering RVA members insurance for their retirement village businesses, the fund offers insurance to village residents also at advantageous rates. This can only be obtained where the village proprietor is a member of the RVA.

In addition the RVA has successfully lobbied government and local government for changes in the law so as to allow retirement village residents in leasehold or licence schemes to obtain the benefit of rates concessions which were otherwise not available.

Furthermore the RVA as a peak industry body has lobbied the Federal Government on tax and GST treatments for retirement villages businesses which impact directly on the consumer resident. Many submissions the RVA makes to the State Government are advantageous to residents and help improve the law affecting retirement village residents. Both Industry and residents have a common interest in enhancing the retirement village product and the respective investments made in that property sector by owners and residents.

8. Issue of Accreditation costs recovery.

Some RVA members may treat their costs of accreditation as an ordinary business cost recoverable in the village operating costs budget. They do so because they consider that having their village accredited under the RVA's accreditation scheme is advantageous to residents and themselves. The accreditation process amounts to an independently assessed audit of the conduct of the village scheme and seeks to prescribe and ensure compliance with universal standards which are for the benefit of residents. It is considered that a village that has RVA Accreditation will be more attractive in the marketplace than one which does not and therefor accreditation is likely to enhance village values for the mutual benefit of residents and proprietors.

9. Assertion - RVA has engaged in misleading and deceptive conduct on behalf of its members.

It has been asserted that a statement made by chairman of the RVA's Western Australian Branch, Mr. Stephen Kenney, to the Health Benefit Fund which was reported in the Funds May 2006 publication regarding "exit fees" or "deferred fees" was deceptive and misleading. The statement, made in the context of discussing deferred fees was reported as follows:

"Charging an exit fee allows the village lower the costs of entry, provide for long term liabilities and may be used to pay for some of the services provided."

Such fees for the most part represent the return on capital invested in what are very often quite

substantial village community facilities such as a club house, bowling green, swimming pool, hobbies room and other amenities. The charging of a deferred fee for the supply of these facilities to residents which is payable on a "re-sale" of a resident's village home effectively defers a residents share of the cost of these amenities. This allows for the residents entry costs to be kept at a lower level that would otherwise be the case. This income stream is often applied to meet the owner's longer term business liabilities in connection with the village. Additionally in some cases the fee is applied to meeting the costs of management/operation services which are not adequately otherwise funded out of the village's annual operating costs budget because of income/affordability constraints applicable to retirees. The above applies notwithstanding residents pay operating costs and contributions into reserve or sinking funds. The RVA therefor does not consider the statement misleading or deceptive.

10. Comment on Operating Costs management and responsibility.

It should be noted that the responsibility for the proper management of a retirement village lies on the proprietor or its manager. This is usually expressed as a duty and responsibility under the village scheme documents. The concept of retirement village living is to relieve residents of the task of property management that they would otherwise have to perform in a normal owner occupied residential context. This management role is a service provided. The service is subject to resident scrutiny and consultation as evidenced by the budgeting processes imposed by the 2006 Code.

Ultimately the final decisions on expenditure have to be made by management. Inevitably there may be cases where residents do not agree with a management decision. If residents or a small group of them want to make the management decisions then an essential characteristic of a retirement village is lost and the establishment becomes a resident managed facility.

If a manager does not properly perform its responsibilities then the matter can become the subject of the Code dispute process which can include the involvement Commissioner for Consumer Affairs or it can become a contractual dispute.

It should also be borne in mind that the Manager has the duty to act in the best interests of all of the residents. The majority of residents may have a particular view on a matter, but that view may be detrimental to a minority of residents. Hence a business decision by democratic vote of residents may be prejudicial to some residents and hence inappropriate in this environment..

Other issues have been raised in Submissions 21 and 32 that are directly specific to a particular retirement village scheme. These are best referred to the proprietor concerned or to any residents Trustee/Representative appointed under that scheme. They do illustrate the complexity of "purple title" tenancy in common retirement villages since these amount effectively to a property co-ownership arrangement between developer and residents. Generally speaking however these schemes have operated quite successfully for many years and offer the consumer an alternative "title owning" village option other than strata title which also has its own specific complexities.



I thank you for the opportunity to make this submission on behalf of the RVA and trust that it will be of assistance to you.

Yours faithfully,



Adrian Pagett.

Hon. Solicitor for and Associate Member of the Retirement Villages Association Ltd.