

Retirement villages

In the end the prospective resident signs the documents in good faith and hopes that the village owner/developer has acted in good faith also.¹

Introduction

- 7.1 Access to housing is a basic human right. For older Australians, secure accommodation, both in terms of personal security and tenure, are particularly important.
- 7.2 Older Australians reside in a range of accommodation types. These include remaining in the family home or in private rental accommodation (often with some support services provided either by family or under programs such as the Home and Community Care program); residing with family members, either under the same roof or in 'granny flat' style accommodation; living in purpose-designed community type housing for over-55s; entering retirement village developments or residential parks; and entering hostels and nursing homes when higher levels of support are required.
- 7.3 The Committee received a number of submissions concerning retirement villages, particularly in relation to the issue of contracts and the difficulties in obtaining legal assistance when in dispute with management of such facilities. For this reason, the Committee has examined some of these issues in this chapter. However, wider

1 Mr Robert Boyne, *Submission No. 157*, p. 3.

accommodation issues, including those related to aged care facilities, are beyond the scope of this inquiry.

- 7.4 Retirement villages are regulated under state and territory legislation, and there is significant variation among those jurisdictions as to the nature of what is covered, including in areas such as residents' rights and dispute resolution mechanisms.² While there are specific statutes regarding retirement villages, fair trading and consumer legislation may also apply to certain aspects of their marketing and operations.

What are retirement villages?

- 7.5 The exact definition of what constitutes a 'retirement village' varies from state to state. For example, in NSW, the *Retirement Villages Act 1999* defines a retirement village as:

(1) For the purposes of this Act, a "retirement village" is a complex containing residential premises that are:

(a) predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons who have entered into village contracts with an operator of the complex, or

(b) prescribed by the regulations for the purposes of this definition.³

- 7.6 In Victoria, the definition is:

"retirement village" means a community-

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

(b) at least one of whom, before or upon becoming a member of the community, pays or is required to pay an in-going contribution;⁴

- 7.7 Most acts specifically exclude a number of types of accommodation from the definition, including residential care provided under the

2 For a summary of legislation, see Rodney Lewis, *Elder Law in Australia* (Sydney: LexisNexis Butterworths, 2004), pp. 255-259.

3 *Retirement Villages Act 1999* (NSW), section 5.

4 *Retirement Villages Act 1986* (VIC), section 3.

Commonwealth Aged Care Act 1997, nursing homes, residential parks and boarding houses.⁵

- 7.8 Retirement villages have been growing in number and popularity over recent years. Retirement villages provide an option for many older people seeking housing appropriate to their changing needs. They provide maintenance free, community style living, often with the benefit of facilities such as a swimming pool, hobbies room, library and other amenities.⁶
- 7.9 Villages are structured in a range of ways, including lease-for-life arrangements; strata title; loan/license arrangements; and 'purple title'.⁷ They can be operated on a 'not-for-profit' or 'for-profit' basis. As there is no system of registration of such villages⁸, it is difficult to estimate how many of each type of facility exist⁹ and the nature of the resident profile. One submission suggested that widows and widowers make up probably about 55 per cent of village occupancy, and that the ratio of elderly women to men is 4:1.¹⁰ It was suggested that the average age of residents was around 80 years.¹¹
- 7.10 The level of unhappiness with retirement village arrangements is very difficult to assess. The Committee was conscious that it was only hearing from those who have concerns about certain aspects of this style of accommodation – those who are happy with their circumstances would be unlikely to write to the Committee and say so. Some submissions suggested that the demographic profile of the villages themselves meant that there was under-reporting of issues arising from the management of these facilities. As COTA Over 50s commented:

5 See for example, *Retirement Villages Act 1999* (NSW), section 5.

6 Ms Joan Adams, *Submission No. 145*, pp. 4-5.

7 Under 'purple title' residents purchase an undivided share in the whole of the village including the land and improvements, such that each resident owns an undivided share in all of the other residents units, the community centre and all of the common property...', Mr Clement Allsworth, *Submission No. 32*, p. 3.

8 Ms Joan Adams, *Submission No. 145*, p. 3.

9 One industry website, www.villages.com.au (accessed 14 September 2007) indicated there were over 1750 villages throughout Australia.

10 Mr Keith Topham, *Submission No. 54*, p. 1.

11 See for example, Mr Stanley Hall, *Submission No. 16*, p. 1; Mr Keith Topham, *Submission No. 54*, p. 1; ARQRV, *Submission No. 19*, p. 2; Mr Robert Harvie, *Submission No. 85*, p. 2.

Many residents are older women, who are less likely to be assertive when faced with either disputes or conditions imposed on them.¹²

- 7.11 Mr Robert Harvie noted the reluctance of older people to actively participate in the management of their own affairs, and the potential for intimidation:

...only approximately 10 per cent of the elderly are thinking persons, despite being retired. Those like me can see what is being unjustly perpetrated on them. However, most elderly tend to be apathetic and think that retirement is a place where one can forget that life carries on without their participation in it ... whilst not condoning this demeaning attitude, it should be the way that the elderly can spend their declining years, should they so desire, without worrying that coercion and intimidation can occur because of their lack of knowledge.¹³

- 7.12 Mr Harvie also stated that he is considered a troublemaker in his village because he is prepared to stand up against the operator and argue against him about different things. When asked if he had been victimised, Mr Harvie stated:

Yes. I have had a death threat, and I have had oil spilled on my front porch so that if I stepped out the door I would have gone head over charlie. I believe that both of those are attributable to the village that I live in or have been put there by somebody in connection with the village.¹⁴

- 7.13 Other submissions also commented on the difficult situation facing some residents in retirement villages:

In our experience the current regulatory regimes do not draw an appropriate balance between the rights of residents and scheme operators and in many cases scheme operators blatantly abuse their power. This is because residents, having sold their homes to get into a village are increasingly vulnerable in the private rental market... They are concerned to maintain secure accommodation suited to their needs, and therefore are reluctant to challenge unfair and exploitative practices within villages despite inadequate repairs,

12 COTA Over 50s, *Submission No. 58*, p. 14.

13 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, pp. 43-44.

14 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 45.

inappropriate use of residents' funds and bullying and intimidating behaviour by scheme operators.¹⁵

- 7.14 The Committee took evidence from a number of individuals and community groups as well as the peak industry body, the Retirement Village Association (RVA). The RVA has a membership of over 400 operators, owners and developers and has developed an Australian Retirement Village Accreditation (ARVA) Scheme.¹⁶ While the Committee acknowledges that establishing standards across the industry is important in addressing the concerns raised by residents, on RVA figures, only 25 to 30 percent of its members are accredited, and the take up rate was 'not as we would like and it is something that we are working on to improve'.¹⁷

Issues surrounding retirement villages

- 7.15 A number of issues relating to transparency and accountability in contracts were raised in evidence to the inquiry. These included:
- The complex nature of contracts;
 - Fees and charges;
 - Misleading advertising; and
 - Lack of low-cost and speedy dispute resolution mechanisms.

Each of these is discussed below.

Retirement village contracts

- 7.16 There is, it was argued, a mistaken belief that in entering such contracts, potential residents and developers were equal participants in the process. Complaints focused on the nature of the contracts, in particular their complexity, and the greater access to legal advice by developers.¹⁸

15 National Legal Aid, *Submission No. 99*, pp. 8-9. See also Mr Philip Phillips, ARQRV, *Transcript of Evidence*, 17 July 2007, p. 14; Mr Frank Reed, *Transcript of Evidence*, 4 June 2007, p. 49; Name withheld, *Submission No. 13*, p. 1.

16 www.retirementvillagesaust.com.au/About_Us.htm (accessed 14 September 2007).

17 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 47.

18 See for example, Mr Robert Boyne, *Submission No. 157*, pp. 2-3.

- 7.17 Mr Robert Boyne, a resident of a retirement village in Western Australia, made the point that the contracts are complex, long and difficult for the average person to understand:

Few prospective retirement village residents can understand the complex documents presented to them by sales people. These documents are supposed to be understood fully by prospective residents, some of whom are more than 80 years of age... Within the village...[where I reside]... the pre-contract and contract documents presented to another resident weighed 1.5 kg on kitchen scales. Thus residents were unlikely to understand at least some of the implications of the contract documents.¹⁹

- 7.18 Seeking the views of those already resident in the facility was also not always an option, due to a number of different contracts often applicable within the one complex. As the Committee was told, 'there is no standardisation within the industry and contracts vary between villages as well as between residents in the same village'.²⁰

- 7.19 This has implications in trying to seek legal redress collectively. As one witness indicated:

In my own village we probably have anything up to 20 or 30 different contracts. Therefore you cannot mount a class action against the operator because whatever my contract says it does not mean to say that your contract says the same thing... as one operator found that such and such applied to him and he was able to get that through without any query then another operator would adopt that and therefore you have another different contract, and so it goes on down the line. The uniformity of contract is one of the big problems in the industry.²¹

- 7.20 The experience was similar in other states. In Queensland, for example, there was criticism about the Public Information Documents (PIDs) that are provided along with contracts:

...a Public Information Document... can and usually does amount to about seventy pages. Where the contract is in respect of a 'strata title' accommodation unit (a small

19 Mr Robert Boyne, *Submission No. 157*, pp. 2-3.

20 Ms Joan Adams, *Submission No. 145*, p. 5.

21 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 48. See also, COTA Over 50s, *Submission No. 58*, p. 14.

proportion of villages – 12% or so) the contract involves a freehold title and not a lease agreement. However, there is still the same voluminous Public Information Document in respect of the facilities provided by the “scheme operator” - the village owner.²²

7.21 The Association of Residents of Queensland Retirement Villages (ARQRV) went on to note:

...there are generic parts of PIDs which are mandatory but other parts vary widely from village to village. Not only that, they differ widely even within a single village; there may be half a dozen different PIDs, according different entitlements and responsibilities to residents within the same village. For example, in one group of villages in Queensland, PIDs issued over the last couple of years forbid residents to have meetings of more than five people on the common property (in the Community Hall) without the operator's approval.²³

7.22 The Committee sought the views of the RVA on the notion that retirement village agreements can be complex, difficult for older people to understand and skewed in favour of village operators and managers.

7.23 RVA explained that retirement village agreements are of necessity quite lengthy documents so as to adequately deal with a substantial number of essential terms. RVA stated that contracts usually deal with the following:

- (a) The grant or provision of occupancy rights subject to necessary reservations
- (b) The consideration payable on entry and the financial entitlements of residents following termination
- (c) The budgeting for, consulting on, fixing and payment of ongoing village operating costs
- (d) The terms for payment of deferred fees and reserve fund contributions
- (e) The operator's management, maintenance and marketing obligations
- (f) Insurance, damage/destruction provisions

22 ARQRV, *Submission No. 19*, p. 1.

23 ARQRV, *Submission No. 19*, p. 1.

- (g) Residents' obligations to maintain their residence
- (h) The marketing procedures and obligations of the parties incidental to "re-sales" of residences
- (i) Operator's financial reporting to residents obligations
- (j) Procedures for residents' meetings
- (k) Termination rights and controls
- (l) Dispute provisions
- (m) Emergency call service provisions
- (n) Rules for occupancy and use of communal facilities
- (o) Modification of scheme procedural provisions.²⁴

7.24 RVA further explained that, although agreements are written succinctly and in plain English, the very nature of their subject matter meant they were often lengthy:

The terms of the agreement must balance the rights, obligations and duties of the parties and ensure the professional long term management of the village. Villages are not self governed by residents, they are proprietor managed. The RVA considers that for the most part agreements are written on reasonable terms which allow the proper management of the village scheme.²⁵

7.25 Given the highly detailed nature of retirement village contracts, obtaining independent legal advice would seem to be the prudent thing to do. However, the very complexity of the contracts and the associated legal costs involved in examining them work against many older people seeking such advice prior to entering into the contract:

This is the sort of contract which is pre ordained and is not a contract negotiated between the parties. It is a take it or leave it contract which most prospective residents are inclined to take because "it must be alright". The contract is unbelievably long, complicated and repetitive. To have a lawyer scrutinise such a contract, which includes the PID, really thoroughly would be expensive, possibly two or three thousand dollars; not the sort of expense one wants to incur just to see if a village contract is "alright".²⁶

24 RVA, *Submission No. 143.1*, pp. 1-2.

25 RVA, *Submission No. 143.1*, p. 2.

26 ARQRV, *Submission No. 19*, p. 1.

7.26 The cost of legal advice to scrutinise such contracts was also confirmed by Ms Julie Van Dort, a Victorian solicitor, who noted that ‘the cost of legal advice prior to signing contracts is prohibitive’, as the nature of the contracts required many hours of careful reading.²⁷ Finding someone with expertise in the area was also problematic:

You can have the best lawyer in the world, but if he does not know the Retirement Villages Act he can say, ‘Yes, that contract looks A-okay,’ and then suddenly you find you have committed yourself for the rest of your life to something that you would not normally have committed to if it had been fully explained to you.²⁸

7.27 The RVA acknowledged the lack of expertise in this area among the legal profession and the costs involved:

...there are not a large number of solicitors with expertise in retirement village law in WA... Part of the problem in accessing legal advice appears to be consumer resistance to legal costs. Those costs cannot be minor due to the detail necessarily involved in retirement scheme documentation and the time taken to give sound advice thereon. The Government is addressing this issue in its current review.²⁹

7.28 Given the highly complex nature of the contracts and the financial implications of the transaction being entered into, the Committee cannot stress enough the importance of people seeking independent legal advice prior to signing the contract. While the cost may seem high at the time, when compared to the financial outlay being undertaken and the longer term costs, it is ‘penny wise and pound foolish’ to avoid obtaining such legal advice.

Standardisation of retirement village contracts

7.29 Evidence to the inquiry suggested that the simplification and standardisation of retirement village contracts could assist older people to make better informed decisions about their accommodation options.

7.30 ARQRV suggested that unless and until residence contracts are completely standardised in a village and preferably across the

27 Ms Julie Van Dort, *Submission No. 125*, p. 1.

28 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 45.

29 RVA, *Submission No. 143*, p. 2.

retirement village industry, residents will be bewildered and quite uncertain as to their obligations and entitlements.³⁰

- 7.31 When asked if more regulation or legislation was necessary to tighten up and limit the variety in retirement village contracts, Mr Pagett, representing the RVA stated:

I would argue against standardisation and limiting the variety. I understand the position where you can have a village – and a village is a long-term proposition – and after day one the contracts of residents might be varied, but the benefit of having the flexibility in our legislation that we have now is that it gives proprietors and prospective proprietors the opportunity to offer a broader range of services and financial arrangements in the retirement village context ... although uniformity in some respects would be helpful ... there is a limit to the subject matter that can be covered by uniform terms and conditions. When you get to the fine detail of the financial and service arrangements, I think the community is better served by the competition that takes place in the marketplace between proprietors in making different offerings.³¹

- 7.32 RVA further explained that consideration is being given to introducing standard approved contractual terms, however, due to the diversity of schemes offered to the public, standardisation has its limitations.³² It added:

The diversity of the title and legal arrangements on offer in the marketplace preclude a “one contract fits all” approach. The Standing Committee should also be mindful that various different taxation treatments apply to different title/scheme arrangements which is also not conducive to a standard contract approach.³³

- 7.33 RVA explained that the imposition of a standard contract would be a very difficult task which would have to allow for the inclusion of a substantial number of non standard terms:

The resulting contract is likely to be disjointed and may not in fact produce a simplified, easy to understand contract for

30 ARQRV, *Submission No. 19*, p. 1.

31 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 43.

32 RVA, *Submission No. 143*, p. 1.

33 RVA, *Submission No. 143.1*, p. 2.

consumers. It is also noted that no other sector of the real estate industry has a compulsory standard contract imposed by law. In a free market society the RVA remains steadfastly in support of the current contractual system.³⁴

7.34 RVA does consider, however, that there are a limited number of contractual issues which could be subject to standard agreed terms. Examples for consideration are:

- (a) Operating costs financial reporting and consultation terms
- (b) Contract termination rights
- (c) Dispute and mediation process terms
- (d) Procedures for the conduct of residents' meetings
- (e) Contract/scheme variation terms
- (f) Resident committee terms.³⁵

7.35 The Committee notes that South Australia recently gazetted amendments to that state's legislation on retirement villages. As the Council on the Ageing noted:

The amendments have provided for standardised and comprehensible documentation for contracts. This model is being well received in the industry and is a model that could be adopted across jurisdictions.³⁶

7.36 COTA suggested that this model of standard documentation that is comprehensible to older consumers would also be well placed in the provision of a wide range of goods and services, including financial products.³⁷

7.37 The Committee was also advised that:

...a committee of State Commissioners of Fair Trading started to look into 'unfair terms in contracts'; substantive unfairness, not just procedural unfairness, from a consumer's point of view. A comprehensive paper was published inviting submissions from the public.³⁸

34 RVA, *Submission No. 143.1*, p. 2.

35 RVA, *Submission No. 143.1*, p. 2.

36 Council on the Ageing SA, *Submission No. 77*, p. 10.

37 Council on the Ageing SA, *Submission No. 77*, p. 10.

38 ARQRV, *Submission No. 19*, p. 1.

- 7.38 ARQRV suggested that the committee's proposition seems to be 'dead in the water'.³⁹
- 7.39 While the Committee acknowledges that complete standardisation of contracts would not be possible, given the diverse legal nature of retirement villages, it does believe that key terms and conditions could be standardised, not just within states, but across the industry throughout Australia. The Committee would like to see the State Commissioners of Fair Trading revive the re-examination of retirement village contracts, and include in this examination the experience of South Australia as a starting point for standardisation.
- 7.40 A number of submissions argued that the regulation of retirement villages should be transferred to the Australian Government:
- ...it would be better for state governments to depart from the scene and hand the reins to a federal authority, introducing controls similar to that applied to hostels and nursing homes.⁴⁰
- 7.41 In discussing this matter with the Australian Competition and Consumer Commission (ACCC) the Committee was advised that:
- While the ACCC acknowledges that retirement village concerns are quite pertinent for older Australians ...each of the states and territories have their own regulatory frameworks which deal with issues such as pricing and fees.
- Of course, coverage under state specific legislation does not preclude the more general application of the TPA - in particular, provisions relating to unconscionability and misleading and deceptive conduct. The ACCC will review complaints received to date to determine whether there are any issues of relevance to the TPA. We will also raise the issues identified with the Committee with our colleagues in the Offices of Fair Trading (OFT) and the Fair Trading Operations Advisory Committee.⁴¹
- 7.42 The Committee believes that the ACCC, in consultation with its state and territory fair trading colleagues, should be playing a stronger role in monitoring consumer protection for retirement village residents. While the matter should continue to be managed at the state level for

39 ARQRV, *Submission No. 19*, p. 1.

40 Mr Keith Topham, *Submission No. 54*, p. 1; see also Mr R Boyne, *Submission No. 157*, p. 6.

41 ACCC, *Submission No. 39.1*, p. 2.

the time being, should there be insufficient improvement in the level of protection for consumers, the Australian Government should consider regulating this industry using its powers under Corporation legislation.

Recommendation 45

- 7.43 **The Committee recommends that the Australian Competition and Consumer Commission, together with state and territory fair trading offices or their equivalents, form a working party to examine the nature of retirement village contracts, with a view to improving consumer protection provisions.**

Fees and charges

- 7.44 One of the areas of greatest complaint among submissions related to the issue of deferred fees and other charges associated with retirement villages, including exit fees.⁴² Mr Clement Allsworth, from Western Australia, outlined the fees that a retirement village resident is required to pay upon leaving the village in which he is resident. These included:

- Deferred facility fee – payable upon the sale of the unit, equivalent to 2.5% of the Estate Sale Price multiplied by the number of days that the resident has been entitled to occupy the residence, and then divided by 365. If the resident has been in the unit for more than 3, 650 days, the Deferred Facility Fee will be the greater of either 25% of the Estate Sale Price or 50% of the amount by which the Estate Sales Price exceeds the Estate Purchase Price;
- Refurbishment and Improvements contribution – this can be up to, but not exceed, 5% of the Estate Sale Price
- Upgrading of the unit, as the discretion of the Manager of the facility
- GST on the amount of Deferred facilities fee paid to the developer.⁴³

- 7.45 The above fees are in addition to payments by residents into a Refurbishment Fund (also called Sinking Funds), ‘the proceeds of which are or should be applied to covering the long-term liabilities of repair, replacement etc.’ Alternatively, in some villages, a percentage of the monthly contributions are set aside for long-term liabilities.

42 See for example, Mr Kenneth Leslie, *Submission No. 21*, p. 3.

43 Mr Clement Allsworth, *Submission No. 32*, pp. 8-9.

Concern was also expressed about the accountability of such funds, with little transparent accounting.⁴⁴

- 7.46 Mrs Jean Lehmann suggested that legal documents should have clear definitions of capital expense, capital improvement, repairs and maintenance, to ensure that residents are not subsidising the capital improvement of the operator from their maintenance fees.⁴⁵ In commenting on her retirement village Ms Lehmann stated that the operator had:

...breached the Act and lease contracts by using residents funds on items of capital expenditure and was forced to refund over \$100,000 to the residents' funds following a Tribunal decision.⁴⁶

- 7.47 In Queensland, many contracts in recent years have required residents to be responsible for the maintenance, repair and replacement of all fixtures, fittings, etc., on or in their accommodation unit:

...despite the fact that scheme operators contribute, compulsorily, to a Capital Replacement Fund and residents, compulsorily, to a Maintenance Reserve Fund. Earlier PIDs in those villages do not contain such restrictions or stipulations so cannot be made to apply to their holders. It is a silly, bizarre, inconsistent situation but scheme operators get away with it because although they are required, in Queensland, to submit 'new PIDs' to the Office of Fair Trading, that Office does not scrutinise them, simply registers them.⁴⁷

- 7.48 The level of fees may become an issue where a resident wishes to sell their residence and leave the complex because they are unhappy or because their health has deteriorated, but they then find the exit fees are such that they are unable to leave.⁴⁸

- 7.49 The RVA explained what the particular retirement village exit fees are and why they are necessary and important.

In most substantial retirement villages, there are substantial community facilities that are also supplied. That amenity or

44 Mr Clement Allsworth, *Submission No. 32*, pp. 9-10.

45 Mrs Jean Lehmann, *Submission No. 15*, p. 1.

46 Mrs Jean Lehmann, *Submission No. 15*, p. 1.

47 ARQRV, *Submission No. 19*, p. 1.

48 Ms Joan Adams, *Submission No. 145*, p. 2.

asset is a long-term investment for the proprietor and he gets a return in part by way of what you call exit fees and what I would call facility fees or amenity fees.

...

In my experience, it is true to say that the management fees that are recovered in those operating costs charged on an annual basis are not likely to provide a fair return to the manager for that role. I would say another justification for what are sometimes called exit fees is that true management costs have not been recovered during the process of managing the village through the operating costs.⁴⁹

7.50 RVA further explained that:

...a retirement village is a long-term property investment that has to be managed over a long term for the benefits of both the proprietor and the residents ... in a retirement village context we have to have reserved funds – whether you call them reserved funds, capital maintenance funds or what have you – in order to maintain the assets very long term. The benefits of the scheme are that we can defer that charge to the resident until he leaves.⁵⁰

7.51 RVA summarised exit fees, and how they are calculated:

...if you have a normal, reasonably substantial retirement village in Western Australia, you are looking at, after 10 years, a deferred fee or exit fee of about 25 per cent of the then rollover value or the then market value of the unit, and you are looking at anything between five and 10 per cent for the reserve fund contribution ... the deferred fee is calculated in most cases on a time basis. In schemes that I have prepared it is calculated on a fee-day basis. Once a resident goes into occupation we calculate that fee over the period of occupation that that person enjoys the amenity.⁵¹

7.52 Some submissions to the inquiry suggested that retirement village developers and the managers are engaging in deceptive and misleading conduct in not explaining the nature of ongoing charges and other fees. When asked if there should be a clearer explanation to any new applicants that there will be ongoing charges and that they

49 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, pp. 43-44.

50 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 44.

51 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 44.

will have to pay for all these services while they are in the village, RVA stated:

Absolutely. And there is. Before someone signs a resident's contract to come into a retirement village, they receive disclosure.⁵²

7.53 In addressing a specific example, RVA explained:

...the fact of the matter is that before he went into his retirement village he would have received full disclosure of the financial arrangements that apply under his scheme. That includes a section which gives examples of your refund entitlements and the calculation of the deferred fees and sinking fund contributions after one year, two years, five years and 10 years. That is a code requirement. We go to great lengths in our disclosure booklets to explain these things.⁵³

7.54 RVA further added:

...unfortunately, it can occur where people, despite being given detailed disclosure, fail to absorb it. This is an issue that has come out in a review of the legislation in that there seems to be a shortage of legal advice available for the consumer in the area.⁵⁴

7.55 The Committee acknowledges that the level of fees, particularly 'exit' fees, is a significant issue for those wishing to leave a village. While it is the responsibility of village proprietors to make potential residents aware of any fees, charges and conditions and fully disclose such information openly and honestly, it is equally the responsibility of potential village residents to make themselves fully aware of, and seek legal and financial advice concerning, the particular fees, charges and contract conditions before engaging in a retirement village contract.

7.56 The Committee is concerned about a lack of transparency in regard to the setting of the level of these fees and charges and the lack of discretion in their application. The Committee believes that, as part of the review of retirement village contracts (Recommendation 45) the ACCC should consider all aspects of 'exit' and other fees, including whether they should be abolished.

52 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 44.

53 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, pp. 46-47.

54 Mr Adrian Pagett, RVA, *Transcript of Evidence*, 30 July 2007, p. 47.

Recommendation 46

- 7.57 **The Committee recommends that, in its review of retirement village contracts, the Australian Competition and Consumer Commission and state and territory fair trading offices also review all aspects of 'exit' and other fees associated with such contracts, including whether they should be abolished.**

Advertising

- 7.58 Evidence to the inquiry suggested that some retirement village operators may be involved in misleading advertising. For example, Mrs Jean Lehmann reported:

Advertising material of [the village] claimed that a nursing home was part of the village when final plans [had] not yet received approval. If/when approved, the nursing home would not be part of the village but a separate income-earning facility, admission to which will be governed by external factors... [this] is not mentioned to unsuspecting prospective residents ...⁵⁵

- 7.59 Mrs Lehmann went on to note:

From personal experience it is desirable to ensure that operators of retirement villages advertise their village in a truthful manner. Many prospective retirees, including widows who may not have made decisions for themselves for many years, are inexperienced, and are easily influenced by clever sales persons who fail to clearly and fully disclose all matters which will materially affect prospective residents.⁵⁶

- 7.60 The Committee believes that there are sufficient legislative safeguards against deceptive and misleading advertising, but acknowledges that not all older people will feel willing and able to pursue complaints in this area.

Complaints mechanisms

- 7.61 Depending on the nature of the contract signed, residents may have limited mechanisms through which to raise their concerns. Usually,

55 Mrs Jean Lehmann, *Submission No. 15*, p. 1. See also Mr and Mrs Leo and Frances Kelly, *Submission No. 31*, p. 1.

56 Mrs Jean Lehmann, *Submission No. 15*, p. 1.

issues can be raised directly, in the first instance, with the complex manager, or through the residents' association. However, in some cases, the Committee was disturbed to hear that even these avenues had been closed through contract provisions. For example, the Committee was told of cases where:

- There was no provision for a manager to be removed;⁵⁷
- Managers claim there is no body corporate or that the manager is the body corporate, and therefore owners have no rights in respect of entering into cost agreements for legal action as required by state legislation;⁵⁸
- The agreement gives the manager irrevocable enduring power of attorney;⁵⁹
- The agreement states that the manager is the agent of the owner and can sign documents on behalf of the owner in relation to changes in title, entering into agreements and to sell the apartment or unit;⁶⁰
- Owners do not have the capacity to petition meetings of the body corporate, and consequently have no capacity to vote on the financial expenditure or examine financial documents relating to the management of the community;⁶¹
- The developer has a right to appoint Residents Representatives of its choice to a village's advisory board.⁶²

7.62 The ARQRV described this loss of rights of older people living in retirement villages in the following terms:

Residents in retirement villages find, in practice, that they have lost some of the freedoms which all Australian citizens enjoy as [a] right. Freedom of speech, freedom of assembly, freedom to dissent are all circumscribed to some extent by some operators of retirement villages. Threats to evict are not unknown even though eviction is not something that can be done at the whim of a village operator. Intimidation is not a

57 Mr Clement Allsworth, *Transcript of Evidence*, 30 July 2007, p. 30; also Mr Clement Allsworth, *Submission no. 32*, p. 11.

58 Ms Julie Van Dort, *Submission No. 125*, p. 2.

59 Ms Julie Van Dort, *Submission No. 125*, p. 2.

60 Ms Julie Van Dort, *Submission No. 125*, p. 2.

61 Ms Julie Van Dort, *Submission No. 125*, p. 4.

62 Mr Clement Allsworth, *Submission No. 32*, p. 11.

figment of anyone's imagination, it is widespread in retirement villages...⁶³

7.63 Should internal mechanisms fail to resolve disputes, residents are able to take their concerns to consumer bodies or tribunals. The experience of these appears to be mixed. One resident outlined his attempts to have his disputes resolved in this manner:

- The resident approached Consumer Affairs Victoria (CAV) with a verbal complaint in early 2004, and a written complaint in November 2005. The resident claimed that little has been done by CAV other than to try to arrange meetings between the resident and the operator. The resident stated that the operator failed to attend those arranged meetings.
- The resident approached the Victorian Civil and Administrative Tribunal (VCAT) in 2004. The VCAT informed the resident that it would only deal with each village resident on an individual basis, whereas the village residents would have preferred a class action. The complaint lapsed on learning of this process.⁶⁴

7.64 In Queensland, where there is a dispute between a resident or residents and a scheme operator, the resident may take a case to the Queensland Commercial and Consumer Tribunal. ARQRV stated that this is meant to be an inexpensive avenue to justice, however:

... the village operator can afford to have and often does have a solicitor and a barrister to represent him; so too may the ... residents [but few] have the necessary financial resources or the resources of spirit. Residents are thus at a distinct disadvantage.⁶⁵

7.65 ARQRV believes that if a scheme operator appeals a tribunal decision to a higher court the resident should be afforded legal aid to defend against that appeal. ARQRV added that even the threat of going to a higher court is most likely to cause a resident to withdraw from the whole dispute, which is in many cases the whole object of such a threat.

7.66 In a recent case in NSW, where a scheme operator appealed a tribunal decision to a higher court, the Office of Fair Trading took over the role of defending against the appeal. ARQRV explained that:

63 ARQRV, *Submission No. 19*, p. 1.

64 Name withheld, *Submission No. 13*, p. 2.

65 ARQRV, *Submission No. 19*, p. 2.

It would have been beyond the resources of the residents concerned. In that instance residents were in effect given legal aid. But legal aid in such matters needs to be a matter of right; residents need to be certain of being able to access it.⁶⁶

7.67 The barriers faced by older people in accessing legal services were discussed in Chapter 5, and are relevant in this context. Taking formal legal action to pursue apparent breaches of contract by village operators can be costly and time consuming. Many retirement village residents rely on limited fixed incomes. The considerable costs of legal services can be quite daunting for many, and can be the deciding factor in pursuing any apparent breaches of contract by retirement village operators.

7.68 In Victoria, for example, the:

...jurisdiction to seek injunctions, orders and declarations relating to the complex title, property maintenance and ownership disputes is the Supreme Court. Estimates of costs of taking a matter to the Supreme Court are from \$30,000 to \$300,000 with a possibility of a 1 to 3 year wait for a decision. The cost and accessibility of the Supreme Court to resolve disputes is no longer appropriate to deal with community style living, promoting harmonious living and good practice in management.⁶⁷

7.69 Some village residents have been threatened with legal action, something which residents cannot readily afford:

The vast majority of residents in this village cannot afford Supreme Court action. The operators know this and constantly threaten us with Court action. They are relatively wealthy individuals and one of them in particular has been to Court many times on occasions not relevant to our particular dispute, but certainly related to other retirement entities and tax matters.⁶⁸

7.70 Mr Harvie suggested even if older people are aware of their rights, often they feel intimidated to the point where they will not do anything about their situation:

66 ARQRV, *Submission No. 19*, pp. 2-3.

67 Ms Julie Van Dort, *Submission No. 125*, p. 2.

68 Name withheld, *Submission No. 13*, p. 2.

Say you think you have got rights and you want to take a matter to the tribunal. An operator will turn around and say, 'If you take me to the tribunal and win I will take you to the Supreme Court'. 'Take you to the Supreme Court' are the operator's words and most people will shy away ... it is intimidation, coercion, bullying – whatever you like to call it.⁶⁹

Statutory supervisor

7.71 Some submissions called for the creation of a retirement village ombudsman,⁷⁰ or commissioner⁷¹ in each state to investigate and resolve disputes. The Committee was therefore interested to hear that New Zealand has recently passed legislation introducing a statutory supervisor to aid their elderly in addressing their particular retirement village problems. The statutory supervisor provision was established in the New Zealand *Retirement Villages Act 2003*.⁷²

7.72 Mr Robert Harvie, who brought this to the Committee's attention, described:

...this statutory supervisor as a person the elderly can go to as a starting point to find out: 'How can I get this fixed up? How can I achieve this? How can I do this? What can I do if I do this?' et cetera. There needs to be a starting point somewhere.⁷³

7.73 In New Zealand, all retirement villages have a statutory supervisor, which is an independent third party, often a trustee company. The statutory supervisor is appointed to supervise the security aspects of a resident's interests in the village. They also will monitor the financial position of the village. Most statutory supervisors will also, by contract, supervise other aspects of the arrangements between a village and its residents, including, for example, consultation on budgets and provision of services.⁷⁴

69 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 46. See also Ms Joan Adams, *Submission No. 145*, p. 14.

70 Mrs Jean Lehmann, *Submission No. 15*, p. 2; Mr Robert Harvie, *Submission No. 85*, p. 3.

71 Ms Julie Van Dort, *Submission No. 125*, p. 5.

72 www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=77720&infobase=pal_statutes.nfo&jump=a2003-112&softpage=DOC, (accessed 11 September 2007).

73 Mr Robert Harvie, *Transcript of Evidence*, 15 May 2007, p. 47.

74 seniors.co.nz/articles/comm/legal.php, (accessed 11 September 2007).

- 7.74 The Hon Clayton Cosgrove, New Zealand Minister for Building and Construction, discussed the implementation of the legislation during an address to the retirement village sector in May 2007. Some key points from the address included:

...any new villages will have to be registered with the Retirement Village Registrar before they can make offers of occupation, known as an occupation right agreement

...

In order to be able to register, all operators will need to supply a series of documents, including a copy of their occupation right agreement, and details of their appointed statutory supervisor, although the Registrar may in some cases grant an exemption to appointment.

...

I am aware that there has been some concern in the industry, in particular among those running smaller villages, about the cost of statutory supervisors, but this cost can be minimised by sharing a statutory supervisor rather than having one for each individual village.

...

They play an important role in the village. They act as guardians of the collective interests of the residents by monitoring the financial position and the management of the village, and provide an avenue for residents to complain to statutory supervisors if they feel their rights have been breached.⁷⁵

- 7.75 The Committee was impressed with the New Zealand model of having statutory supervisors installed for each retirement village as a safeguard measure for residents. The Committee supports further research into the provision of statutory supervisors for Australian retirement villages.

⁷⁵ www.beehive.govt.nz/ViewDocument.aspx?DocumentID=29578 (accessed 11 September 2007).

Recommendation 47

- 7.76 **The Committee supports the concept of a statutory supervisor and recommends that the Ministerial Council on Consumer Affairs examine the New Zealand model to determine its applicability to retirement villages in Australia.**

Greater legislative harmonisation

- 7.77 The Committee found in its previous inquiry that one of the effects of a lack of harmonisation was increased difficulties or uncertainties for individuals and unacceptable differences in impacts for individuals due to inconsistent treatment of the same action across jurisdictions.⁷⁶ This is also the case with retirement villages. The increased diversification of types of retirement accommodation services has raised questions about the adequacy of current consumer protections.⁷⁷
- 7.78 A number of states have or are in the process of conducting reviews of legislation relating to retirement villages. In Western Australia, for example, the *Retirement Villages Act 1992* and the *Fair Trading (Retirement Villages Code) Regulations 2003* are being reviewed by the Department of Employment and Consumer Protection. In New South Wales, a review of retirement village legislation was commenced in 2004 and a bill introduced into State parliament at the end of 2006. That proposed legislation lapsed with the general election and has not yet been re-introduced.⁷⁸
- 7.79 The ACT Government is currently reviewing its *Retirement Villages Code of Practice* with a view to strengthening the protection for consumers:

In the ACT we have a code of practice for villages. It is not state legislation as some of the other states have, but we have a retirement village's code of practice in the ACT with a committee that actually looks at disputes. It has not been anywhere near as volatile as some of the other states are and have been. The abuse in the ACT is not as great as elsewhere

76 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of legal systems within Australia and between Australia and New Zealand*, November 2006, p. 6.

77 ACT Government, *Submission No. 108*, p. 4.

78 Mr Robert Harvie, *Submission No. 85*, p. 4.

...we were horrified with some things that were happening interstate. We then tried to make sure that what we put into the code what was learnt from the other states as well and to build on that. A couple of the matters that had been brought to the committee have been outside the jurisdiction and they are actually currently reviewing that at the moment.⁷⁹

- 7.80 Considerable scepticism about such reviews was evident in submissions to this inquiry. Mr Kenneth Leslie stated that legislative reviews do not adequately consider the views of retirement village residents:

Legislative reviews, such as they are, are orchestrated to limit input by residents ... there is unequal input into legislation resulting in it being weighted, heavily, against the resident (consumer) that it is ostensibly protecting.⁸⁰

- 7.81 However, the Committee believes that greater coordination among the states and territories in this area would assist in addressing a number of concerns of residents of retirement villages, minimising the different experiences of residents from state to state.

Recommendation 48

- 7.82 **The Committee recommends that the Standing Committee of Attorneys-General examine ways in which greater harmonisation of legislation regarding retirement villages could be pursued.**

Hon Peter Slipper MP
Chairman

79 ACT Government, *Submission No. 108*, p. 4; ACT Government, *Transcript of Evidence*, 22 May 2007, p. 12.

80 Mr Kenneth Leslie, *Submission No. 21*, p. 1.