

16 August 2019

Retirement Village Exit Entitlements Discussion Paper
Regulatory Policy, Better Regulation Division
Department of Customer Service
2-24 Rawson Place
HAYMARKET NSW 2000

Via email -

To whom it may concern,

Thank you for the opportunity to comment on the NSW Governments proposed legislative changes to the NSW Retirement Villages Act.

As a private operator that represents over 400 residents, we recognise the moral and financial fiduciary duty that operators within the industry hold with regards to supporting the transition for retirement village (RV) residents into aged care. We have developed two Villages in New South Wales; in Berry (First Resident 2008), and in Cobbitty (First Resident 2013) and are a very proud participant in this Industry - our fundamental aim is to maximise the satisfaction and security of our Residents.

We welcome strong and transparent regulation in our Sector. We recognise that our Residents have many Accommodation Choices which include remaining in their current homes or downsizing to medium density or apartment style developments. We believe Retirement Villages offer a highly regulated and secure choice for Residents who value the benefits that can be delivered.

Most of our Residents express a high degree of satisfaction with their choice, valuing the social infrastructure, maintenance and personal support that our Villages strive to provide. The ultimate benefit that is often overlooked, is that our housing choices have been very specifically conceived to meet the needs of our Residents who often enter initially as active Retirees and inevitably will succumb over time to age related decline.

At the outset, we wanted to choose a financial model that we felt would best align us to our Residents. This meant that sharing the capital gain equally was highly appropriate as it reflected the efforts that we and our Residents make to maximise the reputation and environment of our Villages.

This model results in our Residents being Registered Interest Holders and essentially enjoying many of the benefits of ownership, such as control over the selling process. As our Villages are relatively new, we have only experienced moderate levels of turnovers, but in a number of cases, our Residents have elected to sell privately having had direct approaches where they were satisfied with an offer that was made. We also have some limited experience in dealing with external Licensed Agents, but the choice is always there. In part due





to the success and popularity of our Villages, as well as strong property conditions, the vast majority of our Residents have benefited (usually very significantly) from having a share of the capital gain.

The proposal to have a buy-back for Registered Interest Holders at 6 or 12 months (depending on location), will likely mean that the capital gains share model will no longer be tenable and our Industry and its customers will be poorer for this reduction in choice.

Essentially it is unrealistic to expect a Village to underwrite the sale of a home when The Village has no control over the sales process and price when the Resident is a Registered Interest Holder.

The short duration of the buy-back time frames far exceeds the reasonable application of a safety net, especially when considering the different property cycles during which these provisions will operate. We also make the observation that many Purchasers will often make an offer subject to the sale of their own home which is a common special condition in many Village Contracts, resulting in a more protracted settlement period across different property cycles.

In providing more specific responses in the remainder of this submission, we recognise the often well intentioned aims but have sought to make suggestions that will preserve choice and not severely disrupt, what in our experience are generally very cooperative and cordial, interactions with our Residents and their families when their home is sold.

We look forward to continuing discussions to ensure that any proposed legislative reforms are equally constructive and supportive of the Operators and Resident's objectives. We are excited by the opportunity to restore and increase confidence in the sector that plays an important role in the life of NSW retirees.

Kind regards.

Adam Somerville
Managing Director
Mbark

Specific responses to the NSW Governments proposed legislative changes to the NSW Retirement Villages Act

We have identified three (3) key themes that will ensure the full consumer protection mechanisms exist and that the retirement village industry and the consumer choice will not be compromised.

1. Consumer / Resident Choice

- **Mandating a compulsory buy-back on ALL contracts will remove consumer choice that is currently available** – instead of making it apply to ALL contracts, why not make Operators have a contract that includes a mandatory buy-back and **let the resident decide what they want.**

2. Alignment

- **A mandated buy-back on ALL contracts puts residents and operators on opposite sides of the table** – instead of working as partners to achieve better outcomes, Operators and Residents become misaligned which is the antithesis of the business model the industry currently has, where Operators look after and work with Residents.

3. Transition to Aged Care

- **Aged Care entries absolutely require special attention** - Legislation enabling Operators to pay the Daily Accommodation Payment (DAP) as an early release of the residents exit entitlements should alleviate any concerns that a village resident can be excluded from aged care on funding grounds.

Other comments and alternative suggestions in response to the proposed mandatory buy-backs and the 42 day cap on recurrent charges, are as follows:

1.1 Mandatory buy-back on contracts including capital gains

- Mandatory buy-backs should only be applied to zero capital gain contracts. There is a fundamental alignment issue in mandatory buy-backs where the Resident shares the capital gain with the Operator. **When the Resident enters the village, depending on what contract is selected, they should be capable of opting out of the mandatory buy-back process (up front) if a contract type that includes a share in capital gains is selected.**

1.2 Early release of RV exit entitlements for Residents transitioning into aged care

- **In a typical residential house sale context, homeowners cannot force the sale of their dwelling within a 6 or 12month period - this is no different in a retirement setting** - Victorian and South Australian Retirement Village legislation recognises that the fundamental issue is facilitating the transition into aged care. The notion that allows Operators to fund the Daily Accommodation Payment (DAP) as an early release of the Residents exit entitlements is a good solution that should be given further consideration by the NSW Government.

1.3 Proposed six and twelve-month timeframes for payment of exit entitlements

- **We are setting the RV industry up to fail by accepting the proposed compulsory buy-back periods** - The NSW Fair Trading Model data suggests that the 'average' period between vacancy and settlement is 6.7 months and 13.3 months respectively, for metro and regional villages. Due to the proposed mandatory timeframes being shorter than the 'average' data contained in the Fair Trading Model; and given the 'normal distribution' of the results, **the industry will FAIL to**

settle more than half of all turnovers within the proposed timeframe. This could be exacerbated by the fact that the Fair Trading Model data likely captures 3-4 years of one of the strongest residential markets in NSW's history. As the retirement village industry is most closely correlated with the residential market, it must be acknowledged that the proposed timeframes will knowingly put operators under immense financial pressure and potential bankruptcy.

- **Operators cannot be held to account to buy-back a unit within a 6/12 month timeframe where external agents are appointed to market and sell the property,** because when the external agent is appointed, there are many factors of the sale that are outside the control of the Operator which may not be reasonable or rational.

1.4 Trigger point for the commencement date of mandatory buy-backs & 42 day cap on recurrent charges.

- Where relevant, the commencement dates for the mandatory buy-back period and the 42 day cap on recurrent charges should align as the same date.
- The 'trigger point' should only commence where the Operator is appointed to sell the property (not an external agent). Where an external agent has been appointed, the Operator should be given a further six (6) months, beyond the applicable mandatory buy-back period, to sell the property at the independent valuation amount.
- Further, the trigger point should only commence once the Resident has "permanently departed" the property and the Operator and Resident 'sign-off' on the completed reinstatement works.

1.5 Considerations for the valuation of the property

- In the context of potential conflicts of interest, consideration needs to be given for:
 - who is the instructing party for the valuer?
 - who pays for the valuation?
 - what are the terms of reference for its assessment?

1.6 NSW Civil and Administrative Tribunal considerations

- Rather than the Tribunal giving an order for the Operator to pay a nominal amount by a certain date, consideration should be given for the Tribunal to grant the Operator an additional 6 months to sell the property at the valuation number (this assumes that the property was being marketed either externally or at a price higher than the valuation).
- Hardship provisions – consideration should be given for the inclusion of a cap on the number of compulsory buy-backs within a financial year. This may be represented as a percentage of the total available properties within a RV or a rolling average of turnovers for the last (say) 3 years (plus a suitable % tolerance to account for escalation or variability of turnovers as a village matures).
- In circumstances where the Operator has done everything in its power to sell the property, what is the remedy for the Operator if the property is not sold within the mandatory buy-back timeframes (including any hardship extensions granted by the Tribunal)?