

Inquiry into the NSW Retirement Village Sector

Report





Mr Matt Kean MP
Minister for Innovation and Better Regulation

Dear Minister Kean

I present to you the final report and recommendations from the Inquiry into the Retirement Village sector in New South Wales conducted over the five months to December, 2017.

This Inquiry reviewed the fairness and transparency of business practices of the Retirement Village Industry in six key areas, elucidated in this report. The Inquiry also sought information to test the capacity for the detection of breaches of legal obligations within the Industry, and whether NSW Fair Trading may need to improve its operational role in relation to Retirement Villages. These matters have been well covered in the report.

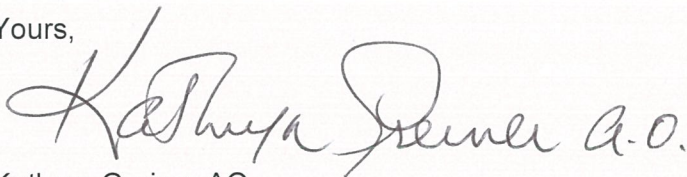
Australia is on the cusp of an increasing ageing population. According to the NSW Treasury's Intergenerational Report 2016, it is estimated that the over 65 year old demographic will represent a quarter of NSW residents by 2056. In my role as Chair of the Ministerial Advisory Council on Ageing, I am aware that one of the key concerns of older residents in NSW is appropriate and affordable housing. The Retirement Village Industry has a significant role in supply of housing choice but only if it is fair, equitable and the financial considerations are clearly understood. The Inquiry has identified a number of areas where improvements may be made, and it is my hope that this report provides the blueprint.

I sincerely thank those who submitted online and individual submissions to the Inquiry and the hundreds of NSW retirement village residents, family members, staff, operators, community group members and advocates who attended our community consultations held throughout the State. This enlightened input was invaluable in understanding the issues confronting residents and operators.

I acknowledge with immense gratitude the members of the Secretariat, Ms Brigitte Bambridge, Mr Evin Norris and Ms Donna Sylvester and the men and women of NSW Fair Trading, who so ably assisted the Inquiry and the community consultations. Their energy was unflagging, and their wise counsel invaluable.

I present you the report.

Yours,



Kathryn Greiner AO,
Chair of the Inquiry into the NSW Retirement Village sector
15 December 2017

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Chair's foreword

As the population of NSW ages, the retirement village industry will play an increasingly important role in meeting the housing needs of seniors seeking a safe, secure and low maintenance lifestyle. Relocating to a retirement village enables seniors to 'right-size' their accommodation, access additional support services as they age, and join a community network.

It is well understood that the sector is facing an increase in the volume of potential residents with the first of the baby boomers now reaching retirement age. Retirement villages, while deemed 'independent living', are increasingly filling the gap between completely independent living and aged care. It can be challenging for industry to respond with options that balance the independent and community lifestyle sought by residents, with suitable design considerations and support services to accommodate residents as they age.

Industry, resident advocates and the Government have worked together on reforms to improve the sector in NSW and the legislation over the years. A standard contract was introduced in 2013, and the standard fees and charges table was introduced into the disclosure statement in 2017, coinciding with the launch of an online Retirement Village Calculator. These initiatives aimed to improve the transparency of the costs associated with retirement village living. Transparency, fairness and timeliness are key drivers of this report.

There is the opportunity for further reform to ensure that the sector prospers into the future and that retirement villages remain an affordable and attractive housing option for older Australians. Many residents report that retirement village living is a fulfilling experience, but the feedback from residents on this Inquiry suggests there is a need for improvement on several key issues. These include the fairness of village charges and contracts, the appropriateness of the process for elderly residents to resolve disputes, transparency of marketing activities prior to entering the village, and the sales process when it is time to leave.

This report and its recommendations reflect the many discussions I have had with residents, their advocates, families and friends and operators in the sector over the past five months. I have heard first-hand from hundreds of residents in regional and metropolitan areas across the state. The Inquiry has also received around 500 written and online submissions from residents and community members from across the not-for-profit and for-profit sectors. I have also met with peak industry and resident advocates, government agencies, organisations and regulators from other jurisdictions. I thank each for their considered and open contributions that have supported the Inquiry to identify opportunities to improve the sector.

Older Australian residents should be afforded the respectful right to peace and enjoyment of their home, and it is my considered view that resolution of the issues identified in this report will improve their experience and increase their satisfaction with retirement village living.

Kathryn Greiner, AO
Chair of the Inquiry into the NSW retirement village sector

Executive summary

The NSW Government appointed Kathryn Greiner AO to lead an Inquiry into the NSW retirement village sector and provide recommendations to the Minister for Innovation and Better Regulation by 15 December 2017.

This report presents the Inquiry's findings and makes 17 recommendations to improve the legislative framework for retirement villages and the operational practices of both the industry and the regulator, NSW Fair Trading. The Inquiry was conducted over five months and supported by a Secretariat from the NSW Department of Finance, Services and Innovation.

The operation of the retirement village sector could be improved in three key areas:

- increasing the transparency of exit fees and contracts
- clarifying the funding arrangements for ongoing maintenance costs which are shared between residents and operators
- providing more support for residents to pursue disputes with operators (in addition to reducing the potential for disputes to arise).

Many of the Inquiry's recommendations require amendments to the *Retirement Villages Act 1999* (NSW) (the Act) to be implemented. A summary of other legislative issues identified during the Inquiry is provided at Appendix 11.

The findings and recommendations are primarily informed by consultation with the public, key stakeholders in the retirement village sector, as well as targeted consultation with other jurisdictions and industry experts. The Inquiry engaged with over 850 individual members of the retirement village community and received around 500 written submissions in response to the Terms of Reference. The submissions made reference to over 70 individual retirement villages and around 40 different operators from the not-for-profit and for-profit sector.

The Inquiry also consulted with other jurisdictions in Australia and New Zealand to understand different approaches to the regulatory framework for retirement villages.

Chapters 1 and 2 of this report provide an overview of the retirement village sector in NSW and the legislative framework, detail the key issues the Inquiry examined, and document the Inquiry's approach to gathering evidence.

Chapters 3 to 10 report on each of the matters identified by Terms of Reference. Each chapter summarises the issues raised by members of the community and presents the main findings and recommendations of the Inquiry in response to the issues raised.

Marketing activities (Chapter 3)

Many residents (63% of respondents to the online submission form) indicated that they do not believe that marketing activities are conducted honestly, fairly or diligently. There is a need for greater transparency of costs, exit fees and the distinction between tenure arrangements to enhance consumer decision-making.

Contracts, fees and charges (Chapter 4)

While the introduction of the standard-form contract has improved the transparency of exit fees, 169 of 286 (around 59%) consumer respondents to the online submission form reported not finding exit fees clear and easy to understand. There is a need for operators to provide more information about the full range of exit fees, their costs and the associated rights and responsibilities of residents under the legislation with respect to paying these costs as part of the contract.

There is a need to ensure that residents are provided with an opportunity to discuss the departure process with their operator throughout the duration of their residency as circumstances may change over time. Importantly, family members or Powers of Attorney should be encouraged to be present at these discussions.

Funding arrangements for maintenance (including defects) (Chapter 5)

More than half of the 286 consumer respondents (53%) to the online submission form reported that maintenance costs are not clear and easy to understand and many residents reported this to be a source of disputes between residents and operators. Maintenance costs form a large part of recurrent charges and the definitions set out in the *Retirement Villages Act 1999* (NSW) should be made clearer and be easier to understand for prospective residents.

Dispute resolution mechanisms (Chapter 6)

Some residents report that the formality, length (which involves progressing disputes to the NSW Civil and Administrative Tribunal) and lack of access to affordable legal resources prevents them from progressing disputes. The Inquiry considers that NCAT should not be the first or only point of escalation for resident disputes.

Safety and security of the built environment (Chapter 7)

There is a mixed level of awareness about safety and security protocols in villages and residents seek more information about important safety procedures such as fire drills and evacuation protocols in their village.

Fair Trading's administrative and operational practices (Chapter 8)

By comparison to regulatory regimes in best practice jurisdictions such as New Zealand, limited key sector data and village information is collected and made publicly available in NSW by the industry regulator. More data on the sector and increased disclosure of the performance of individual villages would better align NSW with other jurisdictions and help enhance consumer-decision making.

Training and conduct of village managers (Chapter 9)

Greater certainty around the expected standard of conduct and care is sought by many residents. The role of a village manager is complex and there is scope for more tailored training to occur and for expected conduct to be set out in a Code of Conduct or some other form of documentation. A negative licensing scheme may work well with a Code of Conduct and an enhanced public register.

General Operation of the sector (Chapter 10)

Further insight into the views of residents on the extent to which the sector operates honestly, diligently and fairly is provided based on the Inquiry's engagement with residents.

Legislative framework (Chapter 11)

The Inquiry focussed on identifying issues associated with the Terms of Reference. Many residents and their advocates, as well as industry, identified opportunities for legislative reform in their submissions. This chapter presents a summary of views on the legislative framework. Issues for consideration are set out in Appendix 11.

Recommendations

Marketing activities

Recommendation 1: Consider amendments to the *Retirement Villages Act 1999* (NSW) to strengthen consumer protections and transparency around marketing practices.

Recommendation 2: Improve the up-front disclosure provided to prospective residents to make it simpler to understand the critical terms and conditions. This should be informed by an evaluation of the effectiveness of existing disclosure requirements.

Contracts, fees and charges

Recommendation 3: Require that a legally-binding, *Exit Fees and Charges Statement* is provided to residents early in the process. The statement should set out in plain-English all costs, fees and charges that a resident will likely be required to pay when leaving the village, how they are calculated and an explanation of any relevant resident's rights under the legislation. The statement should include which items are optional and which items are required under the contract.

Recommendation 4: Require operators to provide residents with an opportunity for a regular contract 'check-up' during their occupancy, and encourage family members or those holding Power of Attorney to be present.

Recommendation 5: Require an operator to buy back the unit after a maximum timeframe from a resident leaving the village that is a registered interest holder.

Funding for village maintenance and upgrades

Recommendation 6: Simplify the funding arrangements for maintenance of a retirement village by clarifying the definitions that apply.

Recommendation 7: Require operators to develop an asset register to increase transparency around maintenance of village assets.

Dispute resolution

Recommendation 8: Introduce a mandatory, accessible and independent step into the dispute resolution pathway which is appropriate for elderly residents and encompasses expertise in retirement village legislation.

Recommendation 9: Require operators to share information about the dispute resolution process in the village by:

- a) requiring that operators have an internal dispute resolution process in place, and
- b) increasing the obligations of operators to report on disputes to Fair Trading

Safety and security of the built environment

Recommendation 10: Improve the level of awareness of safety and security measures in the sector. Consideration should be given to:

- a) increasing consistency in the standard of practice across the sector, and
- b) implementing a requirement for regular fire and emergency drills in villages

Recommendation 11: Consider opportunities to advocate for age-appropriateness in village building design.

Administrative and operational practices of Fair Trading

Recommendation 12: Increase Fair Trading's oversight of retirement villages through targeted compliance activities that focus on retirement villages.

Recommendation 13: Increase the level of collection of village operator and sector data including a requirement that operators report certain data to Fair Trading such as key village information and contract types on offer.

Recommendation 14: Overhaul and enhance the public register of retirement villages to provide information on the sector to members of the public.

Recommendation 15: Increase the level of awareness of prospective residents about retirement village living and their rights to facilitate informed consumer decision-making by:

- a) improving the accessibility of the Fair Trading website and introducing a single portal for retirement village information, and
- b) requiring operators to make the Retirement Villages Living Guide (published by Fair Trading) available to residents, and
- c) increasing the number of community information sessions focussed on retirement villages

Training and conduct of village management

Recommendation 16: Require retirement village managers to undertake appropriate training to ensure that they have an acceptable level of knowledge and the skills suitable to managing a retirement village. States and territories could work together on this.

Recommendation 17: Increase the level of accountability of operators for the standard of conduct and quality of village management and consider:

- a) implementing a Code of Conduct which outlines performance and conduct standards of village managers, operators and residents, and
- b) the potential for a 'negative licensing scheme' involving mandatory public reporting of breaches of the Code of Conduct on a public register

Glossary

Key terms

Accessibility	The design concepts as contained in the <i>Housing for seniors or people with a disability: a guide for councils and applicants (NSW Planning & Environment, DIPNR 2004)</i> .
Aged Care	Care or services provided under the Commonwealth <i>Aged Care Act 1997</i> .
Annual Budget	Planned maintenance expenditure funded by contributions paid by residents in the form of recurrent charges.
Capital Gain	Any increase between the amount paid by the current resident and the subsequent resident for the residence right for the unit, less any costs associated with the sale or lease of the unit.
Contract	A residence contract, or an agreement for the provision of services in a retirement village.
Departure Fee	The amount payable by the resident to the village operator under the residency and/or service agreement.
Disclosure Statement	A mandatory document outlining key information to be provided by the operator to a prospective resident who shows an interest in a particular unit, at least 14 days prior to entering into a retirement village contract.
Exit Fees	The sum amount of: fees and charges; non-refundable portion of the ingoing contribution; departure fee or deferred management fee, due at the end of the contract.
Fair Trading	NSW Fair Trading
General Inquiry Document	A mandatory document to be provided to a prospective resident or their representative by the operator, on their initial enquiry to a village.
Ingoing contribution	Any money payable to the operator under a residence contract, but not including a waiting list fee; recurrent charges or the purchase price of the unit for Strata, Community or Company title lots.
Registered Long-term Lease	A lease registered with NSW Land and Property, that has a term greater than 50 years, or for the lifetime of the occupant. See Appendix 2.
Leasehold agreement	A lease contract to occupy the premises for a given period. See Appendix 2.
Loan/Licence agreement	A lease contract to occupy the premises for a given period secured with an upfront payment amount. See Appendix 2.
Operator	A retirement village owner, manager, employee or representative.
Owners corporation	The collective group of strata unit owners, or their representatives in the case of a corporation owner, of a strata village.

Public Register	The public register of retirement villages accessed at www.fairtrading.nsw.gov.au
Registered Interest Holder	The owner of the land or strata lot, or proprietor in a community land scheme, or shareholder in a company title scheme with a residency right, or a registered long-term lease holder who is also entitled to at least 50% of any capital gain.
Recurrent Charge	Any amount payable under a village contract by a resident on a recurring basis.
Resident	A retired person who has a right or agreement to reside in a retirement village unit, their spouse or de facto partner.
Retirement Village	A residential complex occupied predominantly by residents aged 55 or over, who have retired from full time work.
Strata Unit	An individual lot within a strata village
Strata Village	A retirement village that has been subject to subdivision into individual lots and common property.
Tenant	A person with an occupancy right under a residential tenancy agreement that contains a term stating the <i>Retirement Villages Act 1999</i> does not apply. A tenant is not a <i>Resident</i> under the <i>Retirement Villages Act 1999</i> .
Tribunal	The NSW Civil and Administrative Tribunal
Unit	An individual premise in a retirement village that may be an apartment, townhouse or villa.

Key acronyms

ACL	Australian Consumer Law
ACSA	Aged & Community Services Australia
COTA	Council of the Ageing
FACS	Family and Community Services
LASA	Leading Age Services Australia
NCAT	NSW Civil and Administrative Tribunal
NRIH	Non Registered Interest Holder
RIH	Registered Interest Holder
RV	Retirement Villages
RVRA	Retirement Villages Resident Association
SRS	Seniors Rights Service

1 Introduction

1.1 The retirement village sector in NSW

1.1.1 What is a retirement village?

A retirement village in NSW is a residential complex providing independent living with community style accommodation for persons predominately aged over 55 who have retired from full-time employment.

Retirement villages offer a range of accommodation including self-contained and serviced premises. Residents enter into a contract with a village operator to occupy the premises (usually referred to as a 'unit') and/ or receive services.

Entering a retirement village is often less expensive than purchasing a comparable property in the same location. This is due primarily to the fee structure, where payment of part of the fee can be deferred until the time of leaving the village. Prospective residents typically choose a village based on the geographical location and basic financial considerations such as the upfront and ongoing costs.

The decision to move into a retirement village is often a lifestyle choice based on the sense of community, safety and security, increased access to support services, and reduced maintenance these properties offer. The lower entry cost, community lifestyle and access to a range of other onsite facilities makes retirement village living an attractive proposition for many prospective residents seeking to downsize or transition to a low maintenance lifestyle.

In addition to the upfront costs, which may be in the form of a purchase price, entry fee, or a 'loan', residents contribute to the running of the village through recurrent fees. Recurrent fees are usually charged weekly or monthly, and cover shared expenses such as council rates, insurances and the upkeep of communal spaces and facilities. Residents may also choose to individually contract with the operator for additional options or services, such as parking, meals or housekeeping.

1.1.2 Retirement villages offer a range of contractual options

Although a retirement village contract provides a resident with a 'right to occupy' premises usually for a long period of time, purchasing a right to occupy a unit in a retirement village it is not like buying a house. There are different types of tenure and contracts available that provide varying levels of services and offer different financial arrangements.

Types of tenure can include long or short-term leaseholds, buying into a strata, community or company title scheme, and loan/licence arrangements. Many rights and obligations of the resident and operator vary according to the contractual arrangement.

A loan-licence arrangement is a common agreement offered by the not-for-profit sector. It gives the resident the 'licence' to occupy the unit following the payment of an ingoing contribution to the village. Leasehold arrangements (typically a 99 year 'lifetime' lease) are commonly offered by the for-profit sector. Depending on the agreement, a resident may also be entitled to a share of the

capital gain (or loss) based on the difference between the price paid by the outgoing and the incoming resident for a particular unit.

1.1.3 Retirement villages in NSW and sector trends

There are currently 653 retirement villages run by around 267 operators registered in NSW.¹ According to industry data, villages in NSW and the ACT are home to over 55,000 residents with an average age on entry of 75 years, and an average resident age of 80 years. Residents live in a retirement village for an average of seven years. Around 65% of current residents are women and 35% are men, with 57% of units occupied by a single resident.²

Retirement villages are one of the housing options available to address the accommodation and care needs of an ageing population. The NSW population aged over 65 is on the increase, with modelling showing that this demographic is expected to make up a quarter of the population in NSW by the year 2056.³

While most villages are open and promoted to the 'over 55's' market the average age of a resident is much older, at 80 years. This highlights the need for villages to consider the changing demographic of residents and their needs and to deliver solutions for residents ageing in place.

Retirement village locations mirror the general population spread with many retirement villages located in the Sydney metropolitan area, and major coastal and regional areas. Based on the sample of respondents to the Property Council Retirement Census, the sector is made up of not-for-profit operators (around 36%) and for-profit operators (around 64%).⁴ Figure 1.1.3 portrays the number of retirement villages across the regions of NSW, with further detail provided in Appendix 4.

Under the *Retirement Villages Act 1999* (the Act) land used for a retirement village must be registered with Registrar-General. Basic registration information such as the name, address and website of the retirement village is published on a public register on the NSW Fair Trading website.⁵

The main source of data on retirement village sector trends is an annual census and report into the sector commissioned by the Property Council, a peak industry body.

¹ NSW Fair Trading, *NSW retirement village register*, retrieved on 7 December 2017 from data.nsw.gov.au/data/dataset/nsw-retirement-villages-register

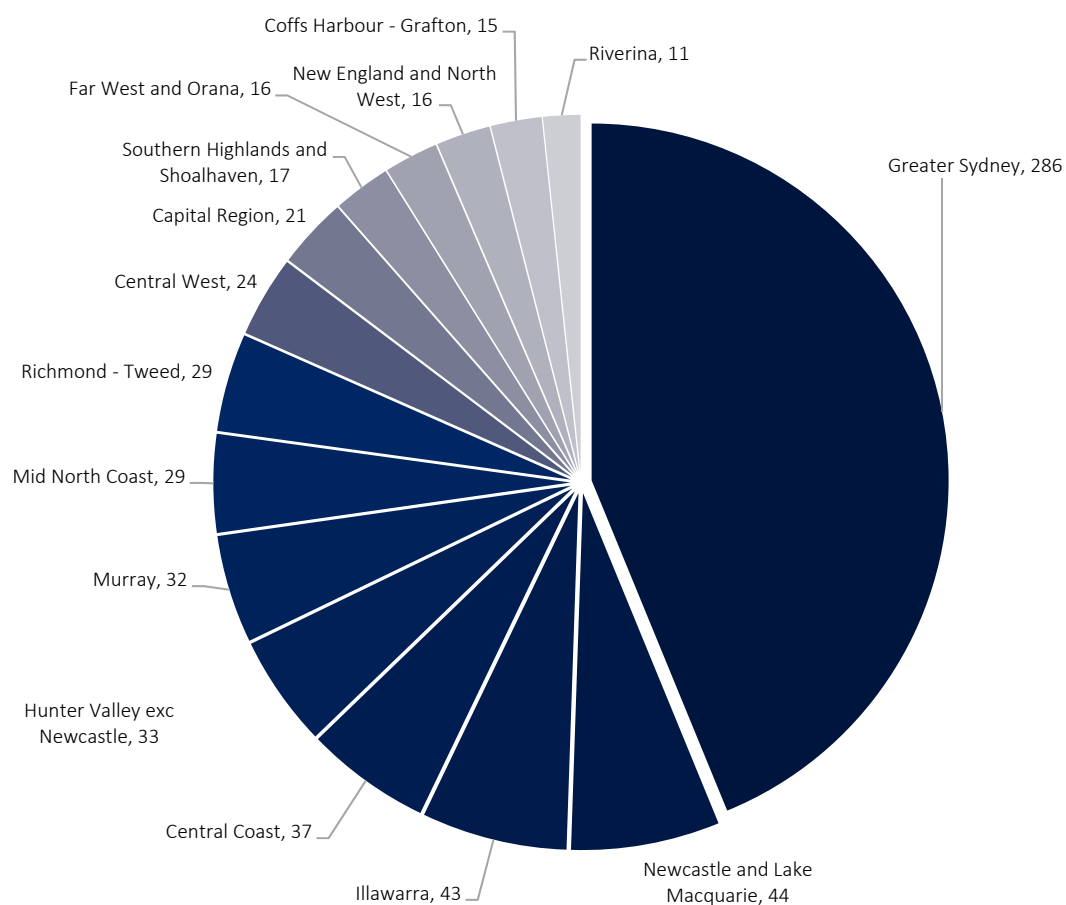
² Property Council, *Retirement Census 2017*, Pg 3, retrieved on 21 November 2017 from www.retirementliving.org.au

³ NSW Intergenerational Report, NSW Treasury, retrieved 21 November 2017 from www.treasury.nsw.gov.au

⁴ Property Council, *Retirement Census 2017*, Pg 1, retrieved on 21 November 2017 from www.retirementliving.org.au

⁵ NSW Fair Trading, *NSW retirement village register*, retrieved on 7 December 2017 from data.nsw.gov.au/data/dataset/nsw-retirement-villages-register

Figure 1.1.3: Retirement Villages in NSW



1.2 Scope of the Inquiry

1.2.1 Terms of Reference

On the 30 July 2017, the Minister for Innovation and Better Regulation, Matt Kean, and the Minister for Ageing, Tanya Davies announced The NSW Government's Four-Point Plan for the retirement village sector. Part of this plan included commissioning an independently chaired Inquiry into the sector.

Kathryn Greiner AO was commissioned to lead the Inquiry supported by a Secretariat from the Department of Finance, Services and Innovation. The Terms of Reference set out the scope of the Inquiry, to review concerns about the fairness and transparency of business practices of retirement villages in NSW, including:

- transparency and honesty of marketing activities
- clarity of fees and contractual rights and obligations for prospective residents and their families
- suitability and fairness of village maintenance and operational practices to maintain resident safety

- availability and cost-effectiveness of dispute resolution mechanisms
- fairness of arrangements to levy maintenance fees to maintain the village and address building defects

The scope of the Inquiry included reviewing the regulatory framework to identify potential amendments that may be made to the *Retirement Villages Act 1999* and the *Retirement Villages Regulation 2017* and considering opportunities to improve Fair Trading's administrative and operational practices.

Submissions to the Inquiry that have been determined to contain a specific complaint about an operator have been referred to NSW Fair Trading for investigation. Issues raised in these submissions were still considered as part of the Inquiry's broad review of the sector.

The Chair of the Inquiry was required to deliver a report to the Minister for Innovation and Better Regulation by 15 December 2017.

The full Terms of Reference are provided at Appendix 1.

1.3 Approach to developing this report

1.3.1 Evidence base

The Inquiry's findings and recommendations are primarily informed by consultation with key stakeholders in the retirement village sector and submissions made by members of the public in response to the Terms of Reference. The Inquiry also reviewed several contracts, disclosure statements, and departure fee estimates. The Inquiry also reviewed relevant provisions of the legislation based on the key issues raised in submissions and consulted NSW Fair Trading legal services.

The Inquiry consulted with other jurisdictions of Australia and New Zealand to understand different approaches to the regulatory framework for retirement villages, including the New Zealand Ministry of Business, Innovation and Employment, NSW Fair Trading, Consumer and Business Services, South Australia; NSW Planning and Environment, and Consumer Affairs Victoria.

The NSW Civil and Administrative Tribunal (NCAT) and the NSW Law Society were also consulted.

Key data and supplementary information was provided to the Inquiry by NSW Fair Trading, the Seniors Rights Service, the Retirement Villages Residents Association, NSW Civil and Administrative Tribunal, the Property Council, Leading Age Services Australia and The Landings Retirement Village.

1.3.2 Public consultation period

The views of residents, their families and advisors, operators and village managers on the topics set out in the Terms of Reference were sought through public consultation conducted from 1 September to 31 October 2017. Members of the community were encouraged to make submissions during the consultation period in one of the following ways:

- attending one of eight face-to-face community consultation forums in metropolitan and regional locations
- completing a user friendly online (or postal) submission form based on the Terms of Reference
- making a written submission by post or email

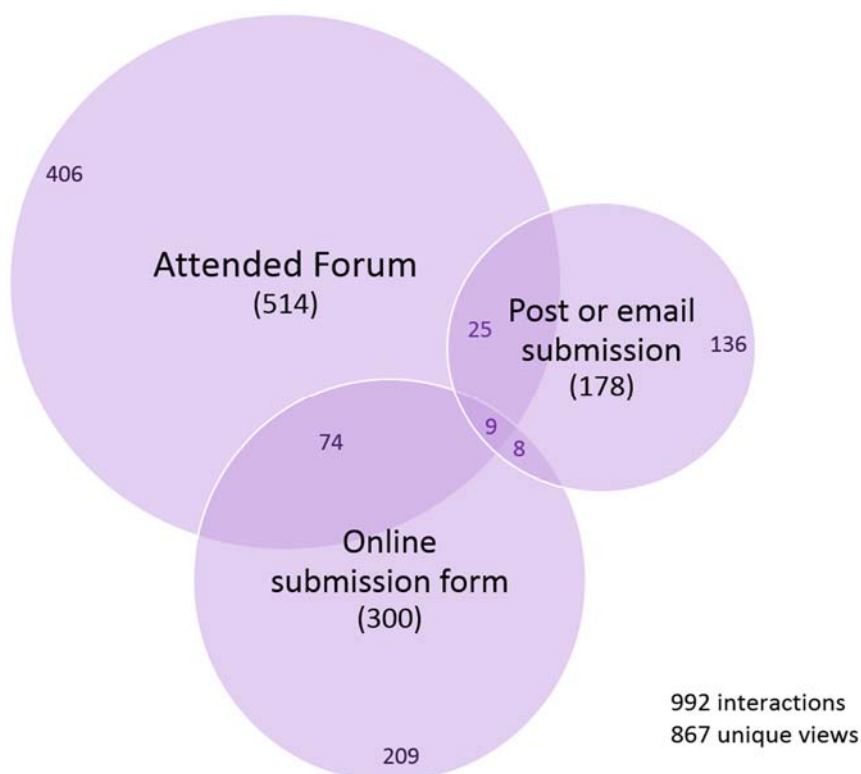
The public consultation period was advertised in local newspapers, state-wide newspapers, the Koori mail, online through seniors and government networks and websites, and in media releases to culturally and linguistically diverse communities.

The Inquiry did not meet with operators or residents at individual retirement villages. Residents were encouraged to participate through one of the public consultation methods. Operators were also encouraged to make a submission or participate in one of the roundtables with operator representatives.

The Inquiry team visited one retirement village in NSW to research the dispute resolution process and develop a case study which is provided at Appendix 9.

The public consultation period resulted in the Inquiry hearing from over 850 members of the community, which is illustrated in Figure 1.3.1 below. Key data summarising the Inquiry's consultation is also provided in Appendix 6.

Figure 1.3.1



1.3.3 Online and written submissions

The Inquiry's findings were primarily informed by 300 individual responses to the online submission form and 178 written submissions from individuals. The key issues raised in the online submissions are provided at Appendix 5. An electronic copy of the submission form template is available on the Fair Trading website.

Several Residents Committees made submissions, and several submissions reflected a group of residents at a single village. Over 70 individual retirement villages, spanning at least 40 unique operators from the for-profit and not-for-profit sector were referenced in submissions. Residents were not required to state the name of the operator or their village.

The online submission form was developed as an easy-to-use convenient alternative to a written submission that could be completed in around half an hour. It contained a series of up to 15 questions based on the Terms of Reference of the Inquiry and provided the Inquiry with a comprehensive response from many residents and their representatives. These useful and specific insights are referred to throughout this report and contribute towards the Inquiry's findings.

1.3.4 Community forums

A series of eight community forums were held in Ballina, Hornsby, Newcastle, Parramatta, Port Macquarie, Sydney, Wagga Wagga and Wollongong during October 2017. These locations were selected based on their geographic proximity to a high proportion of retirement villages located throughout the state.

The community forums were designed to provide a supportive setting for residents to share their views on retirement village living. The Inquiry Chair heard firsthand about the experiences of residents, and in many cases, their families. Families are often left to deal with matters as residents age, or when the resident departs the village for any reason. In total, the Inquiry heard from 514 attendees including:

- current, former and prospective residents
- family and community members
- village management and staff
- members of parliament
- local council employees
- an auditor

A standard format at each forum was followed to facilitate discussion of the topics set out in the Terms of Reference. Common issues were identified across all the forums. A summary of the issues raised at each forum is available from the Fair Trading website.

1.3.5 Consultation with key stakeholders in the sector

The Chair led three roundtables with peak resident and operator organisations to discuss the issues set out in the Terms of Reference, and to provide key stakeholders in the sector with an opportunity to comment on the preliminary findings of the Inquiry.

2 Legislative framework in NSW

2.1 Overview of legislation relating to retirement villages

The principal legislation applying to retirement villages in NSW is the *Retirement Villages Act 1999* (the Act) and the Retirement Villages Regulation 2017 (the Regulation).

The Act replaced the *Retirement Villages Act 1989* and the *Retirement Village Industry Code of Practice 1995*. The code was consolidated into a Retirement Villages Act and Regulation containing clear requirements to provide greater certainty for consumers and industry.⁶ Since its commencement in 1999, there have been several changes to the Act including the introduction of a standard form contract that came into effect in 2013. A comprehensive review of the Act has not been conducted for over 10 years.

The Retirement Villages Regulation 2017 replaced the Retirement Villages Regulation 2009 which was repealed on 1 September 2017 (under the *Subordinate Legislation Act 1989*). Key changes included requiring copies of a village's insurance policy documents to be available to residents, requiring a standard fees and charges table, and average resident comparison figure to be included in the disclosure statement, allowing for matters such as smoking to be considered in village rules, requiring clearer information in budgets around head office expenses, as well as other changes.

Other NSW and Commonwealth legislation that relates to retirement villages include:

- *Australian Consumer Law (Schedule 2 of Competition and Consumer Act 2010)* – applies nationally and in all states and territories to businesses and consumers, and covers matters such as advertising and promotion, as well as national unfair contract terms law covering standard form consumer and small business contracts.
- *Strata Schemes Management Act 2015* – applies to retirement villages set up as a strata schemes through owners corporations, and sets out the obligations and responsibilities of owners corporations within retirement villages, including matters such as managing the finances of the strata scheme and keeping accounts and records.
- *Civil and Administrative Tribunal Act 2013* – applies to residents and operators in accordance with *Retirement Villages Act 1999*, and sets out the process for resolving certain disputes between residents and operators.
- *Fair Trading Act 1987* – applies to residents and operators as it relates to investigations, and sets out the NSW Fair Trading powers to investigate such as obtaining information and documents and the inspection of documents.

⁶ Cork, T & Kelshaw, M 2007, *The Retirement Villages Act 1999: Issues for Practitioners*

2.2 Retirement villages compliance and enforcement authorities

2.2.1 NSW Fair Trading

NSW Fair Trading is the consumer protection authority for retirement villages in NSW. It is responsible for monitoring and enforcing compliance under the Act and Regulation with the power to investigate potential contraventions of the Act by residents and operators of retirement villages. NSW Fair Trading also supports consumer protection by providing information about the rights and responsibilities of residents and operators and retirement village laws to the community through their website, engagement activities and enquiry line.

2.2.2 NSW Civil and Administrative Tribunal

NCAT is an independent decision-making body which hears and decides on applications for orders made under the Act by residents or village operators. The Tribunal has a retirement villages division that specialises in retirement village matters. Decisions of the Tribunal are made according to the law and are binding. There are over 55 matters under the *Retirement Villages Act 1999* that require application to NCAT for determination.

Matters heard by NCAT relate to disputes between retirement village owners or operators and one or more residents that may require interpretation of the law and a decision under the Act. Disputes can relate to village contracts, capital maintenance and replacement, recurrent charges, annual budgets and accounts, security and safety and several other matters relating to retirement village operations.⁷

2.3 The difference between retirement villages and aged care facilities

Retirement villages offer independent living and therefore differ significantly from aged care or nursing home facilities which offer higher care assisted living.

The aged care system caters for Australians aged 65 and over (and Indigenous Australians aged 50 and over) who can no longer live without support in their own home. The eligibility to transfer into aged care is based on an assessment under Commonwealth law.

Importantly, retirement villages are regulated by the state government while the aged care sector is regulated by the federal government under the Commonwealth *Aged Care Act 1997*.

⁷ NSW Civil and Administrative Tribunal, *Retirement Villages*, retrieved on 7 December 2017 from www.ncat.nsw.gov.au/Pages/cc/Divisions/Retirement_villages/Retirement_villages.page.aspx, last updated 4 July 2016

3 Marketing activities

3.1 Introduction

The Inquiry was asked to review the extent to which retirement village marketing activities have been and are being conducted honestly, transparently and fairly in NSW.

Responses to the Inquiry on this topic suggest that the marketing of retirement village living is very influential and formative in shaping the expectations of future residents. This underlines the importance of ensuring that marketing materials and supporting claims are accurate and create realistic expectations for prospective residents.

Marketing activities may include material on retirement village websites, brochures for prospective residents, advertisements and sales information provided by operators and their employees.

In conversation with the public, this area of concern was often summed up in responses to the question - “are you satisfied that you are getting what you paid for?” In public forums and direct submissions to the Inquiry, members of the community frequently identified an experience of retirement village marketing activities that did not meet this test.

Of the 286 online submissions from consumers, 179 respondents (or 63%) did not believe that retirement village marketing activities were being conducted honestly, transparently and fairly. This response was one of the more clear areas of dissatisfaction during the Inquiry’s public consultation. In the main, issues fell into two major categories:

- Information about critical terms and conditions as well as financial obligations were incomplete or provided in a way that made it difficult for prospective residents to understand or seek advice from their financial or legal advisor.
- Representations made verbally by sales people, or in brochures and advertisements of facilities and services that were not delivered, or the overall impression created during the marketing pitch did not match reality.

The obligations of operators and their agents in relation to representations made in marketing activities are set out in Part 3 of the *Retirement Villages Act 1999*. These provisions were enacted to address any consumer protection gaps between general provisions of consumer and contract laws and specific practices in the sector. Part 3 requires operators to ensure that prospective residents have access to necessary information to inform their decision making and that key terms of any potential contracts are disclosed in an easy to understand manner through general inquiry documents and disclosure statements.

3.2 Clarity of the product and service being obtained

Across the submissions and community forums, current residents repeatedly referred to entering into a retirement village as an “investment”, much like a contract for a freehold property purchase. This is in contrast with the concept of retirement village living as a lifestyle choice with associated

fees and charges.⁸ “Investor” residents, in turn, stated that they had been surprised by the extent of ongoing fees, significant exit costs and the smaller than expected capital gain in their property ‘sale’. Sales terminology in the sector and the level of understanding of the critical terms and conditions unique to retirement village transactions may contribute to these perceptions.

Although most respondents were not satisfied with marketing activities, 89 of 286 respondents (or 31%) were satisfied, as one resident of two years stated, “I had an interview and emailed over 50 questions and they were all answered honestly.”⁹ Another resident stated, “The operator of our village ensures that marketing materials are updated regularly in consultation with existing residents.”¹⁰

3.2.1 Sales terminology is unclear

Terminology used throughout the marketing process was identified by some respondents as misleading. A frequent example was given where no clear and easily understood differentiation between the class of rights and financial consequences of NRIHs and RIHs was made by the operator or their sales people. The differences between these rights are summarised in Appendix 3.

LASA, a national peak body representing providers of age services across residential care, home care and retirement living raised the need for developing more meaningful terminology and language for the sector through legislative change:¹¹

*[LASA] Members have voiced their concern over the terminology or language of the legislation and how this inappropriate terminology leads to misunderstanding by potential and current residents. Quite simply the words do not explain their meaning.*¹²

Dr Timothy Kyng and Ms Linda Drake from Macquarie University captured many of the issues raised by residents and their families throughout the public consultation in their research. Their submission was based on an examination of the websites and marketing materials of more than 30 retirement villages in NSW as well as reviewing contracts, holding face-to-face interviews with consumers and attending industry expos and seminars. They argued that the terminology used in marketing is often misleading and factually incorrect, which is likely to create confusion for potential residents. They reported that terms such as ‘purchase’, ‘buy’, ‘sale’, ‘owner’, ‘price’ and ‘price guide’ were incorrectly used by operators in relation to leasehold contracts. These terms imply ownership of a dwelling while leasehold rights only confer the right to occupy a dwelling, and has different financial implications.¹³

One retirement village resident outlined his concerns about the potential for marketing activities to mislead prospective residents:

⁸ This terminology is used across all consumer guidance material from NSW Fair Trading, for example: “Moving into a retirement village is an important financial decision and lifestyle choice” from NSW Fair Trading retirement villages webpage, accessed 21 November 2017 from www.fairtrading.nsw.gov.au

⁹ J. Lewis, *Submission*, 23 September 2017

¹⁰ S. Sarlos, *Submission*, 16 October 2017

¹¹ LASA, *Submission*, 7 November 2017

¹² *Ibid*

¹³ Kyng, T & Drake, L (Macquarie University), *Submission*, 31 October 2017

This concept of "buying" into the Village and ultimately "selling" your property is constantly reinforced and this is where the real problem comes about. Incoming residents are also confused by the fact that the amount they are asked to hand out to enter the Village is to be loaned to the Village owner (a deed of loan is entered into) for an extended period at NO interest.... In a Leasehold Village there are no sales, only termination of leases and the establishment of new ones.¹⁴

Submissions from the Property Council and operators such as Aveo, showed awareness from industry to improve the consumer knowledge of key contract terms and the nature of retirement village arrangements.¹⁵ Anglicare Sydney also provided the practical example of a short-animated video that they provide through their website and play at all village open days to describe their village fee structure.¹⁶

3.2.2 Critical terms and conditions

Many residents stated that they were unaware of the scale of the financial commitments associated with entering a retirement village and the nature and extent of the rights and services that they are purchasing under the agreement.

A substantial number of residents stated that they were not given enough information throughout the marketing process to be fully aware of the fees associated with exiting a village. Many reported that the way they are currently disclosed makes it difficult for prospective residents to understand or seek advice from their financial or legal advisor. The way capital gains and losses are applied when the term of residency ends was one such example.¹⁷

Another example was given of a shopper asking a salesperson if there were any fees beyond entry and ongoing fees, to which they were told no. When the shopper persisted and asked what happens when a resident leaves, the salesperson offered that the operator would also keep a 30% exit fee.¹⁸ Other statements from consumers made to the Inquiry included:

- *I feel that the exit fees are not transparent enough and vary even in the same villages.¹⁹*
- *Some marketing and sales material is either confusing or inaccurate. For example: ... additional and un-disclosed fees on exit.²⁰*
- *Lack of information i.e. the small print on entrance and particularly exit fees, ongoing fees and extras.²¹*
- *They only highlight the attractions. Downplay the downsides like exit fees, [and] rules [and] regulations.²²*

¹⁴ N. Green, *Submission*, 2 November 2017

¹⁵ Property Council, *Submission*, 9 November 2017; Aveo, *Submission*, 8 November 2017

¹⁶ Anglicare Sydney, *Submission*, 30 October 2017

¹⁷ Kyng, T & Drake, L (Macquarie University), *Submission*, 31 October 2017

¹⁸ *Ibid*

¹⁹ K. Jordan, *Submission*, 29 September 2017

²⁰ G. Herrett, *Submission*, 13 October 2017

²¹ M. Grubb, *Submission*, 23 October 2017

²² P. Kiss, *Submission*, 23 October 2017

- *Exit fees not explained properly. We actually lose a considerable amount of money. Can't afford to move out no warning about how much we actually lose if we want to move. Monthly fees go up greater than the CPI.*²³

For those aware of exit fees, many reported that it was difficult to find clear information about how they were calculated, the interaction with any capital gains and a reliable estimate of the quantum of the fee. The difference between an exit fee charged against the entry payment or the payment made on re-sale can have a significant effect on the calculation of the fee and this may not be readily understood by a prospective resident.

3.3 Accuracy and transparency of marketing and sales material

By their nature, representations made in marketing materials and by salespeople are delivered in a less formal manner than mandatory disclosure documents or contracts. Given the complexity of many of the arrangements to enter retirement villages, consumers have indicated that these interactions not only provide important context to their decisions, but can be determinative for prospective village residents.

3.3.1 Promises made but not delivered

One of the biggest concerns raised by current residents was explicit promises made in marketing materials or by salespeople that were not delivered once they had entered a village. This concern is further complicated for residents by the fact that proving non-compliance can be difficult, especially where representations are made verbally and not documented. The issues spanned representations about:

- The responsibility for certain costs relating to maintenance (such as gardening, external painting, window cleaning, council and water fees) and how much these would increase over time
- Facilities/infrastructure that were advertised/offered but not built or delivered (examples included a community centre, walkways, spas, parking spaces, solar panels and boat ramps)
- Amenities and services advertised that were not delivered (examples included bus services, a 24-hour village manager and maintenance services such as window cleaning and gardening)
- Facilities not being maintained as expected based on advertisements and representations in marketing materials, both in relation to the standard and frequency of upkeep (an example was given of a promise that common outdoor areas of a village were to be cleaned three times a year, which dropped to two, one and then to zero times a year) and building defects not declared or remedied.

Uniting, a national operator of retirement villages, suggested that a prescribed document be introduced to form part of, or accompany, a village contract to capture any key representations that the resident is relying upon when entering a village.²⁴ This would be similar to provisions in the

²³ S. Kirkman, *Submission*, 30 October 2017

²⁴ Uniting, *Submission*, 31 October 2017

Retail Leases Act 1994 where a landlord and tenant set out key terms and any representations, warranties or undertakings relied upon in respect of the premises or the business to be conducted on the premises. Additionally, the tenant discloses whether they have received all prescribed documents and whether they have sought independent legal advice.²⁵ This is one example of a practice that could be implemented by operators to ensure clarity and accountability for consumers for representations made outside of the contract and disclosure documents.²⁶

3.3.2 Overall impressions of promotion and marketing of retirement villages

The Inquiry heard from some residents that advertising materials focussed only on the positives and contained insufficient information to adequately set consumers expectations of the realities of living in a retirement village. One written submission from a woman looking for a retirement village for her father said:

*Very rarely did the people shown on the brochures match the level of dependency of the real residents. When a place has 80% of people with walkers or walking sticks there is a need for a greater level of care and support than shown in the brochure. There didn't seem to be a connection between the active fit looking people in the brochure and what we actually saw.*²⁷

There was a concern raised at most community forums that retirement villages are pitched as 'active communities' with young and fit residents, when in the average age of residents in villages is considerably older, at 80 years old. These details can be an important factor in the decisions made by prospective residents. In the forums, some current residents stated if they had known this before they moved in, they would have waited until they were older to enter.

3.4 Sales process when exiting the village

While marketing activities occur prior to entry of the village for prospective residents, sales activities are also relevant to outgoing residents exiting the village. Concerns centred around transparency, fairness and the level of independence of the operator from the sale process when the buyer is both the appointed sales agent (or an affiliated entity) and the operator. One respondent explained that the sales process gives rise to an imbalanced bargaining position between the outgoing resident and the operator, because a resident may want to exit quickly, and minimise liability for levies and other costs, while the operator is not subject to such pressure.²⁸

The concerns raised by residents with regards to the sales process mainly relate to residents who are RIHs. These are typically residents that own a strata lot in the village, or have a registered long-term lease and are entitled to at least 50% of any capital gain. In these circumstances, payments to the outgoing resident are contingent on the value and timing of entering into a contract with the next resident (refer to Appendices 2 and 3 for more information on tenure types).

²⁵ *Retail Leases Act 1994* (NSW), Sch. 2.

²⁶ Note provisions in Retirement Villages Regulation 2017, Schedule 3, s.10 "A village contract must not contain a provision to the effect that the written contract represents the entire agreement between the parties."

²⁷ L. Stone, *Submission*, 13 October 2017

²⁸ Name withheld, *Submission*, 30 October 2017.

3.4.1 Independence and duration of the sales process

Under the Act, a resident who is a RIH is entitled to select an independent real estate agent, although residents often appoint the operator. Multiple reasons were provided as to why in practice it may be difficult for departing residents and their families to appoint an independent real estate agent. One resident stated, “Real estate agents are unfamiliar with RVs and therefore the resident has to use the operator's agent,”²⁹ while another respondent noted that it was hard to get independent opinions because an operator may not cooperate with an external sales agent.

Many residents experienced delays and frustration with the sales process and particularly the marketing activities. For example, the relative of a former resident described a practice where operators may not prioritise marketing vacant units.

My father entered into a 99 year lease at [retirement village] in 2010. In 2012 he needed to go to aged care. The [owner/manager] did not market his property, in fact his unit remained locked on Open Days, prompting me to need to ask for the unit to be opened. Friends who visited the village and enquired after a unit there, were shown the owners vacant units and not those for re-sale including my father's unit. I finally engaged a realtor to endeavour to achieve a sale as my father had passed away in 2014. That realtor attended an Open Day and was told not to approach anyone. I also had placed For Sale signs after nearly 3 years without a sale. These signs were removed within the hour by the owner and staff.³⁰

Multiple residents also commented that certain fees associated with the sale and the relationship with the operator were not made fully clear, for example when a sales commission is paid to an operator buying back a unit or when a related company of the operator is the beneficiary of certain fees.³¹

3.4.2 Transparency of sales price data

Respondents also expressed concern around the transparency of variations to the contract terms and departure fees for the incoming resident, which are set by the operator.³² The fee structure was perceived to be unfair by many given the outgoing resident's limited ability to influence the incoming resident's contract or fee structure, even though they may be financially impacted by this (for example, through the apportionment of capital gain if it is based on the entry payment of the incoming resident).

The Act provides that residents who are unfairly financially disadvantaged by material changes to the contract can apply to NCAT for a determination.³³ However, one resident suggested that this option is time consuming and does not assist those residents moving into a nursing home, suggesting that this situation could be avoided if the resale price was based on the market value instead.³⁴ Other residents suggested that the exit fee calculation should be based on the outgoing resident's ingoing contribution rather than dependent on the next resident's entry payment. This view was often raised at community forums.

²⁹ C. & K. Keun, *Submission*, 29 October 2017

³⁰ L. Smith, *Submission*, 13 October 2017

³¹ B. McBride, *Submission*, 20 September 2017

³² Betterridge, *Submission*, 30 October 2017 and P. Smith, *Submission*, 18 October 2017

³³ *Retirement Villages Act 1999* (NSW), s.180

³⁴ P. Smith, *Submission*, 18 October 2017

3.4.3 Licensing and mandatory training for salespeople

Many submissions referred to the need for salespeople to be licensed or attain minimum training levels to market retirement village properties. Dr Kyng and Ms Drake from Macquarie University as well as COTA NSW proposed mandatory, independent training and certification to “ensure the quality of information provided to intending residents meets a reasonable minimum basic standard”³⁵ and that consumer’s rights are protected.³⁶

Many operators indicated to the Inquiry that they currently ensure all sales staff are adequately licensed and trained for the sector. For example, according to the operator Aveo, “Every Aveo Real Estate sales consultant holds the necessary licensing or certification under the NSW *Property Stock and Business Agents Act 2002*, and participates in the required continuing professional development associated with maintaining the qualification”.³⁷

3.5 Required disclosure and access to information

3.5.1 Non-disclosure of development plans

The consequences of village redevelopment can be significant for residents. The experience of residing near a construction site and in some cases having to move units can be difficult for residents. A smaller cohort of respondents in the public consultation commented that the redevelopment of villages is not adequately disclosed in the sales process or that development plans have changed from what they were initially promised with little to no consultation.

One example was given by a current resident of a retirement village:

*Development plans [were] not disclosed when viewing[the] village, found out immediately after moving in, [about] development that directly affected my unit.*³⁸

One operator submitted that in some cases the completion date of a development “may not be definitively known by a developer until a few weeks prior to practical completion.” They propose amendment to the *Retirement Villages Act 1999* to allow for an operator to state the future size of a village once construction has commenced to overcome this difficulty.³⁹

The future size of the village and the prospect of relocation while redevelopment occurs are likely to be important considerations in choosing a village, along with information about a resident’s right to leave the village, relocate and pay exit fees under the contract should this eventuate.

3.5.2 Mandatory disclosure documents

Throughout the public consultation, residents emphasised the importance of being provided with contracts and disclosure documents early to understand the product and to conduct due diligence on their prospective living arrangements. Under the Act, a general inquiry document and disclosure

³⁵ Kyng, T & Drake, L (Macquarie University), *Submission*, 31 October 2017

³⁶ COTA NSW, *Submission*, 9 November 2017

³⁷ Aveo, *Submission*, 8 November 2017

³⁸ J. Halstead, *Submission*, 27 October 2017

³⁹ Uniting, *Submission*, 31 October 2017

statement are required to be provided to prospective residents on request or at prescribed times in the agreement process.

General inquiry document

Since 1 October 2013, operators must provide a general inquiry document to any prospective resident or their agent within 14 days of a request.⁴⁰ The document contains basic information about the village that is prescribed by the Regulation including:

- type of tenure available
- any accreditation the village has
- makeup of village (e.g. number of units, number of beds in each)
- asking price to enter village and the cost of recurrent charges
- whether residents pay a departure fee and share in capital gains
- any village facilities available and information on village rules.

Disclosure statement

A disclosure statement contains more specific information about a premise than the general inquiry document. It includes information about the village and its current and planned facilities as well as a breakdown of standard fees and charges including certain financial information and conditions of the contract. The disclosure statement forms part of the agreement and can be relied on by the resident, and appended to the contract that may be signed.

Operators are required to provide a prospective resident with a disclosure statement at least 14 days prior to entering into a contract with a resident. Operators must provide a prospective resident (or their agent) with a disclosure statement within 14 days of them expressing an interest in a specific premise, or after they have requested one.⁴¹

Documents available for inspection

Operators are also required to make available for inspection other information such as copies of proposed annual budgets and approved annual budgets, audited accounts and examples of all village contracts an incoming resident may need to enter.⁴² These documents are required to be provided for inspection free of charge.⁴³

3.6 Key findings

Based on the weight of evidence, including the high proportion of residents who have raised concerns over existing market practices, the Inquiry finds the following:

3.6.1 There are multiple recent initiatives which appear to be improving transparency around the costs of retirement village living for prospective residents

There were 50 out of 88 respondents (57%) on post-2013 contracts that consider marketing activities were not being conducted honestly, transparently and fairly compared to 70 out of 114

⁴⁰ *Retirement Villages Act 1999* (NSW), s.18

⁴¹ *Ibid* s.18.

⁴² *Ibid*, s.20

⁴³ *Ibid*, s.197

respondents (61%) on pre-2013 contracts. This suggests that the mandatory disclosure regime introduced in 2013 contributes somewhat towards residents' overall perceptions of marketing activities and that it has improved transparency.

Opportunities for the prospective resident to compare different village contracts and fee options are increasing with the Retirement Villages Calculator introduced in 2017 and the introduction of an 'average resident comparison figure' in 2018. These initiatives help the consumer to 'shop around' and compare the full cost of retirement living. Increased disclosure and information provided up-front can better inform the consumer's decision before entering into a retirement village contract. Both initiatives should improve the clarity of fees and charges for residents prior to entering into the village contract to better enable comparison and inform consumer choice.

It is not clear to what extent the general inquiry document is sufficiently informative to a prospective resident as it is intended to be an early guide to the village. The document does not contain details on financial calculations relevant to the advertised fees which residents have indicated should more prominently feature in marketing activities.

COTA NSW made several recommendations to improve the clarity and usefulness of the mandatory disclosure documents, suggesting that "[t]he most important information – the type of tenure the person is leasing or buying"⁴⁴ should be provided in the general inquiry document and made more prominent in the disclosure statement as well as requiring that both documents use standardised language with the contract and are provided when a prospective resident first visits the village. COTA stated that this will ensure consumers are better informed about the range of charges and obligations before deciding to make a move.

3.6.2 Critical terms and conditions, particularly exit fees and tenure options, should be more prominently disclosed up-front during the marketing phase

There is an appetite for more information on, and transparency of residence rights, exit fees, maintenance fees and capital gains liabilities earlier and more clearly in the marketing process.

The way village properties are advertised has a strong impact on a resident's expectations of the financial implications of moving into a retirement village. Where key terms are not adequately explained or are in 'legalese', consumers are not sufficiently informed about the nature of their purchase. Transparency in pricing is an important principle in the purchase of goods and/or services. A key provision in the *Competition and Consumer Act*⁴⁵ requires that the total minimum price payable for goods or services be included in the advertised price. This means that any mandatory or unavoidable fees need to be advertised upfront to avoid a practice known as drip pricing. A more thorough application of this principle to fees associated with retirement village living is likely to increase transparency over fees and enable consumers to make a more informed decision.

More information about planned redevelopment of the village should be provided. Specific concerns relating to village redevelopment appear to stem from a range of factors. This includes related requirements in the *Retirement Villages Act 1999* and the Regulation preventing

⁴⁴ COTA NSW, *Submission*, 9 November 2017

⁴⁵ *Competition and Consumer Act 2010* (Cth), Sch. 2, s.48

representations by operators relating to future village size unless construction has begun and a completion date known⁴⁶, operators changing plans based on market conditions, inadequate customer communication on the part of the operator or simply non-compliance with the sections of the disclosure document that specifically relate to disclosure about future village development.⁴⁷

3.6.3 Terminology is used inconsistently in sales activities and this leads to confusion about the nature of the product and the essential differences between rights and responsibilities associated with different tenure arrangements

The Inquiry finds that the information provided in advertising and marketing activities is inconsistent and in many cases may not be clear or informative enough to help consumers understand their retirement living options. The wide range of financial and legal arrangements created under retirement village contracts are considered to be unfamiliar, complex, and confusing for consumers. Appendices 2 and 3 provides a summary of the important differences between the rights and responsibilities of different tenure types that are specific to the retirement village sector and legislation. The use of imprecise and common terminology between each of the different offerings exacerbates this confusion.

The language used in the retirement village sector is akin to the language used in the real estate sector. This has the potential to mislead residents, because the rights and responsibilities of a resident and the financial implications significantly differ. A resident 'buys' a right to occupy a premise and a lease may be 'resold' upon exit. In most cases, throughout the term of residency the operator is the 'owner.' Additionally, the term 'lease' in a retirement village contract has different expectations than it does in the rental market where the owner pays for all the maintenance.

3.6.4 There are multiple sources of regulation covering sales and marketing conduct and representations that apply to the retirement village sector

Many sales agents appointed by the operator will hold a real estate licence

The requirements of the *Property, Stock and Business Agents Act 2002* (PSBA Act) will apply when the operator of a retirement village is appointed as a selling agent for a resident with a registered interest,⁴⁸ but there are currently no licensing or training requirements for operators or their employees who market their own property.

A licenced agent is prohibited from publishing any statements in relation to the sale or lease of the that are materially false, misleading or deceptive, whether they are aware of this or not. Real estate agents are also in breach of the PSBA Act if their concealment of a material fact or a statement, representation or promise made by them that is false, misleading or deceptive, leads someone to enter into a contract.

⁴⁶ Prohibition in promotional material for "any estimation of the future size of the village except in respect of development where construction is underway and a completion date is known" in the Retirement Villages Regulation 2017, clause 10(c) and the requirement to make available for prospective residents and their agents, copies of "the terms of the development consent, if any, for the village, but only if: (i) construction of the village is not complete, or (ii) it is a condition of the development consent that a particular service or facility be provided for the life of the village", *Retirement Villages Act 1999* (NSW), s.20 (h).

⁴⁷ Retirement Villages Regulation 2017, Sch. 1, Part 2, Disclosure statement which provides the following disclosure requirements "Is the village fully or partially completed, or still to be built? If the village is only partially completed or still to be built give particulars of all proposed stages, including the estimated date of completion, the number of premises and whether development consent has been obtained".

⁴⁸ *Retirement Villages Act 1999* (NSW), s.168(1)

Given that real estate agents have a fundamental fiduciary duty to their client, there is the potential for a conflict of interest if they are employed by the operator, or an affiliated business.

Australian Consumer Law applies to the retirement village sector

There are a broad range of consumer protections for marketing activities under the ACL in the *Competition and Consumer Act 2010*. Relevant protections for residents under the ACL include a general prohibition, on misleading or deceptive conduct.⁴⁹ This includes failing to disclose relevant information, and promises made relating to the village agreement. The ACL also prohibits unconscionable conduct,⁵⁰ which includes conduct, considered in its context not simply as unjust, but deemed especially harsh or oppressive. One current resident made the following observation from his experiences in the sector,

There is a lack an understanding by operators of their obligations regarding quality and defects in retirement living products, and their need to comply with the Australian Consumer Law (ACL) Consumer Guarantees.

Equally, consumers are unclear of their rights as Customers purchasing retirement living products, and the protection available under the ACL Consumer Guarantees.

Confusion in this area is often exacerbated by consumers being directed to the Retirement Villages Act regarding any village issue, yet The Act does not discuss or reference the ACL Consumer Guarantees.⁵¹

Retirement Village legislation specifically provides for marketing practices

The *Retirement Villages Act 1999* explicitly prohibits representations including making statements that are knowingly inconsistent with terms provided in the disclosure document and promoting facilities or services that are not or will not be provided.⁵² A breach of these requirements comes with penalties under the Act, in addition to residents being able to apply to NCAT for compensation for the service or facility not being provided or made available.

3.6.5 Greater transparency of industry practices relating to the sales process is required to ensure a fair process for outgoing residents

Transparency around the sale of a unit in the retirement village sector can be complicated by the fact that in some circumstances, the operator can be the owner, the 'buyer', and the 'selling agent' in relation to the transaction. Operators may undertake 'remarketing activities' on behalf of the outgoing resident if they are appointed as the sales agent.

The Act does not provide detail on the expected timeframe for the village unit to be sold, the extent of marketing activities that should be undertaken and disclosure on commissions paid to the operator in this circumstance. For RIH, the resale value affects the departure fee calculation and the capital gain. For NRIH the resale value affects the capital gain calculation only. It is a matter of fairness that this process is made clearer.

⁴⁹ *Competition and Consumer Act 2010* (Cth), Schedule 2, s.18

⁵⁰ *Ibid*, Sch. 2, s.20

⁵¹ Name withheld, *Submission*, 14 November 2017

⁵² *Retirement Villages Act 1999* (NSW), s.17

Residents also gave examples of seeking information from operators about the value of offers made on the unit, with limited access to an independent valuation to be able to compare the estimate provided by operator. Compared to other real estate transactions there is less market information available so it is harder for current and prospective residents to gauge whether they are getting value for money in relation to the sale of a retirement village unit.

3.7 Recommendations

Marketing materials and representations from salespeople are the starting point for residents when thinking about moving into a retirement village. These interactions and materials set the tone and expectation for the product that is being offered. It is a fundamental matter of fairness that the promotional material and the conduct of operators is transparent and does not misinform or confuse consumers before they choose to enter into a retirement village agreement.

There is a need for more information, education and training in the sector more broadly. The financial implications of each tenure type, the rights and limitations associated with each and how these differ from a typical rental agreement, leasehold or strata purchase should be highlighted during the marketing phase to enable consumers to make a sufficiently informed decision.

Recommendation 1: Consider amendments to the *Retirement Villages Act 1999* (NSW) to strengthen consumer protections and transparency around marketing practices

3.7.1 Set a minimum standard for the remarketing process

The operator's responsibilities and obligations in relation to remarketing the unit where they are appointed the sales agent by the outgoing resident should be specifically provided for in legislation to ensure fairness. Operators should be required to provide residents with a regular report on activities undertaken (not just on request) to support any marketing fees paid, and match the level of marketing of vacant units for outgoing residents with new units advertised at the same time. Access to historical sales price data should also be considered.

For example, in New Zealand, if the operator is in charge of selling the premises, they are required to provide monthly updates to the outgoing resident on the sales process.⁵³ In Queensland, outgoing residents are able to ask the operator for a report outlining any sales enquiries, the steps they are taking to promote the premises, as well as how many other premises in the village are currently being marketed, including details on their price and how long they have been on the market.⁵⁴

3.7.2 Consider clarifying terminology used in the marketing and sales/relicensing process

The specific terminology used when marketing different tenure types within a retirement village is likely to shape the perception of an incoming resident. Given the concerns raised about the inconsistent use of terminology through the sales/relicensing process, it is the Inquiry's view that providing clarity on appropriate terminology for specific tenure types could help to alleviate some misconceptions that buying the right to reside in a retirement village is an 'investment.' As such,

⁵³ Retirement Villages Code of Practice 2008, s.51

⁵⁴ *Retirement Villages Act 1999* (Qld), s.65

any review of consumer protections should also consider arrangements with regard to appropriate use of terminology in relation to specific tenure types.

3.7.3 Representations and information about retirement villages

The population at large expects that consumers' rights will be protected by appropriate legislation (e.g. real estate licensing) and that certain standards are met. There are a range of protections under the Act and the ACL, but these could be enhanced.

The Inquiry's review process has not involved a detailed legislative review of the adequacy and interactions between NSW real estate law, contract law, the *Retirement Villages Act 1999* and the ACL. However, given the extent of public and stakeholder concerns about potentially incorrect or misleading representations, the Government should consider a review of the existing legislative framework to see if there are any gaps or issues of overlapping jurisdiction and address any need for specific provisions for the sector in the *Retirement Villages Act 1999*. This might focus on the way in which exit fees are represented to residents, the rights and responsibilities that are specifically related to retirement village tenure as distinct from the real estate sector. Existing consumer protections should be given increased prominence in all guidance material.

Recommendation 2: Improve the up-front disclosure provided to prospective residents to make it simpler to understand the critical terms and conditions. This should be informed by an evaluation of the effectiveness of existing disclosure requirements

3.7.4 The current suite of disclosure documents should be updated

The Inquiry recommends that the up-front disclosure process is improved to better ensure that residents are provided transparent, complete and accurate information about the critical terms and conditions associated with entering into a retirement village at the earliest stage before they have committed to a village and entered into a contract, which is likely to be binding.

The mandatory disclosure regime should be tested to ensure that its form and content satisfies the information needs of residents and can be understood by an ordinary person who does not have knowledge of the sector. Evaluation should consider specifically whether it is readily accessible, provided at the right point in time, complete, adequately discloses fees, easy to read and understand with meaningful terminology, age appropriate, and can enable comparison with other villages. Another important consideration is whether it should be provided on the spot or to residents who are interested in a village or potentially made publicly available on a register.

Without pre-empting the outcome of an evaluation, the Inquiry is of the view that increased focus on the tenure type of the agreement and significant rights and responsibilities that apply to the resident should be considered, along with more information about planned redevelopment and exit fees (refer to Chapter 4). Greater disclosure of a resident's rights and obligations regarding any transition to aged care or higher care may also be appropriate (refer to Chapter 10). The use of the Retirement Villages Calculator⁵⁵ and highlighting the Retirement Village Living Guide should also be specifically considered (refer to Chapter 8).

⁵⁵ NSW Fair Trading website, www.rvcalculator.fairtrading.nsw.gov.au

Exit fees must be clearly disclosed and freely available to enquiring residents and potentially be given an increased focus in marketing activities. Other opportunities to ensure that other marketing collateral (such as brochures, websites, advertising) and communication between sales staff and residents complements information provided in the disclosure documents should be encouraged.

4 Contracts, fees and charges

4.1 Introduction

The Inquiry was asked to review the extent to which retirement village costs, fees and charges and residents' contractual and other rights and obligations are clear and understandable for prospective retirement village residents and their families.

To occupy a place in a retirement village a prospective resident is required to enter into a residence contract, a service contract, or both with the operator.⁵⁶ The contract, along with the Act, governs the arrangement between the village operator and the resident during their time of residency. The fees and charges that a resident is required to pay to enter, live and exit a retirement village are determined by the operator and can vary based on factors such as the type of tenure, whether the resident has a registered interest in the premise and timing of fee payments.

The contract must include the full financial terms and conditions relating to the calculation of fees and charges such as the entry contribution, deferred management fee, capital gain arrangements, and marketing costs. Ensuring a resident's understanding at the time of signing the contract is critical as the decision to move into a retirement village is a significant financial decision.

The Inquiry received feedback based on the experience of current and former residents and their families mainly in relation to three types of arrangements (loan/licence, strata schemes and lease arrangements). Appendix 2 provides a summary of the different tenure types in the retirement village sector. The Inquiry has also reviewed several contracts, contract termination fee estimates and examples of departure fee calculations.

4.2 A retirement village contract is complex

The legislative framework for retirement villages is complex, in part due to the multiple forms of tenure that are available and the interaction of the Act with other applicable legislation. For example, in addition to retirement village legislation, residential tenancy or strata schemes legislation may apply. If the contract provides for the future provision of health care services, Commonwealth aged care legislation may also be relevant. Retirement village transactions and documentation are very different to a standard lease or the purchase of a home. The Law Society explained the complexity of providing advice on a retirement village transaction:

The documentation required by different retirement village operators differs significantly. Solicitors acting in relation to transactions involving different operators are required to carefully scrutinise every term of the documentation and also advise on the particular structure of the transaction. In this way, advice on retirement village documentation is very different from that provided in a standard conveyancing transaction.⁵⁷

The Inquiry heard from many residents who did not fully appreciate the financial implications of contracts they had signed, particularly in relation to the costs of exiting the village. Lengthy

⁵⁶ Retirement Villages Act 1999 (NSW), s.24

⁵⁷ Law Society, Submission, 9 November 2017

contracts were cited by older and newer residents, with complicated terms that were not easy for residents to understand and which could have been simpler and expressed in plain-English.⁵⁸ Multiple prospective residents interested in retirement village living commented that the level of complexity, particularly with regards to exit fees, was a deterrent to proceeding with the contract.⁵⁹

While some respondents stated that the contractual terms and conditions are clear, others expressed concern that certain contractual terms only became clear after they had lived in the village for some time.⁶⁰ One family member of a former resident commented that the documentation was “terribly complicated. lots of reading to do. But the information was all there.”⁶¹

Clarity of resident rights, the operator’s responsibilities, and full and detailed explanations of the different costs appeared to be the main issues that contributed to the level of a resident’s understanding of the contract. This was also the case during the residency, when residents sought further information on the full extent of their contractual fees, charges and obligations.

Another way of looking at retirement village contracts that may help to clarify terminology used and contract documentation is as a lease product. LASA, a peak body representing operators, suggested that the retirement village model could be better understood as a long-term residential lease. This view was put forward based on consultation with 20 consumer, provider and government representatives in the sector:

*Industry, government and consumer parties could consider amending legislation and contracts to reflect this ‘lease-based’ rendering of the contractual arrangements, where appropriate.*⁶²

One operator acknowledged the role of industry to support increased understanding of retirement village contracts by prospective residents:

*We recognise that a number of recent events have drawn to the forefront several areas where the industry needs to do better. In particular, things like transparency and simplicity in contracts and costs, and ensuring that residents are empowered to escalate their concerns.*⁶³

Without a full understanding of the critical terms of the contract, a resident has limited power to negotiate better terms. One way to achieve greater transparency may be to encourage that not only the benefits, but also the key risks of a retirement village contract are communicated.

4.3 The importance of independent legal and financial advice

It was evident from submissions that many residents and operators agreed that prospective residents should seek independent legal and financial advice before signing a contract. One respondent advised that a solicitor independent of the operator’s in-house solicitors, experienced in

⁵⁸ Name withheld, *Submission*, 27 October 2017

⁵⁹ Name withheld, *Submission*, 23 October 2017

⁶⁰ J. Fenton, *Submission*, 27 October 2017

⁶¹ R. Bittar, *Submission*, 29 October 2017

⁶² LASA, *Submission* (Part 2: Current matters for the retirement living industry - paper in advance of the sector meeting with Federal Minister Wyatt on 8 August 2017), 7 November 2017

⁶³ Stockland, *Submission*, 9 November 2017

retirement village laws, nursing home laws and all other laws affecting retirees (e.g. tax) should be consulted before anyone signs a contract.⁶⁴

The Property Council's submission⁶⁵ demonstrated an industry-wide awareness of the importance of encouraging prospective residents to obtain legal advice on the contract, and to share this information with family members and trusted advisors. One operator commented on their own practice:

*Aveo has implemented a requirement that any parties not legally represented confirm in writing that they have made an informed choice to that effect. We are also recommending to all new buyers that they obtain independent financial advice and discuss the proposed acquisition with their family.*⁶⁶

Most residents that attended community forums indicated that they sought legal advice prior to entering into the retirement village contract. Of these residents, some raised concerns about the extent to which they felt they were fully advised of their contractual rights and obligations. One resident commented:

*Exit costs are too complicated and few local solicitors understand the full implications of the contract and disclosure statement let alone be able to explain exit fees.*⁶⁷

One respondent gave an example of a contract term that the resident bears any capital loss (while capital gains are shared with the operator) which was not raised during a solicitor's review of the contract and became apparent only upon exit.⁶⁸ Contract documentation could be enhanced to better enable efficient review by a legal or financial professional to advise on any risks.

The Law Society of New South Wales supports the professional development of solicitors and is preparing targeted continuing professional development that includes practical advice on retirement village contracts to assist solicitors advising clients entering into a retirement village transaction. The Law Society is working with the Elder Law Capacity and Succession Committee to make these sessions available to interested solicitors. The Law Society also provides a free referral service to solicitors with expertise in retirement village sector.

4.4 Feedback on the standard form contract

Responses from residents indicate that the introduction of a standard contract form in NSW in 2013 has improved the clarity of entry costs, ongoing fees, exit costs and resident rights and responsibilities (refer to Appendix 7).⁶⁹ Prior to the introduction of the standard contract, there was little uniformity of contract documentation in the sector, making it hard to compare costs or contracts. The Inquiry reviewed several standard contracts that were around 85 pages in length,

⁶⁴ S. Butler, *Submission*, 22 September 2017

⁶⁵ Property Council, *Submission*, 9 November 2017

⁶⁶ Aveo, *Submission*, 8 November 2017

⁶⁷ D. Swanton, *Submission*, 18 September 2017

⁶⁸ M. McGregor, *Submission*, 23 September 2017; B. Reynolds, *Submission*, 25 September 2017; Name withheld, *Submission*, 20 October 2017

⁶⁹ Online submission form responses demonstrate that a higher proportion of residents on post 2013 contracts found entry costs, ongoing fees, exit fees, maintenance fees and rights and responsibilities easier to understand than residents on pre-2013 (non-standard form) contracts. Refer Appendix 7.

due to the inclusion of village specific terms and conditions in addition to the standard form contract terms.

Several residents specifically commented on the standard form contract providing examples of practices that can undermine its efficacy. One Residents Committee gave the example of a standard form contract with up to 15 standard terms cross referenced to clauses in the additional terms section.⁷⁰ Another resident suggested that a one size fits all approach that requires crossing out inapplicable elements was also confusing.⁷¹

One operator explained that any variation to the standard terms are consolidated in additional terms to the standard contract, and the same topic can be dealt with in up to three different locations within the one contract, causing residents and their lawyers' unnecessary confusion.⁷²

One Residents Committee of a retirement village suggested increasing the regulation of contracts in the sector similar to the approach used in the national retail market where standard terms cannot be materially altered. They argued this level of prescription is appropriate for the retirement village sector because:

There is little or no ability to change contractual terms or providers, as there is in the electricity market where retail services are contestable. There is effectively a monopoly relationship between the village operator and resident. Further, whereas annual payments to an electricity retailer might typically be of the order of \$2,000, the recurrent fees paid by [village] residents are typically seven to eight thousand dollars a year.⁷³

Based on these responses, the way in which standard and non-standard contract information is presented in retirement village contract documentation could be improved.

4.5 Entry payments

It is commonly understood that retirement villages offer an affordable lifestyle choice for the ageing looking to downsize because the entry price is typically around 80% of the median house price in the area.⁷⁴ According to the Act, an ingoing contribution is money payable to the operator to become a resident of the village.⁷⁵ Submissions from several operators indicated that entry payments can vary between \$300,000 to \$1.4 million.⁷⁶ The payment is usually made up-front and might also be called an entry payment.

Of the 286 consumer respondents, around 114 indicated that entry costs were clear and easy to understand (around 69%). Of the residents that found entry costs unclear, multiple residents expressed concern about the transparency of financial terms relating to the ingoing contribution, perceiving it to be an unsecured loan to the village operator, limiting their right to access any refund amount in the event of operator insolvency.⁷⁷

⁷⁰ Name withheld, *Submission*, 23 September 2017

⁷¹ Name withheld, *Submission*, 10 November 2017

⁷² Aveo, *Submission*, 8 November 2017

⁷³ Name withheld, *Submission*, 23 October 2017

⁷⁴ Towart, L.C 2017, *A Comparison of Retirement Village Living with General Residential*, Built Environment Informatics & Innovation Research Centre, University of Technology Sydney

⁷⁵ *Retirement Villages Act 1999* (NSW), s.6

⁷⁶ Sakkara, *Submission*, 8 November 2017; Anglicare, *Submission*, 30 October 2017

⁷⁷ Name withheld, *Submission*, 25 September 2017, Name withheld, *Submission*, 13 September 2017, N. Smith, *Submission*, 3 October 2017

A resident may also be entitled to a partial refund of the ingoing contribution on exiting the village. The Act defines the ingoing contribution as a payment and provides for protection of a NRIH's entitlement to any refund of this amount in the event of operator insolvency.⁷⁸ It is important that the entry payment is understood to be a payment rather than a 'loan' which attracts interest and may be secured or unsecured.

4.6 Exit fees and charges on termination of the contract

Exit fees were consistently raised as a major concern to residents. A retirement village contract sets out the exit fees and other charges that are payable when a resident leaves the village. A departure fee is money payable under the village contract by a former occupant that is usually calculated based on the duration of the residence.⁷⁹

The online submission form included the question "are exit fees clear and easy to understand?" There were 202 respondents to this question including 114 residents on pre-2013 contracts and 88 respondents on post-2013 contracts. For respondents on older contracts, only 38% thought that exit fees were clear and easy to understand. This percentage was higher for residents on newer contracts, with 49% of respondents stating that exit fees are clear and easy to understand. This sentiment was reiterated throughout the Inquiry's consultation with residents.

4.6.1 Departure fee and Deferred Management Fee (DMF)

The DMF or Departure fee is the main payment on exit which is usually expressed as a percentage that accumulates over the period of the resident's occupancy and is often capped at a maximum rate by the operator. A departure fee is to be deducted from the refund of the ingoing contribution, or the proceeds of the sale, payable to the former occupant under the contract.⁸⁰ This structure allows the operator to reduce the ingoing contribution making entry to the village more affordable for prospective residents so that a downsizing resident can reserve a portion of funds for living and lifestyle expenses.

The Act requires the departure fee to be calculated daily (i.e. to reflect any part-year residency) and does not fix a rate. Each operator may charge different departure fee rates that will be set out in the individual contract. Two examples of different calculations are provided below.

Example 1: Outgoing charges include a non-refundable component of 6% of the ingoing contribution, and a departure fee at a rate of 3% per annum for a maximum of 8 years.⁸¹

Example 2: Deferred management fee is multiplied by the entry payment at a rate of 7% after one year, 21% after the next and 35% after three years. For the first 3 years a second percentage also applies.⁸²

Many residents perceived the DMF concept to be unfair⁸³ with multiple submissions citing 'high' departure fees of between 30% to 40%. The main issues raised concerned the amount of the fee,

⁷⁸ *Retirement Villages Act 1999* (NSW), Part 10A

⁷⁹ *Retirement Villages Act 1999* (NSW), s.156

⁸⁰ *Ibid*, s.157

⁸¹ Anglicare, *Submission*, 30 October 2017

⁸² A. Carroll, *Submission*, 28 October 2017

⁸³ Over 20 submissions to the Inquiry referred to unfair exit fees

the complexity of its calculation and transparency around its purpose. As one resident commented “exit fees are not clearly articulated, required a lot of mathematical calculations on my part to understand written examples provided by operator”.⁸⁴

The Senior Rights Service (SRS), who provide advocacy and legal services to retirement village residents, commented on the difference between the departure fee calculation for RIH's and NRIH's:

*The distinction between registered and not registered interest holders to calculate departure fee is unfair and penalising. The departure fee calculation of registered interest holders can be based on the new ingoing contribution of the new resident (sale price). The non-registered interest holder only pays a departure fee percentage on the original ingoing contribution of the former resident/outgoing resident.*⁸⁵

Multiple submissions questioned the purpose of the DMF seeking explanations of the services to which the DMF was apportioned.⁸⁶ Several residents sought further explanation of additional components of the departure fee, such as membership fees.

One operator provided insight into the DMF business model:

*The DMF is generally the only source of income for the operator of the retirement village. From this amount the operator must fund any capital expenditure contributions to the village and meet those costs which we are prohibited from funding through recurrent charges, such as legal costs, sales and marketing costs, as well as operational and corporate overhead costs. Only after these costs have been met through the realisation of the DMF can an operator derive a profit.*⁸⁷

Around 39% (111 of 286 respondents) found the exit fees to be clear and understandable, with some residents suggesting that prospective residents should consider their options further and seek clarity of exit fees at the time of entry.

*I have always understood the rationale and benefits of lower entry costs and clearly defined higher exit fees. It is incumbent on potential residents to do sufficient research across the sector and determine which operator offers the best contract for their needs and circumstances.*⁸⁸

Moving into a retirement village is usually considered a long-term commitment by residents, with leases offered for over 50 years. At every community forum and in submissions, a cohort of residents recounted their dismay when they realised the full impact of exit fees. These residents keenly felt that they would be unable to leave the village if it no longer met their expectations because the high exit fees constrained their ability to move elsewhere. One respondent observed:

Many residents are not concerned when joining the Village with the exit fees. They have been told that they have a home for life and will never have to move. Many, when they

⁸⁴ Name withheld, *Submission*, 13 September 2017

⁸⁵ SRS, *Submission*, 31 October 2017

⁸⁶ Name withheld, *Submission*, 2 October 2017

⁸⁷ Aveo, *Submission*, 8 November 2017

⁸⁸ B. Reynolds, *Submission*, 25 September 2017

realise that what they have been told about the ongoing fees are in excess of what they expected, they become disenchanted and then realise that the exit fees are a barrier to them leaving the Village and continue living in the Village and are unhappy.⁸⁹

Multiple submissions made suggestions to improve the transparency and fairness of departure fees, including setting a maximum departure fee rate that a retirement village can charge on a sliding scale⁹⁰ or that the calculation of the DMF be set out in regulation.⁹¹ Several residents commented on the implications of the exit fees at a time where a resident may be seeking entry to a unit within the same village that offers more care services or transitioning to aged care.⁹²

4.6.2 Capital gain sharing arrangements

In addition to a departure fee, a contract may state that the resident receives for example, 100% of capital gain, or shares 50% with the operator. The Act defines a capital gain to be any increase between the amount that the resident paid for the residence right for the relevant premises and the amount that the next resident pays for a residence right for the same premises, less any costs associated with the subsequent sale or lease of the premises.⁹³

Concerns with the capital gain arrangements centred around the fairness of paying a capital gain amount to the operator in addition to the departure fee and the level of transparency of the calculation. One resident expressed this typical concern:

The taking of 30% of the purchase price as an exit fee is ok but then to expect 50% of any capital gains made is over the top. My concern is that if in 10 years I wish to sell and move out of the retirement village I would not get enough money back to purchase outside the village.⁹⁴

Many registered interest holders expressed concern about the level of transparency where the capital gain and the deferred management fee percentage is calculated based on the next resident's entry payment. The typical example given was that a resident has an expectation of a 100% capital gain during the marketing phase and upon entry, however upon exit the final benefit received is equivalent 65% after the deduction of the DMF.⁹⁵ The potential for the 'resale' process of a unit to take an extended period of time exacerbates this perception of unfairness. One resident observed:

Departure fees frequently calculated based on a % of the ingoing contribution of the next lessee. Dishonesty is evident because, in operators' disclosures and in lease contracts, the operator has promised say 100% of capital gain but then deducts the departure fee % from the capital gain portion of the new ingoing contribution. Their motivation is because legislation requires levies shared according to capital gain sharing % until dwelling released.⁹⁶

⁸⁹ Name withheld, *Submission*, 30 October 2017

⁹⁰ B. Baird, *Submission*, 26 October 2017, P.J. Goodsell, *Submission*, 21 October 2017, Hill & Co Lawyers, *Submission*, 31 October 2017

⁹¹ RVRA, *Submission*, 31 October 2017

⁹² Name withheld, *Submission*, 27 October 2017

⁹³ *Retirement Villages Act 1999* (NSW), s.7A - Fees and charges payable under a village contract are not to be included in the calculation of the capital gain.

⁹⁴ Name withheld, *Submission*, 22 September 2017

⁹⁵ Name withheld, *Submission*, 27 October 2017

⁹⁶ Name withheld, *Submission*, 13 September 2017

The resident's rights and obligations with respect to any improvements are also relevant to the capital gain arrangement. A concern raised in numerous submissions related to the ability for any improvements to the premises paid for by the resident to be considered in the calculation.

There is great inequality and lack of balance between the rights of operators and residents in the calculation of capital gains at termination. My contract allows for a 50/50 share of any capital gain between the operator and myself but any capital loss is to be borne solely by myself. In addition no allowance is made for the written down cost of improvements made by the resident. For example I have invested over \$12,000 dollars in improvements the financial benefits of which will flow only to the operator on sale.⁹⁷

The Inquiry heard from residents and operators on this issue. There are multiple factors to consider when a resident undertakes improvements to the unit, including the potential for increased maintenance costs that may be borne by other residents after departure, the saleability of the unit to prospective residents and whether improvements may be required to be removed on departure.

4.6.3 Other 'exit' fees and charges

There was a mixed level of understanding demonstrated by residents and their families about the full scope of fees that the resident will be likely to pay upon exiting the village, particularly any fees and charges in addition to the DMF. One family member of a departing resident commented that there were multiple extra fees upon departing, such as agency fees and the operator's legal costs, that they were not made aware of until after departing.⁹⁸

Another resident pointed out the importance of transparency of contractual and non-contractual costs associated with the sale of the unit commenting that:

These additional expenses seem to open-ended and entirely at the discretion of the owner/operator. It means that departing residents are vulnerable to financial exploitation.⁹⁹

Some of these charges are likely to relate to the specific contract while others may be better understood in line with the Act. It is important that any such relevant information is clearly communicated to residents when costs are disclosed.

4.6.4 Refurbishment and 'fair wear and tear'

Refurbishment relates to improvement of the premises in excess of that required to reinstate the premises to the condition they were in (fair wear and tear excepted) when the resident moved in.¹⁰⁰ Under the Act, operators may no longer require outgoing residents to pay for refurbishment costs in relation to contracts dated after 1 July 2000 (when section 164 of the Act commenced).¹⁰¹

Many residents were unclear of the expectations with regards to the required work to reinstate the unit to its original condition. One respondent observed that there were varying interpretations of refurbishment and reinstatement in contracts, and that fair wear and tear is not consistently defined

⁹⁷ B. Reynolds, *Submission*, 25 September 2017

⁹⁸ Name withheld, *Submission*, 9 October 2017

⁹⁹ P. Johnson, *Submission*, 14 September 2017

¹⁰⁰ *Retirement Villages Act 1999* (NSW), s.162

¹⁰¹ *Ibid*, s.165

across the sector, suggesting the use of an independent co-assessor to make an assessment.¹⁰² One former resident described their experience:

My contract (of the RV place that I recently resided) said that I would have to pay an exit fee and this was quantified as a percentage of my entry fee and adjusted for time in residence and had a maximum limit. This was quite clear. However, as part of my exit, I was also charged, \$6 thousand for "Reinstatement Work" whose precise description was vaguely documented in my contract. The operator said that this charge was for the completely repainting my unit even though I had only resided in it for 21 months, the paint system was in good condition and prior to my entry, there had been some minor paint touching-up. Also, this charge was to replace the carpet even though the carpet had not been replaced over the life of the unit (i.e. 14 years) and several residents. This amount was a figure determined at the operator's legal department.... and without any consultation to my RV manager and against my protestations. Moreover, complaining by me was ignored by the operator's senior management.¹⁰³

Several submissions said that the process of negotiation with the operator around work to reinstate the unit can delay the time taken to receive the resident's refund.¹⁰⁴ The capital gain arrangement seems to complicate further the incentive for the resident to pay for certain work, with some residents reporting the practice of operators delaying marketing activities until the work is undertaken, or emphasising the potential increase in capital gain as a result of additional work.

4.6.5 Ongoing liability for fees until the 'resale' takes place

The length of time it can take to 'resell' the unit of a departing resident and the potential for the outgoing resident to pay fees until this takes place was considered unfair by many respondents.¹⁰⁵

Under the Act the time that the 'resale' of the unit to another resident or 'buyback' of the unit by the operator can impact the length of time that a former resident is required to pay for departure fees and recurrent charges after they have permanently vacated the premises, as follows:

Departure Fees

- Former occupants that are non-registered interest holders (NRIH) on contracts prior to 1 July 2000 can pay for departure fees accruing for a period of up to six months after permanently vacating the premises.¹⁰⁶
- Former occupants that are registered interest holders (RIH) on contracts prior to 1 July 2000 can pay for departure fees accruing up until the time when a new resident/tenant takes up residence or enters into a contract for the premises, or the operator buys back the premises from the resident.¹⁰⁷

¹⁰² Name withheld, *Submission*, 31 October 2017

¹⁰³ V. Vorobieff, *Submission*, 23 October 2017

¹⁰⁴ Name withheld, *Submission*, 29 September 2017

¹⁰⁵ L. Burgett, *Submission*, 21 October 2017

¹⁰⁶ *Retirement Villages Act 1999* (NSW), s.160

¹⁰⁷ *Retirement Villages Act 1999* (NSW), s.159

- For former occupants on newer contracts (post 1 July 2000) the period over which departure fees can be calculated ceases once they have permanently vacated the premises.¹⁰⁸

Recurrent Charges

- Former occupants that are NRIHs on contracts post 1 July 2000 ('new contracts' under the Act) can pay recurrent charges for up to six weeks after permanently vacating the premises.¹⁰⁹
- Occupants that are RIHs can pay for recurrent charges up until the time when a new resident/tenant takes up residence or enters into a contract for the premises, or the operator buys back the premises from the resident. For the first 6 weeks, the cost is met by the former resident. After that, it's met by the resident and the operator in proportion to any capital gain arrangement set out in the village contract.¹¹⁰

This means that residents may be required to pay ongoing fees for an unspecified period. Several respondents shared their experience of the time taken for the sales process to conclude being over two years.¹¹¹

Before entry to the village I had asked what happens when my father passes away and was told, we buy the unit back in 6 months. It took 4 years 3 months to be sold and the only reason it sold was I had to go to NCAT and then a tribunal hearing.¹¹²

4.7 Village budgets and accounts

When living in a retirement village, residents pay recurrent charges that contribute to the ongoing costs of running a retirement village. Retirement villages are operated on a cost-recovery basis¹¹³ which means that residents pay for maintenance and operational costs (such as the wage of the village manager).

A significant proportion (194 or 68%) of 286 respondents found village budgets not clear and easy to understand. Many residents sought further explanation and substantiation of items included in the village budget. Requests for more clarity centred around:

- The general methodology supporting the budget preparation¹¹⁴
- Retirement village specific costs – the basis of any head office allocations and exclusion of costs relating to co-located facilities such as aged care¹¹⁵
- Insurance cover and delineation of responsibility for the cost of certain policy items¹¹⁶

¹⁰⁸ Retirement Villages Act 1999 (NSW), s.158

¹⁰⁹ Retirement Villages Act 1999 (NSW), s.152

¹¹⁰ Retirement Villages Act 1999 (NSW), s.152

¹¹¹ L. Smith, *Submission*, 10 October 2017; L. Gilks, *Submission*, 25 September 2017

¹¹² L. Smith, *Submission*, 10 October 2017

¹¹³ Aveo, *Submission*, 8 November 2017

¹¹⁴ Name withheld, *Submission*, 16 October 2017

¹¹⁵ Name withheld, *Submission*, 19 October 2017; A. Wright, *Submission*, 3 October 2017

¹¹⁶ Anonymous, *Submission*, 3 October 2017; Name withheld, *Submission*, 26 September 2017

- The independence of the auditor – residents sought input in selection of the auditor of the annual accounts¹¹⁷
- Use of the Capital Works Fund¹¹⁸

The Inquiry heard several examples where a village manager consulted with the Residents Committee to develop the budget. This was one of many examples where the Residents Committee was considered an important conduit for information between village managers and residents.

4.7.1 Access to information about the village budget and proposed costs

Access to information about the budget process is important to residents as they are in most cases, required to approve the budget. The operator must supply residents with a proposed annual village budget each year which itemises the way in which the operator will spend recurrent charges paid by residents during the year.¹¹⁹ Operators must seek the residents' consent of the proposed expenditure if recurrent charges are increased either by more than CPI or more than the fixed formula set out in the village contract.¹²⁰ The operator must also provide quarterly accounts to the Residents Committee or on request of a resident.¹²¹

Disputes around cost allocation are negotiated directly between the residents and operators and an ability to readily understand the budget can empower residents to exercise their right to identify any discrepancies in the costs that are recovered from them on a recurrent basis. The level of detail and accessibility of the budget is a key concern to residents:

Budget papers are very complicated and sometimes require experts to analyse the line items. The RV Act requires the operator to provide the budget 60 days before the financial year starts. And residents have 30 days to consider and give their consent to the operator. The average 75-85 year old residents either do not have the capacity to analyse the budget items which are often lumped into one big category or do not bother to question these items. Residents are entitled to ask reasonable questions in order to consent to the budget (s114). Again, even when they do ask questions residents are having trouble getting the correct information from the operators.¹²²

Many residents experienced delays when requesting access to information regarding the village budget and accounts, and reluctance from the operator to provide information. For instance, one resident stated “it has taken me 4 requests over 4 months to obtain accounts and only finally when I had my financial adviser request the accounts.”¹²³ Transparency around increases in ongoing costs is especially important for residents who may be on a fixed income. Several respondents suggested further regulation of the ongoing costs as another way to increase transparency.¹²⁴

¹¹⁷ R. Fletcher, *Submission*, 19 October 2017; G. Laurance, *Submission*, 29 October 2017; N. Smith, *Submission*, 3 October 2017; J. Burgess, *Submission*, 29 October 2017

¹¹⁸ Name withheld, *Submission*, 30 October 2017

¹¹⁹ *Retirement Villages Act 1999* (NSW), Part 7, Division 5

¹²⁰ *Ibid*, Part 7, Division 4

¹²¹ *Ibid*, s.118 - within 28 days to the Residents Committee, or if more than 28 days has passed, provided on the request of resident within 7 days

¹²² SRS, *Submission*, 31 October 2017

¹²³ C. Halliday, *Submission*, 15 September 2017

¹²⁴ R. Slater, *Submission*, 29 October 2017; P. Edwards, *Submission*, 25 October 2017

Multiple residents commented that they were satisfied with the village operators approach to financial management and their responsiveness. One resident stated:

In my limited experience and certainly of the village I live in everything has been explained and I have not been discouraged from asking questions.¹²⁵

One operator commented that at their village, the approval of the budget by residents is sought each year as a matter of practice whether required each year or not under the legislation.

Anglicare has adopted a policy of allowing residents to vote for recurrent charge increases irrespective of whether or not it is required under legislation. This policy helps empower residents' involvement in Village financial decisions.¹²⁶

Another operator suggested the introduction of a template document which operators who operate more than one village could be required to complete. This would help alleviate concerns around head office cost allocation and help operators implement the new regulation.¹²⁷

4.7.2 The level of independent oversight of the budget process

Under the Act, the village budget must be audited by a qualified auditor.¹²⁸ Where audit fees are paid by the residents of the village, the residents' consent to the auditor's appointment is required as part of the approval of the overall budget, and only if the auditor did not audit the accounts for the previous year. Respondents made suggestions to address their concerns around transparency of the budget. These included requiring the auditor to answer questions from residents around the time of the budget, or that residents become more involved in the selection of an auditor.

4.8 Changes in ownership of the village and redevelopment

4.8.1 Changes in ownership

Multiple residents referred to changes in ownership of the village during their residency. Under the Act, a resident's contract is protected and it remains unchanged when a new operator takes over village operations.¹²⁹ Of the residents that raised this issue, a key concern was the circumstance where a new contract is offered to residents. One example made to the Inquiry suggested that residents may be vulnerable in this situation if they are not fully aware of the potential for the contract to materially change and the need to seek independent advice on the contract, while others in the village may do so. This example underlines the importance of ensuring that residents are aware of their rights and responsibilities when there are planned changes to the village.

Under the Act, an operator must not purport to vary or terminate a village contract and enter into a new contract in relation to the same residential premises, unless the resident who is a party to the contract has obtained a certificate that states the resident received an explanation of the effect of the contract change by a legal practitioner, and appeared to understand it.¹³⁰

¹²⁵ M. Steele, *Submission*, 20 September 2017

¹²⁶ Anglicare, *Submission*, 30 October 2017

¹²⁷ Uniting, *Submission*, 30 October 2017

¹²⁸ *Retirement Villages Act 1999* (NSW), s.118

¹²⁹ *Retirement Villages Act 1999* (NSW), s.40

¹³⁰ *Retirement Villages Act 1999* (NSW), s.29

4.8.2 Redevelopment

Under the Act, an operator may not terminate a contract on the grounds of upgrading the village property or changing its use, without seeking an order from NCAT. This requires the operator to give the resident 12 months' notice and provide alternative accommodation that is acceptable to the resident or reasonably ought to be acceptable to the resident.¹³¹

The Act is less clear on the circumstance where an operator does not propose to terminate a residence contract and construction or renovation may occur while the residents remain and are relocated within the village.

Based on their experience, the Residents Committee of one village identified several concerns experienced by residents:

- The village complex may be moving from low-density to high-rise and no longer meets the residents' expectations
- Residents feel that they are in a difficult position should they wish to exit their village and 'sell' as prospective residents may not want to buy-in to a village that is being redeveloped and secondly, for residents who may have been relying on their estate to finance exit fees, the large exit fee may impact their ability to enter another village
- The time from the announcement of the intention to redevelop to the commencement of construction can be years in duration and this can be a stressful time for residents
- Residents who choose to remain in the village may have health issues that could be exacerbated by construction activities
- Redevelopment may occur even when a promise has been made on entry that there are no plans for redevelopment

4.8.3 Changing tenure types within the village

A number of residents sought greater transparency of the different tenure types available in the village. Concerns were also related to funding arrangements in strata villages, and the level of influence exerted by village managers.¹³² At the Ballina community forum, residents gave an example of the potential for an operator to influence the running of the village by buying back a freehold or strata unit and changing the tenure type to a lease, entitling the operator to voting rights. Residents raised concerns about the fairness of this practice due to the implications on the share of voting rights held by remaining strata owner residents.

4.9 Key findings

4.9.1 There is a broad level of understanding that prospective residents should have a retirement village contract reviewed by a lawyer and/or financial advisor.

Most residents are alert to the need to engage a lawyer and or/financial advisor, and residents should continue to be encouraged to connect with specialists in retirement villages law and contracts. Improving the way in which contracts are set out and financial terms and conditions are explained could make it easier for lawyers and financial advisors to scrutinise critical terms.

¹³¹ *Retirement Villages Act 1999* (NSW), s.136

¹³² M. Wilkinson-Huijsse, *Submission*, 31 October 2017

Consumer guides and required documentation could be further updated to prompt residents to source legal and finance advice early on.

Multiple family members of former residents shared their experience of terminating a contract with a retirement village, highlighting the importance of encouraging family members and advisors to understand retirement village contracts.

Prospective residents considering making the move into a retirement village will benefit from the collective effort of Government and operators to embed an understanding in the community of the need to obtain independent financial and legal advice and to encourage prospective residents to share information with their family and advisors. Continuing professional development of the legal profession and increasing the level of awareness of how to find solicitors that specialise in retirement village legislation would also be beneficial.

4.9.2 The standard form contract has improved the clarity of financial terms and conditions but there is the opportunity for further improvement specifically in relation to the transparency of exit fees.

Exit fees could be made clearer and be easier to understand for prospective residents. The full range of exit fees and their explanation does not appear to be explained in any one single short document for consideration by the resident before or at the time of signing the contract. Given the feedback from residents, it seems that the standard fees and charges disclosure statement does not allow for comprehensive explanation of all cost components and deductions. There are specific financial arrangements that are unique to retirement village contracts such as capital gain, refundable entry payments or 'loans' and the multiple tenure arrangements that increase complexity. These require more specific and detailed explanation.

Although the exit fees are not incurred until the time a resident leaves a village, this can be many years later at a time where a resident may be vulnerable (transitioning to higher care/aged care), and it is often a significant cost. Sometimes it may be family members that are responsible for terminating the contract and they may not be familiar with the details of the exit fee payment, be aware of past communication with the resident about the contract, or have detailed knowledge of a resident's rights and obligations under the legislation.

There is also an opportunity to achieve greater consistency with other jurisdictions in terms of greater upfront disclosure of exit fees. For example, Victoria, Queensland and New Zealand all require examples of the estimated refund for a resident after living in the village for one (Victoria and Queensland only), two, five and 10 years to be included in the upfront disclosure statement. In addition, South Australia and Queensland also have provisions for existing residents, where the operator provides an estimate statement of a resident's exit entitlement if they are considering terminating their right to reside.

4.9.3 The DMF is generally understood but widely considered unfair. Comprehensive explanation of all exit fees can improve transparency.

Although some residents perceive the variable rate of DMF to be unfair, the concept of deferred management fee on-the-whole is understood by residents. However, the DMF is often not the only 'exit fee' payable on exit of a retirement villages and residents are particularly concerned about the

transparency of capital gain arrangements in addition to the DMF, which is usually the second most significant payment to the operator on exit.

The Inquiry reviewed several estimated termination payment statements that included a range of fees in addition to departure fees, such as marketing/sales agent related fees, legal fees, refurbishment and reinstatement costs. Some of these fees can be significant (e.g. between \$10,000-\$50,000). It was not clear from the documentation reviewed by the Inquiry which items were mandatory (under the contract) and which were potentially able to be negotiated between the operator and the resident (e.g. reinstatement and refurbishment work).

4.9.4 The process for exiting the village contract could be improved to reduce complexity and delay, and ensure consistency across all tenure types.

Operator and resident incentives to execute termination of the contract should be aligned and transparency of the sales process should be improved. RIHs can be required to pay for ongoing fees in accordance with any capital gain sharing arrangement until the 'resale' of the unit has occurred. This can be particularly concerning for residents who seek to exit the contract quickly and to their families who may be unfamiliar with retirement village contracts and it should be addressed.

Alignment across all tenure types would also make it simpler for residents to understand their rights and obligations under the contract and requirements could be streamlined. The different arrangements add complexity and increase the need for a resident's legislative rights and obligations to also be explained as part of the departure process.

Consistency with requirements in other jurisdictions on this issue is also desirable. Queensland and South Australia require that operators must buy back the unit after 18 months if it's not sold/relicensed earlier unless it would cause the operator financial hardship (refer Appendix 10).

4.9.5 Greater transparency of the village budget during the residents' occupancy is warranted.

Most of the issues raised by residents stemmed from concerns relating to the funding arrangements for maintenance and scrutiny of the budget for cost allocation towards residents. The Inquiry considers that reforms to clarify and simplify funding arrangements will most effectively address concerns raised about the village budget process. Transparency of the village budget should be maintained wherever costs are recovered from residents.

The budget process and auditor arrangements

The arrangement that the village budget is funded by residents and managed by village managers and operators contributes to resident perceptions that the process lacks independence. The Inquiry is of the view that the approval of the auditor should be required where the cost is paid for by residents (and each year), as resident make-up of the village will change over time and the previous years' audit experience could be considered a factor in this decision.

An auditor independent of the operator may help to build trust with the residents in the accounting process, potentially minimising the need for individual residents to query the accounts. However the appointment of the in-house auditor can be cost-effective due to economies of scale. There do not appear to be impediments within the existing framework restricting residents and operators

from voluntarily agreeing to appoint a nominated auditor where this is desirable to enhance transparency.

Access to information about the budget

Certain documents are required to be provided or made available to residents within certain timeframes. For example, the operator must provide information reasonably requested by the Residents Committee or a resident (if there is no Residents Committee) in relation to the proposed expenditure specified in the budget within 10 business days after the information is required.¹³³ The Retirement Villages Regulation 2017 also sets out matters that must be dealt with in the annual budget, and recent changes have been introduced to improve clarification of head office expenses through itemisation. Information about previous years' village budgets is also required to be provided in the disclosure document.

When a budget requiring residents' approval is not approved, the operator must apply to the Tribunal for a determination.¹³⁴ The Act does not provide for the circumstance where residents may be able to approve some items of expenditure, and not approve certain amounts that may then be disputed. Allowing for partial approval of budget items may also help to narrow the field of disputes.

4.10 Recommendations

The Inquiry considers that greater clarity of exit fees is a priority to enhance residents' understanding of the contract.

The right balance needs to be struck between the level of detail provided in the disclosure document and the contract to ensure that prospective residents are informed of the critical terms and conditions before proceeding to the stage of entering into a contract. By the time the resident is ready to sign a contract, they are somewhat committed to entering the village.

Contract documentation could be improved through consultation with the legal profession and financial advisors ensure efficient and effective review is maximised by the standard-form contract requirements.

4.10.1 Entering the village

The experience of the contract termination process for outgoing residents and their families could be improved with greater explanation of the full range of exit fees.

Recommendation 3: Require that a legally-binding, Exit Fees and Charges Statement is provided to residents early in the process. The statement should set out in plain-English all costs, fees and charges that a resident will likely be required to pay when leaving the village, how they are calculated and an explanation of any relevant resident's rights under the legislation. The statement should include which items are optional and which items are required under the contract

¹³³ Retirement Villages Regulation 2017, cl. 20

¹³⁴ Retirement Villages Act 1999 (NSW), s.115

Standalone *Exit Fees and Charges Statement* as part of the required disclosure regime

A single standalone document that lists the different fee components and provides a plain-English explanation of each of the components would help to increase transparency across the sector specifically in relation to exit fees. The banking industry's Home Loan Fact Sheets, or the insurance and superannuation sector's Product Disclosure Statements, provide simple, clear explanations of the critical terms and conditions in an easy to read format in their documentations. These documents should be used as a guide to developing an approach for the retirement village sector.

Criteria for inclusion in this document to ensure consistency around the description of different fee types and costs specific to the retirement village sector. The document should be short (e.g. a two-page summary) and contain:

- Each fee component that the operator may charge upon termination of the contract and a description of the services/rights provided in return
- Explanation of how the departure fee costs are calculated and the potential deductions from the refundable amount at the end of the contract
- Reference to any applicable legislation or relevant resident rights and obligations in relation to the charge
- A distinction between which fees are mandatory under the contract to be offered and which fees may be optional or subject to change and the key variables

The document should be provided to prospective residents as part of the mandatory disclosure regime so that it can inform a resident's decision to proceed with the contract. It should be tailored to the tenure type and compatible with the Retirement Villages Calculator. The document should not duplicate existing disclosure requirements. For example, it could replace the standard fees and charges table and be able to be issued separately with the same effect. The approach should be informed by any findings of an evaluation of the current disclosure regime (refer to Recommendation 2).

This is considered an improvement on the standard-form contract because it requires all the possible components of the exit fees to be consolidated and summarised in a comprehensive short standalone document that can be referred to by residents, lawyers and financial advisors to understand the full extent of a resident's rights, and critical terms that may apply to resident when exiting a retirement village. It would not replace the need for legal advice and is intended to increase transparency of the most financially significant part of the contract reported by residents—the exit fees.

4.10.2 Living in the village

The average term of a residency is around seven years.¹³⁵ Communication of the exit fees is not a 'set and forget' exercise. Clear and understandable information about the resident's contractual

¹³⁵ Property Council, *Retirement Census 2017*, retrieved on 11 December 2017 from www.retirementliving.org.au/wp-content/uploads/2017/11/127054715_2017-PwC-Property-Co_v10-17.11.09-Final-Web-Version.pdf

rights and obligations is not only important at the time of signing the contract but throughout the term of residency – upon entry, while living in the village, and upon exit.

Recommendation 4: Require operators to provide residents with an opportunity for a regular contract ‘check-up’ during their occupancy, and encourage family members or those holding Power of Attorney to be present

Operators should be required to offer to update residents on their contract at regular intervals

While residents should perform due diligence before entering into a contract, it is important that residents maintain their understanding of the financial obligations and key terms and conditions of the contract over time.

This can help to align expectations between residents and operators about exit fees and key terms and conditions. This can empower residents to discuss the exit process when circumstances change. Families and advisors should be encouraged to participate in these discussions to increase awareness and transparency of the contract termination process which they may be required to execute.

A contract ‘check-up’ should be offered at regular intervals, for example 2 years, 5 years and 10 years. An estimate of the departure fee, and related contractual obligations should form part of the process. The NSW Fair Trading Retirement Villages Calculator should be adapted to support estimating exit payments. This would further support and encourage discussions between residents and operators about individual contracts.

4.10.3 Exiting the village

A maximum timeframe for the termination period of the contract should be introduced. Several issues raised by residents and their families in relation to the sales process could be addressed by providing certainty around the maximum period that the unit can remain unsold, and limiting their liability for ongoing fees and charges. This would provide a level of certainty to residents and their families that are terminating a retirement village contract. It will increase transparency around the sales process and align the operator and the resident’s expectations of the timeframe in which the unit should be marketed and sold. This should address the circumstance where the sales process may be drawn out during a stressful time for residents and their families.

According to the Property Council’s census data, approximately 79% of villages have a buy back policy in place.¹³⁶ This suggests that a similar policy is already in place in most villages. Clarifying the timeframe and application to all operators and types of interest holders would ensure a consistent approach across the sector and increase transparency for the benefit of residents and their families.

¹³⁶ Property Council, *Retirement Census 2017*, retrieved on 11 December 2017 from www.retirementliving.org.au/wp-content/uploads/2017/11/127054715_2017-PwC-Property-Co_v10-17.11.09-Final-Web-Version.pdf

Recommendation 5: Require an operator to buy back the unit after a maximum timeframe from a resident leaving the village that is a registered interest holder

Implement an operator buy-back provision after 6 months in metropolitan areas and 18 months in regional areas

The operator should be required to offer to 'buyback' the premises from the resident after a six-month period. The resident should still have the right not to take this option up if they prefer and be able to negotiate with the operator. This should be implemented at least, for new residents. Operators should be encouraged to offer a buy-back for other residents.

A legislative requirement that an operator must buyback a vacated unit, or accept a surrender of lease within a stipulated period should be implemented for registered interest holders.¹³⁷ This would bring NSW into line with South Australia and Queensland on this issue. This Inquiry suggests a different time line of 6 months in urban areas, extending to 18 months in regional or rural areas. This acknowledges differences in demand and supply in NSW. Operators may apply to Fair Trading for an extension to this timeline, having provided evidence warranting the extension.

¹³⁷ Suggested by the Law Society, *Submission*, 9 November 2017

5 Funding for village maintenance and upgrades

5.1 Introduction

The Inquiry was asked to consider the extent to which there are appropriate protections and fair arrangements with respect to building defects and the levy of fees for maintenance of retirement villages.

This is an issue of great concern amongst retirement village residents. When living in a retirement village residents are required to pay recurrent charges. In most villages, the cost of maintenance and repairs is included in the recurrent charges paid by residents. The Act provides broad definitions that can apply to a range of work that may be carried out at a specific village. The resident's individual contract may also need to be referred to in order to determine responsibility for certain items or costs (refer to Appendix 2).

The resident pays recurrent charges and it is the operator's responsibility to provide information about these charges on an annual basis through the annual budget process. The costs include the expenses to operate the village, and maintenance costs are usually the largest proportion of the budget.

Of the 286 consumer respondents to the online submission form, 194 (or 68%) raised concerns about the funding arrangements for maintenance in retirement villages and 152 (or 53%) of respondents indicated that maintenance fees were not clear and easy to understand. Issues were raised at every community forum, and in most submissions, particularly by residents in leasehold villages. In addition to this, the Inquiry has considered the legislative provisions that govern the issues.

5.2 Definitions of capital maintenance and replacement

Around 20% of submissions referenced the funding arrangements for capital maintenance of a retirement village. Many residents indicated they were unclear about the concepts that are defined under the Act which determine the responsibility for costs associated with the maintenance and replacement of village assets. It was not uncommon for residents to state that they were simply unclear about the extent of their financial responsibility for maintenance costs. One current resident observed that many residents within their village were confused about the distinction and seemed unsure about exactly what the operator was required to pay for.

That there was much room for interpretation was a major concern to residents seeking to understand the costs likely to be recovered from them. One lawyer for a prospective resident suggested that although Tribunal decisions have attempted to resolve this issue it remains unclear.¹³⁸

One operator stated that interpretation of these concepts is a common source of disputes at the village.

¹³⁸ P. Goodsell, *Submission*, 23 October 2017

The proper interpretation of these statutory definitions is a commonly disputed issue between residents and operators. In our experience, differing interpretations of each definition results in us being unable to secure approved annual budgets by resident consent, which resulted in Sakkara having to make ongoing applications to NCAT¹³⁹

At each community forum, residents explained the potential for disputes over who is responsible for day-to-day maintenance items in the village to occur, referring to examples such as the removal or lopping of trees, replacement of broken sections of water mains¹⁴⁰ or other village assets that are not owned by residents e.g. roads or defective paving.¹⁴¹

While most respondents indicated that the costs for maintenance were unclear, nearly half of the consumer respondents did suggest that funding arrangements were clear and easy to understand. One resident gave an example of a maintenance request form system that seemed to work well to ensure timely repairs.

Multiple respondents gave examples of delays to undertake repairs and the level of communication between residents and operators about the responsibility to pay for them. Some residents gave examples of funding repairs themselves:

Fixable by maintenance staff are handled OK, it is very hard to get Management to fund capital repairs and replacements. In order to get a larger job done I have had to pay for 50% or more of the cost myself (e.g. floor repair after rain water damage, replacement of carpets 10 years old and worn).¹⁴²

Suggestions were made by residents that may enhance the understanding of the concepts and distinction between capital maintenance and capital replacement, such as “The ATO rules regarding what is treated as capital and what is treated as maintenance should be applied. There are issues regarding upgrades such as changes in the fire regulations which need resolution.”¹⁴³

5.3 Transparency of budget items allocated towards maintenance

Information to support the classification of maintenance of items was sought by many residents. The importance of clarifying how these distinctions were applied in the annual proposed budget was raised by many residents, particularly to ensure that certain costs were not misallocated in the budget. Many residents sought further information about:

- assurance that the allocation of capital maintenance was correctly applied¹⁴⁴
- quotes for capital maintenance works and line item details to inform the residents consent of the budget¹⁴⁵
- transparent management of the funds for capital maintenance such as the Capital Works Fund

A perceived reluctance to contribute to costs of maintenance, and the level of communication with residents about planned upgrades appeared to augment resident concerns about fairness and

¹³⁹ Sakkara, *Submission*, 8 November 2017

¹⁴⁰ P. Keyes, *Submission*, 30 October 2017

¹⁴¹ J.B. Luscombe, *Submission*, 27 October 2017

¹⁴² R. Halford, *Submission*, 13 October 2017

¹⁴³ P. Smith, *Submission*, 18 October 2017

¹⁴⁴ Name withheld, *Submission*, 17 October 2017.

¹⁴⁵ J. Adamson, *Submission*, 23 October 2017

transparency of the funding arrangements for maintenance in the village. Around 15% of respondents who reported concerns with funding arrangements raised the issue of timeliness. Multiple residents were concerned about the potential for maintenance costs to increase each year with some residents holding the view that any identified maintenance would result in an increase in the annual budget.

One resident commented that the “operator has not been maintaining the village for years, then suddenly decides to renovate and paint the complex and charge this as maintenance costs to residents. [It was] apparent that residents were unaware that these costs would be part of their ongoing fees.”¹⁴⁶

The role of the Residents Committee in the budget process was considered a valuable conduit between management and residents in many cases. The residents of one village commented on the role of the Residents Committee to communicate with management about the costs and negotiation of desirable maintenance work.¹⁴⁷ One resident commented that having a Residents Committee reduced the right of all residents to access supporting documentation.¹⁴⁸

5.4 When to replace rather than repair an asset?

5.4.1 Ambiguity of repair versus replace

Many respondents provided examples to demonstrate the practical difficulty of determining whether an item is a repair or a replacement, considered by many to be “grey areas”. Some examples included replacing parts of equipment, “if a compressor of an air conditioner needs to be replaced is it an item of maintenance or capital replacement? Or if a section of guttering on a roof is rusted out is it a capital replacement or maintenance?”¹⁴⁹ Some residents suggested that there was discretion exercised in determining these allocations that favours the operators.¹⁵⁰

5.4.2 Prolonging repairs of capital items

Residents sought clarity to determine when an item should be repaired rather than replaced, suggesting that the ambiguity of the concepts underpinning the funding arrangement does not incentivise timely replacements or upgrades to the village’s condition. Some residents suggested that this could lead to the practice of transferring of financial responsibility from the operator to the resident. One resident commented:

*Too often operators will do everything possible to keep repairing capital items beyond their useful life in order to refuse to replace them.*¹⁵¹

One example was provided where “an entry gate residents paid repairs on approximately monthly for at least 3 years that was never sturdy enough for the job.”¹⁵²

¹⁴⁶ Name withheld, *Submission*, 13 September 2017

¹⁴⁷ G. Herrett, *Submission*, 13 October 2017

¹⁴⁸ L. Cordingley, *Submission*, 29 September 2017

¹⁴⁹ R. Prindable, *Submission*, 29 September 2017

¹⁵⁰ K. Jordan, *Submission*, 29 September 2017

¹⁵¹ D. Swanton, *Submission*, 18 September 2017

¹⁵² A. Robinson, *Submission*, 13 October 2017

5.4.3 Lack of repair and maintenance schedule

The cost-recovery funding arrangement for maintenance costs in the village has implications for both current and prospective residents. For example, where items in the village are upgraded and improved, the increased costs of maintenance can be passed on to residents. Similarly, because of this funding arrangement residents who buy into a village consider certainty about the plan to maintain the village and the cost of future upgrades to be important. A suggestion was made by one prospective resident that a plan for maintenance and upgrades along with yearly budgeting/costs should form part of the marketing, even for new facilities.

For residents that are living in the village, certainty of the planned maintenance was sought and ongoing communication about future upgrades and maintenance was desirable especially for older villages.¹⁵³ Residents expressed an expectation that the village's condition would be maintained by the operator as well as transparency around the timing of the cost and the correct allocation of any work to be cost-recovered from residents.

5.5 Clarity on the responsibility for maintenance

Most residents were of the view that residents who did not own their premises (non-strata village residents) should not be responsible for the costs of maintaining the operator's assets. This was typically communicated "because all buildings are owned by the operator, not the licensee, capital repairs/maintenance should be borne by the operator along with capital replacement."¹⁵⁴ Multiple residents and the Retirement Villages Residents Association (RVRA), a resident advocacy organisation, referred to a previous review of this issue by Fair Trading:

In 2005, Fair Trading's Review advised Government that maintenance, replacement or improvement of capital items within a village, other than within premises owned by a resident, should be the responsibility of operators. This is in line with the laws applying to landlords of other premises.¹⁵⁵

A proposal that the funding arrangements for maintenance and replacement would be treated in the same way, with costs shared between the residents and each operator as agreed between the two, with no more than 50 per cent being funded by residents was brought forward in the Retirement Villages Act Amendment Bill 2008.¹⁵⁶ However it appears that this proposal was amended during the passage of the Bill because "although this proposal would have removed a major area of conflict it has nevertheless caused concern among some residents."¹⁵⁷

5.5.1 Lease arrangements

For residents under lease agreements, comparisons were often made with the residential tenancy sector and the relationship between a landlord and a tenant with respect to the cost and performance of maintenance and repairs.

¹⁵³ K. Osborne, *Submission*, 27 October 2017

¹⁵⁴ A. Buxton, *Submission*, 6 October 2017

¹⁵⁵ N. Smith, *Submission*, 29 September 2017; and others

¹⁵⁶ L. Burney, Second Reading Speech Legislative Assembly, 26 June 2008

¹⁵⁷ P. Sharpe, Second Reading Speech Legislative Council, 2 December 2008

*As we only LEASE our units the maintenance structure should be the same as applies in the outside world, e.g.: the owner should be responsible for all maintenance, insurance, council rates etc.*¹⁵⁸

The level of complexity was also raised by many respondents, who pointed out that reference to Tribunal decisions, the lease contract and the legislation is required to determine the cost allocation correctly between residents and operators.¹⁵⁹

5.5.2 External painting costs

Around 5% of submissions specifically raised the issue of external painting costs, supporting the view that external painting should be the responsibility of the operator. It was commonly stated that ‘the owner/operator should be paying for village-wide external painting projects as they own all village assets. The owner/operator benefits more than its residents from village upgrades.’¹⁶⁰

Residents expressed frustration with this issue, observing that the terms across the sector are inconsistent, making it difficult to understand and apply to their village. One resident gave the example of their contract stating that the operator would be responsible for external painting and the lessee responsible for internal painting with the position later reversed following an NCAT decision.¹⁶¹

5.6 Responsibility to rectify building defects

Defects were raised in 17 out of 478 online form and written submissions. Of these, nearly all instances related to a single operator. Concerns do not appear to be widespread and submissions relate primarily to disputes over whether a fault is a building and construction defect that should be pursued by the operator under warranty, or a maintenance item funded by residents through recurrent charges.

One resident explained that it was often not clear to what extent the capital maintenance charges may include rectification work for building defects.¹⁶²

*Maintenance funding is a major concern in that there needs to be a clearer definition of what is maintenance and what are construction problems. Fixing basic construction problems should not be part of on-going maintenance. In our case when the issue of fixing a construction issue e.g. upgrading the sound insulating materials between upstairs and downstairs villas, it was deemed to be maintenance and therefore too expensive to be paid from recurrent charges. Another example is rainwater entering the villas causing significant wall and floor damage. This was an on-going problem for several years and was only addressed following a large storm event when an insurance claim was submitted by management. We as residents are now paying for this by way of hugely increased insurance premiums as a result of what can only be seen as a false claim by the operator.*¹⁶³

¹⁵⁸ J. Cooper, *Submission*, 29 September 2017

¹⁵⁹ A. Burgess, *Submission*, 29 September 2017

¹⁶⁰ Name withheld, *Submission*, 29 September 2017

¹⁶¹ C. Weir, *Submission*, 30 October 2017 [waiting to hear back on this]

¹⁶² V. Vorobieff, *Submission*, 27 October 2017

¹⁶³ J. Frewin, *Submission*, 30 October 2017

The Inquiry notes that the process for dealing with defects in a village is not provided for in the retirement villages legislation and it is subject to other applicable legislation.

The RVRA suggested a defects bonds scheme for retirement villages could be introduced similar to that under the strata laws.¹⁶⁴ One operator supports clarity that defects should not be funded through the capital works fund.¹⁶⁵

5.7 Key findings

5.7.1 Apart from the Act there is limited available guidance to help residents, village managers and operators make practical distinctions between the terms ‘capital maintenance’ and ‘capital replacement’ which determine a resident’s responsibility for costs. Therefore, a resident is not easily able to verify whether costs have been correctly allocated to residents rather than the village operator.

The terminology used under the Act seems specific to the retirement village sector and this arguably adds to complexity and seems unnecessary. The language is broad and covers the different circumstances of strata schemes, lease agreements and loan/licence arrangements.

Based on the comments of residents and a review of the relevant provisions and definitions under the Act, the Inquiry is of the view that further explanation of which costs are considered capital maintenance and which costs are considered capital replacement is required. Appendix 8 summarises the existing definitions under the Act relating to capital maintenance and replacement. The definitions are too broad and the ability to apply these concepts to village costs in practice needs to be improved. Ambiguity surrounding these definitions leads to concerns over the fairness and transparency of the budget.

The distinction is left open to interpretation with the resident and operator required to resort to the Tribunal for clarification when there may be disagreement. Updating the definitions to provide more guidance could help to reduce residents’ concerns about the allocation of costs in annual budgets.

Suggestions were made by stakeholders to address the issue, including amending the legislation and providing further guidance and specificity in contracts. The Law Society suggested expanding the regulation to include examples of capital maintenance items.¹⁶⁶ ACSA suggested developing guidelines to explain the difference between repair and replacement.¹⁶⁷

Lendlease note that “NSW is one of the only states which obliges operators to bear the cost of capital replacement works... which is a significant burden.”¹⁶⁸

5.7.2 There is a potential for ambiguity in the definition of capital ‘maintenance’ and ‘replacement’ to create incentives for operators to prolong the repair of a capital item rather than replacing it.

The Inquiry agrees that the distinction between ‘maintenance’ and ‘replacement’ is not sufficiently transparent to residents and reliance on interpretation can give rise to the practice of repairing

¹⁶⁴ RVRA, *Submission*, 31 October 2017. Reference made to the *Strata Schemes Management Act 2015*, s.207

¹⁶⁵ Lendlease, *Submission* 31 October 2017

¹⁶⁶ Law Society, *Submission*, 9 November 2017

¹⁶⁷ ACSA, *Submission*, 13 November 2017

¹⁶⁸ Lendlease, *Submission*, 31 October 2017

village assets multiple times instead of replacing them. There is no requirement under the Act for operators to provide or make available a planned program of maintenance at the village.

5.7.3 There is no requirement for operators to set out a plan for village maintenance and replacement over time.

It is a reasonable expectation that the village will be maintained to a certain standard over time. The Act states that the operator is to maintain each item of capital for which the operator is responsible for in a reasonable condition – considering the age of the item, the prospective life of the item, and the money paid to the operator by the residents under a village contract (including ingoing contributions).¹⁶⁹ More information is sought by residents about the operator's plan to meet its obligations for maintenance under the Act, especially for significant village maintenance items where the cost may be borne by one cohort of residents, such as external painting.

The costs of certain repairs and maintenance approved through the annual budget process is based on acceptance by residents of the costs. This will vary between villages depending on the condition of the village and the collective expectations of residents that change over time.

5.7.4 Funding arrangements in a leasehold village are perceived to be unfair and there is the potential for greater alignment with the residential tenancy sector (where the owner is responsible for the cost of maintaining the property or assets that they own).

The retirement village often invites comparison to the residential tenancy sector, particularly for residents of a leasehold village. The opinion that the operator should maintain assets in a leasehold village such as the repainting of external surfaces is held by many residents and multiple resident advocates. The terminology used under the Act is specific to the retirement village sector and this arguably adds to complexity and seems unnecessary. The language is broad and covers the different circumstances of strata schemes, lease agreements and loan/licence arrangements.

The Act does not encourage the development of a model where the operator may be financially responsible for all maintenance costs. The market should be allowed to respond to the demand for a different approach to these funding arrangements. While alignment with the residential tenancy market could be sought, there are important distinctions between retirement villages and the residential tenancy sector (e.g. a resident pays only for the cost of maintenance rather than market rent).

5.7.5 Disputes relating to defects should be addressed by the operator, not the residents.

The Inquiry is of the view that the operator should not be charging for defects through the maintenance budget recovered from residents or the Capital Works Fund. Consideration should be given to providing clarity in legislation concerning defects, and ensuring that contract terms regarding any defects period are made clear.

¹⁶⁹ *Retirement Villages Act 1999* (NSW), s.93

5.8 Recommendations

Greater transparency including communication around the timing of maintenance, financial apportionment of the costs and the source of funding is required to increase consumer awareness around the cost-recovery process of maintenance while living in a retirement village.

Recommendation 6: Simplify the funding arrangements for maintenance of a retirement village by clarifying the definitions that apply

5.8.1 A retirement village maintenance guide to repairs and replacement should be developed

Practical guidance based on typical examples and different contractual arrangements should be developed by the Government to make it easier for the village manager and resident to allocate and understand cost allocations. The guide should address the items raised during consultation such as external painting and draw from common approaches across industry (e.g. taxation and accounting sector) and from relevant NCAT decisions and case law.

The guide should be enforced under the Act and updated over time as industry practices change. Definitions of 'capital maintenance' and 'capital replacement' should also be clarified in the Act itself to reflect this guidance. Contract terms should be required to be consistent with the guide. The guide would aid compliance and provide a reference point for resolving disputes should they arise. It can also support the allocation of budget costs by reference to an independent approach to the classification of maintenance costs.

The Australian Taxation Office defines repairs as work completed to fix damage or deterioration of a property, for example replacing a part of a damaged fence; maintenance as work completed to prevent deterioration to a property, such as mowing a lawn; and capital improvement as work that improves the condition or value of an item beyond its original state at the time of purchase. Consideration should be given to reviewing the terms used under the Act for consistency with terms used in other related sectors (e.g. building and construction, residential tenancy) and for taxation purposes. Simpler terms could be used while still preserving an arrangement that can be flexibly adapted to the village's specific maintenance needs.

5.8.2 Consideration should be given to reforming the funding arrangements for maintenance

The funding arrangement would be fundamentally simplified if the operator were to be responsible for all maintenance costs in relation to lease agreements.

This model would mean that significant maintenance costs could be recovered from residents over time rather than by a single group of residents (e.g. external painting). Because it would be managed by the operator it would allow operators greater control over planned maintenance work and efficiency in the recovery of costs. Protections under the Act with regards to cost increases in recurrent charges would need to be retained and updated. Further consultation with operators and residents is required as it represents a significant change to the status quo and has financial implications for both the operator and the resident.

Recommendation 7: Require operators to develop an asset register to increase transparency around maintenance of village assets

5.8.3 An asset register that provides residents with a forward plan for village maintenance

An asset register must be established by each retirement village, detailing proposed maintenance and replacement of village infrastructure to increase transparency. The register should contain the useful life of major village assets, identify significant planned maintenance at the village for the next one to three years and provide an estimate of the expected cost. External painting should be one item included in the asset register.

Making this information available to residents would help to make it clearer when an item should be 'replaced' rather than 'repaired' with reference to a pre-established schedule. It could help to manage residents' expectations about the timing of planned maintenance and planned expenditure in relation to significant costs that would be recoverable from resident funds. It may also lead to reduced disputes around budgets and contribute to enhanced transparency of the budget process.

It would also be useful to require that this information is made available for review by prospective residents.

6 Dispute resolution

6.1 Introduction

The Inquiry was asked to review the extent to which retirement village dispute resolution mechanisms are delivering just, quick and cost-effective outcomes for residents and operators.

In NSW, there are three main ways a dispute can be resolved:

- The retirement village's internal dispute resolution procedure
- The NSW Fair Trading complaint process
- The Consumer and Commercial Division of NCAT

The internal policy of a retirement village usually encourages residents to resolve the dispute with village management in the first instance. An operator or resident may apply to NCAT to escalate and resolve a dispute relating to certain matters set out under the Act.¹⁷⁰ At any time, a resident or operator may make an enquiry or complaint to Fair Trading, who can investigate potential breaches of compliance. Residents may also reach out to retirement village specialist advocacy services, such as the SRS, and lawyers who can provide legal advice.

A significant amount of feedback was received from residents and operators who have been through the dispute resolution process. The Inquiry also consulted with NCAT and Fair Trading to better understand how the complaints and Tribunal process operates in practice. Data on the volume and types of complaints and applications received by organisations such as the SRS and RVRA that help residents to resolve disputes was also reviewed. A case study of retirement village dispute resolution was also developed through consultation with The Landings Retirement Village (see Appendix 9 for further details).

6.2 Internal village dispute resolution procedures

The first step that a resident is likely to take to manage a dispute is to approach the village's management or operator directly to raise a concern and try to reach an agreeable solution. Multiple retirement village operators indicated that their villages have a procedure in place for managing disputes with the aim of resolving the issue internally before it is escalated.¹⁷¹

6.2.1 Operator responsiveness is a key concern

Of the 286 online submissions, 66% of respondents stated that they are aware of the dispute resolution processes.

Of those aware of the dispute resolution processes, 60% expressed concerns with how disputes are managed and resolved. In 82% of these online submissions, the main concerns centred on operator responsiveness. This suggests that disputes are often exacerbated when there are

¹⁷⁰ *Retirement Villages Act 1999* (NSW), s.122(1)

¹⁷¹ *Retirement Villages Act 1999* (NSW), s.125 sets out that the Act does not prevent the operator and residents the operator and residents of a retirement village from establishing mechanisms in the village for the purpose of attempting to resolve disputes in the village.

communication delays within villages, both in terms of acknowledging issues and the time taken to communicate actions. Some residents commented that “the operator and management have simply ignored our correspondence.”¹⁷²

Another key theme among resident submissions was the need for more effective internal disputes procedures. Some villages were criticised as being “very slow to respond to complaints”¹⁷³ and therefore frustrating for residents who have made a call for “not only ... an effective dispute resolution process but also a change of culture”¹⁷⁴ in how operators and village managers approach disputes.

The lack of formality and oversight of the internal disputes process of villages was also raised as a concern. A submission on behalf of a Residents Committee discussed that the entire process needs to be regulated by the Government as currently:

*The village’s internal dispute resolution process is vague and in legal terms unenforceable as it requires only that residents should notify the operator to discuss the issue. The Act or Regulations should contain a more practical process similar to the State of Victoria.*¹⁷⁵

A village procedure for disputes is not prescribed under the NSW legislative or regulatory framework, as it is in Victoria and South Australia.¹⁷⁶ However, feedback received from operators is that internal dispute resolution processes are widely incorporated into their operating model. For instance, Lendlease’s submission to the Inquiry stated that the resolution of disputes is primarily encouraged at the village level where possible and appropriate.¹⁷⁷ Alternate forms of resolution are also utilised internally in villages. Uniting stated that they recommend mediation by a Community Justice Centre (for disputes between residents) in the first instance to avoid issues escalating to a NCAT hearing.¹⁷⁸

6.2.2 Features of internal dispute resolution procedures that work well

Of the 286 online respondents, 73 respondents indicated they did not have concerns with the dispute resolution process. A number of comments shed light on what makes the process in certain villages work well. One example was the level of engagement by the Residents Committee, who were active and committed to keeping on top of concerns ensuring that they are quickly resolved with management through regular meetings.¹⁷⁹

In many cases, Residents Committees also provide support to residents through this process by providing information on village specific issues and representation at meetings with management.

¹⁷² A. Burgess, *Submission*, 29 September 2017

¹⁷³ R. Halford, *Submission*, 13 October 2017

¹⁷⁴ G. Laurance, *Submission*, 15 October 2017

¹⁷⁵ Name withheld, *Submission*, 31 October 2017

¹⁷⁶ *Retirement Villages Act 1986* (Vic) s.38E-38H sets out the procedures that villages must have in place for when a resident makes a complaint as well as the requirements for recording and reporting complaints. *Retirement Villages Act 2016* (SA) s.45 provides that the operator of a retirement village must have a written policy in relation to resolution of disputes between the operator and residents of the retirement village and it must be provided on request within 5 business days.

¹⁷⁷ Lendlease, *Submission*, 31 October 2017

¹⁷⁸ Uniting, *Submission*, 31 October 2017

¹⁷⁹ For example: C. Cameron, *Submission*, 30 October 2017

Village management adopting an overt 'open door policy' was also identified by a number of residents as helpful to create opportunities to bring parties together early on in the process.¹⁸⁰

There were varying levels of awareness of the dispute resolution pathway in the village by residents. Some villages were considered to have a very clear procedure which assists residents to know their rights and find out about the pathways available.¹⁸¹ Other respondents commented that although some village managers are very good at resolving disputes, they would also benefit from implementing a formal "written dispute resolution policy [that] should be available so residents know how to proceed."¹⁸²

6.3 The role of Fair Trading in the dispute resolution process

Of the 133 online submissions that confirmed that they had been involved in a dispute, 40% specified that one of their actions taken was to contact Fair Trading. This indicates that Fair Trading is frequently one of the first points of contact when a dispute arises between residents and an operator.

If a potential breach of the *Retirement Villages Act 1999* (NSW) is identified, a resident can lodge a complaint with Fair Trading. Fair Trading can offer to support a resolution process between the resident and operator where both parties volunteer to participate. Fair Trading typically follows up on a complaint by researching relevant legislative provisions and encouraging the parties to negotiate their own agreement. Once an agreement is settled by parties, a Fair Trading Agreement can be requested by either party to reflect the details of the decision reached. If a breach of the legislation is detected, it will be assessed to determine the required enforcement action.

The number of complaints made to Fair Trading about the retirement village sector is relatively small. For the financial year of 2016/17, 61 complaints were lodged.¹⁸³ On average, Fair Trading receives 81 complaints on retirement villages per year with the most prominent issues being chiefly in relation to rights and responsibilities (mostly in terms of budget and maintenance), pricing and charges, and conduct of management.¹⁸⁴ By comparison to the property, tenancy and strata category as a whole which had 4,121 complaints in 2016-17, these figures are relatively low.¹⁸⁵ Larger sectors such as residential tenancy contributes more than 2,500 complaints to the agency per year.¹⁸⁶

The outcomes of these complaints are varied. Over the period of 2012/13 and 2016/17, a redress by Fair Trading was possible and offered in 223 cases, which represents 55% of total complaints. Of these, the redress was accepted by parties 78% of the time, which suggests that complaints for the most part are being effectively resolved by Fair Trading. However, there is still scope to support a greater number of residents.

¹⁸⁰ For example: A. Daniels, *Submission*, 29 September 2017; N. Stumbles, *Submission*, 13 October 2017

¹⁸¹ S. Sarlos, *Submission*, 18 October 2017

¹⁸² J. Fenton, *Submission*, 30 October 2017

¹⁸³ Data provided by Fair Trading on retirement Village complaints and enquiries, 23 October 2017

¹⁸⁴ *Ibid*

¹⁸⁵ NSW Fair Trading 2017, *NSW Fair Trading Year in Review 2016-2017*, p.16

¹⁸⁶ *Ibid*

6.3.1 There are concerns with the limitations of Fair Trading's role to resolve disputes

Residents who have lodged a complaint with Fair Trading have indicated a level of frustration with the limitations of the support that the agency can provide.

One concern reported by residents is that a Fair Trading officer cannot offer legal advice, though it can refer customers to specialist legal organisations where appropriate. Another concern raised is that the outcome of the complaints process is not binding on parties. Fair Trading's approach focuses on trying to resolve complaints by providing information and helping the parties understand the options available. It plays a limited role in enforcing or handling contractual disputes or determining matters of interpretation under the law, as appropriate for an independent regulator.

Mediation is another service administered through Fair Trading under the *Strata Schemes Management Act 2015*, the *Community Land Management Act 1989* and the *Residential (Land Lease) Communities Act 2013*. However, this service is not provided by Fair Trading for the retirement village sector. Residents have expressed frustration on this point:

Experienced Fair Trading officers assist the parties to come to a mutual agreement. In some circumstances, formal mediation may also be offered. With the help of a Fair Trading officer most disputes can be sorted out by the parties involved talking through the issues...If such a process was available for retirement village complaints it would be an excellent first step. This would reduce considerations of legal advice and expense that weigh heavily on residents using the current system where recourse to NCAT is the only alternative.¹⁸⁷

6.4 Resolving disputes through the Tribunal process

Under the NSW retirement villages legislation, when a dispute arises between an operator and residents, the parties can proceed to NCAT to seek an order.¹⁸⁸ NCAT has jurisdiction to hear and determine matters under the Act and the Regulation. There is no monetary limit on NCAT's jurisdiction¹⁸⁹ and there are a range of orders which can be made.¹⁹⁰ Over the last five years, the majority of orders sought related to recurrent charges (26% of all orders on average). This was followed by the payment of money and compensation, and termination and vacant possession made up 20% and 13% of all orders respectively.¹⁹¹

6.4.1 Many residents are hesitant to escalate a dispute to a formal Tribunal

The fundamental concerns raised about the level of operator responsiveness appears to be linked to the fact that if a dispute cannot be resolved internally, residents are then required to take the matter to NCAT. This is perceived as unfair by residents (identified by 73% of respondents that raised concerns with the dispute resolution process).

¹⁸⁷ M. Calder, *Submission*, 22 October 2017

¹⁸⁸ *Retirement Villages Act 1999* (NSW), s.122(1)

¹⁸⁹ *Ibid*, s.127

¹⁹⁰ *Ibid*, s.128

¹⁹¹ Data provided by NCAT on Retirement Village Matters, 10 November 2017

In most cases, residents who lodge applications with NCAT appear to have “exhausted all [other] avenues to resolve problems.”¹⁹² Not many residents appear to feel confident preparing an NCAT application, which is frequently described as being cumbersome and confronting.

Many residents report not having the financial means to engage legal representation, creating what they see as a power imbalance between parties when a matter is brought to NCAT. As one resident summed up, “the system is heavily weighed in favour of the operators with deep pockets and high-powered solicitors.”¹⁹³ This recurring comment suggests that many residents feel they cannot compete with operators. One submission further describes this sentiment by stating that low numbers of retirement village cases that come before NCAT should not be used as evidence for an efficient process, as there are other factors contributing to residents not pursuing their disputes:

*The process is based on the court system. Operators have deep pockets and can afford to pay for the best legal minds. They can afford the travel and attendance costs. They can afford to take a case to appeal. They can afford to take a case to higher courts if necessary. The length of time this all takes is generally not an issue for the operator. Residents simply don't have the means to fund this process. In the twilight of their lives they have neither the time nor the energy to pursue their dispute and simply give up.*¹⁹⁴

A common concern is that there is no other avenue available other than lodging an application with NCAT. This causes apprehension with residents for many reasons. One being that the costs of proceeding with the Tribunal hearing is considered to be greater than the value of the issue being pursued, with some residents stating that the only sensible course of action is to withdraw. At one retirement village, the Residents Committee spent over \$120,000 in legal costs to fund their case which took 17 months to conclude. These costs are augmented through the increasing practice of using lawyers on both sides (refer to case study Appendix 9).

6.4.2 The enforcement of decisions is perceived to be unfair

For disputes that are progressed to NCAT, respondents further commented that the time taken to follow through on a decision once a dispute is settled is uncertain. Respondents noted that operators do not appear to be bound by the findings of NCAT and residents then must take the matter to court to get it enforced. Legal firm Hill & Co Lawyers emphasised the limitations of the current process:

*NCAT is not able to enforce its own judgments where residents obtain awards for compensation or repayment of monies. A resident must take the judgment to the Local Court and register this with the Court if an operator refuses to pay an award and then take separate enforcement action. This causes another layer of bureaucracy and anxiety in the system. There is also no penalty regime that can be imposed if an operator flatly refuses to comply with an NCAT order.*¹⁹⁵

¹⁹² P. Johnson, *Submission*, 29 September 2017

¹⁹³ V. Briggs, *Submission*, 27 October 2017

¹⁹⁴ C & K. Keun, *Submission*, 29 October 2017

¹⁹⁵ Hill & Co Lawyers, *Submission*, 31 October 2017

6.4.3 The existing process can take time to achieve an outcome

According to submissions to the Inquiry, dissatisfaction with the system appears to lie in the timeliness of the process which was a key concern specified in around 56% of online submissions that specified dissatisfaction with the dispute resolution process. According to one resident, “NCAT with its low application cost is wide open to abuse and invariably leads to incredibly slow decisions.”¹⁹⁶

Findings from the Law and Justice Foundation of NSW show that the average (median) time taken from lodgement to the ‘first hearing event’ for retirement village matters was 29 days in 2015, compared to the cumulative average of 19 days for all Consumer and Commercial division matters.¹⁹⁷ Further, the average (median) time from lodgement to finalisation of retirement village matters is 120 days, compared to the Consumer and Commercial division average of 22 days¹⁹⁸. This notably higher number of days for retirement villages is mostly due to a small number of complex matters which took a significantly longer amount of time.¹⁹⁹

Many residents who had been involved with NCAT raised concerns that when orders were made in favour of the residents, the operator would frequently appeal the decision, prolonging the process and creating additional costs for the resident. One submission also considered the broader repercussions on the wellbeing of residents:

*Such litigious behaviour ... also cost residents a considerable amount of extra money in legal advice and representation, to say nothing of its effects on the health of residents, some in their eighties, who took on the job of case managing the actions on behalf of residents. The behaviour of the Operator in this case is contrary to the intent of the Tribunal system and places fair and arbitrated resolutions at the mercy of legal gymnastics.*²⁰⁰

The right to appeal is an important part of the justice system and is available to both parties. However multiple respondents suggested that the prospect of extended litigation and an uncertain outcome is intimidating to residents. As one submission claimed, “operators continually advise residents, if you win, we will take it to a higher court. Very few residents see this as an option.”²⁰¹

6.5 Additional dispute resolution processes

6.5.1 There is demand for an additional dispute resolution pathway within the existing framework

There is overall support by residents, industry and resident advocates for another pathway to resolve disputes in the retirement village sector. This was raised at almost every community forum and in many submissions.

A group of 15 residents at The Landings Retirement Village noted that disputes are inevitable despite the best efforts of all parties and what is required is quick, enforceable resolutions through

¹⁹⁶ D. Roberts, *Submission*, 29 September 2017

¹⁹⁷ Forell, S and Coumarelos, C 2016, Data insights in civil justice: NSW Civil and Administrative Tribunal – Consumer and Commercial Division (NCAT Part 2), Law and Justice Foundation of New South Wales, Sydney, p.66

¹⁹⁸ Ibid, p.68

¹⁹⁹ Ibid, p.67

²⁰⁰ R. Fletcher, *Submission*, 19 October 2017

²⁰¹ Name withheld, *Submission*, 25 October 2017

suitably qualified, independent officers. The key required characteristics in the dispute resolution process highlighted by multiple submissions are the need for timeliness, low costs, the ability to make binding recommendation or decisions, industry expertise, and skill in conflict resolution and mediation. Residents also appeared to be seeking this in a more informal setting than a Tribunal process.

The Property Council supports, through its eight-point plan, the establishment of an independent dispute resolution process for cases that are unable to be solved at a village level. It reasoned that:

*The current system does not meet the requirements of residents or operators. Issues that cannot be solved at a village manager or portfolio level have few alternatives than being escalated to the court system...The Property Council is in favour of a cost-effective and government backed independent dispute resolution process. It would provide residents with an alternative to costly legal proceedings and deliver faster outcomes.*²⁰²

6.5.2 There is broad support for a retirement village ombudsman

The Inquiry heard from many residents that there is a need for a dedicated retirement village dispute resolution body. An ombudsman was recommended in 40 submissions and was raised at most of the community forums. In summary, many residents have emphasised “what we need most is readily available experienced ombudsman who can fairly settle issues promptly and efficiently.”²⁰³ This has been echoed by advocacy organisations such as the RVRA and the SRS which has recommended an “ombudsman be established ... to have powers equivalent to both the Aged Care Commissioner and the NSW Ombudsman, with the aim of facilitating better processes and procedures in [retirement villages]. Sanctions available would include the power to report to Parliament.”²⁰⁴

6.6 Access to legal expertise

Of the 133 online respondents who have been involved in a dispute, the most common nature of these disagreements relates to rights and responsibilities raised in 41% of submissions. The Act sets out a broad framework of rights and responsibilities, and many matters will require reviewing the Act and the individual contract. Legal expertise or services is often required to effectively navigate and resolve disputes.

6.7 Key Findings

6.7.1 There are a considerable number of complaints and enquiries made about retirement village operators across multiple avenues.

While the number of complaints made to Fair Trading is relatively low this does not represent the full extent of complaints in the sector. There are a number of organisations and avenues that residents currently utilise to receive advice or make a complaint about their village. As Fair Trading cannot provide legal advice on matters requiring interpretation of the Act or a resident’s contract, other organisations currently fill this gap in providing legal services.

²⁰² Property Council, *Submission*, 9 November 2017

²⁰³ D. Roberts, *Submission*, 29 September 2017

²⁰⁴ SRS, *Submission*, 31 October 2017

The SRS and the RVRA offer specialist advice and services to assist residents with disputes and enquiries. The SRS is a not-for-profit organisation with specialist aged care advocacy and legal services. It receives financial support from Fair Trading for the retirement village sector. The organisation's Retirement Villages Legal Advice Service provides legal advice and assistance to residents, former residents or their legal representatives in relation to many issues. The RVRA is a not-for-profit association that advocates for and supports residents, including by providing financial assistance to residents involved in cases before NCAT.

With these multiple avenues in mind, the Inquiry has attempted to understand the full picture of disputes in the sector based on the last financial year:

- Fair Trading managed 61 complaints²⁰⁵
- Retirement Village Legal Advocacy Team of the SRS dealt with 346 legal advices, 75 minor legal assistances, took on 14 cases and assisted with 150 enquiries for legal information and referrals.²⁰⁶
- The RVRA made 29 referrals to legal practitioners, 12 referrals made to the SRS, 12 to an auditor, and 11 to Fair Trading in 2017.²⁰⁷
- NCAT received 54 applications to determine retirement village matters²⁰⁸

The level of complaints should be considered in context that there are only around 653 retirement villages in the state, and around 267 individual operators. In this context, the number of complaints is not insubstantial. The potential for a single complaint made to multiple organisations and the circumstance where a resident seeks independent legal advice privately are not reflected in the figures above.

There is also a significant number of enquiries made by residents. Over the last three years 2,340 calls were made to the SRS about the retirement village sector.²⁰⁹ The main types of issues raised with the service are about contracts, exploring options, fees and charges, and reasonable peace and comfort. Over the last three years the RVRA has received 1174 calls for advice and assistance, mainly regarding management, finance, legal matters and budgets.²¹⁰ During the last financial year, almost 400 calls were made to Fair Trading about the retirement village sector. Based on the level of enquiries, there is a need for better information to support residents understand their rights and responsibilities under the Act and to resolve disputes.

6.7.2 There should be another step before matters are escalated to the justice system.

The Inquiry considers that there is a gap in the dispute resolution process for the retirement village sector in NSW. There are a considerable number of disputes in the sector and many residents find the Tribunal process intimidating and may not be prepared to take smaller scale disputes to NCAT. There should be a process for residents to be able to raise a range of disputes that may arise at the village, and perhaps cannot be resolved based on discussion alone with the village manager. It

²⁰⁵ Data provided by Fair Trading on retirement Village complaints and enquiries, 23 October 2017

²⁰⁶ Data provided by SRS on retirement village services, 15 November 2017

²⁰⁷ Data provided by RVRA on retirement village services, 10 November 2017

²⁰⁸ Data provided by NCAT on Retirement Village Matters, 10 November 2017

²⁰⁹ Data provided by SRS on retirement village services, 15 November 2017

²¹⁰ Data provided by RVRA on retirement village services, 10 November 2017

is reasonable that residents should have recourse to an alternative pathway to escalate a dispute, without having to resort to the Tribunal or engaging a solicitor.

Multiple avenues are available to seek formal legal advice and a less formal, independent setting may be more age appropriate

While organisations such as the SRS and RVRA offer free legal services, consultation with stakeholders suggests there is high demand for these services. The Inquiry notes that seeking legal advice in every circumstance may not be necessary. Access to a less formal escalation step that involves a level of independence from the operator may be more appropriate in the first instance. This is especially important given that many village disputes relate to relatively small sums of money, and frequently involve elderly and/or vulnerable people.

Disputes should try to be resolved and addressed early in the dispute process

The Inquiry finds that there is a need for a stronger and clearer step between the internal dispute resolution processes of villages and lodging an application with NCAT, or as the RVRA puts it “there has to be another link in the chain before a dispute reaches NCAT.”²¹¹ NCAT should be an escalation point towards the end of a more comprehensive process. It is the Inquiry’s view that there is a need to introduce an additional avenue at the beginning of the process when a dispute is raised but cannot be resolved within the village.

There are a range of mechanisms that may be appropriate. One model is mediation which is a timely, informal, and cost-effective process and generally satisfaction rates are quite high. The outcome is flexible and voluntary and can be made into an enforceable order if both parties consent. The SRS support such an approach, stating “an arrangement of a mediation to resolve matters before the full application to the tribunal would be a good consideration.”²¹² Mediation is used in other jurisdictions of Australia including South Australia and Queensland.

Conciliation provides similar benefits to mediation as well provides an avenue for a subject matter expert to provide knowledge and options during the proceedings. Consumer Affairs Victoria offers conciliation services for contractual disputes between residents and a retirement village manager. The free service aims to bring both parties to an agreement.

Although many residents support the introduction of an ombudsman, the Inquiry notes that it would not necessarily provide a quick solution to complex problems. Based on a review of submissions, the Inquiry considers that operators and residents are supportive of an industry ombudsman for the purposes of assisting consumers and operators in the sector through training, public education and complaint investigation. To some extent, this role is already fulfilled by Fair Trading. The Inquiry recommends that the services of Fair Trading in this regard be expanded rather than another body being established.

²¹¹ RVRA, *Submission*, 31 October 2017

²¹² SRS, *Submission*, 31 October 2017

6.7.3 The Inquiry finds that NCAT is a fair and cost-effective pathway for residents to receive a final and binding decision.

Retirement villages make up a small proportion of matters heard at NCAT. On average, it considers 79 matters per year relating to retirement villages.²¹³ The fundamental objectives of NCAT is to deliver tribunal services that “resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible.”²¹⁴ Member Charles in the *Alloura* case outlines this aim as well as the procedures of the Tribunal to deliver on these objectives:

*The guiding principle to be applied for practice and procedure in the Tribunal is that of facilitating the just, quick and cheap resolution of the real issues in the proceedings. In doing so, the Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.*²¹⁵

The Inquiry finds that NCAT is effective as a final avenue for retirement villages dispute resolution in NSW. As an alternative to courts, it is a less costly avenue for a final determination. The fees paid by applicants vary by the type of application, and a concession rate is available to those who receive social security benefits, a service pension or who are receiving a grant of legal aid or assistance from a community legal service. There is also scope for the full or partial waiving of fees for special circumstances.

Submissions to the Inquiry did raise issues about the costs of legal proceedings, mostly regarding legal representation. However, in 2015, neither party were represented in 68% of retirement village hearings which supports the objective of NCAT for resolving disputes with less formality of courts.²¹⁶

A key feature of the NCAT system that the Inquiry found to be particularly beneficial for residents is the use of conciliation in resolving disputes. Conciliation is used as a confidential way of bringing the parties together to talk about their dispute and it can help the parties reach a mutually agreed outcome. According to NCAT, retirement village matters are listed in the Consumer and Commercial division so that they can be subject to conciliation before a hearing. Other forms of dispute resolution can also be conducted by members including facilitated settlement discussions and mediation. NCAT have advised the Inquiry that a more integrated model is being worked on to include formal mediation and conciliation.

If a hearing proceeds, the Tribunal Member will decide and make orders, which are legally enforceable and must be complied with. Orders include a timeframe for compliance. Enforcement options are available to parties in instances of non-compliance, including taking a certified copy of the order to a Local or District Court. It should be noted that parties can appeal the decision, both internally to NCAT for questions of law and to the Supreme Court or Court of Appeal. Appealing

²¹³ Data provided by NCAT on Retirement Village Matters, 10 November 2017

²¹⁴ Civil and Administrative Tribunal Act 2013 (NSW), s.3(d)

²¹⁵ *Alloura Waters Retirement Village Residents Committee v Living Choice Australia Pty Ltd* [2014] NSWCATCD 68

²¹⁶ *Forell, S and Coumarelos, C, op. cit.*, p.37

the decision can be a costly process, however NCAT has advised that approximately 5 of 56 NCAT retirement village decisions were appealed in 2016-2017.²¹⁷

6.8 Recommendations

The Inquiry finds that the pathway for resolving disputes should be improved to ensure that residents have access to necessary services and support, appropriate to their age and the retirement village sector.

Recommendation 8: Introduce a mandatory, accessible and independent step into the dispute resolution pathway which is appropriate for elderly residents and encompasses expertise in retirement village legislation

The introduction of a mandatory, accessible and independent step into the dispute resolution process to mutually resolve disputes between the resident and the operator before matters are escalated to NCAT is recommended. The following two options should be specifically considered.

6.8.1 Mediation should be introduced as a mandatory step in the dispute resolution process

Mediation is a timely and cost-effective process where a neutral mediator assists those involved in a dispute to achieve their own settlement after they have made every effort to resolve disputes on their own. When an agreement is reached, the mediator may help with drafting a written agreement and, in certain circumstances, an adjudicator may make the settlement into an enforceable order. Mediation is appropriate for elderly residents as it reduces anxiety or stress compared to adversarial litigation, and address the issue of legal representation with parties not being entitled to be represented unless all the other parties consent.

Mediation managed by Fair Trading escalated beyond the village level

Fair Trading could case manage the complaint when it cannot be resolved at the village level and is escalated to the agency. Fair Trading could expand mediation services provided to the strata sector²¹⁸ to the retirement village sector. This would build on the existing complaints management process of Fair Trading. Operators and residents would be required to participate prior to a matter being escalated to the Tribunal. Specialist expertise such as legal or financial advice, and services for mediation, conciliation or expert decisions, could alternatively be outsourced while Fair Trading provides an end-to-end support service and maintains oversight of the dispute resolution pathway.

Mandatory mediation as part of the village-level dispute resolution procedure.

The same process could be implemented at the village level. That is, before a matter is escalated to the Tribunal system, the village manager and resident have participated in a mediation process that would be organised by the village. The Government would approve mediation services that

²¹⁷ Data provided by NCAT on Retirement Village Matters, 10 November 2017

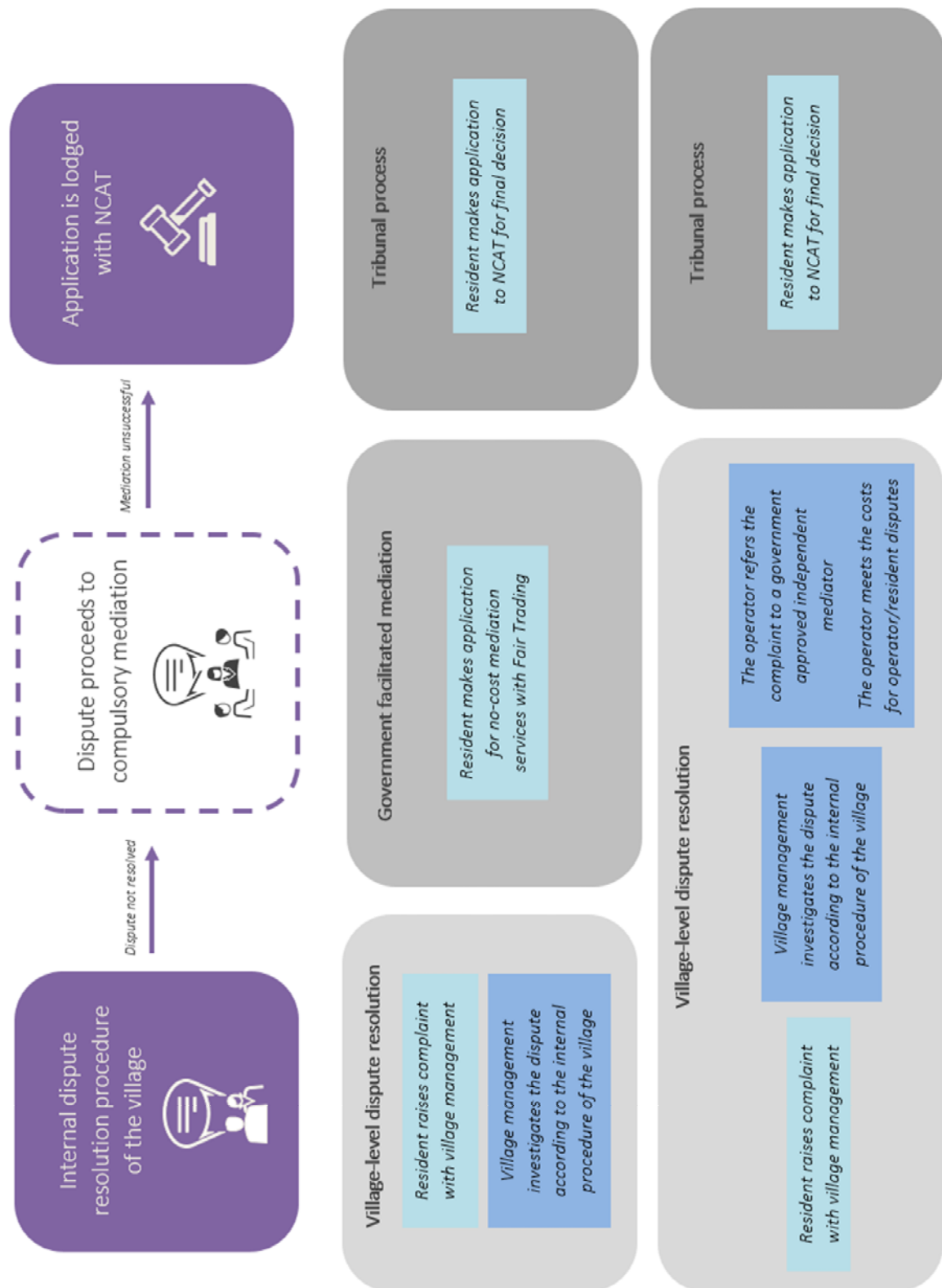
²¹⁸ Mediation is already a no-cost service administered through Fair Trading under the Strata Schemes Management Act 1996, the Community Land Management Act 1989 and the Residential (Land Lease) Communities Act 2013. Mediation is compulsory under legislation before a strata or community scheme matter can be taken to NCAT, with some exceptions.

may be engaged for this purpose, and the cost could be met by the operator for disputes between the operator and residents.

As part of the New Zealand model, when a complaint cannot be resolved internally to the village, the operator must on behalf of the parties refer the complaint to an independent mediator. The mediator must be a member of an alternative dispute resolution agency which is approved by the Government. The operator meets the costs of mediation for disputes between operator and resident. Having a compulsory mediation step at the village level, with mediators approved by the government, should also be considered for NSW.

Two options for mediation are illustrated over the page in figure 6.8.1

Figure 6.8.1



Recommendation 9: Require operators to share information about the dispute resolution process in the village by:

- a) requiring that operators have an internal dispute resolution process in place, and
- b) increasing the obligations of operators to report on disputes to Fair Trading

6.8.2 Require retirement villages to have an internal dispute resolution process

The Inquiry recommends that the *Retirement Villages Act 1999* be amended to require villages to have an internal procedure for when a resident makes a complaint, along with requirements for recording and reporting complaints. This would bring NSW into alignment with other states such as Victoria. It is expected that such a procedure would set out the expected management response timeframe. This would also help to address the concerns raised by residents in relation to the timeliness of operators to resolve disputes.

6.8.3 Increase dispute reporting requirements of operators to Fair Trading

There is a need to enhance the transparency of retirement village operator conduct in relation to how disputes are managed internally by a village. The Inquiry notes that certain details concerning a retirement village's involvement in historical NCAT proceedings and the status of compliance with any outstanding orders is required to be disclosed under the existing disclosure regime. This disclosure could be extended by requiring operators to record and report complaints and increasing Fair Trading's power to collect and publish data on complaints and compliance. This will act as a greater incentive for villages to act in the best interests of residents and increase accountability (refer to Recommendations 13 and 14).

7 Safety and security of the built environment

7.1 Introduction

The Inquiry sought to hear the views of respondents, based on their experience, on whether the built environment of retirement villages is maintained and operated in a manner which is safe for residents.

The safety and security offered by retirement villages is one of the key attractions for prospective residents when deciding to choose this accommodation type. During community forums conducted by the Inquiry, retirement village residents indicated high levels of satisfaction in being part of a community with the associated benefit of knowing that they and their peers were ‘looking out for each other.’²¹⁹

*I've always felt safe and secure here, as the community and my neighbours are just wonderful. The life style and companionship of village life is great, and there is always life around you.*²²⁰

While this peer network promotes a sense of wellbeing, the village operator, management and staff also have responsibilities under the *Retirement Villages Act 1999* to ensure the village is a safe and secure environment for their residents.

Of the 286 consumer submissions made using the online submission form, 54% indicated that in their experience, villages were being maintained and operated in a way that is safe and secure for residents, and 44% did not believe this was the case.

Of the written submissions received by email or post, 29% raised specific issues around the safety and security of villages. Safety issues were also discussed to varying degrees at each of the community forums.

These responses indicate that while the majority of residents are satisfied with the level of safety and security in their village, there is still scope to improve resident wellbeing. Three key areas of concern were identified:

- Safety and maintenance of the built environment
- Design and adaptability of the built environment
- Fire and emergency safety

7.2 Safety and maintenance of the built environment

Analysis of the issues raised in relation to repairs and maintenance affecting safety do not indicate that operators are failing to address critically urgent safety repairs. Rather, the issues raised relate primarily to the timeliness of rectification work to address hazards, such as broken footpaths and

²¹⁹ Submission provided as part of The Landings case study, 23 October 2017

²²⁰ M. Fraser, *Submission*, 27 October 2017

lighting. Whether security protocols are in place and the maintenance of security features such as village entry gates, cameras, and signage were also concerns.

Of the 126 online respondents who indicated their dissatisfaction with safety and security in villages, 41 were specifically concerned about the security of the village. Concerns included the existence of an identification process for visitors and access by the general public.

The effectiveness of identification protocols, particularly in relation to workers or tradespeople carrying out repairs or undertaking building work, was raised repeatedly at the community forums. The submissions suggest that this process is managed very well in some villages, but is problematic in others. Several operators and multiple residents advised they have clear procedures in place to ensure the security of residents at their village.

Concerns were raised about the accessibility of members of the public to enter, drive or walk through villages unchallenged. The presence of security measures such as cameras and security patrols, did not always achieve the desired outcome to address these concerns, due primarily to the maintenance of such measures.

*We have a security gate to the complex but often it is not in working order so anyone can drive through.*²²¹

The smoking policy within villages was raised by several residents during consultation. Residents can address smoking policy in their village rules, and for strata schemes this issue can be decided on and included in the by-laws.

One submission raised the issue of testing and maintenance requirements for the water quality of village pools, and whether they should be considered 'public pools' and therefore subject to compliance with the *Public Health Act 2010*.

7.3 Design and adaptability of the built environment

With the age of the average resident increasing, a number of responses raised concerns about the suitability of village design and its appropriateness to the needs of residents as they age in place. Items such as appropriate external lighting, suitable pathways and kerbing, and the adaptability to enable residents to 'age in place' are all important to residents. Mobility and accessibility is a key factor in enabling residents to remain in their village unit for a longer period. One forum attendee summarised the situation:

*As 'ageing in place' becomes more the norm, it is essential that the design of self-care and supported living units be designed to allow mobility scooter users, wheelchair users and walking frame users to continue to live independently in their homes.*²²²

Operators also recognise the changing needs of their client base, and that issues around design are not limited to new developments, but on renewing current stock to meet the changing needs of their clients. In their submission, Stockland also recognised some of the challenges faced by the operator to adapt the built environment to support residents as they age:

²²¹ J. Gourlay, *Submission*, 27 October 2017

²²² J. Moxon, *Submission*, 21 October 2017

*Resident needs also continue to change and many older villages are no longer meeting the requirements of the current generation, often with large numbers of stairs, inadequate parking and without access to health, community and active lifestyle facilities. This is particularly prevalent in older villages, where resident maintenance costs are generally higher and often increasing as the village ages. Renewing and redeveloping these villages to meet these needs is challenging, for operators and for residents.*²²³

Issues relating to the planning and development of retirement villages were also raised by a number of local councils. The Hills Shire Council and Ku-ring-gai Council submissions both suggested that individual units should be located within reasonable proximity of necessary services.

7.4 Fire and emergency safety

The main concern raised by residents related to fire and emergency procedures. Respondents and forum attendees were keen to understand the protocols involved in an emergency, with inconsistent practices apparent across villages. Residents sought clarity on the role of the village manager in an emergency and the role they themselves are expected to undertake. Residents wanted to be aware of the protocol, specifically to be able to ensure the safety of their less mobile neighbours.

*The village I live in is in a bushland setting and sited adjacent to a Council Parkland that is overgrown. In approximately 11 years of residence in the Village there have been 2 Fire Drills....*²²⁴

Although these issues are significant and were raised at least once at each of the eight forums held, these concerns do not appear to be industry wide. There were also many examples of best practice. In one instance, a village manager advised the Inquiry she initiated a project directly with the Residents Committee to produce (and have them 'star' in), their own safety procedures video. This resource is shown at regular intervals to the residents. Other residents indicated they were satisfied that safety checks were being conducted:

*Regular safety/evacuation drills [conducted] with resident wardens assisting management. Lend Lease have a high regard to safety including contractors on site*²²⁵

Other examples raised related to the requirement under the *Retirement Villages Act 1999* for village operators to have a safety inspection conducted annually, and to make this report available to residents.²²⁶ Responses from residents indicated that compliance with this requirement is inconsistent or that residents are not aware of the operator's compliance obligation and whether it is being met.

²²³ Stockland, *Submission*, 9 November 2017

²²⁴ S. Robertson, *Submission*, 1 November 2017

²²⁵ A. Daniels, *Submission*, 29 September 2017

²²⁶ *Retirement Villages Act 1999* (NSW), s.58A

7.5 Key findings

7.5.1 Delays with undertaking non-critical safety related repairs are usually caused by disputes about the funding.

The *Retirement Villages Act 1999* sets out a number of matters that may be considered urgent or safety related repairs, and empowers residents to undertake or arrange for urgent repairs themselves in instances where the operator fails to act. These items usually relate to significant emergency safety issues, such as water, gas or electricity faults or breakdowns, but also includes any fault or damage that causes the retirement village to be unsafe or insecure²²⁷.

However, the submissions indicated that issues relating to safety related repairs were mostly related to items such as broken footpaths and lighting. Delays by the operator or owners corporations to undertake non-critical repairs are often caused by disputes over which party is responsible to pay for the repair. These issues are addressed at length in the *Funding for village maintenance and upgrades* and *Dispute resolution* sections of this report.

Residents who believe the operator has failed to comply with the *Retirement Villages Act 1999* by failing to mitigate the risk to residents' safety, can choose to apply for an NCAT order to address the repair. Disputes of this nature may benefit from access to an intermediate dispute resolution process prior to undertaking proceedings at NCAT (refer to recommendation 8), or by applying to the regulator instead.

7.5.2 There is the opportunity for Fair Trading to more closely monitor safety reporting compliance.

There is an opportunity for Fair Trading to more closely monitor safety and compliance with this requirement given the apparently low level of awareness and reasonably high level of concerns raised.

Operators are required to undertake an annual safety inspection and prepare an inspection report. This report should be provided to the Residents Committee, and published on a common area notice board. The Inquiry finds that compliance with this requirement appears inconsistent and some residents were unaware of the report. One resident commented:

*I've never heard about an annual safety inspection and what this entails.*²²⁸

It is unclear to the Inquiry whether this is due to the low level of resident awareness, or operator non-compliance.

Information on safety and security form part of the disclosure statement for prospective residents. A range of information must be provided, including whether the unit has security doors and window locks, and whether the village has been the subject of a break-in in the preceding two years. The disclosure document must also include whether the village common areas and the unit are wheelchair accessible. The operator must also include in the disclosure document confirmation that mandatory smoke detectors are fitted, and whether the village has an emergency call system

²²⁷ *Retirement Villages Act 1999* (NSW), s.95

²²⁸ J. Walker, *Submission*, 13 October, 2017

in place for residents. This information is valuable to prospective residents and forms part of the disclosure statement.

The operator is not currently required to keep or report on compliance to either residents or the regulator about safety matters, except for the annual fire safety inspection report, which must be made available to residents and prospective residents. This limits visibility of issues across the sector by regulators and the residents.

7.5.3 There is no clear requirement for water quality testing for village pools.

Retirement villages are not differentiated from private residences under the *Public Health Act 2010*, as it relates to the water quality of communal pools. This may add to the confusion around the required or accepted level of maintenance and testing for village pools.

No specific incidences of health issues arising from swimming pools in villages were reported to the Inquiry. Nonetheless, given the age of current residents and the potential for increased susceptibility and health risks, this issue should be considered further by the Government to ensure that applicable safety standards and requirements are appropriate for the use of village pools by a community of elderly residents.

7.5.4 There are currently no guidelines set out to clarify the minimum industry standards in relation safety or security.

The *Retirement Villages Act 1999* requires operators to provide a reasonably safe and secure²²⁹ environment for residents; however this can be subjective and there can be different expectations between residents and operators about what is reasonable.

Residents can apply to NCAT in instances where they believe that the operator has not complied with their obligations under the *Retirement Villages Act 1999* to provide a safe and secure environment, including mitigating the risk associated with an item requiring repair. This was not raised in the submissions as a resolution option that residents were aware of. However, given other responses on similar issues around disputes, it is likely that many residents may perceive the time and cost associated with getting a minor issue resolved at NCAT as discouraging.

Operators are required to ensure residents are aware of a written emergency plan. However, there is no requirement under the *Retirement Villages Act 1999* for the operator to conduct fire or emergency safety practice drills.

Operator responsibilities under the *Work Health and Safety Act 2011* to manage fire and emergency procedures also vary, depending on the type and use of premises. As an employer, operators would generally also have obligations to develop and implement an emergency safety plan, which must also include 'other persons' in areas deemed to be a workspace. Due to the complexities around the various tenure types and contractual arrangements in villages, there is no single standardised clear requirement across the sector.

In the New Zealand model, operator obligations in relation to Safety and personal security of residents, and Fire protection and emergency management, are clearly defined within the

²²⁹ *Retirement Villages Act 1999* (NSW), s58; s58A

Retirement Village Code of Practice 2008. The provisions in the Code of Practice set down the minimum standard, and are enforceable by residents.

7.5.5 Residents expect that building design and facilities will be adaptable to accommodate them as they age.

The average resident age is currently 80 years. 74% are aged 75 or above and only 3% are under 65. Residents expect that building design and facilities will be adaptable to accommodate them as they age.

The design of the built environment is regulated by planning instruments, and may include the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors SEPP), administered by NSW Planning and Environment and Local Councils.

Developers of villages may elect to lodge their development application under the Seniors SEPP and adhere to its planning and design principles. However, the Inquiry understands that this is not mandatory and is a commercial decision taken by the developer, considered a faster and more predictable way of meeting set criteria. Developments may also be subject to specific conditions as a part of their consent, where building approval is granted subject to particular features or services being provided, or requirements being met. Where services, such as a bus service, form part of the development approval, compliance action against the operator may also be undertaken by the local council.

Residents indicated that the design of their unit and the village impacts the length of time they may comfortably and practically reside in the village. While the market will ultimately determine the most desirable product, planners, developers and operators should proactively consider the needs of their ageing client base, including adaptable options for current residents. Industry is best placed to lead the response to the changing needs of an ageing retirement villages resident demographic.

While operators are recognising the changing needs of their ageing customers, prospective residents should ensure they consider what their changing needs might be as they age, to determine the overall suitability of the unit. Increased community awareness campaigns conducted by Fair Trading may assist residents to consider these factors more closely before choosing a village (refer to Recommendation 15).

7.6 Recommendations

Following consultation and analysis on the issues, the Inquiry recommends clarifying standard safety protocols and increasing reporting requirements. The Inquiry also notes that opportunities should be sought to advocate for suitable design principles to meet the longer-term needs of residents. There are a number of ways that awareness of safety measures could be improved across the sector. The Inquiry has considered several examples of how this could be achieved.

Recommendation 10: Improve the level of awareness of safety and security measures in the sector. Consideration should be given to:

- a) increasing consistency in the standard of practice across the sector
- b) implementing a requirement for regular fire and emergency drills in villages

7.6.1 Increase reporting to the regulator

To improve awareness of safety and security issues across the sector, consideration should be given to requiring operators to report certain information, such as compliance with annual safety inspections, to the regulator. It might also be required that additional records are kept by the operator including the number, nature and resolution of safety related matters, to increase opportunities to monitor compliance and trends in the sector.

Certain reported information could also be used to develop a public register suitable for residents and prospective residents to gain insights into the level of safety and service standards of the operator. Safety and security benefits are one of the main attractions of a retirement village, and this information is likely to be valuable to prospective residents in enabling them to make informed decisions about their retirement village of choice.

7.6.2 Safety procedures could be enshrined in a Code of Conduct

Consideration should be given to the development of a Code of Conduct to benchmark minimum industry standards. An enforceable Code of Conduct would provide a clear foundation for industry practices, providing stronger consumer protection and compliance mechanisms. The development of a Code of Conduct could cover a range of issues including protocols for managing resident safety (refer to Recommendation 17).

7.6.3 Require operators undertake regular fire and emergency drills in villages

Clarity could be achieved through additional legislative measures, such as requiring operators to undertake regular resident emergency drills. This is in keeping with the expectation that villages are a safe environment. In the New Zealand model, the regularity of fire drills is set out in the Code of Practice, which stipulates drills be conducted every six months.

Regularity of fire drills could be in line with expected protocols of other organisations and institutions, such as government departments, office buildings and schools. This is considered specifically important for residents, to ensure that regardless of any impairment, they have an opportunity to acquire a reasonable level of awareness of the procedures.

Recommendation 11: Consider opportunities to advocate for age-appropriateness in village building design.

7.6.4 Consider the changing demographic of village residents in planning and design

Residents will increasingly seek a housing solution that is accessible and adaptable and in alignment with their later entry age. Well-designed options and progressively integrated care services will enable residents to remain in their village and age in place.

Given the needs of the ageing demographic, industry should consider the suitability of current development and design requirements specifically in relation to retirement villages and lead the development of best practice.

NSW Fair Trading, as the regulator for the *Retirement Villages Act 1999*, should also consider opportunities to advocate for retirement village specific design principles.

8 Administrative and operational practices of Fair Trading

8.1 Introduction

The Inquiry was asked to review the administrative and operational practices of Fair Trading that may be adopted to improve practices of the retirement village sector.

Fair Trading administers retirement village legislation and is a regulator of the ACL in NSW. It has an important role to monitor compliance with the law and to protect consumers. In response to the issues raised by respondents, the Inquiry has considered the relevant enforcement powers available to Fair Trading and its administrative and operational practices.

Submissions commented on the support provided to residents by Fair Trading including information and advisory services and areas where services might be improved. The Inquiry has consulted with Fair Trading to discuss its operational practices that support retirement village consumers and considered the potential to strengthen Fair Trading's role in protecting residents in the sector.

8.2 Availability of information about retirement villages

Fair Trading as a consumer protection agency provides information to prospective residents of retirement villages, current residents and village operators about their rights and responsibilities under the legislative framework for retirement villages in NSW. Key documents include the Retirement Village Living Guide²³⁰ that contains information to support a consumer's decision to enter a retirement village, its website which explains the legislative framework and a customer service phone line for general enquiries.

8.2.1 Residents seek more information about specific villages and the sector overall

Many respondents seek further guidance on their rights and responsibilities and greater access to sector specific information. It is not clear to what extent consumers are aware of the information already available to them. Several respondents suggested that there was insufficient information to make informed decisions or to resolve disputes or queries.

It is clear from submissions that prospective residents seek greater understanding of the retirement sector and the nature of the transaction to inform their decision-making. For instance, some current residents have emphasised that documents such as the disclosure statement, property inspection form and the lease, as well as other information provided as required by Fair Trading "are not clear because they all require some knowledge of the retirement village industry and village operations that interested potential lessees do not have."²³¹

²³⁰ NSW Fair Trading 2017, Retirement village living - A guide to your rights and responsibilities.

²³¹ J. Burgess, *Submission*, 30 October 2017

Other respondents have suggested that the Retirement Village Living Guide published by Fair Trading should be provided by the village prior to entry. A similar document is required to be provided to residents by operators in other jurisdictions.²³²

Access to information and data about the quality and history of specific villages is also important to prospective residents. Some respondents have raised dissatisfaction in there being “no rating or information about the integrity or expertise of the operator in the management and operation of the village.”²³³ Others have suggested a “web page on Fair Trading for residents to make comments of why they like their Retirement Village”²³⁴ as a guide for people considering a particular village and that Fair Trading publish a regular report or newsletter to keep residents informed about sector specific news and emerging issues.

Information provided by Fair Trading was praised by many residents as being useful, such as the new Retirement Villages calculator and Retirement Village Living Guide. However, the visibility and communication of the information and services available could be improved. It was suggested by one resident that Fair Trading take out “advertisement in local newspapers [and] the Seniors Newspaper to let Retirement Village Residents know their rights and how they can access information about Fair Trading.”²³⁵ Overall it seems that there is scope for Fair Trading to raise its profile about the level of support that is available to residents.

8.2.2 Residents seek more advice and support from a single source

Submissions suggested that residents look to Fair Trading to respond to a broad range of inquiries about retirement village living, seeking advice on disputes and to report complaints. Comments suggested that it may not be clear to residents what services Fair Trading can and cannot provide. For instance, one attendee at the Hornsby Community Forum shared their perception that it is difficult for residents to know who is responsible for ensuring whether a lease is correct or not because Fair Trading does not determine contractual disputes.

Budget matters were raised as an area where Fair Trading could play an increased role in providing guidance. According to legal firm Hill & Co Lawyers:

*There needs to be more assistance for Resident Committees in reviewing budgets delivered by operators on an annual basis. The financial accounts for a village are often complex and many struggle with understanding how the items relate to increased charges. Support needs to be forthcoming from Fair Trading or an appointed Ombudsman and particularly so where residents are dealing with very large operators who run several villages.*²³⁶

Many respondents stressed the importance of Fair Trading providing more support for dispute resolution. Of the 133 online submissions that confirmed that they had been involved with a dispute, 40% stated that they contacted Fair Trading. Despite this, many residents called for the

²³² In Victoria, a fact sheet on retirement village living must be provided by the village operator when requested under s.18A of the *Retirement Villages Act 1986* (Vic)

²³³ J. Burgess, *Submission*, 30 October 2017

²³⁴ A. Daniels, *Submission*, 29 September 2017

²³⁵ Name withheld, *Submission*, 30 October 2017

²³⁶ Hill & Co Lawyers, *Submission*, 31 October 2017

dispute resolution services administered by Fair Trading to be strengthened by including “possibly legislation specialists, lawyers and accountants, to minimise need for Tribunal applications.”²³⁷

Many issues raised with Fair Trading relate to the administration of the Act or Regulations. Around 49% of complaints and enquiries to Fair Trading over last five years relate to rights and responsibilities under the legislation²³⁸. Further, of the online submissions to the Inquiry in which the respondent was involved in a dispute, 41% of these matters also related to this issue of interpreting the Act to determine the responsibility of each party. Submissions indicated an expectation that Fair Trading could provide legal advice and interpretation, considering this to be a limitation of the level of support available from the agency. One submission identified the importance of receiving independent advice on the legislation in resolving many disputes that arise:

*I note that ... Fair Trading officers will not offer any legal advice but they will provide impartial advice and explain the relevant matters in the complaint...Lack of understanding of the relevance of the legislation is often at the heart of a complaint. If the applicability of legislation could be explained by an independent party many matters might be resolved.*²³⁹

8.3 Scope of Fair Trading’s powers

8.3.1 Perceptions of retirement village complaints handling and compliance investigations

Some respondents to the Inquiry expressed a level of dissatisfaction with the compliance and enforcement activities of Fair Trading. For instance, 17 submissions raised concerns with what is perceived to be a lack of oversight or follow up to ensure operators comply with the legislation. Addressing this issue was recommended by multiple respondents to improve the sector.

Hill & Co Lawyers expressed concerns about Fair Trading not being an effective regulator of compliance breaches under the *Retirement Villages Act 1999*, noting a perceived lack of involvement and investigation of issues despite its array of powers.²⁴⁰ Current residents have also articulated this concern regarding a lack of intervention of Fair Trading when they were concerned there had been a breach of compliance from their operator. One respondent told the Inquiry:

*...It seems to us as residents that the Retirement Villages Act and Regulations are at present framed more to benefit the Operator rather than the resident and this skew should be modified to provide a better balance. Whilst recognizing the enormity of the task, we suggest that Fair Trading should be more pro-active in day to day supervision of this fast growing industry to ensure equity.*²⁴¹

A recommendation was made by one resident for the government to “introduce a mandatory reporting system for operators to submit to an overseeing authority, to ensure compliance with the Retirement Villages Act concerning budgets, management meetings and audits.”²⁴² Another resident supported this recommendation by outlining the need for:

²³⁷ N. Smith, *Submission*, 29 September 2017

²³⁸ Data provided by Fair Trading on Retirement Village complaints and enquiries, 23 October 2017

²³⁹ M. Calder, *Submission*, 22 October 2017

²⁴⁰ Hill & Co Lawyers, *Submission*, 31 October 2017

²⁴¹ J. Murray, *Submission*, 18 October 2017

²⁴² W. Sadlo, *Submission*, 23 October 2017

- more proactive and reactive intervention, including site inspections, by Fair Trading
- more punitive actions by Fair Trading and higher penalties so that there is a financial incentive to avoid penalties being imposed
- more auditing of village Disclosure Statements by Fair Trading, with all such statements to be registered with Fair Trading and follow-up by random audits against subsequent behaviour and actual contract²⁴³

At the Newcastle Community Forum, the potential for increased education and compliance activities was identified by residents as a key mechanism for improving the state of the sector. The suggestion is that this could be achieved by providing greater power to Fair Trading to enter villages and inspect compliance and standards. The overarching sentiment is that earlier and more proactive intervention is required.

8.3.2 Fair Trading's complaints and compliance activities and powers

The *Retirement Villages Act 1999* provides broad powers for Fair Trading to inspect retirement villages, require documents and evidence, issue penalty notices, as well as for the Commissioner for Fair Trading to take or defend proceedings under the Act. Investigators have the power to²⁴⁴:

- require documents or other media relating to the carrying of the retirement villages be presented
- inspect, take copies or extracts from such documents
- take possession of documents if a Fair Trading officer deems it necessary to protect evidence from destruction or for the purpose of obtaining evidence
- require any person on the premises to answer questions in relation to the carrying on of the business of a retirement village or a contravention of the Act
- require the owner or occupier (including a resident) of those premises to provide the investigator with assistance that is reasonably necessary to fulfil their investigation powers.

There are over 50 penalties available for a range of contraventions of the Act. Several examples are provided below.

Area	Example of penalty
Budgets	<ul style="list-style-type: none"> • Required budget related-information has not been provided to the resident • Operator using money from capital works fund other than intended purpose
Sales process	<ul style="list-style-type: none"> • Refurbishment in contract prior to s.165 – quotes and negotiation required • Operator not appointed as agent for sale must not interfere with sale
Contracts	<ul style="list-style-type: none"> • Implying to vary village contract or terminate and enter a new one at same premises, unless resident has obtained a certificate in accordance with Act

²⁴³ J. Crocker, *Submission*, 18 October 2017

²⁴⁴ *Retirement Villages Act 1999* (NSW), s.196A

Fair Trading is currently undertaking compliance operations targeting NSW retirement villages. This compliance program is part of the NSW Government's four-point plan into retirement villages and involves Fair Trading requesting records of meetings, budgets, audits and contracts from a sample of retirement villages, conducting a review and sending Consumer Protection Officers to visit villages where there is evidence of a breach of compliance with the law. This operation is underway with a review of 60 retirement villages. Half of these villages have been assessed as compliant and at 13 villages minor administrative issues were addressed with trader education. A further review is being conducted in the remaining villages to ensure Operators are meeting their obligations.

8.4 Key findings

8.4.1 Residents seek more advice and support and it seems there is a low-level of awareness of the information that is available.

While Fair Trading make a lot of information about retirement villages available to residents in different formats, responses from residents suggest that it may not be fully reaching its intended audience. There are many different sources of information that are dispersed – Fair Trading, legal support services and consumer advocacy groups. Without a single point of coordination, it can be difficult for residents to navigate information about their rights and responsibilities under the Act, and to determine whether it is a contractual matter or a compliance matter and therefore what the appropriate avenue for support is or what their options are.

Comprehensive information should be provided in a way that is tailored to residents who are elderly. It should be easy to navigate, available online and in print and provide information that responds to common consumer concerns. This has been recommended by respondents to the Inquiry, including bodies such as the SRS which recommended that the phone and website accessibility of Fair Trading be improved.²⁴⁵

The Retirement Village Living Guide is also another key feature of Fair Trading's information services. However, it is only available through Fair Trading's website and information sessions. In other jurisdictions, similar documents are required to be provided by operators to ensure fundamental information about the sector is understood. For example, in Victoria a fact sheet on retirement village living must be provided by the village operator when requested²⁴⁶.

Additional information about the different courses of action a resident can take in common areas of dispute may also be useful, as well as links to relevant support services and information about the costs. A resident-centric approach is required to ensure that residents are able to navigate what is a multi-faceted system of support and their rights and responsibilities set out in the legislative framework.

²⁴⁵ SRS, *Submission*, 31 October 2017

²⁴⁶ Retirement Villages Act 1986 (Vic), s.18A

8.4.2 There are opportunities for increased data collection.

Minimal data is required by law to be reported to Government about a retirement village. Operators in NSW must only register with Land and Property Information that the land is being used as a retirement village.²⁴⁷ Once registered the village's relevant details become part of the public register of retirement villages. The information on the register is limited to only the trading name, location, phone and website details. Registration is a once-only process with no provisions for retirement village operators to report back to government when any changes occur or to provide any data about the operation of the village.

No information about retirement villages is directly provided by operators to Fair Trading. This means that it is difficult to establish a baseline of information about the sector and monitor trends over time. For example, when a village undergoes redevelopment there is no requirement for Fair Trading to be notified directly. Such a requirement could be useful to prompt the regulator to provide targeted education and communication that can help assure residents of their rights and responsibilities when there is a significant potential change to their village. Other information such as complaints history, contract types offered, or disclosure documents are also not required to be collected or publicly disclosed. This differs from other jurisdictions and there is an opportunity to bring NSW into alignment with best practice jurisdictions.

By way of comparison, in the NSW Home Building sector complaint data is published on the Fair Trading website²⁴⁸. This data is provided to raise consumer awareness, identify areas of need and to help the home building industry better manage risk.

Victoria and Queensland both require certain data about the village to be collected by the regulator or published. In New Zealand, retirement villages must be registered with the Registrar for Retirement Villages²⁴⁹, who maintains the Register of Retirement Villages which is available to the public. Key documents for any registered village are available on the Register, including disclosure documents and deeds of supervision, as well as the ability to compare terms in different agreements.

The Commission for Financial Capability in New Zealand collects information bi-annually from all registered operators about the number of formal complaints, classification, resolution rate, and the outcome. The Retirement Commissioner uses this information to "monitor trends and any concerns or issues in the industry"²⁵⁰ and publishes a non-identifiable summary of the information received.

Fair Trading should publicly disclose certain complaints data about retirement villages. This could be a powerful tool to incentivise behaviour and enable comparison across villages.

Acquiring data directly from villages, and consolidating information that may be useful to disclose publicly would benefit residents both entering and living in a retirement village through enhanced consumer decision-making and transparency.

²⁴⁷ *Retirement Villages Act 1999* (NSW), s.24A

²⁴⁸ NSW Fair Trading 2017, *Home Building Complaints*, retrieved 1 October 2017 from www.fairtrading.nsw.gov.au/ftw/About_us/Data_and_statistics/Complaint_data/Home_building_complaints.page?

²⁴⁹ The Registrar for Retirement Villages is responsible for administering the registration requirements of the *Retirement Villages Act 2003* (NZ)

²⁵⁰ Commission for Financial Capability 2017, *Retirement*, retrieved 4 October 2017 from www.cffc.org.nz/retirement/

8.4.3 The level of investigations of compliance breaches in the sector is relatively low and this is commensurate with the level of complaints made to Fair Trading.

The Inquiry is of the view that there are wide-ranging powers and penalty provisions already available to Fair Trading, and Fair Trading has sufficient power to investigate operator non-compliance.

The number of investigations of potential compliance breaches for the retirement village sector reported by Fair Trading is low. Over the period of 2012/13 to 2016/17, only 9 complaints received were escalated to the compliance unit for investigation.²⁵¹ This is attributed by Fair Trading to the relatively low number of complaints made about retirement villages compared to other units and businesses covered by the agency, and that the agency prioritises its compliance and enforcement activities targeting areas of highest non-compliance. Although the volume of complaints is relatively low compared to the real estate sector (for example), the Inquiry notes that the retirement village sector is distinct from other consumer sectors. Specifically, the average age of residents is likely to be older and they are considered a more vulnerable consumer group. Additionally, their consumer rights are set out under a broad, complex regime that spans both rights and responsibilities enshrined in the Act and in a commercial contract. Together, there is a risk that these factors combined can give rise to a false sense of regulation in the sector.

No enforcement actions have been issued under the retirement village legislation over the last two years. This is likely due to Fair Trading focusing its compliance efforts towards promoting voluntary compliance in the sector. That is, through a “comprehensive use of educational campaigns to inform consumers and businesses on their rights and obligations under the law”²⁵², Fair Trading reduces the need for compliance and enforcement actions in the sector as ultimately “prevention is better than a cure.”²⁵³ This approach mirrors that of other jurisdictions across Australia.

The *Retirement Villages Act 1999* sets out a broad framework of rights and responsibilities for residents, which must be read in line with the contract which contains complex financial terms and conditions. Key aspects of the legislation can require interpretation, and arguably determining compliance in some cases may require legal expertise. The current model of support provided by Fair Trading for contractual disputes is to provide funding and referrals to organisations such as the SRS, who can provide legal support and advocacy. The role of Fair Trading focuses on compliance rather than legal advice, as is appropriate for a regulator.

8.4.4 Fair Trading plays a key role in educating consumers and traders on their rights and responsibilities.

In the retirement sector, engagement programs with residents, potential residents and operators are delivered through regional community education, digital engagement, events and a mature grants program. Fair Trading targets initiatives to engage with vulnerable consumers and have provided 347 information sessions to a variety of senior’s groups throughout 2016-17, of which 17 focused on retirement villages.²⁵⁴ Community grants are also provided to not-for-profit organisations for the provision of community education, advice and advocacy services for tenants,

²⁵¹ Data provided by Fair Trading on Retirement Village complaints and enquiries, 23 October 2017

²⁵² NSW Fair Trading 2013, Compliance and Enforcement Policy, p.2

²⁵³ Ibid

²⁵⁴ NSW Fair Trading 2017, NSW Fair Trading Year in Review 2016-2017, p.15

retirement village residents and consumers who need assistance with personal financial difficulties. In 2016-17, Fair Trading administered five programs with over \$20.4 million provided in funding.²⁵⁵ These services are especially important to ensure that residents know their rights and responsibilities as older residents are less likely to be online and less mobile than other consumer groups and information services should be provided in an accessible way.

In the 2016/17 financial year, 399 enquiries were received by Fair Trading regarding retirement villages. The main issues related to administration and the rights and responsibilities in village matters, predominately budgets and repairs and maintenance. Of these, 91% were resolved by the Fair Trading officer providing information and education, with the remainder referred to either another department or agency, or to seek independent legal advice.

8.5 Recommendations

In light of the concerns and feedback highlighted in the previous section, the Inquiry recommends the following improvements to Fair Trading's retirement village compliance and consumer services.

Recommendation 12: Increase Fair Trading's oversight of retirement villages through targeted compliance activities that focus on retirement villages

8.5.1 Introduce an annual program of compliance audits and inspections for retirement villages

The Inquiry recommends that Fair Trading expand its compliance activities focused on retirement villages. An annual program of compliance activities might include Fair Trading conducting a sample of audits on key issues and random village inspections. Increased compliance activities could also lead to opportunities to publish compliance and enforcement data about the sector on a regular basis.

For example, this might be in line with the areas which are the subject of the highest number of complaints – unsatisfactory conduct, budgets and repairs/maintenance and in line with penalty provisions²⁵⁶ and informed by the outcome of recent compliance activities. Random audits and inspections could also form part of this program. By reporting on the level of compliance activities in the sector increased visibility of the regulator's oversight and an understanding of the level of compliance at individual villages would be communicated to residents.

A formal reporting mechanism legal services providers that links back to the regulator to inform future compliance monitoring and investigation activities is another opportunity to develop a regular, targeted compliance program for the retirement village sector. A formal reporting mechanism between NCAT and Fair Trading where breaches of compliance are determined should also be established.

²⁵⁵ NSW Fair Trading 2017, NSW Fair Trading Year in Review 2016-2017, p.16

²⁵⁶ Data provided by Fair Trading on Retirement Village complaints and enquiries, 23 October 2017

Recommendation 13: Increase the level of collection of village operator and sector data including a requirement that operators report certain data to Fair Trading such as key village information and contract types on offer

8.5.2 Operators are to register villages and update information directly with Fair Trading

The Inquiry recommends that village operators be required to provide certain data directly to Fair Trading when registering a village and update the data on a periodic basis. This will better provide the regulator with relevant information about the sector such as types of products available, sales prices, and provide information on changes in ownership of the village. This information would be valuable to inform Government policy development and compliance monitoring activities.

8.5.3 Complaints data should be collected and published by Fair Trading

There are also opportunities to make certain data about individual retirement villages publicly available. Publishing certain complaints data would benefit consumers, both when deciding to enter and when living in a village, and could encourage disputes to be resolved prior to escalation. Information published should not be limited to complaints made to Fair Trading but rather extended to include length of time taken to comply with NCAT orders, the number of penalties issued, as well as complaints made through the internal dispute resolution process of a village. The increased transparency would provide greater insight into the operation of the sector and to draw attention to certain issues that a potential resident may not be aware and is useful for decision-making or for the regulator to be alert to.

8.5.4 An annual report of the sector should be commissioned by Fair Trading

Publishing the information collected by Fair Trading from key stakeholders in the sector, including industry and NCAT, would provide invaluable insight into current trends and issues. An annual report could be commissioned by Fair Trading to portray the state of the sector, and provide valuable information to potential residents, current residents and operators.

Recommendation 14: Overhaul and enhance the public register of retirement villages to provide information on the sector to members of the public.

8.5.5 Fair Trading establish a retirement villages register for the public to access specific village information

The Inquiry recommends that Fair Trading overhauls and enhances the public register of retirement villages. Information available on the enhanced public register should include specifics of individual villages including management details, number of units available, disclosure documents and occupation agreements. This would satisfy the information gap in the sector which was raised by several respondents and will facilitate better consumer decision making in the sector.

Recommendation 15: Increase the level of awareness of prospective residents about retirement village living and their rights to facilitate informed consumer decision-making by:

- a) improving the accessibility of the Fair Trading website and introducing a single portal for retirement village information, and
- b) requiring operators to make the Retirement Villages Living Guide (published by Fair Trading) available to residents, and
- c) increasing the number of community information sessions focussed on retirement

The Inquiry recommends that communication and engagement with current and prospective retirement village residents be improved in the sector to increase awareness about rights and obligations and facilitate informed consumer decision making.

8.5.6 Improve the accessibility of the Fair Trading website and introduce a single portal for retirement village information

The Fair Trading website should be reviewed and made clearer, easier to navigate and age appropriate. For example, limited information on the dispute resolution pathway and Fair Trading's complaint handling process is currently published. Fair Trading should also make this information available to those who cannot access web-based services.

There is also potential to establish a single web portal for retirement village information with links to specialist legal services such as the SRS, the RVRA and the Law Society Solicitor Referral Service.

8.5.7 Require operators to offer the Fair Trading Retirement Villages Living Guide to residents

The Fair Trading Retirement Village Living Guide is a useful resource for prospective residents. It should be required under legislation to be offered by village operators to potential residents as part of the suite of disclosure documents already provided. The guide should be updated in line with a review of exemplary guides from other jurisdictions, such as New Zealand.

8.5.8 Increase the number of community information sessions focussed on retirement villages

Fair Trading community engagement and information sessions for this sector should be made more prominent, and the number of sessions focused on retirement village issues increased. These sessions should be increased for both metropolitan and regional areas. Industry engagement activities to work towards the objective of voluntary compliance is also an area that should also be increased.

9 Training and conduct of village management

9.1 Introduction

The Inquiry considered further opportunities for reform in the retirement village sector, including the level of training and the conduct of village management.

In a retirement village, the village manager is typically responsible for the day to day running of the village and is often the first port of call for residents to resolve issues within the village. As such, the village manager plays a critical role in the effective operation of a village, which in turn can have a significant impact on life in the village.

Residents pay the wage of a village manager through recurrent fees and as such are entitled to expect competent management. The role of a village manager may vary somewhat from village to village, but as a general rule their tasks and responsibilities are varied and wide-reaching. Typically their duties can include:

- managing the village budget
- property and facility management
- informal dispute resolution (between residents, and between residents and the operator)
- the sales and marketing of village premises (on behalf of the operator)

This role therefore requires a diverse skillset as well as specific retirement village knowledge. As such, the manager needs to have an understanding of the relevant legislative framework, knowledge of relevant care and support services, basic financial, as well as sound property management skills, in addition to having people skills appropriate for dealing with a diverse demographic of residents.

The Inquiry consulted with residents from a range of villages, spanning both the for-profit and not-for-profit sectors, as well as villages with a religious background. The issues raised here are discussed broadly in terms of the retirement village sector. It is important to also point out that the quality of management will vary between villages, so these issues may not be applicable to all villages.

9.2 Quality and conduct of village managers

The skill level and conduct of village managers was a recurring issue raised throughout the Inquiry. Many respondents also made no comment on management, and many also shared positive experiences of village management.

Overall however, village management is a significant source of concern for many residents. The RVRA's helpline categorised "management" as the number one reason for calls in 2015 and 2016 and the second most common in 2017.²⁵⁷

Industry is broadly supportive of the need to increase standards and training levels within the sector.²⁵⁸ Specifically, the Property Council noted the need for this, and said it is working to raise industry standards and increase professionalization within the sector. Its submission noted the significant role the village manager plays in village life in its submission:

Staff members on the front line ultimately hold the greatest power to educate and provide transparent information to current and potential residents.

LASA also acknowledged the need to improve standards and said it is working towards this with other village peak bodies. However, LASA is also of the view that "'light-handed' regulatory approaches are often the most highly efficient and effective" and noted that improved standards are likely to occur over time.²⁵⁹

While industry groups and peak bodies who engaged with the Inquiry were supportive of a push for greater training in the industry, some were of the view that this could be achieved through enhancing existing industry-based programs, while others believed training programs needed to be independent of industry. For example, the peak body representing residents, COTA NSW called for an independent, mandatory training program for village managers and sales staff, such as a Certificate IV along with a mandatory, independent licensing scheme.²⁶⁰

A reasonable number of responses throughout the Inquiry suggested government develop an independent accreditation system to ensure that minimum standards are achieved. Two industry-sponsored accreditation schemes already exist and have been in place for four to five years. The Property Council developed the Lifemark Village Scheme in 2013 and ACSA, LASA and LASA Queensland developed the International Retirement Community Accreditation Scheme in 2012. Both schemes have a range of standards set by the scheme owners and are accredited through third party auditors. There is insufficient data on the uptake and associated performance levels of these schemes to assess how effective they have been at increasing standards across the sector.

9.2.1 Perceived conflict of interest for village manager

Some respondents were concerned about the potential conflict of interest which exists for a village manager as their wage is paid by the residents while they are employed by the operator. This was a particularly pertinent for many respondents to the Inquiry when a village manager gets involved in the marketing and sales process of an operator's properties. The RVRA also pointed out this conflict in its submission:

²⁵⁷ Calls to the RVRA classified as management related accounted for more than 80 calls in 2015, over 110 in 2016 and over 60 in 2017 (between January and October in 2017).

²⁵⁸ ACSA, *Submission*, 13 November 2017; Aveo, *Submission*, 8 November 2017; COTA NSW, IRT Group, *Submission*, 9 November 2017; LASA, *Submission*, 7 November 2017; Stockland, *Submission*, 9 November 2017; Property Council, *Submission*, 9 November 2017; Uniting, *Submission*, 30 October 2017

²⁵⁹ LASA, *Submission*, 7 November 2017

²⁶⁰ COTA NSW, *Submission*, 9 November 2017

While management of the village is funded through the recurrent charges levied on the residents, there is little, if any, opportunity for residents to participate in the decision making process, especially in the hiring of staff.²⁶¹

9.2.2 Interpersonal and communication skills

The manner in which a village manager treats residents plays a critical role in the experience of village life. One of the most common issues raised in relation to village managers throughout the Inquiry related to managers' people skills, particularly in working with the elderly.

A common theme for respondents when talking about factors that worked well in villages related to residents having open lines of communication and a positive relationship with the village manager. One resident highlighted the importance of the village manager:

If the staff are happy and enjoy their work and regard the village as the residents' homes and want them to be happy it makes a difference.²⁶²

Many residents also commented that a good village manager will proactively communicate information and listen to concerns. One resident said:

Practically everyone in our village is very happy and enjoys the facility and environs. Local management have an open door policy which assists in communication.²⁶³

Conversely, for those respondents who raised issues with management, poor interpersonal skills were a significant source of concern. There was an expectation across the submissions that residents should be treated with dignity and respect and some were surprised by the lack of respect on the part of some operators and managers. This left some residents feeling powerless. One resident said:

Residents should all be treated as intelligent adults, with respect and not like school children. Current management tactics seem to be intent on trying to make us feel inferior.²⁶⁴

Another respondent commented:

Communication is often missing. Just because people are senior members of the community, they are not stupid and should be treated with more respect.²⁶⁵

The village manager is also seen as the enforcer within the village and there is an expectation managers will be proactive. Multiple residents raised concerns about a village manager's apprehension or inability to deal with complaints effectively. One resident said:

Understandably, operators are reluctant to step into disputes between residents, however where there is clearly a breach of the rules concerning the rights of residents to a peaceful existence this has to happen. Village Managers tend to prefer to turn a blind

²⁶¹ RVRA, *Submission*, 23 October 2017

²⁶² M. Steele, *Submission*, 20 September 2017

²⁶³ R. Green, *Submission*, 2 October 2017

²⁶⁴ J. Frewin, *Submission*, 28 October 2017

²⁶⁵ A. Neirinckx, *Submission*, 30 October 2017

*eye and not be game to confront the offender; this often leads to other residents becoming involved so exacerbating the situation. Managers need to be much more pro-active in this regard.*²⁶⁶

9.2.3 Appropriate level of knowledge and skill

There was an expectation across many of the submissions and throughout community consultation that village managers should have training in the specifics of managing a retirement village and detailed knowledge of the legislation. Generally speaking, a knowledgeable and well-trained manager was seen as a marker for success in a village. One resident said:

*With a diligent manager, life in a retirement village can be, as the advertisements claim, a carefree time of your life. The lack of the need to arrange for maintenance of your residence, grounds managed, social events arranged, sporting and artistic groups to join and neighbours always willing to chat. What you are really paying for is a lifestyle and my husband and I will never regret our move into a village even though, financially, it has been costly.*²⁶⁷

However, not all respondents felt their manager was competent. Of those who expressed an issue with management, the most common concerns related to a lack of sector-specific knowledge and skills. Specifically, this related to knowledge of relevant applicable legislation and the rights and obligations of each party, as well as necessary skills and knowledge for managing a village, such as financial skills to prepare a budget and the ability to manage maintenance of facilities in a competent and timely fashion.

For those concerned about managers lacking legislative knowledge, many raised it in the context of managers providing misleading information at the point of purchase (covered in section 3: Marketing). However, there was also concern overall that managers were not knowledgeable in this area and that they should be. For example, one respondent highlighted that village managers were not always aware of the legal standing of village rules given under the *Retirement Villages Act 1999*.

*The village rules are often not enforced or even fully understood by the village manager. There appears to be a conflict with the Village Rules, signed contracts and how they are applied within a village.*²⁶⁸

Managers are also required to manage village budgets and carry out property management, which many respondents felt required a minimum level of training. Inexperience can also result in poor facilities management often leading to unreasonable delays for services and higher costs being placed on resident. For example, one resident said:

*Untrained and unqualified management and similarly unqualified facility managers has resulted in an inefficient village operation, poorly maintained equipment and facilities and the consequential cost of extra maintenance being charged to lessees.*²⁶⁹

²⁶⁶ S. Dunmall, *Submission*, 17 October 2017

²⁶⁷ S. Dunmall, *Submission*, 17 October 2017

²⁶⁸ A. Neirinckx, *Submission*, 30 October 2017

²⁶⁹ A. Burgess, *Submission*, 20 September 2017

9.2.4 Conduct towards residents

As a result of their integral role, the village manager has a large amount of power within the village. A reasonable number of submissions raised concerns about the treatment of residents by village managers and operators. A number of these residents expressed concern that operators and managers were wielding power inappropriately. In a number of cases, residents said they felt intimidated into supporting the views of the village manager and/or the operator for fear of no longer being listened to or having requests for maintenance met. One resident said:

The operators are in business to make money and they rely on the Bluff Act to get the better of residents. They take advantage of the elderly by telling them whatever they can to get out of doing what they should be doing. It is difficult to rally elderly residents to action as they are often unwell or frail or too afraid to speak up.²⁷⁰

In some cases, residents believed that if they made a complaint or raised an issue, they were at risk of being victimised by the operator, or ostracised by other residents.

There should be a system for people to make complaints of bullying and intimidation that is fairer. As it stands most people are so fearful of expulsion that they won't complain²⁷¹

This was also reflected in a submission by an employee in the industry, who advised in their experience some operators intimidate the residents into believing they will be removed from the village if they ask questions.²⁷²

Suggestions of resident intimidation are by their nature, difficult for the Inquiry to adequately research, quantify, or indeed qualify publicly due to confidentiality. Notwithstanding this, it is the view of the Inquiry that allegations of resident intimidation in any form are of serious concern.

Under the current provisions of the *Retirement Villages Act 1999*, operators must respect the rights of residents, and must endeavour to ensure that residents live in an environment free from harassment and intimidation²⁷³. If a resident believes the operator has not complied with this provision, they may make an application to NCAT to have the operator comply, or seek compensation. The current avenue of recourse to address a claim of intimidation or bullying is, in itself, likely to add to the stress of older residents.

9.3 Key findings

9.3.1 The role of the village manager is complex because they report to the operator and have their wages paid by residents

The role of a village manager is integral to the effective management of the village and can play a significant role in the satisfaction levels within the village. However, the relationship between residents and managers in a retirement village is complex.

²⁷⁰ L. Harvey, *Submission*, 22 October 2017

²⁷¹ K. Rowe, *Submission*, 16 September 2017

²⁷² Name withheld, *Submission*, 13 October 2017

²⁷³ *Retirement Villages Act 1999* (NSW), s.66

For residents, the retirement village is their home. They pay ongoing fees to cover the maintenance costs of the village as well as the village manager's wage, who is appointed by the operator. For these ongoing fees, they expect competent managers and an assurance that maintenance is carried out cost-effectively, to an appropriate standard and in a timely fashion. Meanwhile operators (and the appointed village manager) are responsible for apportioning these funds appropriately in order to carry out maintenance of the facilities in line with the annual budget. This is a cost-recovery process for operators rather than a revenue stream.

However, it is the Inquiry's view that this arrangement can be problematic as residents often have little ability to affect the level of service they receive from a village manager, despite paying their wage and the services they offer. For residents, this arrangement may be perceived as a conflict of interest. This issue can be further exacerbated for residents by the fact they are unable to easily switch service providers/village managers, as a residents' contract for village services is bound up in the contract for their right to reside.

9.3.2 There are no required minimum training requirements for village managers

It is the Inquiry's view that the skillset required for the role of village manager is both diverse and sector-specific. However, the Property Council's submission noted that many village managers do not usually come with a skillset specific to retirement villages, rather they adapt skills from other industries. Many village managers come from the hotel industry or have acquired other unrelated management experience²⁷⁴. This highlights the potential for significant knowledge and skill gaps in relation to the retirement village sector. These gaps appear to be particularly pronounced in relation to knowledge of the relevant legislation, skills in relation to property management and budgeting, as well as communication skills for dealing with an ageing community.

The existing legislative framework does not require any minimum level of training to be achieved by village managers or operators, nor is there any nationally recognised training for retirement village managers under the Australian Qualifications Framework. There are a range of industry-based training courses on offer for village managers. Both the Property Council, which represents for-profit villages, and ACSA, which represents not-for-profit villages, offer courses in retirement village management²⁷⁵. In addition to these programs, some of the bigger operators, such as Aveo, have access to other professional development programs.

The Property Council noted in its submission that the development of comprehensive village manager training has been slow to develop due to the relatively small size of the industry. In addition, take up of industry courses does not appear to have been widespread which appears to have resulted in inconsistent and insufficient training levels across the sector. As a result, residents may be hesitant to trust village managers to undertake their role effectively. This is likely a contributing factor in internal disputes, particularly in relation to budgeting. It is the Inquiry's view that increasing levels of professionalism within the sector through appropriate training could help to rectify this.

²⁷⁴ Property Council, *Submission*, 9 November 2017

²⁷⁵ Property Council, *Village Management Industry Diploma*, retrieved on 30 November 2017 from www.retirementliving.org.au/news/village-management-industry-diploma/; ACSA, *Retirement Village Management*, retrieved on 30 November 2017 from www.acsa.asn.au/Education/Library/Retirement-Village-Management
The Property Council offers a range of village manager training through the Retirement Living Council. Its Village Manager Diploma was introduced in 2015 and nine people have completed the Diploma since its inception. A larger number have completed smaller components of the course. ACSA's Retirement Village Management course is a two-day overview of key issues in the industry.

9.3.3 There are no documented standards of performance or conduct

Many of the claims from residents relating to village manager performance and conduct suggest there can be a misalignment between the expected standards of day-to-day village management and the reality experienced by residents. Under the existing scheme, the assurance of quality managers and operators is largely met through a legislative framework which outlines a number of rights and responsibilities of operators and residents, with certain breaches attracting penalties²⁷⁶.

Within this framework there is only minimal guidance with regard to appropriate conduct for operators and village managers. The legislation prevents certain people from operating, promoting or managing (directly or indirectly) a retirement village²⁷⁷ and also outlines the obligation of an operator to respect certain rights of residents. A provision exists for a resident to apply to NCAT should the operator be in breach of these obligations²⁷⁸, although a resident may not always wish to approach NCAT in such circumstances.

The existing provisions do not provide guidance as to what standards are expected of operators and village managers, particularly in relation to what constitutes appropriate/inappropriate conduct or subpar levels of service. Nor are the expected standards of performance or conduct necessarily required in a resident's contract. As such, it is the Inquiry's view that there are currently insufficient provisions to provide clearly documented standards in relation to the conduct and performance of village managers.

The current lack of agreed performance and conduct standards makes it hard for:

- residents to have a benchmark by which to make complaints and exercise rights over the service for which they are paying, and
- operators/managers to know what standard they are expected to achieve/what constitutes inappropriate conduct.

As such, managers and residents are left to negotiate the details between themselves with limited formal guidance on what is appropriate. As expectations will vary between residents and operators, as well as across villages, this can create tension. Given these findings, a system that helps provide guidance on the minimum standards, which are agreed on by both operators and residents, is likely to be beneficial for the sector.

The Inquiry notes that the Property Council is currently developing an industry-based Code of Conduct in order to set an expected standard in relation to marketing, the operation of villages, and dispute management procedures for operators and residents. The Code is due to be launched in the first half of 2018.

9.4 Recommendations

The Inquiry is of the view that improvement is needed to ensure that acceptable minimum standards of conduct and performance are assured in the sector. An acceptable level of training appropriate for the role of a village managers and an agreed set of minimum standards are two key

²⁷⁶ *Retirement Villages Act 1999* (NSW), Division 2

²⁷⁷ *Retirement Villages Act 1999* (NSW), s.57

²⁷⁸ *Retirement Villages Act 1999* (NSW), s.66

areas which the Inquiry believes are likely to improve both the service levels and conduct within villages. In considering the recommendations of the Inquiry, key considerations might be the size of the sector, the cost-benefit of reform and the likelihood that the change will lead to improvement.

Recommendation 16: Require retirement village managers undertake appropriate training to ensure they have an acceptable level of knowledge and skills suitable to managing a retirement village. States and territories could work together on this

9.4.1 Mandate minimum training requirements

The Inquiry has formed the view that there is a need for government to intervene in village manager training because of the critical role they play in the effective operation of a village. Residents reasonably expect a competent manager as they pay their wages and are unable to easily switch village managers if they are not performing to their satisfaction. There also appears to be a skill and knowledge gap, specifically relating to age-appropriate communication with the elderly, relevant legislative knowledge and property and financial management skills. This is likely to contribute to lack of trust, and although there are two industry training courses available, the level of uptake appears to be low.

Government agencies working closely with industry and resident stakeholders should identify the specific skills and knowledge to be required as part of a mandatory training course. In principle, a minimum qualification should encompass the areas relevant to the key concerns raised by residents including:

- The legislative framework of the *Retirement Villages Act 1999*
- Dispute resolution
- Communication and relationship management skills
- Accounting and finance (as necessary for managing village budgets)
- Property management skills (such as coordinating maintenance)
- Emergency and safety procedures (such as fire drills)
- Obligations in relation to property marketing and sales (for any village manager that is involved in marketing or sales)

Determining the appropriate type (industry or non-industry based) and the level (for example, whether it needs to be a nationally recognised Certificate level course) of training will also require further work. As the industry is small, there may be insufficient demand for a nationally recognised village manager course in one state alone. Nationally consistent training is likely to make it easier for businesses to achieve compliance and would make the workforce more mobile, however it would likely take longer to implement.

9.4.2 Establish a mechanism to monitor compliance with minimum training requirements

The mechanism used to achieve compliance with a minimum training requirement would also require consideration. For example, this could be achieved through an enhanced reporting requirement for village managers on a retirement village register (refer to recommendation 13). Consideration could also be given to whether or not a village manager's training details are made available on an enhanced public register (refer to recommendation 14).

Recommendation 17: Increase the level of accountability on operators for the standard of conduct and quality of village management and consider:

- a) implementing a Code of Conduct which outlines performance and conduct standards of village managers, operators and residents, and
- b) the potential for a 'negative licensing scheme' involving mandatory public reporting of breaches of the Code of Conduct on a public register

Due to the complex contract arrangements in a retirement village, many existing residents are unable to effectively influence the level and quality of services for which they are paying. As such, the Inquiry thinks there is an opportunity to encourage increased standards of conduct by village managers and operators as well as to enhance the quality of villages within the sector by placing higher levels of accountability on operators.

9.4.3 Consider implementing a Code of Conduct which outlines performance and conduct standards of village managers, operators and residents

To increase accountability, a framework outlining the expected standards of operators and residents should be developed and could be achieved through a Code of Conduct. Such a framework would provide a benchmark for residents, aiding them to address and pursue concerns that are agreed to be below the expected standards. Similar mechanisms have been introduced in other jurisdictions such as South Australia and New Zealand. For example, South Australia includes expected principles of conduct and performance in a Code of Conduct, contained in the Retirement Villages Regulation 2017. Similarly, the New Zealand Code of Practice is a piece of tertiary legislation which can be amended by a Minister and outlines the minimum requirements an operator must meet in order to comply with their obligations under the *Retirement Villages Act 2003 (NZ)*. The Code covers areas such as training requirements, required policies and procedures and dispute resolution processes.

The Inquiry has not formed a view on whether such a Code should be a statutory requirement or whether a co-regulatory model may work. However, the Inquiry is of the view that to be effective, any such framework would need to require all operators to comply and would need to meet both the reasonable needs and expectations of residents and operators. Further consultation with industry and resident's groups is encouraged to inform this approach. In developing any such scheme, resourcing requirements in the independent arbitration of complaints would also need to be considered. A Code of Conduct could include a range of provisions, including:

- the level of training and knowledge required and any continuing professional development requirements

- expected behaviour and conduct of village managers
- protocols for managing resident safety
- elder abuse mitigation measures
- operator responsiveness
- expected levels of facility management
- dispute resolution procedures

9.4.4 Consider a ‘negative licensing scheme’, which would involve mandatory public reporting of breaches of the Code of Conduct on a public register

Consideration should also be given to increased accountability on operators through transparency measures, such as breaches of the Code being listed on the public register (refer to recommendation 14). This is what is commonly termed a ‘negative licensing scheme’. This is similar to the scheme which operates in the aged care sector, where a statutory Code of Conduct is in place to ensure workers operate in a safe, ethical and competent manner. Care workers in the sector are not required to be registered like other health care professionals such as nurses, however workers can be listed for breaches of the Code. The Code, administered by the Health Care Complaints Commission, sets the standards and provides the ability for disciplinary action to be taken if they are breached. In the retirement village sector, it may be appropriate that the retirement village operator might be licensed (and therefore listed for potential breaches) rather than individual village managers.

The benefit of this type of scheme is that it is less onerous to comply with than a conventional licensing scheme, while still ensuring that standards are achieved and that action can be taken if someone fails to comply. It may also help to improve standards across the sector as operators are likely to fear being listed as prospective residents could base their decision to enter a village on such publicly available information. Consideration would need to be given to who collects the data and is responsible for reporting it. For example, dispute and breach data could be collected from operators as part of an increased reporting requirement (refer to Recommendation 13), or may need to be administered through a third party such as Fair Trading.

10 Retirement villages legislation

10.1 Introduction

It has been over ten years since a comprehensive review of the *Retirement Villages Act 1999* (the Act) was conducted. NSW Fair Trading conducted a statutory review of the Act in 2005 and made 50 recommendations to address key issues such as village contracts, budgets, maintenance, recurrent charges and disclosure.²⁷⁹

The Inquiry has focussed on reforms that align with the topics set out in the Terms of Reference. These include any potential changes to up-front disclosure, requirements to provide information on contractual fees and charges, limiting the timeframe for sale on exiting the village, data sharing arrangements to enhance the public register of retirement villages, and clarity on the definitions of capital maintenance and replacement.

Around 31% of written submissions raised issues relating to the legislative framework as-a-whole or specific provisions. This chapter sets out the views of residents and industry on opportunities for legislative reform that have not been covered elsewhere in this report.

10.2 Views on the current legislative framework

Many current residents expressed the sentiment that the retirement villages legislation is not fit for purpose to protect residents, because it is imbalanced and favours the operator. Several residents identified specific aspects of the legislation that they considered contributed to poor operator practices based on their experience seeking redress through the tribunal and court system.²⁸⁰ Examples identified related to clarifying the interaction of the Act with strata legislation, and the basis for rejecting a prospective resident's entry into a contract with the operator.

Other residents expressed a broad view that as-a-whole, the Act required strengthening. The timeliness of receiving payments, and the timeframe for any money owed to the resident once having vacated the village were also identified as areas of the legislation that should be reconsidered.

Most issues raised by respondents to the Inquiry related to maintenance and funding arrangements captured in chapter 4 of this report. It is evident that this a priority area of review.

Multiple resident advocacy organisations suggested that amendments to the Act were not enough, and recommended that the Act be re-written.²⁸¹ The Retirement Villages Residents Association stated that a full review of the current legislation is required to remove discrepancies and ambiguities that lead to disputes:

²⁷⁹ Office of Fair Trading, Review of the NSW *Retirement Villages Act 1999*, March 2005.

²⁸⁰ B. McBride, *Submission*, 3 October 2017; G. Noon, *Submission*, 31 October 2017

²⁸¹ NSW Council of the Ageing, *Submission*, 9 November 2017

*The Act falls well short of what is expected in modern day consumer protection legislation and needs to be re-written.*²⁸²

One resident provided the Inquiry with a draft Bill proposing to consolidate legislation for independent living into one, single, plain language Act, and repeal the existing legislation.²⁸³

Several operators commented on provisions relating to marketing and development and alignment with strata laws on smoking policy. Multiple residents suggested uniform legislation across states and territories. The Property Council supports nationally consistent retirement villages legislation and contracts.²⁸⁴

One operator commented that the NSW legislative framework is restrictive compared to other states:

*NSW has one of the most restrictive legislative frameworks for retirement villages, and already provides substantial consumer protection. Urge that further legislative measures focus on transparency and honesty without leading to overregulation which can be a disincentive for further investment.*²⁸⁵

The view that the retirement village legislation adds to complexity and limiting the potential for industry innovation was also raised by the legal firm Dentons, who stated that this was attributable to the array of tenure arrangements and the interaction of different legislation:

*As the retirement village model evolves further, it is likely that villages will explore and move from lease and licences to adopt 'strata scheme' or some form of rental model. The current alignment of those Acts and regulatory regimes with the [Retirement Village Act] is cumbersome, causes confusion to residents and in fact limits the innovation that can be brought to the sector through more affordable and flexible contract forms that match residents' capacity to pay.*²⁸⁶

10.3 Clarity on transitioning to aged care

For some residents, a promise of an easy transition to aged care was a persuasive pitch made during the marketing and sales process. Numerous examples were given of residents being informed that there would be some level of aged care provided in a retirement village when this was not the case. They were also informed that if and when it was required, the transition to an aged care facility attached to the retirement village would be simple and streamlined, when this in fact is not within the operators' control.

Under Commonwealth legislation there are provisions that limit representations where aged care facilities are co-located with retirement villages. Importantly, the legislation specifies extensive availability and eligibility requirements and entry cannot be guaranteed or promoted by operators of retirement villages.

²⁸² RVRA, *Submission*, 31 October 2017.

²⁸³ Name withheld, *Submission*, 3 October 2017

²⁸⁴ The Property Council of Australia. Retirement Village Industry Eight Point Plan, *Submission*, 9 November 2017

²⁸⁵ Lendlease. *Submission*, 31 October 2017

²⁸⁶ Dentons, *Submission*, 9 November 2017

Exiting a retirement village can be a stressful time for residents, and in some cases residents are transitioning from a retirement village to a higher level of care. There are two ways in which this can occur. The resident can move from an independent living unit to a more accessible unit where they receive a higher level of care with a Home Care Package (transferring within the village), or the resident may move into an aged care facility, such as a nursing home (exiting the contract).

Industry is preparing for an increase in both the age and volume of potential residents, and the product and services need to adjust to meet this demand. According to the Property Council 2017 census data, the operators of 40% of villages are now also approved providers of aged care, residential care, or flexible care under the *Aged Care Act 1997*.²⁸⁷ This suggests that going forward, the contractual and financial arrangements transition to higher levels of care (be it a Home Care Package within the same village or a move to a nursing home), is likely to be of interest to residents.

The Retirement Villages Residents Association suggest that financial arrangements should be included in the contract to allow easy transition out of independent living dwellings into aged care facilities.

*One identifiable gap is the lack of policies to administer and supervise the financial arrangements allowing easy transition out of independent-living dwellings into care-facilities, with due regard for the Consumer Directed Care assistance scheme.*²⁸⁸

10.4 Key Findings

10.4.1 The Inquiry finds that there are opportunities to bring the legislation in line with modern day business practices and to reduce reliance on a Tribunal process for small matters

Several areas of the legislation set timeframes making payments or the provision of certain documents. These provisions should be reviewed to ensure consistency with modern day business practices and further consultation with resident advocacy organisations and industry representatives.

One example relates to operator legal costs that can be charged to the resident. The estimated cost of legal fees can also be around \$1000, and several resident advocates questioned the need for departing residents to pay for legal costs.²⁸⁹ Under the Retirement Villages Regulation 2017, there is a cap on the legal fees charged to residents associated with preparing the contract.²⁹⁰ However no cap is provided in relation to exiting the contract.

Furthermore, the Inquiry is of the view that wherever it is practical to do so, documents should be made available on the spot (such as the disclosure statement), and payments or refunds processed immediately.

²⁸⁷ Property Council, *Retirement Census 2017*, retrieved on 11 December 2017 from www.retirementliving.org.au/wp-content/uploads/2017/11/127054715_2017-PwC-Property-Co_v10-17.11.09-Final-Web-Version.pdf

²⁸⁸ RVRA, *Submission*, 2 November 2017

²⁸⁹ Hill & Co Lawyers, *Submission*, 31 October 2017

²⁹⁰ Retirement Villages Regulation 2017 (NSW), clause 14

10.4.2 There is the opportunity to consider in further detail multiple issues raised by residents, their advocates and industry with the current legislation

The Inquiry has not conducted an extensive review of the Act and has focussed on the main issues raised in submissions to the Inquiry. The Inquiry is of the view that numerous issues raised by residents, industry and others should be considered in further detail. Further examples are provided in Appendix 11. The Inquiry has not reviewed each of these suggestions in detail.

10.4.3 The Act should be specifically reviewed for aged care arrangements and services

The Inquiry considers that review of the legislation should specifically consider the emerging issues relevant to the role that retirement villages are increasingly playing in the aged care sector. As stated by one advocacy group:

recent developments by many operators to offer a suite of services, including community care and nursing services, means that the old bricks and mortar models of retirement villages that existed when the legislation was enacted in 1999 no longer fits the developing models of care and accommodation that are growing in response to an ageing population and the broader policy environment of ageing in place with care delivered in into people's homes.²⁹¹

This requires considering protections that are appropriate to the elderly, and enshrining the principles of consumer choice and competition in the regulation of the sector, particularly where operators may offer to provide home care services as part of retirement village contractual arrangements.

10.4.4 Transitional arrangements for residents needing a higher level of care should be required in the contract

Based on the submissions received by the Inquiry it is not clear to what extent contracts provide for these transitional arrangements, especially on older contracts. However, it does not appear to be included as a standard term within the standard-contract form and this should be considered as a potential addition.

Additionally, the Inquiry notes that South Australian legislation provides for arrangements if a resident leaves a retirement village to enter a residential aged care facility. The operator is required to commence making payments to the aged care facility for the daily accommodation payment applicable to the resident's care at the aged care facility. The amounts paid on behalf of the resident may be recovered from the resident's exit entitlement.²⁹²

Additionally, in cases where a resident may need to move to an alternative premise that are more suitable to their requirements, it is unclear the level to which these transfer arrangements and financial costs are disclosed within the contracts. There is an opportunity for greater consistency with other jurisdictions in terms of the disclosure of transfer arrangements within the same village. Both Victoria and New Zealand require the disclosure of transfer arrangements within the contract.

²⁹¹ NSW Council of the Ageing, *Submission*, 9 November 2017. P21

²⁹² *Retirement Villages Act 2016* (SA) s.30

11 General operation of the sector

11.1 Introduction

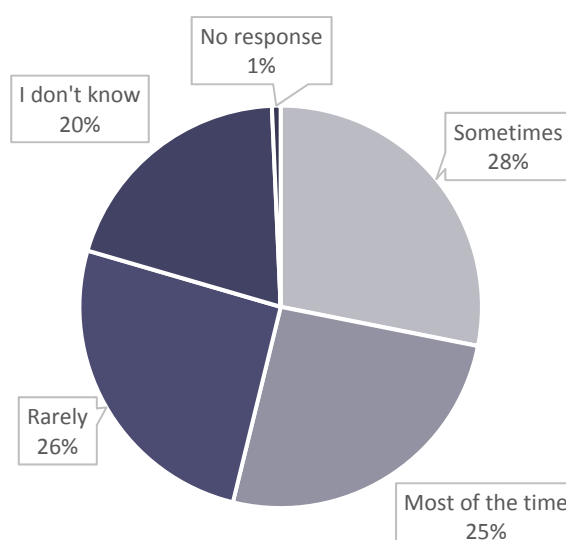
The Inquiry was asked to review the extent to which retirement villages are generally being operated honestly, diligently and fairly.

11.2 Respondent views on the general operation of the sector

In community forums, the Inquiry encouraged a discussion of residents' general concerns by asking "if you had the choice again, would you move into a retirement village?" Typically, a majority of residents said they would choose to re-enter.

In the online submission form, the Inquiry directly asked consumers "In your experience, to what extent are retirement villages being operated transparently, honestly, diligently and fairly?" With 286 consumers, the results were mixed.

Figure 11.2 To what extent are retirement villages being operated transparently, honestly, diligently and fairly?



11.2.1 Residents generally enjoy living in a retirement village but there are clear areas for improvement

The Inquiry has found that there are varying levels of satisfaction with the culture of honesty, diligence and fairness in retirement villages in NSW. Generally, current residents say they enjoy the benefits of retirement village living, particularly the community and safety aspects, but feel that there is more to be done to improve the consumer experience in the sector.

The community and industry has suggested a number of clear areas for improvement and provided a strong case for the sector-wide reforms that are covered in this report's recommendations.

Common points in submissions related to an overall lack of transparency in operations, dissatisfaction with the quality of village staff, poor levels of operator responsiveness and general concerns around respect for elderly residents and a weak spirit of customer service.

Throughout public consultation, the level of operator responsiveness to provide information to residents was consistently raised as a concern. In some cases, it was about being kept informed of important activities and decisions in retirement villages while in others it was about responding to specific requests for information. In Hornsby and Wagga Wagga, residents in the community forums suggested that the flow of information between operators, managers, residents committees and residents could be improved. One resident noted:

*Better communication, consultation and clarity of intentions. Listen to residents' concerns and be prepared to do something about them if warranted. Realise that many residents are aged and do not think or act as well as they used to*²⁹³

Some residents offered their village as a model of good practice and some praised the work of residents committees, the RVRA and the SRS for their work in representing and supporting residents' interests in villages and the sector generally.

One resident, who has lived in two different retirement villages across 19 years and at times acted as a treasurer on a Residents Committee, said the following of her experiences in the sector:

*With a diligent manager, life in a retirement village can be, as the advertisements claim, a carefree time of your life. The lack of the need to arrange for maintenance of your residence, grounds managed, social events arranged, sporting and artistic groups to join and neighbours always willing to chat. What you are really paying for is a lifestyle and my husband and I will never regret our move into a village even though, financially, it has been costly*²⁹⁴

²⁹³ G. Herrett, *Submission*, 13 October 2017

²⁹⁴ S. Dunmall, *Submission*, 23 October 2017

Appendix 1: Terms of Reference

Following concerns raised about the fairness and transparency of business practices of retirement villages in New South Wales, I, Matthew Kean, Minister for Innovation and Better Regulation, refer to the Secretary under section 189(1)(d) of the *Retirement Villages Act 1999* (the Act), the following matters to be investigated, inquired into and reported upon by 15 December 2017:

- 1) The extent to which:
 - a. retirement village marketing activities have been and are being conducted honestly, transparently and fairly;
 - b. retirement village costs, fees and charges and residents' contractual and other rights and obligations are clear and understandable for prospective retirement village residents and their families;
 - c. the built environment of retirement villages is maintained and operated in a manner which is safe for residents;
 - d. retirement village dispute resolution mechanisms are delivering just, quick and cost effective outcomes for residents and operators;
 - e. there are appropriate protections and fair arrangements with respect to building defects and the levy of fees for maintenance of retirement villages; and
 - f. retirement villages are generally being operated honestly, diligently and fairly.
- 2) Any specific matters potentially involving breach of legal obligations which should be referred to Fair Trading or other appropriate authorities for investigation.
- 3) Fair Trading administrative and operational practices that may be adopted to improve the matters referred to in paragraph 1, above.
- 4) Amendments that may be made to the Act and the Retirement Villages Regulation 2009 to improve the matters referred in paragraph 1, above.

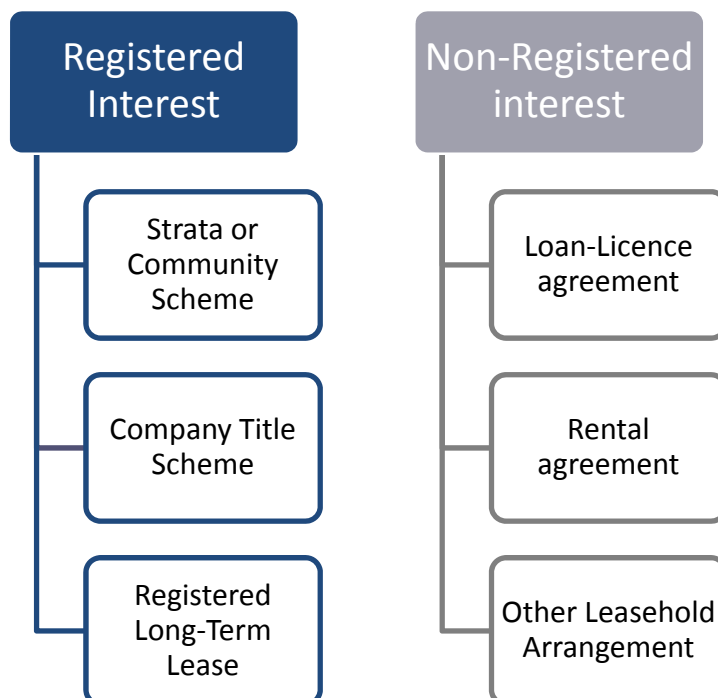
The investigation should involve the opportunity for written submissions from interested parties, and potentially public consultation meetings, but is not intended to operate in a determinative or quasi-judicial manner in respect of any particular allegation or complaint.

The Hon Matthew Kean MP

Minister for Innovation and Better Regulation

Appendix 2: Retirement Village Contracts

Retirement village residents enter into a contract with the operator of the village, either to occupy the premises and/or to receive services. The most common types of retirement village contracts offered by village operators are:



Ownership arrangements (registered interest holders)

Long-term leasehold arrangements

Under leasehold the village operator owns the residential premises in the village and each resident enters into a lease with the operator. The lease must be for a term of at least 50 years (commonly 99 or 199 years) or for the life of the lessee, and includes a provision entitling the resident to at least 50% of any capital gain. The lease must also be registered on the title with Land and Property Information.

The amount the resident pays for the leasehold varies depending on the market, similar to buying the premises. Departure fees are usually payable upon termination.

The remaining balance of the lease period of outgoing residents is assignable, but it is common practice for the lease to be surrendered and a new lease entered into between the operator and incoming resident.

Strata title

In a strata village each resident buys the property under a normal sales contract and automatically is a part of the owners corporation. They are required to enter into a service contract with the operator. There is also commonly an overarching agreement in place between the operator and the owners corporation to supply services and carry out certain functions.

Strata retirement villages are also regulated by the *Strata Schemes Management Act 2015* and the *Strata Schemes Development Act 2015*.

Unlike external strata schemes outgoing residents often have to pay the operator a share of any capital gains as well as departure fees and other charges from the proceeds of the sale.

Community title

Similar to strata title arrangements in many respects. There can be added layers of management in the form of precinct, neighbourhood and community associations. Community title retirement villages are further regulated by the *Community Land Management Act 1989*.

Company title schemes

A small number of privately run villages operate under company title. The village is owned by a company, in which residents purchase shares at market value. The shares give each resident the right to occupy premises. A Board of Directors, appointed by the shareholders, operates the village. Residents are required to comply with the company's constitution and articles of association. Company title villages are also regulated by the Commonwealth's *Corporations Act 2001*.

Non-ownership arrangements (non-registered interest holders)

Loan-licence/occupancy agreements

These arrangements are mainly offered by non-profit organisations such as where a church or charity owns the village. The resident pays an ongoing contribution to the operator in the form of an interest-free loan, part of which may be a non-refundable donation. In return, the agreement permits the resident to occupy premises. Sometimes a separate loan agreement sets out matters relating to the resident's loan.

The permission to occupy the premises ends when the resident's contract is terminated. Regardless of what the next resident pays the outgoing resident is usually only entitled to receive his or her ongoing contribution back, less any departure fee and other charges. Arrangements whereby the resident may get a share of any capital gains are rare.

Rental arrangements

Some villages offer all or some of their premises on a rental basis only. If the rental agreement contains a term excluding the resident from the retirement village laws, the agreement will be covered by the *Residential Tenancies Act 2010* instead of the *Retirement Villages Act 1999*.

In these arrangements, no ongoing contribution is payable on entry or exit fees payable on departure. The resident will usually be required to pay a rental bond up front and the agreed weekly rent like other tenants in the general community. Sometimes the rent payable is higher than the recurrent charges of other residents living in the village.

Non ownership lease arrangements

This is more than a basic rental arrangement. Residents are charged some amount of ongoing contribution and may also have to pay departure fees and the like. However, the lease is for a term of less than 50 years and/or the resident is not entitled to at least 50% of any capital gain. This means that the resident is not a registered interest holder for the purposes of the *Retirement Villages Act 1999*.

Appendix 3: General differences between registered and non-registered interest holders rights

When does the residence right end?

Registered	As an owner, your residence right only ends when the sale of your unit is completed. ²⁹⁵
Non-Registered	Generally, your residence right ends when you permanently vacate your unit or when you die. ²⁹⁶

How are departure fees paid?

Registered	As a registered interest holder, your departure fee is payable out of the proceeds of the sale of your unit. ²⁹⁷
Non-Registered	As a non-registered interest holder, your departure fee is payable out of your ingoing contribution (the amount you paid to move in) before any balance is refunded to you when you leave. ²⁹⁸

When will the refund be paid after leaving the village?

Registered	<p>As you are the owner of your unit until someone else purchases it, you will receive your refund within 14 days of when a new resident moves in or when a new resident pays the operator for your unit.</p> <p>However, if your village contract specifies an earlier date, your refund must be given to you in accordance with your contract.²⁹⁹</p>
Non-Registered	<p>You will be paid your refund within 14 days after your unit is re-sold or re-occupied. If it takes some time for someone else to move into your unit, the operator must pay you your refund after six months from the date you move out, regardless of whether someone else has moved in.</p> <p>However, if your village contract specifies an earlier date, your refund must be given to you in accordance with your contract.³⁰⁰</p>

When will the refund be paid after choosing to move out during the settling-in period?

Registered	If you terminate your village contract during the settling-in period, because you are an owner, you will receive your refund within 14 days of when a new resident moves in or when a new resident pays the operator for your unit, if your contract does not specify an earlier date. ³⁰¹
Non-Registered	If you terminate your village contract during the settling-in period, the operator must pay you your refund within 14 days, regardless of whether someone else has moved in. ³⁰²

²⁹⁵ *Retirement Villages Act 1999* (NSW), s.129(1)

²⁹⁶ *Ibid*, s.129(2)

²⁹⁷ *Ibid*, s.157(3)

²⁹⁸ *Ibid*, s.157(2)

²⁹⁹ *Ibid*, s.180

³⁰⁰ *Ibid*, s.181

³⁰¹ *Ibid*, s.44D(2)

³⁰² *Retirement Villages Act 1999* (NSW), s.44D(1)

What happens with recurrent charges for general services once leaving the retirement village?

Registered	You must continue to pay recurrent charges for general services when you leave until a new resident moves in. However, if you share any capital gain made from the sale of your premises with the operator, you must only pay the recurrent charges in full for the first 42 days after you leave. After this time you and the operator share the cost of the recurrent charges in the same proportion as you share the capital gain. For example, if you and the operator share any capital gain 50/50, you also share the cost of recurrent charges 50/50 after 42 days. This continues until a new resident moves in. ³⁰³
Non-Registered	You are only required to pay recurrent charges for general services for 42 days after you leave or until a new resident moves in. ³⁰⁴

What happens with recurrent charges for optional services once leaving the retirement village?

Whether registered or not, any recurrent charges relating to optional services cease immediately after you permanently vacate the premises or when you die.³⁰⁵

Can the resident or their estate be charged interest on any unpaid recurrent charges?

Yes, whether registered or not. If recurrent charges go unpaid after you leave the operator is entitled to charge interest on the unpaid amount. However, the law prescribes the maximum rate that can be charged where your agreement does not specify an interest rate.³⁰⁶

Is a resident required to pay for repairs to the unit when leaving?

Registered	In some cases yes. You must leave the unit in the same condition that it was when you moved in, less fair, wear and tear. This means you are responsible for any damage in excess what occurs through normal use or happens with ageing. You cannot be required to pay for any repairs or other work which is over and above reinstating the premises to its original condition. ³⁰⁷
Non-Registered	You are only required to pay for repairs if a condition report was completed when you moved in. If so, you are required to return the unit to the same condition that it was as noted in the condition report, less any fair, wear and tear. ³⁰⁸

Is a resident required to renovate/refurbish the unit when they leave?

Registered	No. The operator cannot require you to renovate your unit when you leave if your village contract started after 1 July 2000. If you started living in your unit before this date, check if your contract contains a refurbishment clause. If it does, you may be required to pay for renovation work that is more than what would be required to reinstate the unit to the condition it was in when you started living there. In these circumstances, the operator must obtain a minimum of three quotes for the cost of the work or use the tradespersons who ordinarily carry out maintenance in the village. ³⁰⁹
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³⁰³ Ibid, s.152

³⁰⁴ Ibid, s.153

³⁰⁵ Ibid, s.151

³⁰⁶ Ibid, s.155

³⁰⁷ Retirement Villages Regulation 2017, Schedule 2, Clause 15.1

³⁰⁸ Retirement Villages Act 1999 (NSW), s.163

³⁰⁹ Retirement Villages Act 1999 (NSW), s.164-165

Non-Registered	No. You are not required to renovate or make any other repairs to your unit which is more than returning it to the condition it was as noted in the condition report. ³¹⁰
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What costs are involved when selling the unit?

Registered	If you want to choose the agent who will sell your unit, you will be required to pay any commission to that agent. All other costs of sale are to be shared between you and the operator in the same proportion as capital gain is shared. ³¹¹
Non-Registered	As a non-registered interest holder you are not required to pay any costs involved in selling your unit. These costs must be paid in full by the operator. ³¹²

Who sets the sale price of the unit when it is vacated?

Registered	You are free to set the sale price of your unit. ³¹³
Non-Registered	As a non-registered interest holder, the operator determines the sale price for your unit.

Can the departing resident appoint their own selling agent?

Registered	Yes. You are free to appoint any licensed agent of your choice. ³¹⁴
Non-Registered	No. The operator has control over all aspects of the re-sale of your unit, including who is the selling agent.

For registered interest holders only –

Can the departing resident appoint the operator as the selling agent?

Yes but you are not required to. It is your decision who you want to appoint to help you sell your unit.³¹⁵

14. What happens if the operator refuses to enter into an agreement with a person the departing resident has found to purchase the unit?

In certain circumstances, the operator can refuse to enter into an agreement with a purchaser. For example, if the person is under the required age for entry or if they are not capable of living independently. If you think the operator has unreasonably refused to enter into a contract with a purchaser of your unit you can apply to the Tribunal for an order.³¹⁶

³¹⁰ Ibid, s.163-165

³¹¹ Ibid, s.170

³¹² Ibid, s.166

³¹³ Ibid, s.168(1)(a)

³¹⁴ Ibid, s.168(1)(b)

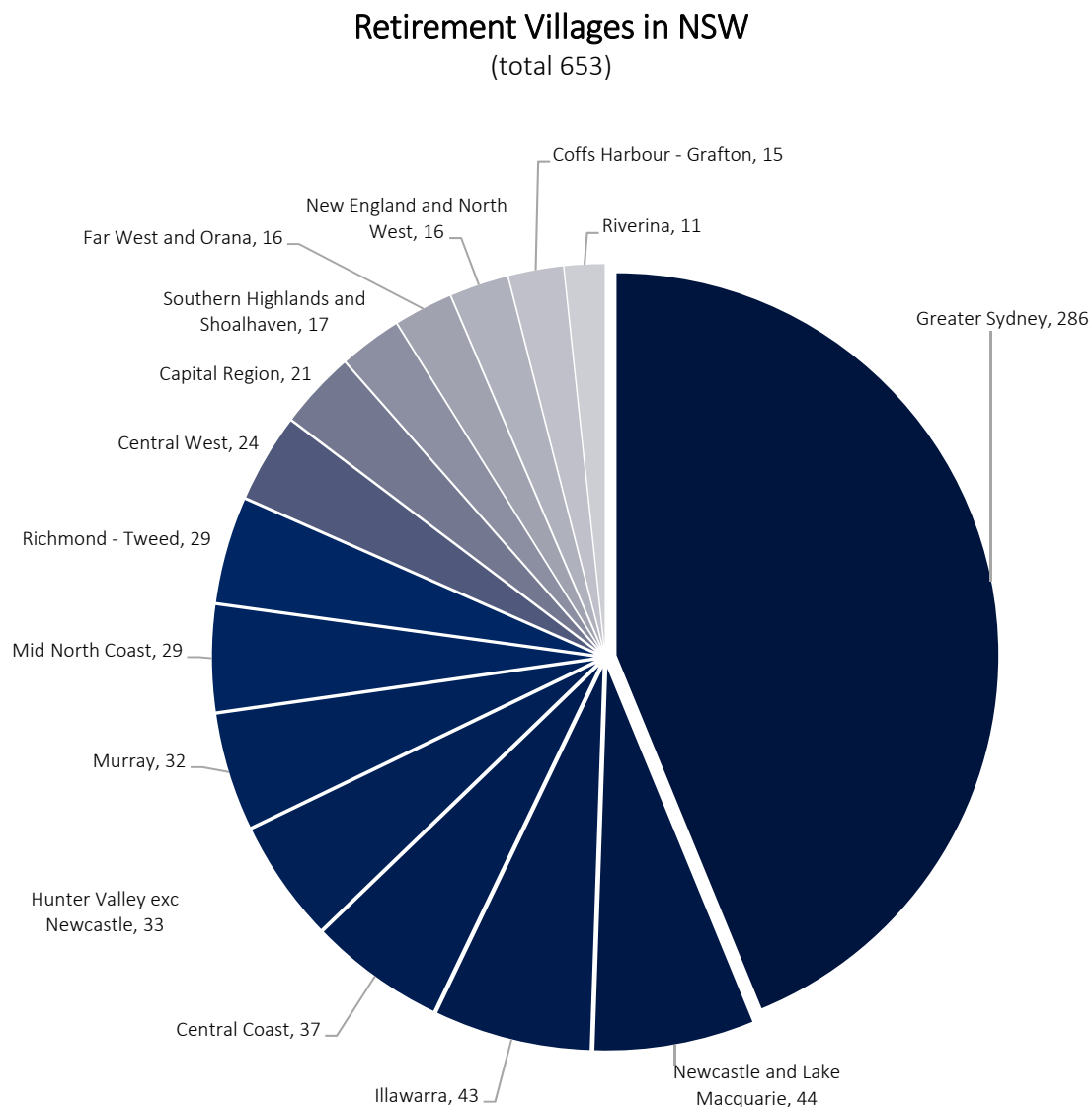
³¹⁵ Ibid, s.168(1)(b)

³¹⁶ Ibid, s.172

Appendix 4: Retirement village sector data

NSW Registered Retirement Villages

Villages	
Number of registered villages in NSW ³¹⁷	653
Number of unique operators in the state ³¹⁸	267



³¹⁷ Fair Trading retirement villages register data report (generated on 15 Aug 2017)

³¹⁸ Based on recorded contact details and business names provided in Fair Trading data

Region of NSW	# Villages	% State
Sydney - North Sydney and Hornsby	62	9%
Newcastle and Lake Macquarie	44	7%
Illawarra	43	7%
Central Coast	37	6%
Sydney - Northern Beaches	35	5%
Hunter Valley (excl Newcastle)	33	5%
Murray	32	5%
Sydney - Baulkham Hills and Hawkesbury	30	5%
Mid North Coast	29	4%
Richmond - Tweed	29	4%
Sydney - Parramatta	29	4%
Central West	24	4%
Capital Region	21	3%
Sydney - Inner South West	21	3%
Sydney - Sutherland	18	3%
Southern Highlands and Shoalhaven	17	3%
Far West and Orana	16	2%
New England and North West	16	2%
Sydney - Eastern Suburbs	16	2%
Coffs Harbour - Grafton	15	2%
Sydney - Inner West	14	2%
Sydney - Outer South West	13	2%
Riverina	11	2%
Sydney - City and Inner South	11	2%
Sydney - Outer West and Blue Mountains	11	2%
Sydney - Ryde	9	1%
Sydney - South West	9	1%
Sydney - Blacktown	8	1%
Total number of registered villages	653	100%

NSW Retirement Village Residents

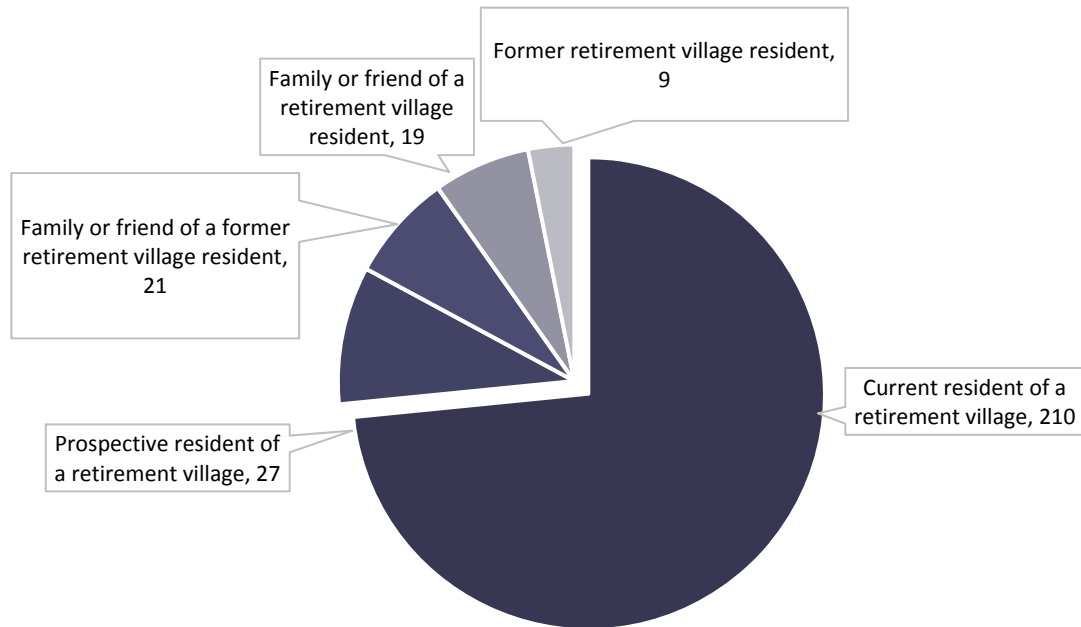
Residents ³¹⁹	
Number of retirement village residents in NSW	56,000
Average age of retirement village residents in NSW	80
Average age of a person moving into a retirement village in NSW	75
Average tenure of resident in NSW (in years)	7 years
Percentage of female residents	65%

³¹⁹ Property Council, *Retirement Census 2017*, retrieved 11 December 2017 from www.retirementliving.org.au/wp-content/uploads/2017/11/127054715_2017-PwC-Property-Co_v10-17.11.09-Final-Web-Version.pdf (note ACT/NSW data is given as "NSW" data here)

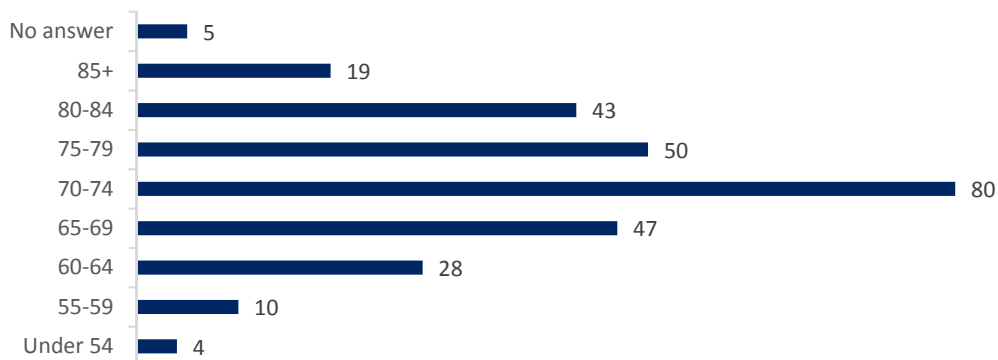
Appendix 5: Online submission form results

Demographic information of respondents

Consumer respondent backgrounds



Age of respondents



Gender of respondents

	Number	Percentage
Female	148	52%
Male	131	46%
Indeterminate/intersex/unspecified	7	2%
Total	286	100%

Non-consumer respondents

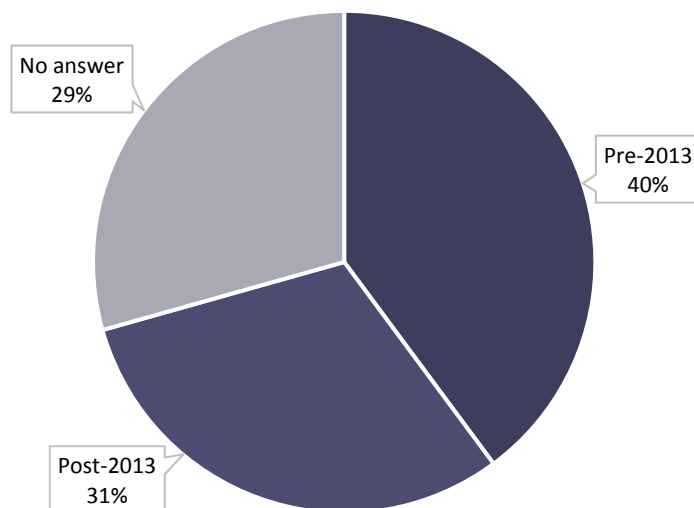
These quantitative results exclude the numbers from 14 submissions provided by respondents identified as non-consumers. These submissions have been considered by the Inquiry but are left out in this analysis to draw focus on the consumer experience of residents and their family and friends.

Non-consumer respondents	Number
A Village owner/operator	2
Employed in the industry	2
Interested Citizen	3
Licensed Real Estate Agent	1
Clergy	1
Health Activist	1
Honorary Director Retirement Village	1
Lawyer for prospective residents of retirement villages	1
Person with prior experience in selling villages	1
Private nurse consultant/educator	1
Total	14

Costs, fees, contracts, rights and responsibilities

If you are currently living in a retirement village, when did you move into your village? (note: the NSW Government's standard contract for retirement villages is mandatory for village contracts entered on or after 1 October 2013.)

When did you move into your current village?



1. Are entry costs clear and easy to understand?

	Number	Percentage
Yes	198	69%
No	83	29%
No answer	5	2%
Total	286	100%

2. Are ongoing fees clear and easy to understand?

	Number	Percentage
Yes	162	57%
No	120	42%
No answer	4	1%
Total	286	100%

3. Are exit fees clear and easy to understand?

	Number	Percentage
Yes	111	39%
No	169	59%
No answer	6	2%
Total	286	100%

4. Are retirement village rules clear and easy to understand?

	Number	Percentage
Yes	172	60%
No	107	37%
No answer	7	2%
Total	286	100%

5. Are maintenance fees clear and easy to understand?

	Number	Percentage
Yes	123	43%
No	152	53%
No answer	11	4%
Total	286	100%

6. Are resident rights and obligations clear and easy to understand?

	Number	Percentage
Yes	122	43%
No	153	53%
No answer	11	4%
Total	286	100%

Dispute resolution mechanisms

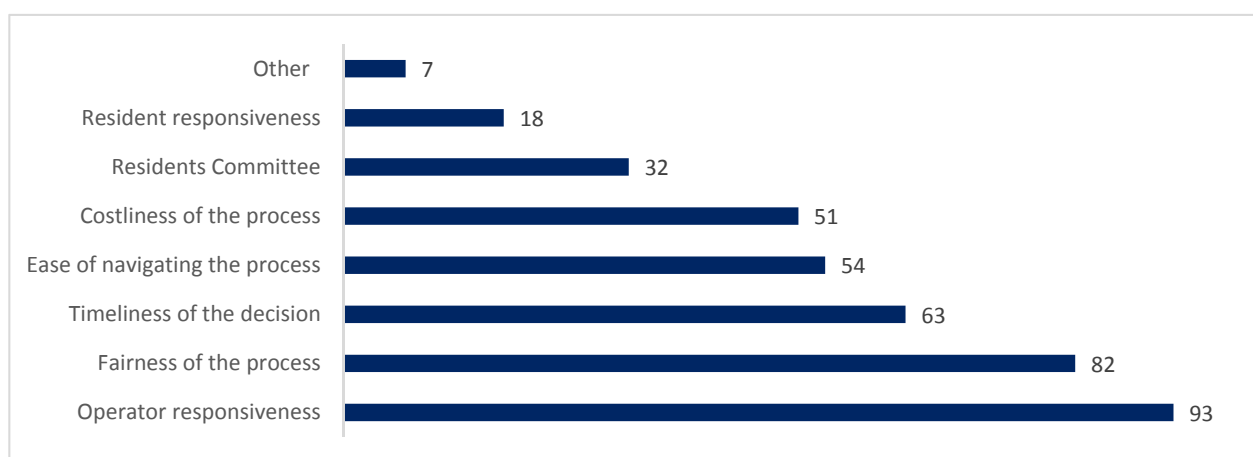
1. Are you aware of the process to resolve a dispute in a retirement village between an operator and resident?

	Number	Percentage
Yes	189	66%
No	91	32%
No answer	6	2%
Total	286	100%

2. Do you have concerns about how disputes are managed and resolved?

	Number	Percentage
Yes	113	40%
No	73	26%
No answer	100	35%
Total	286	100%

3. If applicable, what are your concerns about dispute resolution?³²⁰



4. Have you ever been involved in a dispute with an operator or resident?

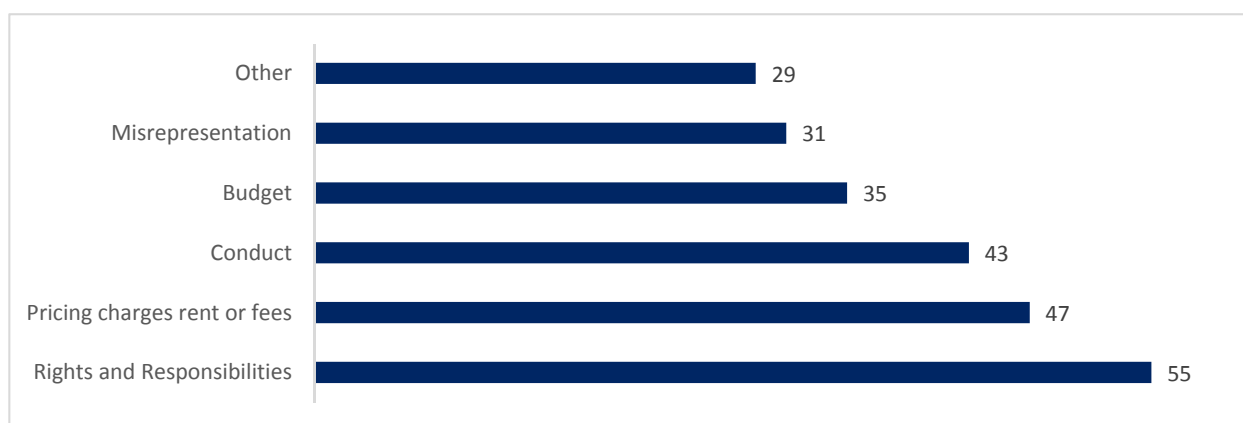
	Number	Percentage
Yes	133	47%
No	141	49%
No specified	12	4%
Total	286	100%

³²⁰ 112 responses with multiple categories chosen

5. If you were involved in a dispute, what did you do about it?³²¹

	Number	Percentage
Raised the matter with Residents Committee	59	20%
Contacted Fair Trading	53	18%
Sought advice from a lawyer	45	15%
Contacted the RVRA	40	14%
Other	35	12%
Sought a determination from NCAT	27	9%
Sought advice from the Seniors Rights Service	27	9%
No action taken	6	2%

6. If applicable, what did your dispute relate to?³²²



Funding for village maintenance and upgrades

1. If you are a current, prospective or former resident of a retirement village, are you aware of how decisions are made in relation to retirement village budgets?

	Number	Percentage
Yes	115	40%
No	120	42%
No answer	51	18%
Total	286	100%

2. Are retirement village budgets clear and easy to understand?

	Number	Percentage
Yes	84	29%
No	182	64%
No answer	20	7%
Total	286	100%

³²¹ 127 responses with multiple categories chosen

³²² 131 responses with multiple categories chosen

3. Do you have any concerns relating to funding arrangements for maintenance and upgrades in retirement villages? (e.g. capital repairs and replacements)

	Number	Percentage
Yes	194	68%
No	86	30%
No answer	6	2%
Total	286	100%

4. Are maintenance fees clear and easy to understand?

	Number	Percentage
Yes	123	43%
No	152	53%
No answer	11	4%
Total	286	100%

Marketing activities

1. Based on your experience of marketing activities in the sector, are you satisfied that marketing activities are being conducted honestly, transparently and fairly?

	Number	Percentage
Yes	89	31%
No	179	63%
No answer	18	6%
Total	286	100%

Safety and security of the built environment

1. In your experience, are retirement villages maintained and operated in a way that is safe and secure for residents?

	Number	Percentage
Yes	154	54%
No	125	44%
No answer	7	2%
Total	286	100%

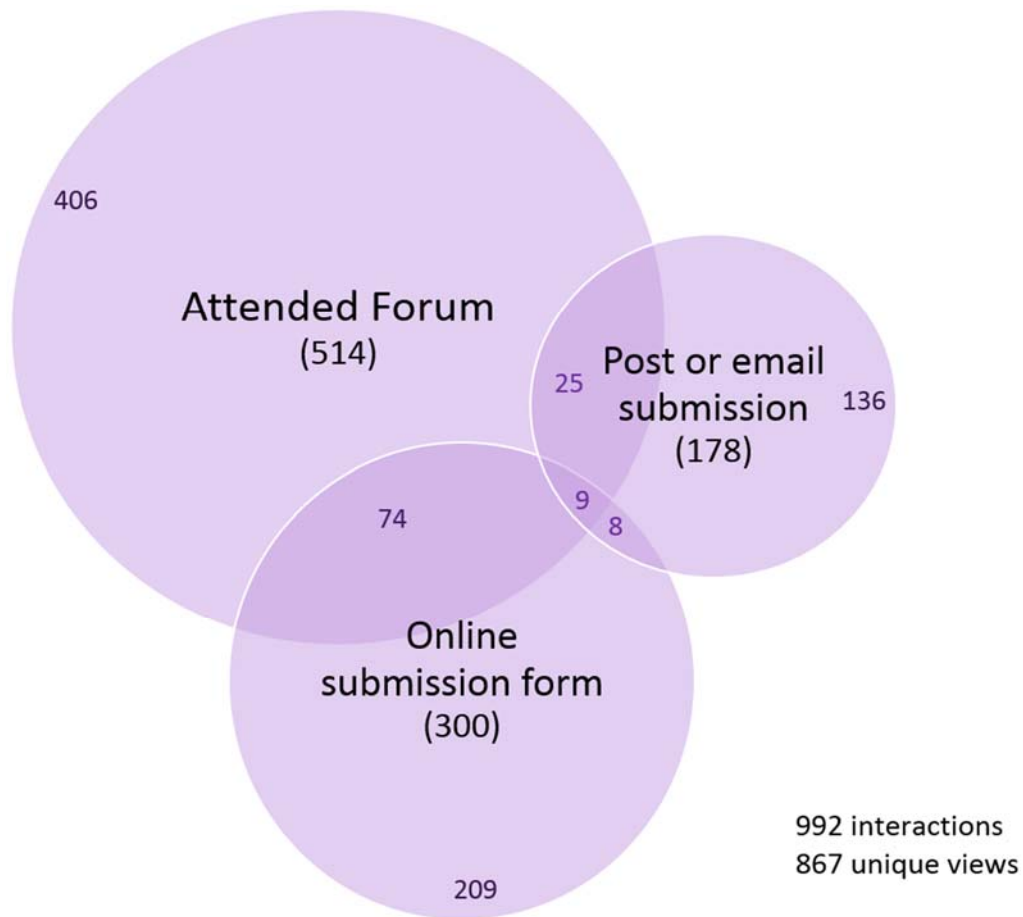
Other opportunities for reform

1. In your experience, to what extent are retirement villages being operated transparently, honestly, diligently and fairly?

	Number	Percentage
Most of the time	74	26%
Sometimes	81	28%
Rarely	74	26%
I don't know	57	19%
No response	2	1%
Total	286	100%

Appendix 6: Key data on the consultation process

The Inquiry's public consultation



Community Forums

Date	Venue	Attendees
3 Oct	Hornsby	95
4 Oct	Newcastle	58
10 Oct	Wagga Wagga	76
12 Oct	Wollongong	53
17 Oct	Sydney	68
18 Oct	Ballina	53
19 Oct	Port Macquarie	72
24 Oct	Parramatta	39
Total		514

Submissions - Consultation 1 Oct – 30 October 2017

Total number of written submissions	178
Total number of respondents to online submission form ³²³	300

³²³ Four online submissions came from Residents Committees that state that they represent the views of over 600 current residents

Roundtables

Date	Venue	Attendees
21 Sep	McKell Building, 2-24 Rawson Pl Sydney	Residents Roundtable
5 Oct	McKell Building, 2-24 Rawson Pl Sydney	Industry Roundtable
26 Oct	SMC Function Centre, 66 Goulburn Street, Sydney	Joint Resident and Operator Roundtable

Geographic distribution of Submissions received

Region ³²⁴	Number of Submissions	Percentage
Sydney - North Sydney and Hornsby	61	15%
Mid North Coast	41	10%
Sydney - Baulkham Hills and Hawkesbury	41	10%
Sydney - Northern Beaches	37	9%
Richmond - Tweed	29	7%
Central Coast	27	7%
Newcastle and Lake Macquarie	27	7%
Illawarra	19	5%
Southern Highlands and Shoalhaven	15	4%
Hunter Valley (excl Newcastle)	13	3%
Murray	13	3%
Sydney - City and Inner South	13	3%
Sydney - Inner West	8	2%
Sydney - Outer South West	8	2%
Sydney - Eastern Suburbs	7	2%
Sydney - Parramatta	7	2%
Sydney - Sutherland	7	2%
Sydney - Blacktown	6	1%
Sydney - Inner South West	5	1%
Central West	4	1%
New England and North West	4	1%
Queensland	3	1%
Sydney - Ryde	3	1%
Capital Region	2	<1%
Sydney - Outer West and Blue Mountains	2	<1%
Sydney - South West	2	<1%
Victoria	2	<1%
Australian Capital Territory	1	<1%
Coffs Harbour - Grafton	1	<1%
Total	408	100%

³²⁴ Regions based on Australian Statistical Geography Standards cross referenced with the postcodes provided by 408 unique written and online submissions

Appendix 7: Examining the impact of the 2013 Contract and disclosure requirement

In 2013, the NSW Government introduced the Retirement Villages Amendment (Standard Contract) Regulation 2013 which governs contracts entered into on and after 1 October 2013. The changes were designed to simplify contractual arrangements and increase transparency in the retirement village sector. The amendment prescribes the content and form of the general inquiry document, disclosure statement and the standard form of village contract as well as imposing penalties on operators for non-compliance.

In the online submission form, the Inquiry asked respondents who identified as current or former residents, what date they moved into their village. Below is a table of the responses for key questions divided into contracts entered into before and after 1 October 2013, as well as the results of consumer respondents who did not identify the year of a relevant village contract.

The results provide the following insights into respondents with contracts entered into after the 2013 amendments -

- 7% more residents state that entry costs are clear and easy to understand (73% to 80%)
- 4% more residents state that ongoing fees are clear and easy to understand (60% to 64%)
- 11% more residents state that exit costs are clear and easy to understand (38% to 49%)
- 11% more residents state that retirement village marketing activities are being conducted honestly, transparently and fairly (29% to 40%)
- 18% more residents have not had a dispute with a village operator or resident (39% to 57%)

On a note of caution, there are limitations to these results that should be considered when examining the data. In addition to the self-selecting bias of the submission process, the Inquiry has not received reliable whole-market data on the proportion of in-force contracts from pre- and post-October 2013 in order to test representativeness.

Only 202 submission form respondents stated their contract date and a smaller proportion of respondents identified themselves as having a post-October 2013 contract (88 respondents). Newer contracts will often mean newer residents and the shorter tenure should be considered with the results.

Online Submission form questions for pre- and post- 1 October 2013 contract

Question ³²⁵	Contract Year	Yes	No	Blank	Total
Marketing activities are being conducted honestly, transparently and fairly?	Pre-Oct 2013	33 29%	70 61%	11 10%	114
	Post-Oct 2013	35 40%	50 57%	3 3%	88
	N/A	21 25%	59 70%	4 5%	84
Entry costs clear and easy to understand?	Pre-Oct 2013	83 73%	29 25%	2 2%	114
	Post-Oct 2013	70 80%	17 19%	1 1%	88
	N/A	45 54%	37 44%	2 2%	84
Ongoing fees clear and easy to understand?	Pre-Oct 2013	68 60%	44 39%	2 2%	114
	Post-Oct 2013	56 64%	31 35%	1 1%	88
	N/A	38 45%	45 54%	1 1%	84
Exit fees clear and easy to understand?	Pre-Oct 2013	43 38%	69 61%	2 2%	114
	Post-Oct 2013	43 49%	43 49%	2 2%	88
	N/A	25 30%	57 68%	2 2%	84
Village rules clear and easy to understand?	Pre-Oct 2013	80 70%	31 27%	3 3%	114
	Post-Oct 2013	64 73%	24 27%	0 0%	88
	N/A	28 33%	52 62%	4 5%	84
Maintenance fees clear and easy to understand?	Pre-Oct 2013	47 41%	65 57%	2 2%	114
	Post-Oct 2013	47 53%	36 41%	5 6%	88
	N/A	29 35%	51 61%	4 5%	84
Village budgets and accounts clear and easy to understand?	Pre-Oct 2013	34 30%	77 68%	3 3%	114
	Post-Oct 2013	32 36%	48 55%	8 9%	88
	N/A	18 21%	57 68%	9 11%	84
Resident's rights and obligations clear and easy to understand?	Pre-Oct 2013	54 47%	57 50%	3 3%	114
	Post-Oct 2013	48 55%	38 43%	2 2%	88
	N/A	20 24%	58 69%	6 7%	84
Are you aware of how decisions are made in relation to budgets?	Pre-Oct 2013	64 56%	46 40%	4 4%	114
	Post-Oct 2013	37 42%	49 56%	2 2%	88
	N/A	14 17%	25 30%	45 54%	84
Any concerns relating to funding arrangements for maintenance and upgrades?	Pre-Oct 2013	84 74%	26 23%	4 4%	114
	Post-Oct 2013	63 72%	25 28%	0 0%	88
	N/A	47 56%	35 42%	2 2%	84
In your experience, are retirement villages maintained and operated in a way that is safe and secure for residents?	Pre-Oct 2013	65 57%	47 41%	2 2%	114
	Post-Oct 2013	50 57%	38 43%	0 0%	88
	N/A	39 46%	40 48%	5 6%	84

³²⁵ Questions have been truncated – see “The NSW Inquiry into the Retirement Village Sector Submission Form” published on the Fair Trading website

Aware of the process to resolve a dispute in a retirement village between an operator and resident?	Pre-Oct 2013	92	81%	21	18%	1	1%	114
	Post-Oct 2013	64	73%	23	26%	1	1%	88
	N/A	33	39%	47	56%	4	5%	84
Do you have concerns about how disputes are managed and resolved?	Pre-Oct 2013	65	57%	26	23%	23	20%	114
	Post-Oct 2013	30	34%	34	39%	24	27%	88
	N/A	18	21%	13	15%	53	63%	84
Have you ever been involved in a dispute with an operator or resident?	Pre-Oct 2013	67	59%	44	39%	3	3%	114
	Post-Oct 2013	36	41%	50	57%	2	2%	88
	N/A	30	36%	47	56%	7	8%	84

General Operation of retirement villages

Question	Contract Year	Blank		I don't know		Most of the time		Sometimes		Rarely		Total
To what extent are retirement villages being operated transparently, honestly, diligently and fairly?	Pre-Oct 2013	0	0%	17	15%	31	27%	35	31%	31	27%	114
	Post-Oct 2013	0	0%	16	18%	26	30%	26	30%	20	23%	88
	N/A	2	2%	22	26%	17	20%	20	24%	23	27%	84

Appendix 8: Definitions of maintenance under the Act

The concepts of capital maintenance and capital replacement are only broadly defined

Under the Act the concepts of capital maintenance and capital replacement guide funding arrangements for capital items in the village. Items of capital include buildings, structures, plant, machinery, fixtures, fittings and furnishings. Key terms for understanding village maintenance costs are set out in Table 1 below.

Table 1: Key definitions that provide for maintenance of capital items in a retirement village

Term	Definition	Relevant provisions
Item of capital	<p>Under the Act an item of capital is</p> <ul style="list-style-type: none"> - Any building or structure in a RV - Any plant, machinery or equipment used in the operation of the village - Any part of the infrastructure of the village - Any item prescribed by the regulation <p>The regulation prescribes items of capital to be:</p> <ul style="list-style-type: none"> - Fixtures (e.g. bench tops, built-in cupboards and wardrobes, floor coverings, hot water systems and stoves) - Fittings (e.g. light fittings, taps and sanitary fittings) - Furnishings (e.g. curtains and blinds) - Non-fixed items (e.g. whitegoods, portable air conditioners, fans, tables and chairs) 	<p>Section 4 of the Act</p> <p>Clause 5 of the regulation</p>
Capital maintenance	<p>Works carried out for the purpose of repairing or maintaining an item of capital and includes works prescribed by the regulations to be capital maintenance, but does not include works that are prescribed by the regulations as not being capital maintenance.</p> <p>According to the regulations capital maintenance does not include the following:</p> <ul style="list-style-type: none"> - work done to substantially improve an item of capital beyond its original condition - work done to maintain or repair an item of capital in circumstances where it would have been more cost effective to replace the item of capital 	<p>Section 4 of the Act</p> <p>Clause 4 of the Regulation</p>

Capital replacement	This means works carried out for the purpose of replacing an item of capital, but does not include capital maintenance.	Section 4
Capital Works Fund	<p>If the approved budget allows for part of the recurrent charges to fund capital maintenance beyond the budgeted financial year the operator must establish and maintain a capital works fund (CWF).</p> <p>The operator is to pay the approved portion of the recurrent charges and any interest received on the investment of any funds in the CWF into the CWF.</p> <p>Money from this fund must only be used to meet the cost of capital maintenance or be returned to residents in equal shares with their consent.</p>	<p>Section 4</p> <p>Section 99</p>

Appendix 9: Case Study – The Landings Retirement Village

Introduction

On 23 October 2017, the Inquiry held a consultation session at The Landings Retirement Village at Turramurra. The purpose of the session was to understand how the dispute resolution process of the retirement village sector operates and The Landings Retirement Village has been involved in legal disputes over several years. Discussions were held with both management and residents of the village to gain insight into the dispute resolutions mechanisms available, the main causes of disputes and opportunities to reform the dispute resolution process.

The Landings at Turramurra

The Landings Retirement Village (The Landings) has 220 dwellings and approximately 330 residents with an average age of 84. At the village, residents are on a 100% capital gain arrangement and all are registered interest holders. The operator is property development company Sakkara Investment Holdings Pty Ltd (Sakkara).

The disputes

The Landings' residents have been active in their pursuit to secure fairness and transparency from their operator who they believe have breached their legislative obligations. The disputes come down to financial management issues, primarily changes to the level of recurrent charges, clarity over responsibility of various costs, and a perceived lack of transparency of the operator's budgets.

The fundamental issue underling the legal disputes has been about the management of the village's budget. The residents have sought assurance that the finances of the village are appropriately managed and meet legislative obligations, and have sought suitable information on budget costs. Over the five years since 2011/12, the setting of budgets has been subject to NCAT hearings with Sakkara making applications to secure an approved annual budget.³²⁶

One of the budgetary disputes was around management fees that were charged to residents without what the residents saw as sufficient disclosure of detail or consent to the new contract. Other matters related to the distinction between repair and replacement items of capital as well as clearer definitions around the responsibility of maintenance costs specifically around the external painting of the village's buildings. The residents have also sought a clear distinction between recurring annual village operating expenditure and non-recurring contributions to specified capital works projects. Furthermore, the Residents Committee have had issues with the auditing process of the village as well as building defects.

The resolution process

The Landings has a documented process for lodging, processing and resolving disputes internally to the village. The first step a resident can take is raise the issue with the village manager who will investigate the issue and aims to reach a timely and fair resolution.

If this is not successful, the Inquiry was informed by residents that the issue can be raised with the Residents Committee who have extensive access to information to start resolving the issues. The

³²⁶ Under *Retirement Villages Act 1999*, s.115(1), if residents do not approve a proposed annual budget, the operator can apply to NCAT for orders setting down an approved annual budget

role of the Residents Committee is to represent the interests of residents on community wide issues and have also provided support to residents in discussions with management and represented residents at NCAT proceedings.

If these avenues do not successfully reach a mutually agreeable outcome to the issues at hand, the resident may lodge a NCAT application.

Fair Trading has also been approached and provided advice to both residents and management throughout these disputes. This has included providing reports on building defects and investigations into non-compliance with legislative obligations. Mediation has also been used by the village to resolve disputes before it is escalated to the Tribunal hearing. One example provided was the use of mediation to develop a Defects Identification Process for the village to resolve issues with defects and maintenance.

An overview of the Tribunal history

The history of litigation of The Landings is complex with numerous NCAT applications being made between Sakkara and the residents over recent years. According to the residents, the last five years has seen around 20 actions taken to NCAT and the courts.

Legal proceedings began in 2011 when Sakkara filed an application with the then Consumer Tenancy and Trader Tribunal (CTTT) to vary proposed recurrent charges for the 2011/12 financial year.³²⁷ In 2012, subsequent applications were made by the Residents Committee and Sakkara seeking orders relating to the appointment of an assessor to make a report to the CTTT, variation of recurrent charges and the distribution of the Capital Works Fund, among other matters. The Residents Committee also sought orders regarding building rectification work. Orders were made in June 2013 for Sakkara to pay compensation to the residents arising from its use of management, contractors, material and maintenance to rectify past defects across the village.³²⁸

In July 2013, Sakkara commenced an appeal in the District Court, but subsequently discontinued the proceedings seven months later. In December 2013, Sakkara sought judicial review in the Supreme Court of the orders made by the Tribunal in June 2013.³²⁹ The orders were in respect to providing residents with reconciled audited statements, holding discussions to agree on the correct accounting baseline for future budgets, and requiring the parties to agree on an appropriate auditor to be appointed. The Supreme Court refused to extend time in which to apply for judicial review and dismissed the summons.

The NCAT disputes that followed dealt with the village's budget and non-compliance with Tribunal orders. As highlighted by residents and management, the subsequent matters to NCAT in part re-addressed past issues. In several NCAT matters, orders were eventually made and the expenditure of the budgets were set. However, this was usually after the end of the relevant financial year which meant that the village was operating without an approved budget for years at a time. For instance, during FY11/12 and FY12/13 a budget was not determined by the Tribunal during either of those financial years. The position for these two financial years were eventually determined by NCAT, along with other matters, in November 2014.³³⁰

³²⁷ Under s.108 of the *Retirement Villages Act 1999*

³²⁸ *Sakkara Investment Holdings v The Residence Committee, the Landings (Retirement Village)* [2013] NSWCTTT 263

³²⁹ *Sakkara Investment Holdings Pty Ltd as trustee for Sakkara Landings Trust v The Residents Committee, The Landings and The Consumer Trader and Tenancy Tribunal of New South Wales* [2014] NSWSC 610

³³⁰ *The Residents Committee, The Landings v Sakkara Investment Holdings Pty Ltd ATF Sakkara Landings Trust* [2014] NSWCATCD 228

The latest dispute before NCAT was decided on 31 May 2017³³¹. Some funds have been repaid by the operator and the decision resulted in a lower levy for the residents than that proposed by Sakkara.

Lessons learned

The protracted history of The Landings legal proceedings points to some of the current limitations of the dispute resolution process in the retirement village sector preventing residents from receiving a timely, fair and cost-effective outcome to their disputes.

A common concern is that there is no other avenue available other than lodging an application with NCAT. This causes apprehension with residents for many reasons. One being that the costs of proceeding with the Tribunal hearing would be greater than the value of the issue being pursued, with some residents stating that the only sensible course of action is to withdraw. In the latest matter before NCAT, the Residents Committee spent over \$120,000 in legal costs to fund their case which took 17 months to conclude. These costs are augmented through the increasing practice of using lawyers on both sides.

The experiences of residents also shed light on the internal dispute resolution practices of villages. Management of The Landings have outlined for the Inquiry the dispute resolution process currently in practice in the village. However, some residents have indicated there is a mixed level of responsiveness from management.

Further, the residents seek a simplified system for complaint processing which is capable of quickly evidencing both sides and assists in reaching a solution prior to resorting to any Tribunal intervention. The residents have raised the option of a mediation process which could take the form of compulsory conferences between village management and resident representatives with Fair Trading mediators. Other options presented included a decision-making jury, or a small specialist team with legislative and financial expertise to provide an ombudsman style of service.

Residents and management have also emphasised the importance of improving communication within villages, both in sharing essential information and enhancing the transparency of decision making, to prevent disputes occurring in the first instance.

Overall, the example of The Landings emphasises the improvements that are required to the dispute resolution processes available to retirement village residents in NSW. It should take the form of an earlier and less formal pathway to resolve disputes, with NCAT remaining as the final escalation point. This will assist in reducing any stress and support the mental health and wellbeing of senior citizens in retirement villages across the state.

³³¹ *Sakkara Investment Holding Pty Ltd atf Sakkara Landings Trust v Residents Committee The Landings* [2017] NSWCATCD 29

Appendix 10: Jurisdictional scan

Buy-back	
NSW	No requirement for operator to buy-back premises for RIH. NRIH must receive their refund after 6 months.
South Australia	Operators must buy back unit after 18 months if not sold/relicensed prior, unless it would cause the operator financial hardship. ³³²
Queensland	Operators must buy back unit after 18 months if not sold/relicensed prior, unless it would cause the operator financial hardship. ³³³

Ongoing liability for fees	
NSW	NRIH interest holders are liable for 6 weeks. RIH are liable for 6 weeks at 100% then in proportion to capital gain share until sold/relicensed. ³³⁴
South Australia	Six months, unless the Tribunal deems it would cause the operator financial hardship ³³⁵ .
Queensland	Maximum liability 9 months. Residents are required to pay in full for 90 days and then ongoing fees are shared with operator in the same proportion to the share of capital gains from premises ³³⁶ .

Provisions for transferring to the same premises within the village	
NSW	No specific provisions in the Act with regard to transferring premises. Residence contract may be terminated on medical grounds ³³⁷ .
Victoria	A residence contract must address a resident's ability to transfer to other residential premises or accommodation. ³³⁸ A residence right (not strata title) can be terminated by an operator if the contract allows and for medical reasons and accommodation is not suitable. ³³⁹
South Australia	No specific provisions in the Act with regard to transferring premises. The residence right may be terminated on medical grounds if the residence is deemed unsuitable place by the Tribunal. ³⁴⁰

³³² Retirement Villages Act 2016 (SA), s.27

³³³ Retirement Villages Act 1999 (Qld), s.63

³³⁴ Retirement Villages Act 1999 (NSW), s.157

³³⁵ Retirement Villages Act 2016 (SA), s.29

³³⁶ Retirement Villages Act 1999 (Qld), s.104

³³⁷ Retirement Villages Act 1999 (NSW), s.133

³³⁸ Victoria Retirement Villages (Contractual Arrangements) Regulations 2017, cl.11(2)

³³⁹ Retirement Villages Act 1986 (Vic), s.16(5)

³⁴⁰ Retirement Village Act 2016 (SA), s.44

Queensland	No specific provisions in the Act with regard to transferring premises. Residence right may be terminated by with 2 months' notice if operator and ACAT assessor deem accommodation unsuitable. ³⁴¹
New Zealand	<p>The occupation right agreement must outline when transfer of residents within the village can occur, and when an operator can terminate the agreement.³⁴²</p> <p>Specifically, an occupation right agreement allowing transition to a higher level of care must outline terms of transfer, including:</p> <ul style="list-style-type: none"> • Circumstances under which this can occur • Whether residents have priority over outside applicants • Whether the transfer depends on availability of services or a unit • Their rights • The financial arrangements associated with such a transfer³⁴³

Exit fee disclosure requirements

NSW	In mandatory upfront disclosure statement: Details of fees and charges payable by resident, including whether the departure fee is based on the entry or new entry payment. An "average resident comparison figure" (from 1 March 2018). This is a monthly average, over an assumed residency period of seven years, of the recurrent charges, departure fee and capital gains sharing arrangement.
Victoria	In mandatory upfront disclosure statement: Details of the liabilities and entitlements of the resident on permanent departure from their premises. Examples of the estimated refundable ingoing contribution or other entitlement payable to the resident if the resident permanently departed their premises after 1, 2, 5 and 10 years residence ³⁴⁴ .
South Australia	<p>In mandatory upfront disclosure statement: All fees and charges (including exit fees) that a resident is responsible for under the contract, including a description of each fee or charge as well as the amount of the fee or the manner in which the fee will be calculated³⁴⁵.</p> <p>While living in the village: A statement outlining the amount a resident would be entitled to if they were to cease to reside at the retirement village must be provided to a resident who requests it³⁴⁶.</p>
Queensland	<p>In mandatory upfront disclosure statement: How the exit fee is to be worked out, including a table showing the minimum and maximum exit fee amounts payable under a residence contract over the term of the contract. Example exit fees and entitlements at 1, 2, 5 and 10 years of residence are required in the prescribed form.³⁴⁷</p> <p>While living in the village: An estimate statement of a resident's exit entitlement must be provided if a resident requests it because they are considering terminating their right to reside³⁴⁸.</p>
New Zealand	In mandatory upfront disclosure statement: Examples of the refund a resident is likely to receive if they leave the village after 2, 5 and 10 years of residence. ³⁴⁹

³⁴¹ Retirement Villages Act 1999 (Qld), s.53

³⁴² Retirement Villages Act 2003 (NZ), Schedule 3

³⁴³ Retirement Villages Code of Practice (NZ), s.24-25

³⁴⁴ Retirement Villages (Records and Notices) Regulations 2015, clause 6 (h)

³⁴⁵ Retirement Villages Act 2016 (SA), s.21

³⁴⁶ Ibid, s.42

³⁴⁷ Retirement Villages Act 1999 (Qld), Part 4, s.74 & 76; Queensland Government, Retirement Villages Form 1: Public Information Document, accessed 6 December 2017 from www.hpw.qld.gov.au/SiteCollectionDocuments/RetirementVillagesForm1.pdf

³⁴⁸ Retirement Villages Act 1999 (Qld) Part 3, S.54,

³⁴⁹ Retirement Villages Act 2003 (NZ), Schedule 2, s.3 (e)

Appendix 11: Legislative issues identified

Area	Section of the Act or Regulation	Issue	Raised by
Aged Care	Section 133	Consider providing further protections for residents given the emerging role of retirement villages filling the gap between independent living and aged care. One example related to the privacy implications of having a registered nurse onsite that is employed by the operator. Medical grounds is one reason that an operator may terminate a contract.	COTA
Annual budget – contingencies	Section 115A	Prohibit contingencies. The regulation prescribes a maximum contingency of \$1.00 which can lead to confusion	Inquiry, resident
Tenure arrangement	New	The Act should distinguish between strata and lease tenure agreements particularly in relation to maintenance funding arrangements, consider referencing this in the disclosure statement.	Multiple residents, COTA
Sales process – fees	New	Contract terms should be clear about exit fee terms that specifically relate to marketing costs, e.g. 'contribution to marketing overheads' <u>and</u> 'sales commission.' This should also be clarified in the disclosure statement.	Resident
Marketing	New	Certain residents report that they were encouraged to sell their home before signing a contract. Prohibition of any requirement that prospective residents 'sell their home' before exchanging contracts for entering into a retirement village was suggested.	Resident
Resident rights	New	Provide residents with a right to negotiate terms and that this cannot be the basis for rejecting a prospective resident's entry into a village contract	Resident

Village smoking policy	Regulation	Introduction of a clause similar to Option B (Clause 9) of the Strata Management Regulation 2016, Schedule 3: Model By-laws for residential strata schemes.	Uniting, multiple residents.
Residents Committee	Section 83	Clarify that members of the Residents Committee must not use their position to intimidate other residents.	Resident advocate
Disclosure of future village size	Section 17 (5A), clause 10 regulation	Operator should be allowed to disclose the future size of the village before the completion date is known	Uniting
Annual budget – approval	Section 114 (8)	Budget approval exemptions should be reviewed for removal	Wood Glen Retirement Village Residents Committee
Annual budget – audit	Section 118	Clarify auditor's obligation to verify compliance of the budget proposal in accordance with the Retirement Villages Act	Family member of resident
Disclosure statement	Section 18 (3a)	Disclosure statement to include details of time limits for refunds	SRS
Proposed annual budget	Clause 26 regulation	Introduce a budget template document	Uniting
Development	New	Provide for accessibility to external services within a certain distance of the facility.	Hills Shire Council
Marketing – aged care facilities	Section 15, regulation 10 (e)	Suggestion that operators be allowed to indicate that they are approved providers of Aged Care facilities. The protections remain that they cannot suggest access to these facilities is guaranteed or prioritised as its subject to Federal jurisdiction.	Uniting
Marketing	Section 17	Suggested increase in penalty units	SRS
Settling-in period (exiting during this period)	Part 5 Division 2	Suggest that RIH should not be required to go through the process of re-selling the unit, similar to NRIH	Hill & Co legal firm
Contract termination – payment of monies	Section 181	If a resident has given formal notice of vacating the property or has passed away,	Inquiry

		any money owed to the resident or their estate should be returned within 120 days.	
Contract termination – payment of monies	Section 180	Suggest amendment to allow for termination payments to occur immediately, rather than within 14 business days. This may facilitate the timeliness of payment for outgoing residents to access their termination payment to support their entry into an aged care facility.	Hill and Co legal firm
Contract termination – recurrent charges	Section 152	Suggest recurrent charges be capped at 42 days and not tied to the selling of the property.	Hill & Co legal firm
Settlement payment (RIH)	Section 180	RIH should receive their settlement monies on settlement of the property with the operator and not within 14 days	Hill & Co legal firm; RVRA
Settlement payment (NRIH)	Section 181 (2)(f)	Suggest reducing the 6-month time limit for refund of ingoing contribution and increasing the penalty	SRS
Capital Gain	Sections 7A (1) and section 157 (3)	Clarification of costs associated with the sale of premises.	SRS
Operator legal costs associated with contracts	Section 31	Cap on operator legal costs that can be charged to residents throughout the life of the contract including termination.	RVRA, Hill & Co legal firm, resident.
Budgeting of village expenses	New	Contributions of operator not provided for, provision that staff whose wages paid by resident cannot be utilised for purposes other than related to operation of the village.	Inquiry
Refund of waiting list fee	Section 21	Reduce reliance on NCAT for small matters that could be handled by Fair Trading	Inquiry
Refund of deposits kept in trust (i.e. holding deposit or a deposit under a village contract)	Section 23	Reduce reliance on NCAT for small matters that could be handled by Fair Trading	Inquiry

Refund of the former occupant's ingoing contribution	Section 24	Reduce reliance on NCAT for small matters that could be handled by Fair Trading	Inquiry
Refund certain payments made by resident if a village contract is terminated	Section 44C	Reduce reliance on NCAT for small matters that could be handled by Fair Trading	Inquiry
Refund of overpaid recurrent charges	Section 109	Reduce reliance on NCAT for small matters that could be handled by Fair Trading	Inquiry
Contract preparation costs, \$200 limit	Section 31	Could be a Penalty Infringement Notice	Inquiry
Sales process – Material change to contract with next resident	Section 180	Changes to lease terms impact sales price achieved by outgoing resident. The requirements of this provision are difficult to prove and an outgoing resident's only recourse is apply to NCAT after settlement.	Resident (Don Murden)
Volunteer workshops in retirement villages	New	Clarity on level of liability or duty of care in relation to community based not for-profit volunteer workshop or clubs or shed association located in a retirement village	Resident

NSW Fair Trading
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Language assistance

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