



**Submission to the
Productivity Commission's Inquiry on
Caring for older Australians**

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CHOICE exists to unlock the power of consumers. Our vision is for Australians to be the most savvy and active consumers in the world.

As a social enterprise we do this by providing clear information, advice and support on consumer goods and services; by taking action with consumers against bad practice wherever it may exist; and by fearlessly speaking out to promote consumers' interests - ensuring the consumer voice is heard clearly, loudly and cogently in corporations and in governments.

1. Executive summary

CHOICE believes that there is a lack of transparency in retirement village contracts with respect to the legal and financial risks that a person is exposed to both **upon exiting a contract** and **during the life of a contract**.

The retirement village industry is a growing industry in Australia. About 5% of Australians aged 65 and older live in retirement villages, and the number of villages increased by more than 8.5% over the three years to July 2010.¹ The number of Australians aged 85 and over is projected to increase from 0.4 million in 2010 to 1.8 million (5.1% of the population) by 2050².

Recommendation 1: CHOICE believes that nationally consistent retirement village legislation should be implemented ensuring that consumer protection is consistent across all of Australia and that regulators are able to work more efficiently and effectively by sharing their relevant knowledge and experiences.

Recommendation 2: CHOICE believes that standardised contracts should be implemented which will assist consumers in comparing the different types of financial arrangements available within the one and different retirement villages and in making an informed decision as to which option is best for their personal circumstances.

¹ Jones Lang Lasalle, Peter Mc Mullen, National Director Health & Aged Care, 27 October 2010, Trends in the Retirement Village Sector, Conference Paper.

² See page xxiv of the Productivity Commission's Caring for Older Australians – draft report released 21 January 2011.



Recommendation 3: CHOICE believes that within a standardised contract, there should be a declaration requirement where before a contract is entered into, the supplier must have received from the prospective resident a signed statement, stating that the prospective resident has been given advice about the proposed contract by an independent legal advisor or has been told that that kind of advice should be sought but has decided not to seek it.

Alternatively, if it is considered warranted taking into account the different type of financial arrangements offered, the system adopted by New Zealand should be implemented in Australia. This is where *all* persons intending to be a resident *must* receive independent legal advice before signing an occupation right agreement and the relevant lawyer must provide a certificate stating that the general effect of the agreement and its implications were explained in a a manner and in language that was appropriate.

2. Nationally consistent legislation

CHOICE is supportive of the Productivity Commission's draft recommendation 10.5 that:

State and territory governments should pursue nationally consistent retirement village legislation under the aegis of the Council of Australian Governments. Changes to state and territory government legislation under this process should

- *be informed by research jointly commissioned by the industry and government*
- *have regard to the industry's accreditation process.*

The use of nationally consistent legislation would ensure that the levels of protection for consumers would be the same instead of varying depending on which State or Territory they reside in. This would be in line with the rationale for introducing the new Australia Consumer Law provisions, namely moving towards a 'Seamless National Economy'.

As an example of the inconsistent protection provided to consumers across Australia, in at least the jurisdictions of Victoria and South Australia, under certain conditions, a former resident is able to receive their entitlements after a certain period if they need to go to an aged care facility and pay an accommodation bond, even if their unit has not yet been sold.³ In at least the jurisdictions of New South Wales and Queensland,

³ See s.6 of the *Retirement Villages (Contractual Arrangements) Regulations 2006 (VIC)* and s.21 of the *Retirement Villages Act 1987 (SA)*.



there appears to be no such similar entitlement provided for in the relevant legislation.

The use of nationally consistent legislation would also ensure that regulators at a Commonwealth, State and Territory level would be able to work more efficiently and effectively by sharing their relevant knowledge and experiences. This is currently hampered by the different legislation across jurisdictions governing the operations of 'retirement villages'. CHOICE would like to draw the Inquiry's attention to the example cited by David Bradbury, Parliamentary Secretary to the Treasurer, in a speech entitled 'The Australian Consumer Law: A microeconomic reform success story' to the Monash University Centre for Regulatory Studies on 15 March 2011:

As the Queensland flood waters began to rise, so did reports that consumers were being targeted by unscrupulous operators and scam artists. In response, consumer officials from around Australia met regularly by teleconference and, drawing upon experience gained from the Victorian bushfires, kept ahead of the issues arising from these crises.

The result was a well-informed network of regulators in each jurisdiction who were able to deal consistently with the range of consumer enquiries and enforcement issues that arose.

The use of nationally consistent legislation would also minimise the costs of compliance for providers operating across more than one jurisdiction and national providers.⁴ It is our view that the additional costs of complying with relevant legislation for providers operating across more than one jurisdiction is likely to be passed on to consumers thus raising prices unnecessarily.

3. Standardised contracts

CHOICE supports the submission made by the Retirement Village Residents Association (sub.30, p.2) calling for standardised contracts for each of the different types of financial arrangements (e.g. leasehold, loan-license and strata title).

It is CHOICE's view that the use of standardised contracts will assist potential residents in comparing the different types of financial arrangements available within the one and different retirement villages and in making informed decisions as to which option is best for their personal circumstances. Given the long-term consequences for consumers in their decisions regarding retirement villages, and the significant variation between the different types of financial arrangements within the

⁴ See page 340 of the Productivity Commission's Caring for Older Australians – draft report released 21 January 2011.



one retirement village and when compared to others, there is a strong case for assisting consumers in making informed choices.

CHOICE believes that there is an issue regarding the transparency in retirement village contracts with respect to the legal and financial risks that a person is exposed to both **upon exiting a contract** and **during the life of a contract**.

CHOICE has been contacted by a number of residents (both former and current) of retirement villages raising these concerns. A fear of retribution means these residents are unwilling for CHOICE to identify their particular retirement village. CHOICE considers that there is likely to be a significantly larger number of residents that have concerns in comparison to the number that have contacted CHOICE.

Residents typically feel that they are a 'captive market' given factors including the following:

- The fear of retribution if they speak out about unfair practices engaged in by the supplier.
- The difficulties involved in switching providers (or finding alternative accommodation) given financial considerations including exit fees (which can be significant in some circumstances).
- The emotional attachment residents have to the retirement village in which they are residing given it has typically been their place of residence for a long period, and a place in which they have established strong relationships.
- The time required to find an alternative suitable provider or form of accommodation.

Accordingly, CHOICE warns that any submissions or evidence suggesting high resident satisfaction rates should be carefully considered given that they may not accurately reflect the true situation in relation to *all* aspects of living in a retirement village. The above considerations also highlight the importance of ensuring that potential residents make a well-informed decision when entering into a retirement village contract.

CHOICE developed the following case study to illustrate the complexities of decisions regarding contractual and financial arrangements facing potential retirement village residents:



CASE STUDY

Devil in the detail

Nine years ago, Joan and Edward each bought a two-bedroom unit in different retirement villages with different fee and capital gains structures; both cost \$360,000. Edward paid a 32% fee (3% annual fee for nine years plus a 5% sinking fund contribution) while Joan paid a

one-off 20% fee. But Joan receives only a 20% share of the capital gain, whereas Edward gets 80%. If there is an 8% capital gain, Edward comes out on top; but in the case of a 2% capital gain, both suffer a similar capital loss. By comparison, if they'd bought a low-maintenance unit, they would

have received the full value – \$720,000 in the first scenario and \$430,000 in the second.

Note: Other costs such as refurbishment and selling costs have not been taken into account and would also have to be deducted from the payout figure.

RETIREMENT VILLAGE VS LOW-MAINTENANCE UNIT

	JOAN	EDWARD
Entry price	\$360,000	\$360,000
Deferred management fee	20% one-off	3% per year *
Total fee after nine years	\$72,000	\$115,000
Resident's portion of capital gain	20%	80%
SCENARIO 1: Selling price: 8% – capital gain over nine years	\$720,000	\$720,000
PAYOUT FIGURE	\$360,000	\$530,000
SCENARIO 2: Selling price: 2% – capital gain over nine years	\$430,000	\$430,000
PAYOUT FIGURE	\$300,000	\$300,000

TABLE NOTES * For the first nine years, plus a one-off 5% sinking fund fee in the first year. All figures are rounded.

As extracted from the March 2011 edition of CHOICE, page 23.

4. Declaration requirements

It is also CHOICE's submission that it should be a legal requirement, incorporated within standardised contracts for all retirement villages, that before a contract is entered into the supplier must have received from the prospective resident a signed statement confirming that the prospective resident has been given advice about the proposed contract by an independent legal adviser or has been told that such advice should be sought but has decided not to seek it.

This requirement is likely to highlight to consumers the legal complexity of the relevant contract and the seriousness that should be afforded to entering into a retirement village contract. It would also be consistent with for example the declaration requirements relating to entering into a franchise agreement which is also typically a long-term decision involving high financial risks (see cl.11 of the



Franchising Code of Conduct, a prescribed code under the *Competition and Consumer Act 2010 (Cth)*.

CHOICE notes that in Victoria at least there is a current obligation that the following statement be provided:

LIST OF IMPORTANT INFORMATION FOR PROSPECTIVE RESIDENTS YOU SHOULD READ THIS DOCUMENT CAREFULLY. IT CONTAINS A NUMBER OF IMPORTANT THINGS THAT YOU SHOULD CONSIDER BEFORE DECIDING TO ENTER A RETIREMENT VILLAGE.

...

2. You should take all of the documents relating to the village to a legal practitioner who understands the financial implications of retirement village contracts.

...

IF YOU ARE UNCERTAIN ABOUT ANY ASPECT OF THE VILLAGE OR THE DOCUMENTS YOU HAVE RECEIVED FROM THE VILLAGE, YOU SHOULD SEEK EXPERT ADVICE.

(See s.19 of the *Retirement Villages Act 1986 (VIC)*, s.11 of the *Retirement Villages (Records and Notices) Regulations 2005*.)

CHOICE believes that the above proposal requiring the consumer to confirm that they have not received legal advice (where this is the case) would more effectively highlight the importance of obtaining such advice.

CHOICE also notes that in New Zealand, legal obligations go beyond the declaration requirements proposed above. It is a requirement in NZ that *all* persons intending to be a resident in *must* receive independent legal advice before signing an occupation right agreement. It is also a requirement that the relevant lawyer *must* provide a certificate stating that the general effect of the agreement and its implications were explained in a manner and in language that was appropriate to the age and understanding of the intending resident (see s.27) of the *Retirement Villages Act 2003 (NZ)* and Schedule 2, *Retirement Villages (General) Regulations 2006*).

CHOICE recommends that any process undertaken to harmonise legislation across Australia give consideration to the merits of the system adopted in New Zealand.