

To SCOCA Australian Consumer Law Consultation: Competition and Consumer Policy Division:

I have only become aware of the existence of this review yesterday which I note was the closing date for submissions. Nevertheless, I trust you will accept this submission.

References:

\* High Court of Australia decision in the matter of *Murphy v Overton Investments Pty Ltd* [2004] HCA 3 of 5 February 2004.

\*Standing Committee Report on "Inquiry into Legal Needs of Older People" tabled in Federal Parliament on 20.9.07.

My submission relates to the lack of consumer protection for residents of retirement villages in all States but, in particular, my experiences while living in a village in Sydney from 1986 to 2008 when I moved to Brisbane.

While the terms of reference of the Standing Committee chaired by Mr Peter Slipper related to Commonwealth matters, residents of retirement villages throughout Australia made submissions to this Committee due to the failure of State Governments to afford consumer protection to residents of villages. The all parties committee included a specific Section 7 in its report that made a number of specific recommendations. In particular, Recommendation 45 (para 7.43) reads as follows:-

The Committee recommends that the "Australian Competition and Consumer Commission, together with state and territory fair trading offices or their equivalents, form a working party to examine the nature of retirement village contracts, with a view to improving consumer protection provisions." Recommendations 46, 47 and 48 are also relevant and I submit you should read Section 7 of the Standing Committee Report in full.

In the light of subsequent events, I question whether it is appropriate to involve the States in any deliberations. In the Legislative Council of NSW, during the recent debate on the Retirement Villages Amendment Bill 2008, the Shadow Minister for Fair Trading identified that the Minister for Fair Trading in NSW attended a luncheon arranged by village operators and made a sizeable financial contribution to the ALP.(NSW Legislative Council Notice Paper 23.10.2008) The Retirement Village Association (representing owners/operators) claimed credit for amendments made to the Bill by the NSW Government to amend certain provisions to require residents to pay 50% of the cost of capital replacements (as defined). Fortunately the publicity given to this matter enabled residents to complain about the change to the law that disadvantaged residents by varying the existing provisions of the Act. Finally the Government acceded to the criticism and at least the provisions were withdrawn.

However great conflict still exists between the terms of contracts signed by residents with operators and the State legislation that purports to over-ride the contract under Section 11 of the NSW Act. This has never been tested in the courts and hopefully never will as it would be a very, very costly exercise. There is nothing in the Retirement Villages Act 1999 (NSW) that confirms it is consumer protection legislation. There is nothing in Section 3, Objects of the Act, that refers to consumer protection, affordability and accountability.

In 1996, the operator increased the monthly fees (recurrent charges) by circa 150% while the CPI rose by 26%. The residents refused to accede to the demands of the operator who started legal proceedings against the residents in the Residential Tenancies Tribunal, the Supreme Court of NSW and later the Court of Appeal. The residents lost because the then Retirement Villages Industry Code of Practice Regulation 1995 that purported to be mandatory was found by the Courts not to over-ride the contracts. The residents found themselves in a position where many of them could be

bankrupted by the operator. It was decided that the residents lodge a claim in the Supreme Court for, amongst other things, misleading and deceptive conduct under the provisions of the Trade Practices Act. The primary judge found that there was misleading and deceptive conduct by the conduct but nevertheless ruled the claimant out of time indicating that, in his view, the damage occurred when the resident signed the contract. The decision was confirmed by two Full Court decisions of the Federal Court. Up to this time, there was no precedent in law relative to retirement village contracts. Finally the resident appealed to the High Court and, in terms of the reference given above, the High Court ruled unanimously and by all judges signing the single decision, that the damage occurred when the operator departed from the representations made to the resident on entering the village. In other words, the primary judge erred when he made his decision that the applicant was out of time. While winning this particular case, it did not benefit the residents as a group as there were a number of different versions of the village contracts (a deliberate decision of many operators) to avoid a class action. Every resident would have had to make a separate claim to the Federal Court in order to prove the representations affected his/her contract. Consequently, many residents avoided bankruptcy but the matter had to be settled out of court as it was impossible to afford separate actions against the operator. The law protected the residents in the final analysis but cost them dearly and some residents in the village have huge unpaid debts to the company for their legal expenses and these have been or will ultimately be deducted from their estates together with accruing interest on the debt. One Federal Court judge made the point that buying into a retirement village was not an investment but merely buying your final home.

As I had no relatives in Sydney, at 81 years of age, I made the decision to sell my unit and return to Brisbane where I had some relatives. I had to dispose of all my investments to complement the small return one gets when one sells a retirement village unit. When a resident buys a unit, you give an interest free loan to the operator who returns your initial sum on your death or transfer to a nursing home or on sale of the unit MINUS a departure fee of anywhere between 20% and 50% of the initial payment according to the terms of the contract.

I ask you to accept this late submission and to acknowledge receipt of this email. If I had more time, I could have amplified many of the above points and made other comments that would show how unfairly elderly vulnerable people are being treated. Nothing in the advertising of retirement villagers indicates the adverse financial conditions that apply - the sales pitch is always about lifestyle and golf courses and swimming pools etc. Many people in my age bracket do not go into these matters as thoroughly as they should. The Act requires a resident to seek legal advice before signing a contract. In fact, it is more important that you have an accountant who is able to get access to the accounts. There is nothing in the contracts or the legislation that entitles residents to see the accounts. In the Consumer Trader and Tenancy Tribunal, I was criticised by the Tribunal for trying to micro-manage the village. All I was trying to do was verify the costs charged to the residents were legally correct. I subsequently summonsed the accounts and found that the Repairs and Maintenance Account included the purchase of capital items such as stoves and hot water systems - items that should have been paid by the operator. Nothing in the NSW legislation permitted the Tribunal to instruct the operator that the expenditure to the residents was unlawful. Again failure to provide consumer protection.

I am available to provide additional information in relation to any of the above matters.

Signed Neville Carnegie

Chermside Qld 4032

Phone 07

Email [fredafred@bugpond.com](mailto:fredafred@bugpond.com)

Neville Carnegie