

21/09/12

# Parliamentary Submission: Review of the Retirement Villages Act 1999

## **Background**

Wesley Mission Brisbane wishes to make a submission to The Transport, Housing and Local Government Committee in their review of the Retirement Villages Act 1999. This submission addresses each of the terms of reference.

## **Overview**

Wesley Mission Brisbane (WMB) is a not for profit organisation whose function is to serve the needs of our community. Our core business has traditionally been a provider of Residential Aged Care Facilities (RACF) and in more recent times we discovered a need within the community for independent living within a retirement village setting to be closely aligned with our RACF business.

We have entered the retirement living industry in recognition of the significant growth in older demographic segments, and that the State faces the need to support larger numbers of older people who are living longer than before. It is clear to us that retirement villages represent an essential component of housing and services in the future, being a crucial element in caring for older Queensland citizens. Based on current penetration rates and projected growth, continued development of retirement villages will be needed to meet the future demand of our communities.

In our opinion, should retirement village housing stock not be available, there would also be both direct and indirect economic impacts on other sectors, including employment, infrastructure and construction. Furthermore, and more importantly, residents would need to remain in standard residential stock, causing heightened social isolation as one example. Without retirement villages, we believe older people would not be able to seek age-appropriate accommodation that meets both their individual needs and that of their community.

Wesley Mission Brisbane operates a retirement village in Chermside Qld known as Wheller on the Park (WOP). WOP is a registered retirement village (under the Act) in Queensland and Wesley Mission Brisbane act at the 'scheme operators'.

WOP is co-located on 11ha of land in Chermside with some of our RACF (approximately 350 beds). Some of the major attractions of our village are its location to shops and amenities, proximity to medical and allied health services, need to feel safe and secure, lifestyle and recreational change and to be close to a RACF for their spouse or for the future.

Wheller on the Park currently has 252 independent living units (ILU's) and we have a further 88 ILU's currently under construction (total of 340 ILU's when completed in 2013). Our village commenced its operations in July 2008 and since then has grown to a community of approximately 350 residents.

Wesley Mission Brisbane and its staff at WOP prides itself on the services and facilities it provides and above all its value for money to our clients and their investment.

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

WMB provides each applicant to their retirement living with a copy of the Public Information Document (PID). The PID is based on the guidelines provide by the Office of Fair Trading.

WMB survey residents annually to gain important insights into satisfaction around a number of matters associated with retirement living. The annual survey in 2012 was completed by 160/250 households. The responses to the question 'How well were you informed of the conditions of residence before you signed an Application / Agreement?' indicated that 158/160 (98.75%) responders felt they had been provided with satisfactory, very good or excellent levels of information.

Despite the foregoing, we do have some concern that the PID in its current form is overly cumbersome for residents. It is repetitive, and includes standard information at the front of the document that does not specifically relate to the village the prospective resident is enquiring about. This can be confusing, where a simpler and shorter document would be beneficial.

Overall it is the view of WMB that the Act does provide adequate fair trading practice protections for residents. To this effect, we feel it is also important to highlight:

- Section 86 of the Act already provides additional protection for residents against misleading or deceptive conduct. WMB must not knowingly provide the Office of Fair Trading or a resident with a document containing information that is false or misleading; and
- An adequate "cooling-off" period is provided for in the current Act to allow residents appropriate opportunity to withdraw from the transaction. This supports disclosure and the ability for prospective residents to ensure they are well informed before making the right financial choice.

**2. Consider whether the Act does not include unnecessary restrictions and provisions which increase the affordability of living in a Retirement Village;**

The view of the WMB is that as the Act is unnecessarily restrictive and as a result increases the expenses around providing Retirement Villages.

Under the Act, revenue streams for an Operator presently include:

- An ingoing contribution (equivalent to a market value purchase price);
- The charging of recurrent charges for the provision of general services whilst the resident resides in the village on a cost-recovery basis; and

- The payment of an exit entitlement to the resident when they leave the village, comprising repayment of the ingoing contribution, from which is deducted an exit fee.

### General Service Charge

The day-to-day costs of running the village are recovered via the general services charge generally funded by residents (with the exception of Operator contributions under section 104 and 105 of the Act). A scheme operator must not profit from the general service charge, but must collect sufficient funds to meet anticipated costs. A resident is able to relax and enjoy the lifestyle of a retirement village, where their daily living and residence maintenance costs are managed by the operator.

Compared to other states, this management and administration has become unnecessarily prohibitive, being too focused on resident protection rather than on resident relations. Clarity around the rights and responsibilities of residents and the obligations of the scheme operator is necessary to reduce the burden currently being borne by operators with respect to (1) increasing general services and the consent process, and (2) ongoing Resident Committee liaison regarding financial performance. In our view, Operators are unable to recover the resulting and ever-increasing costs arising from managing these areas, impacting on the affordability of retirement villages for residents.

### *Increasing General Services and the Approval Process:*

From what we have observed, less prescription in other States has actually assisted in less resident disputes and the need for both parties to make a greater effort towards consultation. For example:

- Western Australia – there is no cap on annual recurrent charges/general service budget increases:
  - Management must provide prudential, efficient and economic management of the retirement village, having regards to the terms and conditions of residence and related contracts;
  - Ongoing consultation throughout the year in relation to where expenditure has departed from budget is necessary and alleviates resident concerns in relation to the consequences of a budget deficit at year end and illustrates prudential management;
  - Although residents in this state are not required to approve the budget, the operator must demonstrate reasonable steps to minimize increases in village operating costs;
- South Australia – there is no cap on annual recurrent charges/general services budget increases:
  - The recurrent charges must not increase from one year to the next beyond a level shown to be reasonable in view of the accounts for the previous year, and estimates for the current year, as explained at the annual meeting of residents;

In both Victoria & Queensland, an Operator is not liable under the current Acts for failure to provide services to residents should they unreasonably vote down resolutions for increases in charges. Unfortunately this appears to have caused issues in both states. Operating costs for varying village offerings is not standardized by a set formula to increase annual levies. Existing villages have been made economically unsustainable via efforts to provide resident protection to the detriment of residents in these villages. Giving residents the power to veto over budgets in a business environment causes the potential decline in the level and quality of services.

Further to this, it is our view that it is the scheme operator who bears the full legal responsibility for the operation of the village. It is therefore their role to protect residents and we do not feel they should find themselves in the position where they pass on their responsibility to those that live in the village.

Finally we believe the current Consumer Price Index used as part of the restriction on increases in Queensland bears no relation to the real costs of running a village and imposes an artificial ceiling. Electricity and audit costs are primary examples. Rather, the operator should use accurate and responsible budgeting methodology, deriving costs on sound bases for the upcoming year, and consider cost effective options. The safeguard for residents should be their right to apply to the Tribunal in the event that an increase in the fee is unwarranted or excessive, as is the case in South Australia and Western Australia. The focus should be directed on consultation with management thereby allowing residents to be comfortable with the charge levied.

#### *Consultation with Residents regarding Financial Performance:*

A great deal of time is invested by the scheme operator with residents and their committee to provide transparency in our accounting for general services, and we feel this is a cost that has an upward pressure on affordability. The majority of time the questions are unwarranted, with significant time of management unnecessarily spent, and at an unrecoverable cost. When queried, the majority of residents have issue with the questions raised by their committee, which often do not represent the concerns of the resident body. Accordingly the residents of the village are then unwilling to approve increases in the administration costs to respond to these constant queries.

#### Exit Entitlement

WMB believes that the rights of the scheme operator to structure tenure and deferred management fee arrangements should not be further hindered by any review of the act. WMB believes that market forces and competition should be the drivers of Retirement Village capital structures rather than further legislation. More regulation and retrospectivity would prohibit both (1) residents opportunity for “choice”, disallowing them the flexibility to choose an exit fee that aligns to their individual financial position and lifestyle preferences (\*) and (2) hinder the ability of both not-for-profit and for-profit sector to continue to be viable and play an important role in the provision of senior housing. As the retirement village legislation has become progressively more prescriptive there is a need to ensure that a standard financial model does not result. Flexibility in adopting alternative models can be achieved under the current Act while still preserving adequate consumer protection. This is further explained at item (6) of this submission.

(\*) for example, some models allow for residents who are unable to pay everything up front to pay a higher deferred fee, versus those that would prefer the alternative option or desire a share in any capital gain. Generational changes have also altered the preferences of the consumer where the exit fee needs to remain adaptable to the changing appetites of the market to remain an option for seniors for the long term.

The governance provisions of the Act dealing with the capital replacement fund (CRF) and the maintenance reserve fund (MRF) are in our opinion adequate and appropriate. These funds are not required in other states in Australia and provide both operators and residents in Queensland with certainty regarding the ongoing standard of asset management and responsibility for expenditure. Although no model rules have been released under section 113A of the Act, sufficient industry guidelines have been issued by industry associations (RVA and LASA) and have been endorsed by the Queensland resident association (ARQRV). In our opinion these guidelines are providing sufficient regulation and a more prescriptive model is unnecessary.

Capital replacement in Queensland is the responsibility of operators, which can erode an operator's profit where a capital gain is shared by a resident for example. These are costs that are not necessarily borne 100% by retirement village operators in other states and can be passed onto residents. This further supports the need for flexibility in exit entitlement options to ensure the operator remains viable and the ongoing stability and certainty of the industry.

Lastly, we wish to raise two other areas which we have considered:

- The 2006 amendments altered the sharing of vacant unit contributions under section 104. In our opinion this does not need to be amended further. There is now a cap on the resident's responsibility to pay continued general service charges of 9 months, with a shared responsibility from 3 months. Most scheme operator's accrue these charges to be paid from the final sale proceeds in recognition of a residents need to pay the costs for residential aged care or a deceased estate process. The current arrangements are therefore supported and felt affordable and fair for both parties.
  - Most retirement village residents are prevented from being able to access rent assistance arrangements from the government, otherwise accessible for example, by manufactured park homes. Furthermore, rates concessions available to those that decide to reside in their own homes are also often not accessible by residents of retirement villages. We raise these issues as impacts on the "affordability" of the retirement living industry that need to be urgently addressed by government. We understand they are considerations however that may be outside of the terms of reference of this submission.
3. **Consider 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;**

The view of the WMB is that the Act does provide adequate certainty, accountability and transparency for residents in relation to their financial obligations. In our view the Act contains a range of provisions summarised below, that ensure residents are fully informed of their financial obligations, both before entering a village and during their occupancy.

- Financial obligations are provided in the PID to a resident on entry to the village;
- Residents are notified prior to any change to their general service levy and are aware that scheme operators cannot make a profit from the General Services Charge (GSC). Residents participate in budgeting for the GSC via the resident's committee;
- When necessary the scheme operator must comply with the act in gaining special resolutions relating to budget increases in section 106 items.
  - The present process involved in working with the residents committee to achieve the desired outcome for all parties is both time consuming, and therefore expensive for the scheme operator and offers little value to either party (as outlined earlier in this submission). A more flexible solution should be available to the scheme operator when cost increases are not the result of adding in new services. Furthermore, it is unrealistic to expect absolute certainty about the costs of living on a day to day basis. Any additional regulation is unlikely to result in greater certainty for residents and in our view will only increase operating and management costs, ultimately resulting in a higher cost of living for residents.
  - The Act does not deal with budget increases relating to increased scale of the village very well. A developing village does not appear to have been considered by legislators with respect to the budgeting and capping provisions. It can well be that fees increase by less than CPI, but special resolutions still need to be gained when increases to section 106 items are due to the increased size of the village as a result of expansion. An Operator should not be exposed, as they have been in Queensland, to residents denying increases that were purely the result of increase in occupancy.
- Residents are able to request an estimate of their exit entitlement at any time during their occupancy. Although this may be perceived as an unnecessary administrative burden on the operator when a resident doesn't really intend to leave the village, this provides residents with certainty regarding the resale value of their unit at any time.
- The Act mandates annual audited statements and the need to provide quarterly reports on the request of a resident. This provides residents with details of the expenditure incurred in providing general services and a range of other information about the financial status and performance of the village.
- In the event of a village closing down, it is our view that the Act currently includes adequate provisions. Consultation with residents, their families, the community and the Office of Fair Trading are obligations that should not require regulation. Residents are protected based on the tenure entered into, with sufficient financial protection already included in the Act regarding maintenance fund disbursements etc.

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

The view of the WMB is that the Act does not provide sufficient clarity. The lack of clarity results in it being unclear for both residents and scheme operators around who is responsible for, and what detail should be provided by operators for residents.

For example when providing quarterly financial statement to the residents committee, Section 112 2b states that the report must present the expenditure involved in providing each general service in an auditable form. To some this is interpreted as traditional financial statement report, to others it means a detailed list of each transaction. On more than one occasion it has been suggested to this scheme

operator, by a resident's committee, that the later interpretation is the correct one. The need for an Operator to be accountable for each individual item of expenditure when they have not varied materially from the budget is unnecessary and contradicts the need for an auditor to be engaged annually for the benefit of residents. This once again incurs an unnecessary cost to management that is not recoverable, and is evidence of the excessive level of resident protection under the current Act, encumbering operators in Queensland.

**5. Consider 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;**

Currently accreditation is optional for retirement village operators.

Although we generally support the accreditation process, we believe the development of protocols as recently issued by Consumer Affairs Victoria (CAV) provides more benefit to and industry accountability than mandating accreditation. While these protocols are not legally binding there is an expectation that they will be applied by operators where if a dispute comes to CAV they will look to see if the protocols have been followed.

**6. Consider 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;**

The view of the WMB is that the Act does not promote either innovation or expansion in the retirement village industry. The requirements for a five star or one star facility are the same.

Our vision is to provide "A compassionate, just and inclusive society". Previously, church and charitable operators were exempt from many parts of the Act in Queensland. These exemptions recognized the important role that the not for profit sector played in the overall provision of senior housing and care services. This allowed charitable operators to historically provide more affordable models and options than under the current framework, hindering our ability to deliver our mission.

We re-iterate the basic model that is entrenched in the Act:

- An ingoing contribution (equivalent to a market value purchase price);
- The charging of recurrent charges for the provision of general services whilst the resident residents in the village on a cost-recovery basis, without a profit component to the scheme operator; and
- The payment of an exit entitlement to the resident when they leave the village, comprising repayment of the ingoing contribution, from which is deducted an exit fee.

Under this model, WMB's only source of "return" is the exit fee. The result is that we are unable to innovate by introducing alternative financial models. For example, offering a small ingoing contribution to a prospective resident, with a higher rental levy. The latter would allow WMB to profit from the recurrent charge and provide a more suitable and affordable option to some members of the community which it is presently unable to support. This example would also provide for a more consistent revenue stream for operators in the industry (rather than profit being realized on turnover

which on average occurs between 10-12 years in standard retirement villages) thereby not only improving the viability of the industry, but assist operators in structuring additional care and service models for aging in place.

We believe that the Act should incorporate flexibility for operators to derive profit from any source that is contractually agreed with residents and not restricted to a “one-size” fits all. Adequate and full disclosure to prospective residents before they make the decision to enter the village preserves consumer protection.

Other areas of note include:

- The current PID, which is as mentioned earlier, overly long, confusing and unnecessarily cumbersome;
- The uncertain legislative environment where recent reforms had retrospectively on existing contracts. This has contributed to some discouragement to invest in this industry, where existing contractual arrangements between operators and residents were altered via legislation, to the financial detriment of operators; and
- The current “cooling-off-period” provisions can be a barrier to obtaining finance to develop new villages.

**7. Consider 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;**

The view of the WMB is that the Act affords individual residents sufficient rights to participate in budgetary and other decisions affecting their financial obligations outside the forum of the Residents Committee. Should residents wish to participate further, they are able to do so as a member of the village Residents Committee.

Whilst living in the village, residents enjoy the following rights to participate:

1. Via the residents committee, a right to be given a copy of the draft budgets for the financial year for the general services charges, maintenance reserve fund and capital replacement fund, and to meet with the operator to discuss those budgets;
2. A right to vote on a special resolution about whether to approve increases in general services charges above the CPI percentage for the relevant financial year (after taking into account section 107 items);
3. A right to vote on a special resolution about whether to introduce a new service for which a services charge is to be made or may be made;
4. A right to vote on a special resolution about whether to approve a capital improvement, for which all residents of the village will be jointly responsible;
5. A right to receive quarterly financial statements;
6. Via the residents committee, a right to receive explanations about expenditure excesses over budget estimates;
7. A right to receive audited annual financial statements; and
8. A right to vote on a special resolution about whether to approve an insurance excess exceeding the prescribed maximum.



Although the above sections provide an appropriate level of control to residents about financial matters relating to the operation of the village, there remains some ambiguity: for example Section 112. This section states the following:

- The quarterly statement must “list for the quarter (1) the income of, and expenditure from the capital replacement fund and maintenance reserve fund, and (2) the expenditure involved in providing each general service”; and
- That although the quarterly statements are not required to be audited, they must “be in a form capable of being audited”

In our opinion, this does not usually mean producing receipts for single purchase items such as garden mulch. The terms of reference for the resident’s committee with respect to this section of the Act needs to be clarified to prevent onerous expectations around residents viewing/requesting copies of receipts, banks statements and multiple quotes for purchases included in the current budget provisions. It has been commonly requested by our Residents Committee to view detailed transaction listings and receive copies of invoices and bank statements. There have even been suggestions from the Residents Committee that they should be able to sit with the accountant each month to tick off every transaction in the General Services Fund. Although we support the need for consultation, transparency and accountability, we believe these are excessive demands that are unnecessary.

Becoming a resident of a retirement village involves a decision to relinquish to the scheme operator a range of decision making responsibilities about the day to day management, administration and operation of the village, which is essential in order for the operator to provide the lifestyle represented to residents and to comply with the contractual promises made by operators to residents when they entered the village. We believe amendments that were to further resident participation and control over decisions that affect their financial obligations is therefore unnecessary, and comprises the village community and lifestyle that the residents signed up for. Many residents moved out of their family home in the first place to avoid the burden of having to manage these issues.

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

The view of the WMB is that the Act does generally provide a timely, informal and cost-effective process for resolving disputes between residents and scheme operators.

In our experience the requirement that residents first raise any concerns with WMB results in timely responses and interventions to address the matter raised by the resident. WMB has not had any issue escalate to requiring arbitration.

In saying the above, we have noted from an industry perspective the following:

- Because QCAT affords residents the ability to litigate claims at no cost and without the risk of costs awards against them should their claim not succeed, there is no detriment to unmeritorious or frivolous claims being brought by residents who are determined to “have their day in court”. This results in considerable costs to operators, both in time and direct expense; and

- QCAT attempts to ensure that proceedings are conducted in an informal way. Whilst this is a sound objective, it can mean residents are permitted to change their claims or the content of their arguments throughout the course of a dispute without formally amending their claim. This is both a frustration and unfair to operators that would ordinarily not be exposed to such changes in a formal court proceeding.

This submission was prepared by Review team; Geoff Batkin, Ken Eade, Chris Haines, John Livesey, Judy Wollin.