LYNCH MEYER
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briefing

Aged Care

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Are your residence contracts unfair?

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Until now, all operators of retirement villages and aged care facilities would answer an emphatic "No!". From 1 January 2010, you had better be right.

The reason for this is that the Commonwealth Government is about to introduce legislation which gives protection to businesses and consumers from unfair contract terms.

An initial draft of the legislation is available but it is still subject to change by the Parliament. However, given that the commencement date is about 6 months away, we thought it was best that you were aware of the thrust of the proposals and we can fill you in on the exact legislation once it has been passed.

The legislation will protect consumers and small businesses from unfair contract terms contained within standard form contracts (ie. not negotiated contracts) and this will be national legislation.

Without question, a residence agreement under the *Retirement Villages Act*, a residence or community care agreement under the *Aged Care Act*, and a residence agreement under the *Supported Residential Facilities Act*, are clear examples of standard form contracts.

The law will apply to all new standard form contracts of less than $2 million in value entered into after 1 January 2010, or which are renewed or varied after that date.

A term is unfair when:

- It does or could cause a significant imbalance between the respective parties' rights and obligations under the contract; or
- The term is not reasonably necessary to protect the interests of a party who is advantaged by the term

There is a legal presumption that a contract is in standard form, and it would be up to you to show that the contract was negotiated between you and the resident or the resident's representatives.

When considering if a term is unfair a court is required to consider the following factors:

- If the term will cause detriment if the term is relied upon, or if there is a substantial likelihood that a term will cause detriment if relied upon. (Note that actual detriment is not required)
- The extent of the transparency of the term (ie. is it written in plain English)
- The contract as a whole

Action items for operators

- Make sure your contracts are written in plain English
- Ensure that any key financial clauses in your residence contracts are fair

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I can see some residents' beneficiaries utilising this law to argue that retention amounts and deferred management fees clauses are unfair.

In some ways, the legislation treats a contract as a guideline to a party's rights to be ultimately determined after litigation or negotiation.

Is the sky about to fall in? Maybe not. The United Kingdom has had similar legislation as has Victoria for the best part of 10 years. However, in those circumstances, the contracts were limited to contracts between a consumer and a business. Here on the other hand, the legislation can, for example, apply to a valuable contract between an aged care operator and the provider of catering services.

Also, the law has for many years provided that if a clause in a contract is "harsh or unconscionable", then the court can set aside the clause or award damages etc. In a similar way, Section 27 of the Retirement Villages Act says that a harsh or unconscionable residence rule is void.

Section 38 of the Building Work Contractor's Act says that a term of a domestic building work contract which is harsh or unconscionable enables a court to grant relief.

But there is a vast difference between an unconscionable contract and an unfair one, particularly based on the above definitions.

What should you do?

Firstly, make sure that your contracts are written in plain English. If you are a Lynch Meyer client and have used one of our original drafted documents, then your documents are in plain English. If you haven't used us, perhaps you should!

Secondly, ask yourself a hard question as to whether key financial clauses in the contract could be deemed to be unfair. For instance, is it really fair to say in a private retirement village operator's contract that you will only pay back the loan if you have not sold the unit within 5 years of vacation? What if such a clause is found to be unfair? What are the ramifications for all of the other contracts in your village? What is the effect upon the deferred management calculation used by your valuer to determine the value of your village?

> "…the Commonwealth Government is about to introduce legislation which gives protection to businesses and consumers from unfair contract terms."

Site contamination legislation is here!

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At the heart of every retirement village and aged care operator's business is the ownership of land, so operators need to be aware of the implications of the *Environment Protection (Site Contamination) Amendment Act 2007*.

This legislation has had a gestation period of several years and late last year some parts of the legislation, principally dealing with definitions, came into effect. However, the most significant aspects of the legislation came into effect on 1 July 2009. These deal with issues such as: determining who has caused site contamination, the ability of the Environment Protection Authority to issue assessment and remediation orders, and the transfer of liability from a seller of land to a purchaser. Some parts of the legislation have retrospective effect.

Lynch Meyer will run an education program on the legislation for our many property, building, retirement village and aged care clients. Stay tuned for the details.

Resident records – who owns them and when they can be disclosed

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In recent months a number of aged care providers have been faced with requests for the release of resident records. Many of these requests have come from family members.

Aged care providers must know their privacy obligations regarding resident records. Disclosure of records to third parties may be a breach of privacy and result in significant penalties. Resident records may contain information which a Provider would prefer not be disclosed. It is important that providers know when they are entitled to refuse a request for disclosure of information.

The *Aged Care Act* and *Privacy Act* (the Acts) impose privacy obligations on aged care providers in relation to resident records. The Acts apply to information that is personal, that relates to the provider's affairs or is defined as "health information" due to it being connected to the resident's health or care services.

The privacy obligations only apply where a person can be identified from the information.

Ownership of resident records

Aged care providers collect health information and hold resident records. As such, providers are considered to own the information and are responsible for determining who is able to access the records. However the Acts provide that individuals also may have access to their own records and information.

Disclosure to third parties

The Acts say that personal information must only be used for:

- a purpose connected to the provision of aged care to the resident or
- the purpose for which the information was collected (providing the resident would reasonably expect the disclosure).

The Acts do not aim to deny third parties access to records if the party is acting in the best interests of the resident. There are circumstances when disclosure is permitted for purposes other than those listed above.

For example, if there is an allegation of professional misconduct, disclosure is allowed if it is:

- to an authority or tribunal responsible for investigating breaches of standards of professional conduct and
- necessary for the investigation.

Note also that documentation containing personal information must be disclosed to the Court if required by subpoena or Court order. However, even if faced with such an order it is only necessary to provide the documents identified in the order.

Disclosure may also be made to a person responsible for a resident, including a child or spouse if it is necessary for the appropriate care of the resident, or is made for compassionate reasons.

We recommend that you seek advice whenever you are faced with a request to release resident records.

Can payroll tax be a recurrent charge? The NSW Tribunal says "yes"!

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A recent case in the NSW Consumer, Trader and Tenancy Tribunal concludes that a retirement village operator may recover the impost of payroll tax from retirement village residents as part of the maintenance fee. This case also clarifies the principles for allocation of costs between villages where an operator has more than one village.

In *Australian Retirement Homes (No 2) Pty Ltd v Minkara Retirement Village Resident Committee RV 0841351* the retirement village operator sought approval of its Statement of Proposed Expenditure for the 2008/09 year. This Statement included the item of payroll tax. The nature of the operator, through its corporate structure and operation of multiple villages, gave rise to the liability for payroll tax – the operator apportioned the payroll tax so that the residents' responsibility extended only to the wages of the employees of this particular retirement village.

The Residents' Committee claimed that the residents should not be responsible for the payroll tax on the wages of the employees of the village as the liability arose from the corporate structure of the operator.

The important question is this: can the liability for payroll tax - incurred by operating more than one village - be passed to the residents by way of a recurrent charge and included in the statement of proposed expenditure?

The Tribunal decided that payroll tax is an item which may be a recurrent charge in respect of wages and salaries where it is a result of the corporate structure of the operator. Therefore, an operator can include payroll tax on the wages of employees of a village, in the proposed expenditure on which the maintenance fee is calculated.

Implications/Lessons for Operators

- Operators of more than one village may be able to apportion certain items of expenditure between villages so long as the method of calculating the apportionment is disclosed to the residents.
- Recurrent charges, such as payroll tax, sought to be recovered from residents through maintenance fees must be included in the proposed expenditure for that year.
- Operators must ensure that the costs of living in the retirement village are transparent through the preparation of detailed statements of proposed expenditure.

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