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The Retirement Villages Review Team
Legislation Policy and Programs
ACT Justice and Community Directorate
GPO Box 158
Canberra ACT 2601

By email: retirement.villages.review@act.gov.au

Dear Sir / Madam

Re: Review of the Retirement Villages Act 2012 (ACT)

We refer to the above review and the Terms of Reference dated September 2015.

The Property Council of Australia represents the majority of retirement village operators in the ACT, including Goodwin, Hindmarsh, Lendlease, Stockland and IRT.

The Property Council would like to thank the ACT Government for the opportunity extended to us to provide our submission as part of the review of the Retirement Villages Act 2012.

The Property Council's submission on the operation of the Act

The Property Council supports any measures taken by Government to improve protections for consumers provided that such measures also underpin the commercial viability of, and promote growth in, our sector in the ACT.

The Property Council considers that the Act in its current form broadly strikes the right balance between providing adequate protection for consumers and supporting the commercial viability and growth of the ACT retirement villages industry.

That said, to the extent the Government is interested to understand some specific parts of the Act which could be improved, the Property Council submits the following:

- The prohibition for an operator to advertise or otherwise promote a retirement village without development approval in section 16 puts unreasonable restrictions on an operator who has the intention to submit or may already have submitted a development application with the ACT Environment and Planning Directorate for the development of a retirement village. These restrictions can be unnecessarily costly due to an increased development timeframe.

  Allowing the operator to promote and advertise the retirement village pre-development approval in the same manner as ordinary residential developments can be marketed and promoted would deal with this issue. As long as there is full disclosure to the prospective resident that the development is subject to development approval, the risk will be solely with the operator.

- The definitions of "capital item", "capital maintenance" and "capital replacement" in section 135 remain a contentious issue in many retirement villages. A clearer definition of these terms, including defining the terms "repair" and "maintenance" would reduce potential tension between residents and operators during the budget preparation process.

- The method of distributing a surplus to residents in section 173 is needlessly restrictive. It requires the surplus to be distributed 'in equal shares'. This ignores the fact that in many retirement villages, residents don't contribute to village expenditure (and therefore any consequent village surplus), in equal shares. It also ignores the fact that the operator may have contributed to the surplus as per section 211.

- The requirement for the operator to provide the annual budget at least 60 days prior to the commencement of the financial year in section 159 is too long and does not give the operator and the residents enough time to prepare a meaningful budget. The Property Council submits that this timeframe be reduced.

- The prohibition on a former occupant's liability for refurbishment in section 220 creates a commercial imbalance that produces negative outcomes for residents.

  It is in the interests of both an operator of a retirement village and a resident that the former occupant's premises are sold to a new incoming resident as soon as possible. This is because in a lot of cases, the payment of money due to a former occupant is dependent on the completion of the resale. Further, where the resident receives capital gain (whether in whole or in part), it is in their interests that the best possible price (in the quickest possible time) be achieved on resale too.

  A refurbishment of the villa may be necessary to achieve both a quick sale and the best price. However, if the operator alone is responsible for funding refurbishment work the likelihood that the refurbishment will take place is reduced.

An approach which permits the costs to be shared, say, in accordance with the proportions in which a former occupant shares in capital gain, would be more balanced and arguably result in quicker sales and better prices, serving both the interests of the former occupant and the resident.

Key Strategic Industry Issues for Government to consider

The Property Council also submits that the Government should include the following key strategic industry issues in its review considerations:

1. Permitting developers of new retirement villages to take binding deposits from interested customers;

2. Improving flexibility in the Act so as to encourage new financial models (such as rental villages); and

3. Clarifying the operator's right to profit from the delivery of market competitive services to residents.

We have outlined below our further comments in relation to each of these issues.

Taking binding deposits from interested customers

Historically, the retirement villages industry in the ACT (and some other States) has viewed its ability to take binding deposits from prospective residents as limited by legislation.

This is because the sections of the *Retirement Villages Act 2012* in the ACT (and, for example, the sections of corresponding legislation in NSW and Qld) lack certainty in terms of the binding nature of deposits.

The Property Council submits that this uncertainty should be resolved in favour of clearly permitting binding deposits from prospective residents of retirement villages in the ACT.

Resolving the uncertainty in favour of permitting binding deposits achieves the following positive outcomes:

1. it places the retirement village industry on the same footing as almost all other property development industries (such as the residential and commercial property industries) where the parties are free to enter into purchase agreements supported by binding deposits;

2. it provides prospective residents with certainty in relation to their ability to secure desired properties in a retirement village early;

3. it provides flexibility for residents and operators to agree on how conditional the contract for purchase (and therefore the binding nature of the deposit) should be. For example, it is often the case that the resident requires that their contract for purchase be conditional on the sale of their home. These more common circumstances that give rise to conditionality of the contract can continue to be accounted for in the terms of the contract without the need for statutory interference.

All of the above outcomes are likely to give rise to greater investment in retirement villages in the ACT, will underpin growth in the sector and consequently provide better and more diversified product for retirement village residents.

Encouraging new financial models (such as rental villages)

The retirement villages legislation in the ACT currently characterises ‘rent’ payable by a resident under a village contract as a ‘recurrent charge’. This characterisation is similar to the approach taken under the retirement villages legislation in NSW.

Characterising ‘rent’ in this manner means that any rental paid by a resident in any given financial year needs to be accounted for in the village budget, that any rental increase above CPI requires the consent of the resident concerned and that, to the extent the rent is accounted for in the village budget and is increased above CPI in any given financial year, such increase may require the consent of all residents before it may be implemented.

The above rules regulating the payment of ‘rent’ by a resident under a village contract, in summary, make it unattractive for any operator to provide a rental offering to a prospective resident. Such rules are unmatched in any other landlord/tenant related property industry and are unnecessarily cumbersome.

The Property Council submits that a regime which regulates the payment of rent (and any rent increases) in a similar manner to that provided in residential tenancies legislation:

1. is more suited to residents of retirement villages who are, after all, in a residential environment;

2. will ensure residents remain suitably protected from unfair and non-market based rent increases (also noting that the rules relating to residential tenancies are generally more well-known and have been regularly considered by review bodies such as the ACT Civil & Administrative Tribunal); and

3. would provide sufficient flexibility so as to encourage operators to provide rental offerings to prospective residents, thereby diversifying the product available in the retirement villages industry. Such diversity may also lead to the opening up of retirement villages to the more affordable end of the market.

Profit from the delivery of market competitive services to residents

Historically, the retirement villages industry in the ACT (and some other States) has viewed its ability to profit from the delivery of services into a retirement village as limited by legislation.

This is because various sections of the *Retirement Villages Act 2012* in the ACT lack certainty in terms of an operator's ability to deliver services into a village and to profit from such delivery of services.

The Property Council submits that this uncertainty should be resolved in favour of clearly permitting operators to deliver services into a village at market competitive rates and to profit from the delivery of such services in the same way that any other service provider might deliver services to a village for profit.

In our view, the protection afforded to residents by statute is not enhanced by unfairly excluding an operator from delivering services into a village in place of a third party supplier.

It is possible that residents' interests are adversely impacted by excluding an operator from delivering services into a village. That is, by excluding the operator from the tendering process for provision of a particular service, competitive tension is reduced and the effectiveness of the tender is reduced.

The Property Council submits that the clarity requested from Government so operators are permitted to deliver services into a village at market competitive rates (and for a profit in the same way any other third party supplier might) can be achieved without any diminution in existing resident protections.

The processes and statutory rules for disclosing village expenditure to residents every financial year and having that expenditure approved every financial year will continue to provide residents with a high degree of transparency and control over village expenditure.

Further, should any service be delivered to a village at an uncompetitive or non-market price, the protections already enshrined in the legislation could be utilised by residents. No change to these existing processes, rules and protections need to occur to extend the right to deliver services to a village (for a profit) to an operator and thereby give the operator the same footing as any other third party supplier.

Conclusion

We trust the ACT Government will give consideration to the above matters in the course of its review of the *Retirement Villages Act 2012*.

Members of the joint Retirement Living Industry Associations (the Property Council of Australia, the ACT Retirement Village Residents' Association and Aged and Community Services NSW and ACT) meet every two months sharing information and addressing common issues that have arisen.

We recognise that industry operators and residents depend on one another but also that we may not always agree with each other's point of view. However, we affirm that we would like to continue working together through any issues of difference that may arise during the process of the ACT Retirement Villages legislation review.

Should the Government have any queries in relation to any of the information contained in this submission or require further clarification on any matter, please feel free to contact us.

We would be pleased to meet with Government to discuss any aspect of this submission or the review more generally.

Yours sincerely

C. Carter

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