Submission

by **Wim Boog**

to **The Legal Affairs, Police, Corrective Services and Emergency Services Committee.**

Re: Criminal and Other Legislation Amendment Bill 2011. Queensland Retirement Villages Act 1999.

Criminal and Other Legislation Amendment Bill 2011.
Retirement Villages Act 1999 [RVA 1999]

30 November 2011

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Background in the Retirement Village Industry

Being part of the Retirement Village Industry started in the early 1990s after 10 years with Philips Industries as divisional technical director followed by 4 years in charge of Logistics with Bryant & May/Wilkinson Swords.

My starting point in the Retirement Industry was a retirement village in its development stage with a hostel facility & kitchen, a handful of 'independent living units' (ILU) and a lot of work in progress. The task was to manage the village, run the administration for the village and the association and take charge of the building activities.

The philosophy of selling ILUs at replacement value was to keep the price at an affordable level so that residents had some money left after they sold their family home.
The philosophy of the 'deferred management fee' (DMF) was to generate a 'village equity' that in future is to be used for improvements and unforeseen events. A club house for the ILU's, extensions of the Hostel, renovations of the early hostel units and lately the establishment of a 60 bed nursing home on site is a few examples of this.
The philosophy of early payment of exit entitlements and no monthly fees after the month of vacating the unit is a combination of fairness and the need to have the exit entitlements available for entry in care facilities.

Functions in the Industry:

1. Village Manager of the Netherlands Retirement Village Association (NRVAQI)
2. Director of Age Care Queensland (ACQ)
3. CEO of the NRVAQI
4. Director (Treasurer/Secretary) of the NRVAQI
5. Advisor to the Board of the NRVAQI
6. Resident in a Village in Mackay

Introduction

Being passionate about a complete overhaul of *the Act* finds its origin in the original philosophy of the industry as shown in my background. The original philosophy worked very well until companies were established with the philosophy that big profits could be made. **The section of the industry that is after big money must have realised that by looking at 'return only' has turned them, in many cases, to a no longer viable and sustainable industry. In fact it is creating a huge problem for the government in the years leading up to the early twenties. Huge amounts of money have been siphoned off thus leaving the individual village without any reserves for future years.**

The first two priorities are:

- **recognition of the rights and expectations of residents under all circumstances including a de-registration of a village as a result of receivership.** [1]
- **a complete overhaul of *the act* with the emphasis on the daily management of a village in order to achieve sustainability and viability at village level** [2]
    - **simple businesslike regulations for GSF, MRF, CRF and equity funds**
    - **simple regulations for exit fees e.g. DMF** [3] **and reinstatement costs**
    - **introduction of an ombudsman.**

[1] See the document (30 October 2010) by Wim Boog presented to Mr Damian Sammon on 5 November in the electoral office in Mackay from page 3 to 5 and Submission to OFT 3 October 2011.
[2] See Book by Wim Boog June 2010 "Retirement Village Industry" chapter 2, page 26
[3] Deferred Management Fees must stay with each individual village. Only part of this money can be used for corporate costs.

1. Amendment of s15 RVA99 (What is an exit fee)

The amendments will apply where an exit fee is calculated with regard to the length of time the resident has lived in their unit. Under a daily pro-rata method of calculation, the actual number of days of occupation would be used to calculate the exit fee. In contrast, under an annual incremental method of calculation, a resident leaving the village after one year and one day would pay an exit fee based on two whole years of occupation.

Under the new laws, for all future residence contracts, the daily pro-rata method of calculation will apply. In addition, a daily pro rata method of calculation will apply to existing contracts where the contract does not specify another basis for calculation.

The new amendment implies that if a residence contract does have a provision for the exit fee to be calculated other than on a proportional basis, there is no need for a pro-rata daily basis calculation. This makes *the Act* missing an opportunity to correct a situation open for inappropriate and unjust practices in fact it seems to me that *the Act* entices operators to be in contempt of the judicial system.

His Honour Judge Robin QC of the District Court has expressed a clear opinion to the effect that the natural meaning of that phrase in (the existing) s15(2) requires a calculation that is specific to a day[4]. On appeal the Court upheld the findings in the earlier *Saunders* decision. [5]

Whether or not I or anyone else supports the findings of His Honour Judge Robin QC in *Saunders* is irrelevant as the District court ruled that the portion of the exit fee attributable to any incomplete incremental period is to be calculated on a pro-rata daily basis *Saunders v Paragon Property Investments Pty Ltd.* [6]
No one would like to be seen 'in contempt of Court'!

Exit fees are linked to annual increments and to charge a full year for a few days or weeks of occupancy seems to be a practice entertained by only a few of the village owners (scheme operators) most of which are the large companies. Some of these companies claim that it would affect their viability.[7] It is a pity for these owners that the ruling to adopt pro-rata calculations will remove the occurrence of "double dipping" [8]

Looking at the new s15(3) there is another complication. The exit fee consists of two components and only one item – the Deferred Management Fee – (DMF) is to be calculated on a pro-rata daily basis.

The other component – Reinstatement costs – is an item that 'screams' for simplicity and strict rules. Now might be the time to overhaul the existing section 53, 60, 62 and 63, delete sections 64 to 68 and add section 52A [9] and item 4 on page 6 re the amendment of section 91 of RVA99.

Suggestions

Suggestion 1

My suggested new s15(3) has the following purpose:
– *The new amendment s15(3) will clarify that the DMF part of the exit fee is uniformly calculated on a pro-rata daily basis.*

[4] QDC 322 [2008] (Saunders)
[5] QDC 19 [2009] (Paragon Property Investments Pty Ltd)
[6] QDC 322 [2008] (Saunders)
[7] QDC 322 [14] [2008] (Saunders) It cannot sensibly be suggested that a village would cease to be viable.....
[8] See submission ARQRV 26 November 2010 page 4 of 9
[9] See Book by Wim Boog June 2010 "Retirement Village Industry" chapter 4, page 32 to 36.

S15(3) Regardless the wording in the residence contract
- the DMF part of the exit fee must be calculated on a daily proportional basis having regard to the period of the resident's residence in the accommodation unit - [10]

Suggestion 2

I suggest that the text of the entire Section 15 of the RVA 1999 to be changed as follows in order to make it more realistic and easier to read and understand:

15 What is an *exit fee?*

(1) An *exit fee* is the amount that a scheme operators is allowed to subtract from the exit entitlements of the resident under a residence contract arising from -

(a) the resident having ceased to reside in the accommodation unit to which the contract relates; or

(b) the settlement of the sale of the right to reside in the accommodation unit.

(2) The exit fee for a residence contract that a scheme operators is allowed to subtract from the exit entitlements of the resident is to be calculated as at -

(a) the day the resident ceases to reside in the accommodation unit to which the residence contract relates; or

(b) if a relative of the resident resides in the accommodation unit under section 70B(2) -the sooner of the following days -

(i) the day the relative vacates the accommodation unit;

(ii) the day that is 3 months after the resident's right to reside in the accommodation unit under the residence contract is terminated under this Act.

(3) Regardless the wording in the residence contract -
the DMF part of the exit fee must be calculated on a daily proportional basis having regard to the period of the resident's residence in the accommodation unit **-** [11]

(4) Subsection (2) and (3) apply despite anything to the contrary in an existing residence contract.

Let's have the foresight to make a useful amendment.

[10] The DMF (part of the exit fee) calculation schedule in contracts must be interpreted as follows:
–For each full year period (e.g.) 4%/annum
–For part of a year period 1/365 of (e.g.) 4%/annum for every day of this part year
–The maximum DMF is for a maximum of 5 years or as described in the residence contract.
E.g. For a period of 2 years and 182 days the DMF is 2x4% plus 182/365 of 4% equals 10%

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2. Amendment of s28 RVA99 (Registration of retirement village scheme)

This amendment is not likely to change much. It seems very unlikely that this new section (4) will ever be used as it is ambiguous and not specific.

The amendment has inserted an example:

It is contrary to that regulatory framework for the scheme operator to directly or indirectly require the retirement village's residents to be responsible for things the Act makes the scheme operator responsible for.

I won't even start tabling known events where the scheme operator unjustly charges residents. However it should be recognised that these breaches involve items like General Service Funds, Capital Reserve Funds, Maintenance Reserve Funds, the use of CPI to name a few.

At this stage I just mention the non-sustainability [12] of the retirement industry and the unjustified expectations of scheme operators on their "return" on investment. I believe there is a need for the government to address this with the utmost urgency. I do believe that a considerable section of the industry is not viable. [13] Many villages are struggling to sell units.

Maybe the time is right for the CMC to have an enquiry in the Retirement Village Industry to have a 'complete picture' before it all goes out of hand. The ARQRV as per their submission fields ~ 4,000 complaints per annum. I suggest that this is only the tip of the iceberg.

I have no further comment for changes to the suggested amendment of Section 28.

3. Submission Amendment of s45, s45A & Dictionary of RVA99 (Cooling-off period)

I agree with the comments made to sections 28, 29 and 36 of the Fair Trading and Other Legislation Amendment Bill 2011 by the ARQRV in their submission 26 November 2010.

–Suggestions

Suggestion 3

Maybe a residence contract could be signed 14 days prior to the settlement of their home with a clause annulling the contract automatically when settlement doesn't take place.

[12] See Book by Wim Boog June 2010 "Retirement Village Industry" chapter 1, page 24
[13] See the document (30 October 2010) by Wim Boog presented to Mr Damian Sammon on 5 November in the electoral office in Mackay from page 3 to 5.

4. Submission Amendment of s91 of RVA99 (Capital Replacement Fund)

Before the suggested amendment is adopted it is necessary to make a few changes to the existing definition of 'reinstatement work'.

> ***reinstatement work**, for an accommodation unit, means the replacements or repairs that are reasonably necessary to be done to reinstate the accommodation unit to a marketable condition having regard to—*
> *(a) the condition of the accommodation unit at the start of the former resident's occupation; and*
> *(b) the general condition of other accommodation units in the retirement village that are comparable with the accommodation unit.*

As it is, this definition is open for all kinds of misinterpretations and abuse of resident's rights.

Item (a) of the definition should be omitted and replaced by limitations such as –taking in account normal wear and tear[14], deliberate damage to the residence and/or the replacements or repairs resulting from a reinstatement agreement for an approved change or addition to the residence.

Item (b) of the definition should be omitted. 'Other accommodation units' might be of a different age, design, class etc. When an operator wants to refurbish a unit for whatever reason, e.g. sustainability, commercial reasons, competition, the costs can only be borne by the scheme operator's CRF or the village equity.

The amendment of s91 refers to section 62(4). Before this amendment is accepted the entire section 62 should be replaced. Section 62(2) makes an unjustifiable distinction between residents who obtained a leasehold interest or a license before and after the commencement of the 2006 Amendment Act.

By rights and common sense a scheme operator can only charge for reinstatement costs:

- if the resident caused accelerated wear or deliberate damage to the residence and/or
- if a reinstatement agreement exists for an approved change or addition to the residence.

There is nothing new under the sun. It is not that long ago, that residents were only charged for accelerated wear, deliberate damage to the residence and if a reinstatement agreement existed for an approved change or addition to the residence. Any change to this philosophy came when operators could get away with charges that should have been met by themselves. It used to be called 'a conspiracy of silence'.

Without the following suggestions the amendment to Section 91 will not achieve anything other than even more not reported chaos.

Suggestion 4

Before the suggested amendment S91 is adopted the existing definition of 'reinstatement' work should be replaced by:

> ***reinstatement work**, for an accommodation unit, means work to be done to repair damage caused by accelerated wear, deliberate damage to the residence and/or the replacements or repairs resulting from a reinstatement agreement for an approved change or addition to the residence*

[14] E.g. a stove in working order cannot be replaced at the cost of a resident. If the operator wants to replace the stove for commercial reasons it must be at the operator's cost (CRF or Equity fund).

Suggestion 5

Before the suggested amendment S91 is adopted the entire Section 62 should be replaced by:

Section 62 Who pays for work in leasehold or licence scheme

(1) This section applies if the former resident's interest in the accommodation unit is a leasehold interest or licence.

(2) The cost of the labour and materials for the reinstatement work for the accommodation unit must be paid by—

(a) to the extent the reinstatement work is required because the former resident caused accelerated wear to the accommodation unit's interior or deliberate damage to the accommodation unit—the former resident; or

(b) for a residence contractual agreement other than an existing residence contract — the scheme operator—

(c) otherwise —the scheme operator.

(3) If the scheme operator must pay the cost of reinstatement work, it must be paid out of the scheme operator's capital replacement fund.

(4) Any cost for upgrading must be paid out of the village equity fund.

Suggestion 6

If suggestions 4 and 5 are adopted, the amendment s91 should reflect the changes.
– section 62(4) should then read 62(3) (4)–

Suggestion 7

If suggestions 5 and 6 are not adopted I cannot see a need for the amendment of S91.

5. Submission relating to Section 34 Amendment of s106 of RVA99 (Increasing charges for general services and CPI)

This amendment seems somewhat frivolous as it will have no effect on the bottom line of the charges calculated.

What is generally known as section 106 items is also known as great opportunity for some Scheme Operators to apply 'clever' accounting methods. It is very easy for an operator to stay within CPI limits.

The two major tricks are:

1. Use only the first 9 months of actuals and use an estimate for the last 3 months of the previous financial year. It won't surprise anyone that the estimate is always lower than the actual.
2. Push expenses that should be paid from the GSF to the MRF.

Looking at the following statistics (2005 to 2010) it is blatantly obvious what has expired between the S106 items and the MRF:

1. **Cumulative increases CPI 16.7%**
2. **Cumulative increases S106 -13% (that is minus 13%)**
3. **Cumulative increases MRF 37%**
4. **Cumulative increases S107 44%** [15]

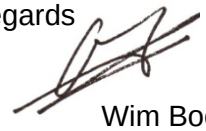
This again highlights the reason for a ruling that each individual line item must remain below the CPI unless approved by a special resolution. A ruling that the total of the S106 items must remain below the CPI obviously does not work.

–Suggestions

Suggestion 8

As this amendment will have no effect on the bottom line I cannot see a need for the amendment of S91 without changes [16] to sections 102A, 103, 104, 105 to108.

Regards



Wim Boog

[15] Cumulative increases Council Rates 142% and MRF 37% are part of the S107 items

[16] See Book by Wim Boog June 2010 "Retirement Village Industry" chapter 5.1, pages 38 to 41