



## **Australia: Application of formulas for the variation of recurrent charges: Contract remains King**

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Article by Jessica Smythe and Lucy Gray

A recent case decided in the NSW Consumer, Trader & Tenancy Tribunal (**CTTT**) has served as a warning for operators to ensure that the formula for variations in recurrent charges are set out clearly and unambiguously in their village contracts in compliance with the *Retirement Villages Act 1999* (NSW) (**Act**) and the *Retirement Village Regulations 2009* (NSW) (**Regulations**).

### **The application**

In *Daley v Scalabrini Village Limited (Retirement Villages)* [2010] NSWCTTT 506 the resident sought orders for repayment of overpaid recurrent charges paid to the operator (among others).

The resident's village contract provided that recurrent charges will be varied according to a fixed formula based "on the same CPI% amount as the Single Aged Pension is increased...".

The dispute related to whether the formula for variation to recurrent charges was based on:

1. CPI generally; or
2. the indexation amount relevant to the Single Aged Pension amount by Centrelink.

### **Submissions**

The resident said the formula was by reference to the general CPI change (2.9% as it was at the time). The operator said that the correct approach was that the formula was based upon increases in the Aged Pension, and that the word 'CPI' did not create a lack of clarity.

The operator also submitted that the recurrent charges had been varied in the same way for a number of years and that method of variation was accepted amongst the residents.

### **Findings**

The Tribunal made the following findings:

1. the operator had misinterpreted the formula. Just because the formula had been applied in the same misinterpreted way for many years and was accepted by residents, it does not mean that the operator is allowed to continue varying recurrent charges in that way. The contract must apply.
2. the fixed formula under the village contract was found to be based solely on CPI increases to the Single Aged Pension and did not include any other variation (such as a budgetary increase). Any overpayment made by the resident in excess of the CPI increase to the Single Aged Pension was required to be repaid to the resident.
3. the operator may only vary recurrent charges in the manner stated in the contract. If that method is to be amended or applied differently, it will only apply where it is also amended in the contract and any amendment to the contract must be carried out in accordance with the Act.

### **Reviewing variations in recurrent charges**

This case serves as a warning to operators to ensure that their processes for calculating and making variations in recurrent charges are:

1. compliant with their obligations under the Act and the Regulations;
2. made using the correct source of variation; and
3. made according to the formula for variation set out in their contracts as properly understood.

The case also serves to remind operators that the Act is there to supplement and where applicable override provisions of a contract, but that ultimately the terms of the contract are king.

**Gadens Lawyers** is able to assist retirement village operators to review their contracts and formulae for variation of recurrent charges.

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*