MHOA (VIC)

Manufactured Home Owners Association (Vic) Inc
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9 December, 2022

TO:

Australian Securities and Investments Commission (ASIC)
Commissioner Sean Hughes
Commissioner Danielle Press

ACCC
Gina-Cass Gottlieb, CEO

Minister for Housing the Hon Danny Pearson

As a newly formed association advocating for manufactured home owners throughout Victoria, we recently wrote to the ACCC regarding unconscionable contracts. The ACCC recommended we write to you to determine if our beliefs that many leases given to residents by numerous owners are in fact unconscionable.

Our association has evolved out of necessity to protect older residents in manufactured home villages (MHVs) from the continuing neglect of our legislators throughout the years. It is common for rental providers to ignore complaints from residents or respond with threats and intimidation. It is also common for residents to believe that if they complain, they will be the subject of intimidation or they may be evicted.

Two of our committee members have participated on the Residential Tenancy Commissioner's Advisory Group for the last three years, advocating for the rights and protections of older Australians who live in MHV villages. These residents have been forgotten.

The Manufactured Home Owners Association of Victoria Inc (MHOA) Executive would like to bring to your attention the huge difference in the site rental agreements (also referred to as site agreements) used by MHVs in Victoria.

Living in a MHV means the resident owns a moveable dwelling (also called a manufactured home or relocatable home), and rents the underlying site (land) where the dwelling (home) is located. Residents are generally 55+, not wealthy and have chosen an MHV as an affordable retirement housing option providing both independence and access to a village community.

After listening to members' concerns living in several different villages, MHOA Executives have discovered that the problems of multiple site rental agreements with varying conditions, even within a single village, is widespread throughout most Victorian villages. For example, Kingsgate Kilmore, Summerhill Residential Park Reservoir, Ingenia Federation Villages Glenroy and Albion and Palm Lake Resort Bangholme each having multiple different agreements in use.

Manufactured home villages in Victoria are not required to be registered or regulated - technically falling under legislation covering caravan parks. As a result, operators are able to increase fees or make changes in contracts without scrutiny.

As Australia's population ages, the MHV sector is undergoing rapid growth. This is why many other Australian states have introduced dedicated legislation regulating MHVs.

MHOA believe that the site supplied by us for your perusal fit the criteria as defined on the ASIC website advice.

The MHV site rental agreements are written with an imbalance of power heavily loaded in favor of the village rental providers. There is a significant imbalance in the parties' rights and obligations arising under these contracts. What protection do the residents have? **None,** and no one seems to care.

Knowing that the Law Institute represents more than 19,000 professional lawyers in Victoria, have no exposure to Residential Tenancies Act – Part 4A legislation, including their committee members, how is an elderly pensioner supposed to understand what they are actually signing? It seems ludicrous to us. Refer to attachment (1) – Pages 3 and 4.

To assist with this process MHOA are enclosing just a few redacted contracts from different villages for ASIC to examine with a view to improving protections, keeping in mind that in the end the prospective resident signs the documents in good faith and hopes that the village rental provider has acted in good faith, which is often not the case.

MHOA believe that manufactured home villages' site rental agreements need to be scrutinized, with action taken for any unconscionable contracts found. If there is no accountability the industry will continue to go on its merry way while the industry grows and there will be no way of cleaning up the mess made by the neglect of our legislators.

If ASIC decides to adopt the recommendation of the inquiry and look into site rental agreements, MHOA will work with ASIC and provide documentation required to address and correct the issues that have been of concern to the residents in MHVs over a number of years and have never been addressed.

We firmly believe in a resolution where village residents are safe, empowered and live free from exploitation without disadvantaging village rental providers.

We look forward to hearing from you.

Yours faithfully,

Judy Duff
President MHOA (Vic) Inc
RTA 4A Village Resident
Rental Advisory Group Member- Commissioner for Residential Tenancies

Encl. Supporting references – Attachment (1)
Redacted copies of Leases:
Attachment (2) Kingsgate Village, Attachment (3) Federation Village Albion,
Attachment (4) Federation Village Glenroy, Attachment (5) Walter Elliott Holdings Willow Lodge,
Attachment (6) Palm Lake Resort Bangholme, Attachment (7) Summerhill Residential Park,
Attachment (8) Pelican Shores Leopold, Attachment (9) Gemlife Woodend.

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ATTACHMENT TO LETTER

9 December, 2022

UNCONSCIONABILITY UNDER THE AUSTRALIAN CONSUMER LAW (ACL)

The ACL deals with unconscionability under ss20 and 21. In *ACCC v Get Qualified Australia Ltd (No. 2)*[15] Beach J outlined the approach to be taken in order to understand the concept. He noted at para [60] that: '"unconscionability" means something not done in good conscience or conduct against conscience by reference to the norms of society'. The test is high. In determining whether conduct is unconscionable.

In particular the ACL contains a number of provisions that govern unfair contract terms. These provisions only apply to certain types of contracts. For present purposes the most relevant of these categories is contracts that are consumer contracts. 'Consumer contract' is a defined term under the ACL: the contract must be for a supply of goods or services or a sale or grant of an interest in land. The contract must also involve an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. Residents of retirement villages enter into a consumer contract when they sign a service agreement or a lease over their unit.

Section 23 of the ACL provides that a term of a consumer contract is void if:

(a) the term is unfair; and

(b) the contract is a standard form contract.

Standard form contracts are defined under s27 and are usually easy to identify.
Most relevantly for present purposes, s24 defines a term as unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

UNFAIR UNDER ASIC

Only a court can determine whether a contract term is unfair. A term in a standard form consumer contract is 'unfair' if :

*a) it would cause a **significant imbalance in the parties' rights and obligations** arising under the contract*

*b) is **not reasonably necessary to protect the legitimate interests** of the party that would benefit from the term, and*

c) *would **cause detriment** (financial or otherwise) to a consumer if it were to be applied or relied on.*

See The House of Representatives Committees Report - Chapter 7 on retirement villages be investigated, recommendation 45.

Recommendation 45

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****.*

7.56 The Committee is concerned about a lack of transparency in regard to the setting of the level of these fees and charges and the lack of discretion in their application. The Committee believes that, as part of the review of retirement village contracts (Recommendation 45) ***the ACCC should consider all aspects of 'exit' and other fees, including whether they should be abolished.***

Recommendation 46

7.57 The Committee recommends that, in its review of retirement village contracts, the Australian Competition and Consumer Commission 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.

Submissions to Legislative Council Legal and Social Issues Committee Inquiry into the Retirement Housing Sector 2016

*Leases/Contracts -****Mr Ben Cording, Principal Solicitor at the Tenants Union*** *of Victoria, said a similar argument could be make about caravan park contracts.*

Mr Cording told the Committee*: "I have seen a plethora of agreements that contain egregious terms and it is very difficult – even for me with eight years of uni and all of that – to identify what the actual net cost is."146 Similarly, with residential parks. Leases/Contracts –*

Jeavons from the Peninsula Advisory Committee for Elder*s said "… many residents report the fact that when they signed the contract … the contract that was signed was not clear and they did not fully understand the implications of each of the statements".147 These sorts of contract are a take it or leave it contract which most prospective residents are inclined to take because "it must be alright". The contract is unbelievably long, complicated and repetitive. To have a lawyer scrutinize such a contract, which includes the PID, really thoroughly would be expensive, possibly two or three thousand dollars; not the sort of expense one wants to incur just to see if a village contract is "alright".*

One of the key recommendations from the review of the Retirement Housing inquiry in September 2016, was that older Victorians have the right to feel safe where they live. This recommendation was accepted in full by the Victorian Government. Unfortunately, this is not a reality that any residents of MHVs are able to enjoy.

As Australia's population ages, the MHV sector is experiencing rapid growth. This is why many other Australian states including Queensland, Western Australia, South Australia and New South Wales have undertaken reviews of MHVs and introduced dedicated policy mechanisms to regulate them and protect the older Australians living in them. Older residents have worked hard their entire life and we believe we have earned a safe, dignified retirement, as do others. I urge you to consider prioritizing protections of site rental agreements for older Victorians living in these villages.

MHOA (Vic) request that the Inquiry into the Retirement Housing Sector recommendations 45 and 46 be adopted and followed through by ASIC

The following article reveals the most complicated financial contracts in Australia

https://michaelwest.com.au/retirement-villages-the-most-complicated-finance-contracts-in-australia

Robert Drake, an adjunct fellow at Macquarie University *and an international consultant on financial literacy and evaluation*, says that operators can make these contracts "as complex as suits them and the onus is put on the retiree"

> *(?) Callum Foote | Feb 7, 2022 Tim Kyng, a former senior lecturer in applied finance and actuarial studies, teamed up with Robert Drake, to conduct research into the complex and confusing contracts to which Australian retirees agree. Kyng found that "the contract and the fee structures were not only complex but cunningly designed to look cheap – when in fact it wasn't."*
>
> *They were complex by design; and it seems a fair conclusion that Australian village contracts are also deliberately designed to be impenetrable to the consumer. So it is that, often, a retiree will be deluded into thinking they are buying a unit in a village when in fact they are giving an unsecured loan to a property developer – with a byzantine fee arrangement on top. The entry fees varied widely, as did the maintenance fees and exit fees. The exit fee structures also varied considerably, and the fees were usually substantial.*
>
> *This complexity doesn't benefit consumers or aid comparison shopping. Kyng realized that even though he was "equipped with skills in financial and actuarial mathematics, it was still challenging to unravel the complexity embedded in retirement village contracts" and that "from actuarial perspective retirement village contracts are a complex hybrid of real estate, insurance and financial products." The contracts, which can stretch up to 500 pages, bewildered all but one of 20 university educated, retiree-aged subjects in a 2020 study into the financial literacy of consumers looking to enter into retirement village contracts. "After shopping around, Kyng found "huge variability in contracts – but it was almost impossible to compare them.*

Site rental agreements for MHVs are not standardized. Some rental providers include unfair, unreasonable and sometimes illegal conditions. Residents commonly sign these in good faith, only coming to understand the consequences of those conditions afterwards.

There is a mistaken belief that in entering such site rental agreements, potential residents and rental providers were equal participants in the process, however, MHV residents are very unlikely to have an in-depth understanding of the law and may not have the resources to challenge the contract.

Extracts of correspondence from and to the Law Institute of Victoria:

Name redacted

> *My name is MW and I'm one of the lawyers here at the Law Institute of Victoria. You will see from my footer that I am in property and environmental law. We are the Law Institute of Victoria and represent more than 19,000 lawyers and people working in the law in Victoria.*
>
> *We promote justice for all by advancing social and public welfare in the operation of the courts and legal system. Part of our role is advocating for change within the profession as we do within submissions on legislative changes, introduction of new legislation and focusing on what works best for practitioners and indeed the general public.*

Dear Judy
Our property law committee met yesterday and were able to discuss the details of your enquiry. Unfortunately, none of our committee members have any exposure to the area of law you're seeking amendment on. Some members suggested further petitioning to CAV given they are the industry body for consumer complaints and/or disputes with legislation, regulations and educational campaigns. I wished we could have been assistance

Hi M,
Thank you for your feedback, I am disappointed, but I had expected this response. It seems no one has the experience, or the will power, to take up our issues, I do appreciate your efforts in putting our case forward. Our legislation is a shambles,
Thank you, Judy Duff.

Deferred Management Fees

Manufactured home village site rental agreements often contain clauses in relation to a deferred management fee (DMF), sometimes referred to as an 'exit fee', which is payable upon the sale of the dwelling.

The DMF component is defined in leases as the resident's contribution upon sale of their home, to (but not limited to) the upkeep of roads, infrastructure and any other communal facilities provided by the village owner.

The rental providers state that all residents pay a weekly/fortnightly/monthly amount in rent (site fee) but that the amount charged does not adequately cover the costs of providing and maintaining the facilities described above and therefore the tenant is charged additional (DMF) upon the resident's exit.

Example – Ruling by a SACAT Magistrate extracts on a manufactured homeowner's lease.
(South Australian Civil & Administration Tribunal)

…. submits that the contract is invalid in relation to the requirements of section 206F(3) of the Act. As the sale price of the Dwelling is unknown at the time of the Applicant signing the contract, imposing a DMF of an unknown figure fails to detail the amount of that fee per section 206S(1)(b) of the Act. These Agreements do not state the purpose for which the DMF is charged per section 206S(1)(c) of the Residential Tenancies Part 4A of the Act. The Agreement does not set out the basis on which the DMF is calculated as required by section 206S(1)(d) of the Act. The formula provided cannot be used by the Applicant at the time of the signing the Agreement to accurately predict the DMF, it would require a crystal ball.

The DMF is effectively a form of rent so the Applicant would be required to pay rent twice, without the operators properly setting out the details of the rent payable as required by section 206S(1) of the Act. The Agreement require payment of the DMF on the assignment or sub-letting of the Site, and as such amounts to a fee or payment for the giving of consent contrary to section 206ZZG of the Act.

In the MHV space, the village owner puts residents' life savings through a complicated series of fee and calculations that the resident is unlikely to anticipate or understand – especially the hefty 'deferred management fee'. As to whether the fees come within the meaning of "rent" under the Act, this is determined by whether they are amounts payable to occupy the site.

I consider that they are not, because unlike rent:

(a) the fees are not payable during occupation of the site;
(b) the fees are not recurring payments made on a regular basis;
(c) the fees arise only upon sale of the dwelling, which is an act associated with the resident ceasing to occupy the site;
(d) the amounts are not known or ascertainable at the outset (because the price for which the dwelling may be sold is not ascertainable at the outset);
(e) the amounts are not calculated by reference to the value of the rented property;
(f) the amounts are calculated by reference to the value of a dwelling that the park owner does not own.

22. I find that neither the Selling Administration Fee nor the DMF are "rent" for the purposes of the Act.

23. Nor are they a bond and nor are they statutory charges which the residents are required to pay under the Act.

24. I have considered whether the Selling Administration Fee is otherwise payable under the Act.

25. The Act provides for the assignment of residential park agreements. A resident may assign his or her interest in the residential park agreement to another person, provided the resident has the written consent of the park owner.

26. The Act states that the village owner "must not make a charge for giving consent or considering an application for consent exceeding the park owner's reasonable expenses".

27. I do not consider that the Selling Administration Fee is a charge for the respondent's "reasonable expenses" of giving consent or considering an application for consent to assignment of the Agreement, because:
(a) according to the operators, the Selling Administration Fee is for costs associated with the sale of dwellings;
(b) the fee is referred to in the Agreement in relation to sale of the dwelling
(c) while the fee possibly includes expenses associated with giving or considering giving consent to assignment of the Agreement as part of the sale process, it is not only for that, i.e. it goes beyond such expenses;
(d) the fee is calculated by reference to the sale price of the dwelling, not by reference to any actual or "reasonable" expenses incurred by the Operators.

NOTE:
Deferred management fees are 20% to 40% of the sale price, or in some village cases, the purchase price, meaning residents wishing to relocate can become financially trapped and unable to leave

Selling Administration Fee

Example – Ruling by SACAT extract on a manufactured homeowner's lease.

(South Australian Civil & Administration Tribunal)

This is defined, in the Agreement, as "the fee specified in the Reference Schedule". The Schedule does not stipulate what the fee is intended to cover: it simply states that the fee is a % of the Gross Sale Price (of the dwelling). The operator says that the fee is designed to cover costs associated with the sale of dwellings. The operator says that it plays a role in sales by liaising with third parties (such as real estate agents) about the sale of a dwelling, explaining the operation of the Agreement to third parties and to prospective purchasers, and interviewing and speaking to prospective purchasers.

As to whether the fees come within the meaning of "rent" under the Act, this is determined by whether they are amounts payable to occupy the site. I consider that they are not, because unlike rent:

(a) the fees are not payable during occupation of the site;
(b) the fees are not recurring payments made on a regular basis;
(c) the fees arise only upon sale of the dwelling, which is an act associated with the resident ceasing to occupy the site;
(d) the amounts are not known or ascertainable at the outset (because the price for which the dwelling may be sold is not ascertainable at the outset);
(e) the amounts are not calculated by reference to the value of the rented property;
(f) the amounts are calculated by reference to the value of a dwelling that the park owner does not own.

22. I find that neither the Selling Administration Fee nor the DMF are "rent" for the purposes of the Act.

23. Nor are they a bond and nor are they statutory charges which the applicants are required to pay under section 43 of the Act.

24. I have considered whether the Selling Administration is otherwise payable under the Act.

25. The Act provides for the assignment of residential park agreements. A resident may assign his or her interest in the residential park agreement to another person, provided the resident has the written consent of the park owner.

26. The Act states that the park owner "must not make a charge for giving consent or considering an application for consent exceeding the park owner's reasonable expenses".

27. I do not consider that the Selling Administration Fee is a charge for the respondent's "reasonable expenses" of giving consent or considering an application for consent to assignment of the Agreement, because:

(a) according to the respondent, the Selling Administration Fee is for costs associated with the sale of dwellings;

(b) the fee is referred to in the Agreement in relation to sale of the dwelling (clause 7.7 of the Agreement) not assignment or transfer of the Agreement;

(c) while the fee possibly includes expenses associated with giving or considering giving consent to assignment of the Agreement as part of the sale process, it is not only for that, i.e. it goes beyond such expenses;

(d) the fee is calculated by reference to the sale price of the dwelling, not by reference to any actual or "reasonable" expenses incurred by the operator

Example - VCAT DMF Decision – Peninsula Parklands

In the 2018 VCAT decision of Bik v Peninsula Parklands Pty Ltd (Residential Tenancies) [2018] VCAT 1606 (Bik Case), the Tribunal held that the deferred management fee in the Site Lease was void pursuant to the Residential Tenancies Act 1997 (Act).

The Bik Case is the first decision on the enforceability of deferred management fees for moveable dwelling as regulated under Part 4A of the Act.

The terms of the deferred management fee in the Bik Case is set out below:

"5.1 Payment of Deferred Management Fee
Subject clause 5.2 the Tenant must pay the Deferred Management Fee to the Landlord:

- *Upon the transfer of this Lease by the Tenant… to a purchaser of the Park Home to remain on the Site;*
- *Upon the Landlord approving the Tenant subletting the Site;*
- *Upon a deemed sale pursuant to clause 10.2(b) of this Site Lease; or*
- *Upon the expiration or earlier termination of this Lease."*

The Bik Case held that the deferred management was drafted as a fee for giving consent to the assignment of a site agreement and as this is in breach of s 206ZZG of the Act (which specifically prohibits charging such a fee).

Whilst the Bik Case did turn on s 206ZZG, the Senior Member seemed to suggest that if s 206ZZG had not applied, he would have examined the deferred management fee under the requirements of s 206S of the Act. Section 206S sets out the details that site agreements must include. Amongst other things there is a requirement that the amount of rent, fees and other charges must be detailed. We think it is arguable that the deferred management fee may not satisfy s 206S in circumstances where its calculation is depended on the value of the dwelling at the conclusion of the lease, a value which is presently unknown.

Further, whilst not referred to in the Bik Case, it also seems arguable that a deferred management fee may be held to be unconscionable pursuant to s 206G of the Act, if it cannot be associated and/or linked to either the value of a service or opportunity given to a resident.

Residential Parks Roundtable

In August 2022, the Residential Tenancies Commissioner and Housing for the Aged Action Group co-hosted a residential parks/villages Residential Roundtable via zoom to hear from residents in Victoria about their experiences of living in residential parks/villages.

Site rental agreements (also known as contracts. leases or site agreements) was one of many main topics discussed. The following are extracts taken from HAAG's report regarding site rental agreements:

> *Many residents said that the contracts they were offered were quite complex with legalese, lacked transparency and were not explained clearly.*
>
> *…residents often find out later about unfair terms and conditions.*
>
> *… often there is a sense of pressure and urgency to sign the contract, and what is verbally exchanged in the sales pitch is misleading and does not match what is in the contract*
>
> *It is difficult for residents to seek expert help with contracts. For example, many residents reported seeking legal support to review their contract, but this was an issue because there was no technical expertise on residential parks.*
>
> *"I sought legal advice and he said it seems like a normal lease."*

MHOA believe site rental agreements for most, if not all, residential villages are unfair and need to be addressed by ASIC as consumer complaints.