

17 October 2011

Research Director
Legal Affairs, Police, Corrective Services & Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

Email: lapcsesc@parliament.qld.gov.au

Dear Sir/Madam

Re: Civil Proceedings Bill 2011

On behalf of Retirement Village Association Queensland and this organization, I attach our Joint Submission which was agreed could be provided today.

We look forward to the opportunity of having a joint presentation by our organizations to amplify our position and assist the Committee in your deliberations.

Please contact the undersigned in regard to meeting with the Committee at a Public Hearing or if any further information is required.

Yours sincerely



Margaret West
Executive Officer – Member Services
Aged Care Queensland Inc.

Affiliated with:



October | 2011



Queensland Retirement Village Scheme Operators

Response to the proposed Amendment in Division 8 Sections 239 and 240 in the Retirement Villages Act, 1999

as contained in the Civil Proceedings Bill 2011

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SUBMISSION

QUEENSLAND RETIREMENT VILLAGE SCHEME OPERATORS

CIVIL PROCEEDINGS BILL 2011

DIVISION 8 AMENDMENT OF RETIREMENT VILLAGES ACT 1999

SECTIONS 239 AND 240

1. EXECUTIVE SUMMARY

The Queensland Retirement Village Scheme Operators comprising Aged Care Queensland (**ACQ**) and the Retirement Village Association (**RVA**) ("the **Operators**"), thank you for the opportunity to submit a response to the Civil Proceedings Bill 2011 as it relates to the retirement village industry.

We support the Government's commitment for an outcome that will encourage best practice standards, provide a clear regulatory framework to ensure certainty for the retirement village industry in planning for future expansion, and ensuring consumer and community confidence.

While noting the desire by Government to legislate for clarity and transparency, it is important that the Queensland Retirement Village Scheme Operators have this opportunity to present not only their own interests, but the long term quality of this housing choice for older Queenslanders.

The Legal Affairs, Police, Corrective Services and Emergency Services Committee are now charged with an Amendment on Exit Fees. This follows on from work undertaken in December 2010 when RVA and ACQ submitted a joint position in regard to Clause 26 Amendment to Section 15 (what is an exit fee) to the then Minister for the Office of Fair Trading, The Hon Peter Lawlor MP. The position provided in this Submission remains consistent with that presented in December 2010.

1.1 Disclaimer

This Submission has been prepared by the Scheme Operators owning and managing Queensland retirement villages and is intended for the purpose described in this paper and not for any other purpose. The contents of this Submission should not be re-produced without the express permission of either organisation – RVA Limited and ACQ Inc.

2. THE IMPORTANCE OF A VIABLE RETIREMENT VILLAGE INDUSTRY

2.1 The importance of Retirement Villages

With an ageing population, the growing role of retirement village accommodation is becoming increasingly recognised and it is widely accepted that the industry's importance will continue as a source of housing choice for those aged 65 years and over. With rapidly increasing expenditure by State, Territory and Commonwealth Governments on public housing, health and ageing, it is important that governments recognise the interaction between these expenditures with the retirement village industry.

Retirement villages provide valuable infrastructure to local communities. They enable Queensland Seniors to have effective social support, improved lifestyle, enhanced health and care along with security of tenure at no cost to government.

With the large increases in the population of people aged over 65 to occur in the next 20 years, it is critical that operators can plan their business operations with some level of certainty.

2.2 The Retirement Village Association (RVA)

The Retirement Village Association (RVA) is Australia's peak body for the retirement village industry.

The RVA represents over 750 village and associate members nationally and plays a critical role in the ongoing growth and sustainability of the retirement village industry.

With five regional offices located in Brisbane, Sydney, Melbourne, Adelaide and Perth, RVA membership consists of retirement village operators, managers, owners, developers, investors and industry specialists across Australia. As the leading industry voice, the principal objectives of the RVA are to:

- lead the building and growth of a sustainable and responsible industry;
- advocate and strengthen our relationships with local, state and federal governments to ensure the best legislative outcomes for the retirement village industry;
- encourage industry excellence and best practice through accreditation and facilitate quality improvement through an effective and relevant professional

development program; and

- support and promote the benefits of retirement villages as “the preferred choice of lifestyle for senior Australians”.

2.3 Aged Care Queensland (ACQ)

Aged Care Queensland (ACQ) is a not-for-profit Association consisting of more than 400 members who provide care and accommodation services to older Queenslanders at approximately 800 sites. It is a member of the two National Peak Aged Care Organisations – Aged Care Association Australia (for profit) and Aged & Community Services Australia (not for profit).

ACQ members operate retirement villages, nursing homes, hostels, independent living units, rental accommodation for the aged, serviced apartments, respite care and in-home care services.

ACQ assists members by promoting the accommodation and aged care sector to the community and to Governments, and by keeping members informed of matters that affect their operations. It also facilitates policy development and strategic development for the industry, and offers education and training specific to the accommodation and aged care industry.

Membership of ACQ is open to all organisations serving older Queenslanders – church, charitable, community, private enterprise, State and Local Government.

Organisations who supply goods or services to villages, care facilities and community services can also show their support for the aged care industry by joining as Industry Partners or Corporate Subscribers.

To assist in benefiting the industry, ACQ works with other State and national Associations (where consistent with its objectives) to ensure a national voice is heard.

ACQ recognises that its members are independent bodies with their own philosophies, aims and objectives. It assists them to provide services of excellence to the people of Queensland.

2.4 Key points in this Submission

- The Queensland retirement village owners and operators representative organisations (“the **Operators**”) support the need for greater clarity in the *Retirement Villages Act 1999* (Qld) (“the **Act**”) in relation to the calculation of exit fee in retirement village contracts. However, any legislative amendments must balance consumer protection interests and the viability of the Queensland retirement village industry.
- The retirement village sector in Queensland currently comprises 311 registered villages with 28,000 residents and employs in excess of 8,000 people.
- The Queensland industry is currently valued at over \$3 billion and; produced an estimated \$105M in exit fees in the 2010-11 year.
- An Exit Fee is the main source of income for scheme operators from which they must pay the expenses of operating a retirement village business. Investors and bank lenders invest and/or lend money to refund retirement villages on the value of the operator’s future income stream. The proposed Amendment will decrease future exit fee income and therefore retirement village valuations will also be reduced. Through commercial pressures, scheme operators will be compelled to increase exit fees for future residents to maintain current levels of income and to sustain existing debt and equity arrangements. As the majority of people who move into a retirement village are pensioners (85 percent), this can impact on the affordability of this form of seniors housing.
- The Operators’ estimate that income from and the value of approximately 65 percent of the anticipated future residence contracts in Queensland villages will be adversely affected by the proposed Amendment.
- Since the commencement of the Retirement Villages Act, residents have been able to compare the financial offerings of competitor villages of which exit fee is just one parameter, through the required disclosure in Public Information Documents. As in any free market, prospective residents are then able to make a conscious decision about which village to enter, and in doing so, accept an exit fee calculation method as part of their residence contract. The Operators believe that the proposed amendment will limit competition and the freedom to contract which is the very essence of a free market economy.
- Some operators are already prorating exit fees and have been able to integrate this into their financial models on the basis of a timed decision. It is important to allow space to include a range of options for residents in selecting a retirement village. Just

as in the general real estate market, no one size fits all.

- The reality is that older Queenslanders do not move into a retirement village to make large real estate gains for their estate, they move into one for the tangible and the intangible benefits around quality of life, safety, access to care and support services and a sense of neighborhood. Residents will pay a given margin to live in a RV. It becomes a question of when they pay that margin. The industry is established in such a way that residents have a choice of paying more up front and less at the back end and so not having a Exit Fee/DMF liability; or paying less upfront, having the benefit of that money during their stay and paying at the back end when they have a significantly reduced need for it. More people are taking the latter option than ever before. This is partly due to the increased economic restraints that have occurred over the last couple of years particularly with the GFC and reduced housing prices.
- The Operators believe that the proposed Amendment, which has been assessed by senior retirement village legal practitioners, as adding to the uncertainty as to exit fee calculation of current contracts and has the potential to generate exit entitlement disputes. Scheme operators cannot sustain constant challenge to their exit fee income through disputation so there needs to be close attention paid to the actual wording of the proposed Amendment.
- To date the current legislation on the calculation of a resident's exit fee has not resulted in a large number of formal resident complaints from existing residents. Where they have occurred, formal Mediation processes have found that the contract entered into resolved in the Scheme Operators favour in the majority of cases.
- In the interests of certainty, the Scheme Operators strongly urge that any proposed amendment does not allow for any retrospectivity. As presently drafted, legal practitioners advise that it may be inferred. Retrospective legislation is an anathema to business confidence in Queensland generally and to the scheme operators in the retirement village industry in this instance. Importantly, it makes uncertain any contract entered into in good faith between a resident and a scheme operator. If a retirement village contract can be changed retrospectively, it calls into question the entire notion of a legal contract.

3. THE NEED FOR A VIABLE RETIREMENT VILLAGE INDUSTRY

- There is a risk to the continuity of investment in the seniors housing market if there is a belief that Government is unsympathetic to congregate housing;
- If Government is not conducive to encouraging organisations and corporations to own and invest in the seniors housing sector, there will be less choice for older persons wanting to downsize their homes (and so freeing up existing housing stock for younger households utilising the existing urban footprint). Already this is a problem because of the increased Stamp Duty imposed by the State Government in the recent Budget;
- With the exploding numbers of older people in Queensland, there will be a greater demand for different retirement housing choices for them – one which will not be able to be satisfied unless there is a viable industry sector willing to invest for the long term in retirement housing models;
- The fees raised each year to pay for the operation of the village are sourced from residents who meet the costs for the daily operations of the village – similar to a strata title unit in the general community **but** without having to contribute to capital replacement items which, under the Act, remains the responsibility of the scheme operator as does any expenditure on capital improvement which provides any new capital infrastructure;
- The scheme operator has to wait until a resident exits the village for any income from which they hope to generate a return on their capital investment. This can range from 8 to 12 years on average. In addition, when adverse attention is drawn to the estimate of the exit fee, there isn't any consideration of the capital gains realised by the exiting resident, nor the fact that they have lived in a village for up to 20+ years enjoying, at no cost, infrastructure provided, renovated and replaced by the scheme operator over the years such as roads, pathways, gardens, commercial kitchens, laundries, roofs, the community centre, entertainment areas, swimming pool, bowling green, library, computer room and similar;
- It is worthwhile highlighting that in integrated sites (for example, where there is a retirement village, perhaps an assisted living facility and a residential aged care facility) operated by the church and charitable sector, any profit made from the retirement village's exit fee/deferred management fee, after appropriate allocation into the Capital Replacement Fund (which is set by an independent Quantity Surveyor - Section 92 of the Act) and into a CAPEX account, is commonly used to assist the operations of the residential aged care facility and/or other charitable works;
- The Australian Housing and Urban Research institute (AHURI) which is an all States and Commonwealth research initiative, says "due to demographic change and Australia's ageing population, the number of older Australians requiring age-specific or care enriched housing i.e. living arrangements that include health and/or social

- services in an accessible, supportive environment, is significant and increasing” and;
- The reality is that retirement villages are, or are fast becoming, the low care accommodation of choice for older Queenslanders as they ‘age in place’ in their retirement village home. Without a viable industry, one allowed to make a reasonable profit, bearing in mind that those who develop the industry have to be very patient and wait many years to realise their investment, there will be no choice, especially affordable housing choices for older females and other pensioners.

4. THE CIVIL PROCEEDINGS BILL 2011

The Civil Proceedings Bill 2011 (Qld) (the “**Bill**”) seeks to make certain amendments to the Retirement Village Act in relation to the calculation of exit fees when residents leave a retirement village.

4.1 What is an exit fee?

An exit fee is a payment to the scheme operator by a resident leaving a retirement village made in accordance with the terms of their residence contract. Exit fees constitute the primary source of income for scheme operators from which they pay the following:

- (i) capital replacement fund contributions;
- (ii) capital improvement costs;
- (iii) the scheme operator’s share of reinstatement costs;
- (iv) the scheme operator’s share of general services charges of vacant units;
- (v) compliance costs;
- (vi) shortfalls in General Services Budget;
- (vii) corporate financing and operating costs.

As previously stated, scheme operators do not receive any income on their own account from the collection of general services charges and payment of village operating costs.

Another source of income for scheme operators is any share of capital gain they are entitled to from the re-sale or re-lease of units in accordance with residence contracts.

Example of an Exit Fee Calculation

Exit fees are calculated by applying a percentage either to the amount paid by the resident for their unit when they first moved in, or to the amount paid by the next resident. The percentage applied usually increases for each year of occupancy of a unit.

The following table illustrates a typical Exit Fee assessment. In a number of villages the Exit Fee is less than 30 percent and in some villages it is spread over a longer time period. It all depends on the site, the location and the market.

<i>Period of time between the Commencement Date and the Exit Date (i.e. the period of occupation of the accommodation unit)</i>	<i>Exit Fee Percentage that applies</i>
<i>1 year or less</i>	<i>7.5%</i>
<i>2 years or less but more than 1 year</i>	<i>15%</i>
<i>3 years or less but more than 2 years</i>	<i>20%</i>
<i>4 years or less but more than 3 years</i>	<i>25%</i>
<i>more than 4 years</i>	<i>30%</i>

Retirement villages compete in a vigorous, competitive market and as a result exit fees vary considerably across the industry both in terms of the quantum percentage, the number of years involved, and whether the exit fee is calculated on the period of occupancy in days, months or years. The Act requires scheme operators to disclose their exit fees and how they are calculated, thus enabling prospective residents to compare villages and exit fees before signing a contract.

Value of the Exit Fees in obtaining Bank Finance

For the purposes of raising equity or obtaining bank finance, retirement villages are valued by a cash flow approach to assess the current market value of the “proprietary rights” attached to the scheme. The value of the proprietary rights is determined by calculating the level of income derived from exit fees and capital gain income over an investment horizon of at least 20 years. Some proprietary rights are valued over 50 years. Clearly, if future exit fees are reduced, the valuation of a retirement village scheme will be reduced.

4.2 The Proposed Amendment

Section 15(2) of the Act as currently drafted is as follows.

“(2) The exit fee for a residence contract, including an existing residence contract, that a resident may be liable to pay to, or credit the account of, the scheme operator 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.”

This section incorporates amendments made in 2006. The Explanatory Notes to the *Retirement Villages Amendment Act 2006* (Qld) explain the Government’s intention in making the 2006 changes to section 15(2). Paragraph 4 on page 5 of the Explanatory Notes discusses the section of that Act that extends the requirement for the exit fee to be calculated '*as at the day the resident ceases to reside in the accommodation unit*' to pre-Act residence contracts as well as post-Act contracts. The paragraph explains the policy underlining the setting of that calculation date and states that '*If a unit takes a long time to re-sell, the percentage used to calculate the operator's exit fee may increase to the **next annual increment** under a pre-Act contract, whereas under a post-Act contract the percentage as at the date of vacation must be used*'.

It has been proposed that section 15(2)(a) was intended to require calculations of exit fees on a pro rata basis. However, this explanation in the Explanatory Notes is entirely inconsistent with this idea. Indeed, it highlights that section 15(2) (a) was intended to cure, which is to prevent an increase in an exit fee by the 'next annual increment' in the event that a scheme operator fails to re-sell the relevant right to reside before the occurrence of the next anniversary of the commencement date of the relevant residence contract after the resident has ceased to reside.

Those who support the pro rata approach cite the decision in *Saunders v Paragon Property Investments Pty Ltd* [2008] QDC 322, in which Justice Robin expressed a view, based on the particular facts of that case, that section 15(2)(a) requires a pro-rata/daily calculation for the partial year of occupation by the resident. However, the Queensland Commercial and Consumer Tribunal has previously formed a different view which supports the Industry’s interpretation (see *Cossey v Pye v Australian Property Custodial Holdings Ltd as Responsible Entity for the Prime Retirement and Aged Care Property Trust* [2006] CCT VH005-06 and VH001-07). The Industry also has obtained legal opinions supporting the view that the District Court erred in law in coming to its conclusion about the meaning of section 15(2) (a). In any case, the view of a single District Court judge, given in the context of the particular facts of that matter, ought not prevail over the obvious and intended meaning of section 15(2)(a).

The Operators are firmly of the view that the current section 15(2) (a) clearly does not require a pro-rata calculation, whether on a daily basis or otherwise. The words '*as at the day*' in section 15(2) (a) clearly do no more than identify a point in time for the purposes of any calculation of an exit fee required by a residence contract. If that

construction is adopted, it follows that the words '*as at the day*' would not have the effect of requiring the exit fee to be calculated on a pro rata basis if the resident's contract provides for another method of calculation. Accordingly, if the exit fee formula in any particular residence contract provides for annual incremental increases in an exit fee, no pro rata calculation is required and the exit fee is not to be apportioned if the resident ceases to reside in their accommodation unit part way through a particular year.

The exit fee payable under a residence contract is not a form of rent as suggested in QDC 322 referred to above, or dividend, nor is it an annuity or another form of periodical payment in the nature of income. Rather, the exit fee ought be properly characterised as a one-off charge, of which the liability to pay crystallises at a particular point in time. The exit fee is usually defined in residence contracts as the amount that must be paid to the operator which is calculated in the way shown in an information table in the Public Information Document.

In light of the above, it is not immediately apparent that charging residents an exit fee that is levied for part of a year is contrary to the purpose of the Act nor would it lead to an absurd result. It means that an operator is not entirely out-of-pocket for the period that a unit is unoccupied, while not providing any incentive to delay the sale process (the latter being the potential mischief that the section was designed to discourage).

The exit fee percentage is set by the operator having regard to its entitlement to calculate the exit fee based on a full year, just as a hotel may do when working out its daily rack rate or a car rental company when setting its hire fee. Were a resident particularly concerned to avoid being charged for the next year, that resident is not prevented from taking steps to ensure that they cease to reside in their unit on or prior to the last day of the current year. A subsequent resident is also entitled to take that approach, meaning that the operator does not receive any income at all for the period that that the unit is unoccupied.

5. THE SCHEME OPERATORS' PERSPECTIVE

In November 2010, the Government proposed in the Fair Trading and Other Legislation Amendment Bill 2011 (Qld) to insert a new section 15(3). It was clear from the proposed amendment that the Government concurred with the Operators that the current 15(2)(a) is **not** intended to require calculations of exit fees on a pro rata basis.

As for the drafting of the proposed Amendment, the Operators' opinion was that it would not result in the clarification the Government intended. We note that the Government's Summary provided '*To put this issue beyond doubt, the proposed amendments will clarify that the exit fee may be calculated on a pro-rata basis*

provided this is stated in the residence contract along with the calculation method or formula'. Whilst this endorses the scheme operator's position on the current meaning of section 15(2)(a), the wording used in the then proposed section 15(3) fell short of achieving the stated intention.

The draft Bill at that time proposed to insert clause s 15(3) which read:

(3) The residence contract may provide:

(a) that the exit fee must be calculated on a proportional basis (however described) having regard to the period of the resident's residence in the accommodation unit; and

(b) the method for calculating the exit fee on that basis.

The proposed section 15(3) merely stated that a residence contract '**may**' provide for a calculation on a 'proportional' basis, and may then set out the method for the calculation on that basis. It did not go so far as to provide that a proportional calculation is *only* required where the contract so provides, as the Government's Summary indicated that it does. In other words, the then proposed section 15(3) did not exclude a proportional calculation in circumstances where the residence contract does not provide for a proportional calculation. The proposed section should have stated, for the purposes of certainty, that if the contract does not provide for calculation on a 'proportional basis', then a calculation on a 'proportional basis' is **not** required (or other wording properly achieving the intention stated in the Government's Summary).

Further, the then proposed section 15(3) was stated to apply where the exit fee payable under a residence contract is calculated on a '**proportional basis (however described) having regard to the period of the resident's residence in the accommodation unit**'. This concept would effectively catch most existing exit fee formulas present in the marketplace, given that they involve an exit fee being calculated by reference to the length of time that a resident has occupied an accommodation unit (including exit fee formulas that provide for annual incremental increases in the exit fee). The expression 'proportional basis' is significantly broader than a 'pro-rata' basis. In other words, the word 'proportional' could be interpreted to apply to any exit fee calculated by reference to the resident's period of occupation, even if the residence contract does not include a 'pro-rata' calculation for part years of occupation by the resident.

6. THE SCHEME OPERATORS' POSITION

ACQ and the RVA, submitted in December 2010, that the intention of the proposed section 15(3) (as set out in the Government's Summary) would only be properly achieved if the drafting was changed to:

(a) refer to the exit fee being calculated on a 'pro rata' or daily basis, rather than on a 'proportional' basis, and

(b) provide that if a residence contract does not expressly provide for calculation of the exit fee on a 'pro rata' or daily basis, then a calculation on a 'pro rata' or daily basis is not required.

Now it recommends that the December 2010 Government-proposed Amendment incorporating the above-mentioned changes should be implemented instead of that proposed in the Civil Proceedings Bill.

The Civil Proceedings Bill would amend the Act to:

- (i) add a drafting note under section 15(2) to clarify that the section only states the day at which the exit fee is to be calculated, and does not require exit fees to be calculated on a daily or other basis; and
- (ii) insert a new section 53A (How to work out particular exit fee for a residence contract) that applies to an exit fee which is to be calculated having regard to the length of time the resident has resided in their unit. In relation to such exit fees:
 - (a) for residence contracts entered into before the commencement of the amendment, if the residence contract does not expressly provide that the exit fee must be worked out on a daily basis, then working out on a daily basis is not required; and
 - (b) for all residence contracts entered into *after* the commencement of the amendment, the exit fee must be worked out on a daily basis (this cannot be contracted out of).

7. CONCLUSION

The ramifications of the Amendments proposed to section 15 by Civil Proceedings Bill 2011 (Qld) proceeding as currently contained in the Bill will:

- not achieve the objective of reducing the uncertainty around exit fees. Rather, it will result in continued legal uncertainty and disputes about the way exit fee are to be correctly calculated for residence contracts entered into before the commencement of the amendment;
- operate "retrospectively" to over-ride the current position in existing residence contracts in cases where the ambiguous test of whether the contract provides for "*a way of working out the exit fee that is not on a daily basis*" is met. Amendments that have the potential to operate to change a bargain previously made with full disclosure between operator and resident are of grave concern to the Operators who urge the Government to ensure that any amendments which eventually proceed do not have this unfair result; and
- cause concern and distress to older residents caught up in complex explanations about changes to their contracts.

Furthermore:

- For many scheme operators their future exit fee income will be reduced. This means that scheme operator cash flow and profitability in future years will decrease;
- A serious flow-on effect of this is that valuations of retirement village schemes whose residence contracts do not require the exit fee to be calculated on a daily basis, will be reduced. A scheme operator has calculated that income would be reduced by \$10,000 per contract over a 20 year period, and results in a 1% valuation reduction. This will be more significant for a new village, where the financing of the development is based on the future income from residence contracts yet to be signed;
- Scheme operators so affected by the Bill will have no alternative but to raise the exit fee percentage to cover the loss in profitability. Future residents will therefore be required to pay more to enter a Queensland retirement village which in turn may discourage them from doing so. Particularly as 85 percent of residents entering retirement villages are pensioners. Importantly, it will impact also on those villages seeking to provide affordable retirement village

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accommodation.

The above outcomes would be in conflict with a main object of the Act which is to encourage the continued growth and viability of the retirement village industry in the State while protecting consumers. The 2010 work undertaken by Government on this matter sought to do just that whereas the new proposed Amendment will not do so.

RECOMMENDATION:

That the December 2010 Government-proposed Amendment incorporating the above-mentioned changes be implemented instead of the proposed Amendment in the Civil Proceedings Bill 2011.