

30 August 2007

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Submission No.....157.....
Date Received.....

BY:.....LAeA.....

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

Dear Sir,

**Submission to House of Representatives Standing Committee on
Legal and Constitutional Affairs - Inquiry into "Older people and
the law".**

Please do not choose to reject this submission.

If you are not satisfied with any element within the submission, could we please work together to make any necessary changes?

I am a conservative former public servant who retains a believe in the capacity of governments to take action to improve the life of citizens.

Yours faithfully,

(Robert Boyne) *

30 August 2007

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

Dear Sir,

**Submission to House of Representatives Standing
Committee on Legal and Constitutional Affairs - Inquiry
into "Older people and the law".**

Executive summary

This submission recommends

- that responsibility for regulation of the retirement village industry be transferred from State Governments to the Commonwealth with regulation undertaken by the Australian Competition and Consumer Commission (ACCC) and/or the Australian Securities and Investments Commission (ASIC)
- that government institute a seamless process of regulation for retirement villages, hostels and nursing homes.

The writer has the first two listed Inquiry terms of reference in mind while writing this submission.

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

I would welcome any opportunity to answer any questions you may have in relation to this submission.

Yours faithfully,

(Robert Boyne)

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

Background of author

The writer has been a resident within a retirement village in Western Australia for eight years. His late mother was a resident of another retirement village for several years.

He was for more than twenty years a Commonwealth public servant working in Canberra. His background is primarily in accounts payment, budgeting, maintaining computer-based accounting systems and cost accounting. The later role involved preparation of quantitative and qualitative quarterly reports relating to Repatriation General Hospitals as well as some Tables appearing at the rear of Annual Reports of the Department of Veterans' Affairs.

He claims limited ability to interpret documents such as retirement village contracts and the Western Australian *Retirement Villages Act 1992 (the Act)* but a working knowledge of the Western Australian *Fair Trading (Retirement Villages Code) Regulations 2006* (the Code). He does not possess the ability to write submissions such as this document in elegant English.

He was not until recently aware of the existence of the Inquiry nor the interest shown by Inquiry members in retirement villages nor the extent to which public meetings has already taken place. Consequently, this submission has been written with some haste.

Basis in law

There appears to be a presumption in law and in the minds of Inquiry members that a retirement village contract is a bargain made between parties of equal competence and power. This presumption cannot be sustained on examination and leaves retirement village residents open to exploitation.

Few prospective retirement village residents can understand the complex documents presented to them by sales people. These documents are supposed to be understood fully by prospective residents, some of whom are more than 80 years of age, at the same time as prospective residents may be selling an existing dwelling, sometimes located in a geographically distant area with Australia, and negotiating building modifications to their new home. Sometimes prospective residents may not enjoy the best of health or be caring for an even less healthy partner or dealing with the recent death of a partner. Many do not possess a familiarity with legal documents.

One the other hand, the owner/developer has access to the expertise of lawyers well versed in drawing up complex legal documents.

Such circumstances preclude the making of a bargain by equals, which I believe is at least part of the philosophical basis of contract law.

Within the village where the writer resides, the pre-contract and contract documents presented to another resident weighed 1.5 kg on kitchen scales. Thus residents were unlikely to understand at least some of the implications of the contract documents.

In the end the prospective resident signs the documents in good faith and hopes that the village owner/developer has acted in good faith also.

However residents on occasion do not become aware of the implications of some the terms of the contracts until years after entering a village.

Absence of licensing

In Western Australia, retirement village developers and owners are not licensed.

State Government regulation of villages

Currently, regulation of retirement villages is the responsibility of State Governments, each of whom has a Code of Fair Practice. The Codes appear to vary in scope and content from State to State.

“Regulation” by the Western Australian Department of Consumer Protection (DOCEP) has proven to be inadequate (in terms on matters not covered) and inappropriate (particularly in terms of the nature of the formal dispute processes).

DOCEP regulation functions on the basis of written complaints from consumers. Retirement village residents typically are seventy years of age or more and many are now single females. In some cases, financial and legal matters had been dealt with by their late husbands.

Few residents have faced legal documents of the size or complexity of retirement village contracts. In most cases, residents are unlikely to be able to understand their contract documents, the Act, the Code or the quarterly and annual financial statements prepared by managers.

Importantly, residents are unlikely to be litigious in nature and feel too intimidated to make a complaint other than verbally to their neighbours.

Until recently, DOCEP has simply been unaware of the level of dissatisfaction within retirement villages. Only the current process of review of the *Code* has brought a number of matters to the awareness of DOCEP staff.

In the opinion of the writer, neither the current DOCEP review, nor the review required by the Act in five years time, are likely to bring about sufficient change to redress the imbalances or inadequacies that currently exist.

Injustices will continue until or unless DOCEP staff get out of their office in Perth and physically present in retirement villages. That is why I suggest a government accreditation similar to nursing homes.

Retirement Villages Association

Given the imbalance at law between the parties and the inadequacy of regulation by the State Government, the industry is, in effect, “regulated” by the Retirement Villages Association.

This body is the peak council of village developers and owners. The RVA promotes its own “accreditation” process, which is primarily for the benefit of its members.

Prospective residents are likely to presume that accreditation is similar the Federal Government accreditation of nursing homes and hostels, and thus are likely to make decisions which are not in their own best interest.

Ownership of retirement villages and consequences

The nature of the ownership of retirement villages has changed radically in very recent times. Now ING, Macquarie Bank and Babcock and Brown (there may be other international companies) are substantial investors in the retirement village industry.

These companies are moving into the industry because of the high profits available. Companies may profit from

- day-to-day operating costs,
- resident-funded major maintenance and improvement costs and capital improvements
- the dwelling sale commission on leaving a village, and, especially,
- deferred fees

The Inquiry heard some evidence in Perth as to deferred fees. There is no regulated standard basis for these charges which may vary with the village, the owner and time. As a rule of thumb, I suggest you consider 30% of the sale price of a dwelling after ten years occupancy. Ten years is a reasonable assumption for the average period of occupancy.

So each year, owners can expect to receive 30% of the sale price of ten percent the dwellings within a village, plus profit from the actual sale and day-to-day operating costs.

The amounts involved, particularly in deferred fees, are substantial and thus attractive to transnational companies, particularly in the absence of any effective regulation.

Prospective and existing retirement village residents cannot be expected to deal on a fair basis in law with companies of this size.

The future for residents on leaving a village

People in Australia are living longer, but in greater need of support services.

On an almost weekly basis at present TV news programs graphically detail incidents of extreme violence inflicted on older West Australians.

Retirement villages are intended, and the contracts provide for, independent living and are not the final dwelling for many older Australians.

Once unable to live an independent life or unable to afford increasing charges levied by village owners/managers, the future for retirement village residents can be bleak.

Given the financial costs of leaving, they will be unlikely to afford an equivalent dwelling. Nor may they find the physical security afforded by some villages.

If fortunate, they may move into a hostel or nursing home. If less fortunate, they may move to inferior accommodation while receiving Home and Community Care services.

Contracts provide the former residents or their estate to continue to pay full fees or rent until such time as the former dwelling is re-occupied.

Worst of all, resident contracts do not seem to provide for return of residents' money within a reasonable time, nor even a requirement to place the former home on the market.

Thus some former residents may be responsible for means-tested hostel or nursing home charges at the same time as paying the fees/rent for their former home.

Proposed future regulation of the industry

Given that

- retirement village contracts
 - are too complex for most prospective residents to understand
 - vary widely from village to village and even vary within a village from time to time
 - are drafted by or for the developer/owner for its own benefit
- retirement village operators are not required to be licensed

- no independent review as to fairness of the contract takes place prior to or after presentation to prospective residents,
- village chains are increasingly owned by transnational companies, and
- regulation of villages by at least one State Departments of Consumer Protection has proven to be inadequate and is unlikely to improve substantially

this submission proposes that responsibility be transferred from State Governments to the Commonwealth Government with regulation undertaken in part by the Australian Competition and Consumer Commission (ACCC) and/or the Australian Securities and Investments Commission (ASIC).

The Commonwealth has the power under the Corporations provision within in the Constitution and there are precedents.

The writer notes the supplementary submission dated 28 June 2007 received from the ACCC and suggests that the extent to which any particular retirement village contract is a financial service remains unclear. This matter is unlikely to be resolved by any action taken within any State Government Department with responsibility for consumer protection.