



9 September 2011

**By email:** janine.bush@parliament.vic.gov.au

Executive Officer  
Family and Community Development Committee  
Parliament House, Spring Street  
EAST MELBOURNE VIC 3002

Dear Executive Officer

### **Inquiry into Opportunities for Participation of Senior Victorians**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide comment to this inquiry.

This submission briefly sets out three key issues regarding retirement villages. Our purpose is to ensure the Committee is aware that significant problems exist with retirement accommodation in Victoria, and to ensure that addressing these problems is part of the Victorian Government's strategy for preparing for an ageing population.

#### **About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

#### **Context and definition**

The availability of adequate and affordable retirement villages is an issue that affects a large number of Victorians. According to the Retirement Village Association, more than five per cent of Australians aged over 65 and more than 10 per cent of those over 75 live in retirement

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villages<sup>1</sup>. Even if the proportion of older people living in retirement villages does not change, demand for retirement village places will increase markedly as the Australian population ages -- the Australian Bureau of Statistics projects that the proportion of the Australian population aged 65 or older will increase from 13 per cent in 2007 to around 23 per cent in 2056.<sup>2</sup>

At present, the retirement village industry presents a number of complex consumer issues, many of which appear to be caused by an unsuitable regulatory framework. Unless these regulatory settings are corrected, existing problems will only become more complex and burdensome for consumers, industry and government as the population ages.

Although the issues with retirement villages are numerous, this submission intends to provide an introduction by setting out three which we consider to be the most significant. Briefly, they are that:

1. Retirement village contracts are unusually complex and lack transparency. This stifles consumer choice and competition, and promotes unjust outcomes by limiting the ability of consumers to understand and defend their rights.
2. The retirement village industry is regulated by multiple, overlapping pieces of legislation. This creates confusion over which law applies to which retirement villages and creates arbitrary distinctions between villages that are in most respects very similar. This confusion limits the ability of consumers to identify and defend their rights under the law and encourages regulation shopping by service providers.
3. There is a lack of access to appropriate external dispute resolution, which further limits the ability of consumers to defend their rights.

In this submission, we use the term 'retirement village' broadly to mean a facility or community that has the purpose of housing older people. This includes both for-profit and not-for-profit facilities, and some that may not be considered a retirement village according to the definition under the Retirement Villages Act 1986 (such as some that would be regulated as caravan parks). We do not use the term 'retirement village' to refer to aged care facilities.

### **Complexity, lack of transparency and unfair terms in retirement village contracts**

Retirement village contracts tend to be long and unusually complex. As an indicator of the complexity involved, solicitors in our legal practice have on more than one occasion had to hire external barristers to assist in interpreting retirement village contracts.

If these contracts are challenging for solicitors who specialise in consumer law, it is very unlikely that unassisted retirement village residents will be able to understand their rights and obligations. It is even less likely that consumers are making informed decisions when they agree to the terms of a particular contract or compare the terms of two or more villages.

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<sup>1</sup> Retirement Village Association (2010), Submission to Productivity Commission Inquiry - Caring for Older Australians. Accessed 6 September 2011 from [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0008/102131/sub424.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0008/102131/sub424.pdf)

<sup>2</sup> ABS (2008) *Population Projections, Australia, 2006 to 2101*. Accessed on 7 September 2011 from <http://www.abs.gov.au/Ausstats/abs@.nsf/mf/3222.0>.

The Retirement Villages Act includes some provisions apparently designed to address this complexity by allowing prospective residents time to consider the contracts. Section 19 requires that relevant documents (including a copy of the management contract, a "disclosure statement" and the by laws of the village) must be provided to prospective residents at least 21 days before entering into the contract. Section 24 allows a three day cooling off period after the contract has been signed in which the prospective resident may back out.

However, these provisions will not help unless residents have access to advice. Research by Housing for the Aged Action Group of (mostly low income) residents of Independent Living Units found that 79% did not seek any advice before moving into their new accommodation, and 69% said that they had no help understanding their contract<sup>3</sup>. Note also that many Independent Living Units are not governed by the Retirement Village Act and so not subject to these cooling off periods in any case.

In addition, the disclosure statement required by section 19 merely sets out particulars of mortgages, charges and other encumbrances. It does not assist prospective residents to, for example, understand the key points of their contract, discuss fees or otherwise assist consumers to shop around<sup>4</sup>.

Confusing contracts also lead to a lack of transparency around fees. As the case study below shows, this confusion can partly be a result of the methods prescribed by the Retirement Villages Act for calculating fees as well as trader conduct.

### **Case study**

Our client became a resident of the retirement village in 1999. By 2009, the village's management company claimed that our client owed over \$10,000 in unpaid management fees and interest.

In response, our client alleged that the management company had calculated the fees in a way that was not permitted by the Retirement Villages Act. The issue hinged on complex fee provisions in that act, the Retirement Villages Regulations and the Owners Corporations Act 2006.

Our client also alleged that an emergency call service in their unit was faulty, and they objected to paying management fees for this service. Fee statements were provided by management, but did not go into enough detail to explain how much our client was paying for this service.

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<sup>3</sup> Housing for the Aged Action Group (HAAG) (2011) *Speak Out - Have Your Say on Housing: The Not For Profit Retirement Housing Community Education Project, Eastern Metropolitan Region of Melbourne*, pp 13-14

<sup>4</sup> The form of the disclosure statement is available via the CAV website:  
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Retirement\\_Villages/\\$file/disclosure\\_statement\\_retirement\\_villages.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Retirement_Villages/$file/disclosure_statement_retirement_villages.pdf)

Other points of contention around fees include questions of how of exit fees (known as 'deferred management fees') are calculated and whether residents receive any benefit from capital gains upon leaving a village.<sup>5</sup>

Possible options to address this problem could include:

- A regime of standard form contracts for retirement villages to allow consumers to more easily assess the product on offer and compare the terms of different providers. This has been recommended in the past by other consumer advocates.<sup>6</sup>
- Ensure fairer and more transparent fee structures, perhaps by requiring key facts statements (like those currently being introduced by the Commonwealth Government for insurance and consumer credit contracts) to be provided to prospective retirement villages residents on request. This would allow consumers to more clearly understand the key elements of contracts and the costs payable, and allow easier comparison between providers.
- Rationalisation of legislation governing retirement villages (discussed below).

### **Legislative framework**

The retirement village industry is regulated by multiple overlapping pieces of legislation. This makes it more difficult for residents to understand and defend their rights and difficult for advocates to assist residents<sup>7</sup>. It also presumably increases costs for operators.

Governing legislation is usually either the Retirement Villages Act 1986, or the Residential Tenancies Act 1997. However, the Owners Corporations Act 2006 and regulations under the Retirement Villages Act and the Estate Agents Act are also relevant<sup>8</sup>.

The Retirement Villages Act's definition of 'retirement village' (at section 3) will generally determine which legislation applies:

*retirement village means a community-*

*(a) the majority of which is retired persons who are provided with accommodation and services other than services that are provided in a residential care facility; and*

*(b) at least one of whom, before or upon becoming a member of the community, pays or is required to pay an in-going contribution*

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<sup>5</sup> For example, see Choice (2011) *Retirement Villages: Contract Traps* Accessed 7 September 2011 from <http://www.choice.com.au/reviews-and-tests/money/investing/superannuation/retirement-villages/page/contract%20traps.aspx>; The Age, 16 February 2011, 'Lifestyle's hidden costs'; The Age, 22 January 2011 'Paying a High Price to Retire'; The Age 18 March 2011 'Not Happy Campers'

<sup>6</sup> See submissions by Choice (number 725) and the Retirement Village Residents Association (number 30) to the Productivity Commission's inquiry *Caring for Older Australians*: <http://www.pc.gov.au/projects/inquiry/aged-care/submissions>.

<sup>7</sup> Housing for the Aged Action Group (2011) p 25.

<sup>8</sup> Retirement Village Association website - Consumer Protection <[http://www.RVAct.com.au/pages/consumer\\_protection\\_vic](http://www.RVAct.com.au/pages/consumer_protection_vic)>.

However, it can be very difficult to determine whether a development falls under the RV Act definition or not<sup>9</sup> and can result in arbitrary distinctions that mean residents in seemingly very similar developments are governed by different acts and so enjoy different rights<sup>10</sup>. According to the Housing for the Aged Action Group, in many cases neither residents nor providers are aware of which legislation is applicable to their case<sup>11</sup>.

It also appears that some owners exploit the confusion to evade regulation. For example, a development may be structured so it classifies as a caravan park, and is regulated by the Residential Tenancies Act rather than the Retirement Villages Act. This distinction is often based on the '24 hour test', which Housing for the Aged Action Group calls an "absurd anomaly... where a dwelling in a residential village is deemed to be akin to a caravan... if it can be removed within a 24 hour period"<sup>12</sup>. This has the effect of denying residents a number of protections they would otherwise be afforded by the Retirement Villages Act.

Options for addressing this problem could include, at a minimum, extending the protections of the Retirement Villages Act to residents currently deemed to be living in caravan parks.<sup>13</sup>

However, a more sustainable solution would be for more comprehensive reform to rationalise applicable Victorian law to create a single regulatory regime for retirement villages. Ultimately the aim should be to achieve consistent legislation across Australia. This is consistent with recommendations in the Productivity Commission's draft report *Caring for Older Australians*.<sup>14</sup>

### **Access to external dispute resolution**

Housing for the Aged Action Group have noted that, where residents and development owners cannot resolve a dispute internally, the next avenue for complaint is to the Victorian Civil and Administrative Tribunal (VCAT). This is unsatisfactory for two reasons:

- the process of applying to and using VCAT as an external dispute resolution option is complex and deters some complainants; and
- an application to VCAT requires complainants to frame their claim in terms of a breach of general consumer law, which is not necessarily well suited to issues arising in retirement villages<sup>15</sup>.

One option for addressing this problem is the establishment of an industry ombudsman service, similar to the Financial Ombudsman Scheme or the Credit Ombudsman Scheme Limited. This kind of venue would be less intimidating than a court or tribunal for consumers, would consider fairness as well as the applicable law (if operating like other ombudsman schemes) and would develop expertise in this complex area.

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<sup>9</sup> Housing for the Aged Action Group (2011) p 25.

<sup>10</sup> Council on the Ageing Victoria (2009) *Submission to: Options Paper: Tenancy Policy Framework for Residential Parks*, accessed on 21 June from [http://cotavic.org.au/wp-content/uploads/2011/01/microsoft\\_word\\_-\\_residential\\_parks\\_options\\_paper\\_final\\_july\\_09\\_web\\_version.pdf](http://cotavic.org.au/wp-content/uploads/2011/01/microsoft_word_-_residential_parks_options_paper_final_july_09_web_version.pdf)

<sup>11</sup> Housing for the Aged Action Group (2011), p 26.

<sup>12</sup> Housing for the Aged Action Group (2011) p 27.

<sup>13</sup> This has previously been recommended by Housing for the Aged Action Group (2011) p 27; and the Council on the Ageing (2009) p 4.

<sup>14</sup> Recommendation 10.5.

<sup>15</sup> Housing for the Aged Action Group (2011), p 23.

Thank you again for the opportunity to contribute to this inquiry. Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**

A handwritten signature in black ink, appearing to read 'Carolyn Bond'.

Carolyn Bond  
Co-CEO

A handwritten signature in black ink, appearing to read 'David Leermakers'.

David Leermakers  
Policy Officer