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# Tax Traps in the Financial Structures of "Resident Funded" Retirement Villages

## **Abstract**

It is claimed that the way to make large, tax-free profits is to develop a resident-funded retirement village. This claim is examined in respect of strata title developments and the various occupancy right based developments, in particular, the lease premium, the loan and the share premium methods. The author's examination reveals that all the occupancy right methods result in excessive assessments, as the entire in-going contribution is assessable and no deduction is available for development costs. Variations to these occupancy right methods are examined, but they fail to overcome the threat imposed by Part IVa of the Income Tax Assessment Act 1936. On the other hand, only the actual development costs are assessed under the strata title method. On balance, the strata title development method gives the best tax result. The occupancy right methods do not live up to their claimed tax advantages.

## **Keywords**

retirement villages, occupancy rights, taxation, strata title development

## TAX TRAPS IN THE FINANCIAL STRUCTURES OF "RESIDENT FUNDED" RETIREMENT VILLAGES



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### Introduction

Traditionally, retirement villages have been developed by charitable, community, or church organisations and run on a non-profit basis. Since the early 1980s the private sector has responded to demographic demand<sup>1</sup> resulting in the proliferation of "resident-funded" (ie "self funded" or "for profit") retirement villages, both small and large. Unlike the non-profit villages, these "resident-funded" villages usually feature "... resort style accommodation with comprehensive and long-life care facilities".<sup>2</sup>

Various financial structures have been created by developers in an attempt to recoup development outlays quickly and to ensure the funding of

- 1 It has been predicted that two out of every seven Australians will be over 60 years of age by the year 2000: "Retirement Estate for Baby Boomers", *Weekend Australian*, 14 April 1990, 47.
- 2 McCullough, "Retirement Villages: a New Act and Code of Practice" [1989] *Nov Law Society Journal* 38.

on-going commitments, including the servicing of loans, while at the same time maintaining a continuing share in the capital appreciation of the project.<sup>3</sup> Similarly, the financial structures have also needed to accommodate the special requirements of retirees. As retirees have limited future income growth, they desire a structure which has a limited initial outlay or a return of secured larger outlays, combined with pegging of recurrent charges and deferral of some major expenses until death.<sup>4</sup>

Despite the array of possible legal forms of holdings and the various legal classifications of occupants available to developers,<sup>5</sup> only four major development methods (financial structures) have been developed in order to satisfy the needs of both groups. They are lease premium, loan/lease or licence, redeemable preference share and strata title structures.<sup>6</sup>

The loan/lease or licence/lease, redeemable preference share and lease premium structures usually have a number of features in common. They are that:

- the occupancy rights (lease or licence) are long term, with 99 years being the most common period;
- an "in-going contribution" (ie an amount of money usually equivalent to the market value of the property) is given in consideration for the grant of the occupancy right. It is styled alternatively as a "lease premium", "loan" or "share premium";
- there is usually no rent payment, or at best a peppercorn rent or sometimes the body corporate fees are called rent;
- the occupancy right is usually terminated on death, breach or mutual consent; and
- usually a formula is provided whereby the former occupant recovers some of the initial contribution paid from the proceeds of a replacement in-going contribution. In fact, repayment is usually conditional upon receipt of that replacement in-going contribution. The amount repayable may be reduced over time or alternatively include a component of the increase in "market value" of the occupancy right. Where the incoming sum is below "market value", some contracts require that the outgoing occupant may have to make good the difference.

In all these structures, the developer can also derive other income from the charging of the resident a monthly management fees for services:

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3 Langford-Brown, "Retirement Villages in Australia: Tax Implications" (1987) 29 Valuer 532.

4 Above n 3.

5 Moore, "Retirement Villages: Victoria and South Australia" (1988) 14 NZ Recent Law 312.

6 Loan/lease/licence or lease premium structures account for 70 percent of retirement villages and strata titles 25 percent. See *Issues in the Financing and Administration of Retirement Villages* (1990), discussion paper by the Office of the Commissioner for the Ageing (SA) 46.

provided, income from concessions and even income from the sale of naming rights of the community facilities.

As the structuring of villages is still, "... if not in its infancy ... in the developing stages",<sup>7</sup> these structures need to be examined to evaluate whether they are as tax effective as their owners wish and to highlight the income tax pitfalls.

This examination can only be general in nature as there still exists a lack of uniformity in deeds and agreements, despite recent legislation in most States.<sup>8</sup> Each case must be reviewed on its own facts. Further, the paper will deal with the legal issues, not the Commissioner's practices.

### Lease premium structure

Under this structure the "in-going contribution" paid in consideration for the grant of a long-term lease, is a lease premium, equivalent to the market value of the residence. The tax effectiveness of this structure is doubtful, given that it was adopted from the traditional suppliers of retirement villages, the non-profit organisations, without regard to the fundamental difference in taxation status.

These concerns are justified given that s 26AB of the Income Tax Assessment Act 1936 ("the Act") assesses premiums received in respect of the grant of such residential leases. Also, it must have been evident to the industry that lease premiums granted in the normal course of the village's business are assessable under s 25(1) following the New South Wales Supreme Court decision in *Kosciusko Thredbo Pty Ltd v Federal Commissioner of Taxation*.<sup>9</sup> Further, they would also be assessable under Part IIIA regardless of the nature of their receipt.

Despite the legislation and case law, developers have continued to use this structure in the belief that only the "gain" on the premium was assessable or only the premium net of construction costs was assessable (ie similar to a strata sale). It is these issues I wish to explore.

### Timing of assessment of premiums

It has been argued that the premiums are earned over the period of occupancy and should be assessed over the life of the lease, rather than at the time of granting the lease. This argument is based on the approach adopted by the High Court in *Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation*<sup>10</sup> and on the assumption that the lease premiums were made in consideration of the right of residency over the balance of the resident's life.

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7 Above n 3.

8 Retirement Villages Act 1986 (Vic); Retirement Villages Act 1987 (SA); Retirement Villages Act 1988 (Qld); Retirement Villages Act 1989 (NSW).

9 (1983) 15 ATR 165; 84 ATC 4043.

10 *Case B47* (1970) 70 ATC 237; *Case 109* 15 CTBR (NS) 714 and *Case B51* (1970) 70 ATC 253; *Case 113* 15 CTBR (NS) 736.

Thus, they should be returned as income over the life of the lease. It is also argued that the premiums are akin to advanced rental payments, which are assessed over the period of the lease.<sup>11</sup> However, as most leases are granted conditional upon receipt of the premium, the premiums are received in consideration of the grant of the lease. Once granted there is nothing more to be performed by the lessor.

The lease premiums are not in the nature of advance rental. Most retirement village agreements do not indicate that the nature of the receipt is rent, nor do their accounts reflect the contingent liability of the developers to repay the unearned rental (the unused portion of the advance rent) on termination of lease. Thus, the rent argument usually has no basis in fact or law.

### *Deductibility of construction expenses*

As the sale of the lease does not generally amount to a disposal of the underlying property and the attached accommodation, construction expenses would not be deductible under s 51(1). They are capital expenditure. It has, however, been argued that the leases are trading stock and as such the development costs associated with the leases should be allowed as a deduction against the lease premiums. As it has been held that leases are capable of constituting trading stock in other jurisdictions,<sup>12</sup> and in light of Aickin J's statement in *Federal Commissioner of Taxation v St Huberts Island Pty Ltd*<sup>13</sup> that "... there may be circumstances in which land, or interests in land may be trading stock", there is no reason in principle why leases are not capable of constituting trading stock in Australia.<sup>14</sup> There are difficulties, arising from the nature of the leases and their cost, in establishing that leases are trading stock in the retirement village context. First, as the lease is usually not created until the lease agreement is entered into, it is difficult to say that the lease agreements are "produced, manufactured, acquired or purchased" in terms of the s 6(1) definition of trading stock. Further, in order to be trading stock, the lease has to be capable of being disposed of in terms of s 36(1). The High Court in *Rose v Federal Commissioner of Taxation*<sup>15</sup> held that in order for there to be a disposal in terms of s 36, there must be "... a transfer of the proprietor's ownership of the asset ...".<sup>16</sup> As the leases usually have restrictions imposed in respect of encumbrances and disposal, there has not been a transfer of all the proprietor's ownership rights in respect of the lease in accordance with

11 (1965) 114 CLR 314; 14 ATD 98; 9 ATR 673.

12 In *Canada in Minerals Limited v Minister of National Revenue* 55 DTC 492 and in *Great West Exploration Limited v Minister of National Revenue* 57 DTC 444 and in *England in Arndale Properties Ltd v Coates (Inspector of Taxes)* [1984] 1 WLR 1328.

13 (1978) 138 CLR 211, 243; 78 ATC 4104, 4121; 8 ATR 452, 472.

14 Although he was in the minority, this view was consistent with that adopted by the majority.

15 (1951) 84 CLR 118; 5 ATR 197.

16 Above n 15 at 124; 200.

s 36. As Dixon noted,<sup>17</sup> the leases were "... not acquired for resale and are not by their very nature held for that purpose ...".

Finally, even if the trading stock argument can be established there are doubts whether the cost of the lease would include development costs. The English Court of Appeal and House of Lords decision in *BG Utting and Co Ltd v Hughes (HM Inspector of Taxes)*<sup>18</sup> are cited as supporting the view that the development costs would form part of the cost of the lease. But in *Utting*<sup>19</sup> the issue under consideration was whether ground rents (ie the reversionary interest in the leases) should be brought to account when the 99 year leases were granted. Further, the write-off of construction costs against lease premiums was only possible due to the existence of specific schedules which provided for recognition of net profits from this form of transaction. In light of the above and the fact that s 25(1) deals with gross income, not with a business income test, *Utting*<sup>20</sup> has no relevance in Australia.

An alternative argument is that the construction costs are deductible in accordance with s 160ZSA of the Act. In order to take advantage of this section the leases must be granted for a term of at least 50 years, and there must be a reasonable expectation that it will continue for at least 50 years. Further, the terms of the lease must be substantially the same as the terms applying to the lessor in respect of the land to which the lease relates (ie it must be able to be transferred and encumbered). There seems little scope for the operation of s 160ZSA in the retirement village context as the lease premiums will be assessed under ss 25(1) and 26AB. Thus, the cost of the lease would be its preparation costs, not the underlying construction costs.

### Evaluation

The adoption of the premium structure in respect of these profit-making ventures without consideration of their fundamentally different tax status has resulted, or will result, in dire tax and liquidity consequences for the developers. The lease premiums are assessable upon the grant of the lease and none of the development costs can be written off against the premiums received. It is a structure that should be avoided for tax reasons.

### Loan/lease or loan/licence structures

Under this structure the "in-going contribution" for the grant of the lease or licence is an up front payment styled as an interest free "loan" ("refundable deposit") to the lessor/licenser. The "loans" are usually contractually unsecured,<sup>21</sup> equal to the market price of the unit and no

17 Dixon, "Hidden Traps" [1989] 3 Retirement Village Journal 20, 21.

18 [1939] 1 KB 256, CA; (1940) 56 TLR 495, HL; 23 TC 174.

19 Above n 18.

20 Above n 18.

21 Part IV of the Retirement Villages Act 1988 (Qld), s 9 of the Retirement Villages Act 1987 (SA) and s 29 of the Retirement Villages Act 1986 (Vic) secure the entrance payments as first charges against the retirement village property.

interest is payable. The claimed commercial advantage of this structure is that the developer is able to reduce its interest costs and to withdraw its capital to use on other projects without losing control of the investment. The claimed tax results include the fact that the pre-tax income flow is roughly equivalent to a strata title approach, without the derivation of assessable income.<sup>22</sup> The developer is able to avoid recognition of income and to take advantage of Part IIIA of the Act. But the claim that deductions for development holding costs, other on-going holding costs, and Division 10D deductions are also available, is doubtful. It would be difficult to establish that a business is being carried on if the income is never realised.

The major concern with these arrangements is whether the "loan" given in consideration of the granting of the lease/licence is assessable to the developer either in full or at its market value.

### *Assessability of "loan"*

A "loan" is "... a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest".<sup>23</sup> The most important feature for a transaction to be characterised as a loan, is a liability to repay.<sup>24</sup> It appears that it is irrelevant that the transaction agreement does not provide for a precise date for repayment, or for an interest charge, or for security to be given for the amount lent. However, in finding that "liability to repay" was the determinative feature of a loan, the Courts have only considered the situation where a loan was interest free.<sup>25</sup> They have not examined situations where all the usual commercial features of a loan were absent.

Clearly the rental or re-letting of the retirement units is not the profit-making subject of a business under this structure, as no rents or premiums are received. The question is: what is the profit-making subject of the development? Under the structure the major gains are made through the use of the loan funds. Thus, in the absence of other assessable income, it is conceivable that the Commissioner may attempt to assess the loans as the profit-making subject. There are, however, a number of English authorities which indicate that a loan is not capable of being assessable income. The only Australian authority in point is a Board of Review decision, *Case 20/Case U7*.<sup>26</sup> Further, despite the income deferral, as the documents on the face of them purport to have a common intention to create legal rights and

22 Dixon, "Taxation Liabilities of For Profit Retirement Villages" (1990) "Retirement Villages 90" conference paper 1.

23 *Chitty on Contracts* (25th ed 1986) 541.

24 *Allchurch v Popular Cash Order Co Ltd* [1929] SASR 212.

25 *Commissioner of Inland Revenue v Wesleyan and General Assurance Society* 30 TC 11, 17.

26 (1987) 18 ATR 3120; 87 ATC 127.



obligations, the structure cannot be a "sham".<sup>27</sup> But there is no need to resort to a "sham" argument in order to determine the true effect of these "loan" payments. As the cases suggest, it is possible to characterise a payment by its legal effect (its substance), rather than its form or title.<sup>28</sup> In fact many deeds contain clauses which give rise to the view that there is not an obligation to repay, ie the "in-going contribution" is not a loan.

Clauses which qualify the obligation to repay are those which require a substitute loan from the incoming lessee/licensee before repayment, particularly where there is no obligation for the lessor/licensee to "repurchase" the lease/licence (ie make direct repayment of the loan). As an unfettered obligation to repay the balance of the loans does not exist, the "loans" could be classified as a payment for the right to occupancy (a premium) and assessed under s 25(1). Further, in order to be a loan, there must be an obligation to repay "that" or "an equivalent"<sup>29</sup> amount. Most deeds have clauses which calculate how much is to be repaid. Thus the amount repayable is never "that" or "an equivalent" amount. The "loan" could be assessed under s 25(1).

This result is harsh as the entire "in-going contribution" is assessed without regard to costs. An economic equivalence approach would be the just alternative. The loans could be apportioned into two elements, an amount equal to the present value of his promise to make repayment in the future (the loan element) and the balance which is a premium received by him on the grant of the lease. This profit, based on time-value-money gains made from the transactions, could be imputed on an annual basis. Despite the merits of this approach, it is not open in light of the Full High Court's rejection of this basis of profit calculation in *Federal Commissioner of Taxation v Myer Emporium Ltd*.<sup>30</sup> They stated that "[t]he accounting basis which has been employed in calculating profits and losses for the purposes of the Act is historic cost . . .".

There is also considerable risk for a structure entered into after 27 May 1981 that Part IVA will apply.<sup>31</sup> The loan agreement would be a "scheme" in terms of s 177A. The agreement would give rise to a tax benefit in terms of s 177C as there is an amount which would have been reasonably expected to be included in assessable income if the scheme had not been entered into (ie assessment of a premium). There would also be little difficulty in establishing that the scheme was entered into with the dominant purpose of obtaining a tax advantage in light of the criteria in s 177D(b).

In summary, clauses that impede repayment or those which determine what is to be repaid should be avoided or modified. Clearly, care must be

27 *Cranstoun v Federal Commissioner of Taxation* (1984) 15 ATR 1278; 84 ATC 4876.

28 *Smart v Lincolnshire Sugar Co Ltd* (1937) 20 TC 643.

29 *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136, 167.

30 (1987) 163 CLR 199, 209; 18 ATR 693, 697; 87 ATC 4363, 4366.

31 Above n 22 at 7.

taken in the original drafting particularly as Part IVA has application. Although I have not reviewed the application of Part IIIA (ie s 160M(6) and (7)), it may also have application.

### *Assessability of market value of the loan*

In the alternative, even if the Commissioner cannot assess the loan there is a danger that the market value of the loan could be assessed under s 21A and Part IIIA. Section 26AB may also have application, but as it is restricted to leases, I do not propose to examine its operation.

### *Application of section 21A*

Section 21A does prima facie apply as the loan/lease transaction is caught by the definition in s 21A(5)(c) (ie "an arrangement for or in relation to the lending of money"). The benefit received by the developer is the market value of the interest free loan.

However, Dixon argues<sup>32</sup> that the gain received by the developer would be offset to the extent that he would have incurred finance costs by paying interest to the retiree (s 21A(3)). The "otherwise deductible" rule, however, may have no application given the fact that the value of the consideration reflect the market value of the loan (ie the present value of future interest charges foregone discounted by various factors which reflect uncertainty in loan duration and market interest rates), rather than an actual interest expense. Further, even if they are the same thing, whether the rule provides relief will depend upon whether the full benefit is deemed to be derived at the time of execution of the loan document, or over time. Clearly, the rule is of no assistance if the benefit is derived at point of execution as little of the interest would be deductible then, given that the interest on the loans is usually charged over time.

Also, even if the interest was deemed to be deductible up front, the prepayment provisions (ss 82KZL to 82KZO) may operate to limit the amount "otherwise deductible".

The Commissioner's view on these issues is uncertain as *Taxation Ruling IT 2631*, his only pronouncement on the operation of s 21A, does not address them. However, the *Ruling* seems to be premised on the basis that the benefit accrues over time and that the prepayment provisions have no application.

### *Application of Part IIIA*

Part IIIA would also prima facie apply. In respect of leases, the granting of a lease is a disposal in terms of s 160Zs(1). Under s 160ZD(1) the taxpayer is deemed to have received as consideration the market value of an interest

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32 Above n 17.

free loan. A token "rent" or premium does deflect its application (s 160ZD(1)(c)).

A licence, being an asset at the time it is granted, is taken by s 160M(5)(c) of the Act to have been acquired by the grantor. Section 160C(2) then treats the grantor as owning the asset. Where the ownership of the asset changes — ie where the licensee becomes the owner of the licence — there is a disposal in terms of s 160M(1). It follows that its value will be determined in accordance with s 160ZD(1), as in the case of leases.

The outcome is likely to be similar in effect to assessment under s 25(1), with the developer being assessed on the market value of a long-term, interest free loan. The market value is likely to at least equal the "loan" sum as there is no "otherwise deductible" rule as under s 21A. As with the application of s 21A, the valuation question will be the major area of dispute.

### *Evaluation*

In summary, the tax and liquidity problems resulting from the use of this structure are the same as those arising under the lease premium structure. It is clear "... that parties adopting this approach in the future are very aggressive gamblers".<sup>33</sup>

### **Share/licence structure**

Under this structure the retiree purchases a redeemable preference share which gives entitlement to occupy a specific unit. The share is issued at a "premium" equivalent to the market value of the unit to be occupied. The major tax advantage claimed in respect of this structure is that the increase in the share premium account will never be assessed as the contributions are capital. Companies are not assessed on the creation and redemption of shares (Division 16K). As with the previous structures there is concern that the "incoming contributions" (ie the "share premiums") are assessable in full.

Despite the strong presumption that the issue of a share by a company would not normally result in the moneys raised being assessable income, it is considered that the "share premium" is assessable. The company under this structure is conducting a business of leasing units via the sale and repurchase of its redeemable preference shares. The fact that the grant of the occupancy right is dependent upon the payment of the premium, is evidence of this trading. Further, the structure has all the hallmarks of a business, ie it involves a series of transactions entered into for the purposes of earning income.

Alternatively, as s 180(1)(a) of the Corporations Act 1990 (Cth) provides that the memorandum and articles of a company effect as a contract between the company and each member, the terms of the memorandum and articles are crucial in determining the true nature of the structure. It must be noted

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<sup>33</sup> Above: n 22 at 12.

that the contractual effect is only so far as they confer rights or obligations on the member in his capacity as a member, not in his or her capacity as an outsider.<sup>34</sup> Where the terms of the memorandum and articles indicate that there exists merely an agreement between a lessor/licensor and a lessee/licensee, then the memorandum and articles will not constitute a contract.<sup>35</sup> At best they merely reflect a statement of what has been agreed upon.<sup>36</sup> The objective facts will indicate what is the nature of the agreement. The facts are that there is the granting of an occupancy right in return for a payment. The "share premium" is therefore assessable under s 25(1).

If there is an agreement to raise capital, then the shares would have all the hallmarks of a redeemable preference share. A "redeemable preference share" is defined in s 192(1) of the Corporations Act 1990 (Cth) as a preference share issued in accordance with the articles that is, or at the option of the company is, liable to be redeemed. As "preference share" is not defined in the Act, it must have its ordinary meaning, ie it vests rights in the shareholder in priority or preference to other shareholders, particularly in respect of dividends and return of capital upon wind-up. This view is supported by s 200 of the Corporations Act 1990 (Cth), which provides that the memorandum or articles of the company should state the —

... rights of the holders of those shares with respect to repayment of capital, participation in surplus assets and profits, cumulative or other non-cumulative dividends, voting, and priority of payment of capital and dividend in relation to other shares or other classes of preference shares.

Thus, a preference share's most important feature is that it confers rights of preference or priority. The memorandum and articles of retirement village development companies usually deny such priorities or preferences. A further complication is that s 192(3) of the Corporations Act 1990 (Cth) requires that redemption of a share must be out of profits that would otherwise be available for dividends or out of the proceeds of a fresh issue of shares made for the purpose of redemption. These requirements can never be satisfied in the retirement village context as most villages do not make profits in their early years of operation and the replacement shares are issued to secure occupancy.

In conclusion, the fundamental commercial nature of the structure, and the absence of any of the standard features of a capital subscription, are all factors which indicate that the structure is merely an agreement to secure occupancy, rather than an agreement to secure capital. Therefore, the "incoming contribution", styled as a "share premium" would be income in terms of s 25(1). Consistent with this approach, any repayment of the "share

34 *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881 and *Herron v Port Huon Fruitgrowers' Co-operative Association Ltd* (1922) 30 CLR 315.

35 *Eley v Positive Government Security Life Assurance Co Ltd* (1876) 1 Ex D 88.

36 *ibid* at 90.

premiums" upon re-issue would be deductible. There would also be no doubt that Part IVA would also apply, particularly since the structure has to breach s 192 of the *Corporations Act* 1990 (Cth) to operate.

### Strata title structure

Although this structure merely involves the sale of the units, it does possess a number of special features which overcome the liquidity problems associated with lease premium structures. First, there is recognition of the economic profit, as the actual profit is brought to account upon sale with the development, holding, administration and marketing costs being recouped. Capital is also freed for other projects. Secondly, a continuing income stream is also achievable through the provision of management services. There is also scope to share in capital gains through commissions on resale (described sometimes as "deferred management fees") or resale profits from the exercise of options to purchase. These commissions, rights and options are usually secured by a series of contractual covenants, which secure these "rights" in perpetuity. Any accruing commissions are normally secured by a charge on the property. Thus, a valuable "asset" is created in the hands of the developer which is capable of assignment for value. Further, as both these structures are contractual they are not affected by any legislative restriction on by-laws that allow for restrictions on sale.<sup>37</sup> On the debit side, the developer loses any entitlement to Division 10D and depreciation deductions which may be available under the alternative structures. There are also a number of perceived practical problems with the structure.

It is argued that the strata title structure does not cope well with the movement of residents within the village from independent living to more dependent care accommodation. Such movement requires sale of the old existing accommodation and the purchase of new accommodation. It is an expensive and complex exercise. However, this is not caused by the strata title structure per se, as it is also a common problem in the lease and licence based structures. The root of the problem lies in the fact that the cost of construction and operation varies according to the level of care provided. Thus, the "in-going contribution" varies. A general fee and broadly-described occupancy rights would be difficult to market as it would result in some accommodation being subsidised by other residents.

Secondly, developers perceive a threat from bodies corporate which are capable of terminating their management services. This latter concern is over rated. No threat exists if the service arrangements are secured by individual service contracts.

Finally, it is argued that the strata title structure restricts development opportunities as although sites may be zoned for retirement village development they may not permit strata titling. This is probably its only defect.

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37 For example, s 30(6) of the Buildings Units and Group Titles Act 1980 (Qld).

## Modification of the structures

There are situations where strata developments are not a viable alternative, for example, where strata title development is not permitted by zoning. Therefore, there is a genuine need to devise a financial structure which enables development, whilst ensuring only assessment of economic profit.

Dixon<sup>38</sup> suggested a variation of the share premium structure that avoids the application of Part IVA by making the structure more commercial. This is done by specifying a dividend rate in respect of the shares which is payable upon redemption and requiring the lessees to make annual lease premiums payments. As well as overcoming the susceptibility to attack by Part IVA, it is assumed that this modified structure has similar commercial and tax advantages to the unmodified share premium structure. It is also claimed that it overcomes the difficulties in claiming holding cost, Division 10D and s 54 deductions as a business is being carried on. However, the underlying aims of developers (to ensure return of capital) and of retirees (deferring recurrent costs) cannot be met under this proposal.<sup>39</sup> Further, by requiring substantial annual payments from lessees it may be difficult to market. Also, this modified arrangement may still be subject to Part IVA as there is deferral of income at the initial subscription ("sale") stage.

An alternative structure exists which does overcome the application of Part IVA. Under the structure the "in-going contribution" is split into an actual loan equal to the actual construction costs and a "premium". As the loan would be repayable in full upon redemption of the occupancy right, it would not be assessable. The amount of any substitute loan would be restricted to the actual construction cost. The "premium", which reflects the economic profit on "sale", would be assessed. The future assessable project gains would be the difference between the amount of "premium" repaid and the substitute "premium" received. The tax result is the same as a strata sale. As there is no deferral there would be no scope for the application of Part IVA. Payment of annual premiums, rents or dividends is not required. However, this structure is not the definitive solution. As well as potential marketing problems arising from the splitting of the "in-going contribution", it has a fundamental difficulty involving the calculation of the construction cost amount. The Commissioner may not accept the inclusion of the underlying plant/buildings in the construction costs calculation, as the developer obtains a deduction for these amounts through the entitlement to depreciation and Division 10D deductions. To allow such plant in the cost calculation may be viewed as sheltering income.

In summary, any modification to the non strata title arrangements may overcome some of the adverse tax effects. However, in doing so, marketing, capital recoupment and other commercial advantages seem to suffer.

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<sup>38</sup> Above n 22 at 12

<sup>39</sup> Above n 3.

## Conclusion

It is clear that attempts to secure capital appreciation whilst retaining legal title will tend to result in the developer suffering liquidity problems arising from resultant tax liabilities. Even modifications of these structures will run the risk of attack under Part IVA if they do not address the issues of income deferral and double dipping. As the strata title structure overcomes these problems, it is the preferred structure. In fact, the Office of the Commissioner for the Agency (SA) encourages the adoption of the strata title method for other non-revenue reasons.<sup>40</sup> Care must be taken in any divergence from this structure. To do otherwise would be indeed "a very aggressive gamble".<sup>41</sup>

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40 Above n 6 at 48.

41 Above n 22 at 12.