Submission by Housing for the Aged Action Group and Consumer Action Law Centre

In response to the 'Review of the *Retirement Villages Act 1986*' Issues Paper

6 December 2019

Housing for the Aged Action Group (HAAG) and Consumer Action Law Centre (Consumer Action) appreciates this opportunity to provide feedback to the review of the *Retirement Villages Act 1986* (the Act).

HAAG is a member-based organisation that provides a range of services to retirement village residents (as well as residents of other forms of retirement housing and older renters more generally). In particular, our Retirement Housing Advice Service provides information, advice, negotiation and representation to financially disadvantaged retirement village residents across Victoria. We also convene a working group made up of retirement housing (including retirement village) residents, the Retirement Accommodation Action Group, to discuss a range of policy issues in this area and ensure that our policy advocacy continues to express the experiences and views of our members. HAAG sees reform of the Act as a key aspect of our overall vision of a society where older people have secure, safe & affordable housing.

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy Page 2 of 5 work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

This submission focuses on five key areas that have emerged as central to retirement village reform in our casework and in feedback from our members: resident rights, contractual complexity, unfair fees, management standards, and dispute resolution. The following case study illustrates the ways these issues are connected and compound each other to the detriment of retirement village residents.

Case study

Maryanne (not her real name) lived happily in a retirement village for over ten years. She was in her mid 80s when construction work in a common area above her unit disrupted a drain above her library, causing serious flooding during heavy rain. Over the months this problem persisted, Maryanne's physical and mental health both deteriorated; she also became more socially isolated as she felt increasingly obliged to stay home in case the flooding recurred. On multiple occasions, she was reduced to bailing out water in buckets, including once as late as 3am.

Management refused to acknowledge there was a link or provide any assistance, and suggested she was liable for repairs. Maryanne found their attitude towards her offensive, beyond their refusal to fix the problem. The village manager repeatedly described her as 'confused' while dismissing her real concerns – a description she considered an unfounded and insulting suggestion of mental health decline.

Maryanne's contract made the village responsible for maintenance of the common areas. In refusing to carry out repairs, management relied in part on the lack of clearly established contractual obligations to do so, and on confusing and obfuscatory definitions of 'common areas' in the agreement.

As it became clear that management would not voluntarily undertake repairs, Maryanne reluctantly made a VCAT application. When her matter reached mediation some three months later, she found Dispute Settlement Centre staff unhelpful and insensitive, and again felt insulted by the manager's dismissal of her concerns. When the negotiated settlement failed she was forced to reinstate her VCAT application, and management finally carried out repairs only months later with a hearing pending. By this time, Maryanne had developed severe anxiety and depression about her living situation, developed physical health problems as direct and indirect results of the leak (for example, an arm injury from bailing out water, and weight gain connected to decreased social activity), and lost furniture, books and irreplaceable personal belongings to flood damage.

Two years after the repairs were completed, Maryanne still lives in the village. She has lost all trust in the provider, and fear what may happen if another fault arises.

She would like nothing more than to leave, but could not afford to buy into a comparable village (or other suitable accommodation) after paying out the contracted Deferred Management Fees (DMF). When she eventually sells the unit, the owner will share any capital gain and she will pay over 30% of the sale price for the privilege of having lived there.

The purpose of the Retirement Villages Act 1986

The current purpose of the Act is "to clarify and protect the rights of persons who live in, or wish to live in, retirement villages", but in many respects it is difficult to see how the Act gives effect to this purpose. In particular, what protections the Act provides seem to relate largely to the retirement village *qua* business, and not the retirement village *qua* home. The Act is silent on almost every aspect of everyday life in a village.

Nevertheless, and especially given the minimal protections the Act provides, the purpose remains appropriate; it is necessary that provisions of the Act be read in terms of the protection of residents. The legislative purpose should remain, and the Act should be amended so that it gives effect to this purpose by:

- Providing protections and clarifying responsibilities around the day-to-day elements of retirement village residency; and
- Providing stronger statutory protections for rights that exist largely as matters of practice and convention.

Many of the strongest protections for residents of retirement villages – for instance, their security of tenure – are matters at least as much of convention as they are of legal right. As a rule and overwhelmingly, for example, residents are not evicted. The reasons this is the case have to do minimally with legislation (which allows residency rights to be terminated fairly easily) and much more to do with the reality that villages don't generally want to evict, or be seen to evict, their residents. One of the things the industry is selling is security of tenure, and so operators generally have an interest in refraining from exercising their rights even where they might otherwise consider evicting residents.

However, it is not difficult to imagine operators finding more instances in which their other interests overcome this reluctance. We see this particularly in the increasing numbers of very elderly residents and residents who require significant support and care, which it may not be possible to provide in a retirement village. HAAG has also observed increasing numbers of providers willing to threaten or pursue eviction in relation to contract breaches, including relatively trivial breaches where there has

been a significant breakdown in the relationship between the parties and/or the residents are perceived as 'difficult'. A resident need only breach their contract twice to face termination under the Act. Given the often-noted complexity and length of retirement village contracts, this leaves residents relying to a significant extent on the assumption that operators won't evict them.

To date, this has remained a largely safe assumption. There is no guarantee it will remain so. As we write, one of HAAG's clients this week received a letter threatening to evict her over a 'contractual breach' – that she smokes in her own home, which is contrary to a set of village rules established after she moved in. There is no serious prospect the village will evict her for smoking. But the threat reflects the reality that she would have no legal protection should they decide to do so.

To provide proper protections to persons *living* in retirement villages, the Act would need to enumerate a set of rights for residents (or, conversely, duties of providers). This could include, for example, rights to security of tenure, to a safe environment, to the maintenance of common areas in good repair, to quiet enjoyment, to be treated with respect, to be consulted on major change and for any services to be provided as agreed, etc. It might also incorporate protections around equal opportunity and disability discrimination or relevant consumer guarantees. Of course, for the Act to effectively protect such rights, residents would also need an effective dispute resolution system to enforce those rights.

<u>Disclosure obligations</u>

Disclosure obligations with respect to retirement villages address the concern that residents may fail to understand the nature of the financial arrangements underpinning their residencies and, in particular, may agree to arrangements where they would not have done so with a better understanding of the costs. HAAG thinks these concerns are well-founded – residents often do not understand what they're agreeing to. In our view, this does not so much reflect a lack of adequate information – the current disclosure statements include a great deal – as the lack of the correct perspective in which to evaluate the information. This is because the most common retirement village financial models are incredibly counterintuitive, and run radically contrary to the understandings of home ownership or simply of commercial transactions that most people hold.

In our view, disclosure obligations are a necessary but not sufficient remedy to these issues. They are not sufficient because they do not protect residents against fees that are unfair, as discussed below. If fees are structured fairly – or if unfair terms are

effectively prohibited – then disclosure statements provide useful information. If unfair fees remain commonplace, then disclosure statements will remain an unhelpful form of extra paperwork.

This has been recognised by regulators. As ASIC has noted in their 2019 report, there are clear limitations to disclosure. For example, disclosure must compete for consumer attention and we are constantly saturated with competing attempts to influence our decisions, mandated disclosure requirements are often 'one size fits all' interventions- but the effects of disclosure are different from person to person and at worst disclosure can create unintended detrimental outcomes for come consumers.[1]

To address unfairness, regulators need different types of regulatory tools. One example that we consider more appropriate is product intervention powers. These powers allow a regulator to restrict or prohibit marketing, distribution or sale of products where there is a significant risk of consumer harm. This allows a regulator to more proactively step in and respond to significant consumer detriment in a targeted and timely way. These powers allow intervention into a particular type of contract offered by a provider, or can operate market-wide. The latter approach may be an effective way to reduce harms associated with exploitative Deferred Management Fees (discussed further below).

In respect to the kinds of information that should be mandatorily disclosed, HAAG and Consumer Action endorse the recommendations in the submission to this review made by the Consumer Policy Research Centre.

Contracts – form and complexity

There is a strong connection between the complexity of retirement village contracts and the inadequacies of the Act. Standard form tenancy agreements can be as short as four pages, because the rights of the parties are substantially clarified and protected by that Act. The Retirement Villages Act tells us almost nothing about the parties' rights, which leaves the contracts (a) to set out those rights and obligations and (b) as a kind of open field in which operators can experiment with new forms of exploitation.

Our view is that contractual complexity is a secondary problem related to the lack of protections in the Act. In the context of a weak Act, residents suffer both under very complex contracts which they can't understand, and very simple contracts which fail

[1] ASIC, *Why disclosure should not be the default*, October 2019, available at: https://download.asic.gov.au/media/5303322/rep632-published-14-october-2019.pdf

to clarify relevant responsibilities. The latter in particular has been a key problem for HAAG's client group, who tend to be concentrated at the lower end of the market.

Earlier in this submission we discussed the idea that the Act should explicitly enumerate a set of residents' rights. As well as protecting residents with respect to those rights, this would reduce the necessary complexity of retirement village contracts (i.e., if there is a right to have common areas in good repair it is not necessary for my contract to set this out over a series of clauses), *and* the extent to which operators can exploit ambiguities or assumptions in contract terms (i.e., if there is a right to have common areas in good repair it is not possible for a deliberately complex set of clauses to obfuscate the relevant responsibilities).

Financial models and the deferred management fee

The Act needs to protect residents against exploitative and unfair arrangements. Residents and their families should have viable recourses against fee gouging.

Deferred Management Fees (DMFs) and other exit fees produce a range of problems for retirement village residents. Typically fixed at a percentage of an unknown future amount, accruing over an unspecifiable period, these are fees that no resident can predict, applied at a point where most residents' capacity will be at its lowest. DMFs can make it impossible for residents to move to a different village where they become unhappy with the service they are receiving or where relations with management or other residents deteriorate. DMFs also, in some cases, represent an exploitative cash grab by unscrupulous operators preying on vulnerable elderly people.

The questions set out in the Issues Paper do not address these factors, which in our view are among the most important issues for any serious review of the Retirement Villages Act. It is particularly striking to us that questions of "potentially becoming trapped in a village they come to dislike" do not figure as a specific topic of discussion in the Paper, considering they are set out in Part 2 of the Paper as "special situations of vulnerability for residents of retirement villages".

DMFs – and the extent to which DMFs can be exploitative and unjustified – have also formed a central focus of public attention to the retirement village industry in the wake of the 2017 Four Corners report, 'Bleed Them Dry'. Even if the Department ultimately conclude that current protections around fees are adequate, it would be incredible to us if this review failed to seriously address public concerns about DMFs.

Yet in the absence of more direct questions, HAAG is concerned this issues paper will fail to draw enough relevant submissions on these key areas of concern. Shifting to a requirement for pro rata billing (question 15) is a trivial exercise in the face of grossly exploitative contractual arrangements. Estimates of departure fees (question 16) are minimally relevant to residents who will lose, say, half their capital gain and 40% of the sale price of their unit after a two-year residence period.

The inadequate questions in this section are a particular concern because DMFs by definition only take effect when a residency ends – at which point the resident is most likely either deceased or living in residential aged care, and unlikely to make detailed submissions to a policy review. We are concerned that the Department may not have done enough to target consultations to the families and estates of former retirement village residents – who in many or most cases will have borne the brunt of unscrupulous and exploitative exit fees.

'Churn'

Four Corners identified the concept of 'churn' as central to Aveo's business strategy. Simply put, because a retirement village makes most of its profit from exit fees, and exit fees can accrue very rapidly, the more often residents exit the village, the greater the profit. This can create an incentive for the village to turn over residents as quickly as possible, rather than creating long-term, sustainable and secure living arrangements where older people can age in place. This incentive is strongest where the DMF accrues most rapidly – as in Aveo villages, where it can reach 40% of the sale price after just two years in the village.

In our view, at least some terms involving DMFs are probably invalid or prohibited terms under the Australian Consumer Law. However, this has proved insufficient protection for vulnerable residents (partly but not entirely for reasons set out in the discussion of dispute resolution, below). The Act should unambiguously prohibit DMFs that are exploitative and unfair, or that manipulate power and information asymmetries between operators and residents to the serious detriment of older Victorians. A year of retirement village living at its best just isn't worth 20% of your sale price. Operators should not be able to charge such an amount.

Specifically, the Act should cap the accrual rate for DMFs at no more than 3-5% of the eventual sale price of the dwelling for each year in the village, and no more than 30-40% overall. This would be consistent with the practice of most villages, and question both the sustainability and desirability of any pricing model that exceeds this accrual rate. Under such a cap, a resident leaving a village after two years would

pay no more than 6-10% of the sale price of their dwelling – tens rather than hundreds of thousands of dollars – which we submit is a more appropriate return for the provider, and a price more proportionate to the benefit derived from the residence. Under such a model, villages would be incentivised to sustain residencies over longer periods to maximise their profits.

Freedom of movement

As mentioned above, the issues paper identifies that one risk that accrues to residents who are liable to pay a DMF is that they may become "trapped in a village they come to dislike". This is in stark contrast to, essentially, all other kinds of housing. A tenant or homeowner who wants to move may be inconvenienced and may incur undesirable costs, but all else being equal should be able to find other housing of a comparable standard. Retirement village residents cannot. Where the ingoing contribution represents all or most of their assets, as it often does, the loss of a substantial portion on exiting will mean they cannot buy into a comparable village. This doesn't just disadvantage individual residents in disputes. It also limits the extent to which the market can compel providers to improve their services or just operate in the best interests of residents. If your customers have no choice but to keep paying you, there is no reason to do better.

Again, it's striking that the Issues Paper identifies this as a concern, but proposes no remedy. Part 2 of the Issues Paper ("The regulatory and policy framework") sets out four "special situations of vulnerability" for retirement village residents, of which one is "potentially becoming financially trapped in a village they come to dislike". It then sets out five ways the Act seeks to address these vulnerabilities, but none of the measures enumerated addresses this potential to become trapped. But having identified a vulnerability that is not currently addressed by the Act, the Issues Paper never returns to this point or asks about a remedy.

Ultimately, so long as DMFs remain part of the industry, there will be an extent to which residents are 'trapped' in the villages where they live. Nevertheless, we believe there are key reforms that could mitigate this problem – releasing residents in the most egregious circumstances, and incentivising villages to resolve problems rather than rely on their residents' inability to leave.

First, operators should not be able to charge DMFs or other exit fees on residencies that end within the first year. Residents need the opportunity to experience life in a village and, if they decide it's not for them, to leave. This would extend the settling-in period provisions for retirement villages in NSW, where residents can leave without

costs in the first three months they spend in their village. This sort of provision is essential, but in our view three months is insufficient; residents need time to experience the village and interact with management before making final decisions.

Second, operators should forfeit any right to DMFs where they have seriously breached the residence agreement. No resident should have to pay 40% of the sale price of her unit to operators who have egregiously failed to provide contracted services. We favour a model in some ways analogous to the system of duties and remedies set out in the Residential Tenancies Act. That is, the Act should specify duties owed by retirement villages to their residents (as discussed above). Where those duties are repeatedly breached, or where breaches are not remedied, and where the resident decides to leave the village within a set period, operators should waive any right to collect exit fees. The set period would avoid allowing a resident to continue indefinitely receiving the benefits of services they would not pay for, but allow someone who'd been badly mistreated by management to leave. Such a system would also incentivise operators to fix problems promptly, and discourage a wide range of undesirable operator behaviours.

Qualifications and training of retirement village managers

We are aware that there is a range of professional training available to retirement village managers that is geared towards the needs of the village as an industry. We support the recommendation from the Parliamentary Inquiry that the government "ensure that an appropriate minimum Certificate level applies to retirement village management courses". We would like to see such training become mandatory. Beyond this, we believe there is a role for such mandatory training in alleviating some of the most common issues raised by retirement village residents.

Overwhelmingly, clients are unhappy with their managers. In almost every file we open, we see one or more practical issues (a contractual dispute, a repair issue, etc) paired with an overarching complaint about the conduct of the manager – that they are disrespectful and patronising at best, and bullying and abusive toward the resident at worst. These problems are compounded by the combined effects of power and proximity – even relatively minor forms and instances of disrespect become serious when they're imposed by an authority figure who's always around. In most cases, there is no remedy for these commonplace forms of bullying and abuse.

The most common way our clients express this is to say that managers "don't understand older people". They describe conduct that is condescending, patronising

and paternalistic. This often seems to arise where managers are simply unfamiliar with older people's basic needs and interests; they don't *know* how to deal with older people respectfully. At times, this crosses over into unambiguous ageism or age discrimination. This suggests a three-pronged approach to training for retirement village managers: around communication skills, the experiences and needs of older people, and specifically around common forms of ageism and age discrimination.

There are also more immediately practical areas where we think training is essential. We would like to see managers provided with appropriate training around occupational health and safety and, especially, fire safety and emergency management.

All forms of training should emphasise and centre respect for older people as a key value, including involving residents in the development of appropriate training for village managers.

Dispute resolution is a central concern for retirement village residents because:

- There is a significant power imbalance in favour of operators across the industry;
- At present, only a tiny number of retirement village disputes reach VCAT, suggesting this forum is unable to redress this imbalance for many residents; and
- Unlike consumers in most areas, residents in dispute often cannot seek market solutions – they can't take their money elsewhere, because onerous exit fees trap them with current providers.

We have long advocated a retirement housing ombudsman as the best form of dispute resolution for the sector, including retirement villages. Questions about dispute resolution in retirement housing were raised in the Parliamentary Inquiry, producing the recommendation that the government "introduce a new alternative for low cost, timely and binding resolution of disputes in the retirement housing sector." We consider it unfortunate that the government has chosen to consider these questions narrowly in the context of the Act and of retirement *villages*, rather than in the broader context of retirement *housing* as per the recommendation.

This decision is disappointing because it weakens the case for an ombudsman. In fact, to our knowledge, nobody has ever argued for the creation of a retirement *village* ombudsman, and when retirement village matters are considered in isolation its unavoidable that the low numbers of formal disputes militate against the

introduction of an ombudsman. But this is only to say that if you ask the wrong question, you get an unhelpful answer.

The argument for a retirement housing ombudsman is, essentially, that retirement housing residents as a class are deprived of full access to justice, and that the reasons for this deprivation are substantially the same regardless of whether or not they live in retirement villages or which Act happens to cover their accommodation. It's worth briefly discussing these similarities. These similarities are around age, lack of access to information and advocacy, risk of escalation of proceedings, and reliance on the retirement housing providers.

Most obviously, retirement housing residents as a group are **older**. Older people are of course a diverse group, but their age can limit their access to information (especially online information), willingness to assert their rights, mobility and ability, mental agility and capacity to engage in adversarial processes.

Retirement housing residents also **lack information and advocacy** in comparison to their housing providers in the context of dispute resolution. Operators overwhelmingly have greater access to legal advice and representation, while residents may not be able to afford legal advocacy. Even where they can afford to engage lawyers, there is a serious shortage of legal experience and expertise with respect to retirement villages – and those legal practitioners who are knowledgeable around retirement village law largely prefer to represent operators rather than residents.

In comparison to other jurisdictions, such as residential tenancies, formal dispute resolution carries a serious **risk of escalation** for successful applicants. Ben Cording from Tenants Victoria discussed this in the context of Part 4A parks in his evidence to the Parliamentary Inquiry. Because parks and villages typically rely on standard form contracts, relief granted to a single resident often implies that the same relief could or should be granted to all residents with comparable contracts. That is, if a single resident successfully challenges an unfair fee at VCAT, the provider must not only consider the loss of the specific amount they expected to recoup from that resident, but the prospect that they may not be entitled to recoup that amount from any resident. In parks and villages with hundreds of residents, this can be a massive multiplier. This makes it very likely that the provider will consider, threaten, or pursue an appeal in the Supreme Court – a costs jurisdiction where unrepresented litigants are at a massive disadvantage and where an unsuccessful resident faces a serious risk of the loss of their home. In all the time HAAG operated a Tenant Advice and Advocacy Program, assisting hundreds of tenants and residents in both standard

residential tenancies and retirement housing, *only* clients in retirement housing ever faced Supreme Court proceedings. (None of these produced a full hearing in the Supreme Court. One appeal was threatened but did not proceed; one was withdrawn; one settled. But the prospect is a real threat that strongly discourages residents who might otherwise assert their rights.)

We have also seen cases of providers threatening Supreme Court actions before residents have even made a VCAT application – "even if you win, we'll just take you to the Supreme Court".

Most residents also unavoidably live in **close proximity** to the provider. Many retirement housing operators and managers live on-site; residents see them as often as daily. Where the relationship deteriorates, as often happens when disputes are formalised, this has a significant impact on residents' quality of life. Residents in dispute overwhelmingly describe their managers as disrespectful or worse, and frequently describe concerns that disrespectful, ageist or hostile behaviour will worsen if they take action to assert their rights.

A large proportion of retirement housing residents are also **reliant on the provider** to sell their dwellings, which in many case will be their only or major asset. While the Act allows a resident to nominate a different sales agent, in an overwhelming majority of cases real estate agents are poorly placed, or simply unable, to sell retirement housing units – most resident have no real choice but to rely on the provider when they decide to sell. The circumstances of this sale have very serious financial implications for residents, or their families or estates. Residents often report a fear that if they engage in formal dispute resolution they will damage their relationship with management, who will consequently deprioritise or otherwise delay the sale of their dwellings. Many residents also report that they observe this happening in the villages in which they live.

While it can be less tangible than the factors above, there is also a lot of fear amongst this cohort when it comes to formal dispute resolution. It's intimidating to take action against someone who owns your home, who has significant day-to-day control over the environment in which you live. Notwithstanding the extent to which VCAT is less formal than a court, residents often also report that they've 'never done anything like this' before, and that the experience of a hearing, in itself, is frightening and intimidating.

There are also, of course, factors that make it difficult for *all* residents and tenants to confront their housing providers, regardless of tenure and jurisdiction. VCAT's 2018-

19 Annual Report shows a significant increase in applications by tenants and residents, but consumers still only initiate 13% of applications in the Residential Tenancies List, with the remainder made by landlords. VCAT has consistently failed to provide a forum in which tenants and residents feel comfortable asserting their rights.

These factors combine to form the serious **structural power imbalance** in favour of operators that make existing forms of dispute resolution largely inaccessible and inadequate for retirement housing residents. This structural power imbalance is the argument advocates and residents have consistently made in favour of an ombudsman for retirement housing *generally*. Ombudsmen models have worked well across a range of industries where there is a significant power imbalance between providers and consumers – where that power imbalance weighs against the consumer in any adversarial process. HAAG continues to believe that a retirement housing ombudsman is the best solution for dispute resolution in retirement villages *specifically*. The attempt to carve out dispute resolution in retirement villages from this context will only result in worse options and outcomes across the board.

There are additional factors that compound the above for retirement village residents, especially in comparing VCAT's Civil Claims list to the Residential Tenancies list, but also returning to issues around exit fees.

The major forum for formal dispute resolution in retirement village matters is the Civil Claims list at VCAT. This has a number of serious disadvantages as compared to the Residential Tenancies list. Wait times are longer – in our experience, roughly three months for a Civil application as compared to around one month for a Residential Tenancies application (with certain urgent applications prioritised in around a week in the latter).

Application fees in the Civil Claims list are also relatively high. Disputes with no monetary value (for example, for orders that the village effect repairs in a common area) or with a monetary value over $15,000 (for example, about whether a fee is validly charged) have application fees of at least $487.30, or $162.90 for an applicant with a healthcare card, with higher fees for larger amounts. This is simply prohibitive for many aged pensioners. Even where residents are respondents, section 115C of the VCAT Act creates a presumption that unsuccessful parties will be liable for application fees. Many retirement villages will pay higher 'corporate' application fees, and aged pensioner residents might find themselves liable for an application fee of, say, $696.10 for a dispute with no monetary value.

In some jurisdictions this might be less of a problem, because potential respondents could get reliable and well-informed advice about their prospects of success. In comparison, retirement village residents roll the dice. The Act provides very little information or guidance about their rights. Individual residents' rights rely very substantially on the terms of their individual contracts. This means there can be little useful or effective standardised advice (along the lines of CAV's red books or Tenants Victoria's factsheets for renters). The high level of complexity of many contracts compounds this problem.

There has also been very little litigation around retirement village matters, which means there is a lack of precedents on which to base information or advice. Again by analogy, tenant advocates can often give well-grounded advice to tenants about, say, their chances of eviction in particular circumstances, or whether VCAT would consider a particular notice to vacate valid. By way of contrast, I don't think anyone in Victoria actually knows how a resident could be evicted from a retirement village. It is unclear how this could or would happen, and it is exceptionally difficult to provide clear advice to a resident who has received an eviction notice. There is, to my knowledge, only one published VCAT decision about the validity of an eviction notice in a retirement village, and it provides very little in the way of general principles to inform residents about their own situations.

Returning to the point that opened this submission, the problems of dispute resolution that are specific to retirement villages reflect the absence of statutory rights for residents. The Act fails to establish rights for residents, contracts are consequently complex, and any litigation as a result is itself lengthy, complex, and costly. Residents are urgently in need of a free, timely and binding form of dispute resolution that meaningfully mitigates the power imbalance in favour of village operators, or they will remain unable to assert their rights in any serious way. HAAG continues to believe that a retirement housing ombudsman is the best mechanism for achieving this goal.

<u>Alternative approach to dispute resolution</u>

As noted above, our services have long argued for a Retirement Housing Ombudsman. We are more concerned, however, with the features of an ombudsman-style service, rather than the particular name of the service. For example, we note that Domestic Building Dispute Resolution Victoria (DBDRV) adopts many of the features of an Ombudsman service. DBDRV has also succeeded in creating demand for dispute resolution services, with more than 6000 applications received in 2018-19. This is around five times the number of disputes previously

handled by VCAT in relation to building before the establishment of DBDRV, clearly improving access to justice.

The features we consider are important to an effective dispute resolution model, such as an Ombudsman, are:

- It would provide free, accessible, informed and authoritative determination of retirement housing disputes;
- It would have the power to make binding decisions without the need for accessing lawyers;
- It would not require personal attendance, but instead offer a flexible and tailored service that meets the needs of users;
- It would create incentives for operators to settle disputes internally, as they would incur costs each time a case is brought against them;
- It would be expected to comply with the Benchmarks for Industry-based Customer Dispute Resolution. These benchmarks set out minimum standards in relation to accessibility, independence, fairness, accountability, efficiency and effectiveness.[2]

<u>Recommendations</u>

In summary, HAAG and Consumer Action recommend that:

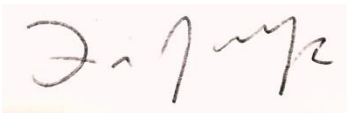
1. The Retirement Villages Act 1986 should be amended so that it gives effect to its purpose by:
    a. Providing protections and clarifying responsibilities around the day-to-day elements of retirement village residency; and
    b. Providing stronger statutory protections for rights that exist largely as matters of practice and convention.
2. To provide proper protections to persons living in retirement villages, the Act would need to enumerate a set of rights for residents (or, conversely, duties of providers). This could include, for example, rights to security of tenure, to a safe environment, to the maintenance of common areas in good repair, to quiet enjoyment, to be treated with respect, to be consulted on major change and for any services to be provided as agreed, etc

[2] Treasury, *Benchmarks for Industry-based Customer Dispute Resolution,* available at: https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution

3. To address unfairness, regulators need different types of regulatory tools. One example that we consider more appropriate is product intervention powers. These powers allow a regulator to restrict or prohibit marketing, distribution or sale of products where there is a significant risk of consumer harm.
4. Deferred Management Fees (DMFs) and other exit fees produce a range of problems for retirement village residents. The questions set out in the Issues Paper do not address these factors, and need to be included in any review of retirement villages. The Act should cap the accrual rate for DMFs at no more than 3-5% of the eventual sale price of the dwelling for each year in the village, and no more than 30-40% overall.
5. We support the recommendation from the Parliamentary Inquiry that the government "ensure that an appropriate minimum Certificate level applies to retirement village management courses". We would like to see such training become mandatory.
6. A Retirement Housing Ombudsman that is free, accessible, independent will be critical

Please contact Shane McGrath shane.mcgrath@oldertenants.org.au if you have any questions about this submission.

Yours sincerely,



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