

Submission to 2012 Review of the *Retirement Villages Act 1999*

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This submission is directed to addressing five issues only of the 47 *Issues for Comment* contained within the *Issues Paper*. It does this in a holistic manner, as the comments raised and recommendations made are relevant for all five.

The issues addressed are –

- Issue 1* *Do you think the RVA promotes consumer protection and fair trading practices? If not, where you believe improvement is required?*
- Issue 3* *Does the public information document include all relevant information to enable prospective residents to make informed decisions? Is there any other information you believe should be required to be included in the public information document?*
- Issue 5* *Do you have any views about how the RVA compares with other legislation to provide consumer protection as well as business viability, for example, the Residential Tenancies and Rooming Accommodation Act 2008 or the Body Corporate and Community Management Act 1997?*
- Issue 22* *Does the public information document and residence contract provide sufficient clarity of residents' rights and obligations when entering a retirement village?*
- Issue 32* *What are some of the key factors that facilitate, or hinder, the viability of retirement villages?*

The recommendations below are premised on the basis that information to enable informed choice by prospective residents needs to be clearly presented and easy to understand. Informed decision-making is required regarding both the lifestyle the retirement village ('RV') offers; and the tenure to be granted and the terms of that grant. While legal advice and assistance, and in some cases also financial advice, remains essential in any form of 'conveyancing' process, public information documents (PID) should enable *fully informed* decision-making by prospective residents independent of such advice. That is, prospective residents should be enabled by reading the PID themselves to answer three basic questions – Is *this* RV, in all respects, *right* for me? If I need to leave, what do I need to do? And how much money will be available to me, and when, if I need to leave?

Benefit is gained by obtaining advice but current processes are such that prospective residents rarely seek advice prior to signing documentation. The cost of obtaining advice during the cooling-off period then deters many from seeking advice, while others choose not to obtain advice on the erroneous belief the transaction, as it is not the same as any other home purchase, is less involved than other processes. (Cradduck & Blake, 2012) While the RVA prescribes a level of consumer protection information that must be provided to prospective residents, the manner of presentation is not as clear as that required under other legislation. (i.e. for example see Secs. 368-368C PAMDA) *Clear* advice is *not* provided to prospective residents that ‘buying’ a RV unit *is* different from buying a strata unit; or, contrary to terminology used on many RV websites, that the transaction usually is not in fact a purchase.

Unlike retail shop leases where both legal and financial advice is required to be obtained by a prospective lessee before entering into the lease and evidence is required to be provided to the lessor that such advice was obtained (Sec. 22D RSLA) this is *not* required before entering into a RV agreement. A prospective resident may appear to understand how RVs operate but appearances can be deceptive. For example, ‘exit fees’ are unique to the RV industry and as disputes and cases reflect, although the method of calculation is specified in the PID, how this works in practice is not clear to some residents. A fact that often only becomes apparent when they wish to leave the RV or their executor needs to administer their estate.

The RVA prescribes the information to be disclosed to prospective residents in a document that can be over 100 pages long. As case law shows, prospective residents find these lengthy PIDs confusing. This can lead to a misunderstanding of their rights or unrealistic expectations of entitlements on termination of their tenure. (William’s Case, [2009]) In addition, the lease and/or licence, RV rules and other documentation are attached to the PID, which further adds to the length of the document. These ‘extra’ documents, however, are more analogous to commercial leasing documents than to either the agreements used for residential tenancies or the bylaws of a body corporate. As such, they tend to be complex documents written in legal ease rather than plain English and as such can be confusing.

Prospective residents tend only read one PID fully, if at all, being the one for the RV they select to live in. Also many have not read commercial leases or other such documents. Many prospective residents therefore are unfamiliar with the terminology of the documents, how information is ordered within the documents or how such documents need to be read. While Australian literacy levels are increasing, ABS statistics show documentary literacy levels remain below the acceptable level. (ABS, 2006) In combination with lack of familiarity with

this style of document this means that ‘informed choice’ comes at the *voluntary* cost of obtaining legal advice just to understand the tenure arrangements let alone the leasing/licensing documentation and any RV rules. These are costs many potential residents naively think unnecessary; or, where they also have to pay the RV operators costs for the lease *and* the Titles Office registration fees, simply another cost that many cannot afford. In comparison, retail shop lease tenants are not required to pay the landlord’s fees associated with granting, renewing, extending or stamping their lease. (Sec. 48, RSLA)

The PID and associated documents, to the inexperienced reader, are not clearly separated between purchase, operational and exit matters. In comparison for a unit purchase, while the body corporate bylaws (operational matters) must be provided as part of the purchase contract, (Sec.206 BCCMA) such matters are more clearly identifiable as being operational matters. Exit matters are left to the contract the resident signs when they wish to sell. This is not to say there are not issues arising within body corporate complexes. Rather that it is perhaps easier for a prospective residents to be aware of what obligations they are taking on when they buy-in in the first place, with fees that are more clearly identified. The result is that it is not so much that more information needs to be contained within a PID rather that currently proscribed information needs to be presented in a clearer manner. This is both as to structure – where the information is located in the PID – and the information itself.

Despite the increasing number of technology/internet savvy older Australians, these skills will not aid prospective residents in being better informed about RVs. This is because the number of RV operators making PIDs available on their website is very small. Most RV websites tend to be focussed on ‘selling’ the benefits of the particular RV/s lifestyle, with limited, or not easy to locate, information about matters such as tenure and operational and exit fees. (Craddock & Blake, 2012) For the majority of RVs the usual process requires a potential resident to submit their contact details for documentation to be sent to them and/or a representative to contact them. When contact is made, it is the RV lifestyle that is sold.

A final point to note is that ‘fixing’ the problem for the future is unlikely to assist existing residents. Unless any changes are made retrospective (which is unlikely) the current confusion will only be exacerbated by yet another different level of compliance required of RV operators. The viability of RVs is dependent upon prospective residents wishing to live in this style of complex. (Craddock & Blake, 2012) Confusion regarding matters such as tenure, fees and parties’ obligations negatively impact upon RV desirability. In the long term a lack of desirability could adversely affect the viability of the RV industry as a whole.

The following recommendations are placed before the Committee for their consideration –

Recommendation 1: Amend the RVA to prescribe a shorter and easier to understand format for PIDs, with the tenure [i.e. freehold/leasehold/licence/other and term as applicable], any participation in capital gain/loss and exit fees being clearly stated.

For this purpose the Committee is directed to the recent New South Wales review and the proposed standard form contract.

Recommendation 2: Amend the RVA to require a copy of the lease/licence and/or other accommodation terms or RV rules attached to the PID, or otherwise to form part of it, be provided as clearly identified separate documents.

Recommendation 3: Amend the RVA to require that legal and financial advice must be obtained by prospective residents before entry into any RV agreement; with confirmation of receipt of that advice to be provided to the RV operator prior to signing of any agreement.

The consequence of a failure by the RV operator to obtain such documents could be that the RV operator would be precluded from charging an exit fee to the resident. The onus being for the RV operator to show advice was provided to the prospective resident at the relevant time.

Recommendation 4: Amend the RVA to prohibit RV operators from passing on any costs associated with the RV agreement (other than the actual Titles Office registration fee for a resident's lease) to the resident.

Recommendation 5: Amend the RVA to require any RV with a website *must* make a copy of its current PID freely accessible online.

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References

ABS, (2006) 'Adult Literacy and Life Skills Survey, Summary Results, Australia, 2006', 4228.0, Australian Bureau of Statistics, 9 January 2008 (Reissue) [http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4228.0Main%20Features12006%20\(Reissue\)?opendocument&tabname=Summary&prodno=4228.0&issue=2006%20\(Reissue\)&num=&view=](http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4228.0Main%20Features12006%20(Reissue)?opendocument&tabname=Summary&prodno=4228.0&issue=2006%20(Reissue)&num=&view=) (accessed 05/03/2011)

Body Corporate and Community Management Act 1997 ('BCCMA')

Cradduck L and A Blake (2012) 'The Impact of Tenure Type on the Desire for Retirement Village Living', *Proceedings of the 18th Annual Conference of the Pacific Rim Real Estate Society*, PRRES, Adelaide, Australia, 15–18 January 2012 <http://www.prres.net/index.htm?http://www.prres.net/Conference/2012Conference.htm>

Property Agents and Motor Dealers Act 2000 ('PAMDA')

Retail Shop Leases Act 1994 ('RSLA')

Williams v Carlyle Villages Pty Ltd [2009] QCA 301 9 October 2009 ('*Williams' Case*')