

**SUBMISSION TO INQUIRY INTO OLDER PEOPLE AND THE LAW
FROM—**

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1. INTRODUCTION

I am a practising solicitor who provides legal services to owners of apartments, units and flats in Victoria and the author of many publications, including the Victoria Law Foundation publication, "the Body Corporate Manual".

In Victoria there is a growing community of older Australians living in community style living which include—

- Over 1 million apartments, flats and units; and
- Over 490 retirement villages.

In Australia, it is estimated that community style living or strata title apartments represents at least 20% of all residential housing.

In the UK and in many states of the US, community style living is the dominate form of residential home ownership. In Victoria in 2004, the value of strata title apartments was valued by the Valuer General as being worth \$48 billion.

For older Australians community style living is an appropriate lifestyle choice because it is a low cost from of home ownership and provides a maintenance free and community environment.

This style of living has severely impacted the ability of older Australians to access legal services and dramatically increased the extent of financial abuse.

2. BARRIERS TO LEGAL SERVICES

Older Australians who live in privately owned and managed community style living have serious barriers to accessing legal services. Barriers have been created because of costs, intimidation, legal capacity and the complexity of the legal framework governing community style living.

2.1 Costs

There are significant costs for older Australians accessing legal services relating to community style living including—

1. The cost of legal advice prior to signing contracts is prohibitive. A solicitor requires many hours of reading to identify the rights and obligations of owners in the Contract of Sale, management agreements and the relevant legislation. My recent experience has indicated that initial legal advice takes more that 10 hours of reading of the documents and the relevant legislation. The pressure to achieve billable hours precludes lawyers from charging less than \$1,000 for initial advice prior signing the Contract of Sale.
2. Older Australians are denied access to free legal services when they are owners of property. Recent experiences show that the Federation of Community Legal Services, Legal Aid and PILCH due to policies or a means test are unable to provide free legal services to property owners.
3. Older Australians cannot afford the high costs legal services in an individual capacity when subjected to financial abuse. Older Australians on fixed and limited income, cannot afford more than \$1,000 for initial legal advice. In most cases however, after 10 to 20 hours of perusal of the relevant agreements and legislation and \$1,000 in legal fees, the solicitor is likely to find that the only party that can require the manager to comply with the relevant legislation is the body corporate and not the individual owner.

The jurisdiction to seek injunctions, orders and declarations relating to the complex title, property maintenance and ownership disputes is the Supreme Court. Estimates of costs of taking a matter to the Supreme Court are from \$30,000 to \$300,000 with a possibility of a 1 to 3 year wait for a decision. The cost and accessibility of the Supreme Court to resolve disputes is no longer appropriate to deal with community style living, promoting harmonious living and good practice in management.

2.2 Intimidation

Older Australians living in community style living can be intimidated, alienated and ridiculed as a trouble maker when complaining of raising legitimate complaints.

The complexity of the legal issues also creates opportunities for managers to argue many legal technicalities and weaken what is a valid legal right by the older owner.

Case Study 1

A retirement village creates a residents' committee and a body corporate committee. However the retirement village manager states that the residents committee does not have the legal capacity or powers to raise funds to pay for or obtain get legal advice. The owners are not aware of the existence of the body corporate as a separate legal entity.

2.3 Legal capacity

Older Australians cannot establish the legal identity to challenge financial abuse in law when living in community style living. In some retirement villages, the managers claim that there is no body corporate or alternatively, that the manager is the body corporate, and therefore, the owners have no rights.

The *Legal Profession Act 2004* requires a signed Costs Agreements prior to providing legal services. The appropriate party to a dispute with a manager is the body corporate and not the individual owners. However, when the manager is the only person or entity that can sign the Cost Agreement, the body corporate cannot take legal action against the manager. Consequently, the individual owners cannot take legal action against the manager. The individual owners need to:

- Each enter into a costs agreement pursuant to the Legal Profession Act 2004;
- Seek legal advice and assistance to petition a meeting of the body corporate
- Seek legal advice and assistance prepare the motions and the notice; and
- Seek legal advice and assistance to create the legal instruments to act as the body corporate.

This process can take 60 days to be effective.

Community style living arrangements are set out in at least 3 acts and many more regulations and often up to 5 agreements. The agreements usually states that the manager—

- Is the agent of the owner and can sign all documents on behalf for the owner in relation to changes to title, entering into agreements and to sell the apartment or unit;
- Has an irrevocable enduring power of attorney;
- Has an irrevocable appointment as manager; and
- Has an irrevocable proxy to vote at meetings.

Case Study 2

In a retirement village, the manager states that he is the body corporate and therefore the owners have no rights to access financial records.

The owners cannot call a meeting because the agreements state that the manager—

- Is the agent of the owner and can sign all documents on behalf for the owner in relation to changes to title, entering into agreements and to sell the apartment or unit;
- Has an irrevocable enduring power of attorney;
- Has an irrevocable appointment as manager; and
- Has an irrevocable proxy to vote at meetings.

When the owners called a meeting, the manager sent a letter to all the owners threatening to seek an injunction in the Supreme Court and seek damages for \$1.5 million.

As only the manager can sign on behalf of the body corporate, the individual owners cannot act as the body corporate and sign the costs agreement required under the *Legal Profession Act 2004*.

The individual owners of units in this retirement village have been seeking assistance from the relevant Government Bodies for over 2 years and have not yet been able to determine whether they are able to convene a meeting of the body corporate.

2.4 Complexity

Contracts of Sale to purchase property in community style living are 300 or more pages and often thicker than telephone books. The cost to a potential purchaser to obtain legal advice on rights and obligations in a contract of sale in a retirement village or off the plan apartment prior to signing the Contract of Sale is prohibitive. The complexity of the legal framework and the numerous agreements in the Contracts of Sale have resulted in legal advisors only transferring the property rather than providing advice on the obligations pursuant to the Contract of Sale.

Specifically, the legal framework setting governing privately owned community style living in Victoria includes—

- The *Subdivision Act 1988* and regulations;
- The *Retirement Villages Act 1984* and Regulations;
- The *Residential Tenancies Act 1999*;
- The new *Owners Corporations Act 2006* and regulations.

A Contract of Sale to purchase into a community style living apartment may include all of the following—

- Body Corporate Services Agreement;
- Management Agreement;
- Plan of subdivision;
- Manager's Lease;
- Occupancy Agreement;
- Car Space licence;
- Body Corporate Rules;
- Appointment of Manager;
- Instrument of Delegation;

- Planning permit conditions;
- Building permit conditions;
- Section 173 Agreement pursuant to the Planning and Environment Act 1987.

Agreements and rules created by the developer acting as the body corporate diminish the capacity of individuals to challenge decisions of the body corporate.

The lack of procedures to hold and record meetings also undermines the capacity of the owners to challenge and address issues.

Case Study 3

In three large community style living complexes, no owners have the capacity to petition meetings of the body corporate because of the hundred of members. Consequently the owners have no capacity to vote on the financial expenditure or peruse financial documents relating to the management of the community.

Case Study 4

In one case, not one owner of 400 owners was advised by their solicitor that they were affected by 2 bodies corporate. This same development also created a separate committee outside the legislative framework consisting of the developer's companies in an agreement between the developer and the Council pursuant to the Planning and Environment Act which resulted in all of the owners not having voting rights in the development.

3. FINANCIAL ABUSE

A number of urgent issues have emerged in privately owned and managed community style living including—

- The costs of purchasing and living in a community style apartment or unit are under stated. The management costs without additional services can be \$10,000 to 20,000 per year or more.
- Older Australians are unable to ensure that the building is managed according to law (for example, compliant with ATO and Building Regulations) and are at risk of substantial penalties.

Case Study 5

Many managers of apartments and retirement villages do not use fees for necessary fire safety inspections or maintenance of the building required by law and compromise the safety of the residents.

Case Study 6

One manager had not held a meeting or produced financial documents to account for the expenditure of owners fees in a retirement village in over 15 years.

4. CONCLUSION

There is a disturbing and emerging growth in financial abuse in privately owned and managed community style living for older Australians.

Older Australians who are owners of property are unable to access legal services, scrutinise expenditure and protect assets when managed by a body corporate manager.

The principal function of the body corporate is to maintain the common property. Management plays a critical role in determining the effectiveness of good property management, enhancing the value of the asset and harmonious living. But it is also an important function from a Government perspective because a breakdown in the maintenance of the physical structures within community style living is usually accompanied by social degradation. If this becomes systematic, it will eventually be a serious problem for Government and one that will be difficult to resolve.

Government can encourage good management if it:

- Establishes a housing ombudsman or commissioner as is provided for in many states in the US and UK. The commissioner in the other jurisdictions scrutinises and approves the disclosures and marketing materials for all new developments;
- Provides a comprehensive information service. The commissioner could provide information, monitor issues and hands on support within the retirement village or other form of community style living;
- Removes disputes from the highest Courts of the State and to recognise the importance of ensuring that disputes in a medium to high density housing environment are resolved cheaply and quickly;
- Keeps legislation as simple as possible;
- Spells out the management procedures clearly;
- Provides approved forms (using the "in or to the effect" approach);
- Imposes competency and ethical standards on professional managers; and
- Requires professional managers to undertake continuing education.

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From—

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