

Contact

Rosemary Southgate
Tel +61 3 9609 1579
Fax +61 3 9609 6779
rsouthgate@rk.com.au

30 June 2016

BY EMAIL LSIC@parliament.vic.gov.au

The Secretary
Legal and Social Issues Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Sir/Madam

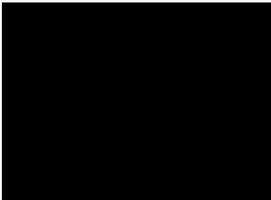
Inquiry into the Retirement Housing Sector

Russell Kennedy has been representing and advising owners and operators of accommodation for Victorian seniors, including independent living units, retirement village units, residential parks and residential aged care facilities for many years. We also on occasion advise residents who are considering moving into retirement villages.

We are pleased to enclose our submission to the Standing Committee on Legal and Social Issues.

If you have any queries regarding our submission please contact Rosemary Southgate.

Yours faithfully
RUSSELL KENNEDY



Rosemary Southgate
Principal

Enclosure(s)

**INQUIRY INTO THE RETIREMENT
HOUSING SECTOR**

**STANDING COMMITTEE ON LEGAL AND
SOCIAL ISSUES**

**SUBMISSION BY RUSSELL KENNEDY
LAWYERS**

30 June 2016

Contact: Rosemary Southgate, Principal
E: rsouthgate@rk.com.au; T: 03 9609 1637

TABLE OF CONTENTS

1	INTRODUCTION.....	1
2	TERMS OF REFERENCE.....	1
3	EXECUTIVE SUMMARY.....	2
4	CURRENT VICTORIAN LEGISLATIVE FRAMEWORK	3
5	TERMS OF REFERENCE 1(A) – DIVERSITY OF RETIREMENT HOUSING TYPES.....	4
6	TERMS OF REFERENCE 1(B) – CONSUMER PROTECTIONS, DISPUTE RESOLUTION AND FAIR PRICING.....	6
7	TERMS OF REFERENCE 1(C) - FOCUS ON DIGNITY, RESPECT, CARE AND QUALITY OF LIFE FOR RETIREES	8
8	TERMS OF REFERENCE 2 - COMPARABLE REVIEWS AND RECOMMENDATIONS FOR REFORM IN OTHER AUSTRALIAN AND OVERSEAS JURISDICTIONS	8
9	TERMS OF REFERENCE 4 - RETIREMENT HOUSING OMBUDSMAN	10

1 INTRODUCTION

Russell Kennedy represents owners and operators of accommodation for Victorian seniors, including independent living units, retirement village units, residential parks and residential aged care facilities. Russell Kennedy also on occasion, advises residents who are considering moving into retirement villages. We have advised operators in this industry since the mid-1980s, prior to the commencement of the *Retirement Villages Act 1986 (Vic)*.

2 TERMS OF REFERENCE

In this submission we have only addressed those matters included in the Terms of Reference which are within our expertise or experience acting as legal advisers in this sector. We have set out below those sections of the Terms of Reference which we have addressed in our submission.

“That, pursuant to Sessional Order 6, this House requires the Legal and Social Issues Committee to inquire into, consider and report, no later than 1 March 2017, on the operation and regulation of the retirement housing sector (including retirement villages, caravan parks, residential parks and independent living units) with the aim of identifying opportunities for improvement and reform and, in particular, the Committee should consider if–

- 1 *existing legislation that relates to retirement housing, in particular recommendations for reform of retirement housing legislation to ensure –*
 - (a) *reflects the diversity of retirement housing types; [See paragraph 5 below]*
 - (b) *includes proper consumer protections, dispute resolution procedures, fair pricing, and consistent, simplified management standards and regulations across the sector; and [See paragraph 6 below]*
 - (c) *has a focus on dignity, respect, appropriate care and quality of life for retirees; [See paragraph 7 below]*
- 2 *comparable reviews and recommendations for reform in other Australian and overseas jurisdictions; [See paragraph 8 below]*
- 3 *the experiences and views of residents of retirement housing and their families and retirement housing owners and managers; [Not addressed in this submission]*
- 4 *the option to appoint a Retirement Housing Ombudsman; [See paragraph 9 below]*
- 5 *the impact of local government rating on retirement housing.” [Not addressed in this submission]*

3 EXECUTIVE SUMMARY

The retirement housing sector in Victoria, comprising retirement villages, caravan parks, residential parks and independent living units, is currently regulated by four different regimes. This framework has been created over time to address different types of accommodation options for senior Victorians which the sector has developed in response to the need for diverse offerings of accommodation types and financial options.

The ability for the sector to continue to provide diverse offerings should be retained without legislative interference. We submit that there are some matters which should be considered as part of the inquiry to ensure that operators can provide diverse retirement housing options for senior Victorians including:

- 3.1 Consumers who reside in retirement villages should have the flexibility to access home care services through Government funded services or user pays services through their village provider or other providers;
- 3.2 for retirement villages, where there are units within a village which are only occupied under a rental arrangement, these units should not have to be regulated by the *Retirement Villages Act 1986*. Instead, flexibility should be encouraged so that such units are governed by the *Residential Tenancies Act 1997*; and
- 3.3 there should be greater flexibility in the assessment of rent assistance across various accommodation types so as to promote greater access to affordable housing.

There is, generally, sufficient consumer protection for residents in retirement villages and residential parks as there is security of tenure for residents, pre-contract disclosure requirements and protections in relation to recurrent fee increases.

We submit that there are sufficient dispute resolution avenues already in place for residents within retirement villages. However, there are not sufficient resources or assistance available to residents or operators to manage disputes between residents. In relation to rental accommodation and residential park accommodation, there should be an additional alternative dispute resolution process for residents without having to rely solely on issuing proceedings in the Victorian Civil and Administrative Tribunal.

We submit that the Retirement Villages Act already includes many of the consumer protections either recently implemented in other Australian jurisdictions or currently under consideration.

We submit that it is unnecessary and inappropriate to consider creating the office of a Retirement Housing Ombudsman.

4 CURRENT VICTORIAN LEGISLATIVE FRAMEWORK

4.1 General

Depending on their legal structure, retirement villages, caravan parks, residential parks and independent living units are currently regulated by four different regimes, namely:

- 4.1.1 the *Retirement Villages Act 1986 (RV Act)*;
- 4.1.2 Parts 1 and 2 of the *Residential Tenancies Act 1997 (RT Act)*;
- 4.1.3 Part 4 of the RT Act; and
- 4.1.4 and Part 4A of the RT Act.

4.2 RV Act

- 4.2.1 If a housing development provides accommodation for persons the majority of which are retired persons (that is, over 55 years of age or retired from full time employment), and at least one of those persons is required to pay an in-going contribution for the right to reside in that development, that development is primarily regulated by the RV Act (sections 3, 4 and 15).
- 4.2.2 One of the main purposes of the enactment of the RV Act was to ensure that a resident who invested in a village by paying an in-going contribution has security of tenure, security for their in-going contribution payment and the ability to participate in relation to the way in which maintenance charges may be increased at the village (Second reading speech, 7 October 1986).
- 4.2.3 If the development is based on residents purchasing title to their accommodation, the development will also be subject to the *Owners Corporations Act 2006*. We note that the interaction between this Act and the RV Act is the subject of another review being undertaken by the Department of Justice.

4.3 Parts 1 and 2 RT Act

- 4.3.1 If a housing development provides accommodation for retired persons, but all residents only occupy their unit under a rental model, and no current resident has been required to pay an in-going contribution for the right to reside in the development, the RT Act will apply (Part 1 Division 2 RT Act).
- 4.3.2 The purpose of the implementation of the RT Act was to regulate the provision of rental accommodation across Victoria, with no specific regulation of accommodation provided to senior Victorians.

4.4 Part 4 RT Act

- 4.4.1 If a development provides accommodation by way of the right to reside in a caravan which that person does not own, or a relocatable dwelling (which is designed, built or manufactured to be transported from one place to another for use as a residence) which that person does not

own, in a caravan park or a residential park, then Part 4 of the RT Act applies.

4.5 Part 4A RT Act

4.5.1 If a development provides accommodation by way of the right to purchase a dwelling which is:

- (a) designed, built or manufactured to be transported from one place to another for use as a residence; and
- (b) which is located within a site which is leased to that person by way of a ground lease,

(**Part 4A Dwelling**), then Part 4A of the RT Act applies (section 3, Part 4A).

4.5.2 Amendments were made to the RT Act to introduce Part 4A in 2011 so as to regulate residential parks, as distinct from caravan parks, in response to an increase in the development of residential parks as an alternative means of providing affordable accommodation in Victoria.

4.6 Basis for differing regimes

In our submission, the above legislation has been implemented over time in order to address different types of accommodation options for senior Victorians which the sector has developed in response to the need for diverse offerings of accommodation types and financial offerings. The ability for the sector to continue to provide diverse offerings should be retained without legislative interference.

5 TERMS OF REFERENCE 1(a) – DIVERSITY OF RETIREMENT HOUSING TYPES

We submit that there are some matters which should be considered as part of the inquiry to ensure that operators can provide diverse retirement housing options (financial and accommodation offerings) for senior Victorians. These are set out below.

5.1 Additional care services

The Commonwealth Government has implemented a series of reforms through its Living Longer Living Better Reforms which commenced in July 2014. The most recent reforms significantly increase the flexibility for consumers to access home care services through consumer directed care. From February 2017 the provision of home care services through the Commonwealth will be further deregulated.

Consumers who reside in retirement villages and residential parks should have the flexibility to access home care services through Government funded services or to access user pays services through their village provider or other providers. We submit that any reforms should ensure that consumers and operators retain this flexibility and the RV Act and the RT Act must not restrict this. This is particularly important as over the past 20 years since the RV Act was implemented, and particularly in more recent times, more retirement village residents require access to home care services.

5.2 Mixed tenure retirement villages

Due to the broad definition of a retirement village under the RV Act, the RV Act applies to the whole of a development, even if only one person is required to pay an in-going contribution to reside in that development.

This means that many of the provisions of the RV Act for which the primary purpose is to ensure that a resident's in-going contribution is secure and that the resident clearly understands the terms of their financial obligations, are not relevant. For example:

- 5.2.1 a statutory charge is deemed to apply to the whole of the village land rather than just that part of the village land in relation to which a resident has paid a refundable in-going contribution;
- 5.2.2 there are extensive pre contract disclosure obligations under the RV Act which are appropriate for residents who pay an in-going contribution and receive a life time lease. However, they are not appropriate or necessary for residents who pay a rental; and
- 5.2.3 the current prescribed form of residence contract includes many provisions which are irrelevant for a resident who pays a rental only.

There are many retirement villages in Victoria, particularly those operated by the not for profit sector, which contain a mix of tenure and financial offerings including an offering of rental payments only or part in-going contribution and part rental payments. In these developments, the whole of the development will be subject to the RV Act which means that the operator must comply with all of the requirements under the RV Act, including those which are not relevant for a resident paying rent.

We submit that, where there are units within a village which are only occupied under a rental arrangement, the legislation should be modified to allow flexibility for operators to provide this accommodation without the complex and cumbersome requirements of the RV Act. This could be done by either providing that these units or residence contracts are subject to the RT Act to the exclusion of the RV Act, or by including additional provisions in the RV Act which deal solely with rental units.

5.3 Availability of rental assistance

Residential parks which operate under Part 4A of the RT Act were originally created to provide an affordable housing alternative for senior Victorians, with lower entry prices through the purchase of a relocatable dwelling, more flexible building requirements and the availability of rent assistance through the *Social Security Act 1991 (Cth)* (**SSA**). In many of these residential parks residents pay a substantial purchase price, to purchase the Part 4A Dwelling to be located in the park under a ground lease.

The availability of rent assistance is critical to assist in the delivery of more affordable accommodation options for senior Victorians. However, under the current provisions of the SSA a resident who resides in a retirement village is significantly disadvantaged in relation to access to rent assistance compared to a resident who resides in a residential park. For example a resident who is in receipt of the aged pension and who pays an in-going contribution of more than \$149,000 (as at March 2016) in a retirement village cannot access rent assistance; whereas a resident who is in receipt of the aged pension and resides in a residential park and pays a purchase price of more than \$149,000 for the Part 4A Dwelling and a nominal ground rent, can access rent assistance.

We note that the availability of rent assistance is regulated by the Commonwealth Government. However, when considering this more broadly across the State and considering the critical need for affordable housing for senior Victorians, the State may consider an approach to the Commonwealth Government to promote the availability of rental assistance more broadly to senior Victorians.

6 TERMS OF REFERENCE 1(b) – CONSUMER PROTECTIONS, DISPUTE RESOLUTION AND FAIR PRICING

6.1 Proper consumer protection

6.1.1 We submit that the current RV Act provides sufficient consumer protection in that:

- (a) a resident's right to reside in the village is secure and enforceable against any successive owner, including any mortgagee in possession (section 14);
- (b) the in-going contribution payable by a resident is secured by a statutory charge over the village land which has priority over any other encumbrance registered over the land, including a mortgage (sections 29 and 31);
- (c) there is a comprehensive two stage disclosure regime which an operator must comply with at least 21 days before a consumer signs a binding contract to enter the village (sections 18A, 18B, 19 and 20);
- (d) a consumer may cool off and rescind a residence contract at any time within 3 business days of signing a residence contract (section 24);
- (e) increases in the recurrent charge are capped at the consumer price index (other than due to increases in municipal rates or salaries) unless a majority of residents approve the increase (section 38);
- (f) an operator can only terminate a residence contract on medical grounds if 2 medical practitioners certify that the resident requires care which cannot be provided at the village or the resident is in substantial breach of a term of the residence contract and that breach continues after notice is served on the resident by the operator (section 16).

6.1.2 We submit that Part 4A of the RT Act provides sufficient consumer protection for residents in occupation of a residential park in the following ways:

- (a) if the resident is granted a ground lease, then the resident has a proprietary interest in the land the subject of the lease and the resident is protected by the provisions of the *Transfer of Land Act 1958* (section 42(2)(e)) as a tenant in possession against a subsequent landowner;
- (b) the operator must grant a ground lease (called a site agreement) for a minimum term of 5 years (section 206H);

- (c) the operator must comply with the pre-contract disclosure requirements including the provision of the Guide issued by the Director for Consumer Affairs Victoria, and the park rules and proposed contracts (sections 206ZR, 206ZS). We submit that it would be useful for operators to also provide a short form summary document, similar to the factsheet prescribed under the RV Act as part of the pre contract disclosure material; and
- (d) if a resident wishes to object to a rent increase, they may apply to the Victorian Civil and Administrative Tribunal (**VCAT**) on the grounds that the increase is excessive (section 206X). We submit that it may assist the residents and the operator to have greater certainty as to rent increases if provision is made, similar to in the RV Act, that if an increase is by no more than CPI increases the right to appeal to VCAT does not arise.

6.2 Dispute resolution procedures

6.2.1 It is our submission that the RV Act:

- (a) provides sufficient dispute resolution procedures for residents to make a complaint about the manager. The village operator must have a documented dispute resolution policy which is available to all residents and potential residents (section 38E); the manager must follow procedures set out under the *Retirement Villages (Records and Notices) Regulations 2005* with respect to the management and recording of resident complaints (which includes advising the resident of their right to contact Consumer Affairs Victoria or seek independent legal advice in relation to a complaint). The resident may ultimately make a claim at the Victorian Civil and Administrative Tribunal in relation to a complaint; and
- (b) provides sufficient internal dispute resolution procedures for residents to make a complaint about other residents in the village. The village operators must have a documented dispute resolution policy and follow the same procedures as set out in paragraph 6.2.1(a). The resident committee (if any) may also assist residents with a dispute.

6.2.2 However, it is our submission that there are not sufficient resources or assistance available to residents or operators outside of the village to assist an operator or a resident to manage a situation where there is a resident who is a serial complainer or who engages in bullying conduct towards other residents.

We are aware of many situations where one resident or a group of residents engages in bullying behaviour towards other residents at the village. There is currently no forum which these residents or an operator can access to resolve such disputes. In our submission, there needs to be an appropriate resource for an alternative dispute resolution system to allow these residents or the operator on their behalf, to seek external assistance to resolve their disputes.

6.2.3 In rental accommodation and residential park accommodation, the current dispute procedure is for residents to make an application to VCAT. In our view, there should be an additional alternative dispute

resolution process for these residents in order that these matters can be resolved prior to a resident or an operator issuing proceedings in VCAT.

6.3 Fair pricing

6.3.1 Pricing of accommodation services for senior Victorians, whether the accommodation is located within a rental village, a residential park or retirement village is generally set according to the market. In our submission, the actual pricing should not be regulated by legislation.

6.3.2 We submit that it is, however, critical that pricing within any particular development must be transparent, must be clearly disclosed to a resident before a resident makes a decision to accept that offer of accommodation, and must be clearly set out in any resident documentation.

7 TERMS OF REFERENCE 1(c) - FOCUS ON DIGNITY, RESPECT, CARE AND QUALITY OF LIFE FOR RETIREES

7.1 We agree that accommodation and services for senior Victorians should be provided within a framework which has a focus on dignity, respect, appropriate care (if applicable) and quality of life for retirees.

7.2 The RV Act and the Regulations prescribe certain contract terms which include a covenant on the part of the manager and the resident to deal with each other in good faith, and a covenant on the part of each resident to respect the rights of other residents in the village and not to interfere with other residents' reasonable peace, comfort and privacy.

7.3 It is our submission that due to the diversity of services and retirement housing types across Victoria, it is inappropriate for legislation to regulate the appropriate care to be provided to retirees. Most retirement villages and residential parks provide independent self-care accommodation, with the option of accessing care services through third parties. In these circumstances we submit that it is not appropriate to regulate the provision of care by these third parties, most of whom are already regulated by Commonwealth legislation.

8 TERMS OF REFERENCE 2 - COMPARABLE REVIEWS AND RECOMMENDATIONS FOR REFORM IN OTHER AUSTRALIAN AND OVERSEAS JURISDICTIONS

8.1 Australian Capital Territory

8.1.1 The Minister conducted a review of the *Retirement Villages Act 2012* (ACT) due to a statutory requirement that the Act be reviewed within 2 years of implementation.

8.1.2 A number of minor amendments, or amendments which are not relevant to the Victorian RV Act, are proposed in the *Retirement Villages Amendment Bill 2016*. The more substantive and relevant proposed amendments include:

- (a) that a detailed internal dispute resolution process be developed and maintained within the village in order to assist with the resolution of disputes before an application is made to the relevant Tribunal;
- (b) that increases in recurrent charges may only be made by way of a fixed formula or with the approval of the residents.

8.2 Queensland

The Queensland Government has released a discussion paper in relation to the development of more sustainable and affordable housing across the State, but this does not include any retirement village specific recommendations (“*Working together for better housing and sustainable communities discussion paper*” – issued by the Department of Housing and Public Works).

8.3 South Australia

The *Retirement Villages Bill 2016* has been tabled in Parliament. The substantive relevant amendments include:

- 8.3.1 the introduction of a pre contract disclosure statement;
- 8.3.2 providing for responsible management of residents’ funds by strengthening auditing requirements and improving transparency of financial reporting; and
- 8.3.3 a proposal to require an operator to repay a resident’s exit entitlement within 18 months of a resident vacating their residence if it is not resold prior to this time (unless an extension is granted by the SA VCAT).

8.4 Western Australia

The Western Australian Government implemented amendments to the *Retirement Villages Act 1992 (WA)*, the *Retirement Villages Regulations 1992* and the *Retirement Villages Code* in stages during 2014 and 2015. The major reforms included:

- 8.4.1 the introduction of a new disclosure regime;
- 8.4.2 prohibiting certain terms from being included in residence contracts;
- 8.4.3 requiring the provision of information to residents as to the proposed refurbishment of their units upon a resale; and
- 8.4.4 to improve consistency and transparency in financial reporting to residents.

8.5 Other jurisdictions

We have not considered other jurisdictions in detail as, although in New Zealand there is dedicated retirement village legislation, the model is unique in that all levels of accommodation are regulated within the one model, and it is not subject to the Federation of legislation model of Australia.

Further, Australia and New Zealand are the most regulated jurisdictions within the Commonwealth with respect to retirement villages, with each jurisdiction within Australia containing legislation which specifically regulates this sector. Other Commonwealth jurisdictions do have legislation which regulates nursing home accommodation, but do not regulate retirement village accommodation

8.6 Comparison to RV Act

We submit that the RV Act and Regulations already provide a more comprehensive disclosure regime, already prohibit certain terms from residence contracts and regulate the layout and substance of residence contracts in more detail than these

other jurisdictions. The RV Act already caps maintenance charge increases to movements in the CPI unless a majority of the residents approve otherwise. We submit that the proposal for a compulsory payment of the exit entitlement as is being considered in South Australia is controversial and creates a significant risk for smaller operators and not for profit operators to fund such payments. The RV Act protects a resident's right upon a resale by providing the resident with the right to appoint an external estate agent and control the sale process so as to ensure a timely sale of their unit.

9 TERMS OF REFERENCE 4 - RETIREMENT HOUSING OMBUDSMAN

- 9.1 The role of an Ombudsman is generally to investigate the administrative actions of government and government agencies upon receipt of complaints from consumers. For example the role of the Victorian Ombudsman is to enquire into or investigate any administrative action taken by or in an authority, including to monitor compliance with certain legislation (Part III *Ombudsman Act 1973*). An Ombudsman appointed to investigate complaints with respect to government actions will usually be government funded.
- 9.2 Certain industries which service a significant proportion of the population, for example financial services and telecommunications, have a dedicated independent Ombudsman. The role of the Ombudsman is to investigate complaints into those sectors, and the office is usually funded by the relevant industry bodies. Reasons for creating the office of Ombudsman for these sectors includes the broad spectrum of consumers affected by the services they deliver, and a history of significant numbers of consumer complaints.
- 9.3 We submit that it is unnecessary and inappropriate to consider creating the office of a Retirement Housing Ombudsman. Rather we submit that there is a broader role for an independent person to assist consumers and operators in the sector, through training, public education and complaint investigation.