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Two Approaches to Retirement Industry Regulation: Queensland v New South Wales

Abstract

The approaches taken to regulation of the Retirement Village industries in Queensland and New South Wales are quite different. At present an Industry Body is working on proposals for amendment of the Queensland Retirement Village Act 1988. In view of the obvious short comings of the Queensland legislation, a comparison with the New South Wales legislative scheme may prove useful.

Keywords

retirement industry regulation, Australia, retirement villages

TWO APPROACHES TO RETIREMENT INDUSTRY REGULATION: *QUEENSLAND V NEW SOUTH WALES*

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The approaches taken to regulation of the Retirement Village industries in Queensland and New South Wales are quite different. At present an Industry Body is working on proposals for amendment of the Queensland *Retirement Village Act* 1988. In view of the obvious shortcomings of the Queensland legislation, a comparison with the New South Wales legislative scheme may prove useful.

Retirement Industry legislation is for consumer protection, as such two main goals can be identified:

1. ensuring that consumers know what they are getting for their money and are able to make an informed comparison of the different products that are offered in the industry; and
2. maximising consumer access to legal remedies.

Access to legal remedies is of particular significance as the purchase of a residence right necessarily involves a long term relationship between operators and consumers. The cost of litigation in the Courts is now beyond all but the wealthy and the few poor people who are able to obtain Legal Aid. Accordingly, traditional legal remedies are beyond the reach of most residents of retirement villages.

In order to achieve the consumer protection goals the regulatory scheme must address the following area:

- the legal agreements to be entered into by consumers and operators;
- the promotion of the village;
- the management of the village; and
- dispute resolution.

Balanced against the consumer protection goals are the economic realities of the business world. Whether motivated by charity or profit Retirement Village operators are in business. There is an economic maxim that compliance is cost, a regulatory scheme should be designed to minimise the cost of compliance for the benefit of both operators and residents, who ultimately pay all costs.

In order to compare the approaches taken in the two states they will be considered in relation to:

- the process of setting up a retirement village scheme;

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- the management of villages; and
- dispute resolution and access to legal remedies.

Setting up a Village

QUEENSLAND

Perhaps the most important function of the Registrar of Retirement Villages is the approval of village schemes. Pursuant to s16 of the Act, it is an offence to in any way promote a scheme for a retirement village unless the scheme has been approved by the Registrar.

Section 17 provides for applications to the Registrar for approval of a scheme. The Registrar must not approve a scheme unless he is satisfied as to, among other things, 'all particulars of the scheme, including the provisions thereof to be utilised upon a failure of the scheme'.¹ There is no guidance given as to how the Registrar should exercise this discretion except for a list of requirements for documents to be published for the information of the public.² Accordingly, the discretion given to the Registrar is very wide.³ The Registrar has issued a list of guidelines for the preparation of village schemes.

The Registrar appears to be willing to impose substantive provisions on schemes through the exercise of the discretion given by the Act. This is shown by the guidelines which include requirements for contractual terms relating to the refund of monies on termination of a residence contract.

Having an approval process will undoubtedly cause delays in the marketing of a village. The approval process is, in practice, quite long. This problem is exacerbated by the existing backlog of applications. The backlog is the result of three factors: the need for existing villages to be approved;⁴ the backlog of applications that arose in the period before the commencement of the Act; and the limited number of staff in the Registrar's office. It is reasonable to expect that the problem will ease when the back-log is worked through.

NEW SOUTH WALES

By contrast there is no approval process for village operators in New South Wales, rather, operators must comply with a Code of Practice under the *Fair Trading Act* 1987. The code sets out requirements for the marketing of villages and contains terms that must be included in residence contracts. There are lists of information that must be provided to potential residents or set out in residence contracts. Residence contracts must be drafted in plain English, there must be a ten day cooling off period and the rights and obligations of both parties must be specified.

1 s17(1)(c)(ii).

2 s17(3).

3 *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353; *Re Maryborough Election Petition; Nightengale v Alison* [1984] 2 QdR 214.

4 See ss 5 and 16.

In addition to the Code provisions the *Fair Trading Act* 1987 contains general prohibitions relating to false representations,⁵ misleading and deceptive conduct⁶ and unconscionable conduct.⁷

Enforcement of the code is provided for in Part 7 of the *Fair Trading Act* 1987. Enforcement is the responsibility of the Commissioner for Consumer Affairs. Proceedings are dealt with in the Commercial Tribunal and the Supreme Court. In addition, the Tenancy Commissioner has power to investigate matters relating to or affecting retirement villages and take such action, including prosecution, as the Commissioner thinks fit.⁸

COMPARISON

The New South Wales legislative scheme contains distinct financial advantages for village operators. The necessity of obtaining approval for a scheme in Queensland results in delays in marketing the village and the considerable costs imposed by the approval process are not incurred in New South Wales. The advantage given to operators is not at the expense of residents as the provisions of the Code of Conduct and the *Fair Trading Act* 1987 are more than adequate to protect the resident's interests. It should be noted that the residents are the ultimate beneficiaries of the cost savings.

Resident Participation in Village Management

In both States provision has been made for resident participation in the management of villages.

QUEENSLAND

Part VII of the Act deals with resident participation. Section 47 provides for the holding of annual meetings. Section 48 requires the operator to provide certain financial information to the meetings. Section 49 provides for the establishment of a resident's committee. Section 50 allows the residents to make, alter or revoke by-laws of the village. Section 51 provides that operators cannot increase service charges more than the rate of increase in the consumer price index unless the residents consent to the increase in a general meeting. There is no provision made for any managerial input by the residents beyond that contained in ss 50 and 51.

There appears to be a loop-hole in s49 that will allow operators to avoid the effect of ss 50 and 51. Section 49(1) provides that it and sections 50 and 52 do not apply 'in relation to a retirement village in respect of which there is a body corporate subject to the *Building Units and Group Titles Act* 1980'. Accordingly, it is possible for an operator to avoid ss 50 and 51 by registering a Building Units or Group Titles plan and then keeping control of the body corporate. Section 48 contains a similar exception, however, it has been drafted in a way that avoids this loop-hole.

⁵ s44.

⁶ s42.

⁷ s43.

⁸ *Retirement Villages Act* 1989 s7.

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NEW SOUTH WALES

The Code of Practice provides for the creation of a management structure that allows resident input, if so desired by the residents. As in Queensland the operator is obliged to present financial information to the residents. The residents are involved in the management of the village in the following ways:

- if the resident disputes any item in the village budget then a dispute is deemed to exist;
- any proposed change to services or facilities that will lead to increased costs or loss of amenities must be approved by the residents;
- residents have a right to be involved in plans to upgrade buildings or fixtures and fittings where the cost is being met in part by the residents. If the upgrading will result in the loss of amenity or cost to the residents then the agreement of the residents must be obtained; and
- the residents must appoint a member to the village disputes committee.

COMPARISON

It is clear that residents in New South Wales have a greater opportunity to participate in village management. Some village operators may resent the intrusion on their role, however, this is a short-sighted view as the long-term nature of the relationship requires a degree of co-operation between residents and operators. Whatever the justification for resident participation, as a goal it has been most effectively achieved in New South Wales. Resident participation has been made more workable in New South Wales by the comprehensive dispute resolution procedures.

Dispute Resolution and Access to Legal Remedies

This discussion will concentrate on the particular provisions made for retirement villages.

QUEENSLAND

The Queensland Act contains no express provisions for alternative dispute resolution, accordingly, residents must rely on obtaining remedies through the normal court system. For many residents, access to the Courts is prohibitively expensive, as such, those people are effectively denied any legal remedy unless they can obtain the assistance of the Registrar of Retirement Villages pursuant to s42 of the Act.

Sections 42 and 43 of the Act provide a right for residents to apply to the Supreme Court for an injunction to restrain a loss or restriction of residency rights. Section 42 gives the Registrar power to make the application to the Court on the residents behalf. The Registrar has a discretion as to the exercise of this power.⁹

In addition to the above-mentioned power, the Registrar may revoke approval for a village where the Registrar considers it necessary for the

⁹ s42(3).

protection of potential residents.¹⁰ Such action would effectively make residency rights unsaleable.¹¹ Revocation of approval is therefore a weapon of last resort.

The same applies to the statutory charge provided for in the Act.¹² The purpose of the statutory charge is to secure the due performance of, and payment of all monies under, the residence contracts.¹³ The statutory charge does not apply where the residents are given freehold title.¹⁴ The statutory charge is not a useful remedy in most circumstances because the procedure to endorse it is unwieldy¹⁵ and the result, the sale of the village,¹⁶ is drastic. The Court may order the sale of a village free of existing encumbrances or subject to such of those encumbrances as the Court thinks should be preserved.¹⁷ One would expect that a village would be sold subject to the interests of the existing residents. Unfortunately, this may not always be possible, for example, the village may not be economically viable if subject to the existing residency rights. Such a situation would give rise to a conflict between residents who are able or want to leave their homes and those who do not. Clearly the charge does not provide an appropriate remedy for most disputes.

Another protective provision in the Act is the limitation on increases in service charges.¹⁸ The apparent purpose of the limitation is to discourage the practice of setting artificially low charges on commencement of the village to induce purchasers. As previously noted, there is a loop-hole in this provision which allows avoidance by operators.¹⁹

NEW SOUTH WALES

The New South Wales scheme provides a two tiered process of dispute resolution. The first tier is contained in the Code and is based upon a co-operative approach by residents and operators. The second tier is set out in the *Retirement Villages Act 1989* and is a determinative procedure using the Residential Tenancies Tribunal.²⁰

THE FIRST TIER

The Code of Practice compels operators to convene a Disputes Committee. The Code also provides for an Appeals Panel of 3 persons external to the industry. The members of the Panel are appointed by relevant industry and consumer bodies. The Committee must consist of three persons, one of whom is nominated by the residents, one by the operator and the third must be a person agreed by both the residents and the operator.²¹

10 s19.

11 s16.

12 s33.

13 s34.

14 s32.

15 s36.

16 s36(1).

17 s36(5).

18 s51.

19 s49(1).

20 *Retirement Villages Act 1989* s14.

21 Code of Practice.

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The Committee can make a decision on a dispute or decline to hear and determine the matter.²²

Application to the Appeals Panel may be made where—

1. The Disputes Committee declines to hear or determine the matter;
2. Where a party is dissatisfied with a decision of the Disputes Committee; or
3. Where a party satisfies the Panel that it should deal with the dispute without the dispute being first heard by the Disputes Committee.²³

If both parties to a dispute are not satisfied with the decision of the Committee and the Appeals Panel and the dispute relates—

1. to the transfer of the residents accommodation from one kind to another;
2. to a claim that a residence rule is harsh or unconscionable; or
3. any other dispute that materially affects a party to the dispute.²⁴

then either party may apply to the Tribunal for a decision in respect of the dispute. The decisions of the Committee and the Panel are not enforceable so are not binding in any real sense. As such, their authority must, if it is to exist at all, be derived from the bipartisan nature of its membership and the fairness to all parties of any decisions. Therefore, there is an incentive for dispute committees and the Appeals Panel to seek decisions that are acceptable to all parties to disputes. This is in keeping with the co-operative approach and the modern trend to alternative dispute resolution.

THE SECOND TIER

The *Retirement Villages Act* 1989 gives the Residential Tenancies Tribunal jurisdiction over disputes between residents and operators,²⁵ except for disputes relating to any question as to title to land.²⁶ It is a pre-condition to jurisdiction that the dispute process under the code be exhausted, if applicable,²⁷ and that the dispute materially affects a party to the dispute or is otherwise in the public interest.²⁸ The Tribunal may order a range of remedies analogous to the normal legal and equitable remedies of Damages, Specific Performance and Injunction²⁹ but the Tribunal is not limited by the rules that normally constrain the granting of equitable remedies.³⁰ The tribunal may amend or repeal any rule of a village except by-laws under the *Strata Titles Act* 1973 or under any other prescribed Act.³¹

22 Ibid.

23 Ibid.

24 Code of Practice; *Retirement Villages Act* 1989 s(1).

25 s14(1).

26 s30(2).

27 s14(1)(b).

28 s14(2).

29 s14(3).

30 s14(4).

31 s14(6).

The Tribunal is limited in that it cannot make orders that are inconsistent with the Code of Practice or any provision of the residence contract that does not operate exclude the provisions of the *Retirement Villages Act* 1989.³²

The greatest benefit of the Tribunal is that it allows access to legal remedies in relatively informal and inexpensive proceedings. The Tribunal is not bound by the rules of evidence and must act according to equity, good conscience and the substantial merits of the case without regard to legal forms.³³ Parties must represent themselves unless represented by the Residential Tenancies Commissioner³⁴ or the approval of Tribunal is given for representation by another person.³⁵ The Tribunal must not make an order unless it has attempted to bring the parties to settlement.³⁶ Decisions of the Tribunal may be appealed to the Supreme Court on questions of law³⁷ and provision is made for applications to the Tribunal for the variation of existing orders.³⁸

In addition to the dispute procedures, the *Retirement Villages Act* 1989 gives further protection for residents by providing that:

1. residency rights cannot be terminated for breach of contract or on medical grounds without an order of the Tribunal;³⁹
2. the Tenancy Commissioner should investigate and attempt to resolve complaints by residents and operators with the power to prosecute if the Commissioner thinks fit;⁴⁰ and
3. the Tenancy Commissioner is empowered to represent a resident in any proceedings before the tribunal⁴¹ and may, with the consent of the resident, take or defend proceedings before the Tribunal.⁴²

The provisions of the Act cannot be contracted out of.⁴³

COMPARISON

The New South Wales approach is clearly superior in this area. As previously noted, access to legal remedies is of vital importance for consumer protection. The New South Wales scheme provides for both alternative and determinative methods of resolving disputes with a minimum of expense and formality. Of equal importance is that the crippling delays involved in normal litigation are avoided. The Queensland Act makes no provision for alternative dispute resolution. The power of the Registrar under s42 is important, but the procedures in New South Wales offer much greater benefits for both residents and operators.

32 ss 31 and 38.

33 *Residential Tenancies Act* 1987 s93(4).

34 *Retirement Villages Act* 1989 s8; *Residential Tenancies Act* 1987 s94(2)(b).

35 *Residential Tenancies Act* 1987 s94(2)(a).

36 *Ibid* s109.

37 *Ibid* s107.

38 *Ibid* s110.

39 ss 16, 17, 23 and 24.

40 s7.

41 s8.

42 s9.

43 s38.

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The one area in which Queensland leads New South Wales is the statutory charge. Lease or Licence tenure is, unless no premium is paid, an artificial title structured for the benefit of the operator. The residents' expectation of a return of capital is unsecured unless the cumbersome Trustee procedure is used. The statutory charge provides an ultimate protection of the residents' capital interest, though, as previously noted, in many circumstances the charge will not be an appropriate remedy it will be effective in such events as the financial failure of the operator.

Conclusion

It is difficult to argue that the New South Wales scheme is not superior in all areas. The Queensland approach largely relies on the approval process for ensuring that residency contracts are fair and properly disclosed to potential residents, this is no doubt effective to an extent but at significant economic cost. The Code of Practice and *Retirement Villages Act* 1989 provide a comprehensive scheme of consumer protection provisions which more than adequately guard residents in New South Wales and those residents have the added benefit of inexpensive dispute resolution procedures.

The New South Wales approach to resident participation in management and dispute resolution will provide a sound basis for co-operative relations between residents and operators.