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Are you considering making the move to a retirement village?

STUART LOWE

Deciding to move to a retirement village can be an exciting but daunting experience. While lifestyle considerations often feature significantly, legal and financial issues are equally important.

Entering into an agreement to live in a village is usually very different - and significantly more complex – when compared to a usual real estate transaction. Such agreements are regulated by the *Retirement Villages Act 1999* ("the RV Act") and must include a lengthy disclosure document.

Residents of villages do not usually own their units. Typically, residents are granted a lease or licence of their unit for life. Where a resident does own the freehold to their unit, there is usually also a body corporate, which introduces additional complexities.

Some of the issues which prospective residents should consider when looking to move to a village include the following:

1. **Ingoing contribution**. This is the amount payable by a resident upon entry to the village. It is often an interest-free loan to the operator, repayable when the resident departs the unit and the unit is resold, subject to certain deductions.
2. **Ongoing charges**. Residents must pay regular amounts called "general services charges", which fund the provision of services and facilities to residents. This includes a component for the maintenance and repair of capital items.
3. **Care**. Villages differ greatly in the level of care and personal services available to residents. Residents should ensure they are aware of the extent of services available and how any additional charges are calculated.

4. **Resident's rights and obligations**. For example, are residents allowed to make alterations to their unit, have a pet or have visitors stay overnight?
5. **Charges payable upon exit**. Upon vacating the village, residents are normally charged an "exit fee", depending on how long they have lived in the village. Departing residents may also have to pay a portion of the costs of reinstating the unit to a marketable condition.
6. **Capital gains and losses**. The new ingoing contribution payable by the next resident of the unit may be more or less than the ingoing contribution paid by the outgoing resident, resulting in either a "capital gain" or a "capital loss". Different villages have different arrangements for sharing capital gains and capital losses between the operator and the outgoing resident.

Retirement villages offer many advantages to residents, including a secure, low-maintenance environment. However, it is important to fully understand all the pros and cons before entering into an agreement to live in a village. Anyone considering this lifestyle option should always seek professional advice from a solicitor with appropriate expertise.

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Family Friendly Fair Work Act

TRACEY JESSIE

The *Fair Work Act 2009 (Cth)* (**Fair Work Act**) has been amended to introduce "family friendly measures" from 1 July 2013.

Employers should review and update their policies and procedures on flexible working arrangements.

The right to request flexible working arrangements was limited to employees who were parents of or had responsibility for the care of a child who was under school age or, if the child had a disability, who was under 18 years of age.

This has changed significantly.

Now an employee who is the parent of or who has responsibility for the care of a child who is "school age or younger" may request flexible working arrangements to enable the employee to care for the child.

An employee may also request flexible working arrangements in the following circumstances:

- the employee is a carer;
- the employee has a disability;
- the employee is 55 or older;
- the employee is experiencing violence from a member of the employee's family; and
- the employee provides care or support to a member of the employee's immediate family or a member of the employee's household who requires care or support because the member is experiencing violence from the member's family.

An employer may only decline a request for flexible working arrangements on reasonable business grounds. Previously the Fair Work Act did not define the term "reasonable business grounds", which provided no guidance to employers who were considering an employee's request for flexible working arrangements.

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The recent amendments have introduced examples of reasonable business grounds which may result in an employer declining a request for flexible working arrangements, including the following:

- the new working arrangements requested by the employee would be too costly for the employer;
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity; and
- the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

From 1 January 2014 comprehensive changes will be introduced to the Fair Work Act, including the introduction of anti-bullying provisions, which will be discussed in a future newsletter.

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WHO IS A **"WORKER"**

CAMERON SEYMOUR

From 1 July 2013, there has been a landmark change to the definition of "worker" in the *Workers Compensation Rehabilitation Act 2003* (**WCRA**).

For years there has been confusion between the terms "employee" and "worker". Many employers have been caught out by organising their workforce to include contractors, only to find those contractors are treated as their workers for workers' compensation purposes.

On the other hand, due to the changes which took effect from 1 July 2013, there may be contractors who were previously covered for workers' compensation entitlements, who are now not.

The Queensland Parliament changed the definition of worker to align with the definition used in the taxation laws.

The definition of a worker, which applies under the WCRA from 1 July 2013 is "*a person who works under a contract and, in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the* Taxation Administration Act 1953 (Cwlth), Schedule 1, Part 2 – 5".

That definition is the starting point but there are also specific exclusions and inclusions in the WCRA. The test still needs to be applied as to whether the person is employed in a contract *of service* or a contract *for services*. There are a number of indicators the Courts have relied upon over the years to determine that issue.

Typically in the construction and transport industries, a lot of workers who are contractors will no longer be covered under the new definition.

It will be imperative for those workers to hold their own income or disability insurance to sustain them during periods of injury.

BEWARE OF HIDDEN STAMP DUTY

DAVID WILLIAMS

The Duties Act 2001 was amended by the Queensland Government to widen the definition in relation to duty payable on the purchase of shares in companies that hold an interest in land. Previously, the Duties Act only caught companies in circumstances where the value of land represented 60% or more of the value of all of the company's property and the land value exceeded $1 million.

The critical issue here is the new definition of landholding which under section 167 of the Duties Act is sufficiently wide to cover any "legal or equitable interest" in land which would include leases. The test is now a value benchmark of $2 million in the assets of the company.

In the event a company is land rich, then in those circumstances ad valorem duty would be applicable on the sale of the shares in the company.

Landholder duty will only be payable if a person acquires a significant interest in a Landholder. Significant interest is satisfied by you seeking to acquire not only all the shares in the company but also a majority of shareholding.

The Office of State Revenue (**OSR**) has recommended that all interests in land, including leases, be professionally valued so that a buyer of shares can determine whether or not it is a Landholder. Any valuation will need to take into account any items fixed to the land, i.e the lease. That would include a fitout profit by a landlord under the lease.

If this risk relates to you then the critical issue is to obtain a valuation that complies with the practice direction issued by the OSR to determine value. Therefore, if any business holding leaseholding interests exceeds $2 million in value then prepare for paying duty to OSR. A specific valuation process needs to be undertaken in order to fall within an exception, otherwise the company could well be dutiable on the sale of shares where previously it would not have been dutiable.

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The full ramifications of these amendments, which have been replicated in each state and territory in Australia except for Tasmania will, as economic times improve, create some significant stamp duty problems in circumstances where buyers may not have been aware that the transfer of shares in the company were dutiable.

COURT-AUTHORISED WILLS

Now Used for Estate Planning

CHRIS HERRALD

In November 2012, the Court ordered that pursuant to section 21 of the *Succession Act 1981 (QLD)* a Codicil be made for John Matsis for estate planning purposes.

At the time of the hearing, John Matsis was 90 years of age, had an estate valued in excess of $13 million and had made what could be considered a "basic" Will in 2001.

The "basic" Will left his whole estate to his wife unless she predeceased him in which case, other than some specific gifts, the residuary estate was to be divided between his three grandsons.

Mr Matsis' wife died in 2007 and Mr Matsis lost testamentary capacity in or about 2009.

In 2012, two of Mr Matsis' three grandsons were engaged in business that carried financial risk and the third grandson, while still at university, was expected to follow suit. Mr Matsis' health was declining and there was a pressing need to protect the significant inheritances of the grandsons. An application was made for the Court to approve a Codicil that would leave most of the 2001 Will intact however set up testamentary discretionary trusts for each of the three grandson's shares of the residue of the estate. In this way, their inheritances would be protected from the financial risk of their businesses.

The Court was satisfied that the draft Codicil was a document that Mr Matsis may have made if he had testamentary capacity because:

- The draft Codicil benefited the same people as the 2001 Will did in the same proportions.

- There was evidence that when taking instructions for the 2001 Will, Mr Matsis' solicitor had intended on discussing the concept of testamentary trusts with him at a later date however that later date never came because Mr Matsis lost testamentary capacity.
- There was evidence that Mr Matsis had a "*very strong emphasis on keeping the wealth within the family*" and had he been aware of the benefits of testamentary trusts for the prospective beneficiaries, he would have made his Will on those terms.
- The only person who was eligible to make a claim against the estate had sworn an affidavit stating that she was in support of the Codicil being made and did not need support from the estate.

Whilst this was a good outcome, the costs of this Court application, paid for by Mr Matsis' estate, would have been greater than the cost to have prepared a Will with testamentary discretionary trusts at the outset.

JOHN MULLINS
EDITORIAL

The Federal Election Campaign, at the time of writing, was well under way and within a few weeks we will know the outcome of the Federal Election. Interest rates are now at record lows and it is clear that the business community is looking for a decisive outcome in the election to move away from the last 3 years of minority government.

There has been a lot spoken in this election campaign by both sides of politics about low tax regimes in the Northern Territory, changed maternity leave arrangements, removal of certain middle class welfare, the prediction of rising unemployment, changes to the mining tax and carbon tax, and allegations about potential future changes to the GST.

These promises are all in the context of a government of whichever persuasion facing deficits for the foreseeable future. It is clear that Australia needs a majority government with a clear vision for the future, and it would appear a willingness to address the overall taxation structure.

This edition of the Mullins Report, which is edition number 70, deals with a lot of issues which affect all of us and those close to us.

The article on flexible working arrangements is interesting and it touches on an area which clearly we are going to see ongoing changes as work and lifestyle issues change for many people.

With an aging population, issues related to retirement villages are increasingly impacting upon many Australians and their families, as there is a wide range of various structures which need to be carefully considered by individuals depending upon their particular circumstances.

Finally the article on Wills reminds us of the need to ensure that we make Wills not for our sake, but for the sake and benefit of those that we will leave behind, to make their lives easier and less stressful and complicated by having to deal with complicated Estates, and the high cost of resolving issues of contested and complicated Estates.

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