

A Submission Paper produced by the Retirement Villages Residents Association.

1. Introduction

The Retirement Villages Residents Association (RVRA) welcomes this opportunity to contribute to the development of the Retirement Village Industry in New South Wales.

The specific focus of the Association's input is on issues relevant to the more than 45,000 seniors, who have chosen to live in retirement villages in NSW, attracted by the security and sense of community that village life offers. Their number will no doubt experience fast growth as the NSW population continues to age.

2. Current situation

In discussing the issues the Association recognises

- ◇ the contribution the retirement housing industry makes to the NSW economy, through meeting the demand for accommodation from a section of the elderly; and
- ◇ the rightful expectation of industry participants for a reasonable return for their engagement and investment in the sector.

However, the Association is deeply concerned

- ◇ that despite several attempts, the legislative provisions governing the operation of the industry continue to be weighted heavily in favour of owners/operators of retirement villages to the financial detriment and, consequently, the general health and well being of residents;
- ◇ at the unnecessary complexity and onerous financial and other terms and conditions the operators apply to contracts that a retiree signs in return for "temporary" residence rights to a dwelling; and
- ◇ at the lack of opportunity for residents to provide input into, and participate in, the decision-making that affects their lives, and in the management and day-to-day operation of their village, which they fund through charges levied by the operator.

3. What is required?

Governments owe a "duty of care" to those who have contributed to the development of our society. This "duty of care" does not stop with the provision of the physical structure of housing. It must extend to protecting the consumer rights of the elderly, the impact on their health and well-being that can result from anxiety and feeling of powerlessness when faced with complex, and sometimes unconscionable, terms and conditions which would be unacceptable to the community at large.

The core principle in any policy concerning retirement villages should be to keep simple any legislation or contracts employed, and within the capacity of older people to understand and deal with their requirements.

A second principle would be to endeavour to strike a balance between the owners'/operators' expectations and residents' aspirations which while divergent are not irreconcilable; to redress the existing inequality not just in financial terms but also in the power relationship between these two major stakeholders in the retirement villages sector.

It goes without saying that the establishment of a harmonious and co-operative relationship between these two groups would augur well for the future of the industry. It

will contribute to the financial well-being and result in social and health benefits to residents. Through building up a reputation for fairness in dealing with residents the owners/operators will also create increased demand for this type of accommodation, which will bring them financial rewards.

Such a co-operative and balanced relationship will also mean fewer disputes and applications to the consumer tribunal, which imposes financial and other costs not just on residents and operators, but also on the public purse.

4. Specific actions to be taken

It is assumed that in the interests of the community generally, Politicians of all persuasions would wish to achieve this balance and harmony. Certainly, the residents want this balance and harmony in the communities in which they aim to spend the remainder of their lives. It is also assumed that forward thinking operators/owners want to act responsibly in fulfilling their 'duty of care' to the elderly and that they also wish to set the industry on a firm and viable foundation for the future. In the light of these wishes and assumption, the aim should be to:

Accreditation, monitoring, legislation

- ◇ introduce a government-sponsored scheme of accreditation for industry owners/operators to ensure set standards are achieved;
- ◇ establish a scheme to monitor the standards of management, accommodation and services provided on an on-going basis;
- ◇ address the shortcomings in current legislation by rethinking and recasting what needs to be changed and preserving what works, rather than tinkering at the edges;
- ◇ remove discrepancies between related/linked sections of the legislation and regulation that lead to uncertainty, ambiguity and dispute;
- ◇ provide greater clarity and balance in allocating expenses so that both owners/operators and residents are in no doubt as to who pays for what;
- ◇ ensure that legislation to regulate the industry does not put extra financial burdens on residents;

Village contracts

- ◇ review the unique terms and conditions attaching to village contracts to assess their necessity and relevance (by comparison with contracts in the general community) with a view to simplifying and removing unnecessary conditions and costs which impose unfair and undue hardship on residents;
- ◇ review the various fees and charges paid by residents to assess their fairness and relevance for today's retirement village environment;
- ◇ introduce policies to administer and supervise financial arrangements allowing easy transition out of independent-living dwellings into care-facilities, with consideration of the ACAT "stay-in-home-as-long-as-you-can" assistance scheme;
- ◇ identify best practices and encourage adoption by owners/operators;
- ◇ ensure security for funds loaned by residents to owners/operators by requiring a portion of it to be deposited in bonds, as is the case with tenancy agreements;

Resident involvement, dealing with complaints

- ◇ allow for input and participation by residents (who fund the expenses) in management, budgeting and operational decision-making that affects their lives;
- ◇ provide greater powers for the Office of Fair Trading to deal with complaints and enforce compliance so that residents are not unduly burdened with the processes and procedures of tribunal applications.

Helping residents to be better informed in dealing with operators

- ◇ approve and monitor a resident-oriented, third-party “dwelling brokerage” agency to provide independent advice, conveyancing services and comparisons between villages and operator performance, when prospective/existing residents wish to buy and sell leased or licensed dwellings in retirement villages.

The basis for these recommendations, and the issues raised, are discussed in greater detail in the following pages. ■

Independent-living Retirement Villages - legislative, contractual and other issues affecting residents and the need for government action

A DISCUSSION PAPER

1. The issues

1.1 Most retirement village residents understand that Governments and those property developers prepared to build and operate new retirement villages, must work together to provide suitable housing so that the growing population of the aged can settle into communities designed specifically to suit elderly residents' needs and enjoyment. Many satisfied residents can offer Government and village operators their appreciation of being able to join a community lifestyle and testify to its social advantages.

1.2 Without question, all residents wish to live in harmony with the operators of their villages. However, serious disharmonies have crept into the relationship between residents and many operators in recent times and this is causing angst and uncertainties, probably to both parties but for different reasons.

1.3 Conceivably and understandably operators would feel that, because they have had to raise and outlay considerable money to construct and/or to purchase the retirement villages they operate, they must ensure that every opportunity is taken to maximise their profits. Many public company operators have shareholders to satisfy by way of dividends and capital growth and they often have large administrative structures to maintain.

1.4 On the other hand, residents are justifiably objecting to the ways that many overly zealous and profit hungry operators are imposing unreasonable costs on residents to the extent of pressing Governments to change consumer protection laws so as to extract as much money as is possible from the purses and pockets of residents who have chosen to simply lease, or be licensed to live in, a village dwelling which they do not wish to own. Operators do this by requiring residents to pay all the costs of preserving the entire village's assets. They have achieved this by pressing Government to place legal responsibility on residents to maintain and repair operators' assets in perpetuity.

1.5 Residents understandably believe that all costs involved in preserving a village's assets, which includes all the dwellings within, should be met entirely by the person or the entity who owns the village assets. It goes without saying that if residents have Strata Title ownership of their dwellings and village, then they should meet such costs. Similarly, if the village owner is the operator who leases or licences the dwellings within to residents, then the operator must legally be required to meet the costs.

Interestingly, this exact viewpoint is shared by the findings of the Review of the NSW Retirement Villages Act 1999 published in March 2005 by the Office of Fair Trading. On page 19, referring to "Capital Maintenance and Replacement" under "Findings and Recommendations":

"Maintenance, replacement or improvement of capital items within a village, other than within premises owned by a resident, should be the responsibility of operators. This is in line with the laws applying to landlords of other premises."

1.6 Operators who own villages and then lease/licence the use of their dwellings derive their profits by contractually imposing on their residents Deferred Management Fees; they also receive earnings from investing the money compulsorily passed over to the operator (interest free and unsecured) by the resident at time of entry to the village. In

addition, they enjoy the usually time-appreciating real estate capital value of the property that comprises the village.

1.7 Perhaps a question to be answered by a formal enquiry to be instigated by future Government is to establish whether or not the profits which operators receive are considered to be insufficient, commercially viable or excessive, bearing in mind that the profit they gather comes from residents and by far the majority of those residents living in and entering villages have decreasing and limited incomes and will not be able to continue indefinitely to be 'milch cows'. Results of such an enquiry would surely be greatly beneficial to Government to enable them to design laws that would result in a more harmonised 'balance' for the future sharing of costs of operating a village.

1.8 Future rights of residents, in relationship to the monetary investments they outlay to enter a village, are jeopardised by the fact that residents entering into a village cannot be considered to be "informed buyers" in the same way that a person buying a Torrens Title or Strata Title house is. The "retirement village market" is not a true market at all because the only way for a resident (or heirs) to recover the original monetary investment is in accordance with a usually complex formula, dependant on obtuse factors, contained within an equally complex contract, often not fully understood by many lawyers.

1.9 As well, new contractual terms are often introduced by operators to issue 'updated' leases, some of which include quite draconian terms that create doubt in the minds of residents as to whether their home will really remain their home if the operator chooses to enforce existing laws in the Retirement Villages Act 1999 (reference Section 136) concerning a possible "change the use" of the village.

2. Facts surrounding the actual operations of retirement villages as viewed by residents

2.1 Background

The Retirement Village industry began with the charitable work of organisations such as the churches that recognised within the elderly some who were lonely, insecure, often poor and no longer physically capable of attending to many of the essentials of daily living. To-day the elderly are a "demographic" studied by the financial managers. Some are recognised as being within the wealthy group of the community but more are pensioners depending on Social Service payments to survive. Nevertheless they have become the target whose wealth is to be tapped and one of the routes for this is through retirement villages. **Thus the "independent-living" retirement village industry is in desperate need of restructure and reform.**

2.2 Power and control is the key to an operator's successful operation of a retirement village. Ownership carries with it power, so actual ownership of and control by residents by means of registered freehold title to the property in which they live in a village is rare. Even so, in Strata Title villages subsidiary contracts transfer much power from the resident proprietors to the operators or managers. Certain perceived conflicts between legislations which govern residents who own a Strata Title dwelling within a Strata Title village, and the obligations of those same residents under the legislation governing retirement villages, often cause higher and unnecessary costs to residents living in those Strata Title villages. **The trend is towards the retention of operator ownership, and thus all day-to-day powers and controls remain in the**

hands of the operator, with premises being leased or licensed to the residents. This concept deserves re-evaluation

2.3 The Retirement Villages Act 1999 was introduced by the New South Wales Government to modify the excesses of some operators. The Government makes no attempt in it to control prices charged by operators. It is argued that market forces should be the determinant of the prices. However, market forces operate only in a climate where there is perfect knowledge, a far cry from conditions in the retirement village market. Considerable deception is employed by the operators. Many residents entering villages have only a vague understanding of the contracts which they have executed or of the conditions they have agreed to accept. Very few lawyers are experienced in advising potential residents on the complexities within ruling legislation and their relativity to a variety of different forms of contracts that have been created by different operators to suit their own particular agenda. **This would suggest that some form of standardisation of contracts is most desirable for the future.**

2.4 The amendments to the Retirement Villages Act 1999 in 2008 and the supporting Regulation gazetted on 18 December 2009 have failed to correct the imbalances that residents have experienced during that decade. *Please refer to Appendix I for details.*

3. The need for commercial-developer participation in retirement village development

3.1 There is no denying that the rapidly growing numbers of the aged are living longer and wishing to both join community lifestyles as well as rid themselves of the work involved in maintaining family style homes. For them, the **retirement village concept is ideal.**

3.2 Most village residents are aware that village living has its pluses and minuses. In return for some loss of autonomy and capital, there is, hopefully, some peace of mind for residents in knowing that they will be less of a burden to their family than if they lived, independently outside of a village setting. **If the operator also provides assisted living facilities, there is the reasonable expectation that, when assessed as needing assisted living, they will be able to move to that higher level of care.**

3.3 However, there is no certainty that the “baby boomer” generation now coming into retirement age, will consider retirement village living as a preferred option for them (or at least not until they have “one foot in the grave”) unless the shortcomings within the industry are corrected and the present odious perceptions are offset. **If it does prove to be the case that the baby boomers will be reluctant to become involved, then the independent living retirement village industry and the Government will face serious challenges as later entry into independent villages will place a great deal more care responsibilities on operators.**

3.4 There is a need to consider policies that are aimed at making retirement villages with easy transition to assisted care more attractive as a retirement option thus overcoming the inevitable decline in the independent living sector of the industry. Unless this is done, **there will be a serious reduction in quality accommodation for an increasing number of older Australians who, because they have made significant contributions to society, are entitled to expect that, in their senior years, they will have a safer, healthier and stronger retirement future.**

3.5 The finances required to create retirement villages and the subsequent construction of them, should ideally be placed in the professional hands of experienced and reputable property developers, but with **ongoing Government monitoring to protect the financial and ongoing physical welfare of the elderly who enter these villages at the very time of life at which they are most susceptible to exploitation.**

3.6 However, other than various legislations administered by ASIC and also OFT's Building Codes, there appears to be little if any Government control over the appointment of, and the progressive operational supervision of, the creative developers who may well specialise in the design and construction of outstanding styles of villages but who then take on the quite specialised role of operating their newly built villages, irrespective of whether they have any experience in handling the often quite unusual problems of the aged with their inevitably deteriorating health problems. Most developers conduct their operations by adopting the present industry model that retains full "Torrens Title" ownership of the village itself, including dwellings which they then lease or licence for use by the aged (often for only short periods of time because of health issues) obtaining their ownership profits from:

- (a) a contractual arrangement entitling them to Deferred Management Fees
- (b) use of money, loaned to them interest free and unsecured, by the resident at the time the contract is executed.

3.7 The entitlement of owner/operators to reasonable commercial returns by way of profits is not disputed. What is disputed is that owner/operators are off-loading on to the residents who live in their villages, all the costs of preserving all of the village's assets on top of the profits they are enjoy from their village ownership.

3.8 To support residents' widely held contention that owner/operators enjoy very healthy profit margins, *Appendix 2* illustrates how an industry market leader, Stockland Ltd recently publicly proclaimed to its potential investors, that they receive excellent returns from ownership profits. They are unquestionably entitled to fair profits. Presumably, however, the icing on their cake (although not mentioned) is provided by residents now being compelled by law to pay for the preservation of, and repairs to, all the village's assets even though residents do not own any of these assets! That represents both unfairness to, and exploitation of residents.

4. Summary

To sum up, a government concerned to fulfil its "duty of care" towards aged persons electing to live in independent-living style retirement villages, cannot support or endorse policies that are in conflict with its own obligations to its people. On the contrary it would set about righting the glaringly unfair situations described in the preceding paragraphs, especially the issues raised in 2.2 and 2.3 above, and the many instances, described in Appendix 1, where the Regulation, rather than protecting the consumer rights of residents, tilts the balance more in favour of owners/operators.

It would fill identifiable gaps, by introducing policies to administer and supervise, for example, the financial arrangements allowing easy transition out of independent-living dwellings into care-facilities, with due regard for the ACAT "stay-in-home-as-long-as-you-can" assistance scheme.

As an additional source of assistance to prospective residents it could examine the feasibility of setting up a resident-oriented, third-party “dwelling brokerage” agency, to provide advice, conveyancing services and comparisons between villages and operator performance, when prospective/existing residents wish to buy and sell leased or licensed dwellings in retirement villages. Such a government-regulated, State-wide entity could operate as a specialist commercial real estate agency and serve perhaps those prepared to pay a fee for unbiased advice and assistance before finalising their choice of a village for their future home. By the establishment of such a system, presumably only villages with transparent quality reputations which provide sound protection and facilities for residents, will rise to the top thus helping to ensure that all operators in the long-term would strive to be competitive and fair to attract new residents. ■

Appendix 1

Examples of imbalances mentioned in 2.4 above:

Unfair aspects in Regulation (2009) supporting the Retirement Villages Act 1999 (amended 2008):

“Capital maintenance”

(a) External painting costs of a village are to be paid from Recurrent Charges to which residents (who are either only leasing or are licensed to live out their, often short, remaining lives in their dwellings) must by law contribute; village operators are not legally obliged to pay any such costs irrespective of the fact that they own all the property in perpetuity.

(b) Major expenses such as repairs to buildings and infrastructure (e.g. drains, sewerage, water supply, and electricity, plus telephone and communication systems, roads and pathways, concrete-cancer in a building, roof repairs, etc.) are also to be paid by residents; again operators have no legal obligation to pay or even contribute. (*Note:* all such costs would be tax deductible against a village owner’s profits but residents do not enjoy such concessions).

(c) Whilst owner/operators must legally replace “items of capital” (i.e. village assets) there is still no clear legal “definition” to determine where ‘repair’ ends and ‘replacement’ of each asset begins (e.g. does the replacement of a section of pipe constitute a repair or is it a replacement?) Whilst the present legislation remains unclear, disputes will tie up the resources of the CTTT and add to the frustrations of residents with no alternative but to fight such issues.

(d) Costs of carrying out “urgent works” (as listed in the Act), become the responsibility of residents to pay out of Recurrent Charges; if the “Budget” goes into deficit as a result of those costs, any resulting deficit in a year now legally rolls over until the next year and Recurrent Charges would be increased accordingly to cover those previous year’s costs.

“Budgeting” of village expenses and its format

(e) There is no principle at all to determine the responsibility of the owner/operator to pay, or at least contribute to, normal property-owner types of costs (such as insurance and repairs) where such costs apply to the preservation of the owner/operator’s assets.

(f) There is no legislation to ensure that staff whose employment costs are paid out of Recurrent Charges cannot be utilized by owner/operators for purposes other than those directly attributable to the operation of the village (e.g. maintenance and administration staff used to arrange and refurbish a dwelling in preparation for an incoming new resident).

(g) There is no transparent uniformity in some aspects of village administration (e.g. The Regulation provides a template/format for the annual budget showing all financial details, but does not impose any requirement on the owner/operator to use that format.)

“Contractual” arrangements

(h) There is no legislative protection for lessees and licensees who have taken up residence in a village, and, in order to have done so, have had to lend, interest free and unsecured, a sizeable amount to the owner/operator. As well, even though the Resident may appear to have long term rights of residency, in the event that the owner/operator decides to pursue a “change of use” of the village property, as is allowed under the Act, there is no compensation legislated for that event. In addition, the mental anguish that may well be imposed under such a dramatic situation would be cruel to any aged person.

(i) There is no legal requirement placed on owner/operators to carry forward fundamental terms contained in a lease granted to a resident who, by right and/or obligation, is integrally involved in the process of finding a new lessee and setting the price, upon termination of that resident’s original lease.

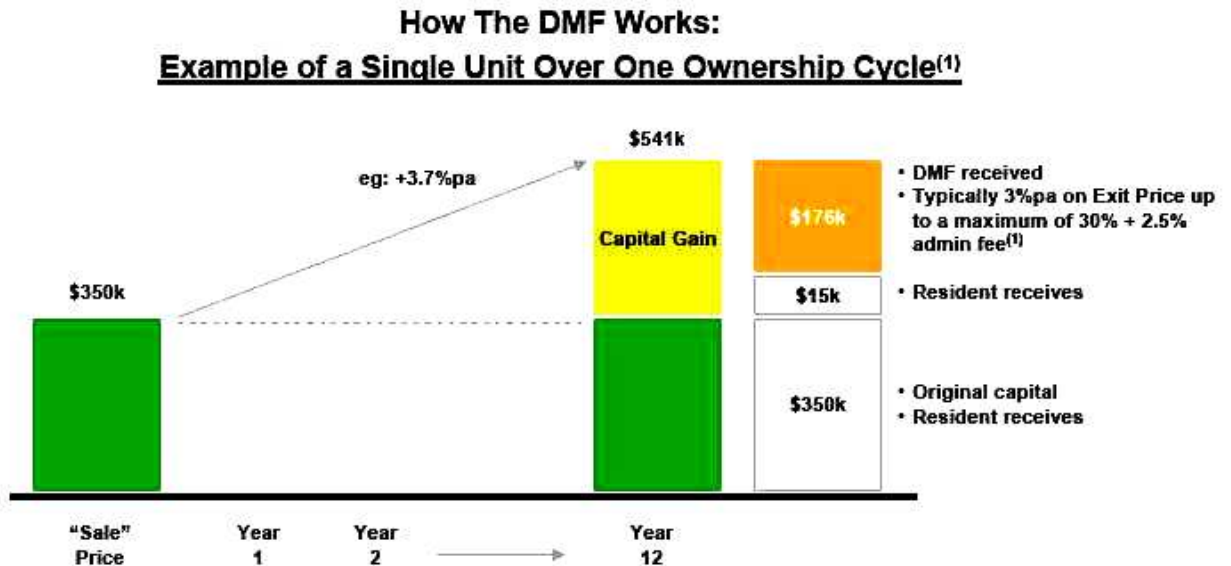
“Trained” management

(j) There is no legal requirement placed on an operator to employ only trained staff with qualifications or who are at least suitably experienced in the specialized management of the welfare needs of the aged and elderly living in a community. The reality that today’s independent-living resident can quickly become tomorrow’s care-patient cannot be ignored by Government. ■

Appendix 2

The following is an example (issued by Stockland Ltd to potential investors in early December 2009) showing the significance of the Deferred Management Fee (DMF):

Recap - Established villages deliver an attractive yield through the DMF



- DMFs are the primary income source for established villages
- At critical mass, the stream of DMFs is analogous to rent
- Can therefore express this income in terms of yield⁽²⁾
- Low risk of no collection: DMF cash is deducted from the upfront payment made by the incoming resident
- Stockland is also entitled to 2.5% of the exit price as a cost-recovery administration fee, in addition to the DMF

Observations about the above example:

- after 12 years the operator plans to receive, with, as stated, "low risk of no collection", the sum of \$176,000 (an accrual averaging \$282 per week over the entire period) from the new lease for the home for which the original resident would have had to lend the operator the sum of \$350,000 interest free and without any form of security over any of the operator's village assets.
- supposing, the resident had instead simply leased or rented a similar dwelling just paying "rent" each week and under traditional "landlord" arrangements, without having to pay and maintenance, repairs or asset replacement costs, or lend anyone the \$350,000, interest free; logically the \$350,000 would have been invested by the resident in a safe Bank Term Deposit at say 6% p.a. average over the 12 years. That investment would have earned the resident in compound interest an average of \$568 per week over the period. Now one would think that sum is more than sufficient to pay rent for a similar dwelling valued at \$350,000.

- but, as the operator has the free use of the \$350,000 interest free, one could safely assume that the operator would be investing that amount in capital-returning assets (constructing more villages perhaps) and earning at least an acceptable commercial rate that would well exceed the 6% p.a. mentioned above or saving interest costs of about 7% minimum at current rates from not having to borrow the funds.
- based on the above DMF calculation, the resident receives back \$15,000 after 12 years (that's only a measly \$24 per week) as a return on their outlay of \$350,000 over 12 years, a long way short of the \$568 per week they have forfeited in interest.

In summary, the exercise outlined above illustrates that:

- the operator eventually receives the DMF accrual of \$282 per week plus the possible return on capital of at least \$568 per week in the interim, so the owner benefits by \$850 per week in relation to the ('retail value') of the 'model' \$350,000 dwelling it owns, a seemingly very healthy overall compound return of 12.63% per annum with, as it claims, "low risk of no collection". It is usual for the operator to have built the dwelling and village in the first place so the dwelling cost, with all associated financial costs, is \$ 285,000, much less than the 'retail value' of \$350,000 'sell' price in their model and showing a healthy 18.6% return (or \$65,000). See below:

Phase 1 - Development period

1. Development

- Captures all costs associated with village development
- Equivalent to development of Residential Inventory

Assumptions	Accounting Entry	P&L	BS	Cash
		Dr/(Cr)		
Land and development costs total \$285k, including:	Property, Plant & Equipment ⁽¹⁾		285	
• Land	Cash			(285)
• Development				
• Construction				
• Interest				
• Holding costs				
		-	285	(285)

Phase 2 - First Leasing – Development Profit Recognised

2. First lease

- Point at which development profit is recognised
- Recognised at point resident takes occupation of unit
- A recent change to AASB 140 Investment Property will affect both the timing of development profit recognition and classification of villages under construction from 31 Dec 2009 onwards. The impact of the change is currently being assessed and will be announced at 1H10 results

Assumptions	Accounting Entry	P&L	BS	Cash
		Dr/(Cr)		
Unit leased to first resident	Cash (received from incoming resident)			350
"Sale" price \$350k	Property, Plant & Equipment ⁽¹⁾		(285)	
"Cost of Sale" \$285k	Revaluation of investment property (development profit on completion)	(65)		
Development margin \$65k				
Margin % 18.6%				
	Investment Property (Capital value)		350	
	Existing resident loan obligation (Incoming)		(350)	
	(Balance sheet "gross up" required under accounting standards and excluded for gearing calculations)			
		(65)	(285)	350

- On top of all this, the operator is also the primarily long term beneficiary from normal property market increases in the value of the property constituting the village's dwellings and its land (which residents are required to pay to keep in good repair!). The operator simply cannot lose under this 'model'. The illustration now following proves the point of anticipated projected property values in the model after the first 12 years:

DMF NPV calculations

Backup: Detailed NPV
Calculation for the DMF

Phase 2 – First Leasing – DMF First recognised (NPV calculated at date resident occupies unit)

Year	0	12	24	36	Terminal value
Unit price increased by 3.7% p.a.	350	541	837	1,295	
DMF at 32.5%		176	272	421	396
PV at 12.55%		43	16	6	5
Total DMF NPV	70				

Calculation of Terminal Value:

- Step 1 - Annualise the DMF by taking \$421 DMF in Year 36 and divide by 12 years, given 12 year assumed occupancy period (= \$35)
- Step 2 - Calculate the value of the growing perpetuity based on this annualised figure: $\$35 / (12.55\% - 3.7\%) = \396

Phase 3 – DMF Revaluation (NPV calculated at date first resident exits unit being 12 years)

Year	0	12	24	36	Terminal Value
Unit price increased by 3.7% p.a.	541	837	1,295	2,002	
DMF at 32.5%		272	421	651	613
PV at 12.55%		66	25	9	7
Total DMF NPV	107				

Calculation of Terminal Value:

- Step 1 - Annualise the DMF by taking \$651 DMF in Year 36 and divide by 12 years, given 12 year assumed occupancy period (= \$54)
- Step 2 - Calculate the value of the growing perpetuity based on this annualised figure: $\$54 / (12.55\% - 3.7\%) = \613

- the resident-lessee is paying the operator \$850 per week, but eventually gets back only \$24 per week. The resident's net cost is therefore \$826 per week over 12 years to lease a \$350,000 dwelling. This cost results from having authorised the DMF accrual and as well, by virtually assigning any interest the resident could have earned on the \$350,000 involved.
- Yet the resident-lessee still does not have full rights of ownership of their home and could still, under Section 136 (1) (b) of the Act for example, be required to move out of their home in the village if the operator wanted to action a "change of use" of the property.

■