

15 June 2020.

Submission by email to: MHC@hpw.qld.gov.au

Response to DH&PW's request for feedback on:

- **Current dispute resolution system and members' experiences of the system**
- **Quality, availability and affordability of expert pre-contractual advice**
- **What pre-contractual advice should be provided to prospective residents to help prevent future disputes**

I refer to DHPW's letter to Leading Age Services Australia (**LASA**) dated 13 May 2020, requesting stakeholder feedback in relation to the above issues.

Although DHPW's letter requested feedback in relation to both retirement villages and manufactured home parks, I provide my feedback in relation to retirement villages only, as follows:

Current dispute resolution system and members' experiences of the system

As you are aware, retirement village disputes are primarily resolved either at the village level or via mediation/hearing at the Queensland Civil and Administrative Tribunal (**QCAT**). The *Retirement Villages Act 1999 (Q) (RV Act)* entrenches this three-step process in relation to retirement village disputes (as defined). QCAT already serves as a simplified forum in which to resolve disputes of this nature. Also, costs orders against unsuccessful parties in QCAT are rare.

We would caution against introducing an even more simplified process or forum for determining retirement village disputes. Such disputes often involve technical issues of statutory and/or contractual interpretation. As such, decisions in a specific matter may have serious industry-wide ramifications, which could potentially threaten the viability of certain operators or the industry as a whole.

Accordingly, it is critical that tribunal members hearing disputes have appropriate legal qualifications and experience, and that legal representation of parties is permitted where appropriate.

To discourage matters unnecessarily proceeding to tribunal hearings, mediators should be thoroughly versed in retirement village legislation and issues. We feel there is evidence of QCAT requiring further resources and knowledge in the sector and not simply hearing matters by papers submitted. These documents do not always provide appropriate information nor does the process allow for questions by QCAT.

1. Inconsistent decision making: This can be attributable to a number of factors including:

The complexity and poor drafting of The Retirement Villages Act has been recognised in judgements by the Queensland Court of Appeal. During the recent review of the legislation unfortunately many of the drafting issues in the Act which were identified by the sector were not addressed (as the focus appeared to be purely on what was seen by the Government as consumer protection measures).

- The prevalence of, and preference by QCAT for, self-represented litigants leads to QCAT being given little assistance through submissions and pleadings.
- QCAT Members rarely have any material background or experience in retirement villages law. When combined with the abovementioned complexity of the Act and the lack of assistance from legal representatives, the Members' jobs become quite difficult, which often leads to poor outcomes.
- Operators in particular, do not appeal incorrect decisions because of the relative cost of doing so (noting that often disputes are minor and limited to one village). This leaves incorrect decisions to stand as precedent, which in turn guide future QCAT decisions affecting the broader sector. Those incorrect decisions lead to confusion and more disputes.

2. Often disputes are binary and there no material likelihood of settlement. The current process has two formal mediations (the mediation required by the Retirement Villages Act before proceedings are commenced and a mediation required by QCAT after the dispute is commenced). The last mediation is often of limited value, places further burden on QCAT's already limited resources and delays achievement of the final outcome.

3. One of the more prevalent areas for disputes are those between residents. The current systems, including the Retirement Villages Act, do not adequately provide a mechanism to resolve disputes between residents. Fundamentally, residents live independently. However, operators are inappropriately being asked to take the role of attempting to resolve disputes between residents. This puts operators in a very difficult position both legally and practically, and there is very little support (legislative or otherwise) for operators in that role. The new behavioural standards go some way but are insufficient. It is proposed that further legislative changes are made to address these issues and to provide better support for residents and operators in relation to these types of disputes.

4. In relation to 3 above, in the context of a dispute between residents, we have seen one instance where an operator has been forced (by reason of s135(2)(b) and (c) of the Act) to spend over \$50,000 to get advice from forensic and legal experts and undertake surveillance on order to try to resolve and prevent disputes between residents at a village. The problem is that the operator has very few powers to address disputes between residents, and the avenues that an operator has to enforce a contract are limited, heavily regulated and require a high threshold of evidence. If that was to happen in any ordinary residential setting, the residents would be compelled to resolve the issues themselves civilly or criminally.

5. Under the current system, the services charges or budgets for a village can be 'undone' or materially impacted by a single resident bringing a claim against the operator (who say, objects to an increase in a particular line item). If the resident wins, it affects the outcome for the whole village, which the other residents may otherwise have been happy to accept (eg if they were happy with the increase). If the resident loses, the operator has incurred cost and the other residents' charges and budgets may have been impacted without cause. It may reduce the incidence or magnitude of disputes about things that impact the broader village (such as general services charges and budgets) if minimum number (or %) of residents was required in order to bring a formal claim against the operator on these kinds of issues that affect the resident community broadly. As an illustration of this concept in operation, under the Residential (Land Lease) Communities Act 2013 (NSW) an increase in site rent in a residential (manufactured home) park (other than by a fixed formula) can be challenged in NCAT only if there is a quorum of 25% of the affected home owners who bring the application (at least to the mediation stage).

Quality, availability and affordability of expert pre-contractual advice

Feedback we have received from retirement village operators over a number of years suggests that the quality of legal advice provided to prospective retirement village residents is mixed. However, we submit that ample options already exist for prospective residents to obtain quality specialist advice in this area and that any sub-standard advice received is a consequence of the prospective resident's choice of solicitor.

We note that the prescribed Form 3 Village Comparison Document (**VCD**) and Form 4 Prospective Costs Document (**PCD**) both advise prospective residents to obtain independent legal advice before entering into a residence contract. These forms also direct prospective residents to a number of sources of legal advice, including Queensland Retirement Village and Park Advice Service and the Queensland Law Society (for referrals to lawyers with expertise in this area).

Accordingly, it is not clear what existing deficiency DHPW's review is seeking to address.

What pre-contractual advice should be provided to prospective residents to help prevent future disputes

As you are aware, the RV Act, including the pre-contractual disclosure regime, has recently been extensively overhauled pursuant to the *Housing Legislation (Building Better Futures) Amendment Act 2017*. As a result of this overhaul, we note the following:

- Retirement village operators are now required to provide prospective residents with two disclosure documents – the VCD and PCD - at least 21 days before entering into a residence contract. These forms were designed by DHPW, are in plain English and are much simpler than the previous form of disclosure document (Public Information Document).
- As part of this legislative overhaul, DHPW also implemented a prescribed form for pre-contractual legal advice, where a resident wishes to waive or shorten the pre-contractual waiting period – Form 5 Precontractual Disclosure Waiver (**Waiver Form**). We submit that, even where a resident is not waiving or shortening the pre-contractual waiting period, but chooses to obtain independent legal advice, the contents of the Waiver Form inform solicitors as to the issues upon which they should be advising.
- The prescribed Waiver Form includes a comprehensive list of issues upon which advice must be provided. These include some of the most historically common sources of disputes, such as exit fees, exit entitlements, capital gain/loss and recurrent charges.
- Retirement village operators report that the disputes/disagreements they encounter from time to time are often with a deceased resident's family (rather than the resident themselves) and often involve exit entitlements. To reduce the likelihood of such disputes arising, operators typically encourage prospective residents to involve their family in the decision whether to move into the retirement village. However, it is ultimately the prospective resident's decision whether they wish to do so – it should not be assumed that the prospective resident's interests and those of their family are necessarily aligned.
- Based on the low number of reported QCAT decisions involving retirement villages, it does not appear that retirement village disputes are arising in significant numbers. Operators and industry surveys consistently report that the overwhelming majority of retirement village residents are satisfied with their choice of accommodation and the retirement village operator.

Accordingly, it is not clear what existing deficiency DHPW's review is seeking to address.

Further, LASA suggests Contracts are made clearer and simpler, not by templates or standard form contracts but by standardised guidelines for content inclusion.

LASA acknowledges the contribution of retirement village operators, Members and Affiliate Members to this submission including law firms Mullins Lawyers and Minter Ellison Lawyers.

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