

PRESIDENT

Phil Phillips

HON. SECRETARY

Bill Runciman

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MT
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 Legal & Constitutional Affairs Committee
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This submission is confined to the inadequacy of legal services available to those senior Australians living in Queensland Retirement Villages which are registered as such with the Queensland Office of Fair Trading. There is no doubt in the writer's mind that what is described here applies equally in other Australian jurisdictions.

1. When applying to enter a retirement village, residents are presented with a contract consisting of a Public Information Document and a lease agreement. This can and usually does amount to about seventy pages. Where the contract is in respect of a 'strata title' accommodation Unit (a small proportion of villages - 12% or so) the contract involves a freehold title and not a lease agreement. However, there is still the same voluminous Public Information Document in respect of the facilities provided by the "scheme operator" - the village owner.

2. This is the sort of contract which is pre ordained and is not a contract negotiated between the parties. It is a take it or leave it contract which most prospective residents are inclined to take because "it must be alright" The contract is unbelievably long, complicated and repetitive. To have a lawyer scrutinise such a contract, which includes the PID, really thoroughly would be expensive, possibly two or three thousand dollars; not the sort of expense one wants to incur just to see if a village contract is 'alright'. A couple of years ago a committee of State Commissioners of Fair Trading started to look into "unfair terms in contracts"; substantive unfairness, not just procedural unfairness, from a consumer's point of view. A comprehensive paper was published inviting submissions from the public, to which the writer subscribed. The proposition seems to be dead in the water. Retirement Village residence contracts so abound in unconscionably unfair terms that a wholesale investigation by the ACCC is warranted.

3. In Queensland there are generic parts of PIDs which are mandatory but other parts vary widely from village to village. Not only that, they differ widely even within a single village; there may be half a dozen different PIDs, according different entitlements and responsibilities to residents within the same village. For example, in one group of villages in Queensland, PIDs issued over the last couple of years forbid residents to have meetings of more than five people on the common property (in the Community Hall) without the operator's approval. In Queensland, many contracts in recent years have been requiring residents to be responsible for the maintenance, repair and replacement of all fixture, fittings etc, on or in their accommodation Unit. This despite the fact that scheme operators contribute, compulsorily, to a Capital Replacement Fund and residents, compulsorily, to a Maintenance Reserve Fund. Earlier PIDs in those villages do not contain such restrictions or stipulations so cannot be made to apply to their holders. It is a silly, bizarre, inconsistent situation but scheme operators get away with it because although they are required, in Queensland, to submit 'new PIDs' to the Office of Fair Trading, that Office does not scrutinise them, simply registers them. Unless and until residence contracts are completely standardised in a village and preferably across the retirement village industry, residents will be bewildered and quite uncertain as to their obligations and entitlements.

4. As in other States, there is legislation in Queensland, the Retirement Villages Act 1999, which to some

extent regulates Queensland retirement villages and which takes precedence over anything in a contract which is inconsistent with the Act. However, scheme operators habitually ignore the Act and even, sometimes, provisions of their own Public Information Document if that advantages the scheme operator. Residents in retirement villages find, in practice, that they have lost some of the freedoms which all Australian citizens enjoy as of right. Freedom of speech, freedom of assembly, freedom to dissent are all circumscribed to some extent by some operators of retirement villages. Threats to evict are not unknown even though eviction is not something that can be done at the whim of a village operator. Intimidation is not a figment of anyone's imagination, it is widespread in retirement villages, as an investigation in 2000 by the University of South Australia revealed.

5. Where there is a dispute between a resident or residents and scheme operator the resident may take a case to the Queensland "Commercial & Consumer Tribunal", or to other Tribunals in other States. This is meant to be an inexpensive avenue to justice. So it is, except that the village operator can afford to have and often does have a solicitor and a barrister to represent him; so too may the resident but few residents have the necessary financial resources or the resources of spirit. Residents are thus at a distinct disadvantage. Few retirement village residents indeed are able to fend for themselves in a Court or Tribunal, especially being cross-examined by some eminent QC, (which has happened) who might well intimidate the Tribunal as well as the hapless resident. So, unless some reasonably competent person, although not a lawyer, takes on the case for the resident, redress or justice is denied them for lack of financial resources. It is ironic that although the scheme operator may have the financial resources to afford legal representation but not the resident, the scheme operator's financial resources derive from the many thousands of dollars paid to him by the resident. Misquoting George Bernard Shaw a bit, one might wryly observe that retirement village operators may have as much justice as their residents can buy!

6. Having beaten my breast about the plight of some of our most senior citizens I should really suggest what might be done to alleviate it. Assuming that retirement village disputes between resident and scheme operator should compulsorily be a matter for the Disputes Tribunal set up for the purpose in each State, then there are two possibilities:

- (1) Neither party to be allowed legal representation, or
- (2) Both parties allowed legal representation but the resident, and only the resident, afforded legal aid including the cost of retaining a barrister.

7. The writer favours the former. The Queensland Commercial & Consumer Act states:

"The main purpose of this division is to have parties represent themselves and save legal costs unless the interests of justice require otherwise"

It is often difficult for a Tribunal to refuse a scheme operator legal representation even if the applicant (resident) is not so represented. The scheme operator (rather his lawyer) may argue that there are complicated legal issues involved, even if there are not. The upshot usually is that respondent's lawyer indulges in time consuming tactics, pointless argument, irrelevant precedents, all of which is designed to bemuse and discourage the resident. As the scheme operator can always appeal a Tribunal's decision to a higher Court if he believes it has erred in law or exceeded its jurisdiction, lawyers should be excluded from a hearing by the Tribunal.

8. It is fair to expect a scheme operator to be aware of the laws within which he has to operate his business and be a match for the resident. Given that the average age of residents is about 80 years it is reasonable to allow a resident (or a scheme operator for that matter) to be represented by another person, younger and more able perhaps, who is not a lawyer. In any case, if the scheme operator appeals a Tribunal decision to a higher Court the Resident should be afforded legal aid to defend against that appeal. Even the threat of going to a higher Court is most likely to cause a resident to withdraw from the whole dispute, which is in many cases the whole object of such threat, In a recent case in NSW, where the scheme operator appealed a Tribunal decision to a higher Court, the Office of Fair Trading took over the role of defending against the Appeal. It would have been beyond the resources of the residents

concerned. In that instance residents were in effect given legal aid. But legal aid in such matters needs to be a matter of right; residents need to be certain of being able to access it.

9. So, how is the sort of legal aid described to be funded! Upon registration of their village and again later if necessary, scheme operators should be levied an amount to be paid into a central fund, held by the respective Office of Fair Trading, which can be accessed and used by that office of Fair Trading to underwrite any costs incurred by a resident in excess of, say, the application fee to the Tribunal. It does not have to be used in advance of an application to the Tribunal but for recovery of legitimate costs which are not awarded by the Tribunal against the scheme operator.

10. The problem of course is to get all States legislatures to accept the idea and subscribe to it. As it is a matter of 'Fair Trading' perhaps it would be possible for the Federal Government to make some changes to the Trade Practices Act, the provisions of which are generally reflected in State "Fair Trading Acts". What is needed is:

1. PIDs to be completely standardised across the retirement village industry or failing that, across the whole of a State.
2. Scheme operators be required to submit standardised contracts and PIDs and any proposed changes thereto to their respective Office of Fair Trading together with a certificate that, having taken legal advice, to the best of their knowledge and belief those residence contracts, including the PID, are consistent with the relevant retirement village legislation.
3. Offices of Fair Trading be required to scrutinise contracts and PIDs to ensure consistency with legislation.
4. Scheme operators be denied legal representation at Tribunal level.
5. Scheme operators be forbidden from recovering any costs or expenses whatsoever from residents' collective funds.
6. Scheme operators be required to contribute to a fund established solely to enable retirement village residents to bring or defend cases in a Court higher than a Disputes Tribunal

P.G.Phillips
President ARQRV
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