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November 21, 2006

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

Dear Sir or Madam:

I am a resident of retirement village writing to point out the exploitation of the elderly being perpetrated by this industry with the acquiescence of Federal and State Government authorities and laws. Along with other residents I am engaged in lobbying Western Australian state ministers and consumer protection bodies to do something about this matter. We have made submissions to reviews of legislation on-going in this state. Three of these submissions are attached to give an indication of the inadequacy of our states consumer protection of the elderly in this sphere.

From your committee's focus-point I want to address the power disparity between the Retirement Village industry's developers, managers and their association (the RVA) on one side and residents on the other. Resident's don't stand a chance, as everything is weighted against them and they are being financially exploited.

### **Legislative Process**

The legislation and regulations have been developed via a cosy relationship between the industry and state government authorities lobbying and advising state parliaments. Residents, by and large have little or no voice in the process, because they are not meaningfully organised and do not have the resources to organise.

Legislative reviews, such as they are, are orchestrated to limit input by residents. For example, knowing that residents are poorly organised and informed about the existence of existing legislation, WA's Department of Consumer and Employment Protection (DOCEP) in August 2006 called town hall meetings to ascertain residents' views on the effectiveness of this state's Retirement Villages Act (1992) (the RVA1992) to come into effect circa 2008/9. Residents were invited to these meetings via a newspaper advertisement and only one month was allocated for the holding of these meetings state-wide. Owing to an excellent word of mouth campaign by residents, these meetings were so well attended that DOCEP had to extend the hearing period to two months. At these meetings proceedings were also orchestrated and produced nothing more than a brainstormed list of minor grievances expressed in a few words each. No history of the grievance drivers was recorded, which is a necessity if one is to understand how the legislation allows grievance situations to persist. In the midst of this review, another review was begun in the same way into the Fair Trading (Retirement Villages Code) Regulations 2006 (the Code), which will supersede the 2003 version that expired on 31 October 2006. This review was not distinguished from the 1992 Act's review, such that

only a few residents were aware it was a different animal and of more immediate importance.

While we do not yet have an outcome of this review we do know the outcome of an earlier review in 2002. The existence of that review was basically unknown to residents until it was a fait accompli. As far as we could ascertain it was prompted by the Retirement Villages Association, whose members are village developers and managers – residents are excluded. That review had the effect of legalising extant practices of developers and managers to the detriment of residents and of removing from the legislation most avenues of redress then available to residents. We are expecting more of the same from the current review, as the Association still has the ear of DOCEP and the Minister responsible for DOCEP opened the Association's conference this year.

The Association's Stephen Kenney said on radio 6PR that he'd "be surprised if in most areas [his members] and the government weren't highlighting the same issues and singing from the same song sheet". Also on radio, the DOCEP Commissioner while speaking on the current legislative review was coy, but his comments offered no comfort to residents.

The point here is that there is unequal input into legislation resulting in it being weighted, heavily, against the resident (consumer) that it is ostensibly protecting.

### **Legal Access**

Retirement village Residence contracts (Deeds) in W.A. are governed by the foregoing RVA1992 and the Code, and this is similar in other states. The law has been drafted on the principle that prospective residents are capable, astute and able to fully inform themselves about what it is they are signing up to when they enter into one of these Deeds. However, this is a niche area of law: apart from the lawyers who act for the developers, managers and their Retirement Villages Association, expertise in this area is sparse – even in DOCEP so we've found!

Unlike a normal contract, a Residency deed usually isn't varied from resident to resident. This is definitely the case in a 'Purple Title' ownership village where every resident is an equal part owner of the entire village and so must have the same deed. These deeds are written in such a way as to limit the resident's rights to the maximum extent possible – and with each successive village built developers learn to restrict these rights even further. They learn from us residents who question what they have done in our village and apply that knowledge to the deed for the next village they develop. These deeds seem innocuous in their wording at first glance, and lawyers we take them to for confirmation we are doing the right thing are taken in by this, but gradually, it comes home to us as we live in the village that what we thought we'd bought is not what we got. By this time we are locked in and generally have zero right to anything but consultation under the legislation, which also allows the manager ignore us after having listened to us – with deaf ears! We residents consider informing prospects we see eyeing our village, but fear being sued by our developer, and have had pressure applied when we attempted to ignore them in this.

We have tried to bring complaints about the legality of our Deed before DOCEP but on the first occasion were told there was nothing wrong with our deed and they closed the file. On an approach to the Minister relating to DOCEP's procedural fairness in giving undue weight to the views of our village's developer, the file was reopened in February this year, but now in November we still have no answer to our complaint despite meeting

with them twice and educating their lawyers somewhat. Legal opinion we have obtained through donations, supports our contention that our deed does not conform to the law, but we are deterred from legal action by the unbounded costs involved. There is a State Administrative Tribunal (SAT), but it can only hear cases on very limited grounds and its findings can be challenged in court. As mentioned above, most of those grounds have been removed from the legislation, thus denying us that route for much of our claim. Even if a claim succeeds through the SAT there is no means of enforcement available to the claimant resident. We have cases that after 10 years in the process, and an emphatic win, there is no satisfaction forthcoming. Another winning claimant tried having the sheriff sequester his village management company's assets and selling them to pay the claim, but was told by the sheriff that he could find no assets, that the company was probably trading insolvent – he died soon after, never having received any satisfaction, and that was for a claim for repayment of improperly charged GST of around \$1,000!

The point here is that residents, even if they are economically and legally educated and have financial capacity, and do everything they should do, they cannot possibly be on an equal footing with those peddling the village to them.

### **Financial Gouging**

Buying into a retirement village requires hundreds of thousands of dollars – a large outlay for anyone. This is only the start of it though. Depending on how the village is owned and administered there will be varying levels of rates, fees, charges, and miscellaneous expenses while ever the resident resides in the village. These will vary according to budgets set and controlled by the village management, after, you guessed it, legally mandated consultation – that is then generally legally ignored.

Regardless of whether the resident owns or leases their abode in the village they must at the whim of the management or developer also stump up payments for certain types of maintenance or refurbishment during their occupancy. They can then be asked to stump again for anything up to and including a complete make over of their abode prior to sale.

At every point along the way, there are opportunities for Management to fudge the books to increase amounts flowing to their own accounts – notwithstanding that they are being mandatorily audited annually. For example, our own accounts are kept within the accounts of our Management company, which manages several villages. The insurance is taken out across all the villages but there is no accountability for the way the cost of the insurance is apportioned to each village, and the insurance cost includes fees for that previously mentioned Association too! Moreover, though we residents are the owners of the village and our deed says each resident is to be insured, the insurance is in the name of our village Developer, Manager, and several other entities, but not we residents – we are third parties liable to recovery claims by our village insurer. Then too, if an insurable event turns out to be under insured, we residents are obliged by our Deed to indemnify them against the insurance shortfall, even though we own the insured assets! Should our interest in the village be sold, the Deed entitles our developer to the greater of up to 50 percent of the capital gain or 25 percent of the sale price, plus any other expenses on sale. These expenses can include the refurbishment of the abode to a standard decreed by the developer or manager plus their sales agency fees plus management fees up to the time that the buyer takes them over.

These Deed documents are like combinations of company prospectuses and constitutions, but without an Australian Securities and Investment Commission (ASIC) or Australian

Securities Exchange or Australian Competition and Consumer Commission like organisation watching over them.

The point is that there are myriad ways to in plain sight hide the real cost of village life from prospective residents and very little likelihood of a prospective resident finding a financial advisor able or willing to provide accurate advise – not willing, perhaps in fear of being sued.

**Conclusion**

There is no one we residents can turn to for a fair hearing here in W.A. The consumer watchdog has been tamed, willingly it seems, and no longer performs its designated role. Perhaps the Federal government's newly confirmed powers over companies will allow it to intercede with the companies that have inappropriately gained control of our assets if your committee can grasp our predicament and makes the appropriate recommendations for remedial action.

Sincerely,

K.J. Leslie