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Legal & Social Issues Committee
Inquiry into Retirement Housing Sector
Parliament House
Spring Street
East Melbourne, Vic. 3002

I am submitting the following recommendations based on my experiences as a ten-year resident of a large retirement village, including membership of its Residents' Committee for a number of years. I am a retired chartered accountant with 40 years involvement in public practice, the majority as a partner in one of Australia's largest accounting firms.

<u>Expenditure from long-term maintenance funds & deferred management fees</u>

The principal justification for deferred management fees ("DMF") is that they provide a return to the owner/developer on the common area assets and other infrastructure that has been funded by that owner/developer. I do not have a problem with this in principle, although the levels of such fees are excessive in some villages.

My issue is that, in addition to claiming the DMF, some owners charge expenditure on <u>replacement</u> of the relevant assets/infrastructure against the long-term maintenance fund built up from recurring fees received from residents for long-term maintenance charges. In my opinion, although it is reasonable to charge maintenance of those assets against such funds, the capital cost of replacements or enhancements should be borne by the owner.

In the case of my village, calculation of the requested long-term maintenance charge is supported by a report from a firm of quantity surveyors. The latest report (2016) contains replacement of capital items representing well in excess of half the forecast total expenditure. This is permitted under the terms of our residents' leases that the long-term maintenance fund "may be expended (at the owner's discretion) on carrying out maintenance, repairs, replacements, renovations, additions, variations, upgrading and improvements, including fixtures, furnishings and equipment (whether or not affixed)". Thus, although residents of our village must accept this situation, it appears to be an unacceptable imposition on our residents, but which could only be remedied by legal action, that is unlikely to be pursued, contesting such onerous clauses.

The effect of these lease provisions is that the owner will receive very significant amounts of DMF in perpetuity, with a zero obligation to outlay any further funds to cover the cost of replacement or enhancement of the original asset base that is the justification of the DMF principle.

<u>Recommendation:</u> Expenditure from long-term maintenance funds should be limited to <u>maintenance</u> items, with the cost of all replacements, additions, variations, upgrading and improvements to common area assets or infrastructure being the obligation of the owner/manager.

<u>Long-term maintenance charges</u>

All retirement villages have monthly fees to pay for day-to-day operating expenses and these fees are subject to the provisions of section 38 of the Retirement Villages Act 1986 ("RVA") and its regulations. Most villages also have long-term maintenance charges that are paid into a fund to meet such expenditure when it is incurred in the future.

The owner of our village claims that the long-term maintenance charges are not governed by the foregoing section of the RVA, but by the wording of resident's leases. Those leases state that those charges may be set "at the owner's discretion". As a result, during my 10 year tenure, monthly long-term maintenance charges have increased from $16 to $125.

The definition of maintenance charge in the RVA means "a recurring charge payable by a resident for the provision of goods and services by the manager". This would appear to embrace fees for both short-term and long-term maintenance but, until recently, such an interpretation has not been enforced by Consumer Affairs Victoria ("CAV"). However, in its response to submissions about the Retirement Villages Amendment (Contractual Arrangements) Regulations 2013, under item 3.7 that "the requirement to include any long-term maintenance fund charge should be deleted, as these are not 'maintenance charges' as defined in the Act", (presumably raised on behalf of village owners/managers), CAV said "this is not supported, as it is considered that these are 'maintenance charges' and that deleting them would mislead residents as to the extent of their recurring financial commitment."

<u>Recommendation:</u> To the extent necessary, the RVA should be amended to make certain that long-term maintenance charges are subject to the requirements of section 38 of the RVA and its regulations, with appropriate penalties for non-compliance.

Profits or losses from use of maintenance charges

During the staged development of a retirement village it is probable, if not certain, that income from maintenance charges will be less than the annual operating expenses. Such losses should be to the account of the developer/owner as part of the capital cost of development - as is normal accounting practice for developments spread over a lengthy period of time.

However, once the village is fully built/developed and all residences have been sold for the first time, it is probable that income from maintenance charges will be budgeted to approximate operating expenses. There will, of course, be differences in any one year, giving rise to profits or losses. In the interests of fairness to both the owner and residents, such operating profits or losses should be carried forward for inclusion in the financial statements of the following year.

Recommendation: *The RVA or its regulations should be amended so that all operating expenses incurred by a retirement village (subsequent to a village being fully built/developed and all residences sold for the first time) must be charged against maintenance charges received. Any differences in any one year should be required to be carried forward to the following financial year – rather than being paid by, or to, the owner. All operating losses incurred prior to a village being fully built/developed and all residences sold for the first time must be borne by the developer/owner.*

Refurbishment of residences following departure of the resident

The extent of refurbishment to be undertaken at the cost of outgoing residents is a topic that has caused great concern and distress for many. While it is understandable that the owner will require the refurbished residence to be of a high standard there must be a limit to what should be demanded.

Depending upon the period of occupancy by the outgoing resident, it will usually be appropriate for the residence to be re-painted throughout; carpets replaced; damage repaired as necessary; and kitchen appliances possibly replaced. What is not acceptable is a demand for significant renovation or refurbishment in the form of additions, upgrades and improvements.

Recommendation: *The RVA or its regulations should provide that refurbishment expenditure should not be required for additions, upgrades or improvements without the written agreement of the outgoing resident.*

Legal redress

My experience with seeking assistance on behalf of village-wide issues from CAV or VCAT has been most unsatisfactory.

Recommendation: *A Retirement Housing Ombudsman or Advocate is essential.*

Protocols

In 2012, CAV issued a series of protocols to provide a benchmark of good practice to guide retirement village managers in addressing commonly-arising issues. They also said "while protocols are not legally binding, there is an expectation that they will be applied."

Experience at my village has been disappointing. When I raised a series of questions at the 2012 annual meeting of residents highlighting non-compliance with a significant number of these protocols, management responded that "as such protocols are not legally binding; it is at the discretion of the owner/manager as to which of such protocols should be adopted."

Notwithstanding such non-compliance, our village has received accreditation as "a six-pillar quality assured retirement community."

Recommendation: *To the extent appropriate, these Protocols should be made mandatory and legally binding under the RVA.*

Audit

Under section 34 of the RVA certain audited financial statements are to be presented to the annual meeting of residents (unless residents have decided to dispense with an audit under sub-section (4)). As those statements are to report on the financial performance of the manager, in my opinion, the auditors should be appointed by the residents, acting through their residents committee, rather than by the manager.

Recommendation: *Auditors that report on the financial statements required under section 34 of the RVA must be appointed by the residents committee.*

I will be pleased to elaborate on any of the issues raised in this letter.

Barry Davies