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11 April 2016

The Director  
General Purpose Standing Committee No.2  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

By email: [gpsnco2@parliament.nsw.gov.au](mailto:gpsnco2@parliament.nsw.gov.au)

**Inquiry into elder abuse**  
*Furthering the deterring of errant attorneys*  
**QUESTIONS ON NOTICE**

I refer to the hearing on 18 March 2016 and the email dated 1 April 2016 from Jodi Rahme of the Upper House Committee.

I am not aware of any questions on notice during the hearing but reply to the Supplementary questions received with the email as set out below.

References to 'the Act' are to the *Retirement Villages Act 1999* (NSW) unless otherwise indicated.

1. *What's your view on Section 152(3)(b) of the Retirement Villages Act which allows retirement villages to continue charging recurrent fees after a resident has departed a village until a new owner is found?*

I agree with this characterization of the provision. In my opinion the provision is not unreasonable, though it could be improved, as follows:

- The resident's liability is limited in being proportional to the share of capital gain retainable under the contract. In the for-profit sector a 50/50 sharing of capital gain is the predominant arrangement in my experience.

- While I cannot quantify this, it is reasonable to assert that the majority of costs recovered through recurrent charges are costs that accrue independently of the occupation of dwellings (eg. building insurance, council rates, long-term maintenance, gardening, wages and on-costs for on-site staff and the like).
  - This could be made more equitable by requiring village operators to apportion recurrent charges between those costs which are and are not contingent upon occupation and only being permitted to recover the latter from residents who have permanently vacated their dwelling as from that date.
  - This would not require more than a modest amount of accounting to implement.
- The recurrent charges not payable by a resident following permanent vacation are payable by the operator and so the shortfall is not transferred to current residents. This seems equitable.
- The subject residents – ‘registered interest holders’ – can reduce their liability by exercising their rights to set and revise the listing price for their dwelling so that it meets current market conditions and sells sooner rather than later, if they so choose. This applies under Section 168 of the Act. There is one caveat to this.
  - Some operators provide in their contracts that if they think the resident’s listing price is substantially below market, they can engage a valuer to provide a valuation. That figure will prevail for the purposes of calculating the share of capital gain and, if based on the re-sale price, the departure fee. Such a clause has been upheld by NCAT.<sup>1</sup>
  - This commercial practice does not preclude the resident from setting the listing price but does exert some pressure perhaps not to hurry a sale with the result that the liability for recurrent charges continues.
  - That practice could be made more equitable by amending Section 168 to oblige the operator to obtain a valuation in the case of disagreement with the resident about the listing price from a ‘contract valuer’ within the meaning of the *Valuation of Land Act*

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<sup>1</sup> *Christine Leaves v Mountainview Retreat Retirement Village Pty Ltd* [2014] NCATCD 76 (14 May 2014) Member Rosser at 52

1916 with at least five years experience including the valuation of dwellings in retirement villages.

- All other residents do not have this right but their liability for recurrent charges is limited to 42 days from permanent vacation under Section 153. Further, the operator is obliged to refund their ingoing contribution within 6 months of then even if a new resident has not moved into occupation yet.

2. *What do you think could be improved to ensure that people buying into retirement villages understand their rights and responsibilities?*

Not a great deal from a lawyer's point of view for the following reasons:

- The introduction in 2013 of the mandatory standard form contract was a very significant reform in the context of transparency and ease of comparison between arrangements offered by different village operators.
- Operators are permitted to have additional provisions that are not inconsistent with the standard form or the Act. Not-for-profit operators tend to add comparatively little to the mandatory contract while for-profit operators often have 60 to 80 extra pages of legal provisions.
- Perhaps charitable operators feel less exposed to the financial vicissitudes of operating villages while private sector operators with obligations to shareholders are more cautious. In any event, it is not obvious how those clauses could be 'pruned back' without seeming to impose arbitrary regulation. The subject matter of those clauses and how they are dealt with by different operators is quite diverse.
- Prescribed general inquiry documents and disclosure statements also assist prospective residents by summarising the arrangements offered by different villages.

3. *Some have argued that care recipients who have received poor or inappropriate care should use legal avenues to seek redress for poor care. What's your view on this?*  
*(a) Are there examples in other jurisdictions or countries that address this issue or provide a higher standard of accountability and/or oversight?*

The terminology and subject matter of this question sounds like it is directed to residential aged care facilities coming under the *Aged Care Act 1997* (Cth) rather than retirement villages under the Act. They are completely separate sources of regulation and the Act expressly defers to the *Aged Care Act* under section 5(3)(b). In other words, a nursing home within a village is not subject to the Act.

### Change of use

- A recent NCAT decision indicates that redevelopment with change of use is not straightforward for a retirement village developer.<sup>2</sup> Such a right is available under Section 136 of the Act subject to the fulfillment of various preconditions and residents being offered and accepting substantially similar alternative accommodation with increased cost to them.
  - In that case the operator had become insolvent and the liquidator was doing his best to repay monies owing to creditors.
  - Part of the cause of the insolvency was the operator's religious motivation to provide affordable accommodation for retirees on low incomes by requiring sub-market rent rather than lump sum ingoing contributions on entry.
  - The Tribunal held that it was not sufficient for an operator to simply show a more profitable use was available and that all residents had been offered alternative accommodation as outlined above. The onus was on the operator to show that alternative models of retirement village operations had been trialed and still failed to be viable. Here, ingoing contributions had not been used and the liquidator's proposal was rejected.

### Unaffordable fees

- Fees becoming unaffordable for retirement village residents due to actions by an operator is not likely because
  - The operator is constrained by the provisions of the contract, which in turn are subject to the Act, under Sections 11 and 1999.
  - Any subsequent operator of the village is similarly constrained under Sections 40 and 41.
  - No variation of a contract is enforceable unless under Sections 29 and 30,
    - It is made at the request of the resident, or
    - It is the subject of a certificate of independent legal advice by the resident's solicitor whose reasonable fees are paid for by the operator.
  - Any attempt to improve an operator's revenues during the currency of a contract by, for example, increasing departure fees or the share of capital gain retained, will not be enforceable unless such a variation to the contract is dealt with as outlined above.
  - An operator is not permitted to rectify a deficit in recurrent charges by rolling this over to the next financial year and increasing recurrent charges. Alternative revenues of the operator must be used under Section 120C.

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<sup>2</sup> *Penshurst Street Holdings Pty Ltd v Robert Barker* [2014] NCATCD 209 (25 November 2014) per Member Smith

### Operator insolvency

- Operator insolvency is the 'nightmare scenario' in retirement villages where residents may lose the roof over their head and their ingoing contribution, which may represent the bulk of their lifetime savings. This is even worse where a resident needs to move into residential aged care but money for the refundable accommodation deposit is not currently retrievable.
- Elsewhere I have argued<sup>3</sup> that the NSW State Government should adopt the model deployed by the Commonwealth Government in respect of insolvent care providers of residential aged care facilities unable to repay refundable accommodation bond balances.<sup>4</sup> Repayments are guaranteed using a fund comprising compulsory contributions from all care providers. A similar regime applies to the legal profession to cover improper use of clients' funds held in trust.<sup>5</sup>

Please do not hesitate to contact me if you have any queries.

~~Yours faithfully~~

Richard McCullagh  
BA LLB (Macq)

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<sup>3</sup> McCullagh, R, *Retirement Village Law in NSW*, Thomson Reuters 2013, Section 19.380

<sup>4</sup> *Aged Care (Bond Security) Act 2006* (Cth) and the *Aged Care (Bond Security) Levy Act 2006* (Cth)

<sup>5</sup> *Legal Profession Act 2004* (NSW) Pt 3.4