

RRVV response to Review of the *Retirement Villages Act 1986* Issues Paper

Introduction

In preparing this response, RRVV drew upon knowledge and experience gained from responding to more than 500 resident queries, feedback and grievances each year.

We point out that the background information and the questions posed by the Issues Paper relate primarily to the current dominant village model; the resident funded village. There are other models.

Key Reform Points

1. Make retirement living policy evidence-based and develop evidence and complaints databases
2. Make a code of ethics and a charter of residents rights the foundations of a reformed Act
3. Rewrite the purpose of the Act to include recognition of older people's needs and vulnerabilities
4. Update the retirement village definition to emphasise community living for older people
5. Define 'residence right' independently such concepts as title, lease, licence or the like
6. Consider new village business models and explain resident funded village model
7. Give the new Act the capacity cope with change
8. Bring village look-alikes into the orbit of the new Act
9. Bring strata-titled villages fully into the realm of the new Act
10. Recognise that residents have a greater stake in their villas and villages than operators and owners
11. Redefine the relationship between residents and operators to reflect residents' stakeholder position and that residents and operators have complementary roles in the running of their communities
12. Licence villages rather than rely on operator self-regulation to clean up the ugly elements in the sector
13. Abandon disclosure as a primary regulatory tool
14. Provide residents with adequate protection against owner and operator insolvency
15. Simplify everything and express everything in plain English (particularly the Act, contracts and fee structures)
16. Standardise as much as possible and adopt Professor Tim Kyng's comparison rental rate
17. Require all villages have a ten-year maintenance plan
18. Regulate manager and senior staff training in much the same way as ASIC regulates the financial services sector's training
19. Make residents committees responsible to the resident body
20. Regulate the provision of care services to protect the fundamental nature of retirement villages while allowing residents to age in place within reasonable limits
21. Make operators responsible for ongoing charges and levies after a resident leaves a retirement village
22. Simplify exit provisions
23. Deliver a proactive regulator with broad powers to intervene, enhanced investigation resources and realistic litigation budget.

The regulatory and policy framework (Part 2)

Application and scope of the Retirement Villages Act 1986

Question 1

Should the payment of an ingoing contribution be the defining factor in determining whether the *Retirement Villages Act 1986* (RV Act) applies to a retirement village? If not, what other considerations would be appropriate?

RRVV Answer

The method of payment for the residence right (e.g. lump sum or periodic payment) is irrelevant.

The current definition's requirement for payment of an ongoing contribution allows operators who don't want to submit to the Retirement Villages Act to escape its disciplines.

RRVV recommends asking the Commonwealth to align the pension treatment of any retirement village ingoing amount with the aged care refundable accommodation payment.

The more important question is the nature of the residence right. RRVV contends that the sector needs a definition of residence right that applies to all residents irrespective of whether they have a title, a lease, a licence or something else.

Question 2

Is the definition of 'retirement village' under the RV Act otherwise appropriate? If not, what changes would you recommend?

RRVV Answer

N. The essential elements of a retirement village are:

1. A community of people
2. aged over 55
3. for whom the village is their permanent place of residence
4. who intend to remain in the village throughout their retirement or to move to a higher care facility if the need arises

RRVV recognises that residents may have legitimate reasons for moving out other than a need for aged care. Nevertheless, we believe it should be clear that retirement villages are not set up for people who plan to move on. Moreover, the concept of a community requires a commitment from its residents to contribute.

Retirement should not be an entry requirement. Many older Victorians will:

1. Work past age 70, and
2. Want to downsize before they retire

Please recognise that:

1. An essential component of a community is the opportunity for as much self-government as desired by its members
2. People contemplating retirement and retired people need a predictable financial commitment, including control over any periodic payments required of them.
3. Keeping the age limit as low as 55 years is necessary to foster a community. A community needs a broad age to include people who have the fitness and energy to perform voluntary work and who are willing to take on community leadership roles

Villages that do not meet the definition but pass themselves off as serving a similar function mustn't escape the disciplines and resident protections provided by the new Act.

The purpose of the *Retirement Villages Act 1986*

Question 3

Is the current purpose of the RV Act still appropriate? If not, what do you think the legislative purpose of the RV Act should be?

RRVV Answer

No, the current purpose has not served residents well.

Despite the stated purpose, the current Act takes a somewhat authoritarian and miserly approach to residents' rights, freedoms and protections. Moreover, it does not recognise the limited capacity and vulnerability of some residents and prospective residents nor the tendency of some operators to exploit or mislead unsuspecting residents and prospective residents.

RRVV believes part of the solution is to include in the Act or subordinate instrument a mandatory code of ethics and a mandatory charter of residents rights, freedoms and protections. We also believe that the Act should require the parties to deal with each other in absolute good faith and where this conflicts with the Act or the contract, absolute good faith prevails. RRVV has already submitted documents that sketch out some of our thoughts on what a code of ethics might cover. We have attached another document that sketches out what a charter of residents rights might include.

Please note that the current Retirement Living Code of Conduct is nowhere near adequately resident centred. Moreover, there isn't a realistic chance that a voluntary code will achieve adequate coverage of the State's retirement villages as the two peak bodies who own the code cover only a little more than half the retirement villages in the State.

The purpose and use of the current register of retirement villages

Question 4

What improvements could be made to the register of retirement villages?

RRVV answer

The question does not recognise that something more than registration (for example licensing) might be appropriate.

RRVV recommends licensing. The register would form part of the licencing regime. RRVV believes the register should serve at least the following minimum purposes:

1. A public database of contact details (e.g. to assist the public find nearby retirement villages and who sits behind them)
2. A public database of further information providing support for public policy researchers

RRVV recommends licensing because we see evidence of:

1. Incompetent operators
2. Underfunded operators (e.g. operators who don't build the facilities they promise)
3. Operators that blatantly disregard the law
4. Operators who shamelessly exploit residents

Question 5

What other information should operators be required to include in the register?

RRVV Answer

RRVV recommends the following for the contacts (physical addresses and electronic contact details) database:

1. The village (details of units, nature of tenure (lease, title etc.) including physical and electronic addresses
2. The owner (or owners) including directors if a company, and registered office details (also provide information on joint ventures)
3. Operator (including where the operator is an incorporated association of residents plus any separate entity that holds rights to receive DMF income
4. Owners corporation manager (if strata-titled)

RRVV would be an active user of a research database containing much more detail on villages, residents' services and complaints. Nevertheless, we believe other potential users' (presumably including Consumer Affairs Victoria) requirements should also shape the design. We recommend calling a meeting of relevant stakeholders to explore research database requirements.

Entering a retirement village (Part 3)

Consideration and cooling-off periods

Question 6

Are the current 21-day consideration' period and the three day 'cooling-off period' under the RV Act effective in achieving their aims? If not, what other or additional measures would be effective and fair?

RRVV answer

The current provisions are satisfactory as far as they go.

RRVV recommends adding a six-month change of mind provision. Under such a provision residents would have the right to leave without paying any deferred fees or reinstatement charges (other than for damage) but would pay a market rent for the period of occupancy.

Disclosure obligations

Question 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?

RRVV answer

This suggestion is not the best solution to the problem.

The fundamental problem is the unnecessarily complicated fees imposed by many contracts. Some residents allege that the complicated fees are designed to conceal the real cost of living in retirement villages.

The obvious solution is to require more straightforward fees (see later RRVV answers). Nevertheless, RRVV expects that, even with less complicated fees, many residents will have difficulty making valid comparisons between the offerings of various villages.

Associate Professor [REDACTED] of Macquarie University has developed a method of reducing retirement village fees to a comparison rental rate (see <https://rvcalculator.mq.edu.au>).

Professor [REDACTED] comparison rental rate is analogous to the comparison interest rate providers of home loans, and the like must include in their advertising. RRVV recommends mandating the publication of a comparison rental rate in all advertisements and marketing collateral along with an explanation of its significance.

There are other DMF issues. Please see the document we emailed to you on 14 July 2019.

Question 8

Has the provision of a Factsheet 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?

RRVV Answer

We distinguish three groups of residents and their responses to the Factsheet and Disclosure Statement

1. This group comprises people who are capable of utilising the additional information and are not put off with the volume of paper (around 30% of the total as a wet finger estimate). They read it all. These people ask more penetrating questions and seem to have a better understanding of some aspects of the commitment they are contemplating. Nevertheless, few fully grasp the full complexity of the fee structure or the resident funded village concept. Retirement Village leases are more like commercial leases than the residential leases most people know. They make tenants collectively responsible for financing the cost of maintenance of common plant, equipment facilities and services.
2. People in this group (around 35% as a wet finger estimate) do derive an improved understanding of the commitment they are contemplating. Nevertheless, this group tends to make an emotional decision. What they learn does not strengthen or test their resolve. A significant proportion misinterprets the information. For example, we have observed prospective residents using the maximum DMF % to compare villages without taking into account whether the fee was a percentage of the ingoing contribution or the outgoing or the resale amount or whether the peak DMF percentage cuts in after three years or ten years or somewhere in between. How could they?
3. People in this group (around 35% as a wet finger estimate) throw up their hands and go ahead without seriously reading the contract. They get nothing much from the additional information, and some get a false sense of security from the volume of paperwork.

The fact sheet and disclosure statement provisions of 2014 were hardly major reforms. Instead, they were add-ons that addressed some of the more apparent symptoms of flaws in the Act.

RRVV sees the need for the Fact Sheet and much of the Disclosure Statement as a tacit acknowledgment of severe deficiencies in the Act and the contracts it allows operators to offer; weaknesses that the Government of the day was unwilling or unable to tackle head-on.

RRVV recommends working to eliminate the need for these documents, in whole or part by correcting the fundamental deficiencies. We expand on this recommendation late in this paper.

Question 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?

RRVV Answer

The short answer - simplify everything.

For example:

1. Draft an Act that creates the environment for a better understanding of:
 - the nature of the commercial arrangements between residents and their operator
 - the nature of the human relationship between residents and their operator
2. Amongst other things, an Act that:
 - is right touch rather than light touch (light touch is the source of many resident woes)
 - is less open to more than one interpretation than the current Act
 - recognises that residents are major stakeholders in their units and their villages because they paid the market value of their unit and that it is their home for the rest of their lives
 - recognises that residents are members of a community rather than mere tenants in a development
 - that acknowledges a precondition for a vibrant community is as much self-government as is residents choose
 - is conceptually consistent with what residents know and understand (e.g. if we must have leases, make them be more like residential leased than the commercial style leases many operators now use)
 - that standardises as much as possible (e.g. a DMF must be expressed as a % of the ingoing amount, must be calculated to the day and be uniform over at least seven years)
 - simplifies what is now unnecessarily complicated
 - defines the three-bucket model that is widely used in resident funded village contracts (bucket one receives the maintenance charge, bucket two receives the major maintenance charge (however derived), and bucket three receives the DMF and any capital gain due to the operator) where buckets one and two belong to the village residents and bucket three belongs to the operator
 - generally regulates contracts more tightly than the current Act and Regulations.
3. Require contracts:
 - written in plain English
 - without ineffective terms (why do operators include terms that they cannot enforce – to intimidate?)
 - to use standardised terms as much as possible (e.g. standard definitions of reinstatement, upgrade, damage, fair wear and tear, long term maintenance, operations expenses and capital gain including recognising approved residents expenditure on their units of a capital nature in the capital gain calculation
 - undergo expert review by an independent authority (the regulator?) before issue
 - mandate disclosure of a standardised comparison rental rate
 - to fully define independent living (if the term is not standardised) and other terms that indicate a condition of occupancy, level of service etc.

Question 10

Are the current timeframes for provision of a Factsheet and Disclosure Statement to prospective residents appropriate?

RRVV Answer

No. Most people receive the fact sheet, disclosure statement and contract(s) after they have made up their minds to enter the village of their choice.

To have the best effect on decision making, residents need the full document pack at the time of the first contact. It is crucial that residents receive a copy of the contract and any necessary disclosure documents at the same time as they receive marketing collateral or verbal advice. Amongst other things, this would mean operators publishing the full pre-contract documentation pack on their websites

Contracts – form and complexity

Question 11

Have the form and content requirements for retirement village contracts introduced in 2014 improved residents' understanding of the contractual arrangements they have entered into?

RRVV Answer

On balance, no. The post-2014 contracts are harder to follow than the best of the pre-2014 contracts (i.e.those using the ingoing, ongoing and outgoing format), and the compulsory material is complex and unwieldy.

Question 12

To what extent do retirement village contracts remain unnecessarily complicated?

RRVV Answer

Some operators have released more straightforward contracts, at least as far as the current rules allow. Nevertheless, the 2014 amendments do not simplify fee structures, so many operators persist with complicated structures. For example, some show the DMF increments ceasing after ten years when it is nine years and one day because a part-year counts as a full year. Others grossly overcharge residents who leave after a short stay (e.g. three years).

Question 13

What further improvements could be made to contractual requirements under the RV Act?

RRVV Answer

See answer to question 9

Financial models and the deferred management fee

Question 14

Should retirement village operators be required to disclose ingoing prices for entering both with and without deferred management fees? If so, what form should this take? If not, why not?

RRVV Answer

Disclosing ingoing prices for entering both with and without deferred management fees will not, on its own, do much to assist most residents. Validly comparing the two takes an understanding of finance that few people possess, including many legal professionals.

We believe Professor [REDACTED] comparison rental rate offers the best approach for comparing offers from operators because it reduces all fees to one number.

Question 15

Should deferred management fees be calculated on a pro-rata basis? If so, why? If not, why not?

RRVV Answer

The various complicated ways operators present deferred management fees serve no legitimate purpose and confuse most residents. For example, counting a part-year as a full year is an unnecessary complication. RRVV recommends pro-rating to the day.

Question 16

When should retirement village operators be required to provide a resident with an estimate of their departure fees and what are your reasons?

RRVV Answer

RRVV recommends that every two years operators provide residents with an estimate of their departure fees, component by component, and likely payout. RRVV also recommends presenting the estimates in a format that recognises the DMF is a fee for services rendered (head office support to the village manager) and profit on that activity. We recommend that operators without automated systems for producing such estimates should prepare them as requested and publicise widely that this service is available.

For some reason, many operators do not present the deferred management and deferred long term maintenance charges as charges residents would otherwise pay monthly. In part, this is because

operators do not accurately describe the purpose of their deferred management (and sometimes maintenance) fees.

The following sentence from section 3.3.2 of the paper is, in RRVV's opinion, nonsense.

“Despite its name, the DMF is not a fee related to management services and could be more properly characterised as deferred rent.”

The best way to ascertain the true nature of the DMF is to examine what operators do with it. It mostly covers those aspects of head office costs that are related to managing the managers of their villages and to making a profit sufficient to justify taking on the task of managing communities on a cash break-even basis. Table 1 below illustrates how operators make money from running retirement villages.

Table 1
Sources of operator profit

Activity	Profit	Comment
Village operations	Nil	Villages budget to break even Any profit or loss is on the residents' account
Capital gain on resale	Most operators take either 50% or 100% of the capital gain. A minority of operators take no capital gain	Generally, but not always, operators that take all the capital gain charge lower fees elsewhere
Deferred management fees	Almost all operators charge a deferred management fee, and in most cases, it is a significant contributor to covering head office costs and contributing a profit	Most operators could not survive without a deferred management fee under the current resident funded village model. The fee is deferred rather than charged monthly or quarterly as many residents could not (or prefer not to) fund the fee out of their incomes. Some operators do allow cashed-up residents to pay the fee as an upfront rather than deferred fee. Rental contracts have the effect of collecting the fee as part of the rent.
Development profit	For a variety of reasons owners often make lower profits constructing retirement villages than other residential developments	This is a once-only profit

Notes:

1. Most not-for-profit operators do make a profit from their retirement village portfolios
2. Operators, on average wait several years to earn a deferred management fee from a resident
3. Similarly, operators on average wait several years to collect a share of the capital gain from the resale of a unit

In any event, promoting the idea that the DMF is rent is likely to confuse residents. Take the case of a resident who owns her unit (i.e. has a strata title). Why suggest an obligation to pay rent to a person who understands rent as what you pay when you don't own the place where you live.

Similarly, take the case of a person who pays a market-based capital sum to secure a lifetime residence right by lease (it could be in the same village as the case immediately above). Most leaseholders understand that by paying a capital sum, they have something similar to homeownership.

Living in a retirement village (Part 4)

Accreditation of retirement villages

Question 17

What do you consider to be the benefits and costs of introducing a form of mandatory accreditation for retirement villages?

RRVV Answer

RRVV strongly prefers licencing to mandatory accreditation if the term accreditation implies a significant element of self-regulation. You only have to look at the various Royal Commissions of late to see the folly of expecting Australian businesses and institutions to self-regulate compliance with minimum standards.

In any event, RRVV asserts that ARVAS is not a suitable foundation for a mandatory accreditation scheme. RRVV evaluates operators' schemes by testing whether they are likely to eliminate or much reduce the incidence of specific issues that concern them or improve life in their villages. Most residents who have studied the schemes report that both the Code of Conduct and ARVAS will not. RRVV believes that a licencing scheme in conjunction with an ombudsman with wide enforcement powers would do more to lift standards than a mandatory accreditation scheme, and at a lower cost to the economy.

RRVV's work gives us some visibility of the ugly underbelly of the retirement village sector. This visibility leads us to suggest the immediate focus should be on cleaning up the bottom end of the sector. This approach would not stop operators from maintaining their voluntary accreditation scheme if they and their residents wished to do so.

Our work also gives limited visibility of owners and operators at significant risk of insolvency. The current Acts protections for residents are woefully inadequate. You only have to look at the case of the former residents of [REDACTED] to see evidence of this claim.

Question 18

What do you consider to be the necessary elements of any mandatory accreditation scheme?

RRVV Answer

If we must have a mandatory accreditation scheme:

1. A focus on residents rights, freedoms and protections
2. A similar focus on quality and efficiency
3. A genuinely independent scheme (developed and administered by a body independent of operators and that engages deeply with residents during the development phase and reviews). Note that two peak bodies jointly own ARVAS. It is not an independent scheme.
4. Strong enforcement powers (i.e. an authority with the power and will to kick people who do not measure up out of the club and to sanction lesser sins in proportion to the severity of the sin).

Question 19

What do you consider to be the benefits and costs of voluntary accreditation schemes?

RRVV Answer

Voluntary schemes do provide benefits to operators and Government but offer few benefits to residents:

1. Operators typically control the schemes and shape them to suit their interests (this applies to a broad sweep of Australian commerce and industry). RRVV senses that operators have rushed to introduce the Code of Conduct and ARVAS more to shore up tarnished reputations than to directly benefit residents
2. Government avoids the costs of operating a mandatory scheme or a licencing scheme

Voluntary schemes offer few tangible net benefits to residents. On the whole, residents like the idea of a code of conduct and an accreditation scheme, although we sense a significant minority have difficulty understanding accreditation.

The appeal of a code of conduct and an accreditation scheme rests on an expectation that they will 'solve my problem' or 'improve my lot'. Residents who have thoroughly read the documents are not convinced.

RRVV acknowledges that the schemes have the potential to deliver indirect benefits to residents. Nevertheless, in the medium to long term, operators will pass on the costs of the schemes to their residents as all, but a tiny minority are 'not for loss' enterprises. We have asked the lead peak body to provide us with cost estimates. It has indicated that it is unable to do so and suggests the benefits are more qualitative than quantitative. RRVV is concerned that:

1. The benefits will flow more to the operators than residents
2. The costs to residents will exceed the benefits

RRVV estimates that a voluntary scheme is unlikely to cover much more than 50% of the retirement village units in the State in the foreseeable future (see our response to Question 3). Voluntary

schemes are, therefore, unlikely to have a significant impact on the ugly underbelly, the incompetent and the underfunded elements of the retirement living sector.

Question 20

By what alternative means could the standard and quality of services provided by retirement villages be improved?

RRVV Answer

When polled on this question, RRVV members repeatedly nominate:

1. An ombudsman or similar with extensive powers
2. Mandatory training for village managers (and others) at Certificate 4 level followed by continuous professional development
3. A code of ethics and a charter of residents rights, freedoms and protections
4. Mandatory minimum standards for operators

Qualifications and training of retirement village managers

Question 21

Should there be any additional limitations or requirements on persons who can be involved in promoting or operating retirement villages?

RRVV Answer

Yes. To section 17 of the Act, add persons convicted of any offence involving violence.

RRVV contends that section 17 allows people it should deal with to go undetected for lengthy periods and so recommends periodic police checks.

Every year, a significant number of members notify RRVV of allegations of bullying and harassment by village managers. Accordingly, we recommend barring habitual offenders.

We also recommend barring village managers and operators with a track record of non-compliance with the Act.

RRVV members see one of the side benefits of an ombudsman service is the maintenance of a complaints database enabling the identification of repeat offenders.

Question 22

What do you consider to be the benefits and costs of mandating training and professional development requirements for retirement village managers and employees?

RRVV Answer

Benefits:

1. Lower cost village operations through reduction of inefficiency and waste (RRVV estimates savings of 15% of current expenditure are achievable)
2. Better recognition of residents rights, freedoms and protections
3. Fewer complaints
4. Fewer unresolved complaints
5. Better service to residents
6. More contented residents

Costs:

1. Initial training. RRVV contends that it is the responsibility of the operator to supply staff who meet the minimum requirements for the job
2. Continuous professional development. Again, RRVV argues that it is the responsibility of the operator to provide staff who continuously meets the minimum requirements of the job.

Given that operators will eventually pass the cost of training onto residents, RRVV contends that residents are major stakeholders in the training programs for village level staff and to a lesser extent in training operators' supervisory level staff. Accordingly, RRVV asserts that the Act must guarantee residents a voice at the training table.

RRVV acknowledges that the cost of bringing around 400 village managers plus approximately 100 other managers up to the required standard will be expensive in the time commitment, tuition fees and programme review.

RRVV contends that an independent training organisation should develop the training, one or more independent training organisations should deliver it, and an independent reviewer should regularly review it. RRVV also contends that the developers and reviewer should engage deeply with residents to ensure that the training focusses on service improvement and consumer outcomes. All too often, resident consultation is a sham.

RRVV also contends that retirement villages are managed indifferently because the resident funded business model encourages complacency. We touch on the causes of this complacency in our response to Question 9. Likewise, the high switching costs of the DMF insulates operators from some of the effects of poor management. An operator that manages well does not earn more in the short run. Similarly, an operator that does a bad job does not earn less.

Training will have a positive impact on manager incompetence arising from lack of skills, knowledge and experience and also on operator complacency. It will have a more significant effect if combined with mandatory minimum standards backed by vigorous enforcement. RRVV recommends that Government sets the basic standards in much the same way as The Commonwealth sets basic standards for financial planners (*see ASIC Regulatory Guide 146*).

Question 23

How should any requisite professional development requirements and training be determined?

RRVV Answer

1. Independently
2. Through formal job analysis
3. Informed by a deep engagement with residents
4. With objectives expressed along the lines of Bloom's taxonomy of educational objectives (for a simple explanation see <https://tips.uark.edu/using-blooms-taxonomy/>)

Question 24

Are there other ways to ensure that retirement village managers and employees have the requisite skills and professionalism to undertake their responsibilities?

RRVV Answer

RRVV sees career path planning as complementing the training but not as an alternative. For example, many villages have a village manager and an assistant manager. The assistant manager position is ideal for preparing a person for village management. Similarly, the village manager position is an excellent preparatory position for area management. It might be that the Act could allow recognition of this experience through a reduced requirement for formal training.

Residents' committees

Question 25

Is the current role of the residents' committee appropriate and are its powers adequate?

RRVV Answer

No, on both counts

The Act gives limited powers to the committee. Contrast this with the Owners Corporations Act which gives broad powers to the owners corporation (i.e. the resident body). It permits delegation of many of those powers to the committee and the withdrawal of delegations as seen necessary.

Many RRVV members complain that their residents' committee does not represent them. Residents have no power to reign in the committee other than by voting against those who stand for re-election. Unfortunately, in many villages, not enough people nominate for committee positions to fill the vacancies, so there is no election through which to express dissatisfaction.

RRVV members also complain that the Act does not give the resident body power to enact rules to govern the operation of residents' committees. Residents' committees can be a law unto themselves.

A significant number of villages cannot support a residents committee. The Act does not specify how residents in these villages might interact with management. One model sometimes proposed to deal with the lack of a residents committee or in some cases to replace a residents committee is for the resident body to meet as a 'committee of the whole'. Sometimes a resident will chair meetings and sometimes the residents appoint an independent chair.

RRVV recommends:

1. Adopting the Owners Corporation Act model (the resident body has the powers)
2. Giving the resident body the power to make rules governing the operation of the committee
3. Giving the resident body the right to make decisions as a committee of the whole

The current Act gives residents only a few powers. RRVV recommends giving residents (amongst other things):

1. The power to set budgets and fees after consultation with the operator (subject to safeguards should the resident body prove disinterested or incapable)
2. The ability to enact, amend and rescind by-laws that are binding on residents and operators and which operators must enforce. Please note, the current Act's by-laws provisions allow operators to frustrate the enactment of by-laws by not including the necessary by-laws clause in their contracts
3. The power to approve long term maintenance fund expenditure, item by item, and to delegate powers to the operator to effect emergency repairs

Question 26

Should residents committees have a role in dispute resolution involving resident-to-resident disputes?

RRVV Answer

No. Residents committees typically make things worse. The Act requires mediation. Mediators need training and independence. Few residents have the necessary skills and even fewer have the independence required.

Question 27

Should residents committees have the power to approve above-CPI increases in maintenance charges? If not, why not?

RRVV Answer

No. This power is too significant to delegate to a committee that, in many cases, represents only a minority of residents and then often the more affluent ones.

The right to veto maintenance charges above the adjusted maintenance charges (subject to section 38(5)) is fundamental to residents on the age pension or other fixed incomes. This provision is a positive feature of the current Act, but in RRVV's opinion, it does not go far enough.

RRVV is aware of villages where the residents want to reduce service levels to reduce the maintenance charge. The Act does not give them the right to do so. Similarly, RRVV is aware of villages where the residents are happy to pay a maintenance charge increase to get increased service but encounter operator resistance. Residents need the power to control fees and services to the extent they desire subject to giving the operator reasonable notice.

Question 28

Should retirement village owner's and manager's involvement in meetings of the residents' committee be prohibited unless invited by the committee?

RRVV Answer

Yes, this is already the case, but the Act does not explicitly say so. An explicit provision would help residents' committees better assert their rights.

Annual meetings and reporting

Question 29

Is the level of detail about the financial activity involving the retirement village required to be included in the financial statements adequate for residents? If not, why not?

RRVV Answer

This issue is a subset of a larger issue – freedom of information.

The special purpose reports typically presented by operators are satisfactory for most residents provided the categories break expenditure down to meaningful chunks (i.e., not too broad). They could be improved by using language that residents understand and by more careful design. Some are a rather slapdash extract from the main accounts.

RRVV recommends:

1. A policy of full transparency
2. Residents who want to study the source accounts should have full access with minimal exceptions and restrictions
3. Salary information privacy should not override the right of access to the detailed accounts provided the person gaining access commits to respecting the rights of the individual
4. Making it clear the sinking fund is part of the reporting regime (many operators do not include the sinking fund in the annual report, forecast expenditure in particular).

Some operators and some village managers deny residents information village operations. A few of the more enlightened operators concede that some of their village managers do withhold information to increase their power.

RRVV advocates that the new Act guarantee residents freedom of information rights; a rights to access all information about the operations of their village on reasonable terms and with minimal exceptions. Please note we make a distinction between an operator's business and the operations of a specific village in its portfolio. We do not seek access to information about an operators business.

Question 30

Should residents be provided with copies of the financial statements before the annual meeting? If so, what period is reasonable?

RRVV Answer

The answer is obvious. Yes. We recommend distributing the reports to all residents at least 21 days before the section 33 meeting.

Most villages call a meeting near the end of the village's financial year to set the maintenance charge for the next fiscal year. The working papers that justify the new maintenance charges are similar to a budget. You could call them a preliminary budget. RRVV recommends distributing the working papers 21 days before the maintenance charge meeting.

Some operators require residents to submit their questions in writing at least seven days before both meetings and refuse to answer questions without notice. RRVV recommends giving residents the right to ask questions without notice and requiring operators to answer those questions.

RRVV recommends allowing the presentation of the budget at a maintenance charge meeting provided residents have the right to review the budget at the section 33 meeting

Question 31

Are there any other matters that should be addressed in the reporting requirements?

RRVV Answer

RRVV recommends mandating that all villages have a ten-year maintenance plan (including a contingency for emergency repairs) and report at the section 33 meeting on:

1. Spending against that plan (item by item)
2. Planned expenditure for the current financial year (item by item)

RRVV also recommends mandating the detail operators must include in their report on complaints and disputes. For example, require operators to categorise each complaint and report the outcome using standard categories.

Similarly, require operators to:

1. Report the elapsed time between a resident first raising a complaint and the resolution
2. For each matter than remains unresolved, how long it has been open, and if they closed the matter without resolution.

Similarly, RRVV recommends mandating that operators report on requests for action (e.g. maintenance requests) received during the reporting period using standard categories and on time taken to respond (e.g. average for the category and the longest time)

Finally, RRVV recommends limiting the time the operator can spend on company propaganda at a section 33 meeting to five minutes.

Retirement villages with an owners corporation

Question 32

In mixed tenure retirement villages (i.e. retirement villages comprising both owner-residents and non-owner residents), should there be separate meetings for the village, according to the provisions of the RV Act, and for the owners corporation, according to the provisions of the Owners Corporation Act 2006 (OC Act)? If not, how should issues identified for mixed tenure retirement villages be addressed?

RRVV Answer

Yes. Villages that combine meetings tend to mess up both of them, often to the disadvantage of residents.

RRVV also recommends prohibiting combining either meeting with any other meeting such as:

1. A residents general meeting called by the residents' committee or by a residents association
2. A meeting of a residents' services association
3. A meeting of the social club

Maintenance and maintenance charges

Question 33

To what extent should the RV Act further address issues of 'responsibility' and 'timeliness' for repairs and maintenance in retirement villages?

RRVV Answer

Freedom from maintenance responsibility is one of the top reasons residents give for entering a retirement village. Given this, it makes no sense for operators to require residents to take responsibility for the maintenance of 'everything inside the unit and all other appliances'. As noted in our response to Question 35 below, RRVV advocates that the new Act places responsibility for rectification of all fair wear and tear including appliances, fittings and fixtures on the operator.

In any event, many contracts are unclear about who is responsible for what maintenance. RRVV members allege this lack of clarity is intentional. Many long-term residents report that the responsibility for maintenance in their villages varies with changes in village managers and operators. RRVV recommends legislating to ensure the interpretation of vague maintenance provisions work to the disadvantage operators (i.e. that operators pay for the work out of a company account)

A village's capacity to respond promptly with the right standard of workmanship and materials to residents' legitimate requests for maintenance (or to respond at all) does in some cases, depend on residents' willingness to approve an adequate maintenance charge.

Nevertheless, residents do need a mechanism to counter any operator tendency to complacency. The resident funded business model (which largely insulates operators from the economic effects of poor performance and the benefits of excellent performance), the lock-in effects of deferred fees and the general lethargy of ageing residents insulates operators from many of ordinary consequences of complacency. RRVV believes the new Act should provide countermeasures. For example, the Act might require the operators to comply with standards for maintenance but provide villages with a mechanism for varying those standards from time to time, perhaps through a revised by-laws provision.

Question 34

What are the problems in more prescriptive requirements applying to all types of retirement villages and in all types of circumstances?

RRVV Answer

RRVV knows of residents who have lived in their villages for thirty years. We understand it is unusual for a contractual relationship to last that long without review. RRVV would like to see a legislated mechanism for reviewing contract provisions that the parties might reasonably expect to suffer obsolescence.

RRVV also contends that principles-based regulation interpreted according to contemporary conditions might provide the mechanism through which villages could adapt to changing circumstances. The interpreting authority would have to be readily accessible, expert, free and independent.

Question 35

To what extent can or should the RV Act regulate what constitutes maintenance and capital items and to what extent should these issues be left to voluntary codes or guidelines?

RRVV Answer

RRVV contends that the resident funded village model, currently the dominant model, is open to standardisation and what constitutes maintenance and capital items particularly so.

RRVV also contends that it is difficult if not impossible for residents to work out at the time of evaluating a shortlist of villages what fees they will pay if all the villages have different arrangements.

Except for a few villages run by charities or benevolent organisations, residents pay for everything. In the long run, it does not matter if the operator writes the cheque against the operations bank account, the sinking fund account or the company account, the company must cover its costs and make a profit if it is to survive.

RRVV believes that the appropriate approach is to assign responsibility according to the behavioural implications.

For example, RRVV does not support charging maintenance of a common area capital item to the sinking fund and replacement to the company account, as is the case in at least one other State. This practice gives an incentive to an unscrupulous operator to continue to maintain an item that is beyond economical repair because to replace the item will require it to spend its capital.

RRVV recommends that rectification of fair wear and tear (as distinct from damage, whether intentional or not) be the responsibility of the operator (paid out of a company rather than village account). It is unfair to charge a resident for the cost of rectifying 20 years of fair wear and tear just because the appliance (for example) failed three days after he or she moved in. Moreover, to charge fair wear and tear to the company account aligns with standard practice for other residential leasehold properties.

Making the operators responsible for both maintaining and replacing appliances will curb the current tendency to replace appliances unnecessarily when a resident leaves. RRVV knows of operators that forced departing residents to pay for replacing serviceable appliances for aesthetic reasons.

Charging rectification of fair wear and tear to the sinking fund is acceptable, but less so than charging it to a company account for behavioural reasons.

In short, the answer to the question is to standardise what constitutes maintenance and capital items

Maintenance and capital replacement funds and plans

Question 36

Should all retirement villages be required to have maintenance and/or capital replacement plans and/or funds?

RRVV Answer

Yes, both.

Residents on fixed incomes need a predictable financial commitment. One-off levies can cause financial hardship

Well managed sinking funds are an effective way of achieving a predictable financial commitment.

Question 37

If so, what, if any, minimum requirements should apply to the establishment and operation of such plans and funds (for example, reporting obligations and restrictions on how monies are held)?

RRVV Answer

RRVV recommends a detailed rolling ten-year sinking fund plan based on professional dilapidation assessment and including a specific provision for emergency maintenance. RRVV also recommends that residents control the expenditure of sinking fund money in consultation with the operator (with a safety net should residents fail to act reasonably) and have the power to delegate responsibility for emergency repairs to the operator.

RRVV recommends holding the funds in trust for the benefit of the residents of the village to:

1. Recognise residents' stake in the fund
2. Ensure the funds stay with the village should the operator fail.

RRVV also recommends holding operations account monies in trust.

Regulation of care services in retirement villages

Question 38

If you are a current or former resident of a retirement village, what are your experiences with receiving privately funded care services through a retirement village?

RRVV Answer

We know of residents (a handful only) paying for fully privately funded care services. In one case, the resident has 24-hour nursing care. This is a private arrangement with a nursing agency but actively supported by the village, primarily by facilitating out of hours access. We know of other similar arrangements where the village is less than helpful with out of hour's access. Nevertheless, most of our contact with the families covered retirement village rather than care matters.

We also know of residents who receive privately funded care services through a retirement village. Again, the number of cases is small. In each case, the residents' families approached us to help them sort out the differences between care provided by an aged care facility, privately funded care provided by a retirement village and Government funded care provided in a retirement village either by the operator or an independent approved health care provider.

We are unable to comment on the care the residents received. We do have a strong impression that, in each case, the distress of the family and the confusing array of options available led to



decisions that might prove to be not in the best interests of the residents. We see a need for independent decision support by licensed professionals.

Question 39

Do you think retirement villages should provide privately funded care services?

RRVV Answer

Yes, with careful regulation

The following three cases illustrate RRVV members concerns and recommendations.

Case 1 - Converting a traditional retirement village to a privately funded aged care facility. We contend that this should require a vote by retirement village residents with an 85 % acceptance as it changes the fundamental nature of the village. Remaining residents who have not elected to receive care also need other protections (e.g. protection against loss of retirement village services and against pressure selling of care services).

Case 2. Converting a conventional retirement village serviced apartment complex to a privately funded aged care facility, thus denying ILU residents the limited option of entering a serviced apartment. RRVV recommends resident protections and an 85% approval vote by village residents.

Case 3. Provide privately funded aged care in a resident's ILU. RRVV sees this as a private matter between the resident and the provider so long as the provision of care services is not on a scale that changes the fundamental nature of the village.

Case 4. While this is outside the scope of the question, RRVV sees the provision of in-home aged care in ILUs by the operator as a parallel case. Again it's a private matter between the resident and the provider, but residents need protection against an operator changing the nature of the village by stealth.

More generally, some residents express concern that retirement villages might become the replacement for low-care hostels.

RRVV notes that the more complicated the arrangements, the more likely the village ends up in a mess. We see the need for careful regulation in conjunction with the Commonwealth.

Question 40

Is the current regulatory framework for the delivery of privately funded care services sufficient to ensure that potentially vulnerable and frail residents receive safe and high-quality standards of care?

RRVV Answer

See answer to questions 38 and 39 above.

Question 41

What role, if any, should retirement village operators have in ensuring the safety and welfare of their residents, taking into account a resident's right to autonomy and privacy?

RRVV Answer

A carefully regulated role

Anita's story (not her real name)

On moving-in day, Anita had lots of help from her family. At around 4 PM with everything in place and her family on the way home to their country town she decided to go to the local shops to buy some food. When she arrived back at the village she could not find her unit. She knocked on Norma's door and asked for help.

Norma took Anita home. Norma checked on Anita the next day and found she was not coping. She spent some time orienting Anita to her unit and to the village.

Each day for the next three weeks Anita asked Norma for help. Norma became concerned that Anita would never be able to look after herself and decided to discuss the problem the village manager. The village manager advised Norma that the village only catered for people capable of independent living and so he could not help Anita. Norma asked why the operator accepted Anita into the village given it was obvious she had dementia. The village manager countered that it was company policy not to discriminate.

Anita's family arranged for her to move to an aged care facility some months later. Anita's daughter told Norma the family thought the village provided a form of aged care.

Similarly, some operators hide behind 'safety policy'. For example, RRVV knows of operators declining to respond to emergency calls after dark because of concerns about "staff safety" despite advertising a 24-hour onsite emergency service.

Safety is a double-edged concept. Residents do seek a safe environment. Nevertheless, they don't want to live in a cotton wool blanket. Some operators pride themselves on their high (and expensive to residents) corporate safety standards. RRVV contends that residents deserve the safety they want consistent with relevant standards, not more and not less, and indeed not safety standards designed to support a corporate public relations campaign.

Leaving a retirement village (Part 5)

Selling/re-leasing a retirement village unit

Question 42

Does the RV Act strike the right balance between the interests of residents and operators in the sale or re-leasing of a retirement village unit, including the appropriateness of the process whereby the prescribed terms are inserted into non-owner residence contracts?

RRVV Answer

No

1. The reinstatement and upgrading process takes too long to the disadvantage of residents
2. Under most contracts, there is no statutory buyback (RRVV recommends one year)
3. The Act permits contracts that allow the operator to spend the resident's money without practical recourse

RRVV supports the basic thrust of the prescribed terms but points out they produce a clunky contract.

Reinstatement and refurbishment of retirement village units

Question 43

Does the RV Act strike the right balance between the interest of departing residents and operators? If not, what improvements could be made to ensure the right balance?

RRVV Answer

No

Reinstatement and upgrading

RRVV defines reinstatement as putting it back the way it was, except for fair wear and tear

The primary focus of reinstatement is on rectifying any damage caused by the resident. For example, scuffed paintwork, stained carpet, burnt or cut benchtops and unauthorised additions.

It will often be necessary to replace carpets not stained but showing some signs of wear or merely well used to satisfy an incoming resident.

Fair wear and tear

Take appliances as an example. A hot water service or air conditioner may fail without notice through no fault of the resident who moved in, say, last month. The current Act does not restrain the operator from requiring the resident of one month to replace the appliance (and sometimes with an upgraded model).

RRVV knows of one case where the operator required an outgoing resident to pay for the replacement of a never used dishwasher because it did not conform to the new look it wanted for its units.

RRVV objects to operators requiring residents to pay the cost of rectifying fair wear and tear. RRVV also objects to operators requiring residents to pay for upgrades.

Upgrades

The current Act does not restrain an operator from requiring a resident to pay for an upgrade and, in some cases, pay extra DMF as a result.

RRVV contends an upgrade is anything that is not a reinstatement (paid for by the resident) or rectification of fair wear and tear (paid out of the sinking fund or company account) that is an improvement.

RRVV believes it is in the interests of residents for an operator to upgrade units from time to time, but not by stealth. RRVV is aware of many operators who upgrade under the guise of reinstatement. Operators sometimes persuade an outgoing resident or resident's family that extra work is necessary to get a better price. On average, the extra work does little more than break even. In some cases, the operator does not even try to get a better price. If the contract calculates the DMF on the resale price, the extra work has the effect of lowering the return to the resident.

Sometimes the operator argues that extra work will produce a quicker sale. Sometimes it does, and sometimes it does not. Sometimes the buyer dislikes the extra work and wishes he or she had the opportunity to have improvements done before they moved in. This heavy-handed approach is the indirect product of an Act that gives unscrupulous operators scope to exploit residents.

RRVV believes the following to be the best practice for upgrades

1. The parties agree on a price for a reinstated unit and the cost of the reinstatement (reinstatement as defined above)
2. The parties enter into a side contract providing for the operator to upgrade the unit as specified (the resident has the right to reject the contract)
3. The operator upgrades the unit and pays the contractors
4. The parties share the upgrade profits 50-50, but if the upgrade results in a loss the operator absorbs the loss.

Ongoing charges after a resident leaves a retirement village and capital gains

Question 44

In relation to the regulation of ongoing charges when a resident leaves a village, does the RV Act strike the right balance reconciling the interests and needs of departing residents, remaining residents and the retirement village operator? If not, what changes should be considered?

RRVV Answer

No

The current regulation of ongoing charges when a resident leaves a village has little to no short-run effect on the financial position of the operator. The outgoing resident pays the maintenance charge for the first six months, and after that, the remaining residents suffer the consequences of reduced revenue until the village finds a new resident. When the vacancy rate is high, and consequently, maintenance charge revenue is down significantly, resident concern rises.

Some operators are sensitive to resident concern. RRVV knows of operators that pay the service fees on vacant units after the first six months.

High vacancy rates are a product of the economic environment and the reputation of the village. At times of high vacancy levels, vacancy times can stretch out well past the six-month point, which means village operations revenue falls putting downward pressure on service levels and upward pressure on maintenance charges.

Well run villages ride out periods when vacancy rates tend to rise better than others. Why should residents suffer from operator underperformance twice?

Therefore RRVV believes that operators should wear the risk of a downturn by paying the maintenance charge beyond the six-month mark. RRVV believes there is also a case for operators paying the service from fees from the date of handing back vacant possession. This approach would:

1. Bring a retirement village lease more into line with a residential lease
2. Provide operators with some short term commercial incentive to run their villages well

Question 45

Should the RV Act regulate the way in which any capital gains (and losses) are treated when a retirement village unit is sold or re-leased? If so, how should it be regulated?

RRVV Answer

Yes.

One contract requires the outgoing resident to pay the operator 50% of the capital gain (if any) or 100% of the capital loss (if any).

Thus, if there is a capital gain of \$100,000, the fees paid by the resident to the operator increase by \$50,000. On the other hand, if there is a capital loss of \$100,000, the fees paid by the resident to the operator increase by \$100,000. Heads I win, tails you lose.

An operator that is the subject of a scandal (for example) that reduces demand for units and thus lowers market prices is, in significant part, insulated from the effects of the scandal. On the other hand the resident suffers both the capital loss and the payment to the operator equal to the capital loss. This contract term is unbalanced and the product of a light touch Act.

RRVV believes that Professor [REDACTED] method of summarising the costs of living in a retirement village if fully implemented is necessary because it is the only one that catches the effects of such complicated anti resident terms.

RRVV is mainly agnostic on the question of who should pocket any capital gain, or loss provided the loss and gain proportions are the same (i.e. you get the gain, you wear the equivalent loss). Nevertheless, we point out that there are advantages to residents in foregoing all capital gain in return for a lower DMF and other savings. Under this arrangement, the costs of living in a village are certain at the time of signing provided the contract expresses the DMF as a % of the ingoing amount, which we strongly advocate. The operator wears the uncertainty but has a higher capacity to manage the ups and downs.

RRVV also recommends redefining the definition of capital gain. The current definition does not recognise the value of improvements a resident makes to her unit. Most contracts require the resident to obtain operator approval before making improvements. Many leases require the outgoing resident to assign ownership of improvements to the operator on request. RRVV contends that the Act should define capital gain as the difference between the resale price and the sum of the cost of approved improvements paid by the resident and purchase price.

Dispute resolution (Part 6)

Internal dispute resolution

Question 46

What are your views on the reform proposals identified by the review of internal dispute resolution procedures in retirement villages outlined in this Paper?

RRVV Answer

The current Act recognises complaints against management and complaints against other residents. Every year RRVV sees complaints against management and one or more other residents (i.e. three-way complaints).

We also see complaints by village staff against residents. Villages need an effective internal mechanism for dealing with these complaints.

Both residents and operators need a simple operational definition of a complaint.

1. Forget trying to distinguish between a complaint and a dispute (as the operators training manual and the code of conduct do). This distinction is more trouble than it is worth and itself is the cause of a few complaints
2. Define what are NOT complaints. For example:
 - A report of a problem (such as a service not provided, something not working or a mistake in an invoice)
 - A request for action (such as please clean my roof gutters)
3. Define what grounds for complaint are. For example:
 - Dissatisfaction with the operator's response to any of the items in 2 above
 - Bullying

Not all operators are competent to deal with complaints internally. Problems we see include:

1. An inability to remain neutral particularly when dealing with management complaints (operator's staff tend to be upward focussed, and some are inclined to suppress complaints to protect their reputations)
2. Little understanding of procedural fairness
3. Little knowledge of what constitutes evidence (a surprising number of village managers see gossip as evidence)

A less than fully competent staff is generally a function of corporate culture (see comments on residents as stakeholders in the covering letter to this response) and lack of training.

External dispute resolution

Question 47

Should a party to a retirement village dispute seeking access to the Victorian Civil and Administrative Tribunal (VCAT) or the Courts be first required to have followed/exhausted the internal dispute resolution procedure?

RRVV Answer

No

1. In some cases (e.g. in the case of a severe complaint against a village manager who is also the operator) it is inappropriate to use internal process
2. There is nowhere else to go to get a binding resolution (at the moment)

What residents need is a one-stop-shop free dispute resolution service that sits between internal dispute resolution and the tribunal and has the power to make binding resolutions. Residents would still need the right to approach this service directly when it is inappropriate to raise the matter internally.

Question 48

Should mediation of a dispute through Dispute Resolution Centre of Victoria (DSCV) be a pre-condition of access to VCAT or the courts?

RRVV Answer

No

DSCV would have to be far more responsive than it currently is for this to be anything more than a hindrance.

The one-stop external dispute resolution service that RRVV advocates would have the flexibility to deal with disputes in the most appropriate way.

In any event, VCAT has the power to order mediation, so why not leave the decision to the member hearing the case.

Question 49

What do you think is the best means to achieve low-cost, timely and binding resolution of disputes in the retirement village sector?

RRVV Answer

An independent, expert, and free (to residents) investigation and adjudication service – a one-stop dispute resolution shop.

Enforcement (Part 7)

Question 50

Are the enforcement provisions incorporated into the RV Act sufficient?

RRVV Answer

No way. The assumption that residents can take the necessary action to enforce the terms of their contracts against retirement village operators or to seek redress for a failure to comply with the relevant Acts is unsafe. Few have the knowledge, financial or emotional resources to do so.

Most current retirement village contracts are primarily commercial-style contracts. Residents are consumers needing all the supports that ordinary consumers need and then more, particularly when the problem is systemic.

Residents need a regulator with:

1. Wide powers to intervene
2. Investigation resources
3. A realistic litigation budget, and
4. A proactive approach.

Question 51

Should the Director of Consumer Affairs Victoria be given additional powers and enforcement options available under the Australian Consumer Law and Fair Trading Act 2012 (ACLFTA)? If so, why? If not, why not?

RRVV Answer

Yes

Residents find it no easier to assert their ACL rights than their Retirement Villages Act or Owners Corporations Act rights. An ombudsman or the like would help individuals assert their ACL rights, but some problems are systemic and so a more active role for Consumer Affairs Victoria would help.