19th May 2023

Hon Christopher Picton MP
Minister for Health and Wellbeing
Level 9, 11 Hindmarsh Square
ADELAIDE SA 5000

ministerforhealth@sa.gov.au

Joint industry submission – Retirement Villages (Miscellaneous) Amendment Bill 2023

Dear Minister,

The Property Council together with the Retirement Living Council appreciates the opportunity to put forward an industry submission on the *Retirement Villages (Miscellaneous) Amendment Bill 2023*("the Bill").

By way of background, the **Property Council** is the voice of Australia's property industry, championing a strong, thriving sector that leaves a positive legacy for all Australians.

Our 2,300 member companies are the nation's major investors, owners, managers and creators of properties and places that matter: homes, retirement communities, shopping centres, offices, industrial areas, education, research and health precincts, tourism and hospitality venues, and more.

Similarly, the **Retirement Living Council** is Australia's national leadership group representing the retirement living sector, championing policies that support more investment in age-friendly communities.

As Australia's pre-eminent industry voice, the RLC champions the growth and sustainability of retirement living, affordable housing options for senior Australians, advocating for fair and balanced regulation, ensuring best practices, providing strong industry leadership, and showcasing excellence.

Given the South Australian Government's legislative review, it is important to acknowledge the nation's retirement industry provides a user-pays (rather than taxpayer funded) purpose-built solution to two complex challenges facing Governments around Australia - namely housing affordability and supply, and an ageing population. The latter is especially pronounced in South Australia.

In responding to the Bill, the Property Council and Retirement Living Council ("PCRLC") and its collective industry membership is motivated by a desire to increase consumer and investor confidence, raise industry standards, and pursue better regulation.

Legislation that balances consideration of both residents and operators alike is key to driving investor confidence and meaningful housing solutions for South Australians.

We ask particularly that attention be given to our commentary around proposed exit entitlement and recurrent charges legislation.

A viable retirement living industry in South Australia advances the State Government's capacity to pursue an ambitious ageing, health and wellbeing agenda by improving wellness outcomes for seniors and providing efficiencies that can be reinvested in services and infrastructure.

With this in mind, we supply you with important quantitative material like the most recent PwC Retirement Census and relevant economic information. Like Government, industry is guided by research, evidence and data because we know it helps to deliver better outcomes.

It should also be conveyed that this submission and the recommendations contained herein carry the support of both the Property Council and Retirement Living Council of Australia, its combined memberships and both associated Boards ("Division Councils").

This collective membership base includes private operators - big and small - as well as church and charity operators right across South Australia.

On behalf of the PCRLC and our collective retirement living operator membership, we extend our thanks and appreciation to you, your department and staff and submit this report for consideration.

Yours sincerely

Bruce Djite
SA Executive Director, Property Council

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Executive Director, Retirement Living Council

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Executive Summary

Section 68 of the Retirement Villages Act 2016 ("the Act") requires that the Minister undertake a review of the Act three years after its commencement.

In late 2021, PEG consulting released Review of the Retirement Villages Act 2016 (SA) and in July of 2022 the PCRLC wrote to the Minister in response to the recommendations of the PEG report.

The PCRLC now makes a submission responding to the Draft Bill released for consultation - *The Retirement Villages (Miscellaneous) Amendment Bill 2023* (the Bill).

The PCRLC has followed the question-and-answer format of the *Guide to the Retirement Villages (Miscellaneous) Amendment Bill 2023* to structure our response.

Our response to the Draft Bill carries the majority support of our membership that is motivated by a desire to increase consumer and investor confidence, raise industry standards, and pursue better regulation.

The industry understands the role it plays as a partner to Governments in providing a privately (rather than taxpayer) funded solution to addressing the complex challenges of an ageing population, housing supply and affordability. Both these points are elaborated upon within the response.

Retirement living communities – or aged-friendly communities - provide fit-for-purpose "ageing in place" housing that deliver significant benefits to retirees such as improved physical and mental health, fewer injuries and accidents, as well as fewer or shorter hospital stays.

In South Australia the sector generates approximately $1.47 billion towards GDP and delivers numerous health outcomes and savings in the order of:

- $332m saved on health and aged care comprised of
    - $210m+ saved from delayed entry into aged care
    - $36.58m saved from hospital stays avoided
    - $21m saved from early hospital discharges
    - $2.43m saved from a reduction in the reliance on General Practitioners
    - $8m in saved from improved mental health outcomes for residents

As captured in the PCRLC's response to the PEG report in analysing PwC's 2021 Retirement Census data, there is a significant shortfall in South Australia's retirement village dwelling trajectory. The report outlines that assuming a retirement village participation rate of 7.6 per cent within the over 65 years of age cohort - and an average of 1.3 people per dwelling the Property Council estimates that an additional 7,637 dwellings will be required given this projection over the horizon to 2041. This is approximately 382 dwellings required each year over the next 20 years and yet the current supply rate projects only 170 additional dwellings by 2024.

Whilst cognisant of the need for reform, operator members report legislation fatigue. It also poses a risk to investment. Legislative stability in the sector is required to establish the requisite investor confidence to increase supply.

We would request that the Government provide adequate time for the industry to absorb and implement any change required of the proposals contained in the Bill. Members have reported that industry has only just begun to experience a normalisation of budget impositions from the last Review, and so we respectfully ask that this request be considered.

The sector implores the Government to heed the advice contained in this report and to supply support for the positions taken by the PCRLC. The PCRLC has taken these positions with a genuine mind to improving outcomes for residents and to providing for long-term sector viability to enable a continuation of this partnership with Government in providing health and housing outcomes for the State.

As part of our submission the PCRLC has put forward a number of resident-focused improvements such as plain language pre-commitment checklists in resident contracts to improve clarity for prospective residents about the nature of the tenure they are entering into regarding their right to occupy. We also lend support to worked estimates of exit entitlements within the Disclosure Statement over two, five and ten-year time horizons.

We ask particularly that attention be given to our responses in relation to the proposed changes to exit entitlement policy, recurrent charges and the payment of capital fund contributions deducted from exit entitlements. These proposals go to the heart of the sector's viability and require careful consideration.

Lastly, we wish to raise concerns in relation to the retrospective nature of some of the proposed amendments to the Act, especially those that impact the business models of operators such as remarketing fees, recurrent charges, and the capping of capital replacement reserves.

On behalf of the PCRLC and our membership, we extend our thanks and appreciation to the Minister, OFAW and staff for taking the time to consider our response.

Part 2 – Before moving into a village

2.1 Residence contracts

Question 1

Do the proposed changes to residence contracts achieve greater clarity for prospective residents, particularly around fees and charges, refurbishment, and types of occupancy within a village? (p.10)

The PCRLC fully supports the intention of these amendments and has worked independently of Government to improve the transparency and consumer-focused nature of prospective contracts.

In order to create greater clarity and certainty for prospective residents, the PCRLC proposes that industry adopts a **pre-commitment checklist** be inserted at the front of residence contracts.

This is intended to provide a simple, up-front, one-page, plain-language checklist that assists a prospective resident in ensuring they understand the tenure model they are entering, the fees they are agreeing to pay, and their rights and obligations.

Importantly, it also serves to remind and encourage prospective residents to seek independent legal and financial advice.

An example follows overleaf.

EXAMPLE - Pre-commitment checklist *[to be inserted at the front of the residence contract]*

This checklist includes important information. Please complete the statements in (a) to (g) below and sign this checklist before signing this residence contract.

Will you be purchasing title to land in the village?

The form of tenure that will apply to your right to occupation of the residence is *[operator to tick box to indicate form of tenure]*:

- Licence to occupy ☐
- community title ☐
- strata title ☐
- lease ☐
- other [insert full description]: ☐

[If the right to occupation is conferred by licence, lease or by ownership of shares insert the following]

You are <u>not</u> purchasing title to land.

Have you obtained legal and financial advice?

You should seek independent legal and financial advice about your rights and duties under this residence contract and to determine if entering into this contract is the right decision for you. As the operator of the retirement village, we strongly recommend that you consider the below statements and seek that legal and financial advice before signing this contract.

Are you satisfied that you understand the residence contract and that this is the right decision for you?

Please tick (✓) as appropriate.

(a) I/we have sought legal and financial advice and believe this is the right decision for me/us.
☐ Yes ☐ No*
We strongly recommend that you seek legal and financial advice

(b) I/we understand the form of tenure that applies to me/us?
☐ Yes

(c) I/we understand that if the form of tenure is a lease, licence or by way of ownership of shares, we are not purchasing title to land?

☐ Yes

(d) I/we understand that the operator has the right to recover exit fees as per terms of this residence contract and I/we understand the calculation of exit fees?
☐ Yes

(e) I/we understand our rights and obligations as residents ?
☐ Yes

(f) I/we understand the rights and obligations of the operator?
☐ Yes

(g) (g) I/we understand our rights to undertake alterations to the residence and that conditions may apply to those rights?
☐ Yes

If you have not answered 'Yes' to all of the statements in (a) to (g) above, [please consider seeking further information and advice before signing the residence contract/please do not sign the residence contract and seek further information and advice].

Signature of resident(s):

Date:

Question 2

Will the inclusion of a premises condition report in the residence contract appropriately address concerns that the premises condition report is not always provided as early as possible to the incoming resident? Are there any unforeseen consequences or matters that need to be considered? (p.10)

The inclusion of a premises condition report in the residence contract whilst well intentioned is not supported. There are a number of practical reasons for this opposition.

In the case for off-the-plan purchases for obvious reasons, this would be unworkable and would impact the ability to be able to develop new stock given that banks normally require a minimum of 50 per cent contracts (pre-sales) to be able to enter into a finance agreement.

It should also be noted that a potential unintended consequence of including the premises condition report in the contract could be the delay in relicensing where a new resident wishes to sign a contract but there is still work to be done to the residence prior to the new resident occupying. This has the potential added effect of delaying an incoming resident putting their house on the market for sale (because a residence contract has not yet been signed for the village), which in turn could impact the timing of exit entitlement payments where a resale is subject to the sale of an incoming resident's home.

Operator members also expressed that including a premises condition report within the contract would make the facilitation of licensing difficult in cases where residents may be moving interstate or are remote from their intended village.

For the reasons outlined above, models in other jurisdictions could be explored where the premises condition report is a separate report to the residence contract and the timing of the provision of the report has regard to whether the residence is under construction.

If a residence under construction (and also where a residence is being relicensed but there is still work to be completed) the premises condition report takes account of this and could be required to be completed and signed at, or within a short period prior to occupation. Alternatively, the status quo could be maintained.

2.2 Disclosure Statements

Question 3

Do the proposed amendments to the Disclosure Statement ensure that a prospective resident is provided with enough information to aid decision-making? (p.12)

The PCRLC supports the intention of disclosures relating to the composition of occupants in a village. The only caveat to industry's support relates to the frequency of composition change in any

one village, which might make the provision of accurate information at the time that disclosures are required, challenging.

Therefore, any amendment or supporting regulations should be adjusted to account for this; for example, updating the currency of the resident composition as listed on 1st July.

The PCRLC also supports prospective disclosure of embedded networks. In relation to disclosure of exit fees the PCRLC supports additional transparency.

Members support the introduction of estimated exit entitlements within the Disclosure Statement over two, five and ten-year time horizons. Members have expressed they are prepared to provide an estimate *with prominent disclaimers* in order to meet this requirement on the basis of providing transparency and scenario planning. This will of course vary depending on contract and product distinctions.

2.3 Information required before signing a residence contract

Question 4

Is the proposed process to allow a person to enter into the contract before the 10-business-day period has expired clear and easily understood? (p.13)

The PCRLC supports this amendment.

2.4 Deposits

Question 5

Is the proposed process for managing contract deposits clear and easily understood? Are there any unforeseen consequences? (p.13)

The PCRLC supports this amendment.

2.5 Repayment of ingoing contribution after rescinding contract

The PCRLC supports inclusion of the process and period within which a new resident is reimbursed for payments made on signing the contract, should they elect to rescind the contract during the cooling off period. It should be noted that some operators engage external trustee services to effect settlements and manage deposits. In these cases, ensuring repayment within the proposed ten days may be subject to their security requirements that the residents funds are being appropriately redirected.

Part 3 - Amendments applicable while living in a village

3.1 Recurrent Charges

Question 6

Do the proposed changes to recurrent charges achieve the aim of providing additional consumer protection? Are there any alterations required to more effectively achieve this? (p.16)

The premise of the question assumes that more stringently regulating the recovery of recurrent charges will achieve consumer protection – however this is ultimately false.

For any business to remain viable, it must be able to recover operational costs. The consequence of not being able to adequately recover costs is that service levels for consumers and amenity (provisioned through for example preventative maintenance) deteriorates over time and the business becomes unsustainable.

Industry has expressed grave concerns about the amendments proposed in relation to recurrent charges. These were also previously expressed in the PCRLC 's response to the recommendations put forward by PEG consulting in Review of the Act (*Recommendation 30*). We welcome further opportunity to express this concern which if enacted will have material impact on operator viability.

Firstly, it must be stated that recurrent cost increases are of course undesirable for both residents and operators alike. However, inflation is a reality. Operators do not derive profit from recurrent expenses and are incentivised to reduce these expenses where possible. Indeed, low recurrent costs are a source competitive advantage for operators seeking to attract residents. Imposing a mechanism that diminishes the capacity to adequately recover costs would be detrimental to operator sustainability. The impact of this would be especially acute for not-for-profit and smaller village operators that have aged care facilities. It is well documented that a large number of aged care facilities are already operating at a loss.

When considering the question of whether residents of retirement villages should be afforded greater regulated protection from recurrent cost increases, it should be noted that insulation from recurrent expense increases are not afforded to seniors who elect to live in the general housing market.

Whilst it would be convenient if costs within retirement villages escalated neatly in line with the Consumer Price Index (CPI) this is simply not the case.

CPI provides a general indication of price movement across a wide "basket of goods" but does not provide a precision tool for policy makers to measure the cost pressures associated with operating a particular retirement village. It is therefore a blunt instrument and suboptimal for sophisticated policy creation.

Most recurrent cost increases are beyond the control of operators or are costs which may not increase in line with CPI. This is because they are set by government (i.e., council and water rates),

or market conditions give operators limited bargaining power in negotiating prices (i.e., utilities and insurance). There are also legislated changes that occur outside of Government that can significantly impact recurrent costs such as award wages. This is evident when it comes to the recent 15 per cent award increase for employees under the aged care award.

If the Government is determined to cap recurrent charges at CPI, then it would be more equitable if it were to provide for carve outs in the following areas:

- Rates, taxes and charges in respect of the village land levied under legislation.
- Salaries or wages paid to a manager or person employed in connection with the village and paid under an award, certified agreement or other industrial instrument made, approved, certified or continued in force under the relevant industrial relations Act or a Commonwealth Act
- Maintenance contracts (for example lifts, fire prevention and security systems).
- Insurances
- Utilities (water, power and telecommunications)

Whilst the Bill provides for circumstances for an operator to increase charges after consideration of the Tribunal when residents do not resolve to increase charges, The PCRLC takes the view that this is both unnecessary if first principles are established in policy (that businesses must be able to sustainably cost recover) and would be a waste of both Tribunal and operator resources.

Operator members of the PCRLC are also concerned at the retrospective nature of many elements of the Bill, including potential changes to recurrent charges. If enacted, this could have an adverse impact on how operators formulate new contracts to gain adequate margin to recover costs in high inflationary business conditions.

3.2 Meetings

Question 7

Do the proposed changes increase clarity around the convening of annual meetings and the documents that are required to be provided? (p.18)

The PCRLC supports this amendment.

Question 8

Do the proposed changes make clear the responsibility for minutes and clarify that consultation about the budget does not require finalized accounts? (p.18)

The PCRLC supports this amendment.

3.3 Residence Rules

The PCRLC would caution against the expansion of Section 41.

The amendments state that if a rule is 'harsh, 'oppressive', 'unconscionable' or 'unjust' it is void. By adding the words 'oppressive' and 'unjust' this opens residence rules to further challenge.

3.4 Provision of required documents to residents free of charge

Question 9

As an operator, will you be able to readily provide the required insurance information to a resident upon request? (p.19)

The PCRLC would suggest that the requirement of the operator to be adequately insured is sufficient provision. The onus rests with the operator in the event of a liability. We do not believe that providing access to insurance policies provides greater consumer protection.

Insuring a retirement village is highly complex process that relies on expert advice. Therefore, industry's concern is that the proposal in the Bill will require operators to divulge details of insurance policies to residents that may lead to circumstances in which residents dispute the level of insurance and the burden of proof is placed unduly upon an operator to prove the adequacy.

Operator members suggest that providing a valid certificate of currency would be an adequate and balanced approach.

3.5 Emergency plan

Question 10

Do the proposed emergency planning requirements appropriately address risks to safety? (p.20)

The PCRLC supports the proposed amendments.

However, it is our view that clause 43A(1) is too broad and might have unintended consequences. In our view it should be made clearer that the obligation on an operator to ensure that the village generally is reasonably safe doesn't extend to a resident's unit, or if it does, that the operator's obligations are limited.

3.6 Lease of land

Question 11

Does the separation of residential and commercial rental within a village provide the clarity recommended by the Review? (p.21)

The PCRLC supports this amendment as it provides more clarity.

Question 12

Will these amendments improve the inclusion and participation of rental tenants in the village community? (p.21)

The PCRLC has no comment in relation to this amendment at this stage.

3.7 Requirement to insure retirement village

Question 13

Are the proposed obligations regarding village insurance reasonable and appropriate? (p.22)

We note that the draft legislation includes a duty to insure a liability determined at a meeting of residents by a special resolution. There is no condition that such a determination needs to be reasonable or that the insurance has to be able to be reasonably obtainable in the market. Nor does it prescribe how long the operator has to arrange the insurance following the meeting. Effectively, this would allow residents to become involved in the management of the village. The inclusion of this provision is another argument for excluding insurance from the recurrent charges cap.

The requirement under section 57C to use the money to reinstate or repair buildings should make it clear that this is money 'received' by the operator rather than money to 'which the operator is entitled under a contract of insurance' which may be interpreted to merely refer to the legal right under the contract of insurance and not to the actual receipt of the money. It is only when the money is received that the operator should be under any legal obligation to do something with it.

It should also be noted that there are many scenarios under which an operator may not wish to reinstate a village after an insurable event, e.g., cost of compliance with new flood and fire provisions under new planning laws.

Question 14

For a resident, does the proposed amendment give you confidence that the appropriate level of insurance is held? (p.22)

The PCRLC has no comment.

3.8 Dispute resolution

Question 15

Will the proposed amendment to broaden the matters that the Tribunal can hear capture common disputes that arise between an operator and resident? (p.23)

Making it an offence for an operator to not follow their dispute resolution policy is problematic. Sometimes the urgency of a matter might mean that an application to the Tribunal is appropriate before the policy can be followed.

The PCRLC notes that the draft Bill contains no provision for operators to resolve disputes between residents. Unresolved it is therefore an operator's issue who then has an obligation to facilitate an environment where residents can be provided with quiet enjoyment.

While the Review determined that the Tribunal's jurisdiction should be limited to disputes between operators and residents, it must be stated that resident-to-resident disputes can in certain instances become resident to operator disputes.

In our response to Recommendation 38 put forward by PEG's Review of the Act, The PCRLC noted:

> *Operators from the Property Council's Retirement Living Committee have expressed that there are instances where the elevation of resident-to-resident disputes to the South Australian Civil and Administrative Tribunal (SACAT) would have been useful.*
>
> *Consultation with industry would enable operators to understand how escalation pathways for resident-to-resident disputes that come to an operator would best function.*

The proposed Amendment of Section 46(3) provides that *the Tribunal may make such orders as the Tribunal considers to be just to resolve matters in dispute.* The PCRLC would suggest that this wording incentivises increased tribunal hearings and could be used to bypass dispute resolution provisions as well as provisions within resident contracts which would otherwise provide a pathway for dispute resolution.

Increasingly, operator members are finding that disputes between residents and operators and between one resident and another resident is due to the cognitive decline of a resident. The proposed amendments do not allow the Tribunal, upon application by an operator, to order that a resident have an independent medical report obtained about the cognitive ability of the resident.

Operators only current option is to request the consent of a resident or their representative which in most cases is not supported by the resident or their power of attorney.

3.9 Management of retirement villages

Question 16

Is the 12-month transitional period for existing retirement village operators and staff to complete training requirements reasonable and appropriate? (p.25)

The PCRLC would suggest that 12 months would likely be long enough subject to the training requirements imposed.

In relation to Sections 63 and 63A the wording refers to staff who work 'at' the retirement village. PCRLC operator members seek clarification on whether this exclusively applies to staff who physically work at the village. For example, does this section apply to head office staff in the case where a head office is located remote from a village itself and those staff do not interact with residents or only visit the village or interact with residents occasionally?

We also seek clarification around Section 63(5) regarding undertaking of training and whether *'any other person employed or engaged to work at the retirement village'* applies to non-core service provision staff such as gardeners, cleaners and cooks.

The PCRLC's view on amendments to Section 63 regarding extending offences in respect of breaching a relevant code of conduct to village managers employed or engaged to work at the retirement village is that this is inappropriate and too broad.

We do not believe that creating an offence in relation to a breach of a code of conduct supports staff training objectives and would likely exacerbate difficulties in attracting and retaining of staff.

The PCRLC submits that offences issued in relation to staff breaches of the code of conduct should be issued to the operator, rather than to the staff member, as is likely the case in most industries. By way of contrast, in the aged care sector where residents are more vulnerable than in retirement villages, aged care workers do not commit an offence if they breach the new code of conduct that applies in aged care (and at most, a civil penalty *may* be applied).

In response to Recommendation 5 of the PEG report (that the Act include a fit and proper person test be met by village operators, managers and senior managers) the PCRLC advocated that:

> *Many operators currently have vetting mechanisms embedded in recruitment processes where staff undertake police checks and ongoing compliance is required as a condition of employment. Members of the Retirement Living Council's South Australian Division would fully support police checks as a mandatory condition of employment. This not only protects residents but staff as well as the reputations of operators.*

We also note that the Draft Bill contains no additional provisions in relation to poor behaviour of residents towards staff. It is worth repeating our comments from our earlier submission following PEG's Review in relation to Recommendation 38:

> *As an aside, a number of our members have observed increased instances of unacceptable behaviour towards village staff ranging from aggression, being unreasonably demanding and in some cases acts of bullying. Such instances can often be mitigated by staff training; however, there is a degree to which these arise independent of the level of training staff have had. Operators have a duty of care to staff, and at a time of skills shortages which threaten the ability of operators to maintain service levels, it is critical to the viability of the industry that operators can retain staff. We acknowledge that the current legislation provides for operator and resident codes of conduct, but this has not had the impact required in terms of managing poorly behaved residents.*
>
> *The Retirement Living Committee asks that these obligations are reinforced within the better practice guidelines.*

3.10 Disqualified persons

Question 17

Do you agree with the expanded list of offences that will disqualify a person from being an operator of a retirement village or being engaged as a senior manager or village manager? Are there any additional offences that should be included? (p.25)

The PCRLC supports this amendment.

Part 4 - Amendments applicable to leaving a village

4.1 Termination of residents' rights

Question 18

Do the proposed amendments provide a better protection for residents who terminate during the settling-in period? (p.28)

The PCRLC supports amendments in relation to settling-in, termination of a resident's right of occupancy and abandoned property.

Question 19

Will the proposed amendments enable a resident to leave during this period without accruing significant fees and charges? (p.28)

The PCRLC believes this amendment is appropriate.

4.2 Exit entitlements

Responses to questions 20-23, 29-32 and 38-40

A strong and viable retirement living sector delivers a privately funded solution to two complex challenges faced by Governments - namely, the housing crisis and the rising cost of health budgets associated with an ageing population.

The decision Government takes in relation to exit entitlements is of paramount concern to the industry as it directly impacts the viability of project development and operator cash-flow. The consequence for Government is that these policy settings either position the private sector to continue to partner with Government in providing housing solutions or presents operators with a significant and risky disincentive.

In relation to health outcomes associated with an ageing population, Grant Thornton's *2018 Overview of the Australian Retirement Village Sector* report examined the economic contribution of Australia's retirement living industry. Extrapolating for South Australia, this sector contributes approximately $1.47 billion towards GDP and delivers savings in the order of:

- $332m saved on health and aged care comprised of
    - $210m+ saved from delayed entry into aged care
    - $36.58m saved from hospital stays avoided

- $21m saved from early hospital discharges
- $2.43m saved from a reduction in the reliance on General Practitioners
- $8m in saved from improved mental health outcomes for residents

Given the current housing crisis across the country, the decision the Government takes in relation to this policy will have a direct bearing on whether there is an adequate future supply of retirement village housing in South Australia.

Members of the PCRLC who are involved in the provision of professional services to the retirement sector (architects, planners, legal professionals), advise that the current supply outlook for traditional retirement villages remains grim in South Australia. Conversely there has been a shift towards less regulated forms of seniors housing models.

Further uncertainty around exit entitlement policy or continued reduction in the exit entitlement timeframes are likely to incentivise the proliferation of other forms of seniors housing that do not afford the same community, health, and ageing-in-place benefits or offer the same level of protection to consumers.

In our response to the PEG Report, the PCRLC noted that at the current trajectory there is already chronic underinvestment in the South Australia retirement village sector to match the current demand:

> *With the current retirement village participation rate of 7.6 per cent within the over 65 years of age cohort - and an average of 1.3 people per dwelling - the Property Council estimates that an additional 7,637 dwellings will be required given this projection over the horizon to 2041. This is approximately 382 dwellings required each year over the next 20 years. However, in analysing PwC's 2021 Retirement Census data, there is a significant shortfall in South Australia's retirement village dwelling trajectory with the current supply pipeline projecting only 170 additional dwellings by 2024.*

Operators and investors in the sector require confidence in the available returns of retirement villages as an asset class to continue to invest in dwelling stock.

With the average age of retirement villages in South Australia at 31 years, it is evident that in the immediate to mid-term time horizon there are likely to be a cohort of villages in South Australia where owners will have to decide to either decommission or redevelop sites. This will mean a further supply squeeze. In addition, investors will be attracted to the higher returns of less regulated models of housing if the returns on traditional villages are not sufficiently high or if there continues to be legislative uncertainty.

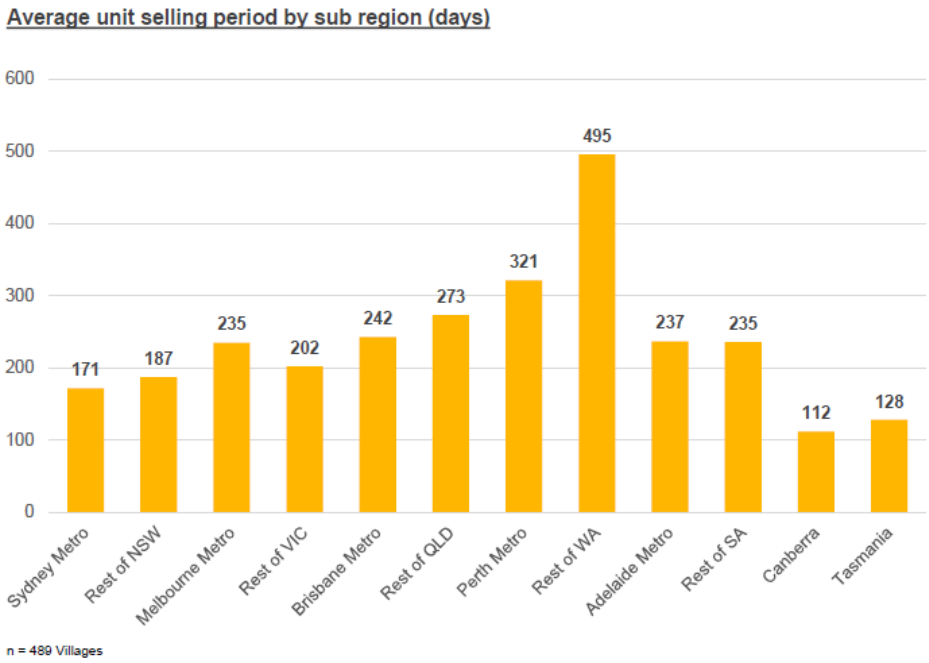
South Australia's exit entitlement policy will not only impact stock levels but housing affordability too. Retirement villages provide affordable, purpose-built accommodation for seniors.

The *PwC/Property Council Retirement Census 2021 Key Statistics Report for Investors* (p.19) notes that in South Australia the average ILU is 69 per cent of the postcode median house price.

The Guide puts forward three options for consideration.

Option 1 (The New South Wales model) would not be ideal for South Australia's market. Modelling South Australia's exit entitlement policy on the NSW model outlines the downside risk. In normal market conditions, this policy would create a level of risk that would deter investment in the sector (therefore slowing the provision of housing) and create potential insolvency risks for operators.

The most recent census reveals the average unit selling period is 237 days in Adelaide Metro compared with 171 days in Sydney Metro, while it takes 235 days throughout 'Rest of SA' compared with 187 across 'Rest of NSW'. This means that in 2021, it took almost 1.4 times the number of days to sell an ILU (Independent Living Unit) in Adelaide than it did in Sydney.



It is important to note that these figures are for 2021, which represents an unusually active market (the COVID property boom) and are not indicative of normal market conditions when the number of selling days would normally be higher in South Australia.

Nevertheless, the distinction in this dataset between South Australia's market and New South Wales is sufficient in underlining that Option 1 would not be suitable for South Australia as they are fundamentally different property markets.

Adoption of a six-month mandatory buyback model (based on the NSW model) in South Australia would significantly put at risk the viability of small to medium operators who have balance sheets that are more cashflow sensitive to shortening of buyback periods.

As communicated with both the department and Minister earlier this year, one small operator PCRLC member forecast $5 million in cash reserves to fulfill the requirement of a six-month policy under normal market conditions. Being required to hold this degree of cash as a buffer to fulfill the policy is unreasonable for small to medium operators and prevents investment in further stock.

Option 3 would continue the status quo (18 month exit entitlement payment timeframes).

The PCRLC supported PEG's recommendation (Recommendation 48) that more data needed to be collected over a substantial period to properly examine the impacts of 18-month exit entitlements to establish sound, evidence-based all-weather policy.

However, a more consumer centric model that the PCRLC's operator members will accept is most closely aligned with ***Option 2 (The Queensland model)*** with some critical adjustments to strike the right balance for both industry and residents in South Australia.

The most workable model for industry would be a 12 month exit entitlement timeframe that would commence from the point at which the property is ready to be marketed.

The preferred operator model departs from Option 2 insofar as it would not impose an arbitrary and severe time limit on operators to undertake refurbishment within 20 business days from vacant possession.

There are sound grounds to establish why a 20-day refurbishment limit is not good policy and may incentivise underinvestment in village stock.

i. Firstly, a resident party and operator need to agree on a scope of works, a selling price or have a valuation in place for their unit for a sale to proceed. This process is not always straight forward, especially in the common situation of a family that is grieving or when an operator has to deal with a family that will not cooperate.
ii. The average ILU in South Australia is now 31 years old, which means an adequate standard of refurbishment that reflects the expectations of incoming residents will be substantial and take time depending on market conditions. Securing adequately skilled and specialist valuers and tradespeople to perform the sequence of works required to refurbish the property and prepare it for sale in a timely manner can present challenges. This situation is only amplified in regional areas, or at times when the property and construction market is 'hot', when there are materials shortages and when there are supply chain constraints.

It is worth repeating commentary in the PCRLC's previous submission in response to PEG's recommendations so that policy makers understand the potential unintended consequences for the viability of the industry (which directly impacts investor confidence to develop this form of housing stock) if the right exit entitlement timeframe policy is not arrived at:

> *When a resident (or their estate) decides or needs to sell, it is naturally in both the operator's and the resident party's interest to execute the sale as quickly as possible for the best price.*
>
> *The long-term consequences for consumers and residents in South Australia from driving shorter buyback periods (or unworkable maximum refurbishment periods) is worthy of consideration.*
>
> *Shorter exit-entitlement or buyback periods naturally increase the pressure on operators to sell and settle a resident's home more quickly to minimise the operator's risk of insolvency. This selling pressure incentivises operators to discount unit sales, leading to lower sale prices for sellers which in turn devalues the units of other residents – and villages themselves – and the market prices achievable by future sellers.*
>
> *Shorter exit entitlement time frames also incentivise operators to reduce investment in refurbishment and modernisation of ageing stock in preparing units for sale. This is because the increased pressure caused by reduced mandatory exit entitlement period creates the need to minimise the outlay of cash that may be needed to mitigate the risks of having to pay out an exit entitlement without a buyer. Under shortening exit-entitlement conditions, sellers will not maximise the sale potential of their units and future residents will not benefit from the maximum possible improvement to amenity.*

In addition, exit-entitlement period reduction further increases the risk of operator insolvency (particularly smaller operators) and deteriorates the attractiveness of investing in units by potential residents. Of course, no resident would wish to buy into an aged-friendly community if they thought their investment (value of their residence) was at risk because the operator was facing the risk of insolvency. This has serious consequences for operator sustainability.

In attempting to settle the question of a reasonable timeframe for the maximum refurbishment period that would be legislated, the PCRLC has surveyed members with operations based solely in South Australia as well as national operators with villages in South Australia. The time taken from vacant possession through to completion of refurbishment is reported to take between 3 and 6 months. This length of time accounts for price agreement, consensus on scope of works as well as engaging and assigning tradespeople. This length of time is consistent with historical averages that is excluding current market conditions impacted by supply chain constraints and skill shortages.

The proposed 20 business days is unworkable. Despite the risks a maximum refurbishment period places on operators, the PCRLC understands that a maximum prescribed refurbishment period provides comfort to consumers, and therefore the Government is incentivised to impose a maximum refurbishment period upon operators.

In the interests of accountability, a position that has majority support from our members is a 60 business days maximum refurbishment period from vacant possession.

Given the above, members of the PCRLC would advocate that a sensible, workable, and all-weather mandatory exit-entitlement repayment timeframe and refurbishment period policy that would enable industry to continue viably in South Australia would be:

A 12-month exit-entitlement timeframe that commences from the earlier of:

- ***At the point the property is ready to be marketed OR***
- ***60 business days from vacant possession***

We also welcome the fact that the Draft Bill allows operators to seek extensions to pay an exit entitlement from Tribunal. However, this would be considered a last resort for operators due to the commercial risk of creating a perception of insolvency and the impact and reputational damage that seeking an extension could carry.

4.2.2 Requirement to provide details for payment of exit entitlements.

The PCRLC supports this amendment.

4.2.3 Payment of Capital fund contributions deducted from exit entitlement.

Questions 41 – 43

Do you support the introduction of a cap to contributions to a Capital Fund? (p.33)
Is the percentage reasonable? If not, what should it be? (p.33)
Will the capping of Capital Fund contributions affect the operations of the village? (p.33)

The PCRLC expresses numerous concerns with the amendments proposed to Section 28 and does not support the introduction of a cap to contributions to capital funds.

Members of the PCRLC are concerned that the Government is now attempting to legislate on the business model of the industry.

Capital fund contributions forming part of exit fees are linked to operators' business models which have been set up based on assumptions about the ongoing needs of the business to provision for the replacement and maintenance of village amenity. Indeed, some operators have factored capital fund contributions into their deferred management fee models. That is why this amendment will be seen by investors as undermining the business model and detracts from the attractiveness of retirement as an asset class.

Additionally, members are concerned that in future legislative reviews the Government may use this legislation (if passed) as precedent for further undermining the business model in relation to the deferred management fees model itself.

Although placing a cap of this nature on the contributions to the capital replacement fund will only affect the limited number of operators who have uncapped contributions to capital replacement funds, there are fundamental issues about fairness which have been overlooked in this proposal.

It must be understood that historically capital fund contributions have been factored into the projections an individual retirement village makes based on original advice from quantity surveyors at the time of build that would be required in relation to the provision of funds needed to maintain and replace facilities over time.

This ensures operators can preserve the amenity, safety and attractiveness residents expect. Contributions are also guided by factors such as the size of the village (broad acre, high density), level of amenities and the age of the village. With the average village age in South Australia being 31 years, adequate capital funds are important to maintain high standards and this proposal would undermine that.

On a matter of principle, members take issue with the fact the amendments proposed would apply to contracts already entered into. Retrospective legislation in most cases is unjust and creates additional complexities for operators and lawyers to ascertain the validity and applicability of aspects of existing contracts.

Villages have been bought and sold on the basis of uncapped contribution to the capital replacement fund. These villages would be worth less if a retrospective approach were adopted. The purchasers of those villages have essentially paid too much and will be unable to recover that loss upon the resale of the village. This also has implications for the balance sheets of village

operators and for the covenants that they are obliged to maintain in relation to their banking facilities.

However, as stated in our cover letter, the PCRLC is guided by the principle of raising consumer confidence. Therefore, in conjunction with other supported measures to strengthen transparency and consumer protections (proposed pre-commitment checklists, exit calculator, improved disclosures) the *prospective* (rather than the retrospective) capping of capital replacement reserves provided for in the Draft Bill may be supported.

4.3 Arrangements if resident is absent or leaves

The PCRLC supports this amendment.

4.4 Remarketing

The definition of remarketing in this section, and elsewhere, seeks to restrict remarketing expenses to the particular residence (unit) itself. This underlines a fundamental misunderstanding of how the sales model works in many villages.

Some villages do not advertise generally, so when time comes to sell a particular unit the remarketing costs are quite clear as to what can be attributed to the particular unit (as those costs will be of the agent marketing that unit, or of advertisements that the operator may put on websites etc for that unit). On the other hand, a great many operators constantly market their village, leading to the establishment of waiting lists, such that no further advertising is required when a particular unit comes up for relicensing. This benefits the incumbent resident who seeks the best possible financial outcome at the time of sale.

It is not in the business interests of most villages to market individual units once they become available for sale. This would only create delays to sale, a perception of an abundance of supply (diminishing the perceived value of a unit) or create the impressions that the village is desperate to sell. Rather villages will for the most part advertise in a general sense to create a steady pipeline of inquiries and demand.

Prior to the commencement of the current 2017 regulations, there was no requirement to specify a remarketing fee or charge, or the manner of its calculation, in the residence contract itself (and it could have been, for example, specified in the remarketing policy). Therefore, if an operator has not specified the remarketing fee or charge or its manner of calculation in those older contracts that are still on foot, this amendment may retrospectively penalise the operator. Operator members disagree with the retrospective application of this proposed amendment.

Part 5 – Miscellaneous

5.1 Registration and termination of a retirement village scheme
5.2 Registration of multi-site villages
5.3 Consultation with new operator

Question 44

Are the obligations for operators wishing to modify or terminate an occupied village clear? (p.36)

The PCRLC has obtained legal advice, as follows:

- The amendments still do not allow the Minister or the Supreme Court to alter the retirement village scheme to accommodate changing ways of delivering housing and accommodation for our seniors' population.

- Although operators as a matter of practice give the reason why a scheme is to be terminated, this has now been made a requirement of the notice to residents under section 59A(1)(i), which may then lead to this being a criteria that has to be met by an operator under an application to the Minister or to the Court.

- The section should make it clear that the reasons why the termination is being sought are not relevant to the determination of the Minister or the Court.

- There is a requirement now under section 59A(2) for an operator to reimburse residents for the reasonable legal costs incurred in obtaining legal advice relating to the proposed termination. In our experience, this is what occurs in practice anyway, but there is no requirement under this section for all of the residents to use one legal firm for that advice at the expense of the operator. The operator should only be required to reimburse one legal firm. Residents do not have to use that legal firm, but if they use separate legal firms, the cost of their legal advice should be at their expense and not the expense of the operator.

5.4 Registrar
5.4.1 Registrar's functions
5.4.2 Registrar's power to require information
5.4.3 Registrar's obligation to preserve confidentiality

Question 45

Do you think the draft Bill captures all of the powers required to fulfill the functions of the Registrar? (p.38)

The PCRLC has obtained legal advice, as follows:

- The obligation on the Registrar to keep information confidential has been removed. This is concerning, particularly when linked to the power of the Registrar to compel the provision of information under section 8. This also opens up the door to Freedom of Information applications (FOI) being made to the Registrar for commercially sensitive information.

- To keep business information private, the Registrar would have to decide (amongst other things) that it would be contrary to the public interest to disclose the information (see clause 7 of Schedule 1 of Freedom of Information Act) (FOIA).

- If this stands, operators, when compelled to produce information, must assert confidentiality so as to give rise to an actionable civil claim for breach of confidence (so as to enliven clause 13(1)(a) of Schedule 1 of FOIA).

5.4 Register

Question 46

Do the proposed changes achieve the intent of making the Register a significant source of information about the operation of the retirement village sector in South Australia? (p.39)

The PCRLC has obtained legal advice, as follows:

- Section 12(1a) allows the Registrar, where the Registrar considers that it is in the public interest, to include information about proceedings before the Tribunal under the Act of which the Registrar is aware or information about criminal proceedings notified to the Registrar for a prosecution launched against an operator under the Act.

- This has the potential for unproven allegations against an operator to become public knowledge and included on the Public Register, which may cause significant commercial damage to the operator.

- In addition, the disclosure of information about criminal proceedings (not convictions) fundamentally offends long held established legal principles of the presumption of innocence and the right to a fair trial.

Question 47

Is it clear that while the Registrar has increased information gathering powers to fulfil their functions under the Act, not all information will form part of the Register or be made publicly available? (p.39)

PCRLC concerns are captured in relation to our comments on FOI in our response to question 45.

5.5 Enforcing the Act

5.6.1 Enforceable voluntary undertakings

Question 48

Do the proposed reforms provide appropriate legislative backing to support a risk-based approach to enforcement of the Act? (p.41)

The PCRLC supports the intent of this amendment.

5.6.2 Offences

5.6.3 Limitation period for prosecutions

5.7 Publication in the public interest

5.8 Review of the Act

The PCRLC positions have been broadly captured in our above comments.