Submission 5

ARQRV SUBMISSIONS FOR REVIEW OF THE RETIREMENT VILLAGES ACT 1999 (QLD.)

The ARQRV and its perspective on the industry

1. The ARQRV was formed in 1992, and is now the largest advocacy organisation for retirement village residents in Queensland. The ARQRV currently represents approximately 8500 financial members across 330 retirement villages.

2. Industry organisations like the "*Retirement Village Association*" and "*Aged Care Queensland*" will sometimes claim to represent the interests of residents, however they are ultimately responsible to their fee-paying members, all of whom are village operators, or service providers to village operators. The ARQRV is the only group that can properly claim to represent the interests of residents.

3. The ARQRV's primary goals reflect the main objects of the Act: to advance '*consumer protection*' and to enhance '*industry viability*'. Some operators argue, quite wrongly, that '*consumer protection*' and '*industry viability*' are competing objectives. In contrast, the ARQRV is firmly of the view that, not only can consumer protections be enhanced in a manner that does **not** limit viability but also that the future viability of the industry actually **depends** on enhancing the consumer protections.

4. The ARQRV fields approximately 4500 complaints annually from distressed residents or their families, and our committee is required to invest approximately 330 hours each week on assisting people to work through their concerns. The Association is extremely concerned with the current extent of resident dissatisfaction in Queensland villages and believes that this dissatisfaction presents a significant risk to the future viability of the industry. It is feeding a rising tide of scepticism about retirement villages among the next generation of retirees – *the baby boomers* – whose attitude to the industry will largely determine its continued success.

5. The bulk of the complaints handled by the ARQRV in the last 10 years have been brought by, or with the support of, the baby boomer children of the affected residents and, having witnessed their parents' situation, they are sworn off the village concept for life.

6. Some operators believe, wrongly, that the extent of discontent among village residents is minimal or limited to a 'noisy minority'. However they are blinded to the true extent of the problem because the incidents rarely appear on the usual radars, such as Court & Tribunal statistics. Moreover, many affected residents are too old, too weary, too unwell, or too intimidated to take any action. Residents rarely seek assistance from the media because doing so may adversely affect their capital investment in the village. Note that the Act currently does not require operators to refund any capital to a former resident unless or until that resident's unit is re-sold.

7. The true extent of resident dissatisfaction is also hidden from operators (and the associations they have formed) because of their position of power over elderly residents. The residents fear repercussions if they 'speak out' and therefore tend to say only what the operator wants to hear. This has been confirmed in research conducted by the University of South Australia and (then) South Australian MLC, Ian Gilfillan. The report arising from that research confirmed that "*residents are frightened of complaining to their managers for fear of retribution*". (See Knowles, K & Gilfillan, I, 2000, *Consumer protection what's that?: an assessment of consumer protection in retirement villages in South Australia : a report*).

8. The few residents who are brave enough to 'speak out' are just the tip of the proverbial iceberg. There is a much larger groundswell of discontent. The very fact that large, resident-funded advocacy groups like the ARQRV even exist is ample evidence of this.

9. The ARQRV believes that increasing the consumer confidence in retirement villages depends on increasing the consumer protections; and that this change must be implemented in a way that offsets *the disempowering effect of a business model based on exit charges*, which is a root cause of residents' dissatisfaction.

The disempowering effect of exit charges

10. Any review of the Act must begin by recognising the unique dynamics of a business model that is based on exit charges, and on an understanding of the disempowering effect of that model on consumers.

11. Retirement villages offer retirees a specialised form of accommodation tailored to their financial position. Retirees are, generally speaking, capital-rich but income-poor. They have a 'nest egg' of capital but live off a limited fixed income. Retirement villages offer a higher standard of living than a retiree's income would otherwise support, on the basis that much of the cost of that lifestyle is deferred until the resident exits the village, at which point that lifestyle is paid for by way of a range of fees and charges that are deducted from the resident's capital on exit. These exit charges are the operator's primary source of profit.

12. Most residents enter villages with the intention of that being their 'last move' and thus not leaving until they pass away (at which point the exit charges are no longer their concern). However, in practice, many residents leave their village much earlier, for reasons such as dissatisfaction, increases in ongoing fees and charges, marital problems, following family interstate, or a need to enter a nursing home. As a result, the average duration of residence in a not-for-profit retirement village is approximately seven years, increasing to approximately nine years for other retirement villages.

13. Currently, the Act does not require the operator to refund to a departing resident, *any* of that resident's capital unless or until the unit sells. At that stage – which can be months or years after they have left – the former resident receives a share of the sale proceeds, known as their 'exit entitlement'. Different villages calculate this in different ways. Some villages base the refund on the resident's original ingoing contribution and then deduct a percentage as the exit fee. Other villages refund the final sale price less a percentage as the exit fee. Some villages might require any increase in value of the unit to be shared between the operator and the outgoing resident. There is a complex array of different permutations of these options available in the market, and there is no limitation in the current Act on the potential extent of the charges.

14. The only common feature in all villages is that residents lose a large portion of their capital when they leave the village; and the operator can only derive a profit when residents leave or die. Thus, the village's profitability actually depends on a regular turnover of units.

15. This position is then exacerbated in a time of slow market demand when the operator has difficulty achieving a fast sale. The operator's profit is thus delayed, which then places a strain on the cash flow and business model. Equally, in a slow market the operator does not have the flexibility to increase sale prices and the profit margins.

16. One inevitable consequence of this business model is that an operator has little or no *economic* incentive to ensure that residents remain satisfied with the village and the services provided. In a slow market a second consequence is that the operator will be more inflexible in negotiations with the departing resident or their family because the operator will aim to protect profit margins. Unlike other consumers, a village resident cannot threaten to 'take

their business elsewhere' because doing so would only trigger a loss for them and a profit for the operator. Nor is there any process by which the resident can express dissatisfaction with the operator's performance. This places the operator in a position of significant commercial advantage over the residents.

17. This is a significant problem for an industry that claims to be selling a 'lifestyle'. Issues inevitably arise in every village that impact on the ability of residents to enjoy the promised lifestyle and in most cases the issues are within the capacity of the operator to control. However, in the ARQRV's experience, many operators – including some of the largest in Queensland – rely on the fact that their residents are effectively a 'captive market' and often fail to respond adequately (or at all) to residents' concerns. Operators limit their response to the minimum extent required by law – which is generally inadequate – regardless of the personal cost to the residents concerned. There is currently no legal requirement for operators to maintain minimum service levels, to respond to resident concerns in a timely and meaningful way, or to treat residents with a basic level of dignity, respect and compassion.

18. The exit fee model evolved in the not-for-profit sector, where the church associations (or similar) that operated the village usually had a legal duty to act in the best interests of their members – the residents. Now however, with the corporatisation of villages, the operator has a legal duty to act in the best interests of shareholders (or financiers), who are usually not residents, and whose interests are often not aligned with those of the residents. Consequently, there is frequently a conflict between the need to maximise returns, and the need to ensure that residents are able to continue enjoying the lifestyle for which they contracted.

19. In other industries, such as consumer finance, 'exit fees' are being restricted because they limit competition and disempower consumers. However, exit fees can never sensibly be prohibited in the retirement village sector because they are the only source of profit for the village operator, who has generally invested significant capital in establishing the village.

20. Instead, in the retirement village sector, two things are required:

(1) formal recognition in the Act of the significant imbalance in bargaining power between operators and residents as a result of a business model based on exit charges; and

(2) implementation of measures that empower residents to the extent necessary to offset the effect of exit charges.

21. The ARQRV believes that it is vitally important to have a healthy, successful retirement village sector and that this can best be achieved by building confidence and demand in the village concept. Strong demand will result in higher values for units and faster sales, satisfying the interests of both the operator and the residents.

22. As a positive and pro-active initiative, the ARQRV, along with other State resident associations, is supporting a national rating program for villages to be featured on the independent web site villages.com.au. Village residents will be encouraged to complete a comprehensive rating form. The analysis of these ratings will allow prospective residents to evaluate and compare villages, in effect giving the resident a voice or vote on the performance of the operator, who will be forced by market demand to respond in order to rectify deficiencies to avoid creating a major impediment to sales. While this approach may be seen as detrimental to the sale prospects for a resident's unit, it is a proven commercial process of self improvement.

23. Done properly, such measures will not increase costs for village operators but will greatly improve consumer confidence in retirement villages and will, in turn, help secure the future viability of the industry. In many cases this can be achieved by harnessing and

directing market forces, rather than by creating 'red tape' procedures or ineffectual regulations that merely reduce the affordability of retirement villages.

24. Notwithstanding, any resulting increase in the regulatory burden on operators would be a small price to pay for avoiding the looming consumer confidence crisis among baby boomers and other prospective residents regarding retirement villages. .

An overview of the Committee's Terms of Reference

25. The Committee has been asked to consider whether the Act:

- *provides adequate fair trading practice protections for residents; including providing appropriate material to enable informed decisions to be made;*
- *does not include unnecessary restrictions and provisions which [de]crease the affordability of living in a Retirement Village* [The ARQRV has assumed that the word *"increase"* was intended to be *"decrease"*];
- *provides adequate certainty, accountability and transparency for residents in relation to their financial obligations, including the interests of residents in the event of a village closing down;*
- *provides sufficient clarity and certainty in relation to the rights and obligations of residents and operators;*
- *should make provision for operators to develop and adopt best practice standards in operating villages, or require operators to comply with mandatory standards or accreditation;*
- *adequately promotes innovation and expansion in the retirement village industry, avoids purely 'red tape' requirements, and facilitates the ongoing viability of villages;*
- *affords residents all reasonable opportunities to be involved, should they wish to be, in budgetary and other decisions affecting their financial obligations; and*
- *adequately provides a timely, informal and cost-effective process for resolving disputes between residents and operators.*

26. Each of these items will be considered in turn. However, as a preliminary point, the ARQRV notes that there is significant overlap between some of these items, and thus many of the issues raised may be relevant to multiple terms of reference.

27. Also, in the course of addressing these items, the ARQRV will be referring to the retirement village legislation in other States, as follows:

- the *Retirement Villages Act 1999* (NSW) (including associated amending Acts and Regulations) ('**the NSW legislation**')
- the *Retirement Villages Act 1992* (WA) (including associated amending Acts and Regulations) ('**the WA legislation**')
- the *Retirement Villages Act 1986* (Vic) (including associated amending Acts and Regulations) ('**the Victorian legislation**')
- the *Retirement Villages Act 2004* (Tas) (including associated Regulations) ('**the Tasmanian legislation**')
- the *Retirement Villages Act 1995* (NT) (including associated Regulations) ('**the NT legislation**')

- the *Retirement Villages Act 1987* (SA) (including associated amending Acts and Regulations) ('**the SA legislation**')
- the *Fair Trading Act 1992* (ACT) and the *Retirement Villages Industry Code of Practice 1999* (ACT) ('**the ACT legislation**')

28. The ARQRV believes that Queensland is lagging behind other States in terms of consumer protection in a number of areas, and considers that this matter should be addressed during the review of the Queensland legislation. This will not only improve protections for consumers in Queensland, but will reduce the compliance burden on those larger operators who operate across State borders.

29. The Productivity Commission has recommended that the States pursue nationally-consistent retirement village legislation (see Recommendation 12.5 in *Caring for Older Australians,* Productivity Commission Inquiry Report No.53, 28 June 2011).

Submissions on the Terms of Reference

> ***whether the Act provides adequate fair trading practice protections for residents; including providing appropriate material to enable informed decisions to be made;***

30. The ARQRV's position is that the Act currently does **not** provide adequate fair trading practice protection for residents, and does **not** ensure that prospective residents are provided with appropriate material to enable an informed decision to be made.

Inadequate 'fair trading' protections

31. The concern most commonly expressed to the ARQRV by residents, former residents and their families, is that the Act currently allows the contracts between a village and its residents to depart from the basic standards of fairness that the community expects in dealings with older members of society. This is perhaps the greatest threat to the future viability of the industry.

32. A retirement village residence contract is a comprehensive and involved document; perhaps the most complex arrangement that a consumer can enter into. Moreover, one party to the arrangement is usually an elderly person with limited understanding of the village scheme, while the other is a corporation in a position of superior knowledge, resources and experience. The operators of for-profit villages are obligated to their shareholders to approach residence contracts like a commercial dealing, and to seek to maximise their position against that of the resident, constrained only by the need to comply (to the minimum extent possible) with the law. Thus, if the law neither demands nor ensures such even-handed fairness, it is often not delivered.

33. The *Australian Consumer Law* (**ACL**) contains provisions dealing with '*unfair contract terms*'. However, such prescriptions have not generated any practical improvement in the manner in which residence contracts are drafted, possibly because those provisions are extremely general in nature, and therefore do not impose the very specific changes that are needed in the context of a contract between a retirement village and an elderly resident (particularly given the effect of the village business model based on exit charges). Also, under the current Act, residents are unable to rely on the ACL during the dispute process, and operators are generally aware of this significant limitation in consumer protection.

34. Residents are usually advised to seek legal advice before entering a village. However, many do not, and those who do will often just get an assessment of legality rather than fairness. Also, many obtain inadequate legal advice regarding this essential due diligence because they engage their trusted 'family solicitor' who is often not well-versed in the intricacies of retirement village schemes. Those who *do* get thorough legal advice often withdraw in the cooling-off period because that advice reveals the current inadequacies in the Act and often suggests that the anticipated lifestyle, with the accompanied financial penalties, may not be the best option for retirement. Either way, the result is not good for the viability of the industry.

35. The Act currently permits residence contracts to depart from basic community standards of 'fair trading' in a number of areas, as follows:

(a) **Exit payments**: When a resident leaves a village, the Act does not require the operator to repay **any** of the resident's capital unless or until the unit re-sells, which can take months or even years, and may not occur at all (in which case the resident's capital is effectively lost). This can render the former resident liable for a significant interest penalty on an unpaid nursing home bond or, if they do not yet need entry to an aged care facility, it can leave them effectively homeless. This is a common cause of distress for elderly former residents and their families, and a frequent cause of complaint to the ARQRV. It is fundamentally unfair for an operator to pass all of the market risk onto the former resident, yet it is currently permitted by the Act and so it has become a common feature of residence contracts.

Operators argue that the former residents would be in the same position if they were selling a private residence rather than a village unit, in the sense that there is no guarantee when a private residence will sell, and no funds are received until it sells. However these arguments have a number of flaws:

(i) following the sale of a private residence, the outgoing owner receives 100% of the sale price, whereas for a retirement village unit sale the operator shares in the sale proceeds via exit fees and, usually, a share of the capital gains. The operator's share can even outstrip the amount received by the outgoing resident;

(ii) during the sale of a private residence, if the property takes longer to sell than the outgoing owner would like, they can use the property as security for a bridging loan in order to fund their next residence. For a retirement village unit sale, the outgoing resident cannot use the unsold unit as security for a bridging loan (whereas the operator usually can);

(iii) in the sale of a private residence, the outgoing owner is free to set the sale price, whereas in a retirement village unit sale the resident must negotiate the sale price with the operator, who has a far greater capacity (in terms of both time and money) to 'ride out' a slow market than an elderly former resident. The operator has less urgency to re-sell any given unit because it can (and does) receive a far greater profit from the sale of other, new, units in the meantime;

(iv) the saleability of a unit in a retirement village depends largely on matters solely within the control of the operator, such as the quality and presentation of communal facilities and the village generally, and the operator's marketing efforts. Unlike a private residence, the operator usually controls the marketing of a village unit for at least 6 months;

(v) in the sale of a private residence, the seller has access to recent sales data from the surrounding area (which is on the public record), allowing them to set

a sale price that is attractive to the market and which will expedite the sale. However in a retirement village, the outgoing resident negotiates the sale price with the operator, and is required to do so without access to any information regarding recent sales in the village or in surrounding villages, as there is no public record of village sales. The operator is not required to share its own historical sales data with the outgoing resident (or with any valuer appointed in accordance with the Act);

(vi) a former resident is normally in the end stages of life, and time is very much against them. The industry has little hope of a viable future if it does not accept responsibility for at least refunding *some* of a resident's capital before their unit sells. The Act should require the operator to at least make a partial re-payment of the exit entitlement if the unit remains unsold for a certain period;

(vii) Queensland is clearly lagging behind other States in this regard, as most States have already made provision in their legislation that allows residents to be paid out before their unit sells. For instance, the Victorian legislation, the Tasmanian legislation, the NT legislation and the NSW legislation, all include provision for payment to outgoing residents within six months in appropriate circumstances. The SA legislation also includes provision for early repayment in certain circumstances, and

(viii) the industry has remained viable in those States; therefore there can be no argument that similar requirements in Queensland would hinder viability.

(b) **Capital losses**: The Act currently allows a contract to be drafted so that any decrease in the value of a unit can be passed on to the resident in full, even if there is no entitlement for the resident to share in any increase in the value of the unit. This is fundamentally unfair. The value of a unit depends largely on factors that are solely within the operator's control, such as how well they maintain and present the communal areas and facilities, and the terms they impose in their contracts. Therefore an operator should be exposed to capital losses to the same extent that they retain capital gains. For instance if they are entitled to retain 100% of any capital gain on a unit, then they should also be required to bear 100% of any capital loss. Similarly if they are entitled to share 50% of any capital gain, then they should bear 50% of any capital loss.

(c) **Capital Gains**: An acceptable and reasonable interpretation of "Capital Gain" within the industry is that it is the value of the difference between the incoming contribution paid by the departing resident and that paid by the new resident. Many residence contracts purport to give the departing resident a specified percentage of that capital gain; (in some cases up 100%). However, in all Capital Appreciation Leases the departing resident's Exit Entitlement is based on the next resident's ingoing contribution, which is as it should be. Conversely, a methodology frequently used allows the operator to also apply the exit fee calculation to the next resident's ingoing contribution, thus effectively reducing the departing resident's capital gain by the rate of exit fee, which usually results in a significant reduction of the Exit Entitlement. In other words, this methodology denies the degree of capital gain that the departing resident has been led to expect.

(d) **Exit fees**: The Act was recently amended in relation to the calculation of exit fees, and the amendments potentially allow an operator to calculate exit fees on an *annual* basis rather than a *daily* pro-rata basis for all residence contracts entered into prior to 1 March 2012 (ie for almost *all* current contracts). This could allow most current residents to be charged for, say, three years of occupation when they have only been in residence for two years and one day, which is fundamentally unfair.

The practice of charging exit fees by annual (rather than daily) increments is an unsophisticated and embarrassing anachronism that only the most recalcitrant operators insist on applying. That practice is also at odds with the ruling by the District Court that exit fees are to be calculated on a daily basis for *all* contracts entered into after 1 July 2000 (see the judgment of Judge Robin QC in *Saunders v Paragon Property Investments Pty Ltd* [2008] QDC 322).

The Act should ensure that the daily pro-rata requirement applies to all contracts entered into since 1 July 2000.

The NSW legislation and the ACT legislation both require exit fees to be calculated on a daily basis.

(e) **Capital replacement**: The Act in Queensland currently allows a residence contract to include provisions making a resident personally responsible for the full cost of replacing capital items in their unit (such as stoves, ovens, air conditioners, hot water systems, etc), even though there is no requirement for such costs to be disclosed to prospective residents in the PID. Such unconscionable clauses arise in situations where:

(i) the item is owned by the village operator (and has provided the operator with a tax benefit via a depreciation schedule),

(ii) the item was already 'second hand' when the resident moved in, and

(iii) the operator retains any capital gains on the sale of the unit.

This substantially defeats a primary reason for entering a retirement village from a retiree's perspective; being the desire to avoid the unpredictable capital replacement costs associated with private home ownership. The attraction of a village is that it offers a standard of living that a retiree's income may not otherwise support, in exchange for a capital payment on exit, via the exit fees. Residents enter villages to escape the capital costs associated with home ownership (which their income no longer supports), and in exchange they accept certain capital costs on exit.

The Act should protect residents (particularly pensioners) from such capital replacement costs during their residence, because such costs can disrupt the resident's finances to the extent that they are forced to eschew social activities and reduce expenditure on food, medicine or other basic essentials.

The Queensland Act *encourages* operators to make residents personally responsible for these capital replacement costs. The Act currently requires that, if an operator wants to make residents personally responsible for the costs of '*maintaining*' and '*repairing*' capital items within their unit, then they must **also** make the residents personally responsible for the '*replacement*' of those capital items, which is absurd and unduly inflexible. The Act should be amended to allow an operator to make residents personally responsible only for the maintenance and repair of items within their unit without also making them responsible for the replacement of the item. (This would require the removal from the Dictionary Schedule definition of "capital items" of the words "*other than items that, under the residence contract, are to be maintained, repaired and replaced by the resident*" and then rewriting s91(3)(a) (in relation to replacements) and s97(3)(a) (in relation to maintenance and repair) to reflect this amendment.)

Otherwise, residents' responsibility for capital replacement costs should be limited to the same extent as they are under the NSW legislation.

(f) **Reinstatement in freehold villages**: The Act assumes (wrongly) that residents with freehold title over their unit are always entitled to retain 100% of any capital gain when they leave the village, and therefore should be required to pay 100% of any reinstatement costs for their unit (see s61).

In reality, residents with freehold tenure are often required to share any capital gain with their operator, in much the same way as leasehold and licence villages. Moreover, they are also required to pay an exit fee which, as with leasehold and licence tenures, reduces the departing resident's share of any capital gain. Therefore the residents of freehold villages should be treated in the same way as the residents of leasehold and licence villages, and only required to meet reinstatement costs to the extent that they share in the net capital gains on exit from their village (ie as is the case under s62(3) for leasehold and licence villages).

Residents should only be charged for capital costs to the extent that they share in any capital gains on exit from the Unit. This policy should be applied both during their tenure and on exit, and should apply equally to freehold villages, as well as leasehold and licence villages.

Inadequacies in disclosure to prospective residents

36. The Act currently requires prospective residents to be provided with a form of pre-contractual disclosure known as a 'Public Information Document' or 'PID'. This document is intended to provide prospective residents with the information they need to make an informed decision. However it is failing to achieve this in practice, for the following reasons.

37. First: the PID is too long and complex. Some PID's extend to over 250 pages, and present an almost impenetrable array of information that effectively obscures the critical issues. A retirement village residence contract is perhaps the most complicated contract a consumer can enter into, and the current PID serves only to exacerbate this. It is a clear case of 'information overload'.

38. There is an urgent need for the PID to be simplified. This needs to be achieved not only be 're-jigging' the current prescribed form of the document, but by amending Part 4 of the Act to reduce the extent of the mandatory content for the PID. This mandatory content is of course important for the purposes of a residence contract, but it does not all need to be included in the initial pre-contractual disclosure. The initial disclosure needs to be simpler, and focussed on a narrower selection of critical issues.

39. Also, pre-contractual disclosure could be simplified in many cases if there was a simple standard-form residence contract that operators were able to adopt (as is being considered in NSW). If a standard form contract was drafted with appropriate simplicity and clarity, and contained 'model terms' from a consumer protection perspective, then it could render a PID unnecessary.

40. The ARQRV would not support a *mandatory* standard contract at this stage, because to do so could inhibit innovation and competition between operators, and limit the choices open to prospective residents. However a voluntary standard contract could have a positive impact in the industry. There would be a clear incentive for operators to adopt the standard (as it would relieve them of the administrative burden associated with the preparing of PIDs) and many would adopt it in order to gain a competitive edge (by having a more consumer-friendly offering). Also other operators would be influenced by the model terms used in the preparation of their own contracts.

41. The ARQRV could assist with the preparation of a discussion draft of the model terms if required.

42. Second: the PID is usually provided to a prospective resident too late in the acquisition process to facilitate meaningful comparison between villages in relation to exit charges and other critical financial matters.

43. The Act currently does not require a PID to be provided to a prospective resident until **after** they have not only selected a particular village but have selected a particular unit within that village. As a result, operators usually do not provide the PID until that late stage. Also, in many cases, prospective residents are even required to demonstrate a level of commitment to the village before the PID is provided, such as signing an 'Application to Reside' form and paying a refundable deposit.

44. Disclosure at such a late stage effectively eliminates the prospect of the exit charges being compared with those imposed by other villages. Even if the prospective resident obtains legal advice, that advice will not reveal how the proposed terms compare to other villages. Also, although the 14 day cooling-off period allows the resident sufficient time to seek advice on the PID (if they move quickly) it certainly does not allow time for comparing PIDs from other villages.

45. As a result, prospective residents are comparing villages based only on the information they have access to **before** receiving the PID. This is usually limited to the information that can be gleaned from the village's marketing material and a physical inspection, which only reveals the 'up-front' costs and the physical attributes of the units and the village. As a result, competition between villages becomes focussed on these matters, and is not operating to constrain exit charges and other financial obligations.

46. The disclosure regime should be amended to ensure that the key aspects of the exit charges and other financial obligations are disclosed **before** a prospective resident decides on a particular village. This could be achieved either by requiring the PID to be published earlier, or by requiring an additional disclosure to be made before the PID is provided.

47. Alternatively villages could be required to publish their PID 'online' so that prospective residents can review it before selecting a village.

48. Third: there is no standard format for disclosing the extent of the exit charges, so even after the exit charges are finally disclosed, they are not presented in a manner that allows easy comparison with other villages.

49. Exit charges are usually 'disclosed' in the PID by way of complex formulae involving various unknown future variables. The Act currently does not regulate exit fees in any way and, as a result, a confusing array of different exit fee structures now exists in the marketplace. There is wide variance between villages as to the formulae used, with differences in matters such as:

- the rate of increase in the exit fee percentages,
- whether the exit fee percentages are applied to the initial purchase price (the departing resident's incoming contribution) or the sale price on exit (the new resident's incoming contribution),
- the percentage of any capital gain retained by the operator,
- the percentage of any capital loss that must be borne by the resident,
- whether the capital gain (or loss) is calculated with or without reference to the exit fee,
- the extent of the reinstatement works charged to the resident,
- the 'selling costs' or 'costs of sale' charged to the resident, and

- the legal fees charged to the resident.

50. As a result of this variance, it is practically impossible for residents to meaningfully compare the exit charges from one village to another. This, in turn, limits competition between villages on exit charges.

51. There needs to be a simple and standardised format for disclosure of exit charges that allows easy comparison between villages.

52. One possible solution would be to require that the maximum total exit charges be disclosed as a dollar figure. This would provide a simple and effective way for residents to compare one village to another, and promote greater competition in the market in relation to exit charges. It would not harm operators financially, as there would still be no upper limit on the exit fee they charge.

53. Another possibility would be to consider imposing a standardised score or ranking to assess the extent of the exit charges in each village. It could be akin to the 'comparison rate' that the *Consumer Credit Code* requires banks and other lenders to disclose so that borrowers can easily compare the total interest and other costs from one lender to another. (Also the 'comparison rate' must be disclosed in the lender's initial advertising, which is well before the consumer has selected a particular lender).

54. It is interesting to note that the disclosure requirements for consumer mortgages under the *Consumer Credit Code* currently do more to facilitate competition between lenders than the corresponding requirements in retirement villages. This is despite the fact that a retirement village residence contract is arguably the most disempowering contract a consumer can enter into (because the exit charges leave a resident 'locked-in' with little or no bargaining power) whereas a borrower under a consumer mortgage retains the freedom to re-finance if they discover another financier who is offering a more competitive deal.

55. Fourth: the PID does not adequately disclose the extent to which the ongoing fees and charges can increase during residence in a village.

56. Increases in the ongoing fees and charges within a village are the single greatest cause of resident discontent and disputes. Retirees have limited fixed incomes, and move into a village on the assumption that the ongoing costs will remain affordable to them during their residence. For retirees, the expectation often is that pension increases by cpi will allow their disposable income to retain parity with the monthly general service charges which are supposedly capped to the cpi. However that is usually not the case, and ongoing costs often increase well beyond the level first disclosed, to the extent that many residents find themselves unable to afford the village lifestyle. This can be a particularly invidious situation because residents often cannot afford to leave the village because the loss of capital on exit would render them unable to fund alternative accommodation.

57. The PID needs to better disclose the extent to which the ongoing costs can increase, and should include future projections so that prospective residents can better assess whether the ongoing costs will remain affordable in future.

> ***whether the Act includes unnecessary restrictions and provisions which [de]crease the affordability of living in a Retirement Village;*** (The ARQRV has assumed that the word *"increase"* was intended to be *"decrease"*).

58. The ARQRV rarely receives complaints to the effect that the Act includes any unnecessary restrictions and provisions. However there are some sections of the legislation that increase an operator's costs without necessarily providing a commensurate benefit to residents:

(a) Part 4 of the Act (which dictates the content of a PID) should be reviewed and streamlined to ensure that pre-contractual disclosure is simplified and is more focussed on critical issues. This would also reduce the administrative costs associated with the production and provision of PIDs.

(b) The provisions which seek to regulate increases in general services charges (ie s106 and s107) are failing to provide any meaningful protection to residents while still imposing a regulatory burden on operators. It is appropriate for there to be a regulatory burden in this area but it should be one with some practical benefit to residents. (This issue is considered further in relation to subsequent terms of reference).

59. Also, the ARQRV believes that greater consistency between the retirement village legislation in the various States would create administrative efficiencies for many operators, which could in turn reduce the costs to residents of their villages.

whether the Act provides adequate certainty, accountability and transparency for residents in relation to their financial obligations, including the interests of residents in the event of a village closing down;

60. The ARQRV believes that the Act currently does **not** provide adequate certainty, accountability or transparency for residents in relation to their ongoing financial obligations, and does **not** protect the interests of residents in the event of a village closing down.

Inadequate certainty in financial obligations

61. As already stated, the single greatest cause of resident dissatisfaction, distress and disputes is the unpredictable (and undisclosed) rate at which the ongoing service charges in a village can be (and are) increased.

62. Residents usually live on limited fixed incomes (such as a pension) and, even if the service charges were affordable when they entered the village, the charges frequently increase to the point where they begin to outstrip residents' capacity to pay. The potential extent of the increases is never revealed when a resident first enters a village, and they usually cannot escape the increases by leaving the village because the loss of capital via the exit charges would be too great.

63. Residents enter a village in the belief that the Act effectively regulates increases in general services charges by reference to CPI, and this belief is readily encouraged by village marketing. However, although the Act contains provisions which purport to limit increases, the provisions are largely ineffective and the charges often increase by significantly more than CPI on an annual basis. The ARQRV is aware of instances where the general services charges in a village have increased by as much as 35% in a single year.

64. The main provisions in the Act that purport to regulate increases in general services charges are s102A, s106 and s107. These provisions are open to an array of different interpretations, and are notoriously difficult to apply in practice. (In a recent dispute regarding these provisions, the Tribunal member said "*the Act is very poorly drafted and contains a number of errors and inconsistencies, some of which have already been identified and are the subject of proposed corrective amendments; others have not been addressed. Suffice it to say that it has made the task of interpreting the provisions unnecessarily difficult*" - see *Ash v Australian Retirement Homes Ltd* [2012] QCAT 25 at [33]).

65. The Act fails to define critical terms like “general service” and “general services charge”, and fails to use consistent language, referring variously (and inconsistently) to “*the general services charge*”, “*the general services charges*” and “*the charges for general services*”. It also fails to clearly differentiate between the final levy ultimately charged to residents, and the individual line items in the annual budget, each of which corresponds to a “general service” and is referred to as the “charge” for that general service.

66. Section 107 of the Act (which embraces a significant percentage of the total expenditure) allows operators to increase a number of the major budget items on an annual basis without any restriction. These items are said to be costs beyond the operator’s control (such as rates and taxes) but they also include the maintenance reserve fund contribution which is substantially within the operator’s control (as the operator determines the ‘maintenance reserve’ under s98(3)).

67. Other components of the budget are subject to a form of CPI restriction under s106, however that provision only limits a selection of budget items (referred to as the “*total of general services charges*”) and then only limits the *budget* for those items. If an operator ultimately expends more than the budgeted amount, the Act currently allows the deficit to be carried forward and charged to residents in the following financial year (under s102A(6)). This effectively renders the “limited to CPI” restriction nugatory.

68. These provisions are in need of an urgent overhaul. Instead of an uncertain CPI restriction over an esoteric sub-set of budget items, residents should have the certainty of a clear CPI limitation on the actual *levy* that they are required to pay. This is the case under the NSW legislation and the Victorian legislation.

Inadequate accountability and transparency in financial obligations

69. The distress caused by the regular annual fee increases is often exacerbated when a resident seeks further information from the operator to explain the increase, and that information is refused on the basis that the Act does not ‘specifically’ require the operator to provide it.

70. The Act also does not allow an individual resident to effectively monitor whether the operator is properly complying with s106 and s107, because operators are free to withhold much of the information necessary to assess that compliance. For instance s107(b) allows an operator to increase budget items without restriction if the increase is required as a result of changes to salaries or wages under an award or other industrial agreement. If an operator increases a charge in accordance with this provision and a resident subsequently requests information to verify that the increase was required under an award or other industrial agreement, the operator usually declines, citing employee privacy concerns. So the resident is unable to assess whether the Act has been complied with. Similarly, if an increase is justified in accordance with s107(c) (which relates to increases in insurance premiums and excesses) operators will often refuse to provide residents with a copy of the relevant policy, citing commercial confidentiality. So the residents are unable to assess whether s107(c) has been applied properly. Residents pay the policy premium and, logically, should therefore have access to the policy.

71. Operators are basically only required to disclose the total expenditure on each ‘general service’, however there is no definition of a ‘general service’ in the Act, so operators are left free to group a number of different items of expenditure together as a single ‘general service’, and can then refuse to provide the residents with any details of the component costs that make up that ‘service’, regardless of the extent to which the total cost has increased.

72. As a result, residents are often faced with budgets (and quarterly reports) where single line items are 30% to 50% of the total forecast expenditure. This significantly limits the

transparency of the budgeting process and there is no way for residents to assess whether "more cost-effective" measures have been considered in accordance with s107A, as they do not have access to details of the relevant costs making up each general service.

73. The ARQRV accepts that it would be unwieldy for every single item of expenditure to be included as a separate line item in a budget provided to residents. However there should at least be some limitation on the extent to which costs can be grouped into a single budget item. An example of how this could be done is found in the *Retail Shop Leases Act 1994* (Qld). That Act regulates shopping centres, and the process by which the operating costs for the centre are shared among the tenants. Each tenant's share is based on an annual budget for the operating costs, and the Act requires that, in the budget presented to the tenants, no single line item may represent more than 5% of the budget total (unless it is a discrete cost item that cannot be further broken down). A similar measure should be considered in relation to the annual budgets for operating costs in retirement villages.

74. In addition, residents should also be entitled to have access to the operator's detailed accounting records, which provide a breakdown on individual costs. An operator is required to keep these records anyway (and most would do so electronically) so there would be minimal additional burden for an operator in allowing interested residents to peruse these records and satisfy themselves that their operator is complying with the Act. Section 3(2)(c) Objects of the Act specifies this entitlement.

Villages closing down

75. The Act currently fails to address the situation where a village closes down. It also fails to address the related situation where an operator does not explicitly close the village, but intends to do so, and then allows the village to become run down and undesirable. Such implicit closure then results in units becoming unsaleable (or substantially devalued). Urimbirra Village at Hervey Bay provides an example of an operator using this devaluing subterfuge for eventual capital gain.

76. Residents entering villages are entitled to assume that when the time for them to exit arrives, their right to reside in their unit will still have some value, and will not be artificially reduced as a result of any business decisions made by the operator.

77. The fundamental problem in these situations is that the Act currently allows the quantum and timing of a resident's exit payment to be determined by the re-sale of the unit. Therefore, if a unit cannot be sold the resident cannot receive an exit payment and will effectively lose all of their capital. Or, if the unit becomes significantly de-valued as a result of an implicit closure, there is nothing to prevent the resident's exit payment being significantly reduced as a result.

78. Where units become unsaleable or significantly de-valued in these circumstances, the residents ought to be protected by ensuring that there is a fixed deadline by which they must be paid out, and that their exit entitlement will be based on a valuation of their unit that assumes the village is operating as a going concern, and will continue to do so for the foreseeable future.

79. The ARQRV considers that there are two significant measures required in order to protect residents in this regard.

80. First: there is a need for improvement in the valuation provisions under the Act. This will not only assist in cases of village closure (whether the closure is explicit or implicit) but will also assist in valuation disputes generally.

81. The Act currently provides a valuation mechanism (in s60, s67 and s70) to address the situation where the outgoing resident and the operator cannot agree on the resale value of the outgoing resident's right to reside. The mechanism basically provides that, if the value cannot be agreed, then a valuer is to be appointed. These provisions are deficient in practice because:

(a) There is no guidance as to the assumptions on which the valuation is to be based. As such, operators argue that the valuer should take into account that the village is being wound down, whereas outgoing residents argue (quite properly) that their unit should be valued as though their village is, and will continue to be, a going concern.

(b) The Act requires the valuer to be engaged (and therefore instructed) solely by the operator. This prevents the outgoing resident from being able to make submissions to the valuer.

(c) Valuers rely heavily on comparative past sales to reach their conclusions but there is no public record of sales for leasehold or licence villages, and there is no requirement in the Act for the operator to provide the valuer with that information.

(d) The Act is not clear as to whether a unit is to be valued by reference to the type of contract held by the outgoing resident, or the type of contract that will be offered to the incoming resident. The ARQRV has been involved in a number of disputes where the outgoing resident originally paid a higher ingoing contribution in exchange for a contract with a lower exit fee and greater capital gain share, but on exit the operator sought to value the unit by reference to a new, cheaper contract with higher exit fees and less (or no) capital gain share.

82. These deficiencies could be addressed by the inclusion of provisions similar to those used in the *Retail Shop Leases Act 1994* (**RSLA**) in relation to determinations of fair market rent under a retail shop lease, as follows:

- Section 29 of the RSLA sets out certain assumptions that the valuer must make and certain matters that the valuer must take into account. A similar provision in the RV Act would be of great assistance as it could specifically state that a valuer must:
  - (i) assume that the village is being operated properly and in the usual way, and will continue to be for the foreseeable future (even if that is not the case),
  - (ii) disregard any specific matters affecting values in the village that are not affecting other comparable villages in the area, and
  - (iii) value units by reference to the type of contract enjoyed by the outgoing resident, and not by reference to any less-valuable form of contract that may be offered to the incoming resident.

- Section 28A of the RSLA allows the parties a right to make submissions to the valuer, who must consider those submissions. In a retirement village context, introducing such an entitlement would ensure that a resident could raise, and have considered, all relevant matters.

- Section 30 of the RSLA requires a landlord to provide any information requested by the valuer. This provision would assist in relation to leasehold and licence villages, because currently there is no public record of sale prices for such units, and there is no obligation under the RV Act for the operator to provide to the valuer historical sales data from the village. Permitting a valuer to request this data would improve the quality of valuations generally, and allow valuers to examine sales that took place before the events leading to the village closure (or the operator's financial distress). Any confidentiality concerns for operators can be addressed by a provision similar to s35 of the RSLA.

83. These changes would be of significant assistance in relation to instances of village closure. They would also ensure that the market value of units is determined by reference to the wider market, without regard to any circumstances that might be affecting values in a particular village, and on the assumption that the village is operating in the usual way, and will continue to do so for the foreseeable future. The ARQRV refers to a valuation on those terms as the 'fair market value' of a unit.

84. Second: in the case of a village closure (whether it is explicit or implicit), it is unlikely that a unit will ever sell for its 'fair market value'. Consequently, there is a need for provisions in the Act that require the operator to buy back the unit at that value, so that residents are not disadvantaged by the operator's decision to close (or to slowly wind down) the village.

85. The buy-back process should be triggered by a notice from the resident to the effect that, as a result of the operator's conduct, that resident does not believe the unit can ever be sold for its 'fair market value', and consequently the operator must buy back the unit at that value within, say, three months.

86. Upon receipt of such a notice, the operator should have the option to either comply with the notice, or to apply to the Tribunal for relief if the operator can show that the unit could potentially sell for its fair market value in the circumstances.

whether the Act provides sufficient clarity and certainty in relation to the rights and obligations of residents and scheme operators;

87. The ARQRV believes that there are a number of areas where the Act does **not** provide sufficient clarity and certainty in relation to the rights and obligations of residents and operators, as follows.

Uncertainty in relation to reinstatement

88. When a resident leaves a retirement village, there is frequently a dispute about the extent of the reinstatement work to be conducted, and the division of responsibility for the cost. The key reason for such disputes is that the Act is entirely unclear in relation to these issues.

89. The Act currently defines "reinstatement works" by reference to the works reasonably necessary to restore the unit to a "marketable condition". Unfortunately though, marketability is a subjective standard, and parties frequently disagree as to what is required. On one hand it could mean a simple restoration of existing fittings and finishes by cleaning and repairing, and perhaps repainting, while in the other extreme, it could involve gutting the unit and fully replacing all fittings and fixtures, including entire kitchens and bathrooms. This definition invites disputes, yet the Act does not provide any sensible mechanism to resolve them. If the parties cannot agree on the works required, then s58(2) calls for the parties to obtain quotes from "a qualified tradesperson". However such quotes will only clarify the *cost* of any proposed works, and will not assist in determining what *scope* of works is necessary to achieve 'marketability'. Quotes can only assist after the scope of works has been agreed and the question of cost needs to be resolved.

90. The only other option for parties who cannot agree on the scope of works is to utilise the dispute resolution process under the Act. However that can take months or years to complete, particularly if the Tribunal's assistance is ultimately required. The resident can only bypass the preliminary steps of the dispute resolution process and apply directly to the Tribunal for urgent relief under s171 if the operator has failed to get quotes under s58(2),

regardless of whether those quotes assisted in resolving the dispute. So if the quotes have been obtained and the parties are still unable to agree on what is necessary to make a unit "marketable", a stalemate position is effectively reached.

91. There is no time limit under the Act for the operator to complete the works in such circumstances, because the time limit under s59 only applies if the works are agreed within 30 days in accordance with s58. (As a result, there is no incentive for operators to actively seek agreement with the outgoing resident, because to do so triggers a time limit that they must comply with.)

92. The outgoing resident is significantly disadvantaged in these negotiations, because they usually have a more urgent need to sell the Unit than does the operator (the departing resident does not receive an exit entitlement until the Unit sells, and it cannot sell until the reinstatement works are agreed and then completed). So the longer it takes for the issue to be resolved, the more likely it is that the outgoing resident will capitulate and accept the operator's preference in relation to reinstatement. This represents a significant failure by the Act to protect residents on exit.

93. The Act should be amended to limit the scope for such disputes by more clearly defining "reinstatement works". It should also clarify whether residents are required to meet the costs of rectifying 'fair wear and tear' as this is a common point of contention. There should also be a mechanism allowing residents to apply directly to the Tribunal under s171 if the issue of reinstatement works has not been agreed within 90 days of them leaving the village, regardless of whether quotes have been obtained. Furthermore, there must be a clear distinction between the cost of the reinstatement works (which may be shared between the resident and the operator); and any more extensive refurbishment work which must be funded by the operator.

Uncertainty in relation to sales commissions

94. Section 68(3) of the Act purports to protect residents from being charged a "sales commission" or "fee for selling" when they exit the village. In practice, however, such fees are regularly charged to outgoing residents.

95. For instance, many operators avoid the restriction in s68(3) by creating a separate subsidiary company that does nothing other than to sell units in the village. The subsidiary can charge a sales commission because it is technically not "the scheme operator" and is therefore immune from s68(3). The operator may grant the subsidiary an office in the village; and the subsidiary will enjoy close ties to the village management. This gives the subsidiary a significant advantage over any outside sales agent; thus outgoing residents who want to sell their unit as quickly as possible have no real option but to use the subsidiary as their agent. The Act could easily prevent this practice by extending the restriction in s68(3) to the scheme operator "*and its related entities*".

96. Another way that operators avoid the restriction in s68(3) is by charging a mysterious lump sum as part of the "costs of sale" under s68(1). This is usually an "internal" or "head office" cost rather than a third party expense. Operators charge up to $8000 to outgoing residents in this way (which is commensurate with a real estate commission). The Act could easily prevent this practice by simply confirming that "costs of sale" under s68(1) can only be costs that are paid to third parties for the purposes of the sale, such as valuation fees, advertising fees, etc. It should also require the operator to provide copies of all invoices for any costs of sale charged under s68(1) so the resident can ensure that they were genuine third party costs, and that they related to the resident's particular unit.

97. Another way that operators avoid s68(3) is by charging a "termination fee" on exit. This is effectively the same as a "fee for selling" because a resident cannot sell their unit without

first terminating their right to reside. The Act could easily prevent this by specifically prohibiting “fees for terminating” in s68(3).

Uncertainty in relation to capital gains

98. In circumstances where a resident occupies a unit under a contract that allows them to share in any increase in the value of the unit (ie any capital gain) when they leave the village, there is significant uncertainty in the Act as to how that capital gain is to be calculated. For instance, if the operator elects to re-sell the unit pursuant to a less favourable form of contract (ie one with less capital gain share and/or with higher exit fees) it can reduce the resale value of the unit, and artificially reduce the exit entitlement of the outgoing resident.

99. The Act currently assumes that, whenever a unit sells, the new resident will obtain the same form of contract as the outgoing resident. However, in reality, operators vary the contract terms from time to time and the incoming resident may enter into a significantly different contract, with a different exit fee structure, a different capital gain entitlement and a different ingoing contribution. Contractual flexibility is important to allow operators to adjust their product to suit consumer demand; however the Act ought to protect outgoing residents by ensuring that their exit entitlement is not artificially deflated because the unit is being sold subject to a less-valuable contract.

100. The Act should require the operator to disclose to the outgoing resident what type of contract (or contracts) will be offered when the parties are negotiating the resale value of the unit under s60 of the Act. The Act should also require that if the Unit is to be sold pursuant to a less valuable form of contract, then the outgoing resident’s exit entitlement should be calculated by reference to the value of a contract similar to their own, rather than by reference to the sale price of the less valuable contract.

Uncertainty in relation to residential tenancies

101. If a village has vacant units that are awaiting a sale, it is currently unclear under the Act whether an operator may or may not rent those units out under a residential tenancy (rather than pursuant to a residence contract). As a result, some operators have proceeded to do this, and it has been a source of significant concern for the existing residents, particularly when the tenants of the unit do not otherwise meet the minimum age requirements or other entry criteria for the village. Recently, some operators have even rented units to young families, which is entirely inappropriate.

102. Under rental circumstances, where there is no residence contract in force the question arises whether the tenants are part of the retirement village scheme, and are therefore governed by the Act, or whether they are legally separate. Are they entitled to use the common areas? And if so should they be contributing to the maintenance reserve fund and the general services charges? Moreover, does the operator retain the rent or is that fee paid to the GSC account?

103. The introduction of residential tenants can erode the sense of community in a village because tenants are generally more transient and have not made the same long-term commitment to the village as other residents.

104. The ARQRV believes that operators should **not** be entitled to rent out vacant units.

whether the Act should make provision for scheme operators to develop and adopt best practice standards in operating villages, or require operators to comply with mandatory standards or accreditation;

105. The ARQRV firmly believes that the Act **must** make provision for operators to comply with certain mandatory standards. The Act in Queensland currently fails to secure many basic rights of residents, and is lagging significantly behind the other States in this regard.

106. The ARQRV does **not** believe that such standards can be properly developed and applied by the retirement village industry itself, and considers that they must be built into the Act. The retirement village industry has clearly demonstrated over the last 15 years that it is incapable of effective self-regulation. This is largely because the business model based on exit charges is fundamentally inconsistent with self-regulation. In other industries, if consumers are dissatisfied they take their business elsewhere and suppliers suffer as a result. This in turn creates an incentive for the suppliers in that industry to properly self-regulate. However in the retirement village industry, the operator only profits when the residents leave or die, which reduces the economic imperative to properly self-regulate. The ARQRV is firmly of the view that residents' lack of bargaining power must be offset by including appropriate rights and obligations in the Act.

107. The NSW legislation, the WA legislation, the NT legislation and the ACT legislation all enshrine certain fundamental rights for residents, and corresponding obligations for operators. These greatly assist in counteracting the disempowering effect of the exit charges.

108. The basic rights and obligations that should be secured by the Act are as follows:

(a) a resident's right to privacy and freedom from uninvited attendances at their unit by management;

(b) a resident's right to peace, comfort and quiet enjoyment (of both their unit **and** the communal facilities);

(c) an obligation on the operator to take all reasonable steps to prevent a resident from interfering with the basic rights of any other resident;

(d) the resident's right to autonomy over their personal and financial affairs;

(e) the resident's right to access any information about themselves that is held by management;

(f) limitations on the operator's right to enter a resident's unit;

(g) a resident's right to freedom from harassment and intimidation (by the operator or by other residents); and

(h) a residents' right to express their views about issues affecting the village without fear of recrimination from the operator (in the form of public criticism or otherwise).

109. These are fundamental rights that cannot sensibly be described as imposing an undue regulatory burden on operators, and many operators would already comply with these principles. Sadly though the ARQRV frequently witnesses violations of these basic principles in Queensland villages, and there are many extremely vulnerable elderly people in Queensland villages who deserve specific statutory protection in these areas.

whether the Act adequately promotes innovation and expansion in the retirement village industry, avoids purely 'red tape' requirements, and facilitates the ongoing viability of villages;

110. The ARQRV believes that the Act currently does promote adequate innovation and expansion in the retirement village industry. However, as noted earlier in these submissions, there is some unnecessary rigidity in the Act insofar as it requires that, if an operator wants

to make residents personally responsible for the costs of '*maintaining*' and '*repairing*' capital items within their unit, then they must **also** make the residents personally responsible for the '*replacement*' of those capital items.

111. As to whether the Act currently "*facilitates the ongoing viability of villages*" the ARQRV's position is as stated earlier in these submissions: the future viability of the industry depends primarily on increasing consumer confidence in the village product by enhancing consumer protections.

112. The Act does potentially include some purely 'red tape' requirements, as outlined earlier in relation to the question of whether the Act includes "*unnecessary restrictions and provisions which [de]crease the affordability of living in a Retirement Village*".

whether the Act affords residents all reasonable opportunities to be involved, should they wish to be, in budgetary and other decisions affecting their financial obligations

113. The ARQRV believes that the Act does **not** currently afford residents a reasonable opportunity to be involved in the budgetary and other decisions affecting their financial obligations.

114. The ARQRV fully respects that many residents simply to not want any involvement in these matters, however a significant proportion *do* want the opportunity to be meaningfully involved because these decisions have a direct impact on each resident's financial situation.

115. The residents entrust their money to the operator on the basis that the operator will prudently and honestly expend it for the benefit of the residents. The operator is akin to a trustee of the residents' funds, and should be subject to similar duties of consultation, transparency and accountability. However this is not currently the case under the Act.

116. The Act's most glaring failure in this regard is that it currently does not even require the operator to seek approval from the resident body for the annual budget before it is implemented! The only right that residents have is to request a copy of the draft budget (s102A(3)), and that right can only be exercised by the resident's committee, not an individual resident. So if an individual resident wishes to scrutinise the budget before it is adopted but, for whatever reason, does not have the support of the residents' committee, they may not even be able to obtain a copy.

117. The Act clearly fails to recognise that it is the ***residents'*** money being expended in each budget, and this is another area where the Act is lagging behind other States.

118. Under the NSW legislation, the WA legislation and the ACT legislation, before a budget can be adopted, the operator must give or publish a copy of the proposed budget to **every** resident, and must hold a meeting of residents at which the budget is to be considered. Also under the NSW legislation and the ACT legislation, the operator must seek the residents' approval of the budget at that meeting.

119. Similar requirements are urgently required in Queensland.

120. In addition to the lack of consultation about annual budgets, the Act also prevents residents from having a meaningful involvement in financial matters because it does not require operators to provide residents with sufficient information about the financial decisions that are made. This issue has already been detailed in an earlier section of these submissions. The problem is largely due to the uncertainty in the Act as to what constitutes a "*general service*" and what are the "*charges for general services*".

whether the Act adequately provides a timely, informal and cost-effective process for resolving disputes between residents and scheme operators.

121. The ARQRV believes that the Act does **not** adequately provide a timely, informal and cost-effective process for resolving disputes between residents and operators.

122. As explained earlier in these submissions, because of the village business model based on exit charges, residents have no bargaining power against their operator. Therefore their only source of leverage is their right to raise a dispute. Unfortunately though, the process provided by the Act suffers a number of significant flaws that deter many elderly residents from seeking to enforce their rights, effectively leaving them powerless and distressed.

123. First: when a resident commences a dispute, the operator will often engage expensive legal advisors to represent or assist them with the dispute. Not only does this create an uneven playing field for self-represented residents but, more importantly, operators often pass their significant legal costs on to the residents as part of the operating costs. So a resident cannot commence a dispute without causing an adverse cost impact for themselves and their fellow residents. They are effectively forced to fund the case against them.

124. Operators often distribute tactical circulars within the village advising all residents of the dispute, and confirming that all residents will be meeting the cost through the general services charge. So residents who raise a dispute may risk a backlash from fellow residents and may also be ostracised in their own village (which they cannot leave without significant loss). This is a significant fear, and a real disincentive.

125. The SA legislation specifically prohibits the operator from charging legal expenses to the residents, and the ARQRV believes that a similar prohibition is essential in Queensland to ensure that the dispute resolution process is workable.

126. The Act in Queensland only prevents an operator from charging residents for costs that are awarded against the operator by the Tribunal (s103(7)). This is an extremely 'hollow' restriction because the Tribunal rarely awards costs and, even if it did, there is still nothing to prevent the operator from passing on its own legal costs to the residents (which are separate to any that might be awarded against the operator by the Tribunal.

127. Second: the Act should be amended to ensure that if a resident raises a dispute, they are protected from any public or private recriminations by the operator.

128. For example the Victorian legislation specifically states that an operator must not take any action that might reasonably be regarded as deterring residents from raising disputes, or causing detriment to any resident who raises a dispute.

129. Third: the dispute resolution process under the Act is only available in relation to an unduly narrow selection of disputes between residents and operators.

130. A resident can only access the process if they are alleging a breach of their residence contract or a breach of the Act. This is unreasonably narrow because the Act does not currently guarantee residents' basic rights (as detailed earlier in these submissions) and residence contracts are generally drafted to minimise resident's rights to the extent permitted by the Act.

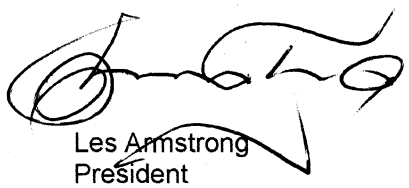
131. Also, many disputes between residents and operators relate to alleged breaches by the operator of other legal requirements, such as the *Fair Trading Act 1989*. In particular, there are many disputes that involve allegations of 'misleading and deceptive conduct' by the operator in breach of *Fair Trading Act 1989*. However residents cannot currently access the

dispute resolution process under the Retirement Villages Act in relation to these issues, because the definition of "*retirement village dispute*" in s21 is too narrow. As a result residents are instead forced to bring a Court action in relation to such matters, which is so expensive and slow that it is not viable for most elderly residents; leaving them distressed and powerless to enforce their rights.

132. The definition of "*retirement village dispute*" in s21 should be expanded to cover *any* dispute between an operator and a resident in relation to the village.

Further Submissions on Review of the RV Act

133. The ARQRV is preparing a section-by-section analysis of the Retirement Villages Act 1999 (Qld), including recommended amendments, for the Committee's consideration. The document will be forwarded no later than Friday 28 September 2012



Les Armstrong
President