

# ***Review of the Retirement Villages Act 1986***

## ***Submission by Les Scobie, retirement village resident since 2007***

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

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

This from the "Review of the Retirement Villages Act 1986 – Proposed Legislative Changes 2004"

*"Possible negative consequences for residents and prospective residents are also increased because of the effects of age-related characteristics on their ability to make informed and knowledgeable decisions about retirement village services.*

*Secondary markets that respond to the complex information requirements of the retirement village market (solicitors, financial planners, accountants and the like) have not developed to a level which adequately responds to market need. Consequently, the the potential for consumer detriment is enhanced"*

Has anything really changed? From one who has lived in a retirement village for 13 years I can assure legislators and civil servants the answer is NO!

The following statement by [REDACTED], the then president of the NSW Retirement Village Residents Association, sums up the entire retirement village industry. It amplifies the financial impact on the capital base of both the occupants and subsequently their families.

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

My submission to the Review of the Retirement Villages Act 1986 -

Les Scobie.

## Review of the *Retirement Villages Act 1986*

*Submission by Les Scobie, retirement village resident since 2007*

### Part 2 - The regulatory and policy framework

#### **Application and scope of the *Retirement Villages Act 1986***

**1. Should the payment of an incoming 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? Response -**

**NO**, the definition should be amended to a broader definition based around the words 'retirement' and 'village' such as -

(1) For the purposes of this Act, a retirement village is a complex containing residential accommodation premises that are:

(a) Predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied by retired persons over the age of 55.

(b) Retired persons who have entered into a security of tenure contract with an operator of the complex for residential accommodation and services other than accommodation and services that are provided in an aged care facility.

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

**NO**, Remove the mandated payment of an 'in-going amount'.

#### **The purpose of the *Retirement Villages Act 1986***

**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? Response -**

**YES** - *"The purpose of this Act is to clarify and protect the rights of persons who live in, or wish to live in, retirement villages."*

#### **The purpose and use of the current register of retirement villages**

**4. What improvements could be made to the register of retirement villages? Response -**

**No response.**

**5. What other information should operators be required to include in the register? Response -**

**No response.**

## **Part 3 - Entering a retirement village**

### **Consideration and cooling-off periods**

**6. Are the current 21 day 'consideration' period and the 3 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? Response -**

**NO**, The New South Wales (NSW) Retirement Villages Act 1999 provides for a 14 day 'assessment' period prior to signing a contract, a 7 business day cooling-off period (with no right for the operator to retain any amount but which ends if the resident moves in during the cooling-off period) and a 90 day 'settling in' period, under which a resident may terminate the contract within 90 days of occupying their unit. These measures should be adopted in Victoria.

### **Disclosure obligations**

**7, 8, 9, 10. - Refer separate submission.**

### **Contracts – form and complexity**

**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? Response -**

**NO -**

**12. To what extent do retirement village contracts remain unnecessarily complex? Response -**

The following are two examples where contracts are written in legal speak and deny the average person the ability to fully interpret and understand what it is they are signing.

Modern Contract example –

Clause 57.15 - Headings and the provision of a table of contents are for convenience only and do not affect the interpretation of this Contract.

Older contract example -

Clause 1.6 – Headings of clauses have been inserted in this deed for guidance only and do not form part of this deed or affect its interpretation.

The impact is that a contract clause heading such as Major Maintenance Fund does not mean the organisation has a Major Maintenance Fund. The internal wording of the clause determines what exactly the fund is, not the heading. Whether by design or default this is both misleading and deceptive.

**ACTION REQUIRED - This practice should be prohibited. The headings of contract clauses should have a literal meaning and purpose as the meaning of that particular clause.**

***A new practice developing is for operators to introduce actions outside the provision of the contract and when challenged use the phrase - "The contract does not preclude it"***

13. **What further improvements could be made to contractual requirements under the RV Act? Response -**

1. **eg. Costs payable on entry [refer to regulation 8C(1)(b)(x)]** - The practice of operators inserting into contracts next to clause headings the regulation by which this clause is required to be inserted should be outlawed. This merely complicates the reading of the contract for the retiree and for some deters them from reading it at all. Operators do not list within the contract clauses that are not required with their regulatory reference so why place it next to those clauses that are required, other than of course to make the contract appear more complex and difficult to read than it already is.

2. **The CAV 'Good Practice' protocols for Retirement Villages** should be enshrined in law.

3. **Statements made by an agent or staff authorised to represent the organisation.** Protection should be afforded retirees by way of statute such as -

**ACTION REQUIRED – Improved legislated protections similar to the NSW Act. -**

***Part 3. Section 17(6) For the purposes of this section, a representation made by an agent or employee of the operator of a retirement village is taken to be a representation of the operator unless the operator establishes, to the satisfaction of the Tribunal or court, that, in making the representation, the agent or employee was acting otherwise than in his or her capacity as the operator's agent or employee.***

4. **Contract terminated by operator.**

**ACTION REQUIRED - Improved legislated protections similar to the NSW Act. -**

**44E Former occupant not required to pay certain amounts**

**If a village contract is terminated in accordance with this Division, the former occupant is not required to pay any of the following amounts that would, but for this section, be payable by the former occupant under that contract:**

**(a) any recurrent charges,**

**(b) any departure fee,**

**(c) the cost of refurbishment within the meaning of Division 4 of Part 10,**

**(d) the costs of sale or letting of the premises,**

**(e) any amount specified in the village contract as being payable for terminating the contract during the settling-in period,**

**(f) any amount prescribed by the regulations for the purposes of this section.**

## **5. Inconsistency between village contract and disclosure statement**

### **ACTION REQUIRED - Improved legislated protections similar to the NSW Act. -**

#### **25 Inconsistency between village contract and disclosure statement**

**(1) To the extent that any term in a village contract is inconsistent, to the detriment of the resident, with the information contained in the disclosure statement provided to the resident concerned, the contract is to be construed (as far as is practicable) as if it contained the information in the statement instead of the inconsistent term, unless the inconsistent term is a term of a standard contract prescribed under section 43.**

**(2) If there is a dispute between a resident of a retirement village and the operator of the village as to whether there is an inconsistency referred to in subsection (1), the resident concerned may apply to the Tribunal for (and the Tribunal may make) an order determining the dispute.**

**(3) Any such order is to specify the way in which the contract concerned is to be construed.**

## **6. Making good of deficit**

### **ACTION REQUIRED - Improved legislated protections similar to the NSW Act. -**

#### **120C Making good of deficit**

**(1) A deficit is to be made good by the operator of the retirement village.**

**(2) Except as provided by the regulations referred to in subsection (3), an operator of a retirement village must not:**

**(a) carry forward a deficit to a subsequent financial year, or**

**(b) request or receive from the residents of the retirement village any special additional payments for the purpose of making good a deficit, or**

**(c) increase or purport to increase recurrent charges payable by the residents of a retirement village in any financial year for the purpose of making good a deficit, or**

**(d) use the whole or any part of the recurrent charges collected by the operator in a financial year to make good a deficit, or**

**(e) use the whole or any part of the capital works fund for the retirement village to make good a deficit.**

**(3) The regulations may prescribe circumstances in which the operator of a retirement village may:**

**(a) increase the recurrent charges payable by the residents of a retirement village for the purpose of making good a deficit, or**

(b) use the whole or any part of the recurrent charges collected by the operator for the purpose of making good a deficit, or

(c) carry forward a deficit to a subsequent financial year.

(4) The operator of a retirement village must not charge the residents of a retirement village interest in respect of a deficit.

## Financial models and the deferred management fee

**14, 15, 16. - *Refer separate submission.***

### Part 4 - Living in a retirement village

#### Accreditation of retirement villages

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

**NIL** – A commercial matter for the industry where 72% of retirement villages are owned by 'for-profit' operators.

18. **What do you consider to be the necessary elements of any mandatory accreditation scheme? Response -**

A commercial matter for the industry where 72% of retirement villages are owned by 'for-profit' operators.

19. **What do you consider to be the benefits and costs of voluntary accreditation schemes? Response -**

**NIL.** Voluntary schemes become an irrelevance as they invariably come without meaningful penalties.

20. **By what alternative means could the standard and quality of services provided by retirement villages be improved? Response -**

An Industry Ombudsman. ***Laws without enforcement are merely words on paper.***

#### Qualifications and training of retirement village managers

21. **Should there be any additional limitations or requirements on persons who can be involved in promoting or operating retirement villages? Response – No response.**

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

A commercial matter for the industry where 72% of retirement villages are owned by 'for-profit' operators.

23. **How should any requisite professional development requirements and training be determined? Response -**

A commercial matter for the industry where 72% of retirement villages are owned by 'for-profit' operators.

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

Improved laws. Enforcement of those laws. **An Industry Ombudsman.**

That is the responsibility of governments and legislators as the very purpose of the Act *"to clarify and protect the rights of persons who live in, or wish to live in, retirement villages."*

If the Act does not do both then the law is not fit for purpose.

### **Residents committees**

25. **Is the current role of the residents committee appropriate and are its powers adequate? Response -**

**YES** – However committee members should be given some civil liability protections under the Act as is the case in South Australia.

**ACTION REQUIRED - LEGISLATIVE AMENDMENT -**

**Legislation to mandate some protections along the lines of the South Australian legislation -**

**South Australia.**

**Section 38 (14) A member of a residents' committee incurs no civil liability for an act or omission in good faith in the exercise of functions under this section.**

26. **Should residents committees have a role in dispute resolution involving resident-to-resident disputes? Response - NO.**

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

**NO**, definitely not. Every individual resident should have the statutory right to vote on a matter that can have a negative financial impact upon them. That right should not be transferred to anyone else.

28. **Should retirement village owners and managers involvement in meetings of the residents committee be prohibited unless invited by the committee? Response -**

YES.

### Annual meetings and reporting

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? Response**

Residents should be given a full financial report applicable to the operation of their particular village, no consolidated figures. Residents should also be given a copy of the latest available financial report of the organisation responsible for any guarantee of repayment.

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

Yes, 21 days.

31. **Are there any other matters that should be addressed in the reporting requirements? Response -**

Retirement village operators should be responsible for maintenance fees due on vacant units. This should be reflected in the maintenance budget.

### Retirement villages with an owners corporation

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? Response – No response.**

### Maintenance and maintenance charges

**33, 34, 35.. - *Refer separate submission.***

### Maintenance and capital replacement funds and plans

36. **Should all retirement villages be required to have maintenance and/or capital replacement plans and/or funds? Response -**

Yes, all villages should have a Major Maintenance fund legislated to operate in the same way as for an Owners Corporation village. Capital replacement should be the responsibility of the property owner such as is the case in the residential rental market. The relationship between the occupant and the property owner is identical to that in a loan/lease retirement village, some 74% of the market place. Both property owners are seeking the commercial rewards of property ownership whilst the occupant merely has a right to occupy by way of a written agreement.

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)? Response -

As per the owners corporations Act. Clearly monies should be held independent of any monies of the operator.

## Regulation of care services in retirement villages

38, 39, 40, 41. - *Refer separate submission.*

### Part 5 - Leaving a retirement village

#### Selling/re-leasing a retirement village unit

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? Response -

**NO** – The determining factor should be one of 'ownership'. The relationship between the occupier and the property owner is no different than that of landlord / tenant. In both cases one party is the property owner seeking all the commercial rewards of property investment and one party is simply the occupier of that property by way of lease, licence or tenancy agreement.

#### Reinstatement & refurbishment of retirement village units

43. - *Refer separate submission.*

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

44, 45. - *Refer separate submission.*

### Part 6 - Dispute resolution

#### Internal dispute resolution

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? Response. - No response.

#### External dispute resolution

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? Response -

**NO** – Every citizen deserves the right to take their matter directly to a court for a legal determination.

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

**NO** – Every citizen deserves the right to take their matter directly to a court for a legal determination.

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

**An Industry Ombudsman.**

## **Part 7 - Enforcement**

50. **Are the enforcement provisions incorporated into the RV Act sufficient? Response -**

Is it a matter of the provisions or is it simply that the provisions are not being enforced. A law not enforced becomes merely words on paper. The situation best summed up in the Farifax press, “Without a feared regulator, people with questionable ethics will push the line”.

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? Response -**

**NO** – It has been my lived experience that Consumer Affairs Victoria have shown on multiple occasions to lack a full understanding of the retirement village industry and the law applicable to the industry. For example -

- CAV displayed a lack of understanding of both the law and accounting principles when it came to an operator charging residents a fee for 'depreciation. Fortunately a resident had the energy to take the matter on to VCAT who overruled the original ruling by Consumer Affairs Victoria.
- CAV displayed a failure of concern for village residents that are facing a financial loss over their occupancy period to a combined total in the order of 2.5 million dollars. This from a breach of the law by the village operator, the final CAV statement to residents being that they (cav) were only interested in compliance.
- CAV have proven unable to deal with their own publication that includes information that misleads or has the capacity to mislead Victorian retirees contemplating entering a retirement village.

Only an Industry Ombudsman with appropriate powers and a determination to use those powers can support the interests of retirees who already have or are contemplating entering the retirement village industry.

Submission by -

Les Scobie,

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