Victorian parliamentary inquiry into the retirement housing sector

WEstjustice submission to the Legal and Social issues Committee

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1. Introduction

1.1 About WEstjustice

WEstjustice was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service, and the Wyndham Legal Service. WEstjustice is a community organisation that provides free legal assistance and financial counselling to people who live, work or study in the Maribyrnong, Wyndham and Hobsons Bay areas.

WEstjustice has a particular focus on working with newly arrived communities. More than 53% of our clients over the last five years spoke a language other than English as their first language. Approximately one quarter of our clients are newly arrived, having arrived in Australia in the last five years. Furthermore, our refugee service in Footscray alone has seen approximately 700 clients in the past five years.

1.2 About the WEstjustice Tenancy Program

WEstjustice employs two tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in the west of Melbourne. In the past five years, WEstjustice's tenancy program has assisted over 1,100 clients with almost 1,800 matters.

Our catchment area includes suburbs in Melbourne's inner-west (including Footscray, Sunshine, and Braybrook), and Melbourne's outer-west (including the fast growing areas of Werribee, Wyndham Vale, Hoppers Crossing and Melton). We also provide a duty lawyer service to assist tenants with on-the-spot advice and representation one day per week at the Victorian Civil and Administrative Tribunal ('VCAT') in Werribee. Whilst we primarily assist tenants in private tenancies, we also advise tenants who live in rooming houses, public and community housing.

Our tenancy program has a particular focus on working with clients from refugee and non-English speaking backgrounds. We work closely with local refugee settlement agencies and community development workers, and almost 60% of our tenancy clients in the past two years were born outside of Australia.

Through its casework, WEstjustice has advised and aided a number of clients living in the retirement housing sector. WEstjustice's submission and recommendations are informed by these experiences. In particular, the casework has illustrated to WEstjustice key areas of concern, especially the imbalance created between the landlord and tenant by certain occupancy agreements and the inadequate legislative arrangements in place to ensure these imbalances do not lead to residents experiencing financial or social disadvantage. This issue has been at the forefront of the experiences of our clients and shall thus be the focus of WEstjustice's submission to the Inquiry.

2. Executive Summary

As the state population ages, more and more Victorians will elect to become consumers in the retirement housing sector. With 37,000 Victorians already relying on such a form of accommodation and 400 villages listed on Consumer Affairs Victoria's retirement village register, the sector is likely to see significant growth, as well as growing pains.

The retirement housing sector should be distinguished from rest homes, respite, and the aged care sector. While the residents of retirement villages and residential parks may rely on home help or live with a disability, they are active participants who have made a significant personal and financial choice to live in these shared communities. In doing so, they agree to be bound by contractual arrangements that clarify the basis on which they "buy into" a village, how maintenance and upkeep of the village and their home is paid for, the rules and regulations they must abide by, and the terms and conditions on which their stay at a retirement village comes to an end. It is vital that these arrangements are clear, consistent, and lawful.

The sector is somewhat complicated by overlapping legislation for different forms of retirement living. The *Retirement Villages Act 1986 (Vic)* ("RVA") is taken to apply to most retirement villages, but from 1 September 2011 the *Residential Tenancies Act 1997 (Vic)*("RTA) was amended to include rights and duties for residential park tenants. These 'over-55' villages will contain a very similar cohort to other retirement villages, the main contractual difference being that they take out long-term leases on sites and own the dwellings built on top.

Because of our organisation's tenancy program, we mostly encounter RTA casework, although we will occasionally deal with RVA matters. Although the RTA sets out a number of clear rights and duties for residential park owners which they may not contract out of, we are concerned that the agreements consumers enter into do not themselves always comply with these duties or with the RTA in general. In some cases, they also appear to mix RVA procedures with RTA ones.

Even where agreements meet their basic legal requirements under the RVA and RTA, we believe that clarity is needed in terms of transparency of pricing and appropriate avenues for dispute resolution.

For these reasons, we believe a regulator-initiated audit of occupancy agreements and further education about the nature of RVA and RTA rights among consumers are each essential. To be effective, education should include resources for prospective residents to appropriately compare the cost of different retirement villages and residential parks.

We also echo Consumer Action Law Centre's call for a Retirement Housing Ombudsman to be established as an effective external dispute resolution body for the sector.

3. Summary of Recommendations

Recommendation 1: That the regulator completes a targeted review of residential park agreements in the retirement housing sector to identify unfair contract terms.

Recommendation 2: That further campaigning and advertising clearly outline the different nature of residential park and retirement village arrangements, and offer guidance on how residents may identify and respond to unfair contract terms, and that this include a centralised database that enables prospective residents to effectively compare retirement living options.

Recommendation 3: That a Retirement Housing Ombudsman be established in Victoria in line with other industry external dispute resolution models.

4. The retirement housing sector and unfair contract terms

The retirement housing sector is an increasingly important accommodation sector in Victoria. In 2013 an estimated 37,700 Victorians relied on such a form of accommodation and there were 400 retirement villages listed on the Consumer Affairs Victoria Retirement Village register.[1]

WEstjustice has encountered numerous contracts in the retirement housing sector that contain problematic terms in their standard form occupancy agreements. How many agreements in the sector contain such clauses, and how often owner-operators[2] claim to enforce them, is unknown. This in itself represents a knowledge gap that should be closed in order to better protect resident rights.[3]

Such provisions may attempt to impose onerous conditions above and beyond the requirements of the legislation, create unfair conditions around exit arrangements and resale of properties and even empower operators to make significant decisions on behalf of individual residents.

These areas of concern were also raised when the first substantial amendments were made to the RVA in 2005, which aimed to address potential risks for abuse posed by the original 1986 legislation.[4]

4.1 Vulnerability in the retirement living sector

The importance of fair occupancy agreements for retirement villages and residential parks is heightened by the fact that individuals in the retirement housing sector may be particularly vulnerable and unaware or unwilling to enforce their rights.

While age may not in and of itself lead to vulnerability, it is known that residents of the sector are mostly 75 years or older,[5] and that 'the incidence of factors giving rise to vulnerability among older consumers tends to be higher than for the general population as older age can bring frailty, ill health, bereavement, and social isolation.'[6]

This is compounded by the standard form contractual arrangements which characterise the sector. While there are differences between residents covered by the RVA and residents covered by the RTA, contractual arrangements relating to retirement housing mostly adhere to a model where the resident:

- Enters into a contract to purchase a right to reside, linked to other contractual arrangements for the supply of services as a member of the village;

[1] Consumer Affairs Victoria, 'Retirement Villages Amendment (Records and Notices) Regulations 2013 and Retirement Villages Amendment (Contractual Arrangements) Regulations' (Regulatory Impact Statement, 2013) 1.
[2] In this submission, "owner- operators "is used interchangeably in this submission to refer both to owner-operators of retirement villages under the RVA and owner-operators of residential parks under the RTA. Where we are referring to owner-operators under a particular piece of legislation, we make this clear in the text.
[3] In this submission, "Residents" refers to both residents of retirement villages under the RVA and residents of residential parks under the RTA. Where we are referring to residents under a particular piece of legislation, we make this clear in the text.
[4] Victoria, *Parliamentary Debates,* Legislative Council, 22 March 2005, 109 (M.R. Thomson, Minister for Consumer Affairs).
[5] Consumer Affairs Victoria, 'Retirement Villages Amendment (Records and Notices) Regulations 2013 and Retirement Villages Amendment (Contractual Arrangements) Regulations' (Regulatory Impact Statement, 2013, 6.
[6] Ibid 25 citing The Allen Consulting Group, 'Retirement Villages (Contractual Arrangements) Regulations 2008 and Estate Agents (Retirement Villages)' (Regulatory Impact Statement, 2006) 8.

- Makes regular payments (typically monthly) to cover the costs of services and facilities provided by the village community;
- May make separate payments to the operator for the provision of personal services (typically in a serviced apartment); and
- Particularly in commercial villages, will receive after exit either the proceeds of the re-sale of the residence right or a refund of the ingoing contribution, net of a fee commonly known as a 'deferred management fee'.[7]

Opportunities to bargain are limited and the agreements are mostly provided on a take-it-or-leave-it basis. In the first major overhaul of the *Retirement Villages Act 1986* (Vic) in 2005, it was clear that power imbalances were central to any reform, as it was understood that retirement village residents may be particularly vulnerable to those who might seek to take advantage of them.[8]

[7] Ibid 7 citing The Allen Consulting Group, 'Retirement Villages (Contractual Arrangements) Regulations 2008 and Estate Agents (Retirement Villages)' (Regulatory Impact Statement, 2006) 2.
[8] Victoria, *Parliamentary Debates,* Legislative Council, 22 March 2005, 109 (M.R. Thomson, Minister for Consumer Affairs).

5. Case studies: the experience of residential park residents and their occupancy agreements [9]

Both the RVA and RTA include provisions requiring owner-operators to provide relevant documentation to prospective residents some time before signing an agreement, and requiring owner-operators to provide cooling off periods in which a resident may rescind such an agreement.

The inconsistency between cooling off periods under the RVA and RTA is concerning. Section 206J of the RTA gives a resident 5 business days to rescind a site agreement with written notice, while section 24 of the RVA only requires 3 business days.

Conversely, owner-operators of retirement villages must conform to the disclosure requirements of the RVA's associated regulations, while owner-operators of residential parks are not required under the RTA to provide the same information to prospective residents.

Given that individuals who consider entering contracts to reside in a retirement village or residential park are generally looking at lifetime outlays of hundreds of thousands of dollars, we submit that even the 5 business day cooling-off period is not appropriate. Statutory cooling-off periods for retirement living under both the RVA and RTA should at least match those provided those for under section 82 of the Australian Consumer Law (ACL) for door-to-door sales (10 business days at a minimum, with longer cooling-off periods available where there have been breaches of a unsolicited supplier's other obligations).

Even while nominally complying with disclosure and cooling-off requirements, owner-operators or their agents may use 'hard sell' tactics which discourage clear decision making.

Case Study: Wilfred

Wilfred lives in a residential park which he brought into after attending a retirement lifestyle expo. At the expo, he was told there was a "one time only" opportunity to buy a house on a site at the village at a lower price, and it was suggested to him that if he didn't buy now prices could rise significantly later on. The belief that he was getting a significant discount that he may not receive elsewhere meant that he paid little attention to his contract or the cooling-off period. Months after moving in, Wilfred was dismayed to discover that new residents were buying dwellings at the park for only marginally more than he had paid – it is likely that the discount wasn't a discount at all.

Additionally, even disclosure requirements may not adequately guard against unfair contract terms in retirement village contracts. Prospective residents may not be aware of their additional rights at law, whether or not the proposed agreement refers to these, or understand that different legislation covers different forms of retirement living. The following examples highlight this fact:

[9] Names have been changed and identifying factors removed for all case studies.

5.1 Attempting to shield contracts from the rent increase requirements in the *Residential Tenancies Act 1997* (Vic)

Case study: Liesel

Liesel lives in and owns a relocatable home in a residential park covered by the RTA. As part of her Occupancy Agreement, a rental fee is paid fortnightly for the lease of the land upon which the house is located. This amount also includes the use of the park's communal facilities. The Agreement gives Liesel the right to occupy the land for 99 years.

WEstjustice assisted Liesel after the owner-operators sent and charged her 'rent increases' which did not comply with the provisions of the RTA.

Despite entitling the letters sent to Liesel as 'Rent Increase', the owner-operators contended when challenged that the letters referred to an increase in 'occupancy fees' and were thus not 'rent' as such. Therefore, they said, they were not subject to the rent increase provisions of the RTA This was despite the retirement village writing elsewhere in the Occupancy Agreement that the Agreement was subject to the provisions of the RTA.

Both the Occupancy Agreement signed by Liesel and the legal arguments of the owner-operators tried to create a distinction between the terms 'occupancy fee' and 'rent'. In the agreement, there are recurring references to the word 'rent', rather than 'occupancy fee' in clauses relating to an 'Annual Rent Review' that itself may not be compliant with the rent increase provisions of the RTA. This created confusion for Liesel and other residents when it should have been clear that the rent payable and the occupancy fee payable were one and the same. Indeed, there seemed to be some confusion from the owner-operator's end as to whether they were depending on the RVA or RTA in calculating rent rises.

WEstjustice sought compensation on Liesel's behalf from the owner-operators for rent increases that had been unlawfully charged. They held that the notices sent to Liesel had to provide her with all relevant information and protection that the RTA required that she be provided with, irrespective of the contents of the Occupancy Agreement.

The owner-operator had not done so, neglecting to include a statement informing a site tenant of their right to apply within 30 days to the Director to investigate and report on the proposed rent increase.

As this had not been done, the rent increase was declared invalid pursuant to the RTA. The owner-operator was required to pay back Liesel the additional rent paid in reliance on the notices of 'rent increase' sent to her over a period of over four years.

5.2 Unreasonably attempting to curtail the use and enjoyment of a tenant's property

Case study: Dolores

Dolores lives in and owns a relocatable dwelling in a residential park. She pays a fortnightly fee to cover the cost of her dwelling occupying the site and her use of all the facilities in the village. She is retired, lives alone and is in receipt of a pension.

Following a number of acts of vandalism to her property that she had raised with village management without adequate response, she had external security cameras installed on her dwelling by a licensed firm.

WEstjustice assisted Dolores after the owner-operator alleged that the installation of cameras was in breach of her Occupancy Agreement. She was ordered to remove the cameras within seven days. If not, she was told that tradespeople would be employed by the village to enter the premises and pull her cameras off the house she owned, and that she would be billed for the cost of doing so.

Management said a clause requiring the tenant to abstain from doing anything that might cause nuisance, damage or disturbance to an owner of any adjacent property had been violated. However, the cameras' viewing lines are restricted to her own premises and did not monitor common areas of the village or sites of neighbours.

*Management further pointed to terms which give the landlord absolute discretion regarding the alteration or addition to the premises. They invoked the requirement for landlord's written consent for the installation of **any** fixtures or fittings to the relocatable dwelling, except those necessary for permitted use.*

Apart from the fact that Dolores owns the relocatable dwelling outright, and is thus altering her own property, measures to ensure the safety of herself, her home and possessions might be regarded as necessary for 'permitted use' under the Occupancy Agreement. At no point did Dolores claim to ensure her safety and security by recording common or neighbouring private space, and did not put into place any security measures that would create a hazard to neighbours or members of the public.

The threat to enter the premises and remove Dolores's fixtures and fittings is problematic considering that under the same Occupancy Agreement Dolores is entitled to exclusive possession of the site upon which her relocatable dwelling is located. Interference with this right might be seen as trespass.

This concern might well extend to tampering with Dolores's relocatable dwelling which she owns outright, and more generally the placing of limits on the addition of fixtures and fittings by an owner that would be lawful on any other dwelling.

5.3 Further concerns pertaining to Occupancy Agreements in Residential Parks

Further to the experiences highlighted above, the standard form nature of Occupancy Agreements makes it possible for owner-operators to include provisions which, *prima facie*, are concerning. This suggests that current consumer protection is inadequate to protect residents in certain retirement living complexes. The following examples are taken from one such Occupancy Agreement for a residential park, nominally covered by Part 4A of the RTA.

5.3.1 Tenant's Obligations Not To Cause Damage

Along with the provisions highlighted in Dolores' case study, the Occupancy Agreement examined requires the resident to request permission to bring onto the premises 'any object which by its nature or weight might cause damage to the premises'. It may be argued that a natural consequence of being a homeowner is that there will be objects that may cause some damage to premises. Heavy objects such as pianos, large pot plants or garden furniture might well cause an element of minor damage to premises, and this thus may raise questions as to the appropriateness of a landlord's consent being required in such circumstances when it pertains to a home belonging to the resident.

Even where a resident did not own a property but instead paid for an indefinite licence to occupy (as in some RVA agreements), we argue that this would still be a restrictive clause. Given the duration of their stays and the price they pay to enjoy that tenure, retirement living residents should be entitled to reasonable furnishing and fixture arrangements of their own.

5.3.2 Ending of Occupancy Agreement

Provisions may be inserted which not only fail to comply with the RTA, but would also create an impermissible imbalance between the tenant and the landlord's rights under the RVA.

One such provision in an Occupancy Agreement purports to require the tenant to vacate the premises within fourteen days where the landlord is of the 'reasonable opinion' that the tenant is 'no longer able to live independently and are dependent on Assisted Living'.

Alarmingly, this provision attempts to 'irrevocably authorize the manager to discuss with any Medical Practitioner treating the Resident matters pertaining to the said Resident's physical, emotional and mental health and wellbeing'. It further states that the Resident shall consent, upon request from the Manager, to undertaking an assessment by an independent Medical Practitioner as to their capacity to live independently and to agree 'to be bound by such independent assessment'.

If at the conclusion of this process the tenant vacates, the landlord purports to become the attorney to affect the sale of their right to occupy the premises where, 'in the reasonable opinion of the landlord, the resident has not made appropriate arrangements'.

The potential for abuse of this provision, further to the legal and moral appropriateness of such a provision's inclusion in a standard form contract, is concerning.

There is no basis whatsoever in the RTA for a tenant to be evicted in this fashion. Section 16(5)(b) of the RVA allows an owner to require a resident to leave within 14 days where they need care of a kind not available in a retirement village, but does not empower an owner with:

- The right to demand or access a resident's private medical information;

- The right to require a resident to attend an assessment by an independent medical practitioner of the owner's choosing and have a decision on their capacity to live independently made by that practitioner alone;

- The right to become the resident's attorney for the property's sale where they perceive the resident has not made appropriate arrangements for an attorney of their own (this is expressly forbidden by section 38C and 38D of the RVA).

5.3.3 Deferred Management Fee (or Exit Fee)

These fees are said to accrue during the period of ownership, but are payable when there is a change of ownership. As such, they are often fees payable by a deceased's estate. Capped at a set number of years, and calculated as a percentage of either the original purchase price or subsequent re-sale value of the right to occupy the premises, the fee is accrued annually at each anniversary of the resident's commencement at the village, and are usually paid out to the village owner from the proceeds of the re-sale of the unit.

The particular fee structure examined was capped after 5 years at a maximum of 15% of the sale price. As a result on a sale price of $165,000, after occupancy of over 5 years, the deferred management fee would be equal to $24,750.[10]

Whilst such fee arrangements seem to be common practice in the industry (in both residential parks and retirement villages), there are questions to be raised as to their appropriateness, especially concerning their size, when they coexist alongside circumstances where a resident has to pay for the relocatable dwelling as well as a fortnightly rental. That the particular structure is mandated in the standard form contract and is thus seemingly non-negotiable may adversely affect certain residential park residents and their estates.

5.3.4 Events of default and landlord's rights

One Occupancy Agreement examined allows the village owner as landlord to re-enter the premises and end the Occupancy Agreement for a variety of reasons that go beyond those outlined in the RTA. Of particular concern are the reasons pertaining to the Resident becoming bankrupt, entering into a composition or arrangement with their creditors or, more broadly, becoming "unable to pay their debts as and when they fall due".

Whilst the *Property Law Act 1958* (Vic) is invoked to give the Resident fourteen days to remedy a breach capable of remedy, it is unclear how something such as becoming bankrupt may be

[10] This accounts for the reality that a relocatable dwelling will often depreciate rapidly, with the sale price falling well below the initial purchase price.

remedied. The rights of the landlord do not necessarily have to be invoked in a particular case, but they may do so 'on any later occasion'.

This standard form term clearly creates a potentially precarious situation for the Resident, and large imbalance in parties' rights, despite their ownership of the relocatable dwelling and the possibility that they may be able to find a way to pay their rent regardless of specific circumstances. That the Resident is unable to even enter into general debt management and repayment agreements (e.g., for credit card debt) without the fear of being ordered to vacate is alarming.

Bankruptcy and formal creditor arrangements are often also considered default events under agreements covered by the RVA, although we believe that "unable to pay their debts as and when they fall due" is a dangerously broad and arbitrary ground for default under any retirement living model.

5.3.5 Interest rate on overdue money

The Occupancy Agreement also fixes an interest rate on overdue money at 4% more than the rate fixed from time to time by *the Penalty Interest Rates Act 1983* (Vic).

As the overdue money will most likely take the form of rent, this clause is contrary to the RTA. Consumer Affairs Victoria state that it is illegal for a landlord or agent to charge any sort of administration fee or 'late fee' to process rent payments, even if the rent is late or in arrears, which may include the charging of interest. The Occupancy Agreement therefore seems to attempt to curtail the relevant legislative framework.

5.3.6 Dispute Resolution

One Occupancy Agreement we reviewed required residents with a dispute to undergo compulsory mediation before taking a matter further (e.g., to the Victorian Civil and Administrative Tribunal (VCAT)). It provided that mediation would be approved by a Law Institute of Victoria-approved mediator, and that both parties undertook to pay equal shares of mediation costs.

This requirement cuts against the ordinary mechanisms of the RTA, which allow matters to proceed to VCAT with relative expediency. VCAT may still order mediation where necessary, but it will be significantly cheaper for both parties. Although we have reservations about VCAT's effectiveness in the retirement living context, it is absolutely superior to requiring residents to participate in a paid internal dispute resolution (IDR) process.

We believe it is illegal to impose a requirement for compulsory internal dispute resolution in an agreement covered by the RTA. Including this requirement in the agreement is likely to have a chilling effect on the residents who read it, who may fear significant mediation costs arising from legitimate concerns raised with park management. We note that the 2005 amendments to the RVA prohibited any mandatory arbitration clauses in agreements and required owner-operators to notify residents of the right to bring disputes to the Director of Consumer Affairs.

5.4 General issues in retirement villages

As discussed above, we have had more experience with residential parks than retirement villages. However, we believe the following areas would benefit from additional consumer protection.

5.4.1 Transparency of fees, and interest charges

Currently, retirement village agreements have complicated and confusing fee rates and payment schedules. Additionally, there is no easy and centralised way for prospective residents to make cost comparisons between villages.

In order for prospective residents to make an informed decision about deferred management fees in advance, we would support reporting and disclosure requirements on all owner-operators (those covered by the RTA and RVA) specifying the current amount of deferred management fees at their complex, as well as the amount of ingoing contributions and ongoing service fees.

Additionally, wider standardisation of the schedules used in such agreements and how they must present their information would be welcomed. One RVA agreement schedule WEstjustice encountered only listed the initial principal a resident was expected to pay and the monthly service fee. It is unclear whether a separate fact sheet was supplied. Information about the deferred management fee itself was buried within the 40-page agreement residents were expected to sign.

RVA agreements our organisation has reviewed empower owner-operators to charge interest on overdue service fees. Given that these residents are mostly on limited incomes (ie: Centrelink payments, with few if any assets beyond their place of residence) and are at greater vulnerability if their living arrangements are threatened, WEstjustice opposes the ability to charge interest on rent or service fees on retirement village or residential park residents.

We note that owner-operators of both retirement villages and residential parks may also lawfully evict residents who fall into arrears with these payments, and these powers should not be compounded by forcing residents to keep on top of interest payments.

5.4.2 Dispute resolution

Current models for dispute resolution for retirement villages under the RVA appear deeply inadequate. The RVA prescribes the recordkeeping requirements for a village IDR scheme, but not its form. Retirement village IDR schemes do not have to be evaluated against a set of principles, let alone the relevant Australian Standard.[11]

Residents who want to bring disputes to an external resolution are required to apply to VCAT. Such VCAT applications are made more difficult by:

- The lack of any dedicated list to consistently handle retirement village matters (presently, they are chiefly dealt with on VCAT's Civil Claims list)

[11] ISO AS 10002-2006, approved by Standards Australia in February 2006.

- The lack of provisions in the RVA that directly integrate the jurisdiction of VCAT to rule on certain matters, and create a clear pathway for residents to raise matters, compared to the RTA provisions on residential parks.
- The guidelines in VCAT Civil List matters stipulating that there is no automatic right to representation for claims under $10,000. This has the potential to severely disadvantage vulnerable population groups, such as the elderly.

These issues make it difficult for either a self-represented or represented party to bring an RVA matter to VCAT, and in particular mean that issues that have a low monetary value but are important to residents' quality and dignity of life (failure to maintain common facilities adequately, unreasonable village rules) are unlikely to be challenged. We have had to reluctantly advise retirement village residents with such issues that their options following unsuccessful IDR are limited. Whether an external industry Ombudsman is instituted or a clearer role for VCAT is defined in the RVA itself, change appears necessary.

6. Recommendations

Since before the first substantial amendment to the RVA and before residential parks received clear coverage under the RTA, it was clear that regulation of contract terms, rules around exit arrangements and resale of properties, limitations on operators with regard to making decision on behalf of individual residents and improved dispute resolution were central areas of concern for legislators.[12]

We are concerned, particularly in the residential park sector, that residents' agreements contain a number of unfair and unlawful terms that go against both the wording and the ethos of the legislation.

In light of this, WEstjustice believes that there is an urgent need for a targeted review of residential park agreements in the retirement sector by the appropriate regulatory bodies. This would lead to greater compliance with the legislative framework currently in place.

A 'retirement village disclosure and contract regulations consultation' was held by Consumer Affairs Victoria in 2013, but it focused on examining the costs and benefits of the proposed regulations to help consumers better understand their general rights and obligations when choosing and living in a retirement village, and did not deal with the question of unfair contract terms. [13]

Educative campaigns and advertising should be reviewed to make sure they are covering both retirement villages and residential parks, that they clearly outline the differences between the two, and that they provide guidance on what kind of terms in a residential agreement may be unfair and how a resident may challenge them.[14] A centralised database with regularly-updated information on Victorian retirement villages and residential parks and their relevant fees should form part of this information campaign.

Recommendation 1: That the regulator complete a targeted review of residential park agreements in the retirement housing sector to identify unfair contract terms.

Recommendation 2: That further campaigning and advertising clearly outline the different nature of residential park and retirement village arrangements, and offer guidance on how residents may identify and respond to unfair contract terms, and that this include a centralised database that enables prospective residents to effectively compare retirement living options.

WEstjustice believes that the nature of some agreements we have encountered in the retirement living sector, as well as the lack of effective external remedies to deal with disputes under any

[12] Victoria, *Parliamentary Debates,* Legislative Council, 22 March 2005, 109 (M.R. Thomson, Minister for Consumer Affairs).
[13] Consumer Affairs Victoria, *Retirement village disclosure and contract regulations consultation* <https://www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/retirement-village-disclosure-and-contract-regulations-consultation>.
[14] In particular, attention should be drawn to those terms and conditions that Reg 8B of the Retirement Villages (Contractual Arrangements) Regulations 2006 state must not be included in a retirement village resident or management contract, including a requirement for a resident to have a will or take out insurance.

agreement, strengthen the call for the establishment of a Retirement Housing Ombudsman to sit alongside these dispute resolution mechanisms.

WEstjustice thus supports the Consumer Action Law Centre's ('CALC') recommendation in CALC's submission to the Victorian Department of Justice and Regulation's *Access to Justice Review*.[15]

While we note that amendments to both the RVA and VCAT's procedures could enhance its effectiveness, WEstjustice further agrees with the view that (at present) VCAT 'is largely an ineffective forum for resolving retirement housing disputes'.[16]

In particular, it is noted that the overly legalistic nature of VCAT reinforces the power imbalances between the parties to a dispute.[17] Further, VCAT's arduous procedural requirements, including service of documents upon the respondents, fee waiver requirements and the increases to its application fees have made the VCAT a difficult and costly dispute resolution body to navigate.[18]

As CALC highlighted, residents are often self-represented against a well-resourced opponent with legal representation, and VCAT does not tend to take this power imbalance into account.[19] Also, VCAT's decisions are unenforceable at the level of VCAT itself. Both Residential Tenancies List and Civil List monetary orders are often escalated to registration with the Magistrates' Court in order to commence enforcement proceedings. This makes it difficult and expensive to enforce a decision, even if a favourable outcome is obtained.

The establishment of a Retirement Housing Ombudsman would enable an effective and simple mechanism for dealing specifically with disputes between parties. Properly-resourced and free EDR would empower retirees to bring disputes without facing unaffordable fees or potential cost risks.[20] Beyond individual disputes, we believe that such an Ombudsman would also be in a ideal position to review proposed rent rises and service fee increases across the industry for their equity and fairness.

CALC recommended that, at a minimum, the Retirement Housing Ombudsman would be expected to consider retirement housing consumer disputes that relate to the Australian Consumer law, *Retirement Villages Act 1986*, *Residential Tenancies Act 1997*, *Owners Corporation Act 2006*, and associated regulations.[21] WEstjustice supports this recommendation.

Recommendation 3: That a Retirement Housing Ombudsman be established in Victoria in line with other industry external dispute resolution models.

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[15] CALC, Submission No 53 to the Department of Justice and Regulation, Parliament of Victoria *Access to Justice Review*, Submission, 29 February 2016, 2,21,22 ('*CALC Access to Justice submission*').
[16] Ibid 22.
[17] See generally WEstjustice, Submission No 12 to the Department of Justice and Regulation, Parliament of Victoria *Access to Justice Review*, Submission, February 2016, 36.
[18] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report (2014) 357; *CALC Access to justice submission*, above n 7, 22.
[19] *CALC Access to Justice submission*, above n 7, 23.
[20] Ibid 22.
[21] Ibid 23.