

**Submission by John Punter on the Inquiry by the Upper House into the
Operation and Regulation of the Retirement Housing Sector including
Retirement Villages**

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Confidentiality Requirement **NO**

Submission Content

This paper has been prepared to address the following topics identified in the TERMS OF REFERENCE issued under Sessional Order 6 ..

Item1(b) This submission details my recent experience on how the owner of the retirement village of which I am a resident has attempted to have lease holders who are non owner of lots on the retirement village pay the costs of \$500,000 (approx) associated with the replacement of the failed Fire Hydrant System from the Village's Capital Improvement and Maintenance Fund funded by the residents of the Village. This report also identifies how the owner has also used the Operating Budget and the Capital Improvement and Maintenance Fund to fund the owner's obligation for Essential Safety Measures under the Building Act 1993 and the Owners Corporation Act 2006 using the provisions of the lease..

Item 3. This submission details the way in which the retirement village owner developed and implemented a strategy to pass the costs of his legal obligations on to non-owners (residents) of lots on a retirement village.. Prior 2012 the owner had a number of different conditions for leases covering the villages they owned or managed and wanted to standardize on a standard lease to save administration costs by using a standard lease across all of their villages. Residents were encouraged to accept the new conditions of leases by offering the existing lease holders an incentive (one time) payment of \$200,000 to the Village's Capital Improvement and Maintenance Fund. The owner also offered to pay the costs of a lawyer of the residents choosing to review the terms and conditions of the new lease.

Background and History Behind the Submission

I have been a resident of the [REDACTED] since 2007. The owner initiated the activity to standardize on the conditions of the lease for their Victorian Villages which were under a long term lease by non owners of lots on the village in the middle of 2012. The owner of approached all residents with the offer to transfer to a new lease which would be standard across all villages they operated in Victoria. An electronic copy of the lease can be provided if required but would be the subject of a confidentiality agreement as it clearly identifies the owner of the villages in question.

This submission was initiated as a result of the village owner advising the Residents' Committee in December 2014 that the Street Fire Hydrant System had progressively failed pressure testing and that the Metropolitan Fire Brigade would not grant any further concessions on the pressure test requirements. The owner took the decision, after spending in excess of \$120,000 on pressure testing to abandon further pressure testing and decided to design and install and new Street Fire Hydrant System which cost \$390,000. The owner notified the Committee the costs associated with the testing of the failed system and provision of a new Fire Hydrant System would be funded from the Village's Capital Improvement and Maintenance Fund.

Initially the Committee decided to accept the owners offer. It wasn't until early 2015 that the committee notified the Residents of the issues associated with the Fire Hydrant System that any action as taken to challenge the position taken by the owner.

The committee was informed by myself almost immediately that these costs were an owner's responsibility since the Fire Hydrant System lies totally on the common property of the Village. The committee took the position that they needed to be convinced that this was the fact. As a first step they established a Task Group to study the issues involved and provide a report to the committee for their consideration. The Task Group identified the legislation which established who had legal responsibility for the costs associated with Street Fire Hydrants on a Retirement Village installed on the common property. As result of this review, the following acts and regulations were identified as being applicable to the [REDACTED] signed by all residents in December 2012.

1. Victorian Subdivision Act 1988
2. Owners Corporation Act 2006
3. Planning and Environment Act 1987 administered by Whitehorse City Council
4. MFB Safety Guideline No GL-27
5. Building Act 1993 and Building Regulations 2006
6. Australian Consumer Law and Fair Trading Act 2012 (No 21 of 2012) Victoria
7. Consumer Affairs Victoria Web Site
8. Retirement Villages Act 1986
9. Burwood Terrace Lease Terms and Conditions dated Dec 2012

Initially the Task Group's efforts were concentrated on the issue associated with establishing responsibility for the replacement fire hydrant system. However it soon became apparent that the owner had been incorrectly charging costs for which they had legal obligation to both the Operating Budget and the Capital Improvement and Maintenance Fund for a number of years.

STUDY OF APLICABLE VICTORIAN LEGISLATION

The results of the investigation carried out by the Working Group into the Applicable Victorian Acts and Regulations covering Retirement Villages are detailed below.. The group initially concentrated on the Acts and regulations which cover the long term lease by non owner residents under the Victorian Retirement Village Act 1986 and the terms and conditions of the Standard Lease signed in December 2012. The results of these efforts are discussed below

Victorian Subdivision Act 1988

Part 5 Clause 27A (Page56) states (sic)

If there is common property an owners corporation must be created (Page 56)

A plan which contains common property must provide for the creation of one or more owners corporations

COMMENT

Item 1 (Page 4) of the standard lease identifies the Owners Corporation Plan of Subdivision PS348750N as the document which shows the areas classified as Common Property on the Plan of Subdivision.

Owners Corporation Act 2006 (Act No 69/2006)

The following sections of the Act apply to Common property in relation to the Fire Hydrant repair activities (Sic)

- definition 3

"common property" means land shown as common property on a plan of subdivision or

a plan of strata or cluster subdivision;

- maintenance, repairs 46

Owners corporation to repair and maintain common property

An owners corporation must repair and maintain—

(a) the common property; and

(b) the chattels, fixtures, fittings and services related to the common property or its enjoyment.

COMMENT

The Plan of Subdivision (Stages 1 to 9) identifies the areas of Common Property applicable to the Village. The repair/replacement work undertaken on the Fire Hydrant System falls completely within the areas identified as Common Property in the Plan of Subdivision.. In accordance with the Owners Corporation Act 2006 the repair/replacement of the Fire Hydrant System is an obligation of the owner.

Planning and Environment Act 1987

This Act of Parliament covers the requirement for councils to introduce planning schemes called the Victorian Planning Provisions (VPP) which sets out the objectives, policies and provisions for the use, development and the area of the land for which it applies.. Under the planning scheme for Whitehorse Council (VPP 1987) Clause 56.Residential Subdivision (Page 580) covers Utilities. Clause 56.09-3 sets out the Fire Hydrant objective which states that fire hydrants are to be supplied which enable fire fighters to access water safely, effectively and efficiently

Standard C29 states:-

Fire Hydrants shall be provided

- a maximum distance of 120 metres from the rear of each lot
- no more than 200 metres apart

COMMENT

Whilst the original fire hydrant system installed complied with this provision. As the village was developed the MFB Planning Guideline No GL-27 had to be taken into account to cover town houses built under Stages 8 and 9 of the Village. This meant that the fire engine hoses couldn't meet the 120 metre requirements. See discussion on MFB Fire Safety Guideline.below.

MFB Fire Safety Guideline No GL-27

Page 9 of the referenced guideline shows that, for the Australian Standard Fire Hydrant installation, the fire engine has to be positioned no more than 20 metres from the fire hydrant. To this has to be added 60 metre fire hose length of 60 metres..

In the case of Stages 8 the fire engine was unable to connect to the Fire Hydrant on the north east corner of the main building because the fire engine could not get access because of the limited road access. In the case of Stage 9 the fire engine, when using the Fire Hydrant in front of the main building, the 60 metre hose maximum meant that some of the residences did not have the required fire protection..

COMMENT

Clearly [REDACTED] site has been in clear breach of the Planning Provision and the MFB Guidelines for Fire Fighting provisions for years – 10 years in the case of Stage 7 and 4 to 5 in the case of Stage 9. Documentation has been provided by Whitehorse council which confirms that the permit issued for Stage 9 makes it an owners obligation to ensure that the Fire Hydrant System complies with the mandatory requirements imposed by the Melbourne Fire Brigade.. A copy of this documentation can be supplied if required

Building Act 1993 and Building Regulations 2006

The work undertaken to date by the working group established that, under the Building Regulations, the owner of the land on the Plan of Subdivision PS348750N is responsible for ensuring that the essential safety measures (Fire Hydrant System) are maintained in a state that enables them to fulfil their purpose.

Fire fighting equipment and other essential safety measures must be provided and maintained in accordance with any occupancy permit or determination issued by a building surveyor.

COMMENT

In light of the fact that Lend Lease, under the Owners Corporation Act as the owner, must repair and maintain the common property and the chattels, fixtures, fittings and services related to the common property. Any further effort required to test, repair and maintain the new Fire Hydrant System is clearly an owner's responsibility. This has been accepted by Lend Lease in their letter dated 1 December 2015.

Australian Consumer Laws and Fair Trading Act 2012 Victoria

The referenced act repealed the Fair Trading Act 1999. The ACLFTA came into effect on 1 July 2012 . The ACLFTA made certain consequential amendments to the Retirement Villages Act 1986 including Section 18 which provided that the new ACLFTA apply to goods and services supplied under a residence contract. Many provisions apply to retirement village operators including unconscionable conduct, unfair terms and ban specific unfair practices. The ACFLTTA also included provisions which gave residents the right to make complaints to the Director of Consumer Affairs Victoria and seek conciliation and arbitration and granted broad powers to VCAT to hear and determine disputes between residents. Significantly the Victorian Retirement Villages Legislation expressly provides that the Australian Consumer Law or State based fair trading legislation applies in respect of retirement village residence contracts.

COMMENT

In spite of the fact that the ACLFTA came into effect on 1 July 2012 the terms and conditions of the standard lease do not pass the fairness test required by the ACLFTA in relation to the resident's obligations under Clause 11.2 of the lease. VCAT has already made a recent ruling in the resident's favour on an application regarding a replacement hot water system.

Retirement Villages Act 1986

The provisions of the Retirement Villages Act Part 5 Charges (Page s 37-41) do not identify any requirements for the non-owner resident to assume responsibility in relation to common property. A non-owner resident under the act is defined as:-

non-owner resident, in relation to a retirement village, means a person who is a resident of the village, who does not own the land the person occupies in the village, and premises, in relation to any such resident, means the land so occupied by that resident Page 7 (sic)

COMMENT

The only applicable charge identified in Retirement Villages Act is the Maintenance Charge which means a recurring charge payable by a resident for the provision of goods and services (Page 6). The Retirement Villages Act does not identify any responsibility of the non-owner resident to cover costs and charges associated with the common property. As part of the activities to establish responsibility for the Fire Hydrant replacement Victorian Consumer Affairs recently provided advice that residents who are non owners of lots on a subdivision have no responsibility for the Common Property and that a term of the lease cannot override the requirements of the the Planning Act, the Owners Corporation Act and the Building Act which all make it the owners responsibility to cover the coss associated with eth repair and replacement of the Strret Fire Hydrant System.law.

Terms and Conditions of Burwood Terrace Lease dated December 2012

Common Property The following document is relevant to the identification of the Common Property on the Plan of Subdivision PS348750N .. The Lend Lease Legal Department provided this document as a result of a request from me earlier in the year. Lease Agreement which was re-negotiated by Lend Lease and all of the [REDACTED] residents back in December 2012. In relation to responsibility for the replacement costs for the Fire Hydrant system the following clause is relevant:-

Item 3 Page 7 of the Standard Lease states (inter alia):-

To the extent that any of our obligations under this lease are the responsibility of the owners corporation for the Village under the Owners Corporation Act 2006 (Vic) or the Subdivision Act 1988 (Vic) then we will perform those obligations by procuring the owners corporation to comply with the relevant responsibilities of the legislation (Sic)

COMMENT

The village owner has based their claim that the terms of the lease includes the following clause which allows the owner to use the Capital Improvement and Maintenance Fund to be used to fund the fire hydrant costs..

Capital Improvement and Maintenance Fund means the fund established and operated by us to pay for the costs of new or replacement equipment, furniture and vehicles, and for maintenance, repairs, refurbishments, renovations, replacements, extensions and upgrades of a substantial but infrequent or irregular nature of and to:

- (a) the Community Areas and Facilities;
- (b) the respite rooms (if any) and guest suites (if any);
- (c) those designated areas at the Village that are used by us in the operation and management of the Village; and
- (d) any building or structure at the Village,

but excluding any costs that are your responsibility under this Lease (including the costs you incur in complying with clause 16) or the responsibility of another Resident.

Clearly this clause which is funded by the residents is being used to fund the owners obligations under the common property is contrary to the provisions of the law and Consumer Affairs has provided advice that a clause of the lease cannot override the provisions of the law.

This clause of the lease has also been used by the owner to charge the many costs of the Essential Safety Measures under the Building Act and associated Regulation to either the Maintenance (Operating) Budget charged monthly to the residents. or to .the Capital Improvement and Maintenance Fund also funded by the residents. On reflection the offer by the Owner to donate \$200,000 to the Capital Improvement and Maintenance Fund was that they were providing funds to cover their own obligations. On reflection residents could be forgiven for thinking that the introduction of the standard lease was nothing but a “con” which was up by the Legal Community in their role of providing future residents with legal advice on the fairness of the standard lease.

CONCLUSION

As a result of the work done in investigating the responsibility for the cost of repair and replacement of the Street Fire Hydrant System the Task Group has come to the conclusion that the significant costs are being incorrectly charged to residents who have long term (99 year) leases and are non owners of lots on the retirement village for many costs involved in arrying out th Essential Safety Measures and the costs of maintenance and upkeep o the common poperty

Recommendation

The Government should legislate to make the leases covering residents who are non lot owners on properties covered by the Retirement Villages Act of 1986 conform with a modified version of the one provided under the Residential Tenancy Act of Victoria. The other frustration I experienced was that the Consumer Affairs does and would not provide advice on the most simple legal question. I did not get the feeling that the Consumer Affairs staff took any follow up action where it was clear the owners were identified as acting in a manner which was clearly in breach of the law,.

Signature

JOHN HENRY PUNTER

Date 30 June 2016