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Retirement Villages Regulations Regulatory Impact Statement Submissions  
Regulation and Policy Division  
Consumer Affairs Victoria  
GPO Box 123  
Melbourne VIC 3001

Dear Sir or Madam

### **Regulatory Impact Statement—Retirement Villages Regulations**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Regulatory Impact Statement for the *Retirement Villages Amendment (Records and Notices) Regulations 2013* and the *Retirement Villages Amendment (Contractual Arrangements) Regulations 2013*.

Briefly:

- we are very supportive of the proposed reforms. In particular we support the introduction of options 1a, 2a and 3a as a package;
- we support intervention to improve disclosure because many of the existing problems in the retirement villages market are caused by confusing or opaque terms. However, problems in the retirement housing market go well beyond those which can be solved by improving disclosure. The Government is advised to be open to further reform to resolve broader problems in the industry
- regarding the intermediate stage disclosure document, we recommend that option 1a be introduced, and further recommend changes that will:
  - simplify and clarify the section on entry and exit costs;
  - simplify and clarify the section on ongoing costs; and
  - move less important information on financial management and accreditation to the end of the document;
- regarding the pre-contractual disclosure document, we support option 2a, but we have recommended changes to:
  - reorganise the ongoing costs section to provide a figure showing total minimum costs per week, fortnight or month (whichever is more appropriate); and
  - shorten the departure costs and entitlements section.
- regarding contract simplification, we support option 3a;
- we dispute the statement in the RIS that the only benefits of the proposal are 'personal and social in nature';
- we argue that the reform, while welcome, is limited in that it will not apply to Residential Tenancies Act regulated developments.

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Our comments are detailed more fully below.

## **About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. 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.

## **Broad remarks**

We are broadly very supportive of the reforms proposed in the RIS. In particular we support the introduction of options 1a, 2a and 3a as a package. In our view the RIS has given a good description of the problems in the retirement village market and provided a sound justification for regulatory intervention.

### The benefits and limitations of improving disclosure

Consumer Action believes these reforms will create real benefits for prospective residents of retirement villages by improving the opportunities for consumers to understand the different products available and make choices which suit their needs.

In doing so, these changes will enhance competition between retirement villages. Competitive markets are not simply created by the supply side of the market undercutting each other on price. Competitive markets require active consumers who can assess competing products on features and price and choose the option best suited to them. This ensures useful price signals are sent to suppliers which drive product innovation and competition to the benefit of consumers.

Markets are not competitive where consumers have trouble understanding the features of products or where it is difficult to compare one product with another. In these circumstances, consumers make choices based on incomplete information and may decide purely on price (because they cannot distinguish between suppliers on product features or standard of service) or intangible elements like brand. Where this occurs, consumers send confused messages to traders which lack any insight on which features consumers are looking for and how much they are willing to pay for them.

The proposed disclosure changes will benefit consumers because many of the problems in the retirement village market flow from this kind of problem, in particular complex contracts and opaque pricing.

However, these reforms are on their own unable to solve much of the consumer problems in the retirement housing market because many of those problems are caused by things other than a lack of information. Consumer detriment is also created in this market for a number of other reasons:

- the use of Deferred Management Fees (**DMFs**) which are not only opaque but arguably unfair;

- the contract structure and nature of residence rights chosen by the industry are very unusual;
- consumer vulnerabilities inherent to the transaction; and
- a complex and overlapping regulatory structure.

Each point is discussed in more detail below. We are aware that each of these points are outside of the scope of the RIS. However we believe it is important to acknowledge that the problems in the retirement housing market go well beyond those which can be solved by improving disclosure. The Government is advised to be open to further reform to resolve broader problems in the industry.

*The use of Deferred Management Fees which are not only opaque but arguably unfair*

A lack of transparency in contract terms can be remedied by improving disclosure. However, a contract term which is structured in an unfair way and is not open to negotiation will probably still be unfair regardless of how well it is explained.

It is Consumer Action's opinion that DMFs may be unfair contract terms and are anti-competitive. This is principally because they put the consumer at a disadvantage by removing certainty about their financial position on exiting the contract. Consumers in all transactions should have the right to understand how much a product costs before they buy it, especially with such a high value transaction. Uncertainty around price will have a disproportionate effect on retirement village residents because:

- the earning potential of this group of consumers is minimal, meaning they are less able to bounce back from financial shocks, and;
- leaving a retirement village with less money than expected may limit a consumer's ability to afford an aged care bond if their health deteriorates, and so could have serious implications for a the consumer's future quality of life.

On the other hand, this uncertainty creates advantages for the operator:

- by linking the size of the DMF to capital gains and by front-ending fees (in that a resident leaving early pays a higher fee per annum than a resident leaving later) helps manage the operator's financial risk;
- charging part of the cost on exit (and determining the price by a formula rather than a certain amount) of the contract obscures the true cost of the product and so dulls competition on price; and
- the presence of an exit fee creates a barrier for dissatisfied residents who may otherwise switch providers.

We note that the UK Office of Fair Trading (**OFT**) has made a number of similar comments in relation to retirement home transfer fees.<sup>1</sup> The OFT document mainly refers to leasehold agreements and transfer fees that are somewhat different to Victorian DMFs. However, the OFT notes that the same principles apply to 'retirement village' model exit fees which do appear very similar to DMFs.<sup>2</sup> In any event, the key problem (that residents lack certainty on their exit entitlement) applies equally to the transfer fees the OFT report concerns.

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<sup>1</sup> United Kingdom Office of Fair Trading (February 2013) *OFT investigation into retirement home transfer fee terms*.

<sup>2</sup> see paragraph 2.11.

*The contract structure and nature of residence rights chosen by the industry are very unusual*

The most common types of retirement village contract in Victoria (loan-licence or loan-lease) are not like other property transactions a consumer is likely to enter. Despite paying a large sum upfront, the consumer does not own the property in the way they would own any other goods they paid an amount for upfront. It is also highly unusual that despite appearing to provide the capital for the property, the resident may not benefit from any capital gain (and may make a loss even if the property value improves because of the operation of the DMF). The resident will also commonly be required to pay for improvements to the dwelling when they exit the village and may have little say over which improvements should be made. That is, a resident could be placed in the bizarre position that they are required to pay for improvements even if that would result in a net loss for them. Regardless of how well contract terms are disclosed, the atypical nature of these arrangement is likely to cause confusion.

*There are consumer vulnerabilities inherent to the transaction*

The RIS explains in some detail why prospective retirement village residents may be more vulnerable than other consumers.<sup>3</sup> One vulnerability that cannot be addressed by improving disclosure is the likelihood that prospective residents will want to make their decision urgently and as such are less likely to assess the features of a village or compare between competitors.<sup>4</sup>

*A complex and overlapping regulatory structure*

As well as the *Retirement Villages Act 1986 (RV Act)*, a retirement housing development may be regulated by the *Residential Tenancies Act 1997 (RT Act)* (where it is structured as a residential park) and by the *Owners Corporations Act 2006 (OC Act)*. When a retirement village is structured as an owners corporation, the RV Act and OC Act can provide inconsistent requirements regarding the holding of annual meetings and voting rights. The existence of an owners corporation also creates extra categories of ongoing fees ('owners corporation' fees are now charged on top of maintenance charges in the RV Act) as are extra distinctions between what property is owned by residents individually and what property is owned by the owner's corporation. We discuss the overlap with the RT Act further below.

## **Intermediate stage disclosure**

### Our preferred option

We support the introduction of the option 1a factsheet, though we have made recommendations below to make the factsheet shorter and clearer. We do not support option 1b.

We support option 1a because it provides more of the detail a prospective resident needs to make an informed comparison between different villages.

In general, we will not necessarily support a disclosure option simply because it provides more information. More information can simply bury the critical points or discourage consumers from reading at all. We support option 1a because much of the extra information which is included in option 1a is critical for consumers to have. For example:

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<sup>3</sup> At chapter 2.2 of the RIS.

<sup>4</sup> See RIS at chapter 2.2.2.

- details of entry, ongoing and exit fees including refundable and non-refundable ingoing contributions, deposits and donations, the timing of repayments and contributions to any long-term maintenance fund;
- estimated resale price ranges for units;
- owners corporation fees;
- reinstatement or renovation obligations; and
- waiting list fees.

We support the proposal that retirement village operators be required to provide the intermediate stage factsheet within seven days upon request, with any marketing material, and at the pre-contractual stage if the resident hasn't received the factsheet already.

We agree that the form of the factsheet should be standardised and determined by CAV. Allowing operators to design their own factsheets would result in multiple different factsheets in the market, hampering comparability. It would also be possible for operators to arrange factsheets to bury important details at the end of the factsheet if those details are not favourable to the operator (for example, costs or facilities that do not compare well with competitors.)

### Recommended amendments

#### *Entry and exit costs*

The necessary information on entry and exit costs is all contained in the draft factsheet, but in our view it could be shortened and better organised.

At present, the section on entry costs covers around two pages (see Appendix D, pages 5-7) by asking multiple questions with tick box options that could be covered in one statement. We recommend this section be shortened as below:

9.1 To enter the village, the resident must pay a **[refundable / non refundable] [ingoing contribution and/or deposit and/or donation] of \$[amount / range]**

*[if refundable]* Refundable ingoing contribution or deposit will be refunded **[details of when]**

9.2 The following fees and costs must be paid by the resident on their permanent departure from the village. These fees and costs will be deducted from the resident's ingoing fee or deposit *[delete last sentence if inapplicable]*

A departure fee, calculated using the following formula **[formula]**

A contribution to the long term maintenance fund of **[amount or formula]**

Refurbishment costs (that is, improving the unit to a standard better than it was in when the resident moved in)

Reinstatement costs (that is, restoring the unit to the condition it was in when the resident moved in)

Renovation costs (this should be explained and distinguished from refurbishment)

Sale costs of **[amount or formula]**

9.3 If the unit is sold, the resident **[does / does not]** share in the capital gains or losses on the resale of the unit. The share of capital gain or loss is determined using the following formula: **[formula]** *[delete last sentence if inapplicable]*

9.4 The estimated sale price ranges... (keep this as it currently reads at 9.7)

As well as simplifying this section we believe our suggested changes clarify it by including points regarding capital gain / loss (currently at item 13 in the draft factsheet) and refurbishment / reinstatement / renovation (currently at item 14) alongside exit costs. It makes sense to bundle these points together as refurbishment fees and the share of capital gains / loss all effect the resident's financial position at exit.

If those changes are made, item 13 and 14 on the factsheet can be removed.

#### *Ongoing fees*

We also believe the ongoing fees section can be simplified. We suggest the format below:

10.1 The current rates of ongoing charges for new residents are as follows:

<b>Type of unit</b>	<b>Cost</b>
Self-contained unit	<b>[\$[amount or range] in total per [week / fortnight / month]</b>  Which is made up of Service charge of <b>[\$[amount] per [period]</b> Long term maintenance fund charge of <b>[\$[amount] per [period]</b> Owners corporation fees of <b>[\$[amount] per [period]</b> Insurance costs of <b>[\$[amount] per [period]</b> <i>[if insurance is organised by the operator]</i>
Serviced unit	<b>[\$[amount or range] in total per [week / fortnight / month]</b>  Which is made up of Service charge of <b>[\$[amount] per [period]</b> Long term maintenance fund charge of <b>[\$[amount] per [period]</b> Owners corporation fees of <b>[\$[amount] per [period]</b> Insurance costs of <b>[\$[amount] per [period]</b> <i>[if insurance is organised by the operator]</i>
Other (specify)	<b>[\$[amount or range] in total per [week / fortnight / month]</b>

	<p>Which is made up of</p> <p>Service charge of <b>[\$amount] per [period]</b></p> <p>Long term maintenance fund charge of <b>[\$amount] per [period]</b></p> <p>Owners corporation fees of <b>[\$amount] per [period]</b></p> <p>Insurance costs of <b>[\$amount] per [period]</b> <i>[if insurance is organised by the operator]</i></p>
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By providing a total figure per week / fortnight / month the factsheet makes the cost of different villages more comparable without losing any detail. We suggest consumers will be far more interested in the total amount of ongoing fees rather than the breakdown.

We have recommended that insurance costs be included in the ongoing charges section if it is arranged by the village operator and charged to residents. In this case, insurance is a real part of the inescapable ongoing fees and operators should be able to disclose the current cost. At a minimum, the information in the insurance section of the draft factsheet (section 15) should be bundled with the ongoing fees section and disclose whether the operator organises insurance and passes the cost onto residents as an additional charge.

*Moving less important sections*

We recommend that sections on financial management of the village / owners corporation (currently at sections 11 and 12) and accreditation (currently section 19) be moved to the end of the document as they are less important than other content.

**Pre-contractual disclosure**

Our preferred option

We support the introduction of the option 2a statement, though as with the intermediate stage factsheet, we would suggest some changes. We do not support option 2b.

We support option 2a primarily because it includes an estimate of the amounts payable by and to the resident if they permanently depart the village after one, two, five and ten years. This is critical to give consumers a tangible indication of what their financial position will be when they exit. It is also important to clearly show how large a DMF is if residents leave a village within the first few years.

We reject criticisms raised by industry in the past that including these estimates would be misleading or create further confusion for consumers because they must be based on certain assumptions (for example about capital gain) which may turn out to be inaccurate.

On the contrary, these estimates are not misleading if they are made alongside clear disclaimers that explain that they are based on standard assumptions. Nor will they create any further confusion. They will in fact remove confusion by allowing consumers to compare costs between villages on a like-for-like basis. By standardising elements that are out of the control of village operators (like the rate of future capital gain), the estimate allows consumers to compare villages

based on the charges that the village does control (such as the share of capital gain shared with residents, or the fee ceiling).

Providing estimates is much more useful than only providing a formula. It cannot be assumed that all prospective residents will be able to apply the formula to predict possible cost scenarios. There are many people (even among those who are well educated) who are simply not good with numbers and could not make this calculation themselves.

Assuming retirement village operators continue to resist disclosing these estimates, it should be noted that the estimates would not be necessary at all if retirement village operators used clear, common sense methods for pricing of their product (like simple monthly fees that can be changed over time like a residential tenancy) instead of opaque methods like deferred management fees. These non-transparent pricing methods have been chosen by the operators because they (presumably) create advantages for them or limit their risk. These methods do not in our view create any advantage for residents and in fact create detriment, for reasons we have explained above. Further, residents will rarely if ever have any ability to choose a village without a DMF. Having chosen methods like DMFs to price their product for their own advantage, it is only reasonable that operators be required to explain their effect to residents.

We do not support option 2b because it does not provide the estimation of exit entitlement provided by 2a. The description of option 2b on page 44 of the RIS also suggests that 2b would only give 'a summary statement' of ongoing, ongoing and exit costs. These items are in our view the most important points and should be covered in detail.

### Recommended amendments

#### *Ongoing Costs*

The ongoing costs section should be reorganised to provide a figure showing total minimum costs per week, fortnight or month (whichever is more appropriate). This figure should include:

- owners corporation fees
- insurance costs where insurance is purchased on behalf of residents by the village operator and the costs are passed on as a charge separate to the standard service charge; and
- any other regular costs which are readily ascertainable, such as council rates.

To leave costs such as owners corporation fees, insurance and council rates out of the ongoing fees disclosure would be to give an artificially low indication of the actual ongoing fees a resident will have to pay. It is reasonable to avoid disclosing costs where they are genuinely not able to be ascertained (for example, utilities costs where they vary depending on the resident's usage). However, there is no reason to leave costs out where they are ascertainable. Our approach is consistent with the single pricing law that applies to all consumer transactions<sup>5</sup> and so should not represent any extra compliance burden for operators.

We recommend this section could be structured as follows:

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<sup>5</sup> At section 48 of the Australian Consumer Law.

To live in the village, you must pay a total of **[\$amount] per [period]** in ongoing charges and costs, which includes:

- service charges of **[\$amount] per [period]**
- long term maintenance fund charge of **[\$amount] per [period]**
- [specify any other maintenance charges] of **[\$amount] per [period]**
- owners corporation fees **[\$amount] per [period]** *[remove if not applicable]*
- house insurance **[\$amount] per [period]** *[where this can be ascertained]*
- contents insurance **[\$amount] per [period]** *[where this can be ascertained]*
- council rates **[\$amount] per [period]** *[where this can be ascertained]*
- water rates **[\$amount] per [period]** *[where this can be ascertained]*
- utilities **[\$amount] per [period]** *[where this can be ascertained]*

The following costs are not included in the service charge or the list above:

- Personal services fees
- [List any other regular charges which are not ascertainable, such as insurance or utilities if not mentioned above]*

Where the disclosure document allows 'other' ongoing fees or costs to be listed, each should be itemised. For example, the draft at Attachment E of the RIS (and our suggestion above) include a space for 'any other maintenance charges'. If there is more than one 'other' maintenance charge, they should be listed individually. It is not acceptable to bundle a number of charges into a single amount.

#### *Departure costs and entitlements*

We suggest the sections in the pre-contractual disclosure document on departure costs and entitlements should be shortened. We suggest the following format:

When you leave the village, the following costs apply:

You **[will / will not]** be required to pay a departure fee  
**[state departure fee formula if applicable]**

You **[will / will not]** be required to pay for the **[refurbishment / reinstatement / renovation of your unit]**

You **[will / will not]** be required to make a separate contribution to the long term maintenance fund  
**[state amount or formula if applicable]**

You **[will / will not]** be required to pay me / us any costs of selling your unit

These costs are:

(list likely costs as already suggested on page 5 of Appendix E to the RIS)

You **[will / will not]** be required to pay ongoing costs after you leave the village

These costs are:

(list costs as already suggested on page 5-6 of Appendix E to the RIS)

## **[List any additional costs]**

The section on departure entitlements could be reformatted in the same way. Changing the format in this way does not create any loss of detail, but will make the disclosure document more concise and so more likely to be read and understood.

## **Contract standardisation**

### Our preferred option

We support option 3a. We prefer option 3a over 3b because we believe the requirement of a standard layout for contracts will:

- make it easier for prospective residents to compare contracts from different providers; and
- allow clarity of contracts to be improved if the standard structure requires the most important information to be placed prominently.

We welcome the decision to require that certain matters must not be listed in a contract and the rationale for doing so—that the disallowed terms are ones which are likely to be unfair and disallowing them prevents harm before it occurs.

We otherwise support proposal 3a for contract standardisation as described in the RIS and attachments, and do not suggest any amendments.

## **Other points**

### Failure of the RIS to quantify benefits of the proposal

On the whole, we believe the RIS has given a good indication of what the benefits of the proposals will be. That being so, it is surprising that the RIS makes no attempt to quantify those benefits to allow a proper assessment of the costs and benefits of this proposal. It is also very disappointing that at one point the RIS explicitly dismisses the benefits of the proposals as being 'personal and social in nature'.<sup>6</sup>

The following are all benefits that the RIS at other points suggests the proposals are intended to create or will flow from the proposals:

- assist prospective and proposed residents to compare villages<sup>7</sup>
- assist prospective and proposed residents to choose a village that meets their needs<sup>8</sup>
- assist prospective and proposed residents to find information about their rights understand their rights, obligations and financial commitment before entering a village; to reduce the information asymmetry between operators and prospective residents;<sup>9</sup>
- a reduction in the risk of consumer detriment in the retirement villages industry<sup>10</sup>

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<sup>6</sup> At page 3.

<sup>7</sup> At pages 3, 34, 35 and 46.

<sup>8</sup> At page 3 and 46.

<sup>9</sup> At pages 3, 34, 35, 37, 42 and 46.

- a reduction in disputes between operators and residents or a change in the nature of disputes (for example, reducing the number of disputes about exit fees);<sup>11</sup>
- savings for operators and residents because less time and money is spent resolving disputes;<sup>12</sup>
- standardised contract structure would assist prospective and proposed residents to be confident that the contract is complete<sup>13</sup>
- fewer retirees moving into retirement villages where it is against their financial interests, or social and personal preferences;<sup>14</sup>
- more retirees moving into retirement villages where it is in their financial, social and personal interests;<sup>15</sup> and
- increased competition as operators would need to offer better services and fairer costs to attract better informed retirees.<sup>16</sup>

We accept that many of these kinds of benefits are difficult to quantify in dollar terms<sup>17</sup> (with the exception of dispute resolution savings, which we think should be quantifiable). However, a failure to make any effort to quantify these benefits creates a risk that the proposal can be seen as having no benefits to offset the costs to business.

#### Limitations of this reform to address problems in RT Act regulated developments

As mentioned above, the retirement housing market is regulated not only by the RV Act but also the RT Act. One of the limitations of these proposals is that they apply only to RV Act regulated developments. There are a number of 'residential parks' in Victoria which would appear to almost any consumer to offer the same product as a retirement village but are regulated by the RT Act. Residents of those RT Act regulated villages will not receive the benefit of these reforms.

The RIS explains that residential parks are 'not in competition with retirement villages' because 'residential parks are not normally characterised by ingoing contributions and deferred management fees'.<sup>18</sup> We disagree. We know of at least one multi-site operator of residential parks in Victoria that uses DMFs. At one site, this operator originally did not charge DMFs but is now including DMFs in contracts of new residents. At another site, the same operator is building a new development which will charge DMFs but is structured as a residential park. DMFs are attractive to operators for a variety of reasons, and it appears that at least some developers see advantages in establishing new retirement housing developments that are structured to be regulated by the RT Act. As the retirement housing industry in Victoria becomes more sophisticated, we think it is likely that DMFs will be used more in residential parks.

We also disagree that residential parks do not require 'ingoing contributions'. It may be true that, in technical terms, the upfront payment made by a resident under a RT Act development is not the same thing as the 'ingoing contribution' paid by a resident in a (RV Act regulated) loan-

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<sup>10</sup> At page 19.

<sup>11</sup> At pages 19, 35, 37

<sup>12</sup> At page 37.

<sup>13</sup> At page 34 and 46.

<sup>14</sup> At page 37.

<sup>15</sup> At p 37.

<sup>16</sup> At p 38.

<sup>17</sup> As the RIS notes at p 57.

<sup>18</sup> At page 69.

license or loan-lease contract. The upfront payment made by a resident in an RT Regulated park purchases the dwelling, and thereafter the resident rents land and pays for services. The RV Act upfront payment is considered an interest free loan paid by the resident to the village operator. However it must be said that (at least in in RT Act contracts that require payment of a DMF) the difference between the two types of upfront payment is semantic or technical at best. In substantial terms the impact on the consumer is the same: in both cases the resident must make a large upfront payment to secure a right to reside in the village, and in both cases the resident is refunded that payment upon exit, less a fee. We doubt that many consumers would see a significant distinction between the two models or whether any would choose one village over another based on how the upfront payment was categorised at law..

Furthermore, the categorisation of the upfront payment is irrelevant to the disclosure problems identified by the RIS, which are about how that payment is refunded and the fees that are subtracted. To the extent that DMFs apply in RT Act regulated developments, the same DMF related problems will occur. There is no reason why residents in those developments should not be entitled to the same protections.

More broadly, the suggestion that residential parks are not competing with retirement villages is highly questionable. In each case, operators are marketing the same product—a secure, low maintenance, community of like-minded retirees. Residential parks will often be a lower cost option with fewer 'frills' but we do not think it is true to say that they do not compete with Retirement Villages. It is more correct to say that the two models are substitutes competing in the same market.

Again, we accept that this question is probably beyond the scope of the RIS to consider. However we think it is important to revisit the wisdom of regulating some types of retirement housing differently when they offer almost identical products and the only differences between them would seem to most consumers to be merely technical or formal distinctions.

Please contact David Leermakers on 03 9670 5088 or at [david@consumeraction.org.au](mailto:david@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



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