



THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Virginia McKay
Senior Policy Officer
Fair Trading Policy (Property Policy Branch)
Department of Services, Technology and Administration
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Dear Ms McKay,

Retirement Villages Regulation 2009 (Regulation)

Thank you for your email dated 11 November 2009 seeking the Law Society's view on an amount which represents an average or appropriate range of legal and other expenses incurred by the operator of a retirement village in connection with the preparation of a retirement village contract. This figure is required for the purpose of calculating a maximum prescribed amount to insert in clause 13 of the draft Regulation.

This issue was considered by the Law Society's Property Law Committee (Committee) at its November meeting.

Section 31 of the *Retirement Villages Act 1999* (Act)

Section 31 relevantly provides as follows:

- (1) *Legal and other expenses incurred by the operator of a retirement village in connection with the preparation of a village contract are payable by the operator and the resident concerned in equal shares (except as provided by section 30).*
.....
- (3) *The regulations may prescribe a maximum payable by a resident for legal and other expenses incurred by the operator in connection with the preparation of a village contract.*

Section 31 of the Act provides for legal and other expenses incurred by the operator in connection with the preparation of a village contract to be shared by the operator and resident, but also enables the regulations to prescribe a maximum amount payable by the resident. The proposed Clause 13 prescribes a maximum of \$200 as the amount payable by a resident for this purpose.

The proposed regulation reads as follows:

13 Amount Payable for Legal and Other Expenses

For the purposes of Section 31 (3) of the Act, the maximum amount payable by a resident for legal and other expenses incurred by the operator in connection with the preparation of a village contract is \$200.

The Regulatory Impact Statement released by the Office of Fair Trading (Fair Trading) with the draft Regulation for public comment notes that alternatives to clause 13 would be not to prescribe a maximum amount, or to prescribe a lower or higher amount.

The Committee notes that Fair Trading has received submissions from operator groups claiming that the figure of \$200 does not accurately represent the costs incurred in preparation of a legal contract and that a more realistic figure would be \$750 (representing half the average costs of a contract – said to be \$1,500).

Fair Trading has requested the Law Society to provide its view on the average and/or range of costs involved in the preparation of a contract, to “assist Fair Trading in determining the most appropriate figure and one which represents a fair and reasonable approximation of the cost incurred by operators in preparation of a retirement village contract”.

Committee’s view

Reasonable Costs

Retirement village contracts reflect the diversity and complexity of the arrangements under which the operators of retirement villages provide retirement village accommodation. As you are aware, such contracts can document the terms of transactions as varied as the purchase of a strata unit or a lease or loan arrangements. The diversity and complexity of both the transactions and the resulting documentation makes setting an average or even range of figures both unrealistic and undesirable.

The Committee concluded that it was unable to assist Fair Trading in determining a figure which represents a fair and reasonable approximation of the costs incurred by operators in preparation of a retirement village contract by providing an average figure and/or a range of costs in such preparation.

Cap of Two Hundred Dollars (\$200)

The Committee was unanimous in its view that a figure of \$200 plainly does not accurately reflect half the costs of preparation of any type of retirement village contract or indeed any other type of contract.

The Committee does not agree, in any event, that the imposition of a cap is an effective long term solution. Any figure enshrined in legislation can quickly become outdated.

Operator's Costs

The Committee considers that this issue would be better addressed by an amendment to section 31 of the Act providing that each party should pay their own legal and other expenses incurred in connection with the preparation and execution of a village contract.

The Committee is not aware of any policy considerations that would require residents to contribute to the legal or other expenses incurred by operators in the preparation of a retirement village contract. Committee members consider that this contractual relationship is akin to the relationship of vendor and purchaser in other real estate transactions. This being the case, the Committee members cannot conceive of policy considerations that would require elderly retirees to contribute to the legal costs of commercial or other entities operating retirement villages.

The Committee is aware that the failure to impose a cap, in the absence of amendment to the Act, will leave residents paying some hundreds of dollars towards the legal and other expenses of retirement village operators. The Committee considers however, that rather than attempting to remedy this through imposition a cap in the regulations, a more effective long term solution is to amend the Act as suggested above.

Conclusion

If you wish to discuss the matters raised in this submission, please contact Ms Liza Booth, Executive Member of the Committee by telephone (02) 9926 0202 or by email to liza.booth@lawsociety.com.au

Yours sincerely



Joseph Catanzariti
President