

**Residents of Retirement Villages Victoria Inc.**

**Submission – Access to Justice**

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## Executive Summary

There are six major impediments to residents of retirement villages obtaining justice:

1. Internal dispute resolution procedures are problematic, particularly concerning complaints about management. In almost every case a resident with a complaint about management must take that complaint to a representative of the management company, more often than not the subject of the complaint
2. The available free mediation services are not binding. Some operators decline to attend.
3. Consumer Affairs Victoria enforcement of the Retirement Villages Act is weak to non-existent and its information phone line less than helpful. Residents of Retirement Villages Victoria understands the problems derive from g budgetary constraints, inadequate staff expertise and an unduly restrictive mandate.
4. Mounting a Victorian Civil and Administrative Tribunal case is expensive, time-consuming and daunting.
5. The key Acts. Retirement Villages Act is not user-friendly. Residents and village managers do not understand it, suburban solicitors struggle with it, and operators tend to exploit it or ignore it when it suits them. Basic consumer protections are weak, misunderstood or missing. The Retirement Villages Act and the Owners Corporation Act don't work well together in the case of villages transitioning from strata title to lease contracts
6. Residence contracts are complex and biased towards the interests of owners and operators. Many of them contain provisions that conflict with the relevant Acts. Residents and village managers don't understand them, suburban solicitors are not much better, and operators often ignore provisions that are inconvenient

Major recommendations:

Residents of Retirement Villages Victoria submits the following actions would go a long way towards addressing the problems arising from the impediments identified above:

1. Appointment of an industry ombudsman service to deal with, amongst other things, retirement village complaints and disputes including the making of binding determinations. RRVV sees such an appointment as urgent.
2. Resolving the problems between the Retirement Villages Act and the Owners Corporation Act in the case of villages transitioning from strata title to lease contracts. We see this matter as urgent
3. Strengthening of Consumer Affairs Victoria enforcement of the Retirement Villages Act and the Owners Corporation Act. Residents of Retirement Villages Victoria sees this as a pressing need.
4. A rewrite of the Retirement Villages Act, to amongst other things, make it more user-friendly, strengthen consumer protections, prohibit contract provisions that conflict with the Act and eliminate provisions that confuse residents about the true costs of life in a retirement village.

## **Residents of Retirement Villages Victoria Inc.**

Residents of Retirement Villages Victoria (RRVV) is a volunteer organisation representing residents of retirement villages and like housing communities with around 5,900 paid up members. A committee of nine members supported by 83 resident liaison officers (village level coordinators) administers its affairs.

RRVV has four primary activity streams:

1. Government relations
2. Industry relations
3. Member support
4. Research.

RRVV devotes the greater part of its resources to member support. This includes:

1. Publishing four newsletters a year
2. Holding two primary member events a year
3. Visiting villages
4. Advocating on behalf of residents making complaints
5. Responding to telephone and e-mail queries (around 1,000 a year)
6. Provision and maintenance of the website [www.rrvv.org.au](http://www.rrvv.org.au) as a service to members and a source of information for people interested in retirement villages.

RRVV has members in a little over 42% of the registered retirement villages in Victoria.

RRVV research explores the demographics, health, life satisfaction, retirement village satisfaction, interactions with management, problems encountered, disputes, access to information and participation in decision-making of residents living in retirement villages.

## **Methodology**

RRVV has based this submission on:

1. A review of requests for assistance lodged by Residents of Retirement Villages Victoria members and other retirement village residents over the last five years
2. A series of small workshops and one on one interviews with members who have reported access to justice problems. RRVV conducted these workshops and interviews over the past three months. Where appropriate, RRVV has documented the essence of discussions in the form of case studies
3. The results of a survey of residents of retirement villages funded by RRVV and conducted by National Ageing Research Institute Limited in late 2015.

## **Disputes in Retirement Villages**

Disputes in retirement villages fall into broadly into two categories.

1. Resident - resident disputes
2. Resident - management disputes

The following are subjects of some typical resident-resident disputes:

1. Noise
2. Car parking
3. Use of Village resources
4. Pets
5. Dissatisfaction or conflict with residents' committee
6. Voting at meetings
7. Residents attempting to enforce legal rights
8. Harassment and bullying
9. Behavior of children visiting neighbors

The following are subjects of some typical resident-management disputes:

1. Policy
2. Access to Financial information
3. Spending priorities
4. Spending efficiency
5. Problem response times
6. Quality of maintenance works
7. Consultation
8. Management style
9. Lack of respect (both ways)
10. Management competence
11. Management performance
12. Staff efficiency
13. Maintenance responsibilities
14. Responsibility for building faults
15. Perceived discrimination, inequity and inconsistency
16. Over regulation
17. Under regulation
18. Contractual matters
19. Matters of law
20. Bullying, harassment and intimidation
21. Property reinstatement scope and costs
22. Termination payments

23. Residents attempting to have legal rights enforced
24. Interference in the sale of property

Only a minority of residents complain, and not all complaints have substance. Nevertheless, in RRVV's experience, dealing with complaints effectively is critical to the well-being of the complainants.

### **Internal Dispute Resolution in Retirement Villages**

The internal dispute resolution processes of most operators require the complainant to lodge his or her complaint with the Village Manager. Most residents have at least a passing relationship with their village manager. If that relationship is not good, this requirement is problematic. If the complaint is about the Village Manager or that manager's employer, the requirement is even more problematic.

Not all operators adequately advertise their internal dispute resolution process.

In RRVV's experience, a significant proportion of village managers:

1. Have little understanding of procedural fairness
2. Have little understanding of what constitutes evidence and how to weigh it
3. Are biased because they cannot act independently of their employer or see the exigencies of their managerial function as carrying more weight than residents' rights
4. Do not understand the relevant Acts and residence contracts
5. Seek to suppress disputes rather than resolve them

For example, a couple complained of residents parking in visitors car parks in direct contravention of the residence contract. See case study S and N. (Appendix C). They asked the Village Manager to enforce the contract. When he did not do so effectively, they filed a formal complaint. The Village Manager acknowledged that the parking was more than an occasional breach of the contract. Nevertheless, he did not take action that produced permanent change. The couple then filed an updated complaint with the Village Manager's manager. They attended a meeting with both the senior manager and the Village Manager called to resolve the complaint. During that meeting, the senior manager acted as though his role was to back up his village manager. Moreover, the Village Manager rather than the senior manager responded formally to their complaint. In his letter, he asserted he had the discretion not to enforce the relevant provision of the contract. More recently, the operator proposed to reassign some of the visitor car parks. The couple pointed out some legal complications. The operators reply included a blatant misrepresentation of the effect of a clause in the contract. The matter is ongoing at the time of writing this submission.

## **Consumer Affairs Victoria**

RRVV understands Consumer Affairs Victoria (CAV) in recent years has undertaken almost no enforcement action on behalf of residents of retirement villages, amongst other things, because of budget constraints.

RRVV regularly receives telephone calls from residents CAV referred.

A small number of residents report that their solicitor advised them that Consumer Affairs Victoria was available to support them, but when they contacted the Department, the officer they spoke to advised them to take their matter to VCAT. For example, three residents from a new village who reported financial irregularities, contractual irregularities, and construction defects on a large scale indicative of regulatory failure complain that the only assistance they received was advice to take the matters to VCAT. See Case Study, G.I and A (Appendix E). Also, see Case Studies V and W (Appendix G) and SU (Appendix J).

## **Independent Mediation**

Few residents have formal mediation. Those who report having considered using services offered by CAV or the Department of Justice but rejected it say they did not go ahead because they feared pressure to compromise with a party they doubted would follow through fully on its side of a bargain.

Others report having raised the option of mediation with the other side, only to have the operator refuse to attend the conference.

RRVV believes that disputes between residents and management require resolutions binding on the on both parties.

## **Victorian Civil and Administrative Tribunal**

Very few residents have taken a legal problem to the Victorian Civil and Administrative Tribunal (VCAT). Most of those who have taken their dispute to the tribunal reported that the process was complex, time-consuming and too expensive for the matter in dispute.

For example, two residents who challenged an operator's ruling on proxy voting applied to VCAT for determination. At a Directions Hearing they became aware they would need legal advice. Accordingly, they engaged a solicitor who engaged a barrister. The matter settled out of court after the operator agreed only to present motions at a Section 33 meeting because the law on proxy votes at these meetings is clear. The total cost of the exercise to the residents was \$2,293. See case Study W and V. (Appendix G)

In the experience of those few RRVV members who have experience of taking a case to VCAT, the tribunal does not live up to its promise of being cost-effective, less formal, suitable for self-

represented litigants, available to everyone, and easy to access. See Case Study SU (Appendix I) and case Study BB (Appendix J).

Given this, a surprising number of residents seriously consider taking their problem to VCAT and representing themselves. More might proceed if there were better support for self-represented litigants including an explanation of the relevant law, support with documentation (including completing the application and drafting affidavits), framing a case and oral presentation of that case. A handful of residents reported contacting a community legal centre. Some did receive a modicum of advice, but the matters met the criteria for assistance in only two cases. RRVV believes it unlikely residents will ever see a tribunal as being as user-friendly as an ombudsman service. Anecdotal evidence suggests residents of retirement villages do use the available relevant ombudsman services at least as much as the general population.

RRVV believes the low number of retirement village cases reaching the hearing stage reflects poorly on VCAT and is not evidence of low demand for binding conflict resolution.

The nature and reputation of VCAT are not the only reason residents do not use the tribunal's services. RRVV members who report not proceeding cite:

1. Conflict fatigue ( they have already had a lengthy battle with management)
2. Fatalism (you can't win against the legal resources of big companies)
3. Fear of:
  - a. Management retribution
  - b. Overt disapproval of other residents (sometimes because residents fear they will have to pay managements costs in defending the action. See Case Study L and P (Appendix F).
  - c. Uncertainty about costs and outcome.
4. Advice from local solicitors.

Some local law firms tend to put residents off by interpreting simple matters as complex, then referring the resident to an expensive expert (e.g. a barrister, a consulting engineer or the like). See Case - Study AAAA Village ( Appendix B), Case Study G, I and A (Appendix E) and case Study W and V (Appendix G).

## **Legislation Governing Retirement Villages**

### **1. Retirement Villages Act**

The Retirement Village Act (RV Act) was enacted in 1986 when the retirement village industry was a cottage industry with mainly not for profit benevolent societies running villages as inexpensive housing for retired pensioners. Private for-profit retirement villages were mainly family owned.



More recently corporate operators entered the industry by buying up the smaller family owned properties and building larger resort type facilities advertised as offering a luxury lifestyle for all.

The RV Act has undergone many amendments since 1986 including the 2005 repeal of an arbitrator who the parties to a dispute could appoint to make a binding determination.

The RV Act is an obstacle to residents' access to justice. In the opinion of RRVV members, it is unnecessarily complex, unclear and uncertain. Moreover, its resident protections are weak.

Residents typically consult their family solicitor on entering and leaving a retirement village and if they need advice during their stay. Very few search for a lawyer with a reputation for strength in retirement village matters. In RRVV's experience, family solicitors practicing in the suburbs rarely have an adequate grasp of the Act. We judge this by the variability of their advice on common questions and problems. For example, a simple question such as 'what are the voting rules for a special resolution at a Village meeting called by residents' produces different answers.

If the solicitors who residents turn to when faced with a dispute are not able to offer sound advice, the chance of obtaining justice has to be low with the likelihood of a resident who is not able to afford a solicitor obtaining justice even lower.

The situation of a village with an owners corporation is even more complex. Amongst other things, the role of the manager is unclear.

Case study AAAA Village (Appendix B) documents the trials of the residents of a small village who wanted to change the owners corporation manager without taking away the managers rights to deferred management fees. Three different solicitors could not offer useful advice on a problem for which there is a reasonably straightforward solution; all it takes is a majority vote on an ordinary resolution.

In summary, the Act does not provide adequate consumer protections. Moreover, it's content, complexity, and ambiguity favours owners and managers over residents.

## 2. Owners Corporation Act

In the opinion of RRVV members, the Owners Corporation Act is easier to follow than the Retirement Villages Act. Moreover, it is easier to find a solicitor with relevant expertise. Nevertheless, as illustrated in the paragraph above it is hard for residents to find a solicitor with expertise in both Acts.

## 3. The problem of mixed villages

There is an established trend for the operators of owners corporation (i.e. strata titled) villages to transition them to loan-lease villages.

The Retirement Villages Act does not contemplate such a transition. Take, for example, the question of resident participation through a residents committee. Section 3 of the Act defines committee as:

(a) in relation to a retirement village in respect of which there is an owners corporation, the owners corporation;

and

(b) in relation to a retirement village where there is no owners corporation, the residents committee;

Residents who lease their units have no owners corporation vote because the owner of the residence retains the lot owners voting rights, and they have no right to form a Section 36 residents' committee.

It is RRVV's observation that operators of transitioning villages bluff their way through the many difficulties to the disadvantage of all residents. Moreover, RRVV submits that wherever there is both ambiguity and change, the risk of injustice to residents increases.

## **Contracts**

There are more different styles of contract than there are retirement villages. RRVV only sees a small proportion of them. Nevertheless, we see some recurring characteristics:

1. Complexity (some contracts are over 100 pages long)
2. Considerable vagueness raising the potential for conflict and injustice for residents
3. Clear and strong coverage of **resident obligations** to operators
4. Weak and unclear coverage of **operators obligations** to residents (e.g. there is rarely a performance commitment)
5. Fee structures that confuse residents and disguise the real cost of occupancy
6. Responsibility for maintenance not fully articulated (it is usually less than clear who is responsible for what repairs and maintenance, item by item – the owner (e.g. building warranty claims), the operator expending resident contributed money, or residents expending money directly from their own pockets)
7. Provisions in conflict with the Retirement Villages Act, the Owners Corporation Act and other laws including provisions purporting to overcome provisions of the relevant law
8. Provisions having the effect of constraining or weakening the role of resident's committees

Most operators refuse to change their contracts in any way, and solicitors only rarely try to negotiate away obnoxious or redundant provisions.

Many of the contracts seen by RRVV contain provisions that clearly contradict the RV Act. For example, one widely used contract purports to give the operator the right to appoint three people to the residents' committee. The Act clear on this point; it is a residents' committee. There is a conceptually simple remedy, form a Section 36 committee, but it requires a majority of residents to

defy the operator at a vote. A small group of residents is proposing action but doubt they will secure the necessary popular support. See Case Study G, I and A. (Appendix E)

RRVV believes retirement village contracts should be subject to review before operators implement them in much the same way as the Australian Securities and Investment Commission reviews disclosure documents.

Operators often ignore provisions in their contracts they find inconvenient from time to time such as certain obligations to residents and residents rights. For example, the standard contract of one operator contains a provision requiring the Village Manager to consult with the residents' committee or residents attending a Village meeting before spending money from the long-term maintenance fund. Village Managers use a variety of excuses to explain away failures to consult. In some cases, Village Managers engage in sham consultation by putting forward a spending proposal but withholding information necessary for sound decision-making. Residents report frustration because there is no simple way they can obtain an authoritative opinion on what level and nature of consultation they can reasonably demand.

RRVV suggests existing dispute resolution mechanisms are inadequate for resolving contract disputes that individually are relatively minor but in aggregate constitute a grave injustice. We believe the solution is a free and binding dispute resolution service.

### **Managers and Village Managers**

Most residence contracts show the manager as a company. This company appoints a village manager to manage village day-to-day operations.

Again, most residence contracts require the residents to contribute all the funds needed to run and maintain their village. This is known as the self-funding village business model. On top of paying for the operations and maintenance of their community, residents also contribute funds (typically as a deferred management fee and a share of any capital gain) to the management company, which uses the money solely for company purposes including distributing profits to its shareholders.

Village management companies lack normal commercial incentives to perform for their customers. The self-funded business model insulates the companies' profits from any inefficiency in their management of villages. It is not surprising some managements become complacent, or indifferent to the rights of their residents. For example, a resident signed a contract for a unit subject to extensive renovation. On occupying the unit, he noticed some problems. He also saw that the village had built a new courtyard fence and in the process reduced the size of the courtyard significantly. Repeated representations to the manager over a period of two years elicited only perfunctory attention to the problems. See case Study C and S (Appendix D). Also, see Case Study SU (Appendix I)

Village management varies widely in style and effectiveness. The difference between good and bad management on the enjoyment of village life can be dramatic. Not surprisingly, the bad managers

are also likely to be the ones to inflict injustices on their residents. There is little that residents who are dissatisfied with the quality of their Village's management can do to improve their lot. Packing up and moving out is impossible for most. Firing the manager is impossible in most cases. There are no practical avenues of redress or means of resolving such problems. See Case Study SU (Appendix I) and Case Study BB (Appendix L).

Rare groups of residents who persist in attacking injustice can have some effect. They would have much greater effect if they had the backing of better-drafted laws and had practical assistance in utilising those laws.

RRVV believes that because village managers' ignorance contributes to the level of disputes, there is a case for implementing some form of licensing and continuous professional development. There is a training and licensing requirement for owners corporation managers and compulsory continuous professional development is under consideration. Why not for village managers?

### **Implications of Difficulties in Accessing Justice**

Older Australians enter retirement villages for a variety of reasons, but low-stress living is one of the main ones. Low stress rests on operators and owners delivering full value for money, delivering in full on promises and treating residents with respect, even the difficult ones. If the operator underdelivers or treats residents with disrespect and the residents cannot get the matter resolved, the incidence of stress and depression increases and conflict between residents, (in particular, conflict within couples) increases.

Aversion to conflict increases with age and loss of spouse or partner. Accordingly, residents of retirement villages are more like to react to conflict by accepting peace at any price resolutions, particularly if they cannot readily access appropriate support. This is particularly so when residents fear the consequences of revealing they are not coping. If there is any risk that complaining will expose them to scrutiny and the possibility of transfer to a care home, they are likely to remain silent.

Owners and operators of self-funded villages have little incentive to perform. The only remedy available to residents is to complain. A few residents thrive on constant complaining, but most find it wearing or avoid it all together. The support of fellow residents, including a residents committee, can be helpful. Nevertheless, what residents need is access to a fee dispute resolution service with the power to make determinations binding on both parties.

RRVV believes residents committees can play a part in resolving disputes. Nevertheless, a significant number of residents report that management has 'captured' their committee, and so they decline to seek the committee's assistance.

The lack of a workable dispute resolution system allows operators and owners to get away with the delivery of poor value for the money residents pay for operational and long-term maintenance services (i.e. short delivery of services, delivery of poor quality services and inefficient delivery of

services) and to fall short on honoring promises. The lack of an effective dispute resolution procedure thus has significant financial consequences – real, even if not understood by all.

Residents of retirement villages are people of some economic substance in that they own their unit or own a significant financial asset in the form a debt instrument issued by the owner or operator in recognition of the loan made to secure a lease. Nevertheless, many are cash poor. Others do have more liquid investment assets. The big risk in retirement is lasting longer than your money. Living on the pension in a retirement village is particularly difficult and in some villages impossible. This weighs heavily on any decision to take expensive legal action.

Not all potential actions are between an individual or a couple and the owner or operator. There are occasions where groups of residents contemplate taking legal action. Ideally, residents would band together to address a joint problem. Residents who do not know if their money will last long enough resist contributing to a fighting fund.

Without either a free dispute resolution service or adequate fee assistance, very few residents with a genuine case are likely to take legal action.

## **Recommendations**

Residents of Retirement Villages Victoria recommends:

- a. Dispute resolution that is:
  1. Independent, with both resident and operator on an equal footing (wherever possible, without lawyers)
  2. Swift - free of backlogs and repeated adjournments
  3. Free
  4. Expert (before someone who knows the industry, knows the relevant Acts backwards and is capable of dissecting retirement village contracts, and has adequate investigation resources)
  5. Confidential (backed by enforcement provisions) wherever possible
  6. Binding on both parties but with the opportunity for the resident to appeal to a court as is the case with the Financial Ombudsman Service
  7. Financed in a way that provides operators with an incentive to reduce (but not suppress) complaints
  8. Subject to formal oversight including a comprehensive annual report freely available to the public ( including operator and village complaint statistics)
  
- b. Establishment of an Industry Ombudsman

RRVV's preference is for:

1. The appointment of an industry ombudsman service to deal with, amongst other things, retirement village disputes.

2. An ombudsman with the power to make determinations binding on both operators and residents but giving the resident (not the operator) the right to appeal.

c. A New Retirement Villages Act

RRVV suggests a rewrite of the RV Act, to achieve amongst other things:

1. Elimination of contract provisions that conflict with the Act.
2. Provisions understandable by suburban solicitors, village managers and residents
3. Strong consumer protections
4. Enhanced resident participation (including free to village financial information)
5. Greater certainty and consistency of dispute outcomes

d. Amendments to the Owners Corporation Act

RRVV sees resolving the problems between the RV Act and the OC Act in the case of villages transitioning from strata title to lease contracts as urgent.

e. User-Friendly Contracts

RRVV suggests requiring contracts and key provisions to be:

1. Drafted to minimize ambiguity and conflict
2. Written to inform rather than confuse and obfuscate
3. Clear
4. Free of provisions that conflict with the Act (RRVV suggests a process much same as ASIC uses to block the release of disclosure statements that don't meet the requirements of the relevant Act),

Additionally, RRVV suggests contracts identify:

1. What the manager must do for residents and include a performance guarantee
2. What items of repair and maintenance are an owner or operator's responsibility (e.g., covered by builders warranty), a village responsibility and a resident responsibility? This is an area of considerable confusion and cause of many conflicts.

f. Accrediting Solicitors

RRVV suggests implementation of a formal system of accrediting retirement housing specialists

g. Strengthening Consumer Affairs Victoria Service

1. RRVV believes strengthening Consumer Affairs Victoria enforcement of the Retirement Villages Act is urgent
2. Similarly, RRVV believes the provision of better training and a wider mandate for helpline staff are urgent issues.

h. Licencing and training village managers

RRVV suggests a similar licencing and training regime to that applying to owners corporation managers.

## Appendices



**Appendix A - Research Report by National Ageing Research Institute**

**Retirement Village Residents' Experiences of Contracts and Outcomes**

**Synopsis of Results**

Please see the report by National Ageing Research Institute forwarded as a separate document attached to the e-mail of transmission.

### **Appendix B - Access to Justice Case Study, AAAA Village**

The developer and first manager of AAA Village sold the management company around seven years ago. Over the next two years, the committee of the Owners Corporation became increasingly concerned about the competence of the new directors and, in particular, the competence of one of them whom the company nominated as its personal representative and manager of the Owners Corporation.

The committee tried to work with the manager but became frustrated with her inability to maintain proper accounts, unwillingness to provide necessary information, and failure to perform her duties by the contract. It eventually concluded that it no longer wanted her to manage the Owners Corporation.

Over a period of two years, the committee consulted three lawyers. One advised that it would be necessary to take the matter to VCAT and that the chances of winning were less than 50%. Another recommended seeking the opinion of a barrister. A third concluded that it was not a matter he was competent to handle and waived his fee.

With the help of one of the lawyers, the committee put a motion to the residents to call on the Owners Corporation manager to resign and then communicated to the management company that residents had passed the motion. The company did not reply in writing, but the manager made it clear at a heated meeting she would not resign.

Committee members concluded that legal action was beyond the Owners Corporation's financial resources (the village is a little over one-tenth the size of a typical village) and their personal resources. The committee resolved to try again working with the manager. This has proved unsuccessful. Moreover, Committee members now doubt her integrity and understanding of 'conflict of interest'. She has refused to provide documents that would either confirm or refute their concerns.

One committee member summed up the seven years as 'it's been like trying to run a marathon knee-deep in molasses'.

### **Appendix C - Access to Justice Case Study, S and N**

S and N reserved a unit off the plan. Later the Village Sales Manager gave them additional documentation that showed there would be a carpark alongside their unit. The Sales Manager assured them that the carpark would be for visitors. S and N noted that both the contract and by-laws stipulated that residents must not park in visitors' car parks and concluded that the car park alongside the unit would not cause them any inconvenience, and it was most unlikely visitors would arrive or leave during their sleeping hours. They signed the contract.

Soon after moving in, S and N noticed that residents were parking in various visitor car parks around the village. One resident regularly parked a large 4WD diesel utility in the carpark adjacent to their unit, several times waking them up early in the morning.

In May 2015, S and N asked the Village Manager to enforce compliance with the contract. The Village Manager did take some action that reduced resident car parking in visitor car parks, but the core offenders soon resumed parking for extended periods in visitor car parks.

In June 2015, S and N filed a formal complaint and backed it up with extensive photographic evidence. The Village Manager agreed the evidence showed the parking was more than just an occasional breach of the contract. Several follow-ups with the Village Manager produced no permanent change. S and N then took their complaint to the next level of management. They did not feel they received a fair hearing because the senior manager acted as though his role was to back up his Village Manager (also in attendance). Moreover, it was the Village Manager rather than the senior manager who responded formally. In his letter, he asserted he had the discretion not to enforce the relevant provision of the contract. This second complaint did not produce any permanent change

S and N then took their complaint to the next level of management again. This time, they felt they received a proper hearing, but there was no immediate improvement. In casual conversation with S, the Village Manager still denied he had an obligation to enforce the contract.

S and N engaged an RRVV Committee member as their advocate. Following discussions, senior management has agreed to write to the serial offenders reminding them the seriousness of their contractual obligations.

Throughout the whole process, the three levels of management S and N dealt with made veiled threats of retaliation.

Management did eventually make the offenders aware of the relevant provisions of the contract. After two weeks, S and N advised they were happy with the results. Unfortunately, just at that time, the Village Manager put forward a plan to reorganise village parking. S and N support the broad intent of the plan but point out that there are significant legal obstacles to its implementation.

At the time of writing, the operator has answered S and N's concerns about legal obstacles with a blatant misrepresentation of one of the provisions of the residence contract. The operator attempts to rely on the following clause to make the proposed changes:

"If your Unit does not include a garage or carport (emphasis by RRVV):

- (a) we may allocate to you a Parking Space for your use and enjoyment while you reside in the Village if a Parking Space is available; and
- (b) we may at any time re-allocate the Parking Space because you are no longer;
  - (i) the owner of a vehicle that can be parked in the Parking Space;
  - (ii) allowed or able to operate such a vehicle safely; or
  - (iii) operating such a vehicle regularly but are instead using the Parking Space for the permanent storage of the vehicle.

All the Units have a garage. Therefore, the clause is irrelevant.

The operator encourages S and N to "obtain their own independent legal advice should they wish". On the surface, his may seem sound advice, but it is also a form of the challenge 'sue us if you dare'.

S and N believe an ombudsman would have resolved the matter in a matter of weeks saving them nine months of frustration.

#### **Appendix D - Access to Justice Case Study, C and S**

C and S reserved a 30-year-old unit around two years ago. The Sales Manager provided C with details of renovation work to be completed before they moved in including, amongst other things, changes to the layout to increase the size of one bedroom, relocation of the bathroom and laundry, a completely new kitchen and split system reverse cycle air conditioning. The price was roughly \$50,000 above the price of similar but un-renovated units to cover the cost of the works. The Sales Manager promised that Village would replace the porch and pergolas and repaint the whole of the exterior soon after they moved, paid for by the long-term maintenance fund.

Immediately on moving in, they saw that the courtyard was smaller than it was at the time of signing the contract because the Village had built a new fence inside the line of the old fence. They also saw that the well-established (if untidy) common area garden that was alongside the unit was missing, that that the Village had replaced the retaining wall, and added a safety fence constructed from cheap pool fencing. The area was devoid of plants and looked sterile. They felt cheated because the external environment of their unit was not what they thought they were getting.

After living in the unit for a short time, they noticed design and workmanship problems in the renovation work. One problem caused them particular concern. The architect's drawings for the new bathroom showed a zero-threshold shower cubicle. The shower as built did not drain efficiently. Water from the shower ran out of the shower cubicle towards the bedroom and wet both the carpet and the door. The operator replaced the door and repositioned a thin metal beading rod on the bathroom floor to prevent the water flowing out of the shower and into the bedroom, and added another to prevent water flowing into the bedroom. This patch up proved to be largely effective at containing the water. Nevertheless, C felt cheated he did not get the free draining shower he paid for.

As winter approached, C and S discovered that the air conditioner did not heat the unit. The Village maintenance person repeatedly insisted that the way C and S operated the system caused the problem. C had a gas heater installed at a cost of more than \$2,000. He nevertheless continued to press to have the air conditioner repaired. The operator eventually had the manufacturer's representative examine it. The representative found the improper installation of internal components caused the problem. C was highly annoyed he had spent over \$2,000 unnecessarily. C lodged a claim for monetary compensation with the operator.

C believes this is a consumer protection matter. He fears he could not have represented himself before VCAT. He did consider considered briefing a lawyer but concluded the costs of lawyers would render the exercise pointless.

### **Appendix E - Access to Justice Case Study, G, I and A**

G, I and A are residents of a large loan-lease retirement village developed in stages between 2008 and 2013. Over a period of 5 years, they have jointly and individually lodged formal complaints with local management, the management company of the day and the owner concerning what they believe are serious construction defects, financial irregularities, contractual irregularities and a management dominated resident participation process. They have not been satisfied with the responses. In many cases, they have not received any response.

They are particularly concerned that the management company for the greater part of the life of the village was also the builder of most of the units and so conflicted in the handling of warranty claims. Moreover, the residence contract seeks to transfer the cost of rectifying building defects to residents through the service fees they pay.

The residence contract purports to give the operator the right to appoint three people to the residents committee. There is a conceptually simple remedy, but it requires a majority residents voting to defy the operator. G, I and A doubt they will secure the necessary support.

The three believe local management, the management company and the owner have callously exploited the fears and insecurities of many of the residents.

G, I and A have also filed complaints with Consumer Affairs Victoria, The Department advised them to take the various matters to VCAT. They believe many of the issues they raised deserved Consumer Affairs investigation and enforcement action under both retirement villages and building regulation legislation. Nevertheless, they have considered mounting a VCAT case and have taken legal advice. They have not proceeded as they lack the financial resources to mount an effective case, particularly as they fear the management company and the owner will both string the process out.

G, I and A believe the law and the responsible authorities have failed them. They support the establishment of an ombudsman service to cover retirement village disputes.

**Appendix F - Access to Justice Case Study, L and P**

L and P moved into a new condominium-style village and were the first occupants of their unit. They immediately noticed some workmanship problems. As other residents moved in, they became aware that noise insulation was inadequate and well below the standard of other modern multi-storey residential buildings. They also noticed further workmanship and design problems, including significant drainage problems affecting common areas and some balconies, some concrete cancer, a serious bird-dropping problem on window ledges visible from within units and a range of safety hazards.

The owner did eventually arrange for tradesmen to address some of the problems. The workmanship was again poor, and the owner did not follow up with the tradesmen

L and P persisted with their requests for full corrective action over a period of 12 months both directly with the owner and through the residents committee of which one of them was a member. The residents committee proposed a special resolution to remove the member from the committee because, members believed, persisting with the complaints was against the interests of residents and risked bringing the village into disrepute and thus lowering resale prices. Members also expressed concern that residents would have to pay managements costs in defending their legal action. Residents passed the resolution.

Five months later L and P applied to VCAT for a hearing. The owner promptly agreed to release them from the contract on confidential terms.

L and P assert the owner and the Village Manager tried to wear them down then actively campaigned to turn residents against them.

RRVV supported L and P throughout the entire period.

**Appendix G - Access to Justice Case Study, W and V**

W attended a "Special General Meeting" of residents of his retirement village, which was called by the manager, to consider a proposal to charge a significant monthly levy for catering services. W's fellow resident, V, was unable to attend the meeting and appointed W to be his representative to attend, speak and vote in person on his behalf, under Section 36A of the Retirement Villages Act.

At the meeting, before the votes on the relevant resolution were counted, W asked the chair whether he would allow proxy votes. Instead of the chair answering the question, the village operator's regional manager intervened and told the meeting that under the Retirement Villages Act such proxies were not allowed. In the event, V's vote and those of other residents unable to attend the meeting were excluded from the ballot. The position taken by the village operator's regional manager appeared to be inconsistent with Section 36A of the Retirement Villages Act and potentially denies residents natural justice in having a say on amendments to the terms and conditions of their service contracts.

W & V did not want to challenge the vote taken at the meeting but instead wanted to ensure that residents unable to attend future general meetings would be able to appoint representatives to act on their behalf, as implied by Section 36A of the Act.

W sought advice from the CAV help-line and was advised to obtain a list of suitable solicitors from the Law Institute of Victoria and to engage one of them. The CAV help line person had next to no knowledge of retirement villages or the Retirement Villages Act and was unwilling, or unable, to offer any advice directly relevant to the issue of proxy voting.

W & V made an application to VCAT to resolve the matter. At a Directions Hearing at VCAT, it became clear that legal advice was required. A solicitor and barrister were engaged to provide a legal opinion to take to the full VCAT hearing. The costs incurred were shared by W & V and a small group of concerned residents. Before this second hearing was held, however, the village operating company offered to undertake not to call any more residents meetings which would affect service fees (unless it is the annual general meeting) on condition that V&W withdrew their VCAT application. W & V accepted this offer and withdrew their VCAT application. The total cost to W & V and their fellow residents was \$2,293. They all feel strongly that advice on such basic issues should be available to residents of retirement villages from an independent agency such as an ombudsman, without the need to spend a considerable sum of money to obtain natural justice. The issue of proxy votes was not resolved and the Retirement Villages Act remains vague in this matter.



**Appendix H - Access to Justice Case Study, HK**

HK lives in a retirement village operated by a large company. She noticed that a small amount of money was missing from her purse on a regular basis.

HK has a disability, and the operator supplies her with a caregiver. One day she noticed that after the caregiver had attended her money was missing. She reported this to management and again over a lengthy period as she noticed further instances of missing money.

Management told her she could not remember what money she had, that she had spent it and could not remember doing so.

Acting on the advice of her caregiver and a nurse, the Village Manager arranged for a doctor from a major Melbourne hospital to examine her. The Doctor diagnosed frontal lobe dementia and recommended she move to more suitable accommodation.

A lay advocate arranged to have a surveillance camera installed in her unit. The camera caught the caregiver stealing money from HK's purse. Police charged the caregiver with theft.

Management nevertheless went ahead with the formal process to expel her from the village claiming that as well as having dementia, she was a trouble maker.

HK took her case to VCAT. The operator did not attend. The VCAT Member hearing the case threw it out saying 'if this lady is suffering from dementia so am I'.

The hospital gave HK a written apology but the operator did not. The operator continues to victimise HK.

Over the period, HK has other problems with management such as overcharging for power and telephone service. The matter of the power bills remains unresolved.

HK's ordeal has extended over four years. She has suffered physically, mentally and financially.

### **Appendix I - Access to Justice Case Study, SU**

*Note: this is an edited February 2016 contribution from a member and not the product of RRVV's workshop and interview program.*

The story is about small "independent-living" strata titled retirement village with a pleasant and sought after outlook, good shopping and convenient public transport. Despite these advantages, this retirement village is no paradise. It is not the place for a care fee retirement. Rather, it is a financial and emotional grieving place for most residents.

Our problems started some years ago when the residents began standing up for their rights.

The village management company suggested to all the unit owners their Management Agreement (MA) no longer complied with current Retirement Villages Act (RV Act) and Owners Corporation Act (OC Act). Consequently, that company tabled a new standard MA for the resident owners to sign.

Several unit owners thought it wise at the time to seek legal advice about the old and new MA. That advice when received was not encouraging. Both the old and new MAs are heavily biased towards the management company's interests and neither the old nor the new MAs comply with the legislation requirements of their day. Some breach examples include the granting resident proxy votes to the management company under certain circumstances and dispute resolution provisions requiring the use of an arbitrator selected by the operator.

The management company identified one resident who took part in the MA review process for expulsion and later attempted to evict that individual from the village then sell the unit. The reason the operator gave for eviction was the individual in question, although well over 55 in age, still worked for a living, and, therefore, not entitled to live in the retirement village. The eviction failed because the RV Act definition of a "retired person" in part quotes "a person who has attained the age of 55 or has retired from full-time employment" Quite obviously people over 55 years are entitled to work if they so wish, and still live in a retirement village. The resident incurred significant legal expenses fighting the eviction.

The company's solicitor sent two other working unit owner residents a similar eviction letter. One resident, not wishing involvement in a dispute, quickly sold the unit and moved elsewhere. The other unit owner reluctantly stayed in the village but remains fearful the operator will again commence that legal action.

Like most retirement villages of its kind, for many years, the management company carried out the functions of the Owners Corporation (OC). Without explanation, the management company announced it would no longer undertake OC related management work, and residents should

appoint a new OC manager. Given no choice, the residents did appoint a new OC manager, and the OC paid its fees. The Management company did not reduce its fees.

A company associated with the management company bought village units and the lodged complaints against the OC. The litigation went on for several years and put untold time and emotional strain on residents, particularly those on the OC committee.

Several residents made complaints to Consumer Affairs Victoria (CAV) about the management company not complying with the RV Act including its failure to supply required detailed financial information. The outcome was only a weak warning letter.

There was a bullying incident involving a Director of the management company. He gatecrashed a resident organised village social event and verbally abused several residents.

The management company unnecessarily disconnected an existing hard-wired emergency call system to all the units. It then harassed some unit owners when they objected to the installation, at the residents expense, of a new high-cost telephone monitoring system.

It was not long after the abuse incident that the management company presented a budget that more than doubled the fees previous years fees, surely a retirement village world record.

Believing the RV Act was drafted to protect aging residents in retirement villages against such an obvious injustice, the residents took action. What followed was a protracted legal battle at VCAT - a contest between a poor David and a deep-pocketed Goliath

'David' scored points in a few rounds, but unlike the biblical story, it must be said that 'Goliath' won the contest.

VCAT accepted the operator's argument that despite the village being an independent living establishment, the "aged care award" applied over 24 hours of every day of the year.

The long-running VCAT exercise about fees taught residents many lessons, the most significant of which was that RV Act did not protect village residents from a rapacious management company driven by callous self-interest.

Because of the very high on-going fees (both RV and OC) about double that of equivalent villages, owners are finding it very difficult to sell their units on the open market and prices have fallen. Some owner residents on fixed incomes concluded they cannot afford the high fees and have had to sell their units to the family business related to the village management company. The family business has then leased them back to the original unit owners under confidential arrangements. It is known the deferred management fee under the new leasing arrangement greatly exceeds the original deferred management fee.

Strata title residents are concerned about the fate of those residents leasing their units when the time comes to move to an aged care facility. Because of their financial disadvantage, their options will be limited.

The retirement village is a very small one. It has a so-called RV manager on site 24/7. When this person is not on duty, the individual is replaced by expensive relievers. This is despite the fact calls to the new emergency call system go to an off-site call centre. 24/7 coverage is, of course, a very expensive service for so few residents to fund. Other villages usually have administrative people on-site during business hours only. Some of them have attend for only part of the day.

Several years ago residents attempted to bring the establishment into line with similar independent living retirement villages. This initiative failed because the sister company's clear objective is to acquire all the village units, and so the management company has no interest in working to reduce the on-going costs. Far from it in fact. By increasing the financial burden on the existing unit owners, it greatly lessens the purchase price of the units, and at the same time pushes financially stressed owner residents into its financial web.

In conclusion:

1. The management company endeavors to stress the remaining unit owner retirees who have not sold their units to the sister business partner. There is no interest in the well-being of these retirees, and by very questionable means there is an open plan to acquire all the properties within the village.
2. CAV failed in not steadfastly pursuing the penalties laid down by legislation.
3. The RV Act did not protect the retirees from unconscionable fee hikes by an unscrupulous operator.
4. There is a compelling argument therefore that the RV Act requires strengthening to better protect aging people from unscrupulous operators. There is a similar case for making the changes retrospective.
5. VCAT may not be the forum for retirees to seek serious disputes redress. The suggestion of an Ombudsman with clear authority is a welcome step forward. Aging retirees are vulnerable, and few have the will and capacity to engage in drawn-out legal battles.

**Appendix J - Access to Justice Case Study, BB**

*Note: this is an unedited transcript of a letter from a member and not the product of RRVV's workshop and interview program*

I believe, as do most others residents of our village that we are treated unjustly, unfairly and are bullied by our management.

We have proved that VCAT does not work for retirement village residents, as it certainly did not for us. Our story is one that has been going on for years and in desperation we went to CAV and VCAT, to no avail. We could not afford a barrister for VCAT and the Member had absolutely no sympathy for, or empathy with us and our case.

It was an extremely stressful and expensive process, which caused great hardship to our residents, who are elderly of course.

Our Retirement Village Manageress has put our fees up 120% and rising. Many of us are pensioners so what little funds we have are being depleted rapidly.

Residents and their executors are unable to sell their units due to the fees we are charged and Managements attitude to buyers and sellers. We believe there has been unlawful interference in the sale of properties (Owners Corp) by the Retirement Village Manageress.

We have a 'live-in' Manager, she has no empathy for or understanding of the residents. She writes inane letters to us constantly pointing out our faults and our behavior and treating us like children. We are all intelligent, kind and caring people who just want our small village (31) to be a happy and welcoming place. We do not need criticism and carping comments – we certainly do not deserve this. Our hands are tied as far as having this "manager" replaced. She is lazy, and we all wonder what she is being paid (with our money of course) for doing very little, if anything, around our village. We do not need a 24/7 on-site manager.

Our village is in a beautiful place it overlooks the beautiful Pt. Phillip Bay and we, as residents feel very blessed to live here. Unfortunately, there are so many issues with the owners and their choice of manager that many residents are stressed and anxious due to the injustices which have been going on here for years.

Where and when will it all end?

The residents of our village need help, we need an ombudsman.