Monday 30 May 2016

[redacted]

The Secretary
Legal and Social Issues Committee
Parliament House, Spring Street
EAST MELBOURNE VIC. 3002

REF. INQUIRY INTO THE RETIREMENT HOUSING SECTOR

Dear Sir / Madam,

We refer to the above inquiry and wish to submit the attached paper for consideration as part of committee's investigation into retirement villages.

In particular, we strongly believe that there is urgent need for the appointment of a dedicated Regulator, preferably a Retirement Villages Ombudsman, with power to investigate and rule on unfair actions by village owner/operators/management and unconscionable Deed/Contract clauses that impact significantly on residents' rights as consumers.

Major issues, outlined further in the attached paper are:

- The complexity of Resident Contracts/Deeds
- Construction defect and maintenance issues
- Owner determined "defect periods" – contravention of State Legislation
- Consumer Affairs Victoria inability to effect prompt resolution to disputes
- CAV referring residents to VCAT is ineffectual and costly to residents

We trust that the attached document sufficiently details our concerns and experiences and supports our contention that a Retirement Villages Ombudsman is sorely needed. A representative is available to expand on the issues raised in our submission.

Yours faithfully,

Representative: Mr Graeme Taylor
Phone: [redacted] **Mobile:** [redacted]
Email: [redacted]

SUBMISSION

To: Legislative Council Standing Committee on Legal and Social Issues

INQUIRY INTO THE RETIREMENT HOUSING SECTOR

MATTERS FOR COMMITTEE CONSIDERATION:

1. The Resident Contract -

- Transparency in the form and presentation of contracts/disclosure documents is a fundamental right that must be enshrined in legislation
- Residents often do not fully understand or are intimidated by contract complexity and there is little domestic legal expertise or knowledge on village contracts
- Resident Deed/Contracts invariably shift all legal and financial obligations on to the Residents' Association/management committee to manage and maintain the village
- Owner has created an incorporated association within the deed/contract which gives voting rights under the rules to the owner via the permanent members (30% of votes) which prevents resident members from changing association rules or by-laws. How Consumer Affairs Victoria could approve such imbalance is questionable
- The permanent members have the right to transfer their membership to whoever they wish. The owner thus retains control of the association - in perpetuity
- It is a requirement under the association rules for a permanent member to be present at an AGM or SGM to establish/ensure a meeting quorum. A control issue that disregards the fact that the association is a resident member based entity
- The owner/operator (but not residents) has the capacity to change the terms of the deed/contract i.e. exercise a right or power at its sole discretion
- It is a pre-requisite to contract termination that the resident shall refurbish the unit and also cover the costs of the work. Decision as to scope and cost of work and the contractor engaged is at the sole discretion of the owner
- The above clause has the following wording included – **"but is not limited to"**; the owner/operator's interpretation here is to require significant upgrading of fittings rather than just "fair wear and tear" or refurbishment
- There is a significant imbalance of power in the owner/operator to village resident relationship. The contract, prepared by the owner, is offered on a take it or leave it basis and most potential purchasers (elderly citizens) lack the financial, physical and mental resilience to comprehend the implications contained in the contract
- As we understand, the Fair Trading Act over-rides the resident contract should it contain clauses that can reasonably be deemed unfair or they can be challenged under the Competition and Consumer Act 2010

2. Construction Defects/ Maintenance Issues –

- Maintenance issues are often difficult to resolve, particularly if the manager and/or owner/agent simply ignore repair requests or refuse to mediate on issues. This has occurred in recent times
- Implied warranties under the Domestic Building Contracts Act are difficult to pursue as, who are the parties to the dispute? Is it Resident v Association or Owner or Agent
- Residents assertive enough to challenge village management/agent/owner on maintenance issues and complain to Consumer Affairs are simply advised/referred to VCAT and then face a lengthy and expensive battle in that forum

- Such ignored maintenance requests and the resultant forced referral to VCAT is in effect a form of intimidation, bullying and borders on Elder Abuse. Elderly residents, particularly single ladies, can be distressed by such tactic
- Unconscionable conduct occurs when an organisation is particularly harsh or oppressive towards a resident. Breach of Contract claims for failure to repair and maintain units are extremely difficult to pursue. The imbalance of power mentioned previously comes into play, residents simply do not have the required resources
- Unit construction defects have been identified and reported by residents - and acknowledged by the owner and its agent. The contract/deed cites a "Defects Period" of twelve (12) months after the date of issue of an Occupancy Permit. Occupancy Permits are issued to the owner not the lessee. State Legislation over-rides this clause which has, and is being used, to deny liability for repair
- Contract Clause: "The Residents Association must at its cost all times repair, and maintain in good repair and condition (and replace those things which are beyond repair)".
  To maintain and repair is reasonable. To replace major items of infrastructure such as a bowling-green, swimming pool, communications hub, underground sewerage and water pipes/drains, electric and telecommunications cabling should not be cost shifted - away from the owner - to residents. Responsibility for replacement of such major infrastructure items would normally be that of an owner, not residents
- In 2012 the Owner's Agent, whilst acting during the village's construction stage as an appointed committee of management (as well as constructor) established a Communications Equipment Replacement Fund (CERF) and Electricity Surplus Fund. These funds were initiated by the owner/agent to upgrade equipment and cabling using surplus funds derived from resident usage charges.
  These revenue streams (services overcharging) are not identified as being agreed or part of the resident contract/deed, should be revoked and in future any surplus derived from usage charges returned to residents in accordance with the RV Act

Summary:
It is our opinion that there are a number of manifestly unfair provisions in our Village Resident Contract/Deed that require examination and amendment. The protection of elderly retirement village residents from unconscionable contract conditions must be foremost in committee's deliberations.
Bi-partisan support for the appointment of a Retirement Villages Ombudsman with power to review resident contracts and unfair practices prevalent in the retirement villages industry is undoubtedly necessary.

Representative
Graeme Taylor, Cardinia Waters Village – Pakenham, Victoria
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