

## Aged Care

March 2010

### Update – Unfair Contracts Regime

The unfair contracts regime was introduced into Parliament on 24 June 2009. It makes major changes to Australian consumer laws and is contained in various pieces of legislation, including the *Trade Practices (Australian Consumer Law) Bill* ("the Bill"). This update explains the impact of the Bill and clarifies how the regime will apply.

The Bill will, amongst other things, introduce new unfair contract terms into both the *Australian Securities & Investment Commission Act* ("ASIC Act") and the *Trade Practices Act* ("TPA"). The Bill has not yet been passed and is currently before the Senate.

There is much confusion regarding which piece of legislation governs unfair contracts. It is important to understand that the changes to the TPA and the ASIC Act apply to different industry sectors. Both pieces of legislation (when they come into force) will allow for unfair terms in standard form contracts to be declared invalid. However, the ASIC Act will regulate *financial* services contracts, whereas the TPA will apply to *goods and non-financial* services contracts.

Note that a standard form contract is one which is generally prepared by one party prior to the existence of a transaction with the other party. Please refer to our article in the July 2009 aged care briefing (which can be accessed on our website) for a detailed explanation of what is a standard form contract.

#### Amendments

The Bill has been amended several times. The main amendment relates to the issues which must be considered when determining whether a term in a standard form contract is unfair. The Bill currently provides that a term in a contract is unfair if:

- it would cause a significant imbalance to the parties' rights and obligations
- it is not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term
- it would cause detriment to a party if it were to be applied or relied upon

Previously, it was only necessary to show that a term had a *substantial likelihood* of causing detriment. The fact that actual detriment is now an element of the unfairness test makes it harder for a person to show that a term is unfair.



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In addition to the above amendment, the Bill now clarifies that the unfair contract provisions will only apply to contracts entered into, and contractual terms varied, on or after the commencement of the Bill.

### Proposed Amendments

It was initially intended that the Bill would commence on 1 January 2010. However, this has been delayed by the proposal of further amendments. The proposals include:

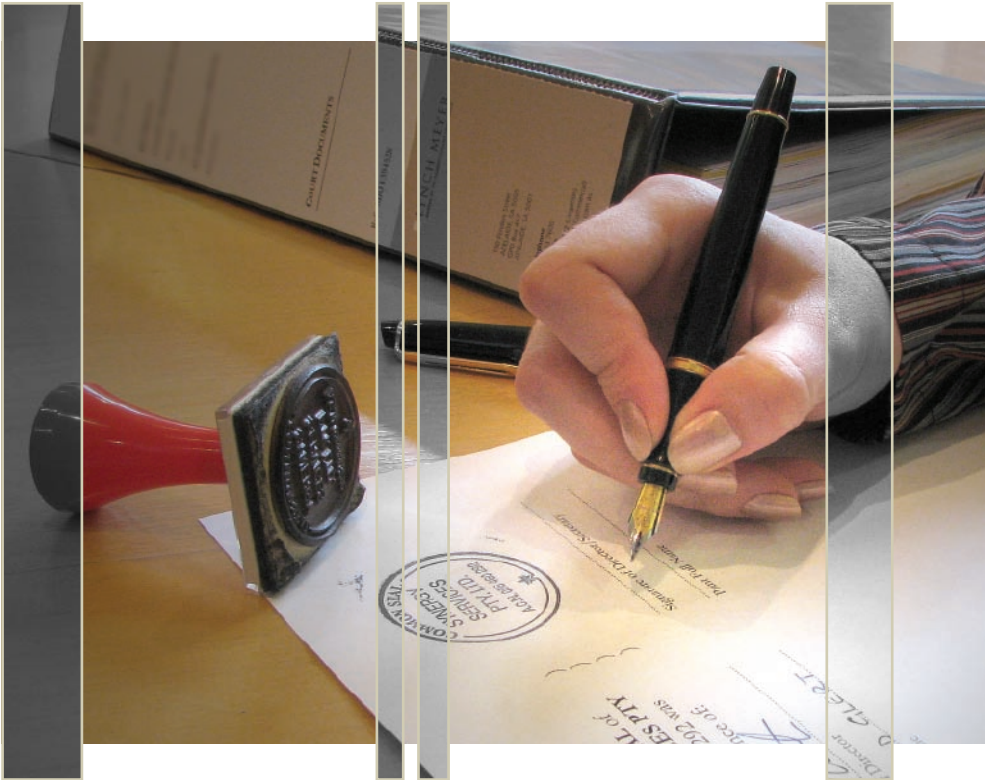
- extending the Bill to cover consumer contracts with corporations where the upfront price of the contract is less than \$2 million (the Bill currently applies to consumer contracts where the service or product supplied is largely for personal, domestic or household use)

- providing for "safe harbour" terms which are approved by the ACCC or ASIC to be exempt from the Bill
- extending the Bill to cover insurance contracts

Parliament will debate the proposed amendments to the Bill in early 2010 and it is intended that it will commence before or on 1 July 2010. Once the Bill is passed it will introduce civil penalties and new remedies for consumers. So be prepared and start thinking about the changes now as 1 July is not far away.

### Action items

- If you are affected by the Bill, you should take advantage of the delay and carefully review all of your standard form contracts.
- It is important to ensure that your contracts do not contain terms which may be found to be unfair. This is crucial given the financial ramifications which may be imposed for a breach. Please seek our legal advice if you are unsure whether your contracts comply with the Bill.



# Older People and the Law Report: The Government's response



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The Federal Government has responded to the Older People and the Law report, issued by the House of Representatives Standing Committee on Legal and Constitutional Affairs. In its response, the Government has raised issues which will affect retirement village operators.

## Key Points

- **Contracts:** The Government's response indicates that it sees the proposed Australian Consumer Law legislation as an important way of regulating unfair terms in retirement village residence contracts on a national level.
- **Fees and disclosure:** State-based Consumer Affairs offices may work together in the future to review fees charged under residence contracts (including deferred management fees) and to consider ways to harmonise disclosure arrangements and standard contract terms. The Victorian and New South Wales Consumer Affairs offices have already announced a joint project to address some of those issues.

## Overview of Issues

Issues raised in *Older People and the Law* (the Report) concerning the regulation of retirement villages include:

- the adequacy of consumer protection provisions in residence contracts;
- the appropriateness of fees commonly charged under residence contracts, including exit fees (usually referred to in South Australia as deferred management fees) and whether those fees should be prohibited;
- whether the concept of a *statutory supervisor*, as used in the New Zealand model of retirement village regulation, could be adopted in retirement village regulation in Australia; and
- harmonisation of retirement village legislation across states.

## Residence contracts and unfair terms

Recommendation 45 of the Report states:

*The Committee recommends that the Australian Competition and Consumer Commission, together with the 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.*

In its response, the Government agrees in principle with such a review. The government indicates that the Australian Competition and Consumer Commission (ACCC) is not the most suitable agency to do so. Instead, the Government notes that:

*The COAG-agreed Australian Consumer Law (ACL) will create an economy-wide consumer protection regime, including provisions regulating unfair contract terms in standard form consumer contracts, which will apply to retirement village contracts in conjunction with any sector-specific regulation which might apply.*

*The recommendation for a working party to examine the nature of retirement village contracts will be raised with the Standing Committee of Officials of Consumer Affairs.*

it is interesting to note that the New South Wales Fair Trading Office and its Victorian counterpart have proposed to work together to develop consistent disclosure documents and prescribed contract terms for retirement village residence contracts.

### Deferred management fees

Recommendation 46 of the Report states:

*The Committee recommends that, in its review of retirement village contracts, the ACCC and state and territory fair trading offices also review all aspects of 'exit' and other fees associated with such contracts, including whether they should be abolished.*

In its response, the Government partially accepts this recommendation and repeats its comments in relation to Recommendation 45.

### Statutory Supervisor

Recommendation 47 of the Report states:

*The Committee supports the concept of a statutory supervisor and recommends that the Ministerial Council on Consumer Affairs examine the New Zealand model to determine its applicability to retirement villages in Australia.*

The Government accepts this recommendation.

### Harmonisation of retirement village legislation

Recommendation 48 of the Report states:

*The Committee recommends that the Standing Committee of Attorneys-General examine ways in which greater harmonisation of legislation regarding retirement villages could be pursued.*

In its response, the Government accepts this recommendation in principle and notes that it will refer the matter to the Ministerial Council on Consumer Affairs. The Government also points out that the New South Wales, Western Australian and ACT governments are currently reviewing the regulation of retirement villages in those states.



In this regard, it is interesting to note that the New South Wales Fair Trading Office and its Victorian counterpart have proposed to work together to develop consistent disclosure documents and prescribed contract terms for retirement village residence contracts. In a Regulatory Impact Statement on the Retirement Villages Regulation 2009 (NSW), the New South Wales Fair Trading Office notes that 'this approach would result in a superior outcome for prospective residents and significant cost savings for operators who have villages in both jurisdictions. Consequently, it is proposed that the Regulation will be amended in 2010 to implement the new harmonised requirements once they have been developed.'  
(NSW Government Fair Trading Office, Regulatory Impact Statement to the Retirement Villages Regulation 2009 (October 2009), page 24.).

## Conclusion

Although unified national legislation for retirement villages is unlikely in the near future, it appears that the Federal Government wishes to use the proposed Australian Consumer Law legislation to address the adequacy of consumer protection in residence contracts on a national level.

In addition, it appears that the various state Consumer Affairs offices may work together to:

- harmonise disclosure requirements and standard contracts terms; and
- consider the merits of fees charged under residence contracts, including deferred management fees.

Full copies of the Report and the Government's response are available at the following address:

<http://www.apf.gov.au/House/committee/laca/reports.htm>

We will keep you informed of developments in relation to the Australian Consumer Law legislation and the Government's response to the Report.



## Mandatory Disclosure of Energy Efficiency – are you ready?

**By mid 2010 we are likely to see new legislation making disclosure of the energy efficiency of any commercial office building – with a net lettable area greater than 2,000M<sup>2</sup> – a mandatory requirement upon the sale, lease or sub-lease of that building.**

As currently proposed, a valid building energy efficiency certificate (valid for 12 months) and an assessment report (valid for 7 years) must be provided to prospective buyers and lessees at the point of sale and lease. The assessment report is to include: a National Australian Built Environment Rating System star rating; an assessment of the lighting energy efficiency of tenancies; and some suggestions on how to improve the building's energy.

### Calculating the rating

Buildings will require an energy star rating on a scale of one to five calculated *"by adding up the amount of each form of energy consumed by the building or tenant to calculate the level of greenhouse gas emissions, adjusting raw emissions figures to take account of hours of use, occupant and equipment density and climate, dividing the "normalised" emissions figure by the rated area to give the emissions per unit of rated space and comparing the emissions per unit of rated space against bench marks to award a star rating"*. That rating will be contained in the energy certificate and must be disclosed in any advertisement for the building.

The assessment report and certificate will need to be provided to potential purchasers and tenants and to a central registry.

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As building owners, potential purchasers and tenants you should be prepared for increasing regulation in this area and should address the energy efficiency of your building or tenancy as a matter of course.



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### Exemptions

While some buildings falling within the above categories will be exempt, those exemptions are likely to be for a limited period and the scope of the legislation will be widened, potentially to include residential buildings. It is not clear whether an aged care facility may be a "commercial office building", but it certainly does not currently fall within the exemptions. Although a facility is unlikely to be an "office" building, why is it then necessary to exempt a "place of worship"?

With energy efficiency a global issue, requirements such as these are not likely to go away. As building owners, potential purchasers and tenants you should be prepared for increasing regulation in this area and should address the energy efficiency of your building or tenancy as a matter of course.

### Be prepared

If you are the owner of a commercial office building with a net lettable area greater than 2,000M<sup>2</sup>, you will have mandatory energy efficiency disclosure requirements and will have to cover the cost of an energy efficiency assessment, certificate, and any upgrade costs. As a potential purchaser, you will need to make allowance for the additional time and due diligence required for an assessment report.

If you have any queries please do not hesitate to contact Kathryn Walker. We will be happy to run a seminar on the topic if enough people indicate their interest.

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## SENIOR APPOINTMENTS



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Rebecca Barr returns to Lynch Meyer.

Lynch Meyer is delighted to have Rebecca Barr back on the team, where she has returned as a Partner. Rebecca has spent the past three years in Brisbane honing her skills at one of Australia's largest law firms.

Rebecca is a property lawyer specialising in retirement villages and aged care law. She advises on the sale and acquisition of retirement villages, aged care facilities and other commercial properties. She conducts regulatory due diligence on retirement villages and aged care facilities and advises on regulatory compliance and other issues relating to the Aged Care Act and the Retirement Villages Act.

Rebecca has advised on a number of significant transactions in the retirement villages and aged care sectors, including one involving over 40 aged facilities across a number of states. Most recently, she has advised on an acquisition of 13 retirement villages and aged care facilities situated across South Australia, Victoria and New South Wales.

When asked about the type of work she has been exposed to in the past few years she said:

"I have advised on issues relating to retirement villages and aged care facilities in Queensland, New South Wales, Victoria, Tasmania and South Australia. A large part of that work involved mergers and acquisitions of portfolios of villages and facilities, some of those being national portfolios. I've also worked with the banking and finance and insolvency teams of my previous firm in relation to refinancing of retirement villages and aged care facilities, and villages and facilities in financial difficulty.

"While working in Brisbane, I was a member of the Aged Care Queensland Retirement Village Committee and the Queensland Law Society Elder Law Committee. I enjoyed those appointments as they enabled me to work closely with other members of the retirement villages and aged care industries on current and emerging issues in Queensland and other eastern seaboard states."



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David Martin has been appointed to our family law practice following the retirement of Jill Cooper. David is a senior practitioner in family law with 25 years experience. David advises clients in all areas of family law and has acted as counsel in the Family Court, Federal Court, Supreme Court, District Court and Industrial Court.



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Jody has been practising since 1998. She spent several years as Legal Counsel with the Real Estate Institute of South Australia and has a strong background in property, and planning and environmental law. Jody specialises in advising developers on planning, development, environment, Local Government, Native Vegetation and Water Licensing issues.

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