

CARING FOR OLDER AUSTRALIANS

SUBMISSION TO PRODUCTIVITY COMMISSION BY NEVILLE CARNEGIE

My specific interest in this inquiry relates to the provision of retirement village accommodation and in particular in the State of New South Wales.

My background: Upon retirement from Commonwealth employment in 1987, my wife and I “purchased” a unit in The Heritage Retirement Village at Padstow Heights in Sydney. (This village is now called Beauty Point Retirement Resort following its sale w.e.f. 1.7.2000) At time of purchase, we were given a General Information Booklet that contained information about the village and its facilities and some of the financial provisions regarding the operation of the village. We were also advised, as were any prospective residents, that a single aged pensioner could always afford to live at The Heritage. This resulted in later years to litigation which lasted from 1996 when the residents were before the Residential Tenancies Tribunal to 2004 when the High Court of Australia made its first decision in relation to retirement villages.

The contract provided for the establishment of an Advisory Committee consisting of management and elected residents. However the Trust Deed which set out details of the Committee further stated that the Committee shall have the power to advise but not instruct the Manager and *it shall be in the Manager’s sole and absolute discretion as to whether or not to act on the advice of the Advisory Committee.* A toothless tiger! The residents soon objected to this arrangement and established a Residents Committee to consider matters of concern and make whatever representations were necessary.

I became the Secretary of the Residents Committee in 1994 and was in that role when the managing director of the company instigated litigation in 1996 against the residents when they refused to accept demands for increased operating costs that had risen by 150% in a period when the CPI had increased by 26%. The litigation moved from the Residential Tenancies Tribunal to the Supreme Court and to 2 hearings before the NSW Court of Appeal. During most of these proceedings, the residents had financial support from the NSW Government as the residents relied on the provisions in NSW Regulations, The Retirement Village Industry Code of Practice Regulation. The Courts determined that the Regulation did not have the power that the Government considered it had provided for the protection of residents.

As these decisions would have meant that aged pensioner residents could NOT have been able to live the Heritage, the residents decided to instigate their case against the management for misleading and deceptive conduct under the Trade Practices Act (Clth) in an attempt to save many residents from bankruptcy. A class action could not be taken since there were a number of different versions of the contracts signed with the various residents.

The Federal Court in 2000 gave a decision that the operator was guilty of misleading and deceptive conduct in that the original representations were not honoured. However, the presiding Judge also said that the applicant by taking action at that time was statute barred. After 2 unsuccessful appeals to the Full Court of the Federal Court, it was necessary to go to the High Court to determine precisely when the departure from the representations became effective. The High Court in February 2004 made its decision emphatically – all 7 judges making one decision – that the Federal Court had erred. The time that an action can be taken now relates to the date from

which an operator departs from any representations made at time of signing a contract. That now creates a precedent should any other retirement village litigation eventuate.

My role in the above was that I was the main contact with our counsel and solicitors during these protracted hearings. As a result of our loss in the NSW Supreme Court, I originated many submissions for creation of stronger consumer protection in NSW legislation and an examination of the Hansard at the time that the then Minister for Fair Trading in the NSW Parliament summed up the debate on a new Retirement Villages Bill will show that he listed me as one who had made a significant contribution to the new legislation.

In 2003 following my experience with the Residents Committee at The Heritage Retirement Village, the litigation between the operator and the residents and my connection with the Office of Fair Trading NSW on the legislation (Retirement Villages Act 1999), I joined the Committee of the Retirement Villages Residents Association and was Secretary of that Association until I resigned in April 2007. The resignation followed political interference by a Ministerial advisor following the publication of the Association's Newsletter just prior to the NSW State election. During this time I prepared all the initial submissions made to the State Department, Government, Opposition and Independents on the review of specific provisions in the Retirement Villages Act which was started in 2004. However the amendment Bill was not passed until December 2008 and the Regulations under that Act took a considerable time to be drafted. The result was that the new Act and Regulations did not commence until March 2010.

For my services to the Retirement Village Residents Association I was made a life member in 2007. I was also awarded the Centenary Medal in 2003 for my services to retirement village residents.

1. My views: I have carefully considered the Terms of Reference of the Commission in undertaking this review. I have long held the opinion that housing is primarily a State responsibility. Retirement villages were first built in the various States with the approval of Local Government for their construction. The NSW State Government established the State Environment Planning Policy to govern the facilities and services necessary in retirement villages. NSW and other States subsequently prescribed a legislative basis under which the villages fitted in with other State laws and Local Government policies that were relevant to the particular town or suburb where a village was constructed.
2. The contracts under which residents occupied units in villages in NSW are prepared under the provisions of the State Contracts Review Act. The contracts are examined on behalf of residents by solicitors throughout the State who are mostly involved in NSW conveyancing. Any proposal that villages could operate under Commonwealth law presents added difficulties to operators and residents alike. In NSW, there is easy access to Government and Opposition Parliamentarians and the relevant Departments the Government Ministers administer. Making personal representations to a Minister administering a Commonwealth Act could involve travel to Canberra or the Minister could have his electoral office in Perth, for example. The same situation would prevail in regard to any representations to a Shadow Minister. Many of the day to day issues are State or Local Government in character. For example, local transport services, State liquor laws, local Tribunals for the resolution of local contractual and legislative problems. Many of these problems would present further difficulties for residents if the local authorities were not empowered to handle matters under Federal law. For example, the Federal Court could not hear matters relative to contract disputes as it has no jurisdiction over State laws except in certain circumstances.

3. Any problem which is identified which requires amendment of current State retirement village legislation can be handled reasonably quickly by co-ordination with the authorities. If there is Commonwealth law, the matter would be further protracted until it is resolved what the implications are in the other States before any action can be commenced. In the meantime, it would inevitably be the vulnerable elderly residents who are most affected.
4. It is been considered for some years that there could be benefits if aged care facilities were included within a retirement village complex. In practice, there is some operating now. However, the operator on a site may have beds unfilled because there is no demand. Alternatively, if the beds are currently filled and further demand occurs, the family who thought their parent would be accommodated in a different part of the village may now find they have to move the parent to an aged care facility in another town or suburb.
5. Even the Retirement Village Residents Association that represents the residents in NSW villages has no powers in relation to villages in other States. There is a degree of co-operation between relevant State associations now but Commonwealth law would require the State Associations to amalgamate into a Federal body with a Central Office at greater expense to members. Conversely the operators, many of whom are now corporations with their Head Offices in cities in a different State from where the villages they own are located, would welcome the transfer of powers. They could then originate an action in say Adelaide or Brisbane and put the residents in NSW at a considerable disadvantage in trying to defend the claim. That also works in reverse but the corporations are clearly in a better financial position to defend an action brought by residents in say Sydney.
6. The Constitution specifically prescribed some matters to be Commonwealth in nature and hence Section 51 set out those matters that were essential in the interests of Australia. Defence and External Affairs are just 2 that fall into that category. However our forefathers had sufficient foresight to leave the States to look after those matters where the States could best look after them. There is no reason why the Commonwealth should have power over the construction of housing accommodation in a State and a retirement village is merely an extension of that accommodation. Most villages operate on the basis of leasehold or loan/licence but some have strata units. Surely the Commonwealth would not want to take over the powers in regard to the operation of strata dwellings. Such an expansion would require a larger population in the ACT which seems to be against the current inquiry into population sustainability.
7. There is no financial problem as I perceive it. Most villages are built by developers or corporations for the purposes of their own profit. There are villages called not-for-profit but I see that as a misnomer. Churches and some other charitable organizations advertise they are not for profit. However they own valuable property which is an asset to them. As they have turnover when units become vacant, they re-sell them at higher prices and make profit. However they have no shareholders to look after so they invest the profits made into building more villages or more units on a site where there is room for expansion. Everyone in the retirement village industry is there for the money they can make out of it.
8. One problem that has arisen which should be of concern to residents but inevitably they don't think about it and the advice they get does not contemplate it. It is the situation where a new village is constructed on borrowed money and the operator does not sell sufficient units to recoup the cash to pay the mortgage. There have a few instances of this in NSW and the vulnerable elderly people who "purchased" their units have lost all their

capital when the operator becomes a bankrupt. Another operator is unlikely to bail out the unfinancial operator if the village is being built in an area where there is little demand for aged accommodation. I am aware of some villages that have been built in country areas where the residents purchased a unit because of the price but didn't think seriously enough about how far from shopping or medical centres they were. Now some of these residents are house-bound and the operators are also having difficulty in re-selling any vacant units.

9. There is a financial problem for residents that does need attention by the States or perhaps there is a way the Commonwealth can get employed. Judge Gyles in the Federal Court in one of the cases involving my old village said that buying into a village was not an investment but merely buying your final home. This makes sense. However some parents decide their suburban home is too big for them now the family has grown up and left the home. There is too much maintenance and they growing too old to do it themselves. They sell their home and "purchase" a villa or a unit in a village. That requires them to give something between \$100,000 and a \$1,000,000 to an operator as an interest free loan from them to the operator. On their demise, the operator is contractually bound to refund to the their estates, the money paid at the time of entry (which could have been 10 or 20 years) BUT the operator then deducts his deferred management fee of anywhere between 10 and 50% . So the residents' initial payment comes back to the estate as a smaller sum than when the parents outlaid it. The residents don't know whether the operator used the initial money to build more units, pay the mortgage or whether it went in gambling. It is an unsatisfactory state of affairs.
10. The Retirement Village Association on behalf of member operators has an accreditation scheme that promotes the idea that a village is a 5 star village. It evaluates the services and facilities in a village and the staff that it offers. The only thing it doesn't do is examine whether the fees paid by the residents is being spent economically and whether the money is being wasted. In Government Departments, the budgets are frequently pared because of the economic situation or to effect economies for other important programs elsewhere. The RVA accreditation scheme could reward a village for having services and facilities that are not wanted by residents and not used by residents. I know of an occasion where the accreditation examination was carried out by another operator whose own village was not accredited. Their system lacks accountability and credibility and Government supervision is needed to prevent the advertising gimmick from deceiving the vulnerable elderly residents.
11. Another aspect of accountability that needs to be given more attention is where the regulating Act does not give residents access to the records of where their monthly fees are being spent. By reason of going to a Tribunal and getting the financial records produced by summons, it was discovered that capital items of expenditure had been recorded in the residents accounts as part of the repairs line which is recoverable from residents fees whereas any capital items should have been met from the operator's own account. This amounts to fraud in my view but the Tribunal had no power to make the operator meet the amount because the legislation did not give him the power to reduce the expenditure. Current legislation in NSW and no doubt in other States leaves a lot to be desired. However if it were Federal legislation, it would still have loopholes that operators could use to pass on their own costs to the residents. There was another instance of the operator having an open day to sell additional new units in his village. He used the staff (whose salaries are paid by residents) to entertain the visitors to the site. He had a radio studio on site for 3 days plugged into the light and power grid, the costs of which are paid by residents. The operator takes all the money for sales but his advertising of them in terms of the light and power used and the staff salaries identified above are borne by the residents. Whether the operator claims the money to reduce his tax bill is unknown but for

the discerning resident, it is very shonky to put it mildly that operators do not account to residents for the expenditure of their money. The operators tell residents that you get a copy of the audited accounts. For the price residents pay for the auditor, the audit is not a detailed one and expenditure of the kind mentioned in this paragraph would never be picked up by an auditor. It is another sham.

12. I do not feel it necessary to comment on any of the other items in the Terms of Reference. They are not within areas of my knowledge or experience. I feel there a few matters to which I can draw your attention and I will list them as points of reference. I can say I have visited friends in aged care accommodation. I have told friends that if I ever have to go to a nursing home (I am currently just on 84), you have my permission to shoot me. One other problem on retirement villages. I told officers of the NSW Office of Fair Trading that if they were going to prepare good legislation on villages, they should get one of their officers to live in a village for a year so he/she could get firsthand experience of what goes on in one. The same could be said of nursing homes. For a very good friend of mine when he reached 90 he had to live in circumstances where he lost all his dignity and those around who were in a worse condition than he was, must have driven him to distraction. I came away from the nursing home feeling very depressed.
13. Currently I do not need any outside services. I live alone and I still participate in social events outside my home and have plenty of cricket or football to watch (and submissions to make!) to fill in my twilight years. The Terms of Reference appear to give the Commission plenty of scope to recommend all kinds of alternatives. However I suggest just throwing money at some of these issues or combining retirement villages with nursing homes is not the answer as I see it. Clubs like National Seniors and Probus can do more for aged people than some of the other options you have before you. I hope you get input from organizations that are currently doing a lot for the aged on a voluntary basis. On a personal basis I told Wayne Swan (my local member) last week that he had lost my vote on the issue of indexation of pensions – MTAWA for aged pensioners and politicians and CPI for ex-Commonwealth employees. No doubt there is no votes in this matter other than from 100,000 or more former Commonwealth employees who are still alive but when Mr Rudd promised a review before being elected and he had been on a Parliamentary committee that recommended an increase during the Howard years, we had reason to believe our spending power would be increased. Another broken promise!

References:

- *High Court Decision – J Murphy v Overton Investments Pty Ltd [2004] HCA3 dated 5 February 2004*
- *Federal Court Decision - J Murphy v Overton Investments Pty Ltd [2000] FCA 801 dated 15 June 2000*
- *Older People and the Law – Peter Slipper et al(Legal and Constitutional Committee) – Inquiry Report tabled in Federal Parliament on 27 September 2007 (Chapter on retirement villages notwithstanding that retirement villages were administered by State Governments)*
- *Retirement Village Residents Association NSW website – <http://www.rvra.org.au>*