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21 September 2012

Our Ref: Geoff Ebert:Sharon

Your Ref:

Research Director
Transport Housing & Local Government Committee
thlgc@parliament.qld.gov.au

Dear Sir

**RE: SUBMISSION REGARDING REVIEW OF THE RETIREMENT VILLAGES ACT
1999**

We are the solicitors for Mr and Mrs [REDACTED] and [REDACTED] whose companies are currently the proprietors and Scheme Operators of [REDACTED] at Bundaberg and also [REDACTED] in Hervey Bay.

Our clients are aware of the current review process involving the Retirement Villages Act and have requested us as their solicitor to make a submission on their behalf.

There are a number of recent matters of concern which our client had raised prior to the instigation of the review and in this regard we attach the following documents:

1. Copy of our correspondence to Mr Jack Dempsey Honourable Member for Bundaberg dated 10th May 2012;
2. Correspondence from the Bundaberg Electorate Office dated 12th September 2012 regarding the on forwarding of that submission to the Minister for Housing and Public Works.

We would anticipate that a full copy of our correspondence to Mr Dempsey including annexures can be obtained from the Minister for Housing and Public Works.

Having regard to the review of the Retirement Villages Act ("RVA") ("the Act") and the considerations raised, there are also a number of other features with respect to the Act on which our client has asked us to make a submission. These principally relate to the construction of the Act upon a resident's request to leave the Village or the end of the Lease generally (for example, if the resident has passed away). Common problems which require addressing relate to the following, in summary:

1. For the calculation of Service Fees when is the actual "vacation date" of the unit by the resident;
2. In relation to the calculation of reasonable costs of sale the silence of the Act in relation to how this calculation is to be performed;
3. The practical difficulties applying the Act when there is non agreement regarding the refurbishment costs of a unit between a Scheme Operator and resident (or next of kin);

Dealing with each of the above matters in turn:

Timing of Vacation Date

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Section 104 (2)(b)(ii) provides that a former resident ceases to be liable to pay a proportion of the charges for general services where if the unit has not been previously

sold, after a period of nine (9) months after the resident vacates the accommodation unit ends. There is no definition of the word "vacates" in the Section.

There are a number of practical difficulties and confusion between residents and Scheme Operators as to what vacation means. From a point of view from the Scheme Operator to ensure that the Scheme Operator is able to for example, access the unit for undertaking cleaning and/or refurbishment, the following really needs to occur;

1. The Lease will have needed to have been terminated by Notice/Death;
2. The unit needs to be made genuinely vacant by the removal of all furniture and other items belonging to the resident;
3. All keys, remotes and other items to access and use the property need to be delivered up;
4. For practical purposes the estimated exit entitlement including refurbishment costs as provided under the Act ought be agreed and signed off.

What occurs on a practical basis is that a resident may advise the Scheme Operator that they have left the unit (for example moved into a nursing home) and not given formal notification of the ending of the Lease. In addition, it may be several months before all of the furniture and other items are removed or keys and other items are returned. This delays the ability of the Scheme Operator to access the property, undertake quotes for refurbishment and a number of months may have passed in the nine (9) month "vacation period" before the property can even be considered for placing on the market for sale.

There is also the practical difficulty of reaching agreement as to the refurbishment costs. The Act makes provision in this regard as to reaching agreement as to the refurbishment costs (see Section 59 of the Act) however, on a practical basis this can take three (3) to six (6) or sometimes longer months after the Lease is "terminated". The practical effect of this is that when the unit has not been sold for some time, the Scheme Operator is wholly liable under Section 104 for all service charges when the reality is the Scheme Operator has not had a genuine period of nine (9) months to sell the unit from when the Lease was initially terminated.

We are therefore instructed to submit that a definition of vacates be added to the Act clarifying this issue. This will cause less controversy between a Scheme Operator and a resident (or usually family members assisting the resident in this regard).

Please note that Section 59 of the Act does indicate what a vacation date means for the purpose of completion of the reinstatement work. But under subsection (b) still uses the generic word "vacates" without specifying the true meaning of what a resident may consider as vacating the unit versus the practical reality of furniture and other items left behind, keys not returned and other practical issues which delay access by the Scheme Operator.

Advertising

Section 68 of the RVA provides that the costs of the sale of the right to reside are to be shared by the former resident and the Scheme Operator in the same proportion as they are to share the

gross ingoing contribution on the sale of the right to reside.

In relation to the above provision there is significant uncertainty as to what the costs of the sale to be shared are for practical purposes. The issue that arises is that a Scheme Operator in the industry will advertise the Retirement Village as a whole inclusive of individual units. For example, blanket marketing may occur through television or paper media, magazines and the like. In addition, a Scheme Operator such as our client will attend a number of expositions throughout Australia advertising the Village and each of the individual Lots that are for sale. Therefore there are no "stand alone" advertising costs incurred by the Scheme Operator rather the resident's Lot which is to be sold is advertised in a global sense with all of the other Lots. The approach as adopted by our client is that this global advertising is only in part then apportioned to the individual residents i.e. the whole of the advertising costs are not sought from those units which are sold but rather the Scheme Operator bears a significant portion of those costs. These costs exceed in relation to our client \$10,000 pa per unit sold. Our client comments that naturally as the unit market has slowed in the last few years and the number of total units sold has decreased (the advertising budget has not) and hence the pro rata share of advertising per unit has significantly increased which is being borne in the majority, by the Scheme Operator.

The practical difficulty is that a resident or family on behalf of the resident are questioning how a global pro rata sum is calculated in the above circumstances and this is leading to some degree of disharmony. As part of the review of the Act consideration needs to be given as to crystallising how the costs of sale are to be calculated and/or apportioned to provide more certainty both for the Scheme Operator and the resident or their family.

Reinstatement work within a Retirement Village

Sections 59 and 62 of the RTA relate to the issue of reinstatement work to be completed to a unit prior to its re-sale. Section 59(2) provides reinstatement work to be agreed within the ninety (90) days after the vacation date. As we have indicated above the issue of what is the vacation date is unclear to the extent of what actual practical vacating of the property means (as opposed to the actual technical termination of the Lease).

In addition, Section 60 of the Act provides that within thirty (30) days of the "vacation date" where possible, the resale value is to be agreed or valuations need to be undertaken.

The practical issue is where, as it is becoming more common, a resident disputes the reinstatement costs as proposed by the Scheme Operator.

For practical purposes this means that the reinstatement work is generally not undertaken until such agreement is reached (as clearly what actual work is undertaken may be effected by the negotiations in this regard). There is therefore a significant delay before the unit can be then placed "on the market". This relates to our earlier submission as to what is the nine (9) month period in relation to the Scheme Operator then becoming wholly liable for the service fees. What our client is seeing is that on a number of occasions the bulk of the nine (9) month period can be "chewed up" in negotiating reinstatement costs and unit valuation which then places the Scheme Operator as a disadvantage in becoming wholly responsible for service fees a short time thereafter. This is an unfair financial impost on the Scheme Operator.

Whilst the Act makes provision for ultimately the Tribunal to resolve the value of the reinstatement works and provision for valuations in relation to undertaking the valuation of the unit, the Act needs

to be revamped to take into account how service fees are being calculated and from what date taking into account the practical disputes can place the Scheme Operator at a disadvantage and generally create uncertainty as to how those fees ought be apportioned between the parties.

There is a second related issue in relation to reinstatement costs. Section 58 requires the Scheme Operator and resident or family to agree in writing on any reinstatement work to be done for the resident's accommodation unit. Ultimately the Act under Sections 58 and 59 provide that each party where this a dispute to provide a cost of reinstatement and ultimately the Tribunal to ascertain which is the correct figure (or presumably a combination of both). What the Act is silent about is where a Scheme Operator in relation to reinstatement work seeks to pro rata the replacement of certain fixtures and fittings within the unit. As an example, where the Lease requires the unit to be returned to its original condition and bathrooms and kitchens are say ten (10) years of age it could be argued that those bathrooms and kitchens need to be replaced. An alternate approach and as adopted by our client from time to time is that if ultimately the kitchen and bathroom have a twenty (20) year useful life then it would be unfair to wholly charge the one resident when the kitchen reaches it 20 year life the whole of cost of reinstatement when in fact, another tenant may have had 10 years use of that item. For practical purposes, our client as Scheme Operator would reasonably apportion the replacement cost of those items (a quote is obtained at the time the resident leaves) such that where for example the replacement cost of kitchen and bathroom fittings would be \$20,000.00 and their useful life of 20 years with a resident leaves after 10 years, a replacement cost be pro rated one half to the outgoing resident and one half to the next resident/s who then use those items until the 20 year period has expired. As a Scheme Operator it is becoming more common that the outgoing resident where the actual fixtures and fittings are not to be replaced but endeavoured to be pro rated are objecting to the apportioning of replacement arguing that the actual costs is not being directly incurred at that time. The practical effect of this is that the Scheme Operator could reasonably then require the replacement of all of the kitchen and bathroom at the time of leaving which would be counter productive for the outgoing resident initially as they would be up a higher cost and for practical purposes, wasteful in replacing an item which may have some years left of useful life. In the circumstances, our client submits that the Act should clarify the right of a Scheme Operator to pro rata reinstatement works over the use of life of the fixtures and fittings where appropriate.

Conclusion

As outlined above there are a number of matters which are problematic to both Scheme Operator and resident particularly where the resident is now closely scrutinising costs incurred on the exiting of the resident and/or particularly by their family in a market place which has slowed both in volume of units sold and in capital growth.

If our client or the writer can be of any further assistance, we are able to provide same.

Yours Faithfully

FINEMORE WALTERS & STORY



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Our Ref: Geoff Ebert: Sharon

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29 June 2012

Mr Jack Dempsey
Honourable Member for Bundaberg
Delivery

DISPATCHED
3 JUL 2012

Dear Sir

**RE: SUBMISSION AND CONCERN REGARDING INCONSISTENCY OF
RETIREMENT LIVING ARRANGEMENTS FOR ELDERLEY PERSONS IN THE
WIDE BAY REGION**

We are the solicitors for Mr and Mrs David and Aneta Torrisi who are currently the proprietors of Sugarland Gardens Retirement Village at Bundaberg and also Fraser Shores and Fraser Shores 2 Retirement Villages in Hervey Bay. Our clients operate these Retirement Villages and have more than twenty (20) years experience in the Retirement Village industry. The operation of the Retirement Villages is regulated by the Retirement Villages Act 1999 (State Legislation).

There are a number of features within the Retirement Villages Act (RVA) which have been designed over a period of time to ensure that residents who generally either purchase a leasehold or freehold interest within a Retirement Village (our client's villages are leasehold interests) that upon acquiring such interest they have the protection of the following;

- Provision of initial public information document (copy of which is kept by the Office of Fair Trading and is updated when the document is updated). This document provides both a summary of all relevant terms in relation to Village operations and a copy of the lease agreement which regulates the use of the independent living unit by the resident. In general it explains ongoing fees and initial purchase costs and charges which are applicable upon the sale of the unit.
- The RVA provides for a capital replacement fund. The Scheme Operator (owner of the Village) manages this fund which is used to provide replacement of the Retirement Villages capital items including communal facilities, amenities, plant and equipment including community facility furnishings, gardening equipment, Village bus and infrastructure such as roads, paths, drainage, sewerage, general landscaping and the like. Currently in relation to our client's Villages this fund is maintained by a percentage of the initial purchase price of a unit being directed into the fund.
- In addition to the capital replacement fund there is also required to be created a maintenance reserve fund for maintaining and repairing (but not replacing) the Retirement Village's capital items. Again, a quantity surveyor is engaged to calculate the amount needed for this fund (as with capital replacement fund) the individual residents are responsible for this amount which is deducted from the individual residents contribution to the General Services Charges Budget.
- The RVA has provisions as to the sale of the independent living unit by a resident when they wish to leave the Village or upon their passing away. The RVA Act regulates the requirement to reinstate the units and the sharing of those reinstatement costs between the resident and the Scheme Operator. The RVA Act is designed so that the units are returned to their original condition (or in fact upgraded at the cost of the Scheme Operator) to ensure that units do not

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- deteriorate in appearance and value over an extended period of time.
- As either acquirer of a leasehold or freehold interest a Retirement Village resident is not eligible for rent assistance through any Commonwealth program and in relation to leasehold interests, is not entitled to any new home or building boost grant.
- During the resident's occupation of the Village in general, save for a resident failing to comply with obligations and payment of service fees or serious behavioural issues, the resident is entitled to an ongoing occupation of the unit throughout their remaining lives. A Village Operator cannot simply "close down the Village".

All of the above matters are contained within the RVA Act which has been in operation since the year 2000 and been designed to protect the interest of residents and to ensure for their peaceful occupation of the Village and that their capital investment in the Village is maintained.

What has come to our client's attention is a worrying trend that to "get around" the reasonable requirements of the RVA that another form of "retirement village by stealth" has been developed which has used the manufactured homes (Residential Parks) Act 2003 (the "MHA"). This is again a State piece of legislation.

The MHA provides for a very different model of ownership and obligations on the park owner which in our client's and the writer's view, provides little protection to a park resident and will ultimately lead to the potential failure of the park and severe losses to all park residents. There are a number of differences with respect to an MHA property an example of which is Palm Lake Resort at 39 Werring Road, Bargara. An example of the tenancy documentation supplied is attached. We however summarise some of the key differences:

- There are no requirements under the MHA for the park operator to have a capital replacement fund established to replace all of the capital items contained within the park (village). Were the operator to fail, simply not wish to expend funds or simply not have funds to do so, the capital infrastructure of a MH park will obviously deteriorate and fail. There are no requirements under the MHA for a maintenance reserve fund with similar effects on the maintenance of capital items as with the lack of a capital replacement fund.
- Security of tenure for a resident is less secure in a manufactured home park. As is contained in Section 6 of the information document a park owner, where it wishes to use the park land or part of it for another purpose, may make application to terminate the residents' agreements. The only protection is a compensation order to the resident for the cost of removing the home (although as we will detail further in this correspondence, for all purposes the homes are not capable of being removed in any cost effective manner).
- Where an owner wishes to sell their home, unlike under the Retirement Villages Act, a resident will remain perpetually liable for the weekly service fees where the unit has not been able to be sold. Under the RV Act service fees becomes the sole cost of the Scheme Operator nine (9) months after the lease agreement has been terminated.

What is concerning to our client is that the structures which are being used at the Palm Lake Resort and claiming to be manufactured homes are really permanent dwellings. We attach a copy of brochure and related documents including house plans showing the homes could not be considered relocatable (noting for example the garages are on slabs) and the suggestion that these homes could be deconstructed and moved is in reality, fanciful. It is noted that the homes are constructed of hebel.

Mr Jack Dempsey
Re: Torrisi & Retirement Living Arrangements

The basis of the use of the MHA is purely designed in our client's view, to obtain advantages which are not available under the RVA. Examples of these uneven playing field conditions are as follows:

- Purchasers of manufactured home were entitled to the building boost which until recently has been available in an amount of \$10,000.00.
- In theory, the purchaser of a manufactured home is entitled to a First Home Owner's Grant.
- Because the manufactured home is "sited" on the Palm Lake Resort land a resident is entitled to rent assistance (even though they have actually purchased the manufactured home themselves). The rent assistance (unavailable to true village residents) is to offset the weekly service fee charged by the park owner (both park owners and retirement village operators must charge a weekly fee to cover expenses such as administration, rates and the like).
- There is no requirement to reinstate a home under the MHA. A resident can sell their home for whatever price they chose both allowing the village to "run down" and potentially driving the overall pricing of all homes down.

Our client notes that the cost of purchasing a "manufactured home" as opposed to an independent living unit within a Retirement Village is very similar. Our client submits that a proposed purchaser in either circumstance would not be aware of the distinctions between the two pieces of legislation and the significant disadvantages under the MHA. Residents in our client's view, would both consider they were purchasing a "permanent residence". In no reasonable way could a purchaser at Palm Lake Resort consider they are buying a "modular" home capable of removal where the park ceased to exist or its facilities ran down over time.

Apart from the uneven playing field in relation to the attraction of residents with respect to provision of rent assistance and initial purchase bonuses, our client's significant concern is the long term future of a manufactured home park. The purpose of the MHA was in reality to regularise the more permanent structures contained within caravan parks and not to run a retirement village by stealth. We attach a copy of the preamble for the purpose of the MHA for your assistance.

We would be pleased if you would investigate the issues raised in this correspondence and provide your response in due course.

Yours Faithfully
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Sharon White

From: Bundaberg Electorate Office [Bundaberg@parliament.qld.gov.au]
Sent: Wednesday, 12 September 2012 12:10 PM
To: Geoffrey Ebert
Subject: Mr Geoff Ebert Finemore Walters & Story
Attachments: Guide to Making Submission to Parliamentary Committees.pdf

Afternoon,

The Minister for Housing and Public Work's office has been following up our inquiry into the matters you raised on behalf of David and Aneta Torrisi. They have advised that some of the issues raised actually fall under other acts such as the Manufactured Homes. (Residential Parks) Act 2003 and the Mobile Homes Act 1989. They are looking further into this and will follow up with a reply.

That said, they still advised that you should make a submission to the current parliamentary inquiry into the Retirement Villages Act

Submissions would need to be made directly to the Parliamentary Committee and I have attached the Guidelines for making a submission. Also here is the link to the appropriate page which sets out timelines, contact details etc

<http://www.parliament.qld.gov.au/work-of-committees/committees/THLGC/inquiries/current-inquiries/INQ-RVA>

Note that the closing date is September 21 on this.

Regards

Chris McLoughlin

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12/09/2012