



Australia's property industry

Creating for Generations

Property Council of Australia
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Friday 28 October 2022

Ms Tessa Piper
Executive Director
Regulatory Assurance and Policy
Department of Justice and Community Safety

By email: rvreview@justice.vic.gov.au

Dear Ms Piper,

The Property Council of Australia Response to the Retirement Villages Amendment Bill 2022 Exposure Draft

The Property Council of Australia welcomes the opportunity to provide the retirement living sector's official response to the Victorian Government's consultation on the draft Retirement Villages Amendment Bill (**the Bill**).

The retirement living sector forms a crucial part of the housing, community and services mix for senior Victorians, and the importance of the sector will only continue to grow with population ageing patterns and increasing life expectancy. The Review of the *Retirement Villages Act 1986* (**RV Act**) is timely and provides a significant opportunity to ensure the legislative framework is geared for the future. We congratulate the Victorian Government on its commitment to the review and deep consultation with the industry and community.

About the Property Council

The Property Council is the leading advocate for Australia's property industry – the Victorian economy's largest sector and employer.

AEC Group's report for the Property Council, 'Economic Significance of the Property Industry to the Victorian Economy,' shows that the property industry makes up 13.8 per cent of the Victorian economy, employs more than 390,000 people and supports more than 471,000 workers in related fields, pays 59 per cent or \$17.9 billion in tax revenue and pays more than \$21 billion in total wages salaries per year, which is approximately 27.9 per cent of wages and salaries paid to Victorian workers.



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The Property Council's Victorian membership has over 500 member organisations. They are architects, urban designers, town planners, builders, investors, and developers who develop, invest in, design build, and manage the places that matter most to Victorians – our homes, office and industrial buildings, retirement living communities, shopping centers, education precincts, research and health precincts, tourism, and hospitality venues.

The Property Council's members own and/or operate more than 250 retirement living communities in Victoria. Our members are a diverse mix of companies with small, medium, and large village portfolios, across Melbourne and regional Victoria, and include not-for-profit operators, commercial for-profit operators, listed and private companies and church and charitable operators.

The Retirement Living Council, a division of the Property Council, is the national leadership group of the retirement living sector, advocating policies that deliver more senior Australians age-friendly homes and services in retirement communities.

Property Council Response to the Consultation

This response contains the Property Council's preliminary comments in response to the Consultation Paper on the Retirement Villages Amendment Bill 2022 Exposure Draft.

Our comments are prefaced by the fact that the 20-day consultation window has not been long enough to engage with retirement living members deeply and meaningfully as we otherwise would to inform a response to such a detailed draft.

As of the date of finalisation, there are still issues we are exploring in more detail to assess the potential unintended consequences of the change. As such, we would strongly encourage the review to open another period of formal consultation following the completion of the caretaker conventions to enable us to complete our analysis, as well as to discuss the issues raised in this response.

If you wish to obtain more information or clarify anything in this response, please contact Duda Nusevic, Policy and Regional Advisor, at DNusevic@propertycouncil.com.au.

Kind regards,

A handwritten signature in black ink that reads 'Andrew Lowcock'.

Andrew Lowcock
Deputy Executive Director, Victoria
Property Council of Australia

October 2022

THE PROPERTY COUNCIL OF AUSTRALIA RESPONSE RETIREMENT VILLAGES AMENDMENT BILL 2022 EXPOSURE DRAFT

GUIDING PRINCIPLES

Question 1: Are the proposed guiding principles clear and easily understood? Are any refinements needed to the proposed principles?

The Bill introduces overarching principles that will be used to guide the interpretation of the RV Act. It is intended that the guiding principles will be used to apply in administering the RV Act and when providing accommodation and services in a retirement village.

The Property Council considers that while the proposed guiding principles provide greater clarity and understanding of residents' rights, they fail to include, recognise, and represent the rights of operators and retirement village staff. Whilst we agree that residents' rights should be respected and protected and that residents ought to be treated with dignity and respect, we consider that the same principles should also apply to operators and staff. Without explicitly including principles to protect operators, the Bill exposes operators and staff to be subject to bullying, harassment and fails to provide general rights and requirements for respect.

We also note that the proposed guiding principles have been broadened to focus heavily on consumer protection, promote management standards and evidently increase regulation of the industry. The guiding principles must be refined to ensure that operators' interests, such as viability and profitability, are also adequately represented by the RV Act. Without explicit consideration of operators' interests by the RV Act, there is a risk of significantly decreased market confidence and future investment into the industry.

It is imperative that the RV Act, through its guiding principles, permits operators to have the flexibility required to provide services and accommodation through a variety of models, which in turn enable residents and senior Victorians to have a variety of options in the future.

Additionally, we believe that the proposed guiding principles listed below are too broad and require further clarity to ensure workable practicality.

- ***“A resident’s preference to remain in a retirement village should be respected,”*** requires further consideration. Whilst we acknowledge the purpose supporting this principle, we consider that it is not workable in the context of ‘health and safety’. For example, a resident may **prefer** to remain in a retirement village, however, due to their health and/or risk to their safety, this may not be practical. Additionally, although a resident has a **preference**, it may not always be in the best interest of the retirement village community for that resident to remain in the village due to the residents’ health/safety needs.
- ***‘Decisions about a resident’s personal life, financial affairs and property should be made consistently with the will of the resident...’*** requires further consideration. We consider that this proposed guiding principle is unclear about whether it is referring to the resident’s right to make their own decisions (assuming they have the capacity to do so) or is an obligation on operators to know the terms set out in a residents’ will. It is worth noting that under regulation 10(a) of the Retirement Villages (Contractual Arrangements) Regulations 2017, an operator is prohibited from requiring residents to have a will and from knowing its location.

DISPUTE RESOLUTION

Question 2: Are the pathways and processes for dispute resolution appropriate and clear? Are any changes needed to what is proposed?

The Property Council supports a more detailed and robust dispute resolution process for external disputes. However, further clarification is required as to:

- what forum a dispute is to be referred to;
- whether a dispute must be considered by the Chief Dispute Resolution Officer (CDRO) before it can be referred elsewhere;
- what expertise the CDRO will have to consider retirement village disputes;
- what matters can be considered by the CDRO;
- how quickly the CDRO will be able to deal with disputes; and
- what costs will be required to refer a matter to the CDRO.

Clarification is also required as to in what circumstances the CDRO can make a binding order on the parties – is this only if they agree or is it proposed that the CDRO will have a judicial function to hear matters and make binding orders.

We request further consultation on the proposed dispute resolution pathway and more in-depth information to address and clarify the concerns listed above.

EXIT ENTITLEMENTS

Question 3: The changes to exit entitlement payments are intended to support residents and their families when finalising their exit from a village by reducing delays and improving certainty.

a. Is the process proposed in the Bill clear and appropriate?

b. Can you foresee any unintended consequences or implementation issues?

The Property Council supports the expansion of the buy-back timeframe. We consider that the proposed 12-month timeframe does not provide enough time for operators to achieve an optimum outcome of resale and therefore strongly urge the government to increase the timeframe to 18 months for the reasons outlined in our response to the RV Act options paper in 2021, and, on the proviso that the 18 months' timeframe is:

- only prospective, **and**
- provided that the resident does not have any control over the resale of the unit (such as, has not appointed a real estate agent, does not interfere with the sale process, and complies with all reasonable requirements of the operator in the sale process), **and**
- that the start of the 18-month timeframe begins from the date that the resident's unit is completely empty including the removal of resident's belongings, sale price is agreed on, scope and cost of refurbishment/reinstatements is agreed on.

Agreeing to the sale value

The Bill proposes that all parties involved need to agree on the value of the premises to be sold, and if there is no agreement, then the amount may be determined by a valuer, also agreed by parties. The drafting suggests that the proposed provision around agreeing to value will apply in all cases where there is a liability to pay an exit entitlement, even where there is no capital gain or loss to a resident. This section should be amended to not allow a resident with no capital gain/loss share, to have a say in setting the price or to appoint an independent real estate agent to sell the retirement village unit.

We believe that where a resident has a right to agree or disagree the value of their unit (i.e., the 'sale' asking price), they must also carry responsibility for the costs that continue to run (including maintenance charges and accrual of the Deferred Management Fee (DMF)) while they are

forming their view and exercising that right, including any period of time in which they exercise their right to dispute the unit's value. Conversely, if the resident has no right to capital gain / loss upon 'resale' and therefore has no interest in the 'sale' outcome (i.e., their contractual entitlement is based on the entry payment less the DMF only), then they should have no say, and no responsibility for the time and cost of valuation decisions made by the operator.

Daily accommodation payments and alternative accommodation payments

Clause(cl) 32Q and cl32R of the Bill provide that an operator must make aged care and/or alternative accommodation payments on behalf of the vacating resident from the vacating resident's exit entitlement.

We consider that the expansion of the aged care payment rule to include an obligation to pay alternative accommodation payments for care of residents who move from the village to other accommodation, which is not a residential aged care facility, places a significant burden on an operator. It would mean, for example, that an operator would have to fund a resident's care needs even if the resident moves into family accommodation.

Given that this concept is not included in any other Australian state or territory retirement village legislation, we consider it is unreasonable and unfair to include it in the Bill, particularly without prior consultation. The Property Council strongly opposes any expansion of the aged care payment rule.

In discussions with the Department of Justice and Community Safety (DJCS), it was established that this interpretation is an unintended consequence of the drafting, and that the policy position on 'alternative accommodation payments' is only intended to address any legislative amendments at federal level to provisions dealing with payment of accommodation payments under the *Aged Care Act 1997*. If, as discussed, this is the intention, then the Property Council accepts this policy position, but strongly recommends that any reference to alternative accommodation payments is removed from the Bill as it is unnecessary and confusing.

CLEARER AND CONSISTENT CONTRACTS

Question 4: Will the use of standard form contracts assist prospective residents to make more informed choices about retirement living? For example, will the proposed changes help residents to understand their legal obligations and costs?

The Property Council supports the principle of standardising contracts, if they do not add to the complexity of contract terms and are sufficiently flexible to permit operators to offer a variety of models to ensure there is consumer choice across villages. The Property Council, together with Russell Kennedy Lawyers, worked on a standard and more simplistic form of contract which is fully supported by the industry. Please see a copy attached to this submission.

26G Contractual requirements for settling in period

CI 26G of the Bill provides for the contractual requirements for a settling in period. As it is currently set out in the Bill, it is not clear whether the proposed settling in period is and/or will be a mandatory requirement for all operators, or whether it will only apply as an optional offering by individual operators. It is also not clear or defined for how long the 'settling in period' will extend (for example, for 20 days) and clarity about when it commences (for example, from the day the resident starts to live in a village). Further clarity on these points is required, noting that in our meeting with the DJCS it was indicated that the policy position is that these proposed provisions will only apply if an operator offers a settling in period.

The Property Council believes that, should the proposed 'settling in period' be established as a mandatory requirement, it will have significant and impractical cash flow implications for operators, and therefore is strongly opposed to any form of mandatory settling in period.

The sale process for a retirement village unit is an extensive, comprehensive, and generally lengthy process. It includes complete disclosure and village due diligence, as well as the resident meeting the village community, selecting a unit, and implementing any customisations to the unit. It also includes several legalities such as the preparation and provision of documentation to the incoming resident (as well as the outgoing resident) before the resident can settle into the purchased unit. The entire process provides a significant period and ample opportunities for an incoming resident to seek advice, review information and make any additional enquiries needed to ensure they are making an informed decision about moving into a village.

Following the above process, should a resident simply 'change their mind' after moving in, the resident would have the right to leave the village and get a payment of their exit entitlement, within 14 days of leaving, however the complexity of 'undoing' the process for an operator is enormous. It would cause significant stress and a burden on the operator, as the costs and broader operational impacts would be significant. For example, the operator would need to cover:

- reinstatement costs to the unit particularly where residents have customised features, finishes, fittings, and additions (including pergolas, landscaping, and reconfiguration of layouts);
- costs of resale and marketing the unit due to 'change of mind';
- holding and associated costs resulting from working through the extended sales process again (6-12 months), including funding vacant unit costs and village resident maintenance charges; and
- balance sheet impacts on village asset value, as valuers assess village businesses on a discounted cashflow basis so extended turnover times for units (due to reneged sales and reselling) decreases real value, village financing and village capacity to attract further investment.

The Property Council strongly believes that any provision which permits 'change of mind' must be carefully thought out and consider the significant financial and operational implications on operators, as well as the long-term viability of the sector. Further, requiring a contract to provide that any DMF is to be calculated by reference to the entry price solely will remove operators' rights to offer different financial models to residents and adversely impact the viability of the sector.

CONTRACT TERMINATION

Question 5: Are the proposed processes for contract terminations fair and will they make dispute resolution more accessible for residents and their families?

The right to terminate a contract is linked to the proposed guiding principles in the Bill. As noted above, the proposed guiding principles do not include anything in relation to the operator's rights and/or interests.

The principles must include additional rights of the operator, and if they are not included, then the Property Council does not support the inclusion of a requirement that the principles are taken into consideration as part of the decision as to whether a termination notice can be served.

160(b) – Consequences of termination notice

Termination of a residence contract on health and safety grounds will (in most cases) mean that the resident should be moved to a residential care facility (Aged Care). Under these circumstances it is appropriate and reasonable for the operator to pay the aged care payment. If the resident's unit is not sold within the buyback timeframe from vacant possession (assuming exit entitlements are paid within 18 months of vacant possession) then the resident should be entitled to the exit entitlement.

Any proposal to pay a resident their exit entitlement immediately on termination on health and safety grounds is not reasonable and could have unintended consequences. For example, this could incentivise families to not accept an assessment that a resident belongs in Aged Care, thereby forcing the operator to terminate on health and safety grounds so that the exit entitlement would be paid out immediately.

MAINTENANCE RESPONSIBILITIES AND OBLIGATIONS

Question 6: Are the changes relating to capital maintenance obligations for operators and residents helpful in clarifying roles and responsibilities in villages? If not, what refinements could be made?

The Property Council provides the following comments on cls 38A, 38BE, 38BK, 38BG of the Bill.

38A Former residents not liable for maintenance charges

The Bill proposes to substitute section 38A of the RV Act, to provide that a resident is not liable for a maintenance charge that arises on or after vacant possession.

Under the current provision, a resident is liable for maintenance charges for six months after the date of delivering on vacant possession. We consider that where a resident has a right to use and enjoy clubhouse and other common property facilities and, through that use, these depreciate and ultimately require replacement, then the resident should carry responsibility to contribute (with other residents) to the payment of its up-keep and replacement. That is, they should continue to pay maintenance charges whilst they have rights that give them some control over the timing of the 'sale' of their unit, including while the selling price is being agreed on, condition reports are being prepared and reinstatement works are being undertaken.

The Bill also proposes to apply this requirement for resident owners, and it is not clear what the policy basis is for this, given that the Owner's Corporation legislation regulates these villages. In an Owner's Corporation, the Owner's Corporation fees, levies and utility fees are paid, and liability continues until the dwelling is sold and settled. This is on the basis that the Owner's Corporation is to be self-funded so that the obligation for fees is to be borne by the individual resident rather than passed on to the Owner's Corporation which is comprised of lot owners.

We consider that the current six-month time frame for non-owner residents is both fair and reasonable and should not be changed. Any changes to the current provision will result in unintended consequences for retirement village residents and their budgets.

38BE Any surplus in accounts to be carried over

Cl 38BE of the Bill provides for accounts, including that any surplus in the accounts for a financial year of a retirement village must be carried forward to the accounts for the next financial year.

It is concerning that there was no prior visibility and consultation on the proposed cl 38BE, which significantly restricts the use of a retirement village's operating surplus and/or deficit.

We consider that the means in which a retirement village manages any surplus heavily depends on the financial model of the village and may also be dependent on historical agreements made between the operators and its residents. The proposed clause will impact residents unfairly, as it will prevent the resident group from having the choice as to how the surplus is to be treated. For example, in many villages the surplus is paid into a sinking fund.

Additionally, transferring any surplus to the next financial year's account artificially inflates the retirement village's income, which is not good financial management or business practice.

We strongly believe that cl 38BE should be reconsidered, as there is no benefit or value for either residents and/or operators, in legislating that surplus in the accounts for a financial year of a retirement village must be carried forward to the accounts for the next financial year.

38BF Making good of deficit

CI 38BF of the Bill requires an operator to fund any operating deficit. This is contrary to the financial model under which most villages operate, that is on the basis that the operation of the village is to be on a self-funding basis, and it is also inconsistent with the treatment of the operating surplus. To treat the surplus as resident funds, but to treat the deficit as an owner liability is problematic and unfair for operators. It will have a significant impact on the viability of operating villages. It will also have the unintended consequence that there is no responsibility of the resident group to consider the cost of the services supplied to be funded by the maintenance charge if they have no responsibility for any operating deficit.

In a developing village, this will also be problematic as during this period the operator needs to carefully manage the operating budget while the resident population increases as and when units are built and settled.

Capital Replacement/ Capital Maintenance

Under the current system as provided by the RV Act, the responsibility for maintenance, repair and replacement is stipulated clearly in the resident's contract and is linked to the operational financial model of the retirement village. Some financial models provide for all maintenance, repair, and replacement costs of independent living units to be included, on the basis that there is a higher deferred fee model with no capital gain share to the resident. Other financial models provide for a lower deferred payment and a capital gain share, on the basis that the resident is responsible for repair and maintenance and replacement for their unit. These obligations cannot be considered in isolation. There is a significant risk that prescribing requirements in legislation will not consider the variety of financial models on offer, and the choice available for consumers to choose the model which most appropriately reflects their needs.

If there is to be any regulation of capital maintenance, then it must take into consideration the financial model offered by the village. For example, if the DMF, capital gain and maintenance charges have been set on the basis that the resident is responsible for all repairs, maintenance and replacements in the resident's unit, then consideration will need to be given as to how a change which removes this obligation from the resident, to the resident group (by way of being funded from the maintenance charges which is the proposal in the Bill) is to be addressed. This will not just affect a resident who currently occupies the village – it will affect all future residents as the maintenance charge has already been set for the village and cannot be increased without resident approval.

Consideration also is required as to the impact of the changes on the resident group at the village. In many villages the operator and the resident committee work collaboratively to consider the repair, maintenance, and replacement requirements at the village as a whole. The changes set out in the Bill mean that an individual resident will have no obligations in relation to repairs and maintenance during their occupation of their unit, and it is not clear how this will interact with the

provisions on exit and reinstatement. The resident group will then have a greater obligation to fund the repairs and maintenance to a resident's unit as this is to be funded from the maintenance charges payable by all residents. There is a real potential for this to lead to conflict within resident groups.

Another issue is that many villages operate a sinking fund which is NOT funded from maintenance charges, for long term maintenance at the village, including regular painting and maintenance of the exterior of all buildings including resident units. The Bill as drafted seems to prohibit such an arrangement – and would mean that this would have to be funded from the maintenance charges payable by residents. Again, this would require a significant increase in maintenance charges for residents.

We consider that what constitutes maintenance and capital items should not need to be legislated as it causes complexities and may lead to unnecessary conflicts between residents and operators.

38BJ Resident may carry out urgent capital maintenance or replacement

The Property Council is concerned that the provisions in relation to urgent repairs have not been fully considered or discussed in consultation meetings. For example, as drafted they mean that:

- a resident could carry out urgent repairs to any unit in the village, not just the resident's unit, or any area which is not part of the common property;
- the resident could arrange for repairs for items which may be covered by the operator's insurance and which the operator is waiting to be assessed by its insurer;
- there is no obligation upon the resident as to who carries out the works, the quality of the works or obtaining quotes for the cost of the works.

The Property Council does not support these provisions.

38BK Funding of certain capital maintenance and capital replacement

We strongly recommend that the Bill must not impact upon capital replacement and the operation of sinking funds for this purpose. As currently drafted it seems that the Bill will still allow an owner to operate a sinking fund for long term maintenance and replacement of common facilities (but not long-term maintenance of units – see comments above).

In most villages with a sinking fund (which is funded from contributions paid at exit), expenditure from the fund requires resident approval of annual expenditure. The current system works incredibly well across retirement villages and is a popular system amongst residents. Under the current system, the residents must approve both major capital maintenance expenditure and capital replacements to be paid for out of the sinking fund. This empowers residents to have a rightful say.

Any changes to the current system should be strongly reconsidered, as any changes may lead to conflicts in retirement villages given the complexities around operating two different budgets for capital maintenance and replacement.

UNREASONABLE REFUSAL

Question 7: Will the proposed reforms to alterations and renovations support residents and operators by making it clear who is responsible for undertaking and for paying for repairs, alterations, reinstatement, and renovations?

Further consultation is required in relation to these provisions as they were not addressed in consultation meetings.

Alteration

Cl 37C of the Bill provides that a non-owner resident may request the consent of an operator to make alterations to their premises. Under subcl 37C(5) the operator may grant consent to the alterations, subject to reasonable conditions.

Further clarity is required on the type of conditions which can be applied to the resident's application. The Property Council cannot provide its position without further detail on what can be included as 'reasonable conditions.'

Reinstatement

We consider that further clarity is needed around what is required of residents and operators, including:

- the definition of 'reasonably clean,' under subcl 37D(2). Unless the term 'reasonably clean' is elaborated on, it will cause conflict and dispute between residents and operators who cannot agree on what *reasonable* looks like in practical terms.
- the definition of 'fair wear and tear,' under subcl 37D(3). The definition should clarify what reasonable use is intended to cover, and that only environmental matters which the resident has not contributed to or are beyond the resident's control are included.

The draft also provides that residents are not required to reinstate or replace fixtures or fittings that were added as an approved alteration. However, it should allow for this to be included if this was a condition of the operator granting permission – for example, significant alterations which the resident wanted may not be appropriate for the next incoming resident and the resident should bear the obligation to remove if they have the right to make the alteration.

Renovation

CI 37H provides that a resident who permanently ceases to occupy premises is not required to renovate or pay for the cost of renovations of the premises unless an agreement is entered into with the operator.

As drafted in the Bill, this would prohibit an operator from including in the residence contract that where the resident receives a share of the capital gain, the resident must contribute an amount equal to that share, to the renovation of the unit. We consider this to be unworkable and unreasonable. If the resident is entitled to the benefit of the capital gain as a right, the resident should have the obligation to pay for any renovation work. It should not be required that the parties then must negotiate and agree on this at exit – this is likely to lead to disputes at that time.

The Property Council accepts the principle that the cost of renovation should be consistent with the capital gain share – but does not support a requirement that the parties have to negotiate and enter into an agreement on this at the time of exit. We consider that the agreement should be entered into and signed when the resident moves into the retirement village, or at any point prior to the resident giving notice that they are intending to vacate.

RESIDENT PARTICIPATION IN DECISION MAKING

Question 8: Will the changes to residents' committees, residents' meetings, and annual meetings make it easier for residents to participate in, and contribute to, their retirement village?

33H Quorum for meeting of residents

CI 33H of the Bill provides that no business may be conducted at a meeting of residents, unless a quorum, of at least half of the total number of residents who are entitled to vote, are present.

We consider that the proposed amendment is not workable and will have a negative impact on the delivery of resident meetings. Mandating that 50 per cent of more of residents attend a meeting to conduct business will result in no business ever being conducted.

Most residents are busy with work, travelling, or occupied with ongoing commitments such as golf or lawn bowling and do not have an interest in attending residents' meetings. On average, our members report that about 30 per cent of residents who are eligible to vote attend any single meeting. Annual General Meetings (AGMs) attract between 40-60 per cent of the residents. While operators try to incentivise residents to attend by providing morning/afternoon tea and/or inviting guest speakers, it still does not attract enough interest in residents to attend.

Any mandate to achieve quorum is not workable and would result in increased frustration amongst residents who would be unable to progress any order or business.

REGISTER AND REGISTRATION FEES

Question 9: Are there any further improvements that could be made to the proposed reforms to the Retirement Villages register requirements and exemption processes?

Retirement Villages Register

The Property Council requests further details on the fee requirements provided under 'Register and Registration Fees.' We request further consultation and require further disclosure of the proposed retirement village registration requirements, which may have a significant financial impact on operators.

The Property Council is also concerned about the proposed requirement that, as part of the annual reporting requirement, operators must provide a report on disputes. We request further clarity and consultation on the purpose and process of this proposed requirement.

EMERGENCY AND EVACUATION PLANNING REQUIREMENTS

Question 10: Do the proposed emergency and evacuation planning requirements appropriately address risks to resident and staff safety?

The Property Council fully supports the proposed emergency and evacuation planning requirements and believes that they adequately address the safety of residents and staff in retirement villages.

It is worth noting that mandatory evacuation drills are different to mandatory resident participation. While operators of retirement villages will comply with the proposed planning requirements, operators are not able to ensure resident participation. It is important that the legislation does not hold the operator accountable for resident participation rates.

PRE-CONTRACTUAL DISCLOSURES

Question 11: Will the proposed pre-contractual disclosure reforms give prospective residents the information they need to make an informed decision about living in a retirement village?

Contract checks

Cls 26K to 26Q of the Bill provide for contract checks. Under the proposed changes, an operator would have a mandatory obligation to provide an annual contract check to all residents in the retirement village, regardless of whether a resident makes a request.

The proposed changes are unreasonable, unaffordable, and impractical. Mandatory annual contract checks are an extreme measure and will add significant pressure on the operation of a retirement village. Mandatory annual contract checks will result in an unnecessary increase in administrative and financial burdens which will ultimately be passed on to residents through increased fees and a decrease in general service delivery.

Currently, operators provide contract checks (free of charge) to all residents that submit a request for a contract check. Generally, most residents do not seek contract checks, with the largest portion of residents (or their representatives) who do make a request doing so before a move to aged care or other decision to leave the village. On average, retirement villages operators review three resident contracts per week.

Given that operators are generally not qualified to provide contractual advice to residents, and often need to refer to village managers or in some cases seek legal advice, the proposed provisions will create significant logistical and financial costs associated with preparing contract checks. Each contract review requires a minimum of 45 minutes, plus a face-to-face meeting. The process for a single contract review could take up to 3 hours. Should this become a mandatory obligation, operators responsible for 300 residents (on average) would be required to undertake an additional 900 hours of work ($300 \times 3 = 900$) each year. Most retirement villages, especially the smaller operators, would not be able to meet this obligation due to several factors including lack of staff, support, and finances.

Importantly, most residents do not request annual contract checks, therefore any mandate to conduct annual checks risks being perceived as intrusive and unnecessary and could cause discontent between operators and residents. For example, in a mature retirement village, generally the husband is/was the sole provider and therefore the key decision maker. In almost all instances he would have signed the contract and handled all formal paperwork, whilst his wife primarily took care of home duties. In cases where the husband has either died or moved on to an aged care facility, the wife (80+ years old) is left alone with little support or understanding of legalities and/or formalities. Such women would feel annually targeted, intimidated, and stressed by the confronting process of 'contract checks' and would need to engage their children, grandchildren, or a lawyer on an annual basis, to navigate the burdensome process of mandatory contract checks. It is necessary to highlight that under the current system, such women would have access to a fair and transparent contract check, should they make a request to the operator.

Whilst we acknowledge the intention of the proposed provisions, and agree that residents need to understand their contract, we strongly believe that residents should be empowered to make that decision for themselves without the need for a mandate. We believe that the provision should be reworded to provide that a contract check is mandatory upon written request by a resident once per calendar year.

Information Statement

Subcl 22(4) of the Bill provides that the information statement must be sent out with any “targeted promotional material”. The definition of “targeted promotional material” as set out in subcl 22(6) covers a village brochure sent personally to a person intended to promote a village as a place to live. This would be impractical as operators send out general village brochures all the time to specific people. Such brochures (sent to specific individuals on a mailing list) provide very general marketing information about the village (e.g., examples of floor plans, descriptions of clubhouse facilities), not specific information.

The requirement to provide an information statement when sending promotional material “personally to a person” should only be required when providing promotional material about a specific unit in a village for that person.

CAPITAL LOSSES

Question 12: Do the proposed reforms provide for a fair apportionment of capital gains and losses between residents and operators?

General comment on the sharing in capital gain and loss

The Property Council considers that where a resident has the right to access a share of the future market value of their unit (through capital gains or loss sharing), the resident should also carry a degree of responsibility for the timing and costs involved in preparing their unit for the sale, to maximise the value, they receive.

We are of the firm view that prior to vacant possession, key steps should be finalised including sale processes such as setting the sale price and picking an agent, costs associated with reinstating, restoring, or renovating the unit, and the payment of all ongoing maintenance fees. The buyback period should only commence once all the above steps are finalised and agreed upon, to ensure that operators have a fair and reasonable amount of time to achieve the best possible sale outcome. A favourable sale outcome would also be in the best interests of the resident as a larger sale price would mean they would have access to a greater share of gains.

We consider that if a resident has no interest or personal investment in the future resale of their unit, other than to contractually receive their entry price repaid, then the resident should have no right to participate in and delay the resale process. If the resident is not positioned to make any capital gains on their unit, then the operator should have full carriage of the sales process including determining the sale price, agreeing to reinstatement requirements, and paying for maintenance levies.

ROLE OF DIRECTOR, CONSUMER AFFAIRS VIC

Question 13: Are the proposed reforms sufficiently robust to address serious forms of financial harm and misconduct in the retirement village sector?

The Property Council requests further and detailed consultation on the proposed role of the Director, Consumer Affairs Victoria. The proposed role of the Director requires scrutiny, particularly around the governing parameters, enforcement powers, penalties, and general management/execution of the role. Further consultation is required to provide an appropriate response.

DEFINITIONS

The Property Council requires further time to consider the impact of changes to definitions and new definitions of terms in the in the Bill but provides the following initial comments on several proposed definitions in the Bill, including:

Capital Loss definition

The Bill proposes two differing definitions for calculating capital gain and capital loss. The difference in definition creates confusion and may lead to disputes. The definition should be simplified and provide that capital loss is the new ingoing contribution minus the original ingoing contribution. Subcl 3B(1)(a) provides a clear definition, which is then contradicted and redefined throughout the Bill.

Deferred Management Fee

Under the Bill, DMF is described as amount payable *“as a contribution for the cost of services provided in the village...”* It is important to note that some village operators do not charge residents for services (e.g., villages operating under a similar structure to an Owner’s Corporation), rather the DMF is just a payment of a component of the original purchase price that is deferred to after the resident leaves the village. This makes the entry cost more affordable for the resident and provides an alternative solution to residents with different budgetary and financial needs. Therefore, we consider that the definition should read *“...as a contribution for the cost of ~~services provided~~ living accommodation in the village...”*

Fair wear and tear (FWT)

As per the response provided under question 7 (page 12 of the response), we believe that the definition of ‘fair wear and tear,’ should be elaborated on in detail. The Bill proposes a definition which includes *‘deterioration of the condition of premises or a fixture or fitting caused by the reasonable use of the premises or the fixture or fitting; or natural environmental forces,’* however, the proposed definition is subjective and provides no clarity around what is considered ‘reasonable’ in practical terms.

Management Dispute

Subcl 3E(1)(b) provides that a management dispute is “*any action or failure to act by the operator or proprietor that affects the residents’ use or enjoyment*”. This meaning is too broad, vague, and subjective. The meaning also fails to define and differentiate between positive and/or negative “effects”. We consider that the meaning is too open-ended and will give rise to many unwarranted disputes. Cl3E(1)(b) should be removed.

Repayable entry payment

Under cl3A of the Bill, the entry payment contemplates the entry payment may be paid by a third party. However, the repayable entry payment does not appear to reflect that the entry payment may be repayable to a third party. It is also unclear how the Bill will address aged care payments where the entry payment has been paid by a third party on behalf of the resident.

Retirement village

The Bill proposes to substitute the meaning of ‘retirement village’ with a new meaning that provides a retirement village is a place at which accommodation services are provided or are to be provided **for the care and benefit of retired persons...**

We consider this problematic. A retirement village is the provision of independent living accommodation. It is **not** a facility that provides care services in any way or form. Care services are provided through the Commonwealth aged care system and are governed by separate legislation. Care services are not part of the accommodation or premises that a retirement village provides; but rather care services can be purchased separately and/or provided to any citizen within their home, be that in a regular house or in an independent living gated community (a retirement village, land lease community or apartment complex, etc). Therefore, the Bill, through the definition of retirement village, should not seek to address care or the provision of care services in any way.

All references to ‘care’ should be removed from the definition of ‘retirement village’ and all the draft clauses concerning aged care payments, alternative accommodation payments, etc. These clauses should only address accommodation needs and payments.

Permanently ceases to reside/occupy

The reference to ‘permanently ceases to reside/occupy’ should be removed and replaced with vacant possession. Using multiple definitions for the same purpose creates confusion and does not provide for clear interpretation. It is important that all references share the same meaning as provided by ‘vacant possession.’ (See below comment on the meaning of vacant possession).

Vacating non-owner resident

The Bill describes a vacating non-owner resident as a non-owner resident who has or 'is about to' permanently vacate the village. We believe that reference to 'is about to' should be removed as it may have negative consequences should it be used, referred to, or linked in various provisions of the legislation.

Vacant Possession

Given that 'vacant possession' dictates the beginning of the mandatory exit entitlement repayment timeframe, we consider that the meaning of 'vacant possession' should be defined as, that the:

- retirement village unit needs to be completely vacated including the removal of resident's personal belongings;
- sale price and sale process of the retirement village unit needs to be agreed on and signed; and
- scope and price of the refurbishment and/or reinstatement of the retirement village unit needs to be agreed on and signed.

OTHER COMMENTS

Commencement and Applicability

The Property Council reiterates its concerns around the lack of transparency around commencement dates and the applicability of various provisions. We firmly believe that any changes to the legislation should **not** be applied retrospectively to existing contracts. We also believe that the commencement date of any new provisions should carefully consider the timeframe that operators will require to inform themselves of, seek guidance on and implement the changes and any new processes.

26Y Deferred Management Fee

The Bill provides that a resident must not be charged for a DMF, unless the DMF is calculated as a percentage of the resident's entry payment.

The proposed changes to DMF calculations will impose financial restrictions on both the operator and resident. As it currently stands, there are a range of models and calculating methods which the resident can choose from depending on their budget, financial preference, and future outlooks. For example, the DMF can be calculated at resale, or as a percentage of the ingoing contribution. Mandating the calculations for the DMF will have unfair and unjust consequences on residents, leaving many of them in disadvantaged positions, given that many residents who make a considerable profit at sale benefit from the current options of DMF.

References to 'prescribed' terms in the Bill.

The Property Council notes that the term '*prescribed for the purpose of this paragraph*' (or similar), is used in many instances throughout the Bill. It is not possible to provide meaningful comments on provisions throughout the Bill that use this terminology when the "prescribed" requirements are not yet drafted and therefore are not visible to the reader. It is impossible to apply a fair and reasonable assessment of the Bill when we do not have complete visibility of information that is hidden behind references to "prescribed".

Persons who may live in a village

The Bill provides that a resident may apply to an operator seeking permission for a person of or under the age of 55 years to live in the retirement village with them, and that the operator must not unreasonably withhold permission from an applicant.

We believe that clear parameters must be set around what is 'reasonable and unreasonable.' For example, this provision requires parameters around age limits, circumstances for application and time limits, such as 'cannot stay with the resident for longer than 3 months.'

Whilst most operators would not have an issue with granting permission (on reasonable grounds), it is important to empower operators to be able to assess each application on a case-by-case basis, to ensure that operators can protect the interests of the greater retirement village community. For example, if a teenage grandson was to move into a retirement village, play loud music, drive a loud car, and have friends visit all the time, it would be at the detriment of other residents who have the right to enjoy a quiet village community.

It is important to ensure that operators have clear guidelines available for each case-by-case assessment to ensure that they can deliver the best possible outcomes and avoid any conflicts with the residents.

Redevelopment

We request further detailed consultation on the Bill to ensure that any proposed amendments do not hinder an operator's ability to renovate and/or redevelop their retirement village.

Given that most retirement villages will need to redevelop in some shape or form over the upcoming years, it is important to ensure that any future legislation empowers operators to undertake necessary works.