A fair go for retirement village residents

Response to NSW Fair Trading's discussion paper 'Retirement villages - exit entitlements and recurrent charges cap'

Joint response from:

NSW Retirement Village Residents Association
Robert Drake and Timothy Kyng - Macquarie University
Seniors Legal Service
COTA NSW

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Executive Summary

1. The governments' reforms (if implemented as we have recommended) will go a substantial way to addressing the real and serious problems that can arise when people exit a retirement village, but they need to go further.

2. Context for the reforms

2.1. The reforms are important for two reasons:

a. To ensure retirement village residents are treated fairly when they leave a village, while maintaining a healthy retirement village industry.

b. To give the practical mechanisms for people needing to move home, especially into aged care.

2.2. Residents depart a retirement village (or want to depart) for several reasons:

a. They have a decline in health, can no longer live in their retirement village and need to move to an aged care facility. These are the most vulnerable consumers, with the most urgent need to move. Without other capital to fall back on, any delay in accessing their exit entitlements will force them into serious financial disadvantage and costs that they would not otherwise incur.

b. They want to move to other accommodation that better meets their needs, such as another retirement village, to standard housing or to move in with their family. If people want to move to regular housing or another retirement village without having other capital assets, any delay in refund effectively means they are trapped.

c. They die.

The delay in getting exit entitlements in (a) and (b) makes it much harder for people to access a suitable aged care facility or alternative accommodation because they do not have the required funds immediately. They can be trapped and/or suffer financial hardship by paying twice for accommodation.

2.3. The proposed reforms need to ensure ex-residents are not over-charged in each of these situations, but the timing issues are particularly important for the aged care and moving situations.

3. Buy back provisions

3.1. We support the introduction of buy-back provisions for registered interest holders. This will counter the current inequity which occurs when what is in effect an interest-free loan to the operator as consideration for the acquisition of a residence right, is not repaid when the residence right ceases until it is convenient to the operator (the borrower).

3.2. We recommend that the 6 month period be applied state-wide, rather than having a 12 month period in non-metropolitan areas. Regional residents should be entitled to the same fairness and lack of barriers to moving. If this is not adopted, the 'metropolitan area' should include Newcastle and Wollongong until a study can be conducted using real data to establish actual areas or dwelling types where average sale periods substantially exceed 6 months.

3.3. The fact that similar buy-back provisions already operate in Victoria, and are offered contractually by some operators in NSW, shows they are completely feasible.

3.4. If the legislation allows a 'hardship' application by operators, Fair Trading should ensure that the consumer's perspective is presented at the Tribunal. This could be done by funding Seniors Rights Service to represent residents, if they wish.

4. Recurrent charges

4.1. We support a time limit on recurrent charges for all contracts so they end 42 days (at the latest) after the resident has left.

4.2. The trigger date should be when the premises are permanently vacated (eg giving vacant possession to the operator or the operator having the right to remove former resident's possessions).

5. Estimation of costs and benefits

5.1. The discussion paper requests feedback on the accuracy and completeness of the cost/benefit model.

5.2. Macquarie University has carefully examined the modelling of the cost benefit impacts of the reform. There are several areas where the model could be improved by using more recent data or more appropriate assumptions.

5.3. Our estimate is that the cost impact to industry (before it makes any changes in practice) is quite minor - about 10-12% of that estimated in the discussion paper for the buy-back and less than 55% of that estimated for recurrent costs (and possibly zero after year 1).

5.4. We predict that industry will adjust to the reforms:

a. Operators are likely to adjust by spreading recurrent costs across actual residents, not including vacant units. Costs are likely to be passed on to residents generally, not borne by RV operators.

b. Operators will adapt to the buy-back provisions by taking steps to reduce delays in selling units.

5.5. These views are supported by the experience in Victoria, where similar reforms have been introduced without major problems.

6. Timing of implementation

6.1. It is critical that three reforms (buy-back, limit to recurrent charges, and payment of aged care daily fee) apply to <u>all existing retirement village residents</u>, and not just to those that enter a village in the future. This is a critical issue. If the reforms were 'grandfathered', no current resident would benefit. In fact, in 7 years' time (the average period of residence) half of the residents of retirement villages would still have no protection under the reforms.

6.2. The reforms should commence with a transition period to allow industry to prepare (eg 6 months). The industry has been on notice since the state election, as this was a clear and unequivocal election commitment in February 2019.

7. Other issues

7.1. A major gap in the reform package is to assist retirement village residents who need to move to aged care. NSW should adopt the Victorian provisions, where retirement village operators pay an amount equivalent to the ex-resident's Daily Accommodation Payment for aged care (if needed) until the consumer can access their equity in the retirement village unit (either via "sale" or buy-back at 6-12 months). This represents payment of the money that the resident has, in effect, lent to the operator. The amount paid during the regular buy-back period can be deducted from the resident's exit payment (but not amounts after that if the buy-back is delayed due to an operator hardship application, to prevent creating incentives for operator delay).

7.2. The retirement village legislation also needs a wider system to deal with operators who can't (or won't) meet their legislative or contractual obligations. Operators might be having financial difficulties or they might just be putting profit ahead of their legal obligations. There have been too many situations where residents have suffered (personally and financially) from non-compliant operators and have been unable to find a satisfactory solution. Penalties for non-compliance need to be significantly higher than the economic benefits for operators of breaching their obligations.

About us

This is a joint submission from people concerned about the interests of residents of retirement villages and senior Australians generally.

Retirement Village Residents Association

The Retirement Village Residents Association NSW represents and supports retirement village residents across NSW. It has members in 493 villages across NSW.
Contact: Jim Gibbons, President jim.gibbons@rvra.org.au

Macquarie University

Robert Drake is a researcher and Adjunct Fellow at Macquarie University. He has deep experience in consumer protection and financial literacy. He has held senior positions with NSW Council of Social Service, NSW Department of Fair Trading and the Australian Securities and Investments Commission.
Contact: robert.drake@mq.edu.au

Dr Tim Kyng is Associate Professor in the Department of Actuarial Studies and Business Analytics at Macquarie Business School. Dr Kyng's research interests include financial education and literacy, complex financial derivatives and actuarial analysis of Australian retirement villages. He leads a project on retirement village cost calculator and is also leading a project on the transition from a retirement village to aged care.
Contact: timothy.kyng@mq.edu.au (02) 9850 7289

Seniors Legal Service

Seniors Rights Service is a not-for-profit, community legal centre with specialist legal services and aged care advocacy for older people across NSW. Its services include:

- A professional advocacy service for people who are residents in aged care facilities or receive commonwealth funded aged care services and assistance.
- The Older Persons Legal Service provides legal advice and assistance to disadvantaged and vulnerable older persons on a broad range of elder law issues.
- The Strata Legal Service provides legal advice to older people who are owners of a strata unit or townhouse about any aspect of the strata renewal process.
- The community education service provides rights education to older people and their carers, professional carers and the community.

Contact: Nalika Padmasena, Solicitor or Tom Cowen, Manager Legal Services
02 9281 3600 npadmasena@seniorsrightsservice.org.au

COTA NSW

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, service and product providers as well as media representatives to make sure our constituents' views are heard and their needs met.
Contact: Karen Appleby, Senior Policy Officer, COTA NSW
karen.appleby@cotansw.com.au 02 8268 9607

Introduction

We welcome the opportunity to respond to NSW Fair Trading's discussion paper "Retirement villages – Exit entitlements and recurrent charges" published in July 2019.

Our submission comments on:

- The overall reform proposals on exit entitlements and recurrent charges
- The fine details of implementation
- The estimates of costs and benefits
- Related reforms that need to be implemented.

Fair Trading estimates there are currently around 66,000 people living in retirement villages[1] around NSW. This number is expected to double by 2033[2] (according to the Fair Trading model) as the population ages and people use home care to stay longer within a retirement village. According to a recent retirement village census[3], about 62% of village resident are women and the average age of residents is 81.

The overall reforms

The two reforms covered by the Discussion Paper come from a policy announcement by the NSW government in February 2019.[4]

> *"I understand the frustration and anger of residents, which is why we're placing a 42-day limit on the length of time villages can charge for general services, after someone leaves."*
>
> *Mr Kean said retirement villages would also have to sell or buy back a unit within six months of a person leaving a retirement village in metropolitan areas and 12 months in regional NSW.*
>
> *"Many retirees use their life savings to buy units in retirement villages - and need to access that money as they move into aged care or other arrangements. However, with residents forced to continue paying fees, there is currently no incentive for villages to resell the units after they are vacated," Mr Kean said.*
>
> *"We have already legislated to give retirement village residents better protection, clearer contracts with retirement villages and stronger dispute resolution, and now they can have even more peace of mind," Mr Kean said.*
>
> - Matt Kean, Minister for Better Regulation. *Media release*: *Fair go for retirement village residents"* (14 February 2019)

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[1] Fair Trading discussion paper, p. 3

[2] Fair Trading discussion paper, p. 3

[3] PwC/Property Council, Retirement Village Census 2018. We note that the PwC survey has limitations for use in this review. It is a national survey, so figures are national averages rather than NSW figures. The survey only covers about one third of retirement village units in NSW. It appears to only cover 2 bedroom independent living units.

[4] https://mattkean.com.au/news/media-release/fair-go-retirement-village-residents

The government’s commitments were repeated in the Minister’s letter to the RVRA dated 28 February 2019 which contained a pre-election statement. This was subsequently published in the RVRA’s newsletter in March 2019.[5]

It is important to protect the consumer rights of all village residents, particularly the most vulnerable. We support the proposed reforms as <u>one</u> step towards the fairer treatment of retirement village residents (although there is much more to do). These must be implemented promptly to implement the government’s promise and to protect both current and future residents.

We support the reform to require village operators to offer a buy-back after 6 months in metropolitan areas. We would urge that the proposed 12 month buy-back period for non-metropolitan areas be reduced to 6 months as well.

We support the reform imposing a 42 day time limit on ongoing charges after a person has left the village.

The reality of retirement village contracts

Retirement village contracts come in a range of legal formats: 99 year lease, license to reside, strata title, company title, monthly rent. However, most arrangements also involve a second contract with the retirement village operator (sometimes the two contracts are wrapped together). This village contract takes away most of the resident rights normally associated with ownership of a property or a long term lease.

When you look at the reality behind the legal fiction, most retirement villages require the incoming resident to make what is, in effect, an interest free loan to the village operator in exchange for the right to reside in the village. When the resident leaves, the operator may wait (and frequently does) until it gets a new entry fee from the replacement incoming resident before repaying the loan to the departing resident (minus exit fees and, if applicable, any adjustment for a share of capital gains or losses), unless the contract has specified a prompt payout. This reality is recognised in some other states where contracts have the clearer name “loan/license agreement”.

This puts the discussion about exit entitlements in context. The departing resident wants their exit payment, and they want it (and deserve it) paid promptly when they leave the village. It is the resident’s money! The operator should not be allowed to arrange its own affairs without any contemplation of the outgoing resident’s rights or needs. This should be the starting point for the discussion, not when it is most convenient for the village operator to repay the loan.

Reason for departure

Residents depart retirement villages (or want to depart) for several reasons:

a. They have a decline in health and need to move to an **aged care** facility, as they can no longer live in their retirement village (even with homecare)

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[5] NSW Retirement Village Residents Association. Residents Newsletter, No. 122, March 2019 p.5

b. They want to move to **other accommodation** that better meets their needs, such as another retirement village, to standard housing or to move in with their family. The needs might include being closer to family or to be closer to health care.

c. **Death** of a single person, or death of a surviving spouse

Where people need to move to aged care, they have a large amount of money tied up in a retirement village refund (often their only asset). Delay in accessing this money often affects people's access to aged care, or results in a higher daily fee ('DAP') in aged care if they can't pay an upfront bond ('RAD'). Delay in accessing their capital also affects their ability to purchase optional services and facilities above the DAP level that would be a significant enhancement of quality and comfort for that person.

The discussion paper correctly discusses how people living in retirement villages are vulnerable consumers (average age on entry is 75). People <u>leaving</u> a retirement village to enter aged care are even more vulnerable – average age would be in mid-80's, often with very limited mobility, ill-health, perhaps early dementia. The need to move to aged care is often urgent. It is critical that the system protect these most vulnerable consumers.

Case study - Jane's broken hip

Jane, aged 84, had a few health issues, but had been coping OK in her retirement village until she fell and broke her hip. After 2 weeks in hospital and a detailed assessment, the doctor said she could not return to her home, as it was not safe for her and she needed intensive support and rehabilitation.

She was advised that she had 4 weeks to find an aged care place. She was assessed by the Aged Care Assessment Team as needing aged care. After a difficult search, the team eventually found a suitable aged care place for her, near her family. The aged care home would wait 6 months for her to pay the Residential Accommodation Deposit ($400,000), but in the meantime she would need to pay an extra $40 a day as a daily fee. She couldn't afford the higher daily fee. The only aged care home that she could afford was a long way from her family and had poor reviews.

Jane did not know how long it would take to sell her village unit, and being bed-bound, was reliant on the village operator to move things forward. Lying in her hospital bed, Jane was extremely stressed.

(based on a combination of real people's situations)

If people want to move to alternative regular housing or another retirement village, the delay in refund effectively means they are trapped in a Catch 22. The exception is a small proportion of cases where people can move to a retirement village of equal or lower value run by the same operator. In practice they can't "sell" their interest in the retirement village until they have moved out, but they can't plan or afford to move out until they "sell" their unit and get their money promptly. In most cases the task of "selling" the residence entitlement is done by the operator (and this is encouraged by the operator because there is commission involved) and the operator has no financial incentive to achieve a "sale" with reasonable urgency. Indeed, an operator may seek benefit from a delay in "selling". Our understanding is that people cannot get a bridging loan against their interest in a retirement village unit.

The main benefit from the reform (with the recommended aged care addition) is the improved quality of life for retirement village residents, from greater flexibility to move to accommodation that suits their needs (whether aged care or alternative accommodation). This is extremely important for the people currently “trapped” in inappropriate accommodation.

Reasons for delay in sales

The discussion paper presents data on the current time taken to sell a registered interest in a retirement village (average of 6 months in metro area, 12 months elsewhere). We suggest that the current delay is often longer than necessary:

a. The retirement village operator may be holding out for a top price on the resale, to advance their commercial interests. We suspect this is quite important to many operators:
    - If the retirement village operator’s profit comes from exit fees as a percentage of entry fee, then they have more interest in maximizing the new entry fee rather than a quick sale.
    - If the retirement village operator is also selling new units, these may be given priority over second-hand units because of the significant cash input derived from an initial ingoing contribution which does not need to be used to fund an exit entitlement.
    - The sale price for one unit may affect the valuation for units generally. The retirement village operator may have a strong interest in having a high valuation for future sale and the valuation of their whole property book. This may affect their loan/valuation ratio, how much they can borrow and the interest rate. It may also affect the company’s share price.
    - The delay in “on-selling” a unit may be used as leverage in negotiations about the “selling” price, the extent of refurbishment to be carried out prior to “sale”, the amount of marketing expenditure to be incurred, and the proportion of such costs to be borne by the departing resident and the operator.

b. Under current contractual arrangements, some retirement village operators have no financial or contractual incentive to speed up the resale process. They receive recurrent fees even if the unit is empty.

c. We have had discussions with retirement village operators that have professional processes in place to ensure a fast transition process. This includes having standing arrangements with tradespeople for renovations, tight project management, standard residential contracts already prepared, etc. They know residents will depart each year, they just don’t know exactly who and when. Other retirement village operators appear to have a much more casual approach, because there is currently no incentive to promptly complete the sale process.

d. There appears to be little or no competition between real estate agents at many retirement villages, as one agent has an actual or de facto monopoly. Often the sales agent is an entity related to the retirement village operator. In practice, it is not clear whether the real estate agent is serving the interests of the retirement village operator or the departing resident.

Case study: Madeline Cozma – an extreme example of delay in sale

In January 2004 Ms Cozma bought into a retirement village unit at Strathfield Gardens for $210,000 on a 94 year lease. She died in October 2005.

In July 2006 her estate's administrator formally appointed the operator's sales agent to sell her lease over that unit. The sales agent and the village operator were related entities. The sales agent estimated the lease was worth $210,000 -$220,000.

By 2011 (five years later), the lease remained unsold. The estate decided to appoint a second independent sales agent which estimated the lease was worth $185,000. The operator initially refused to provide the second sales agent with the information it needed to market the lease, but it eventually relented.

A further 2 years passed. Neither sales agent sold the lease.

In 2013 the estate arranged for Ms Cozma's former husband to move into the premises and sell him the lease for $1,000. However, the RV operator exercised its right to refuse to enter into a village contract with him.

Meanwhile, the estate of Ms Cozma was still being billed for monthly charges for the unit. By the time the matter came before the Tribunal in mid 2016 (almost 10 years after Ms Cozma's death), the unit was still unsold and the bill for monthly charges had grown to $110,000.

The operator also claimed the unit was still worth $210,000 (despite that no-one had offered anywhere near this price in 10 years). On this value, the departure fee would be $52,500 (25%). The Tribunal concluded that the operator's sales agent had maintained an over-valuation of the Lease because this served the broader commercial interests of the village operator.

Estate of Madeline Cozma v Milstern Retirement Living Pty Ltd [2016] NSWCATCD 56

Buy back provisions

Refunds for non-registered interest holders

The proposed buy back provisions should only apply to registered interest holders.

Currently, non-registered interest holders must be paid their exit entitlements within 6 months after the date on which they delivered up vacant possession of the premises to the operator (s 181 Act). This applies to residents with contracts such as loan / license arrangements and leases under 50 years. In the discussion paper [p.11], this is left unchanged.

Identifying the Sydney Metropolitan Area

1. Is the description of the 'Sydney Metropolitan Area' appropriate? If not, why not, and what areas should be included or excluded?

The issue of whether this description is appropriate should include consideration of fairness. Requiring all RV residents outside Sydney to wait 6 months longer to pay is unfair and lacks adequate justification.

We strongly recommend that the 6 month period be applied state-wide, rather than having a 12 month period in non-metropolitan areas. Regional residents should be entitled to the same fairness and lack of barriers to moving.

We would welcome data on the average sale times in different regions. The time taken to resell village units is likely to vary substantially from region to region and between types of dwellings. A 6 month buy-back period should be applied to the whole state unless robust data on unavoidable sales delays indicates which (if any) areas or types of dwellings should not be in that category.

If (against our recommendations) some regions have a 12 month period, the 'metropolitan area' should at least include Newcastle and Wollongong until a study can be conducted using real data to establish actual areas or dwelling types where average sale periods substantially exceed 6 months. We note that the government commitment was for a 6 month period in "metropolitan areas", not 'Sydney'. Newcastle and Wollongong metropolitan areas may have similar sales times to Sydney.

Exit entitlements - Calculating fair property values

2. Are the proposals for appointing a valuer, to determine the value of the property, necessary and appropriate?

The proposals regarding a valuer are reasonable and necessary.

The independent valuation should be required to take account of the deferred management fee / exit fee structure. There is a trade-off between the entry fee and the exit fee structure, and these can vary within a village or even be flexible for the one property.

The valuer needs to be knowledgeable in and experienced with the particular features of retirement villages that affect prices (eg tenure types, exit fees, the amount of refurbishment that has been carried out before the unit is offered to the market).

3. Should the valuation be done by someone independent of both parties?

It is essential that there be a simple, credible process for getting a valuation. The valuation needs to be done by a professional who is independent of the retirement village operator, the operator's real estate agent and the resident. This is a reasonable requirement and fair to both sides.

4. Do the provisions, above, adequately manage any potential or actual conflicts of interest? If not, why? How could conflicts of interest be better addressed?

There will not always be disagreement over a valuation. Recourse to an independent valuation needs only to be offered as a fall-back position where either party, after negotiation, triggers the requirement for an independent valuation. If either part thinks an independent valuation is needed, the cost should be shared equally between resident and operator.

5. What information should the operator be required to provide to the resident when the exit entitlement has been determined?

The valuation should include information on what comparative properties were used in the valuation, the property description and contractual situation (including the deferred management fee) for each. The time taken for each of the comparative properties to sell should also be disclosed. The operator should also disclose any improvements during the resident's occupancy.

The valuation report should also include any current or previous relationships between the valuer (or the valuer's company) and interested parties (if an independent valuer could not be found).

Opt out provisions – Exit entitlements

6. Where residents wish to sell their residence on their own terms, under what circumstances should they be able to opt in or opt out of the exit entitlement provision?

7. At what point, or time should residents be able to exercise these rights?

The buy-back should apply unless the resident (or their estate) opts out. The operator should give the resident one month's notice ahead of when their opt out rights expire.

For a 6 month buy-back, from the date of vacant possession:

> From day 1: former resident has the right to appoint a sales agent of their choice, if they wish. Operator can make a voluntary offer to buy-out the ex-resident at any time.
>
> By end of month 1: Operator advises resident of sales process, buy back provision, and their right to opt out.
>
> At end of month 4: Operator advises resident that their right to opt out will expire at end of month 5. If the operator does not need an independent valuation, they can offer a buy-out value, so the former resident can consider whether to accept that value or request an independent valuation.
>
> At end of month 5: Resident's right to opt out expires, unless exercised. Parties agree on a value, or an independent valuer is engaged if requested by either party.
>
> At end of month 6: Buy back occurs and resident is paid exit entitlement.

There must not be a provision that the buy-back option is waived if the contract gives the resident the option to appoint their own real estate agent. This would be a back-door loophole that could undermine the whole reform.

8. Should former residents be able to change their mind and opt back into the provisions, after they have notified the operator they are opting out?

Former residents should be able to opt back into the buy-back provisions. This may be because their circumstances have changed (they did not need the money urgently before, but now they do) they find that factors outside their control in the village are blocking a sale (such as non-performance by the RV operator). The former resident should be able to opt back in, after giving 2 months' notice.

The village operator will be no worse off than if the former resident had never opted out.

NSW Civil and Administrative Tribunal – Exit entitlements

9. What issues should the Tribunal take into account when considering whether or not the operator has done everything in their power to enable the sale of a premises?

Issues considered include:

- whether a lower price has been tested within a range that the owner is willing to accept, as the departing resident may be willing to accept a lower resale price in return for a speedier exit payment.
- whether the contract terms on offer to an incoming resident have been modified to make the contract more or less attractive – e.g. changing the DMF structure.
- whether the property has been advertised with other real estate agents or websites.
- whether the operator has sold new units when the second-hand unit has remained unsold.
- whether promised community facilities have been built and maintained.
- the speed at which renovations have been completed.
- the contract terms being offered to new buyers.
- whether there have been any delays from the retirement village operator's side.

Any extension of the buyback period due to hardship should be limited, so the maximum period is double the original period (eg 6 months + 6 months).

If the buy-back period is extended due to operator hardship, the operator should pay the ex-resident interest monthly on the outstanding amount.[6] This would follow the precedent of Tasmania for any exit payments[7] and the current NSW rules for exit payments to non-registered interest holders.[8]

10. Are there any additional circumstances the Tribunal should be able to consider when considering a hardship application from an operator?

As currently proposed, the process for a hardship application to the tribunal hearing is a very one-sided affair favouring RV operators.

It considers applications from operators who experience hardship and want to delay making a payment, but not applications from ex-residents who suffer hardship and need a payment quicker.

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[6] The Supreme Court sets a prescribed interest rate which the Tribunal uses.

[7] Tasmania Retirement Villages Act 2004 s. 13

[8] NSW Retirement Villages Act 1999 t ss181 (6)

Given the extreme vulnerability of many ex-residents of retirement villages, the theoretical right to appear before a tribunal may be of little practical benefit. A typical ex-resident would be in their mid 80's, have a disability or health issue serious enough that they had to move to an aged care facility, and would have little spare cash to pay a lawyer (as their major asset is the refund that is in dispute).

Few ex-residents or the family member managing the estate would have the skill and experience to analyse the operator's financial figures that it claimed demonstrated hardship. Residents risk being dragged into a legal process when they are the innocent victims.

If there is provision in the legislation for hardship applications from operators, then to ensure fairness, either:

- Fair Trading should join each case as a party, so it can ensure the relevant information and expertise is available to the Tribunal, and/or
- Fair Trading should provide increased funding to Seniors Rights Service to increase its capacity to provide free legal representation and appropriate accounting analysis for the ex-resident or the estate, where needed with hardship applications.

If a hardship application, the Tribunal should also consider the hardship to the resident or the beneficiaries of their estate.

A more appropriate policy response would be for the government to set up a system for Fair Trading to deal with a retirement village operator does not (or is not able to) meet their obligations. A retirement village operator's inability to afford a buy-back is a sub-set of the wider range of problems. This is discussed in the 'Related Reforms' section below.

The discussion paper notes the remote possibility that an operator may face a large number of buy backs in close succession. This might stretch its capital reserves and ability to borrow. However, this does not appear to have been a problem in other states with buy back provisions. If it is a real risk, the market could respond by offering an insurance product to cover this risk.

The trigger point

11. Are there any other factors that could affect the setting of a 'trigger point'?

The discussion paper lists a number of practical steps that could delay the sale of a retirement village interest. Village residents have raised frustrations that some retirement village operators seem to be in no rush to sell their property. The setting of a trigger should provide encouragement to the retirement village operator to be professional and facilitate the sale as quickly as possible for a market price.

We suggest a trigger should be the earlier of a number of events, including:

- 28 days after the resident gives notice that they wish to exit (whether or not they continue to reside there) and that notice is not withdrawn.
- the date they provide vacant possession
- 28 days after the resident's death
- the date the property is formally put on the market.

There are a number of preliminary steps the retirement village operator might do in preparation of sale, and these can happen during this period. These include engaging an agent, getting quotes for renovations, preparing contracts, etc. These should be standard processes for any retirement village operator, using regular suppliers.

Other timing considerations for the transfer of payments

13. Would any of the current provisions in Victoria and South Australia as set out in Appendix A, be of benefit to NSW residents of retirement villages?

As discussed above, a pressing issue is to ensure that people exiting retirement villages to enter aged care are not hindered by delays in exit payments.

We strongly urge NSW to adopt the Victorian provisions, where retirement village operators pay an amount equivalent to the ex-resident's Daily Accommodation Payment (DAP) for aged care until the consumer can access their equity in the retirement village unit. This should apply to both registered and non-registered interest holders, if there is a risk of a delay of more than 28 days. The amount paid during the regular buy-back period can be deducted from the resident's exit payment (but not amounts after that if the buy-back is delayed due to an operator hardship application, to prevent creating incentives for operator delay).

An alternative policy solution is for operator to pay interest on the estimated exit payment from the date the resident vacates the unit. This means it would change from being an interest free loan to a low interest loan. This preserves the incentive for operators to finalise the payment of exit entitlements and rightly preserves the departed resident's capital. An interest rate should be set at that rate prescribed by the Commonwealth Government for the calculation of DAPs – currently 5.54%.

This provision assists a resident to immediately transition to aged-care accommodation from their village. We see this as one of the most important issues in the review, to address a pressing issue for the most vulnerable consumers. Without this, consumers may not be offered a place in a particular aged care home because they cannot afford the higher daily fee (ie the DAP) for 6-12 months until they can pay a Residential Accommodation Deposit (RAD). A typical Residential Accommodation Deposit is around $400,000, but can often be $550,000 or more.[9]

The discussion paper (p.25) claims a benefit of the buy-back is that "*This would be particularly beneficial for residents exiting a village to transition to aged care accommodation.*" Unless the resident's transition was planned a long way in advance, the 12 month buyback in non-metropolitan areas would be too late for most transitions to aged care. Aged care homes offer a 6 month grace period for paying the RAD. Unless special aged care transition arrangements are added, a 12 month buyback is too slow.

It is important to note that the DAP is deducted from the consumer's exit payment; it is not a long-term cost to the operator. However, we note that the DAP is a real extra cost for the consumer. The discussion paper gives the example of an aged care place where the RAD is $550,000. In lieu of paying the RAD, the DAP is about $86 per day. This adds up to $31,390 per year. This is a permanent reduction in wealth that the consumer would not have

[9] See for example, Illawarra Diggers https://illawarradiggers.com.au/Accommodation-Options/accommodation-pricing-structure.html

experienced if they had received their exit payment earlier. For this reason, any such scheme in NSW should ensure that DAPs paid by an operator during an extension to the buy-back period are not deducted from the exit entitlement.

We do not support the South Australian provision where operators can require the resident to provide evidence of inability to afford the DAP. First, Centrelink's assessment of income and assets is notoriously slow – the form is very complex and there may be delays in Centrelink completing the assessment. Secondly, it is the consumer's money that is being accessed, so there is no reason for them to have to justify needing their own money. Finally, when a frail senior is entering an aged care facility, the last thing they (or their family) needs is another set of financial papers to complete.

14. Would it benefit residents if the provisions were to apply to both registered interest holders and non-registered interest holders?

Our proposed reform for aged care Daily Accommodation Payments should also apply to non-registered interest holders, as they have exactly the same problem.

Potential impacts of the reform and estimation of costs and benefits

Q15. Can you think of any other benefits or costs of this reform? What are they?

The discussion paper focuses on financial costs and benefits. However, as discussed above, the reforms would improve the quality of life for retirement village residents as they exit, and reduce stress for themselves and their families (as discussed above). This is just as important as the financial impact. The other benefit is an increase in consumer protection and equitable outcomes, especially for vulnerable consumers.

Q16. Are the cost and benefits listed above, accurate? If not, please provide information to help work out the true costs and benefits.

The Discussion Paper uses a spreadsheet model to estimate the financial costs and benefits of the reforms. It also requests comment on their accuracy and completeness. Unfortunately, Fair Trading has declined requests to make the model available publicly, and this limits our ability to critique all aspects of its accuracy. Appendix 1 contains detailed comments on the financial model.

In general, our analysis shows that the discussion paper greatly over-estimates the cost of the reforms to industry and under-estimates the benefits to consumers.

The cost / benefit modelling appears to assume that retirement village operators do not change their practices in light of the buy-back reform. This is contrary to basic micro-economic modelling. As a result, the current projections of the cost to industry will be an over-estimate. The reforms provide an incentive for retirement village operators to avoid delays in sales and improve the efficiency of the industry.

For example, operators could follow professional practice by preparing in advance for departures, and moving quickly to get properties ready for sale. This is demonstrated by the fact that many retirement village operators already get properties ready for sale quickly, and offer a contractual buy-back guarantee.

The reforms could also provide a gentle incentive on retirement village operators to ensure their properties adapt to meet market needs. For example, if people are looking for arrangements for home care or transition to aged care, retirement village operators would have more incentive to put these in place.

The model needs to be adjusted in crucial ways to give an accurate prediction:

- The model uses some implausible assumptions for key variables (eg inflation, contractual terms for sharing capital gains, etc) that result in over-estimating the cost.
- If the buy-back reform adds costs to operators, it is reasonable to assume that they will increase efforts to make sales within the buy-back period. This will reduce the proportion of sales beyond the buy-back period.
- The proposed reforms allow the resident to waive the buy-back period if the ex-resident (or the executor of their estate) wants to hold out for a higher sale price. This might happen if there is a dip in market prices and the estate is in no rush for the money. The modelling does not appear to factor this into the calculations about the frequency of the retirement village operator needing to fund a buy-back.
- Some retirement villages already provide buy-back provisions via their contracts that are similar to the proposed reforms (eg AVEO contracts). So the reforms would have zero impact on these contracts.

When you put these factors together, we estimate that the cost of the buy-back would only be about 10% of the estimate in the discussion paper. Further details on the cost/benefit estimates are in Appendix 1.

On our calculations, the average cost of the buy-back reform to industry per vacated dwelling would be:

$1,255 in metro areas (Discussion Paper estimate is $12,500)
$2,016 in non-metro areas (Discussion Paper estimate is $16,000)

For the reform about recurring costs, we estimate the average cost is $674 per vacated property in metropolitan areas and $1,504 in non- metropolitan areas (about a quarter of the estimate in the Discussion Paper). Even this lower figure is an over-estimate, as it does not allow for the industry speeding up “sales” in reaction to the reforms.

However, we expect that the industry will react to the changes on recurring costs by distributing the costs across remaining residents in the village via a slight increase in their recurring charges. After a short adjustment period, the ongoing cost to industry could be zero.

The discussion paper attempts to predict the likely impact of the reforms on the retirement village industry and gives figures for a reduction in profit. For the reasons above, we think the cost estimates are dramatically over-stated. However, the most telling evidence is that similar provisions have been in place in Victoria for a number of years, and the sky has not fallen. We have not observed an upsurge of retirement village operator bankruptcies in states with better consumer protection, or an outcry from industry.

The discussion paper seems to put undue weight on the possibility that one or two village operators might struggle to meet the new requirements. In any industry, some players will not succeed commercially. The regulatory regime should not be set to suit the least efficient, most borderline operator in the industry, at the expense of meeting real consumer needs. Even if some operators do struggle in individual cases, they can apply for a hardship exemption.

The reforms (with the variations recommended here) would reduce the chance of the industry's public reputation being damaged again by examples of consumer detriment. Improving the overall reputation of the retirement village industry is a benefit to all operators.

Time-limit on recurrent charges

We support the proposal that the time duration for recurrent charges being levied is limited to 42 days after the resident has left. The ex-resident gets little benefit from these fees, and has no say in how the money is spent. The time-limit could even be shorter.

Seniors Rights Service has seen several cases where consumers have been bankrupted because the recurrent fees that accumulated since they left the village are greater than their exit entitlement.

At a recent Retirement Villages Consultative Committee meeting, industry representatives suggested that recurrent charges should be allowed after 42 days, and divided between the operator and the resident in the same proportion as capital gains are shared. We completely disagree with this, as there is no connection between recurrent expenses and factors that lead to capital gains.

17. As with residents with a non-registered interest, should the 'trigger' to commence the 42-day period commence when the resident permanently vacates the premises?

The trigger should be the date upon which vacant possession is given to the operator or the date upon which the operator is entitled to remove any goods left in the premises by the former resident (whichever is earlier).

Optional fees (eg for additional services such as meals, outings, hairdressing, and personal care or nursing) should not be charged after the resident has permanently left the village. These services are not provided to the ex-resident and no additional costs are incurred. This should apply regardless of whether "vacant possession" has been given.

Implementation issues

Commencement options for both reforms

18. When is it appropriate to commence the provisions?

19. Should one or both of the reforms be 'grandfathered'? If not, please provide your reasons.

The changes should commence with a short delay to allow industry to prepare (eg 6 months). The three reforms (timing of buy-back, limit to recurrent charges, and payment of DAP before sale) must not be "grandfathered". This is a critical issue.

The Minister for Innovation and Better Regulation, The Hon Matthew Kean, stated in a letter to the Retirement Village Residents Association on 28 February 2019 *"The reform package, set out below, will afford greater protections to current and prospective residents and improve the operation of the sector."* [emphasis added] (see Appendix 3).

If the provisions only applied to residents entering retirement village contracts after the starting date for amendments, ALL current residents would be excluded. The problems that the reforms are intended to cure would persist for years to come. If the average period of residence is 7 years, then half of village residents would still be unprotected in 7 years' time. This would be completely contrary to the government's commitments.

In fact, if the buy-back reforms only apply to future residents, the changes are likely to leave existing residents worse off. Operators would have an incentive to speed up re-sales for residents who contracted in after 2019, at the expense of properties with residents who moved in before 2019.

Many operators already offer a six month buy-back via the contract. The regulatory regime should not be structured to accommodate the least efficient and least viable retirement village operator.

Penalties

The proposed maximum penalty for non-compliance with the buy-back provisions is 50 penalty units ($5,500). This penalty should be much higher, given the large amounts of money at stake ($400,000+) and the detriment to the ex-resident. A one-off $5,500 fine will, in many cases, be cheaper for the operator than the interest they gain from delaying payment of the exit entitlement. For example, a $400,000 exit payment delayed for 6 months (at 5% interest rate) would save the operator $13,333. We recommend that penalties for delay be on a continuing basis, ie that a further penalty be applied each and every day after the payment was due to be made.

In contrast, in Tasmania the maximum penalty for a failure to repay an exit entitlement on time is $58,800.[10]

Related issues

Regulatory response to operator collapse or inaction

We recommend that the government set up a system for Fair Trading to deal with a retirement village operator that does not (or is not able to) meet its obligations. These could be obligations under statute or contract. These situations can arise because the operator is

[10] Tasmania Retirement Villages Act 2004 s. 12

financially insolvent, is teetering on the edge, faces particular market conditions or is putting profit ahead of resident's interests.

This is a gap in the overall regulatory regime, not just for buy-back provisions. There are currently only ineffective mechanisms available to deal with a retirement village operator that is insolvent or not fulfilling its legal obligations. Currently, mechanisms are slow, expensive, rely on vulnerable retirement village residents to take legal action, and still may not actually resolve the issue. A retirement village operator's inability to afford a buy-back is a sub-set of the wider range of problems.

Appointing a sales agent

Registered interest holders should be entitled to appoint their own sales agent, if they wish. Contracts should not be allowed to enforce exclusive agency clauses with the operator's own sales agent. However, residents are often discouraged from appointing their own sales agent.

Review of legislation

While we welcome these reforms, we note there are other aspects of the Retirement Villages legislation that need review. We recommend a new statute for the regulation of the retirement village sector to address the many inconsistencies and weaknesses in the current legislation.

First, many of the types of tenure in the current legislation are now outmoded or no longer used and the different types of tenure only serve to confuse consumers. Any review the legislation should include a review of the tenure arrangements under the current legislation with a view to simplifying the types of tenure available.

Second, many operators now offer a suite of services including community care, nursing services and 'ageing in place'. This means that the old bricks and mortar models of retirement villages that existed when the legislation was enacted in 1999 no longer fit.

APPENDIX 1. Comments on spreadsheet model by Macquarie University

The discussion paper mentions the use of a spreadsheet based model to estimate the financial impact of the reforms. We are advised that the spreadsheet model is “cabinet in confidence” and Fair Trading has declined to provide a copy. This means that details of the assumptions and methodology are not visible. In the circumstances it is difficult to have full confidence in the model, its assumptions and therefore its conclusions. However, we are able to identify some areas where the model could be improved, and to estimate how corrections might affect the overall conclusions.

There is confusion about the average tenure of RV residents. On p8 it says it is 7 years. The
There is confusion about the average tenure of RV residents. On p8 it says it is 7 years. The
PWC/Property Council Retirement Village Census 2018 says the average time NSW residents live in a village is 7.7 years. On p47 the discussion paper says the model gives a value of 12 years for the average tenure. The data source for the 12 year figure is not disclosed. If it is an estimate of *future* expected tenure, it would be useful to have clarity on the empirical or other basis for this estimate.

The discussion paper (p47) states that 87.2% of RV residences are registered interest holders, citing a paper by Cradduck & Blake. Table 2 p6 of that paper indicates that 28.77% of RVs are freehold or leasehold, 25.05% are license to occupy or loan and 48% are unknown. This large “unknown” figure casts considerable doubt over the assumption in the model that 87.2% of properties are registered interest holders. This is quite a critical figure within the model. Using a lower number for this assumption will lower the estimated cost of reforms on industry.

On page 48, the discussion paper says that capital gains are shared 50/50. But the PWC Retirement Village census 2018 says that only 55% (not 100%) of RVs have any capital gains sharing. It does not disclose what the average operator/resident share is. One possible assumption (in the absence of accurate information) would be 50/50 sharing for the 55% that have any capital gains sharing. This takes account of the situations where the resident notionally gets 100% of the capital gains, but this is reduced by the deferred management fee. Incorrectly assuming all RVs have 50% capital gains sharing will result in overestimation of the cost of the reforms.

The assumed inflation rate of 3% is not consistent with recent government predictions and 1.6% is a more reasonable figure to use in the current economic climate. The assumption of 5% p.a. compound growth in retirement village (“RV”) dwelling prices within Sydney and 3% outside Sydney seems overly optimistic, given the current property market.

Some of the assumptions are based on the PWC/Property Council Retirement Village Census for 2017, but a 2018 version is now available and gives different values for these assumptions.

We suggest an alternative method of estimating the impact of the buyback reform (before allowing for a change in behaviour), including more recent data and more plausible assumptions.

On our calculations, the average cost of the buy-back reform to industry per vacated dwelling would be:

$1,255 in metro areas (Discussion Paper estimate is $12,500)

$2,016 in non-metro areas (Discussion Paper estimate is $16,000)

If industry reacted to the reforms by speeding up the “sale” of properties, the cost would be even lower.

For the cost of the 42 day limit on recurrent charges, we estimate the average cost per vacated dwelling to be:

$674 in metro areas (implied Discussion Paper estimate on page 51 is $1,226)

$1,504 in non-metro areas (implied Discussion Paper estimate on page 51 is $2,736)

Our estimates are about 55% of the estimate in the Discussion Paper. If industry reacted to the reforms by speeding up the “sale” of properties, the cost would be even lower.

Comments on the key modelling assumptions (p52)

- The RV “penetration rates” assumed for the model and 15 year financial forecast is based on very optimistic growth assumptions. The 7.1% and 7.5% figures should instead both be 4.9% which is the NSW figure according to the Property Council 2014 report. Correcting for this will reduce the long term (15 year) forecasts of the impact of the changes. The number of RV dwellings occupied will be overstated by approximately 50% by using the chosen figures instead of 4.9%. Alternatively using the 4.9% figure instead of 7.1% would reduce the number of occupied dwellings for their model by 33%.
- The number of persons per retirement village dwelling assumed is 1.27 but it should be 1.39 based on the PWC RV census 2018 (61% singles 39% couples). Correcting for this will reduce the estimated number of occupied retirement village dwellings in their model by about 9%.
- The share of dwellings occupied by registered interest holders is assumed to be 87.2% but the document cited to support this (p46/47) doesn’t say that and a more reasonable estimate is 50%. Correcting for this will lower the estimated cost of the proposed 42 day limit on recurrent charges substantially.
- The assumed capital growth rates of 5% and 3% per annum (for Sydney and rest of NSW) are unrealistic in the current economic climate. We suggest using 1.6% instead, the latest estimate of long-term inflation from the Reserve Bank of Australia (RBA) website.
- Sharing of capital gain – the assumption all registered interest holders have 50/50 capital gain sharing is incorrect and there is evidence (PWC RV Census 2018) that only 55% have capital gain sharing. Assuming that this 55% have 50/50 sharing means that the average registered interest holder has 27.5% capital gains share. Correcting for this will reduce the estimated cost of the 42 day limit on recurrent fees by close to 50% for the registered interest holders.
- The inflation rate of 3% assumed is way too high; 1.6% is a more reasonable figure to use in the current economic climate. The RBA website statistics section provides

information on interest rates and inflation expectations. This is currently 1.6% p.a. for the CPI.

Full details of the revised methodology are available from Dr Kyng on request.

APPENDIX 2. Bibliography

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APPENDIX 3. Letter from Minister for Innovation and Better Regulation

NSW GOVERNMENT **Matthew Kean MP**
Minister for Innovation and Better Regulation

Mr Jim Gibbons
President
Retirement Village Residents Association
By email: jim.gibbons@rvra.org.au

Dear Mr ~~Gibbons~~ Jim

Thank you for your letter regarding the Retirement Village Residents Association (**RVRA**) Pre-election Newsletter. The NSW Liberal National Government is committed to putting the power back into the hands of retirement village residents and making villages more transparent and accountable. This letter outlines the NSW Liberal National Government's work to date to strengthen the regulation of retirement villages in NSW and further plans to improve the lives of NSW retirement village residents.

The Greiner Inquiry

As part of its plan to improve retirement village living, the NSW Government commissioned Kathryn Greiner AO to lead an inquiry into the state's retirement village sector. Ms Greiner's report, titled the Independent Inquiry into the NSW Retirement Village Sector (**Inquiry**), was a pivotal moment for the retirement village industry. The Inquiry made seventeen recommendations to improve the sector and in June 2018 the Liberal National Government committed to implementing the recommendations.

The reform package, set out below, will afford greater protections to current and prospective residents and improve the operation of the sector.

The *Retirement Villages Amendment Act 2018*

One of the priorities of this Government was to amend the *Retirement Villages Act 1999* to provide residents with immediate benefits following the Inquiry.

The *Retirement Villages Amendment Act 2018* (the **Amendment Act**) was passed by Parliament on 28 November 2018, bringing in a raft of changes and improvements.

The Amendment Act was developed in response to the findings and recommendations of the Inquiry and delivers on a range of key improvements for residents and the sector, including:

- minimum standards around safety and emergency plans and awareness of evacuation procedures,
- annual contract 'check-ups' to give residents clarity around the process involved when leaving a village and, most importantly, the costs involved,
- mandatory rules of conduct for operators, with penalties for non-compliance,
- improved transparency around maintenance and replacement costs through an asset management plan, which will be available to current and prospective residents,

GPO Box 5341 Sydney NSW 2001 ▪ P: (02) 8574 6150 ▪ F: (02) 9339 5572 ▪ E: office@kean.minister.nsw.gov.au

- a consent process for the appointment of a village's auditor, putting power back in the hands of residents, and
- enhanced powers for Fair Trading to collect, share and publish retirement village sector information.

The Amendment Act represents just the first set of reforms to be implemented by this Government in response to the Inquiry.

The Liberal National Government has also introduced new mediation services within NSW Fair Trading for retirement village disputes, improving the availability and cost-effectiveness of dispute resolution options for retirement village residents in NSW. The service is free for retirement village residents and operators and is conducted on-site at a resident's village by skilled mediators from Fair Trading.

This work is not complete, with regulations still to be developed in order to shape how these reforms will take effect. They will rely on both industry and residents' feedback to guide them so that, ultimately, residents are able to enjoy their retirement as they should.

Retirement Villages Ambassador

To ensure the retirement villages sector has the ongoing oversight it deserves, the Government has appointed Ms Kathryn Greiner AO as the first NSW Retirement Villages Ambassador. The Ambassador travels to locations around the state to meet with residents ensuring they are aware of their rights and helping them to understand the changes to the laws. Importantly, the Ambassador advocates on behalf of residents as a whole, and provides the government with insights on emerging issues affecting residents.

The Liberal National Government understands that there is still plenty of work to do and is committed to continuing to work with residents and the industry to ensure a fair, transparent and strong retirement villages sector. It recognises the importance of resident feedback and will continue to work with residents and the RVRA, so that their valuable input is utilised into how we continue to shape the sector.

Capital Maintenance

A key reform that the Amendment Act provides is the power to prescribe an asset management plan for retirement villages. The NSW Government understands that capital maintenance, and the associated costs, is a particular pain point for residents and often a cause for tension between residents and operators. That is why these new requirements seek to significantly improve resident expectations about planned expenditures, thereby decreasing the potential for 'bill-shock' and disputes and improve accountability of operators for village maintenance and capital investment.

The introduction of village asset management plans is intended to more aptly provide residents with a defined and detailed understanding of their responsibility for costs associated with the maintenance and replacement of village assets. The plans will ensure that residents are aware of the extent of their financial responsibility, the likelihood of costs being recovered through charges to them, and importantly – what the operator is responsible to pay for.

Mandatory buy-backs and capping recurrent charges

In February 2019, the Liberal National Government announced that it intends to enact further recommendations of the Inquiry by introducing mandatory buy back provisions and a cap on recurrent service charges under the *Retirement Villages Act 1999*.

Under the proposed changes, a 42-day limit will be applied to operators and villages for the length of time that they will be able to charge residents for general services once they have exited the village. Additionally, the changes will require operators to either sell, or buy back, a unit within six months of the resident's departure, when living in metropolitan areas, or 12 months if they are located in a regional area.

These proposed changes are designed to save departing retirement village residents thousands of dollars and return their hard earning money that is often needed to move into aged care or make other arrangements sooner.

Funding for the RVRA

The Liberal National Government understands the importance of having a strong voice to represent the needs of retirement village residents. For this reason, the NSW Government has provided in-principle support for additional funding of $125,000 (plus GST) per year for the next two years to enable the RVRA to support the implementation of the retirement village reforms.

The funding is in addition to the $25,000 already received under the Aged Care Supported Accommodation Program and is contingent on the development of a partnership agreement between NSW Fair Trading and the RVRA.

2019 and beyond

It is most definitely an exciting time for the retirement village industry – the reforms that have already been achieved, along with those recently announced, will put consumers first and see greater protections for residents through increased transparency, improved dispute resolution and more certainty around costs.

The Liberal National Government is confident that the new arrangements will improve the performance of the retirement village sector and support residents to be able to live safely and independently. We are committed to continuing the reform process over the course of 2019, delivering change that will bring real improvements for residents.

I would like to take this opportunity to thank you and the RVRA for your work with the NSW Government in developing these important reforms and I look forward to working with you as we continue to give retirees a stronger, better future.

Yours sincerely

The Hon Matthew Kean MP
Minister for Innovation and Better Regulation
28.2.19