



COTA New South Wales

Retirement village living – know what you are buying

Discussion Paper No 1

July, 2013

Our rights. Our future.

COTA NSW is the peak body representing people over 50 in NSW. We're an independent, non-partisan, consumer-based non-government organisation. We work with politicians, policy makers, product and service providers as well as media representatives to make sure our constituent's views are heard and their needs met. People over 50 represent a large and growing segment of the NSW population. More than 33% of all people in NSW are aged over 50. More than 43% of the state's electorate is also aged over 50.

Governments, planners, service providers and businesses cannot afford to ignore these people - they are as big a segment or market as people between 26 and 49.

For COTA NSW people over 50 come first.

COTA NSW exists to pursue the best interests of our constituents. At the same time, we note that it is in the best interests of elected representatives, policy makers, product and service providers and representatives of the media to understand them.

COTA NSW has always been a consumer focused organisation, which in the past year has worked hard to increase the level of engagement with our constituents and build closer ties with other stakeholder organisations.

This year we asked people from around NSW what they thought about a range of topics, including retirement village living. We ran a Parliamentary Forum to raise awareness around the issue and COTA NSW facilitated the formation of a reference group with The Aged-care Rights Service (TARS) and the Retirement Village Residents Association (AVRA) in order to strengthen policy and advocacy and make joint recommendations to the NSW Government.

This position paper is a result of that work.

TARS

TARS is a multi-faceted organisation working in three distinctive programmatic areas: legal services, including specialised retirement village legal services; education and promotion; and advocacy for individuals in aged-care facilities or those older people who receive services through Home and Community Care initiatives.

The mission of TARS is to work with the most vulnerable and disadvantaged people in our community who are growing older across NSW.

The more vulnerable and disadvantaged an individual may be, the more difficult it is to connect to mainstream services. This is even more apparent for people from already marginalised communities.

TARS ensures its work traverses the full spectrum of our society. We proudly provide services to people of all backgrounds including Aboriginal people those from culturally

and linguistically diverse backgrounds, members of the gay and lesbian community as well as other individuals who may experience marginalisation from mainstream services.

Further information about retirement villages

For a detailed information brochure on retirement living in NSW go to the Department of Fair Trading website at www.fairtrading.nsw.gov.au or ring 13 32 20

For tips and questions to ask before considering a move into a retirement village, see the appendix at the back of this document or see the COTA NSW Fact Sheets on retirement villages at www.cotansw.com.au or ring 02 9286 3800

For legal advice or information go to the Aged Care Rights Service (TARS) website at www.tars.com.au or ring (02) 9281 3600

For advice and information from village residents, go to the Retirement Village Residents Association (RVRA) at www.rvra.org.au or ring 1 300 787 213

Summary

“A good deal of the disputation and anxiety that has been generated surrounding retirement villages has stemmed from a lack of awareness on the part of the prospective resident and their families on entry to the village as to what they are actually purchasing and what they receive on departure or exit. This usually arises some years later when the resident has either passed away or needs to move to a higher level of care in a nursing home facility.”

Peter Hill, Solicitor

People have a reasonable expectation that their rights as consumers are protected by laws governing business practices. Imminent reforms, including the development of a standardised contract and disclosure documents have helped provide better protection for consumers who are considering purchasing a home in a retirement village.

To date, proposed reforms have focused on ensuring more transparent communications between village owners and residents and are premised on the community’s reasonable expectation that they have a right to know what they are buying. This has been an important and valuable process. However, more needs to be done to provide greater accountability on the part of operators when dealing with prospective and existing residents.

While the interests of retirement village residents and operators may often be aligned, both COTA NSW and TARS are aware of many instances where they are not. As this paper will suggest, there are numerous areas where better protection of consumers’ interests is urgently required. To this end, COTA NSW and TARS are calling for further consumer protection for potential and existing residents.

Summary of recommendations

1. COTA NSW and TARS supports the Retirement Villages Act (NSW)1999, which “encourages the industry to adopt best practice standards” by calling on the NSW Government to develop a government funded and supported, *independent* accreditation body for all retirement villages in NSW.
2. The NSW Government undertake a comprehensive review of the Retirement Villages Act (NSW) 1999 and make specific amendments as follows:
 - a) reduce the liability for former residents to pay recurrent charges fees under registered leases from indefinitely to six (6) months;
 - b) legislate to stop operators from breaching the privacy and autonomy of residents. Section 66 of the Act is too broad and the access powers of an operator to a resident’s property are also too broad;
 - c) tighten section 164 so that operators stop charging residents to refurbish units that were entered into post 1 July 2000, particularly where the resident will not benefit from the capital gain or only partially benefit from the capital gain.
3. The NSW Government should ensure that a proportion of the entry fees loaned to operators are deposited in bonds as is the case with tenancy agreements.
4. The NSW Government should encourage the development and increase the availability of rental units in retirement villages as a form of affordable housing for seniors available under the Residential Tenancy Act. A mandated proportion of the retirement village should be available to older people who rent.
5. NSW planning legislation and local government planning instruments should work synergistically to encourage the development of retirement villages in established communities.

Background

Originally retirement villages were primarily run as not for profit undertakings by church groups offering affordable housing to retirees. More recently, the concept of up-scale retirement villages has attracted for-profit operators who have seen opportunities to create resort style facilities to attract prospective residents. With the growth in popularity of retirement villages as profitable business ventures over the past 15 to 20 years, states across Australia have seen the need to legislate to provide a system of rights and obligations for both operators and residents.

State based legislation is intended to govern the business and protect the residents of retirement villages around Australia. In NSW the operation of retirement villages is controlled by the Retirement Villages Act (NSW) 1999 and its subsequent amendments. While we recognise that retired villager operators, whether for-profit or not-for-profit, are operating within a competitive commercial framework, we also believe that commercial interests need to be carefully balanced against the interests of a vulnerable customer base.

In NSW the introduction of the Retirement Villages Act in 1999 represented the most significant regulation of the industry since retirement villages first began in New South Wales in the 1950s. When introduced, the primary purpose of the Act was to clarify the rights and obligations of residents and operators. The Act sought to ensure the disclosure of information to prospective residents before entering a village and to ensure residents had the right to have input into the management of the village. The Act only applies to residential premises predominately or exclusively occupied by retired persons who have entered into a contract with a retirement village operator. The Act does not cover boarding houses, hospitals, and residential parks. Nor does it cover residential aged care facilities, which are governed by legislation under the Aged Care Act 1997 (Commonwealth).

The Retirement Villages Act was amended in 2009 and the changes came into effect in 2010. The amended Act was intended to strengthen residents' rights and ensure they had the right to access information and ask questions of the village operator. While these amendments were made with a view to providing greater protection and clarity for residents, both COTA NSW and TARS are aware that many consumers continue to experience high levels of confusion regarding the array of residency options, the standards and conduct of village management, excessive ongoing fees and departure charges.

Context – current reforms

The NSW Government is in the process of developing a standardised contract which is due to be implemented by late 2013. The standard form contract will be mandatory and operators will be required to use the standard form for all village contracts. In addition to the standardised contract the Government is also in the process of developing standardised disclosure documents – one at village level and one with information about individual units.

Main issues

Based on COTA NSW and TARS extensive interactions with our consumers it is clear that people are confused about the differences between retirement villages, residential care facilities and the different forms of accommodation in the general housing market.

Retirement villages are not residential aged care facilities

Many consumers lack an understanding of the difference between residential care facilities and retirement villages. Residential aged care facilities are funded and operated under Commonwealth Government legislation (the Commonwealth Aged Care Act). A residential aged care facility receives funding from the Federal Government to provide support and care for frail older people who have been assessed as needing care by an Aged Care Assessment Team (ACAT).

Retirement villages on the other hand operate under state legislative frameworks. Some operators offer both retirement village living and aged care facilities. Nevertheless, a retirement village resident will require a new contract when leaving a retirement village and entering an aged care facility. Consumers often don't understand that there is no automatic transition from a retirement village facility into an aged care facility even if they are adjacent to each other and owned by the same operator

Retirement villages are a lifestyle choice not a bricks and mortar purchase

Many consumers have told COTA NSW and TARS that they are surprised to discover that they have not made a bricks and mortar purchase. Instead they find they've acquired only a long term leasehold or license to occupy a dwelling. In such cases a person purchased a legal right to occupy the unit rather than purchase the property itself.

Members of the public are often unaware of the range of legal bases that underpin a person's right to occupy a unit in a retirement village, known as 'residence right'. They are often unaware that The Retirement Villages Act 1999 (NSW) recognises a number of different types of residence rights, including strata title, community title, company title,

leasehold title, and licence. Residential tenancy agreements can also be used in retirement villages and do not expressly exclude the provisions of the Act.

Many attendees at the COTA NSW Retirement Villages Forum in 2012 were unaware that the most common form of title in retirement villages is not strata title ownership, but a long term lease. It is estimated that about 90% of village units are now occupied on long-term leases with the operator retaining ownership of the units and the resident buying a right to occupy the unit for a stated length of time. Strata title, community title and company titled units are less common. Prospective buyers were also surprised to know that while entry fees on a lease can often be as much as the full market value of the property (or sometimes slightly discounted), they wouldn't be purchasing the bricks and mortar outright.

Fees and charges

There are a variety of fees and charges related to retirement villages. These include charges upon entry to the village, recurrent charges to cover maintenance and upkeep of the village's facilities and departure or exit fees when a resident permanently leaves the village.

COTA NSW and TARS are concerned that unlike other forms of accommodation such as residential care under the Aged Care Act 1997 (Commonwealth) or tenancy agreements under the Residential Tenancies Act 2010 (NSW) there are no standards or guidelines around what a retirement village operator can charge, what is done with a resident's entry fees, or how much is paid back to the resident when they leave the village. The operator is only obliged to pay back the 'refund' as stated in the contract when the resident leaves.

a) Entry fees

COTA NSW and TARS are concerned that there are insufficient checks and balances on the entry fees or charges retirement village operators can apply to residents. Currently these fees and charges vary depending on the type of title or right of residency held by the resident. COTA NSW and TARS are also concerned that there is little transparency around the process whereby operators retain the entry fee paid by residents for the period of time they remain in the village and are not required to pay interest. We see this issue as one for further consideration by the NSW Government.

An exception to this process is where rent is paid without any up-front lump sum payment under a Residential Tenancy Agreement, which operates under different legislation (the Residential Tenancies Act [NSW] 2010). This type of arrangement is increasingly being offered by the not for profit sector as a form of affordable retirement housing (see Recommendation No. 5). This is a much more clear and transparent process under the Tenancies Act.

b) Monthly fees and ongoing costs

Residents usually pay recurrent monthly fees that are used to run the day-to-day operations and maintenance of the village. COTA NSW and TARS are concerned with the numerous cases of residents being liable for recurrent monthly charges long after they have left the village even if the unit is empty and could be filled by a new tenant or sold to a new occupant. COTA NSW and TARS recommends that the Retirement Villages Act be amended to reduce the liability for former residents to pay recurrent charges and fees under registered leases from indefinitely to six (6) months.

c) Departure or exit fees

There are a number of fees and charges accrued by a resident when they leave the retirement village. Departure fees can be high and any profit or capital gain is often split with the operator. The departure fee (often described as a 'deferred management fee') is usually a substantial payment due to the operator after a resident permanently vacates the dwelling and can be as much as 40% of the initial ingoing contribution, depending on how long the resident has been living at the village, with percentage increases usually accruing yearly. COTA NSW and TARS are concerned that there is again little transparency or accountability around how these fees are calculated. We believe this issue requires further consideration by the NSW Government.

d) Capital gains

Consumers are often not aware that any profit made on a dwelling in a retirement village is shared between the resident and the village operator. COTA NSW and TARS have received numerous calls from residents in retirement villages and from their families who express their distress regarding the application of these fees. We are concerned that capital gains issues are not regulated and the status of any capital investment is dependent upon what an individual contract states.

e) Refurbishment costs

Both organisations have received calls from people who state that they have been pressured to pay for refurbishment costs when they leave, despite the fact that this is prohibited under section 164 of the Act. The costs borne by residents in such situations can run to many thousands of dollars. Prior to departure from a retirement village a resident may decide it is in their interest to make a contribution to refurbishment of the unit when they are entitled to a proportion of the capital gain, however COTA NSW and TARS question whether a resident should be compelled to pay when they receive only a small proportion or no capital gain at all under their contract. This issue requires further consideration by the NSW Government.

Information provision and disclosure

COTA NSW and TARS are concerned that prospective residents bear the burden of verifying the accuracy of information provided about a village. TARS is aware of incidences where residents who have been promised services such as emergency buttons and 'smart' technology have later found the advertised technology is not yet available, or that an emergency button is defective, in the wrong place or indeed non-existent. In addition, consumers tell COTA NSW and TARS that retirement village marketing and sales staff have given them inaccurate information about prices of units and comparative prices of other units either for sale or recently sold. As the situation currently stands, residents may only discover that the information provided about the inclusions and services offered in a village – or the fees they must pay operators - are incorrect once they are *in situ*, and have little scope to seek redress.

Operational and budgetary issues

There have been ongoing complaints by residents to COTA NSW and TARS that retirement village budgets are overly complicated and confusing to residents. Other issues that can cause dispute are management costs and accountability and dealing with annual account deficits and surpluses. For example, many operators have introduced a capital works fund from the surplus from the annual budget which in some cases may be refunded back to residents. Additionally, in a recent Consumer, Trade and Tenancy Tribunal (CTTT) case the village residents, with the support of the Retirement Village Residents Association, challenged two line items in the annual Queens Lake budget. The CTTT ruled in favour of the residents. The retirement village operator acknowledged that they should have provided a "greater level of transparency during the budget process."

These cases demonstrate that despite recent reforms, problems continue to exist with regard to the broader lack of transparency associated with the day to day operations of retirement villages. Other issues include matters relating to vacating premises, including who pays for reselling costs/ commissions and capital replacement fund contributions. In light of these facts, many residents have expressed their desire for greater transparency and better access to operators' budgets. Residents have also called for greater input into how the budget derived from their recurrent charges is spent. As the Act currently stands, if the annual budget increase is below CPI, residents cannot vote to approve the Proposed Annual Budget, and they have no say in how money is spent.

Potential residents should keep in mind that many retirement villages are for-profit operations with investors and shareholders and that sometimes those businesses are sold or become insolvent. COTA NSW and TARS believe that consumers require more protection in the event that an operator sells the business or becomes insolvent. For example, many retirement villages are built in stages and companies are increasingly going insolvent in

between or during stages and residents are left living on unfinished construction sites without promised essential services. Other scenarios include operators that wish to sell villages in prime metro areas to redevelop for denser unit blocks. In this case the operator may seek to change the resident's status. These can be worrying trends considering the age and vulnerability of many retirement village residents. COTA NSW and TARS believes that more consideration needs to be given to ensuring that operators advise residents when they are insolvent or in financial trouble. Stronger regulation is needed to address this issue.

Sales and management conduct

As the previous sections of this paper have noted, much of the distress reported to COTA NSW and TARS by retirement by retirement village residents and their families springs from their failure to understand what they're 'buying into' once they enter a retirement village. While we acknowledge that prospective residents bear responsibility for making informed decisions about moving into a retirement village, COTA NSW and TARS have had many reports of prospective and existing residents being misled or intimidated by staff that market or operate retirement villages. For example, there are instances where prospective residents have felt pressure to accept rather than negotiate contracts or terms before entering a village. This can often happen because there are long waiting lists and the retirement village operator has the benefit of a seller's market. Other instances involve residents who report on-site management behaviour in breach of section 66 of the Act, such as entering residents' units without following procedure outlined in the Act, not responding to emergencies, and not responding to urgent requests for repairs and maintenance. Other types of intimidation reported include managers threatening an "assessment" of a resident, which implies they can no longer live independently and the operator can then get an order at the CTTT that requests the resident be removed from the home. While we welcome the new standardised disclosure documents, which will deliver a greater level of transparency, we urge the NSW Government to consider the development of a Code of Conduct as part of a broader regulatory framework for the industry.

Privacy

COTA NSW and TARS are concerned about the current lack of regulation around the right to privacy of retirement village residents. For example, some operators have introduced on site nurses as a service to residents. The nurse then becomes privy to the confidential medical history of village residents. COTA NSW and TARS are concerned about the implications of this situation and believe it requires further consideration by the NSW Government. The current legislation does not address this issue, however it is relevant in relation to section 133 of the Act, where a resident's right to reside in a village can be terminated on medical grounds.

Conclusion

COTA NSW applauds the NSW Government's move in 2011 to respond to consumer concerns by establishing an expert committee to draft a simplified standard contract for retirement villages in NSW. While the standard contract and the two new standard disclosure documents to be released on 1 October 2013 will go some way to minimising confusion around buying into a retirement village, much still needs to be done to ensure that the rights of retirement village residents are adequately protected.

The following recommendations outline further considerations for the NSW Government.

Recommendations

1. COTA NSW supports the Retirement Villages Act 1999 (NSW), which “encourages the industry to adopt best practice standards” by calling on the NSW Government to develop a government funded and supported, independent accreditation body for all retirement villages in NSW.

This independent non-government entity would

- a) establish best practice guidelines
 - b) devise a code of conduct for sales, marketing, management and administrative staff
 - c) analyse the accuracy and relevance of information provided by villages to prospective residents
 - d) ensure mandatory registration of retirement village managers and compulsory training in legislation
 - e) implement an independent ratings system to encourage industry excellence.
2. The NSW Government undertake a comprehensive review of the Retirement Villages Act (NSW) 1999 and make specific amendments as follows
 - a) reduce the liability for former residents to pay recurrent charges fees under registered leases from indefinitely to six (6) months
 - b) legislate to stop operators from breaching the privacy and autonomy of residents. Section 66 of the Act is too broad and the access powers of an operator to a resident’s property are also too broad
 - c) tighten section 164 so that operators stop charging residents to refurbish units that were entered into post 1 July 2000, particularly where the resident will not benefit from the capital gain or only partially benefit from the capital gain.
 3. The NSW Government should ensure that a proportion of the entry fees loaned to operators are deposited in bonds as is the case with tenancy agreements.
 4. The NSW Government should encourage the development and increase the availability of rental units in retirement villages as a form of affordable housing for

seniors available under the Residential Tenancy Act. A mandated proportion of the retirement village should be available to older people who rent.

5. NSW planning legislation and local government planning instruments should work synergistically to encourage the development of retirement villages in established communities.