

Review of the Retirement Villages Act 1986

Submission by Les Scobie, retirement village resident since 2007

Before moving to examine the Victorian Retirement Villages Act 1986 it is important that all parties are aware of the following primary facts when it comes to Retirement Villages.

- 1. 72% of retirement villages are owned by 'for-profit' operators. The days of the 'benevolent' operator discounting the entry cost by the amount of the 'deferred fee' are well past.**
- 2. 74% of retirement village residents do not occupy their units on a freehold basis, merely granted a lease or licence to occupy.**
- 3. Retirees often pay a price commensurate with an outright purchase price for a similar unit within the general community without ever gaining ownership.**
- 4. Contractually residents have all the financial responsibilities of 'property ownership' like maintenance costs, renovation costs, selling costs, administration costs.**
- 5. Contractually in the order of only 1 in 2 residents have the financial rewards of 'property ownership' such as capital gain. Where granted however the retiree may not be entitled to 100% of any capital gain, it may be shared with the operator. The retiree also becomes proportionally responsible for any capital loss.**
- 6. Contractually residents can lose up to 45% of their in-going payment in a so named 'deferred fee' without ever gaining ownership.**

The following statement by [REDACTED] the [REDACTED] [REDACTED], sums up the retirement village industry succinctly. It amplifies the financial impact on the capital base of both the occupants and subsequently their families.

“Families need to be aware that what we are talking about here is the transfer of inter-generational wealth, not to families, but into the pockets of large multinationals. Shame about elderly people not having enough money for aged care”

The Federal government is yet to fully realise the negative financial impact this industry has on the capacity of retirement village residents to eventually fund their own in-home care or residential aged care.

Respected journalist [REDACTED] also provided clarity as to the reality of the retirement village industry with his article 'Retirement villages: how grandma and grandpa become corporate financiers'.

“It would be interesting to know just how many retirees know, when they finally alight upon a leafy retirement village to while away their twilight years, that they are using their nest eggs to make a large, unsecured, interest-free loan to a property developer.”

One is also reminded at this point of the words of Barack Obama -

“If the people cannot trust their government to do the job for which it exists – to protect them and to promote their common welfare – all else is lost”

My submission to the disclosure obligations aspects of the Retirement Villages Act - Les Scobie.

Review of the Retirement Villages Act 1986
Submission by Les Scobie, retirement village resident since 2007

The regulatory and policy framework (Part 2)
Application and scope of the Retirement Villages Act 1986

Disclosure obligations

7. When advertising the 'price' of a retirement village unit, should there be a requirement to include a reference to any deferred management fees and other departure fees and charges?

Response -

YES – The great deception of the retirement village industry to date has been that the 'actual' cost to the retiree is not known until the retiree departs the village. The goal of any revision process should be to ensure that all the cost components are known, based on the best available information at the time, to a prospective resident prior to the execution of a contract of occupancy.

To enable a direct cost comparison with other non-ownership forms of residential accommodation it should be mandatory that all prospective residents be given an all inclusive monthly occupancy cost for 5, 10, 15 year periods. This all inclusive monthly cost to include the devaluation cost of any interest free loan to the operator, the deferred management fee, the refurbishment cost on departure, monthly maintenance fees, selling costs on departure, any other relevant fee but excluding any potential capital gain or capital loss. Although there are shortcomings with the parameters that need reviewing NSW have introduced the mandatory provision of an Average Resident Comparison Figure.

8. Has the provision of a Fact sheet and Disclosure Statement to prospective residents led to an improved understanding of the financial and contractual arrangements relevant to living in a retirement village enabling prospective residents to make an informed decision?

Response -

PARTLY. There are still serious issues with the failure of some retirees and even their advisors to fully comprehend the fact sheet and disclosure statements and their important relationship to the contract to be executed. The following correspondence extracts are from an actual case regarding a retirement village in regional Victoria it discloses the failure of all parties the retirees, their professional advisors, the operator and particularly the responsible authority Consumer Affairs Victoria.

"01-08-2016

Department of Justice and Regulation,
Consumer Affairs Section,

Re:- Failure to provide a fact sheet and failure to provide an accurate fact sheet

I wish to bring to your attention a matter which I consider to be of a serious nature. Since July 1 2014 the operator of the retirement village that I live in, [REDACTED] had consistently failed to provide a prospective resident with a fact sheet and disclosure statement and then where provided these documents contain some terms and conditions contrary to the contract provided for execution. The areas of concern relate to the selling costs of the unit on departure and the costs of renovation/replacement on departure (see attached extracts from the documentation handed out by the selling agent as at July 16 2016)."

"06-01-2017

Director,
Consumer Affairs Victoria,

Re:- Failure to receive feedback re case [REDACTED]

I wish to lodge a complaint re the lack of courtesy feedback following a complaint I lodged against [REDACTED] the operator of a retirement village here in [REDACTED].

Case [REDACTED] details the failure of the organisation [REDACTED] to issue a fact sheet for an extended period following legislative amendments dated July 1 2014. It also detailed that where a fact sheet was subsequently issued it contained differing terms to the contract, the contractual terms being favourable to [REDACTED] than the fact sheet at the cost of the consumer. The original legislators saw these actions as serious matters as can be seen from the strong penalties for operators who failed to amend practices from July 1 2014 or who infringed these legislative requirements on an ongoing basis.

The primary purpose of the complaint was to get [REDACTED] to stop the practice of differing terms and conditions between the fact sheet and the contract which was detrimental to the consumer and to the advantage of the operator. It was my firm belief that [REDACTED] would not stop the practice simply on my personal request, only firm action from your department would ensure the measures introduced by legislators in 2014 would be adhered to."

"19/03/2017

[REDACTED],
Hume Regional Manager,
Consumer Affairs Victoria,

Re:- Case number: [REDACTED] – Failure to provide a Fact Sheet / Failure to provide an accurate Fact Sheet

In reference to my original complaint regarding the failure of local retirement village operator [REDACTED] to provide a fact sheet or where provided the information in the fact sheet differed from the contract to the detriment of the consumer. Where provided the fact sheet advised that the prospective resident WAS NOT responsible for reinstatement or renovation costs on departure. The contract they were given to execute stated that a resident is responsible for reinstatement, renovation and refurbishment costs of their unit on departure.

32 Costs of renovation or reinstatement [refer to regulation 8C(1)(b)(xvii)]

'Kennedy' Contract

The Manager agrees to consult with the Resident regarding what renovation, reinstatement or refurbishment works may be required to be carried out to the Resident's Premises in order for the Resident's Premises to be re-let for the maximum new Entry Payment. Such works may include replacement of all floor coverings, repainting all painted surfaces any replacing any Chattels, Fixtures, Fitting and Furnishings. The Resident must pay all costs reasonably incurred by the Manager in carrying out these works to the Resident's Premises.

Your attention is drawn to the word 'refurbishment' in Clause 32 of the contract as above. At the recent State Government enquiry into retirement living the word 'refurbishment' was given greater

understanding in a presentation to the enquiry by a [REDACTED].
http://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Retirement_Housing/Report/LSIC_58-06_Text_WEB.pdf

[REDACTED] advised the enquiry "Refurbishment means bring it up to today's standard, whatever that standard is." This presentation is significant in that the financial loss to be born by these consumers here in [REDACTED] can now be quantified with a greater degree of accuracy. This \$60,000.00 at present day values quoted by [REDACTED] may not be a little high to reflect local costs but her presentation does help to quantify the financial damage done to local consumers. What we don't know of course is what will the 'refurbishment' cost be to these affected consumers in say 5, 10, 15, 20 years into the future when it is their time to leave the village.

My estimate is still that there may be between 20 to 40 residents (consumers) here affected by either not getting a fact sheet or getting an inaccurate fact sheet. At a estimate of \$60,000.00 for refurbishment costs at some point in the future makes the value of the financial damage done to them by this legislative breach by the operator in the order of between \$1.2m and \$2.4m dollars in future dollar terms, a not insignificant amount of money.

I am still of the firm view that the operator should at a minimum excuse all so affected residents (consumers) from at least the 'refurbishment' provisions of their contract.

Yours faithfully,"

The verbal advice ultimately received from the Regional Manager Consumer Affairs was that Consumer Affairs was only interested in compliance. The operator continued to fail to correct the error until at least February 2018.

MAJOR POINTS FROM THIS CASE -

- Despite being given a fact sheet retirees can and will execute contracts with provisions contrary to the fact sheet or disclosure statement.
- Professional advice did not find that a fact sheet had not been issued or that there was an error in the fact sheet.
- Consumer Affairs Victoria failed to enforce the provisions of the Act including statutory penalties thus reducing the law to merely words on paper, leaving those retirees impacted exposed to the financial consequences of the operator breaking the law. A sum that could total in the order of 2.5 million dollars.
- One resident executed their right under Section 22 of the Act to rescind their contract ultimately reaching a settlement with the operator.
- It is imperative that Section 18 through to Section 22 of the Act remain to protect residents.

ACTION REQUIRED - LEGISLATIVE AMENDMENT -

Section 20(1) to be strengthened -

FROM - A person who includes in a disclosure statement, a factsheet or a document relating to the retirement village prescribed for the purposes of section 18B(1) a statement which the person knows to be false or misleading in a material particular is guilty of an offence.

TO INCLUDE - A person who includes in a disclosure statement, a factsheet or a document relating to the retirement village prescribed for the purposes of section 18B(1) a statement which the person knows to be false or misleading **OR KNOWINGLY IGNORES AN ERROR TO BE FALSE OR MISLEADING** in a material particular is guilty of an offence.

9. **What, if any, further improvements could be made to improve prospective residents' understanding of the potential financial and contractual arrangements relevant to living in a retirement village? Response -**

1. ACTION REQUIRED - LEGISLATIVE AMENDMENT -

A copy of the fact sheet / disclosure statement should form part of the contract, an all inclusive single document. Being placed at the front of the combined document. Information in the fact / disclosure statement to have a direct reference to the relevant clause in the contract.

2. ACTION REQUIRED -

Ensure government publications do not mislead or have the capacity to mislead retirees in their decision making.

Refer the following sequence of correspondence to show the failure of a government department to fully understand the issue around published information that misleads or at a minimum has the capacity to mislead.

06/08/2019

The, Hon. Marlene Kairouz,
Minister for Consumer Affairs,

Re:- Government publications that have a 'Capacity to Mislead' consumers.

I wish to raise the issue of statements that have the 'capacity to mislead' consumers made in the booklet downloadable from the Consumer Affairs web site. The booklet being - Guide to choosing and living in a retirement village.

There are three major points of concern all with the capacity to mislead consumers are -

Page 15 - Deferred Management Fee "how not-for-profit villages improve their services or subsidise maintenance charges". There is nothing in the Retirement Villages Act 1986 that requires an operator to do this, in fact they can and do contract away from it by including a statement in the contract of occupation that Deferred Management Fees are 'for their own use absolutely'. The statement in the booklet is simply not true in every case and clearly has the 'capacity to mislead' consumers.

Page 17 - Capital Gains - The statement that 'most contracts share any capital gain between the resident and the village owner' has the 'capacity to mislead' consumers as the use of the word 'most' is simply not true. Industry data has shown that only 41% of Australian village contracts share capital gain. It is difficult to imagine Victoria is completely isolated from this industry ratio.

Page 21 - Auditing of Financial Statements - The statement "the financial statement must be audited. Unless residents have agreed by special resolution" - Operators can and have applied for exemption to this mandate under - Section 6 of the Act – (1) *Any religious or charitable organization may apply to the Director to have the organization declared an exempt organization for the purposes of all or any of the provisions of this Act.* The statement on page 21 of the booklet has the 'capacity to mislead' consumers as the statement is simply not true in every case.

19/09/19

Director, Regulation Policy Governance,
Department of Justice and Community Safety,

Your reference – [REDACTED] (see attached copy)

Thank you for your reply to my letter of complaint to Minister for Consumer Affairs Marlene Kairouz regarding inaccurate and misleading statements in the publication by Consumer Affairs, 'Guide to choosing and living in a retirement village'.

I was saddened and in fact dismayed that a government department with the title of Department of Justice and Community Safety would hide behind any disclaimer in the publication rather than address the real issue of inaccurate and misleading statements.

Your reply included the phrase 'so as to avoid the use of technical legal language'. Removal of the false, misleading or capacity to mislead statements does not require the use of any technical legal language.

My primary issues are -

1. Is the statement made by Consumer Affairs 'true' or 'false'.
2. Does the statement mislead or have the capacity to mislead retirees in their decision making process in relation to Victorian retirement villages.

The ACCC make it very clear in its information to business – False or misleading statements - "It is illegal for a business to make statements that are incorrect or likely to create a false impression".

It is surely beholding on a government department particularly one charged with the responsibility to protect consumers to reach the same standard.

ACTION REQUIRED - BOOKLET AMENDMENT -

Booklet to be re-printed to remove statements that mislead or have the capacity to mislead.

In the interest of accuracy and Victorian retirees the booklet should be amended to remove the misleading or capacity to mislead statements.

- *The statement in the booklet, Page 15 - Deferred Management Fee "how not-for-profit villages improve their services or subsidise maintenance charges" is simply not true in every case. Without the need for any technical legal language the statement should be amended to read for example "how **some** not-for-profit villages **may** improve their services or subsidise maintenance charges" .*

• Page 17 - Capital Gains - The statement that 'most contracts share any capital gain between the resident and the village owner' is simply not true. Industry data has shown that only 41% of Australian village contracts share capital gain. Without the need for any technical legal language the statement should be amended to read for example ' **some** contracts **may** share any capital gain between the resident and the village owner' .

• Page 21 - Auditing of Financial Statements - The statement "the financial statement must be audited. Unless residents have agreed by special resolution" is simply not true in every case. - Operators can and have applied for exemption to this mandate under Section 6 of the Act. Without the need for any technical legal language the statement should be amended to read for example "the financial statement must be audited unless residents have agreed by special resolution, **some organisations however can be granted an exemption**" .

10. Are the current time frames for provision of a Factsheet and Disclosure Statement to prospective residents appropriate? Response –

Residents should be given a minimum of 30 days access to fact sheets / disclosure statements prior to executing a contract.

Submission by -

Les Scobie,

[REDACTED]

[REDACTED]