



24 April 2017

By email: cav.consultations@justice.vic.gov.au

Retirement Villages (Contractual Arrangements) Regulations
Regulatory Impact Statement Submissions
Policy and Corporate Services
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

Dear Dr Lanyon,

Retirement Villages (Contractual Arrangements) Regulations 2017 – Regulatory Impact Statement

The Consumer Action Law Centre (**Consumer Action**), Council on the Ageing Victoria (**COTA**), Housing for the Aged Action Group (**HAAG**), and Residents of Retirement Villages Victoria (**RRVV**) write in relation to the *Retirement Villages (Contractual Arrangements) Regulations 2017* Regulatory Impact Statement (**the RIS**) conducted by NERA Economic Consulting (**NERA**).

We understand that the *Retirement Villages (Contractual Arrangements) Regulations 2006* (**Regulations**) will expire on 30 July 2017. The RIS proposes new regulations to come into operation on or before 1 August 2017, which will see major changes made to the existing aged care bond rule.

Our respective organisations work both independently and jointly to further the interests of older Victorians across the full spectrum of retirement housing. As a coalition of both membership and non-membership based policy, advocacy and service delivery organisations we are well informed on the issue the RIS was commissioned to address.

We write to express our strong view that the current aged care bond rule should be retained (Option 1). In the alternative, we submit that if operators choose to pay the Daily Accommodation Payment (**DAP**), this amount should not be deducted from the resident's exit

entitlements. We believe this option fairly balances resident choice and financial wellbeing with the concerns of operators.

Residents and their families bearing the burden

The RIS has suggested that the preferred option for re-making the Regulations is Option 2, which will give operators the choice of whether to pay the DAP or the refundable accommodation deposit (**RAD**) for new residents after 1 August 2017.

According to the RIS, under Option 2 residents as a group will initially be worse off by \$0.5 million in 2018, and will be worse off by as much as \$5.5 million in 2032, compared to the current arrangements (Option 1). Individual residents are expected to be \$824 worse-off on average, but could be up to \$6,607 worse-off in extreme cases under the proposed changes.

Compared to the base case, Option 2 would cost residents far more than Option 1 would cost operators:

- Under Option 1 (the current arrangements), operators would be \$1.7 million worse-off on average each year over 20 years, compared to the base case.
- Under Option 2 (NERA's preferred option), residents would be, on average \$2.1 million worse-off each year over 20 years, compared to the base case.

The RIS takes the position that individual residents (most of whom are elderly females) are better placed to absorb these costs than retirement village operators. There also appears to be an assumption in the RIS that it is acceptable for operators to transfer business risk to residents. This conclusion is grossly unfair and inequitable.

The collective impact on retirement village operators of retaining the current aged care bond rule (Option 1) is relatively small, particularly given size and predicted growth of the sector. In comparison, the costs to residents of Option 2 would have a significant impact on individual retirees and their families. Most retirees are generally on low, fixed incomes and are already subject to unequitable and costly arrangements that are unique to the retirement housing sector.

In addition, if an operator is required to pay a RAD under Option 1, this would provide an incentive for the operator to sell the retirement village unit more quickly, which would in turn reduce the costs for the operator. However, we cannot see this cost mitigation being considered in the RIS.

The RIS suggests that Option 2 is necessary in order to maintain the viability of the retirement village sector, and that 'consideration must be given to the viability of smaller retirement village operators'. However, the RIS acknowledges that the proportion of small retirement village operators is likely to be less than 30 per cent. Residents and their families should not be expected to shoulder significant additional financial burdens because a minority of retirement village operators might have difficulty sourcing sufficient capital to pay a resident's RAD.

The RIS does not clearly establish that the sector cannot absorb the costs of Option 1. If the concern is that small operators do not have sufficient capital, we suggest the appropriate policy response is a capital adequacy requirement, as opposed to transferring the risks of inadequate

capital to residents.¹ The RIS also does not consider the regulatory costs and benefits of allowing small operators to apply for exemptions to Option 1. We have provided further details about these recommendations below.

Furthermore, the Multi-Criteria Analysis used in the RIS appears to provide a 50% weighting to 'viability of the sector' and only 25% weighting to 'choice of aged care payments for consumers'. It appears to base this weighting on the objectives identified in Chapter 3. However, those objectives do not indicate a weighting between objectives (or how objectives might be traded off). The RIS claims that the Multi-Criteria Analysis has been 'weighted in such a way that criteria capturing benefits to residents (the first two criteria) and criteria capturing benefits to retirement village operators (the last criterion) are weighted equally.'

However, there is no suggestion that changes to the Regulations would be applied retrospectively against residents. In addition, there is no consideration of the benefits to industry of not retrospectively changing residents' entitlements, such as the benefits of regulatory certainty. We therefore question why 'choice of aged care payments for consumers' has been weighted significantly lower than criteria capturing benefits to retirement village operators. Furthermore, given the power imbalances and information asymmetry between operators and residents, we question why operators' interests have been given equal weighting to those of residents. If the Regulations lapsed, residents and operators would not be on equal footing, which should have been acknowledged by these weightings.

A better approach

Retirement village operators are far better placed to absorb the costs outlined in the RIS than retirees. Furthermore, residents should be able to choose how they wish to pay for their aged care expenses. Essentially, the issue comes down to equity and fairness. On this basis, Option 1 should be the preferred option.

In order to address concerns about the impact of Option 1 on the viability of the retirement village sector, we recommend requiring operators to meet capital adequacy requirements. These requirements have applied to the banking and financial services sector for years in order to address concerns about financial service providers' viability and capacity to pay amounts owing to consumers.²

Smaller operators could also be allowed to apply to Consumer Affairs Victoria (**CAV**) for permission to pay the DAP instead of the RAD. CAV could grant permission to small operators if the operator would experience significant financial hardship as a result of having to pay the RAD. CAV could also provide an extension of time to pay the RAD (similar to the extensions available to South Australian retirement villages for payment of exit entitlements³).

¹ We have previously recommended a similar requirement: see COTA Vic, RRVV and Consumer Action's joint submission to Consumer Affairs Victoria dated 16 June 2015.

² For example, see Australian Securities and Investments Commission, *RG 166 Licensing: Financial Requirements*, July 2015. Available at: <http://download.asic.gov.au/media/3278616/rg166-published-1-july-2015.pdf>.

³ *Retirement Villages Act 2016 (SA)* s 27.

Alternatively, if Option 2 is selected, retirement housing operators that elect to pay the DAP should not be permitted to deduct the DAP payments from the resident's exit entitlements. This would balance the financial wellbeing of residents with the operators' cash flow concerns, and provide an incentive for operators to sell properties promptly.⁴

We note that many residents and their families are unaware of the current aged care bond rule. Moving a loved one into aged care is often a very distressing experience for family members, and many are unsure of their rights. We recommend that retirement village operators be required to clearly inform residents and their family members of the operators' obligations to pay aged care expenses before the sale of a residence.

Finally, the practical operation of the aged care bond rule is typically bound up in other fees and charges. The Inquiry into the Retirement Housing Sector received over 750 submissions from residents, many of whom are frustrated by the 'bleed them dry until they die' approach of many retirement village operators. The aged care bond rule cannot be altered without looking at the whole contractual and financial model surrounding retirement villages. Residents are expecting significant structural reform, and are unwilling to accept yet another cost being imposed on them for no return.

We note we support retaining the status quo for the remainder of the regulations, being:

- The six month rule exemption;
- The calculation of in-going contribution refunds before units are sold; and
- The establishment of minimum contractual requirements.

If you require any further information in relation to this submission, please contact Katherine Temple at Consumer Action Law Centre on 03 8554 6912 or at katherine@consumeraction.org.au.

Yours sincerely,



Gerard Brody
Chief Executive Officer
CONSUMER ACTION LAW CENTRE



⁴ If the DAP is to be deducted from resident's exit entitlements, we oppose this amount being limited to 85% of a resident's estimated exit entitlements. If there are significant delays with the sale of a property, it is possible that a resident's aged care costs could exceed the proposed 85% cap.

On behalf of:

Lawrie Robertson

Vice President

RESIDENTS OF RETIREMENT VILLAGES VICTORIA



Shanny Gordon

Housing Housing Information Worker

HOUSING FOR THE AGED ACTION GROUP INC.



Ronda Held

Chief Executive Officer

COTA VICTORIA

