



SPRING 2008

Retirement Villages - Current Trends in Australia

By Lorna Gelbert, Partner & Sue Harris, Senior Associate

Retirement Villages are now big business, with the Retirement Village sector set to continue growing rapidly over the next 15 to 20 years.

In the 1970s and 1980s, not-for profit organizations and private operators, with one or several villages in a single State, dominated the industry. While there is still a large number of single owner villages, (representing around 70% of all owners¹), the industry is now becoming dominated by a smaller number of public investment entities owning and/or operating resident-funded villages.

For these larger players, retirement villages are generally bigger, providing economies of scale on development and greater profitability for management. For lawyers, this means acting on the acquisition, development and disposal of very substantial real estate assets.

Resident-funded villages generally operate under a loan-lease or loan-licence arrangement where the profitability for owners and operators resides in the departure fees and the share of capital gain that the owner retains for itself at the end of the agreement. Departure fees are not regulated by law but by the market. They are set out in resident agreements and can range from 25% to 45% of either the outgoing resident's ingoing contribution or the ingoing contribution paid by the new resident, with or without participation in the capital gain.

¹ Property Australia, Property Council of Australia, 7 March, 2008 citing references to the Jones LaSalle National Retirement Living Database



The type, structure and complexity of resident agreements vary widely from village to village and from State to State in order to comply with various States' retirement village legislation. Given that an ageing resident is always one of the parties to a resident agreement, it is not surprising we are seeing an increase in consumer protection in this area with codes of practice and stringent disclosure obligations being imposed through legislation and regulations. In Victoria, for example, the industry is awaiting the introduction of standard provisions, currently being drafted, which the regulations will require be included in resident agreements.

Uniform legislation across all States is being mooted but is not yet a serious proposal. It would be of enormous advantage to those owners and/or operators who operate villages in a number of States. It would also allow for the introduction of a standard form resident agreement, similar to standard form sale of land contracts. *Continued on page 4 ...*

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Regulation of Management Rights Schemes in Victoria

► By Vanessa Johnston, Lawyer

The use of on-site managers is commonplace in the serviced and holiday apartment industry throughout Australia. However, many operators and owners are unaware of the overarching regulatory regime imposed on Management Rights Schemes under the Corporations Act 2001 (Cth). Until recently it has been difficult to establish and operate Management Rights Schemes in Victoria as, unlike other states, a full real estate agents licence was required. Following a relaxation of the requirements of the Estate Agents Act 1980 (Vic), we are seeing an emergence of these Schemes in Victoria.

Management Rights Schemes, or schemes under which apartment or unit owners pool their apartments together to be let and maintained by an on-site manager are regarded as managed investment schemes by the Australian Securities and Investments Commission (ASIC). Managed investment schemes are strictly regulated under the Corporations Act, which places substantial obligations and disclosure requirements onto a Management Rights Scheme operator. For many, compliance with these obligations and requirements would outweigh the benefit of operating this type of business or using this type of arrangement on a small scale.

However, the requirements of the Corporations Act need not be complied with where the Management Rights Scheme complies with ASIC Class Order 02/305. This Class Order prescribes how owners may enter and exit the scheme, what types of payments are allowed and how management rights can be transferred. If owners and operators comply with these requirements, their scheme will be exempt from registration under the Corporations Act and the operator will be exempt from holding an Australian Financial Services License.

Where the onsite manager also performs letting duties on behalf of the owner, provisions in the Estate Agents Act will restrict the performance of their duties. Where the onsite manager provides services to an Owner's Corporation, both parties need to also be aware of the relevant provisions in the Owner's Corporation Act.

On the one hand it is important that onsite managers, owners and brokers understand how Management Rights Schemes are regulated in general, and are aware of, and comply with, the additional requirements placed on Management Rights Schemes in Victoria. On the other hand however, it is equally important to realise that this task is not impossible if the commercial arrangements between the manager, the owners and the owners corporation are properly documented and comply with the ASIC requirements. ■

Alert!

The next Madgwicks forum will be a joint Property & Construction and Financial Services Forum in a Madgwicks first! It will be held on Wednesday 26th November from 5:30pm at Madgwicks offices in William Street. The topic 'Riding the Storm: Surviving These Wild Times' will be presented by Hugh Giddy, Managing Director of Cannae Capital Partners. To register please contact Penny Thomas on 03 9242 4776 or at penny.thomas@madgwicks.com.au



Spotlight: Lorna Gelbert, Partner

Lorna Gelbert joined Madgwicks in 1996 and is a Lead Partner in Madgwicks' Property & Construction division. Lorna has over 30 years experience working on a wide range of property matters. She spends her busy days at Madgwicks advising mainly property trusts on large transactions. Lorna's special interest is in aged care and retirement villages. She has carried out the acquisition, development and sale of many facilities and advised on the related commercial agreements. In her 'spare time' Lorna is a keen viticulturalist, owning a winery with her son at Buxton in the Acheron Valley where she spends time among the vines with her family. ■



The Margin Scheme and Subdivided Land

► **By Michael Norbury, Partner**

Developers and home buyers alike have welcomed the decision of the Full Federal Court in *Brady King Pty Ltd v Commissioner of Taxation* [2008] FCAFC 118.

The Full Federal Court found that the margin scheme applied in circumstances where property was subdivided by the developer. Specifically, a developer purchased a 17-storey office block in King Street, Melbourne. The contract to purchase was signed and deposit paid prior to the introduction of GST, but the developer did not gain access to nor did he complete the purchase until after the introduction of GST.

Subsequent to the registration of the developer as owner, the King Street property was converted into about 158 residential units, the units were strata subdivided and all but a handful were sold. The argument that the strata unit is a different asset from the land originally purchased, and therefore the margin scheme cannot apply was accepted by a single Judge of the Federal Court, but then subsequently rejected on appeal by the Full Federal Court.

The Full Federal Court specifically found that there was a sufficient connection so that the strata

units could be regarded as being owned by the developer prior to the introduction of GST, so the margin scheme applies. They also found that the appropriate value upon which the margin was calculated was the value of the strata unit at the introduction of GST, even though the strata unit did not exist at that time, not the actual purchase price of the King Street building. The actual price paid for the King Street building was lower than a valuation valuing the units as at 1 July 2000 (the date of introduction of GST). So the margin, the difference between the purchase price of the King Street building and the actual sale price of the strata units, was greater than the margin calculated as the difference between the deemed value as determined by valuation of the strata units and the actual sale price of those units.

Since GST is paid on the margin, a higher 1 July 2000 price (i.e. the value of the strata units) means less GST is payable.

The approach taken in the *Brady King* decision however is restricted to GST, and should not be seen as altering the approach taken for stamp duty of real property law, where a subdivision does create new assets. ■



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What is clear from the demographers and commentators is that the industry is and will remain highly dynamic. The type and style of villages is changing. Commentators are discerning a clear divide between the market for retirees in the under 75-age group and those in the older age bracket. The retirees in the younger age group are tending to opt for a "sea change". Villages catering for this group now have a resort feel with larger homes and more sophisticated communal facilities. Retirees in the older age bracket are tending to settle in larger centres of population closer to high quality medical facilities². Villages that provide for ageing in place with transition to various levels of aged care within the same facility continue to target the older age bracket of the market with great success. Operators report that retirees in both age brackets are becoming more sophisticated and require a higher level of service and greater value for money than the retirees of earlier decades.

A number of "villages" comprising ground leases and

² Taken from a recent address regarding demographic trends in Victoria, given by Andrew Giles, MacroPlan, Australia (April 2008)

re-locatable homes are also being developed using a model developed in the caravan park industry. "Rental villages" which, owing to the absence of an in-going contribution, are usually not regulated under retirement village legislation are found in most Australian states. At present such villages tend to cater to the low-cost end of the market for retirees, however, higher end rental models with assisted living following an American model are also being introduced into Australia. Vertical villages in highly sought-after suburban locations are usually targeted at the higher end of the market.

These existing and new trends offer challenges for all those involved in the industry - owners, developers, operators, architects, financiers, accountants, valuers and lawyers.

Madgwicks has an excellent reputation for assisting clients in the acquisition, development and management of retirement villages and aged care facilities. Contact Lorna Gelbert on 03 9242 4763 or Sue Harris on 03 9242 4758 for more information. ■

About Madgwicks

Madgwicks is a progressive business law firm servicing local, national and international clients. Our personnel pride themselves on responsive legal services driven by a passion for client success. Our lawyers strive to provide accessible and professional legal solutions, and partner with our clients to work with them in achieving their business objectives.

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Leasing
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