

**INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE  
TRIBUNALS IN NSW**

**Name:** Mr Neil Smith

**Date received:** 15/11/2011

---

Partially Confidential

14 November 2011

Submission re: "Review of Tribunals in NSW"  
Neil Smith,

---

***1. Some of the matters creating unnecessary Tribunal hearings:***

***By way of background:*** I have been a lessee of a dwelling in a NSW Retirement Village for eight years. The average age of residents in this village ranges between mid to late 70s. Each lessee pays an 'ingoing contribution' to secure a life-time lease. Almost the entire amount paid is an unsecured, interest free loan equivalent to a titled purchase price of a similar dwelling in the surrounding upper North Shore of Sydney.

***How finance structure causes different issues that Tribunals are left to sort out:*** Each lessee must also contractually commit to pay a 'departure fee', being up to 25% of the amount that a subsequently introduced lessee is to similarly lend the operator when the lease is terminated triggering a new lease to be issued. Each retiring lessee must find, and pay all costs of finding, the new lessee prepared to enter into the new lease to occupy the dwelling to be vacated.

Lessees also must pay monthly Recurrent Charges in compliance with the provisions of Retirement Villages Act 1999, No 81, and Regulation 2009 (*legislation*).

In total, leasing a \$700,000 valued dwelling could realistically translate to out-of-pockets of approximately \$1,200 per week for ten years as a result of:

- forfeiting interest normally expected on the loan comprising the ingoing contribution,
- paying the departure fee at the end if capital gain is not involved,

- paying on-going Recurrent Charges during the ten year lease period.

Such expectation of cost can be foreseen prior to entering into a lease. What isn't foreseen is the 'double dipping' practiced by the operator who uses unclear legislation and bluff to then use lessees' Recurrent Charges to pay costs that lessees' believe should legally be paid by the operator as the owner of the assets.

**This 'double-dipping' by the operator who, with consistent determination, ignores high costs already contributed by a lessee in a retirement village such as in this village, has, is and will continue to be, the cause of many unnecessary applications by lessee-residents to Consumer, Trader and Tenancy Tribunal (CTTT) for rulings under legislation.**

For many years this village's lessees have been suffering financial personal losses because the village's owners/operators have not fairly observed 'consumer law' provisions within legislation. Consequent misuse of lessees' funds being held as Recurrent Charges has followed and that is on record as an outcome already ruled by CTTT.

The need to seek qualified rulings about some issues in this village's finances have already, on three occasions now, required lessees to challenge the operator's unfair decisions through the CTTT. At present, one matter still remains before CTTT for completion of mediation which if unsuccessful will proceed to a full hearing. At present, mediation to date is unsuccessful.

Two more applications to CTTT will shortly be lodged seeking rulings on issues concerning the operator's recently unwarranted payments, and advised intended future payments, to meet

certain expenses which lessees believe should be the cost responsibility of the operator to meet under legislation but not paid by the lessees through Recurrent Charges.

Both of these two issues have arisen as a result of unclear definitions within legislation of what can be interpreted as being maintenance as distinct from replacement of items of capital within the village.

As well, the complexity and uncertainty surrounding interpretations by both lessees and lessor of some lease terms, will most certainly contribute largely to future possibilities of further unnecessary applications to CTTT for rulings.

## ***2. My suggestions for ways forward:***

The three emphasized paragraphs in 1 above form my opinion of why CTTT hearings will continue whilst so ever the legislation fails to provide sufficient clarity to both lessor and lessee. Therefore, if Government seriously intends to now take definite steps to minimize the number and complexity of future CTTT hearings relating to retirement village issues, it must firstly revise the areas of legislation that have, since the new legislation commenced on 1 March 2010, triggered so many new applications. That, I believe, is fundamental.

Based on my own observations comprising a layman's analysis of past CTTT rulings that have been made within the jurisdiction of CTTT's retirement villages' division, I submit:

- (a) CTTT Members who hear applications do not appear to always be consistent in their rulings on similar matters;
- (b) some Members, whilst having knowledge of general and common law, perhaps as solicitors, do not always display the depth of knowledge of the particular legislation

that a senior lawyer, or even specialist judges, experienced in retirement villages' issues, would be able to contribute;

(c) precedent, based upon other Members' previous rulings on an issue, does not appear to be adopted by other Members hearing another application. This may be caused by lack of statutory direction that impels Members to take cognizance of previous similar rulings;

(d) within CTTT's retirement villages' division, there seems to be a reluctance on the part of some Members to allow or even discuss some issues involving leases and contracts, ignoring that the issues so arising still relate to consumer laws and consumer rights and, as explained in 1 above, often relevant to the issues being presented;

(e) the growth of the retirement villages' industry and its future development by new constructions is evidently rapidly increasing. This surely must be helpful to Government's future plans for housing density and the inevitable arrangements it must soon put in place for concentrated health assistance to the elderly. Fortunately, community living in smaller dwellings with health services being made available, suits many of the elderly assuming they can live in a 'happy' and trouble free village. These same elderly, many nearing life's end, should not have to be subjected to on-going arguments with unfair operators using smoke and mirror tricks to juggle legislative and contractual matters which most of the elderly, unqualified in legal matters, don't even understand. Therefore there is clear need to establish a free specialist legal-aid service and system to support residents seeking 'class-action' rulings whilst the legislation remains open to differing interpretations, to be financed and administered within CTTT's or Fair Trading's investigative authority, specializing only in the legislation concerning retirement villages and residents rights under

consumer law, particularly under the law of contract. Perhaps the "spare capacity amongst the judicial officers" and the fact that "many judges will have an insufficient workload", as mentioned in the "Issues Paper", could be the basis of such a group, ready to act for the "underdog" when they are being unfairly challenged by 'big-end-of-town' developers as has happened in the past. Such invaluable assistance by Government would, in the future, prevent any other unscrupulous operator from again threatening residents following a residents' favourable CTTT ruling on a matter, to appeal the ruling but in so doing, would pursue costs, logically knowing that the residents who had receive the favourable ruling, could not afford to finance such an expensive appeal and may therefore have to withdraw and so lose the appeal;

- (f) extraordinary delays are evident in the past between lodging an application and the finality of a ruling by CTTT. This is unfair, frustrating and more costly to both applicant and respondent. Either more judicial Members, experienced in the relevant legislation, need to be appointed or the actual process of conducting hearings needs to be streamlined.
- (g) These delays in terms of the age and health of retirees makes it essential for a much faster and more efficient method of dealing with retirement industry issues to be introduced. The operators have a distinct advantage over their aged customers and "Survive and Rule" would appear to be their motto unless a better system can be introduced.

Thank you for considering this submission. Clearly, it does not support the "Options" presented in your "Issues Paper". On the contrary, it suggests creation of a smaller, more effective and specialized Tribunal to actually help the elderly get a fairer deal than is available at present.

Neil Smith