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New retirement village laws

The retirement village laws in New South Wales will undergo significant changes from 1 March 2010 with the Retirement Village Amendment Act 2008 (NSW) (Amendment Act) reforms taking effect. The reforms will affect retirement village operators, residents and prospective residents in a number of ways, the most significant of which are set out in this article.

1. Statutory charge over land overriding indefeasibility of title

New section 182B of the Retirement Villages Act 1999 (NSW) (RV Act) — inserted by the Amendment Act — creates, in certain circumstances, a statutory charge in favour of residents over all land within the retirement village. The charge is created where the resident has an entitlement to a refund of their ongoing contribution (upfront payment) under their contract of residence and the amount of the refund exceeds a certain amount to be prescribed by the regulations (at some future date). The charge secures the indebtedness of the operator to the resident in respect of the refund.

It would be a dangerous trap for registered proprietors of land used for a retirement village or for a person with an interest, mortgage, lien or other charge over the land created or registered after the

creation of the charge under section 182B to think that section 42(3) of the Real Property Act 1900 (NSW) would protect their indefeasibility of title against such a charge. In May 2009 we inserted commentary into paragraph [41160.63] of the LexisNexis Butterworths Conveyancing Service NSW in which we said that provisions inconsistent with section 42, which take effect after section 42 took effect, would override that section regardless of whether those sections “expressly [provided] that [they are] to have effect despite anything contained in [section 42]”. Section 182B is a perfect example of such a provision. The net effect is that any charge created by section 182B will prevail over a registered proprietorship or interests in the land created or registered after the creation of the charge.

2. Capital works

The current situation with respect to capital items in retirement villages is undesirable. “Capital items” — which constitute much of the property included in the price paid by the resident upfront — include:

- buildings and structures
- infrastructure (eg water piping)
- fixtures (eg stoves, bench tops, cupboards)
- fittings (eg light fittings and taps), and
- non-fixed items (eg whitegoods, portable air conditioners, tables and chairs).

New retirement village laws (Continued)

Currently, residents are responsible for maintaining capital items and operators are responsible for replacing them. Unfortunately, this results in disputes as to who is responsible for what and has the effect of items being repaired far beyond their economic life due to residents believing that they would need to foot the bill for items being replaced.

The effect of the reforms is to cause the cost for all capital works — maintenance, replacement or improvements — to be borne by both operator and resident, with the resident not having to pay more than 50% of the cost. Parliament hopes that the effect of this will be to reduce residents' recurrent charges.

3. Budget-related matters

Operators will now be responsible for making good any budget deficit. They will no longer be entitled to roll it over to the next financial year, impose a special levy on residents, increase recurrent charges or use recurrent charges or capital works fund monies for the purpose of making good such a deficit. However, regulations may provide for situations in which one of those courses of action is permitted.

Operators are relieved from the need to supply residents with a budget statement, provided the residents consent to this.

4. Freedom for residents to modify their living environments

Residents will now be able to add or remove fixtures or fittings or renovate their premises with the consent of the operator. Operators will not be able to refuse consent unreasonably.

5. Time limitation on recurrent charges enuring after vacation of resident

Currently, recurrent charges may continue to accrue for up to six months after the vacation of a resident. This often occurs where the resident dies. In such cases, recurrent charges — which are sometimes hefty, especially where the retirement village is a nursing home — are usually borne by the resident's estate or family. The reforms have imposed a time limitation of 42 days after the vacation (or death) of the resident for recurrent charges enuring after the vacation.

6. Meetings

Operators will now be required to hold annual management meetings with residents. Operators will be required to answer residents' questions at those meetings.

7. Relieving smaller operators of some compliance burdens

Some of the compliance burdens on smaller operators (annual income of less than \$50,000) will be lifted. For example, those operators will no longer need to have their annual accounts audited or to provide residents with quarterly accounts.

8. Disclosure requirements

Reforms to disclosure requirements mean that operators will now be required to give prospective residents a "general inquiry" disclosure document when they make initial enquiries and a more detailed "disclosure statement" when they express an interest in a particular unit. This will allow prospective residents to make better informed decisions.

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New retirement village laws (Continued)

9. Settling-in period

Residents will now have a 90-day "settling-in" period. If, during this period, the resident decides to move out for any reason (eg if they decide that the retirement village is not to their liking), they may do so and only be charged a fair market rent for the period of their occupation and a reasonable administration fee.

10. Registration of retirement villages

Operators will now be required to notify the Department of Lands that their land is being used to operate a retirement village. In effect, this will provide the Department with an exhaustive list of all retirement villages in New South Wales, which would be useful for statistical purposes and for ensuring compliance with retirement village regulation.

11. Safety and emergency procedures

In order to ensure the safety of residents, operators will now need to have written safety and emergency procedures and ensure that all residents and staff are familiar with those procedures. They will also be required to carry out annual safety inspections.

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Put and call options — are they contracts?

This question was considered by the Supreme Court of Queensland in the decision handed down on 23 December 2009 in *Vale No.1 Pty Limited v Delorain Pty Limited*.

This related to put and call options with respect to the sale of various apartments which were sold "off the plan".

The vendor sought to put to the grantee one of the properties which had not been taken up by a nominee of the grantee under the option and the grantee sought to avoid liability to acquire this lot on the basis that the consumer protection provisions under the Property Agents and Motor Dealers Act were not complied with. The purchaser's contention was that the provisions of that Act applied because the put and call option arrangements, together, constituted a "relevant contract".

Not only did the documentation contain usual put and call option provisions, but there was a clause that the grantee could refer a buyer to the grantor to buy the lot, in which case that referred buyer would take the place of the grantee.

After considering a number of decisions, the Court held that even though the relevant agreements included put options which, if exercised, bound both the grantor and the grantee with respect to the sale and transfer of the relevant

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Put and call options — are they contracts? (Continued)

properties, as there was a provision to facilitate the marketing of lots to third party purchasers which was in the contemplation of the parties when the options were entered into, the arrangement was not the same as a contract for sale even though a put option was incorporated in the arrangement.

The Court held that the substance of each agreement was to provide stock for the grantee to market, with the grantee having the obligation to take any lots which it was unable to market.

The Court held that its decision in this regard was reinforced by the fact that the ultimate buyer was not clearly identified in the option document. This was because the identity of the buyer would not be known until such time as the buyer's call option expired and it either was forced to buy the property under the put option or it, prior to that date, had referred a third party buyer to the vendor who became the end purchaser. Until the purchaser was identified, it was impossible to conclude that the arrangement was a contract for sale.

This decision is consistent with the advice that we have given clients that put and call options which contain nomination provisions do not constitute together a valid and binding contract for sale. The reason for this is that both parties could elect, for whatever reason, not to exercise their respective options or the grantee could nominate a third party who becomes the ultimate purchaser.

Therefore the ultimate identity of the purchaser (an essential ingredient for a binding contract) would not be satisfied at the time of entering into the put and call option arrangements.

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Uniform Torrens legislation coming to Australia

Gary Newton was involved in the drafting of a proposed National Uniform Torrens Legislation for Australia

There is a proposal in Australia to have uniform Torrens Legislation apply across the country. At present there are eight different Torrens title systems which, although similar, are not identical.

The introduction of the uniform system will hopefully take the best from each of the systems and also allow for easier dealings in property across state borders in Australia. It will also assist the national electronic conveyancing and other property initiatives which are being developed.

Gary Newton, a partner in our property and development group, was involved on 28 & 29 January at a two day workshop which looked at the development of a uniform Torrens Title Act for Australia. The workshop was convened by the Property Law Reform Alliance, was held at the offices of the Property Council of Australia and was jointly sponsored by the Australian Law Council.

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*Uniform Torrens legislation
coming to Australia
(Continued)*

Gary recently co-authored a book titled "Annotated Conveyancing and Real Property Legislation New South Wales" 2009 edition.

Gary is also the co-author of the New South Wales Conveyancing Services for LexisNexis Butterworths. This puts him in a unique position, with other experts in the field of real property Torrens title legislation, to be able to discuss the development and effect of a national uniform Torrens Title legislative framework for Australia with our clients and contacts.

Should you have any comments or questions about the *Real Property Act* or other property related legislation in New South Wales or relating to the possible future development of a national uniform Torrens Title legislation for Australia, please feel free to contact Gary Newton of this office.

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