

29 July 2015

**By email: [housing@pc.gov.au](mailto:housing@pc.gov.au)**

Karen Chester and Ken Baxter  
Commissioners  
Productivity Commission

Dear Commissioners

### **Housing Decisions of Older Australians**

The Consumer Action Law Centre (**Consumer Action**), Housing for the Aged Action Group (**HAAG**), Residents of Retirement Villages Victoria (**RRVV**) and Council on the Ageing Victoria (**COTA Vic**) welcome the opportunity to comment on the Productivity Commission's research on the housing decisions of older Australians.

We welcome the Productivity Commission's interest in this issue. As the Commission is no doubt aware, significant growth is predicted for the retirement housing industry as a result of our ageing population.

Our submission is limited to age-specific retirement housing, which includes retirement villages, residential parks, rental villages and Independent Living Units. Our submission discusses the factors that can influence a person's decision to enter, stay at or leave these types of retirement housing, including:

- the complexity of the retirement housing sector;
- the importance of housing to older people;
- the regulation of retirement housing in Victoria;
- 'push' and 'pull' factors;
- barriers to making complaints; and
- dispute resolution.

Our comments are detailed more fully below.

#### **1. Complexity of retirement housing**

'Retirement housing' covers a myriad of housing types, far beyond the traditional retirement village model that most people are familiar with. It includes residential parks, rental villages, Independent Living Units and semi-supported housing, in addition to not-for-profit and for-profit retirement villages. Below is a brief summary of the main types of retirement housing our organisations deal with:

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- a) *Retirement villages* are a type of housing for retirees and their spouses. They may be either privately owned or owned and run by not-for-profit organisations. A retiree is generally defined as being aged over 55 years and no longer in full time employment. Retirement villages require an upfront payment for entry, also known as an 'ingoining contribution'.
- b) *Residential parks* originated from caravan parks that allowed for permanent residency in low numbers. Over time the industry has evolved to provide larger numbers of sites (or entire villages) for retirees. Residents own their relocatable home but lease or rent the land on which it stands.
- c) *Independent Living Units* originated during the 1950s when the Australian Government passed the *Aged Persons Homes Act 1954 (Cth) (APHA)* which funded churches, charities and not-for-profit organisations to provide housing for older people. As a result 34,700 Independent Living Units (**ILUs**) were built over a 30 year period providing "affordable, independent housing for lower-income older people".<sup>1</sup> In Victoria, approximately 9000 units were built during this period. However, over time ILU stock in Victoria has reduced to roughly 6200 units.
- d) *Rental villages*, operated by private companies, are targeted to aged pensioners who want a supported housing option with independent living conditions. Historically rental villages in Victoria have been covered by the *Residential Tenancies Act 1997 (Vic) (Residential Tenancies Act)* and tenants typically pay 85% of income as rent, including 100% of their Commonwealth Rent Assistance.

## 2. Importance of housing to older people

Research has shown that the importance of housing and accommodation is amplified with ageing. The housing situation of the aged is the culmination of a lifetime of opportunities and obstacles.<sup>2</sup> According to the Australian Bureau of Statistics, "older people place a high value on their home environment, as they are less likely to be in full-time employment, and consequently more likely to spend more time in their home, and in their immediate neighbourhood, than at any other period in their lives".<sup>3</sup>

The importance of stable, safe and secure accommodation as we age can make older people exceptionally vulnerable to accommodation-related problems, and can have a significant impact on their housing decisions. Housing problems often present a greater level of stress and anxiety to older people than other age groups, which means that appropriate regulation for retirement housing is particularly important.<sup>4</sup>

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<sup>1</sup> Jones, A., Howe, A., Tilse, C., Bartlett, H. and Stimson, B. (2010) *Service integrated housing for Australians in later life*, Australian Housing and Urban Research Institute, p 26.

<sup>2</sup> Faulkner, D. (2001) *Linkages among housing assistance, residential relocation and use of community health and social care among old adults: shelter and non-shelter implications for housing policy development positioning paper*, Australian Housing and Urban Research Institute as quoted in S. Ellison et. al. (2004) *The legal needs of older people in NSW*, Law and Justice Foundation NSW, p. 85, available at: [http://www.lawfoundation.net.au/ljf/site/articleIDs/6FFEB98D3C8D21F1CA25707E0024D3EB/\\$file/older\\_law\\_report.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/6FFEB98D3C8D21F1CA25707E0024D3EB/$file/older_law_report.pdf).

<sup>3</sup> Australian Bureau of Statistics (2000) *Older People, New South Wales, Catalogue n.4108.1*, p. 5 as quoted in S. Ellison et. al. (2004).

<sup>4</sup> Ibid.

### 3. General remarks on the regulation of retirement housing in Victoria

The complexity of the regulation of the sector arguably makes it more difficult for older people to make clear, well-informed decisions about the type of housing they are moving into, and their rights and obligations in relation to this. As Consumer Affairs Victoria (**CAV**) notes in its consumer guide on retirement villages, many residential complexes market themselves as community-style accommodation for retirees. However, not everything that looks like a retirement village is regulated by the *Retirement Villages Act 1986* (Vic) (**Retirement Villages Act**).<sup>5</sup> This can lead to a real lack of clarity about which legislation applies to some of these accommodation types. In fact, we believe that this is a defining problem with the retirement accommodation industry—that it is regulated by multiple, overlapping pieces of legislation. In our view, this causes or contributes to many of the problems faced by residents of retirement accommodation.

Governing legislation for retirement accommodation operators in Victoria is usually either the Retirement Villages Act or the Residential Tenancies Act. However, other legislation including the *Owners Corporations Act 2006* (Vic) and regulations under the Retirement Villages Act and the *Estate Agents Act 1980* (Vic) are also relevant.

The definition of 'retirement village'<sup>6</sup> will generally determine which legislation applies. However, it can be very difficult to determine whether a development meets the Retirement Villages Act definition, especially in the case of not-for-profit villages. As a result, seemingly very similar developments can be governed by different legislation and the residents in those developments will enjoy different rights.<sup>7</sup>

So far, the regulatory approach appears to focus on giving potential residents explanatory information, rather than working to clarify the regulatory system itself. A disclosure regime might be assessed as costing less than stronger and more effective regulation as it does not limit the types of products offered, so has less impact on the market. However, disclosure alone will not ensure residents are able to make informed decisions, nor stop the harm to residents unless the underlying product (in this case, retirement housing) is fair, safe and suitable. The net effect of these failings will be to impose costs on business and consumers.

We would like to be quite clear that we do not oppose diversity and innovation in this market. Diversity and innovation can be drivers of competition and generally provide benefits for consumers. However, the current diversity in the retirement accommodation market appears to be exacerbating confusion and detriment, rather than necessarily meeting residents' needs.

We are currently asking the Victorian Government to consider more comprehensive reforms to regulation of the retirement accommodation industry by undertaking a comprehensive review of the retirement housing sector. Ultimately the aim of such a review should be to ensure that all

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<sup>5</sup> Consumer Affairs Victoria (2014) *Retirement villages: Guide to choosing and living in a retirement village*, available at: <http://www.consumer.vic.gov.au/library/publications/housing-and-accommodation/retirement-villages/retirement-villages-guide.pdf>.

<sup>6</sup> *Retirement Villages Act 1986* (Vic) s 3.

<sup>7</sup> Council on the Ageing Victoria (2009) *Submission to: Options Paper: Tenancy Policy Framework for Residential Parks*, available at: [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)

developments which effectively operate as retirement accommodation are regulated consistently, and that residents have appropriate consumer protections.

#### 4. Moving into retirement housing

It is clear that price is not the only factor that influences a person's decision to move into retirement housing. Research has shown that the most common 'push factors' to enter a retirement village are health issues and the need for greater assistance; death of a spouse; problems in maintaining the home; the need for a lifestyle change; and a desire to be close to family. The pull factors identified include the built environment and affordability; location and convenience of location; and maintenance of existing lifestyle and familiarity.<sup>8</sup>

Other research has indicated that "feelings of social isolation or loneliness that can accompany the many changes that occur to our social networks as we age, coupled with the community-friendly designs of many retirement villages", are significant 'pull' factors. People with little social support from family, friends or neighbours may be more likely to consider relocation because retirement housing offers community support and encourages social activities and engagement amongst residents.<sup>9</sup>

For retirement homes in the early stages of development, residents may choose to move in on the basis of promises that certain facilities will be built, but these promises are not always kept. Forcing management to fulfil these commitments can be difficult because of the way individual contracts are worded, and the costs and delays associated with taking disputes to the Victorian Civil and Administrative Tribunal (**VCAT**).

#### Case study

In 2007, Neil and Sharon entered into an agreement to purchase a unit in a retirement village that was in the early stages of development. They moved into 'temporary' accommodation in the village soon after, as they waited for their unit to be completed. Neil and Sharon still have not moved into their permanent unit, living in temporary accommodation inferior to the unit they agreed to purchase. The expected improvements to the village, including the construction of a community centre, have also never commenced. The new owner of the village has talked about developing the village, but Neil and Sharon are still waiting.

Neil and Sharon say the strain and frustration of this situation has had a significant impact on their lives. The fact that they cannot make their temporary villa the home they looked forward to is taking its toll. In addition, they cannot have easy access to many of their personal possessions, which have needed to be boxed and stored in another part of the village due to the downsize. Neil and Sharon are worried they may never move into the villa they purchased.

<sup>8</sup> Cradduck, Lucy M. & Blake, Andrea (2012) *Retirement villages : time for a change?*, Australia and New Zealand Property Journal, 3(8), available at: [Http://Eprints.Qut.Edu.Au/56643/3/56643.Pdf](http://Eprints.Qut.Edu.Au/56643/3/56643.Pdf).

<sup>9</sup> National Seniors Australia (2013) *Relocation to a Retirement Village: Who considers relocation and what are people looking for?*, available at: [Http://www.Cepar.Edu.Au/Media/113023/0113376pac\\_Relocationtoaretirementvillage\\_Fn\\_Lowres.Pdf](http://www.Cepar.Edu.Au/Media/113023/0113376pac_Relocationtoaretirementvillage_Fn_Lowres.Pdf).

We note that merely disclosing the complex and often expensive fees (particularly in for-profit retirement villages) and suggesting residents obtain advice will not necessarily change their decision. These disclosures can be drafted in language that is difficult to understand, and some of the fees may not be intuitively expected by residents. For example, deferred management fees (**DMFs**), where the operator keeps up to 40% of the sale price of a unit, are not common in non-retirement home properties. Residents are also unable to judge whether they have received value for money, or whether they are happy with their choice, until they have lived in a property for some time. By this point, DMFs may have accrued which can make it difficult for residents to afford to move to another property.

The United Kingdom Office of Fair Trading (**the OFT**) noted that the behavioural characteristics of consumers may mean that they do not take account of the full cost in calculating the price they are willing to pay to purchase a retirement home property.<sup>10</sup> The OFT noted that even when consumers find out early on about all the fees they are liable to pay, they still give more attention to upfront costs and benefits than future costs and benefits. Purchasers focus on the benefits to them *now* of purchasing a retirement home property, and do not focus on the costs they or their families will incur at a later date.<sup>11</sup>

This is particularly the case in relation to DMFs, which are calculated as a percentage of the sale price, as these are impossible to calculate when a resident purchases a retirement home property. It is difficult for the consumer to understand or plan for what their future liabilities may be. They need to make a number of complex assumptions about how long they will live in the property and how much house prices will have increased in this period.

## 5. Moving out of retirement housing

There can be a number of 'exit fees' that can influence a resident's decision whether to move out of a retirement housing property. Residents, particularly those in for-profit retirement villages, are often required to pay some or all of the following fees:

- *A deferred management fee (DMF)*: an amount determined by a formula, usually based on the price the resident paid or the sale price. DMF contributions have been found to range from 20 to 40% over any period from 5 to 10 years.<sup>12</sup>
- *Reinstatement or renovation costs*: a requirement to either pay to restore the unit to its original condition, or pay for improvements to bring the unit up to date.
- *Contribution to 'long term maintenance fund'*: an amount determined by a formula, usually based on the price the resident paid or the sale price.
- *Sale costs*: advertising, marketing and legal costs for selling the unit, and/or a sales commission.

These costs cannot be exactly quantified at the time the consumer enters a contract, meaning that the total cost of living in a village is difficult to ascertain, and it is hard to compare the costs

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<sup>10</sup> The UK Office of Fair Trading was considering whether 'transfer fees' were unfair. Transfer fees are similar in many ways to DMFs, in that they are a percentage payable of the sale value or market value of a retirement property.

<sup>11</sup> Office of Fair Trading UK (2013) *OFT investigation into retirement home transfer fee terms*, available at: [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared\\_offt/consumer-enforcement/retirement-homes/oft1476.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/consumer-enforcement/retirement-homes/oft1476.pdf).

<sup>12</sup> Cradduck & Blake (2012).

of different villages side by side. Most retirement housing operators have limited information available online. For example, 63% of retirement villages nationally have no information publically available via their website as to the applicability or quantum of DMFs.<sup>13</sup>

This is a substantial barrier to competition in the market, as some residents of retirement villages feel that they are effectively 'trapped' in their retirement home. If they leave, they may not have enough money left to purchase another property. It is important to note that, in general, retirement housing residents are not wealthy. The majority are either fully or partially reliant on the age pension.<sup>14</sup>

## 6. Barriers to making complaints

We sometimes see industry surveys showing how happy retirement housing residents are with their decision to move into retirement housing. However, retirement housing problems are often 'hidden' as older people may be unwilling or unable to make complaints or enforce their legal rights. Many older people may have difficulty accessing complaint mechanisms and communicating their needs due to physical limitations, communication difficulties, or a lack of knowledge of their rights, entitlements, and the complaint mechanisms available.<sup>15</sup>

There are also social barriers which leave some residents feeling too intimidated to complain. Residents may fear being labelled a trouble-maker by other residents, or damaging their relationship with staff and management. We have received reports of outright bullying by retirement village managers in response to complaints, or to deter residents from making complaints.

The University of Western Australia summarised the problem as follows:

*"...residents may be reluctant to institute complaints for various reasons. Residents may also find themselves ostracised by management or even fellow residents as a result of instituting a complaint...Some of the reasons given... for residents failing to institute complaints include their fear of management; their reluctance to let their families know for fear of being put into aged care; their unwillingness to give their village a bad reputation for fear that their units will become devalued or unsaleable; and elderly people wanting to live out their lives with a minimum level of stress."<sup>16</sup>*

Statistics relating to abuse in aged care are also indicative of the barriers older residents face to seeking assistance. It is estimated that close to 70% of older people do not access legal services in instances of abuse because the situation is personal and individual and the older person may fear retribution from the abuser if they attempt to stop them.<sup>17</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> L. Towart (2013) *Who Lives in Retirement Villages; are they wealthy enclaves, ghettos or connected communities?*, University of Technology, available at: <http://www.soacconference.com.au/wp-content/uploads/2013/12/Towart-Social.pdf>

<sup>15</sup> Dr. B. Black (2004) *Empowering and rights-based approaches to working with older people*, *Alliance for the Prevention of Elder Abuse: Western Australia*, available at: <http://apeawa.advocare.org.au/publications/empowering/rights-based-a/>

<sup>16</sup> A. Freilich et. al. (2014) *Security of tenure for the ageing population in Western Australia*, available at: <http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-summary.pdf>.

<sup>17</sup> D. Cripps et. al. (2002) *Abuse of older people: Issues for lawyers*, *Elder Law Review*, 1(1), pp14-19, as quoted in Australian Human Rights Commission (2006) *Submission to the House of Representatives Standing Committee on*

The lack of community legal assistance services in this sector is also a significant barrier to justice. Community legal centres simply do not have the resources to provide casework assistance to residents. Paid legal advice and support for residents is problematic to obtain due to a lack of affordable expertise, and the domination of industry favoured law firms, meaning many firms are unable to provide advice due to conflicts of interest.

These factors together mean that government, regulators and the public are often unaware of the difficulties being faced by residents, and residents may feel powerless to enforce whatever rights they may have.

## 7. Dispute resolution

Even if a resident is brave enough to make a complaint, it is incredibly difficult for them to achieve a successful outcome as they must take their complaint to a court or tribunal for determination. At present, if disputes are unable to be resolved internally, disputes in Victoria must be taken to VCAT. The VCAT process involves a court-like, adversarial hearing, which is much more formal and intimidating for a consumer than an ombudsman process.

The Western Australia Department of Commerce recognised the need for improved dispute resolution in this sector, saying:

*"It is recognised that there is a need for a model of dispute resolution that adequately addresses the needs of residents whose age and vulnerability place them in a very limited position in terms of representing themselves. Older people tend to enter retirement villages seeking stability and security, not conflict. As discussed above, some of the existing dispute resolution options can be daunting for many residents. Instituting a complaint can be very stressful in that in doing so, residents may find themselves ostracised by management or even fellow residents."<sup>18</sup>*

We recommend establishing a dedicated external dispute resolution scheme to resolve disputes between residents and retirement housing operators. This could either be government-run or an industry funded scheme comparable to existing operations like the Financial Ombudsman Service or the Public Transport Ombudsman Victoria. These services provide consumers with access to free and independent dispute resolution, and also create incentives for businesses to settle disputes internally, as they incur costs each time a case is brought against them.<sup>19</sup> The advantage of an ombudsman process is that it remains informal and avoids some of the pitfalls of adversarial face-to-face dispute resolution where a power imbalance exists between the parties. We note the Productivity Commission's findings in its Access to Justice report that

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*Legal Affairs regarding Inquiry into Older People and the Law*, available at: <https://www.humanrights.gov.au/inquiry-older-people-and-law#toc6>.

<sup>18</sup> Government of Western Australia Department of Commerce (2010) *Statutory Review of Retirement Villages Legislation, Final Report*, p. 107, available at: <http://www.commerce.wa.gov.au/sites/default/files/atoms/files/statutoryreviewofretirementvillageslegislationfinalrep.pdf>.

<sup>19</sup> Productivity Commission (2015) *Access to Justice Arrangements: Inquiry Report Overview*, p. 11, available at: <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>.

ombudsmen improve access to justice by providing a simple, prompt and professional dispute resolution service that reduces power imbalances and identifies systemic issues.<sup>20</sup>

Other improvements to dispute resolution could include:

- improved conciliation services at consumer affairs regulators, including providing regulators with binding powers;
- better community advocacy services; and
- a retirement villages list at relevant tribunals and courts to speed up applications and make the process more relevant to residents.

Effective dispute resolution services contribute to compliance, monitoring and enforcement by providing information about common and systemic issues of complaint. They may also improve complaint handling standards by operators themselves, by acting as an additional discipline to avoid complaints.

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

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



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*Supported by:*



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<sup>20</sup> Ibid, Chapter 9.2.