

Recent Developments in Retirement Villages Law

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- Overview
 - Status of legislative review - *Retirement Villages Act 1999*
 - Recent Court and Tribunal decisions
 - What's on the horizon?

- The Act
 - No significant amendments since 2006
 - Ministerial Working Party
 - Problems created by the new definition of ‘cooling off period’
 - Significant policy and drafting matters
 - Possible actions to prevent the re-occurrence of the situation at Urimbirra Retirement Village
 - No official announcement on amendments

- QCAT
 - Replaces the Commercial and Consumer Tribunal
 - Benefits
 - better qualified members
 - more flexible appeal rights to both QCAT and Court of Appeal

- Recent case law
 - *Saunders v Paragon* - calculation of exit fees
 - Issue: Must exit fees be calculated on a pro-rata, daily basis?
 - Tribunal decided – no
 - Resident appealed to the District Court
 - District Court (Justice Robin) decided – yes
 - But decision clouded by decision on the length of time the resident had occupied the village
 - No appeal – issue not yet resolved

- Recent case law cont'd
 - *Jomal v CCT* – capital replacement and maintenance spending
 - Issue: Can a resident contract to pay for repairs, maintenance & replacement of items in their unit?
 - Tribunal decided (after oscillation) – no
 - Operator appealed to Supreme Court
 - Supreme Court (Justice Douglas) decided – yes
 - Residents have appealed to Court of Appeal

- Recent case law cont'd
 - *Cossey & Pye* – termination fees
 - Issue: Was a component of an exit fee charged to resident (called a ‘termination fee’) a cost of sale, or a fee for selling, under section 68 of the Act?
 - Tribunal decided – no, because termination of a right to reside and the sale of a new right to reside are separate and distinct transactions
 - A fee for terminating a right to reside is lawful

- Recent case law cont'd
 - *Tew & Kelly* – village accounting
 - Accounts and funds of a retirement village must be kept separate from those of other facilities
 - MRF and CRF must be kept in separate *bank* accounts, not merely in financial ledger accounts
 - General services budgets must set out section 106 line items separately from section 107 line items
 - Quarterly and annual financial statements must list each item of general services expenditure individually

- Recent case law cont'd
 - *Residents of Kawana Island* - general services charges
 - A service is a ‘general service’ if it is *made available* to all residents, whether or not all residents obtain a *benefit* from the service
 - *Filmer* – limits of Tribunal’s jurisdiction
 - No power to vary residence contracts or issue mandatory injunctions
 - No power to order operator to build an aged care facility due to monetary threshold of \$250,000

- On the horizon
 - Winding down of schemes
 - Recent examples – Urimbirra, Gleneagles
 - OFT unlikely to intervene
 - Residents lack means to effectively defend
 - Media attention a risk to industry reputation
 - Possibility of legislation to regulate better
 - Increasing charges for general services
 - Is budgeted expenditure or actual expenditure for previous year to be used in applying section 106?

- On the horizon cont'd
 - Recovering corporate/head office costs through the general services charges
 - Tribunal held in 2004 that operators can apportion payroll tax across villages in a portfolio
 - NSW Tribunal has now reached the same conclusion in the context of the NSW Act
 - Recovery of corporate/head office costs in general services charges may continue to be an issue

- On the horizon cont'd
 - NSW Act amendments
 - Amendments about to come into effect in NSW:
 - Settling in period of 90 days
 - Recalculation of exit entitlements where operator's conduct unfairly has negative financial impact on resident
 - Rights of residents to conduct alterations to units
 - Removing operator's ability to carry forward deficits
 - Obligation to maintain capital items in "reasonable condition"
 - Risk of similar amendments in Queensland