

Responses to submissions

Proposed Retirement Villages Amendment (Records and Notices) Regulations 2013 and Retirement Villages Amendment (Contractual Arrangements) Regulations 2013

Summary of issues raised in submissions on the Regulatory Impact Statement

Responses and Statement of Reasons

Introduction

On 16 May 2013, a Regulatory Impact Statement (RIS) was released to facilitate public consultation on the proposed Retirement Villages Amendment (Records and Notices) Regulations 2013 and Retirement Villages Amendment (Contractual Arrangements) Regulations 2013 (the proposed regulations). The public submission period closed on 19 July 2013.

Twenty-nine submissions on the proposed regulations and the RIS were received. Following detailed consideration of each submission received in response to the RIS, a number of changes will be made to the proposed regulations and to the drafts of the factsheet and enhanced pre-contract disclosure statement attached to the RIS.

The following table summarises the issues raised in the submissions and sets out the responses.

Issue	Comment or issue raised	Response
1. Costs		
1.1	The costs of the regulations, both initial and ongoing, have been underestimated.	Not supported. Consumer Affairs Victoria consulted with leading retirement-village legal firms on the costs of the contract-standardisation proposals and made every attempt to estimate the impacts of the proposed regulations on the retirement village industry. The focus was on average costs for the industry, rather than the costs for individual retirement villages at the high or low end of the industry. The Victorian Competition and Efficiency Commission assessed the RIS costings as satisfactory.

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		<p>Further, the requirements of the proposed regulations in total, are not considered to be significantly different from those that the New South Wales legislation currently and prospectively imposes on NSW operators. Both states require operators to disclose a similar amount of information, although the break-up between the respective documents is different.</p> <p>Victoria is essentially adopting the current NSW contract standardisation requirements; and there has been no submission that the somewhat different NSW contract layout requirements have any different cost consequences to the Victorian proposal.</p>
1.2	<p>The costs will be passed on to current residents, who do not benefit from the regulations.</p>	<p>Not supported.</p> <p>The proposed regulations will benefit future residents, not existing residents, and any increased costs incurred in complying with the regulations cannot be imposed on existing residents. The <i>Retirement Villages Act 1986</i> (the Act) sets out that above-CPI increases in maintenance charges require residents' consent. Future residents' service charges may be higher as a result of the regulations, but the benefits they will obtain will outweigh the costs, as set out in the RIS.</p>
2. Factsheet		
2.1	<p>The factsheet is too long; it should be more like the NSW 'general inquiry' statement, with the pre-contract disclosure statement containing the bulk of information.</p>	<p>Not supported.</p> <p>The Victorian approach, as set out in the second reading speech to the Retirement Villages Amendment (Information Disclosure) Bill 2013, is that at the initial inquiry stage, interested retirees need sufficient information to choose an appropriate village. That information should be general and generic information about the village. It should not be part of the pre-contract disclosure statement, because at that stage the prospective resident is usually too committed, emotionally and, perhaps, financially, to the village to absorb the information and use it for comparison purposes.</p> <p>Having selected the appropriate village, the pre-contract disclosure statement should contain a summary of the costs of entering, living in and leaving the village, to ensure that the prospective resident can clearly see</p>

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		<p>the nature and extent of the financial commitment they are about to undertake.</p> <p>The preferred approach was arrived at after an extensive consultation process. It included a Discussion Paper in 2011, followed in 2012-13 with a stakeholder forum, publication of 'Other issues for resolution' papers, focus group analysis and consultation with resident and industry representatives, culminating in the RIS. It was considered that the information in the factsheet is the minimum required to enable retirees to see what a village has to offer and whether it is generally affordable.</p>
2.2	The factsheet is too generic and does not account for the range of tenure-types in villages.	<p>Supported in part.</p> <p>The factsheet should be succinct and easily understandable. Drafts of the factsheet were tested through several stages of focus groups, industry and resident and public consultation. At each stage, the document was modified to accommodate valid criticisms and suggestions, to achieve a balance between the need to ensure that retirees get sufficient information to make an informed decision and the need to not overwhelm them with information. Many retirement villages have mixed tenures, so need a factsheet that can be used for such villages. This does not reduce comparability. However, the factsheet will be amended to cover full-rental units.</p> <p>Many villages are wholly leased or licensed or wholly strata titled, so separate factsheets for those villages will be developed. This will shorten the documents and make them easier to compare with other such villages.</p>
2.3	The factsheet should be provided to interested retirees with or without request.	<p>Not supported.</p> <p>Because it is an offence to not meet this requirement, we must be clear about how the operator must comply, so it is clear when a breach occurs. It is not possible to frame a requirement to provide a factsheet without a request, that fulfils this criterion. In practice, many operators will provide a factsheet without a request. Also, they must provide a factsheet with any marketing material, whether requested or not, and before a contract is signed.</p>

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2.4	<p>The requirement to set out details of budget surplus or deficit is a new matter that requires justification. Further:</p> <ul style="list-style-type: none"> • any requirement relating to financial matters should only refer to the financial statements required under the Act; and • the requirement to provide the dates of the financial year should be deleted as being premature for the early stage of inquiry. 	<p>Supported in part. This was part of the factsheet attached to the original Retirement Village Association submission on the Discussion Paper published in 2011, which was adopted as the basis for the proposed factsheet. It is considered to be important information. While the item was not included in the Discussion Paper, it was part of the draft factsheet that was taken to consultations with industry and resident representatives in February 2013. However, all requirements relating to financial matters will be modified to refer only to the financial statements required under the Act and the requirement regarding the financial year will be deleted.</p>
2.5	<p>The statement of correctness should be signed by the operator or other authorised person and include a declaration that the signer accepts that any misleading or false statements may lead to legal action.</p>	<p>Not supported. Provision for signing was considered but rejected, because the factsheet will normally be given by a salesperson or other employee or agent. The owner or manager will not always be available to sign a particular factsheet. However, the Act requires the owner or manager to provide the factsheet, so any employee or agent who provides the factsheet does so only on their behalf. The owner or manager would be responsible for any false or misleading matter in the factsheet under section 20 of the Act.</p>
2.6	<p>The requirement to include details of pet and parking restrictions should be deleted, as those matters are premature for the early stage of inquiry; any details can be provided on request.</p>	<p>Supported. The item will be deleted.</p>
2.7	<p>The requirement to include details of any waiting list should be deleted, as some operators will falsely claim to have such a list for commercial advantage.</p>	<p>Not supported. It is considered important for interested retirees to know whether a fee is charged for being on a waiting list and whether the fee is refundable on entry.</p>

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2.8	The details regarding 'ownership' of a village need to accommodate strata-titled villages where village facilities are owned by the owners corporation.	Supported. The item will be amended accordingly.
2.9	The requirements to include details of owners corporation maintenance plans and funds should refer only to those required under the <i>Owners Corporations Act 2006</i> .	Supported. These items will be amended accordingly.
2.10	Various suggestions to expand the matters covered by the factsheet beyond those set out in the Discussion Paper and the 'Other Issues for resolution' papers published by Consumer Affairs Victoria in 2012.	Not supported. Some of the suggested matters were not considered to substantially aid retirees in deciding on an appropriate village. Any advantage of including the other suggested matters was considered to be outweighed by the disadvantage of lengthening the factsheet and overwhelming retirees with too much information.
2.11	Various suggestions to re-organise the material in the factsheet.	Supported in part. A draft of the factsheet was tested with focus groups before the publication of the RIS and the groups reported very favourably on its ease of reading and comprehension. However, several suggestions that clearly improve the layout and organisation of the document will be adopted.
3. Disclosure statement		
3.1	Allowance should be made in the disclosure statement for inapplicable matters to be deleted, to make document shorter.	Supported in part. Some sections of the disclosure statement ('Departure fee', 'Long term maintenance fund' and 'Departure entitlements') will be improved by allowing for the deletion of inapplicable items. However, it is necessary to retain the full 'tick box' range in other sections ('Entry Costs' and 'Ongoing costs') so residents can see what does not apply at a particular village. Also, separate forms of the disclosure statement will be developed for each form of tenure, thereby removing the need to include matters relating to other forms of tenure.

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3.2	The requirement for the 'owner of the land upon which a retirement village is located' to certify the disclosure statement will also require owner-residents to complete and certify the statement when selling their unit.	Not supported. Owner-residents' units are not considered to be 'land upon which a retirement village is located' and it is not intended that the disclosure statement be completed or certified by owner-residents. Because the Act requires the manager to provide the statement, the manager will be the person required to certify the statement, so the issue will not arise.
3.3	The 'Departure costs' section should provide for sales commission payable to any third party estate agent	Not supported. The disclosure statement is intended to refer only to the costs payable to the village operator. Also, the operator does not necessarily know what third party agents charge.
3.4	The requirement in the current disclosure statement to provide details of securities that take priority over the resident's financial rights should be expanded to refer to the resident's rights under the Act.	Supported. The confinement of the statement to a resident's 'financial' rights does not align with paragraph (b) of the definition of 'disclosure statement' in section 3 of the Act, which refers to '...priority to the rights of residents of the retirement village under this Act', and the disclosure statement will be amended accordingly.
3.5	The 'Entry costs' section of the disclosure statement should provide for costs that may not attract GST.	Supported. A statement will be inserted that all amounts are GST-inclusive unless stated otherwise (where it is permissible to do so).
3.6	The requirement to provide costs of personal services should be deleted, as they are optional and therefore not part of the resident's financial commitment.	Not supported. This is considered an unduly restrictive or technical approach to the issue.
3.7	The requirement to include any long-term maintenance fund charge should be deleted, as these are not 'maintenance charges' as defined in the Act.	Not supported. It is considered that these charges are 'maintenance charges' and that deleting them would mislead residents as to the extent of their recurring financial commitment.

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4. Disclosure statement – exit-entitlement table		
4.1	The requirement to complete an exit entitlement table is unexpected, as it was not included in the ‘Other Issues for resolution’ papers published by Consumer Affairs Victoria in 2012.	Not supported. The ‘Other issues for resolution’ papers dealt with issues on which the submissions on the Discussion Paper showed a degree of consensus. The proposals on which there was no consensus, including the table of exit-entitlement estimates, were dealt with at the stakeholder forum in February 2012, where modified proposals were presented for discussion and comment. Also, the table (representing the outcome of the forum discussion) was part of the draft factsheet that was taken to consultations with industry and resident representatives in February 2013.
4.2	The exit entitlement table and departure entitlement section will confuse residents and should be deleted.	Not supported. Drafts of the disclosure statement, including the table of exit entitlements, were tested with focus groups, and industry and resident-group consultation. The focus groups and resident/consumer groups have expressed approval of the table, including its readability. Resident/consumer groups said the table is the most important part of the disclosure statement. At each stage of consultation, the disclosure statement, including the table, was modified to accommodate valid criticisms and suggestions, and further amended to incorporate a number of suggestions for improvement made in the submission on the RIS.
4.3	Residents may be misled if the exit-entitlement table is used to compare other villages.	Not supported. It is not intended that prospective residents use the table for comparison purposes, because it is considered that at the stage when a resident is about to sign a contract, they are committed to the village. The purpose of the table (and the disclosure statement as a whole) is to ensure that prospective residents have a clear understanding of the costs of entering, living in and leaving the village.

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4.4	In completing the exit-entitlement table, operators will have to speculate and use assumptions to estimate costs.	Not supported. It is considered that the table does not require the operator to speculate. While it requires the operator to estimate the capital growth of the unit, that estimate can be based on current average capital growth in the value of units in the village. Otherwise, the table requires the operator to estimate the reinstatement or renovation costs and sale costs based on current average costs.
4.5	The exit-entitlement table will involve guesswork and risks raising residents' expectations.	Not supported. The table states that the estimates of sale price and capital growth are the operator's estimate. Also, the operator may insert whatever disclaimer they believe is necessary to avoid unrealistic expectations.
4.6	The exit-entitlement table assumes there will be capital growth, which could create false expectations for residents. Therefore, it should only be a table of examples of possible exit entitlements.	Not supported. It is considered reasonable to assume that if the operator estimates negative growth, they will simply insert a negative number. The table is intended to be comprised of 'estimates', not 'examples', because the latter are not sufficiently informative for prospective residents. Any false expectations can be dealt with by inserting appropriate disclaimers.
4.7	Some operators will use misleadingly high capital-growth factors in the exit-entitlement table simply to make sales and will rely on the disclaimer if challenged. Therefore, a standard growth factor should be produced for use by operators.	Not supported. Relying on a disclaimer will not help an operator charged with an offence under section 20 of the Act, or under the Australian Consumer Law for including a false or misleading growth factor, or in any civil action if there was no reasonable basis for the estimate. A standard, government-produced growth factor was considered at the stakeholder forum in February 2012, but rejected as impracticable.
5. Contract standardisation		
5.1	Although many benefits of contract standardisation may not be quantifiable, some attempt should have been made to do so because, as presented, the proposal could be	Not supported. Although the social and personal benefits cannot be quantified in monetary terms, the proposal cannot be seen as having no benefits that offset the costs to business. The RIS describes the two social and personal benefits

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	said to have no benefits to offset the costs.	(ability to choose the right village and to understand financial commitment and rights and obligations) and uses a 'multi-criteria analysis' to offset their relative importance against the cost to industry, as a tool to compare the options.
5.2	The regulations should not apply to 'residence contracts' constituted by agreements for lease, as they are not relevant contracts, or operator-to-resident contracts of sale of land, as they are regulated by other laws and their inclusion will result in conflict between some of their prescribed general conditions of sale and the proposed regulations.	Supported. Proposed regulations 8B, 8C, 8E and 8F will not apply to a contract of sale to which a compliant management contract is annexed, or to an agreement for lease to which a compliant residence contract is annexed.
5.3	The regulations should not apply to 'residence contracts' constituted by resident-to-resident contracts of sale of land, particularly as most conveyancers will not be aware of the proposed regulations.	Supported in part. Resident-to-resident contracts of sale are not considered to be 'residence contracts' under the Act and it is not intended that the proposed regulations apply to those contracts. An express exclusion is therefore not required.
5.4	The application of the regulations should be clarified for operators who use a management contract combined with an option-to-purchase deed and deferred-fee deed, neither of which are 'residence contracts'.	Supported in part. The Act only refers to 'management contracts' and 'residence contracts', which is why the proposed regulations are only directed at such contracts. Therefore, contracts that are not a 'management contract' or a 'residence contract' as defined in the Act will not be required to comply with the proposed regulations. Express provision is therefore not required.
5.5	The prohibition on terms that require the resident to pay the costs of preparing and providing information required to be given to them under the Act would unfairly include the costs of preparing and auditing financial statements under section 34 of the Act, which	Supported in part. It will be clarified that the costs of auditing the financial statements are not covered by the proposed prohibition; however, the costs of preparing the statements will still be covered, as residents only control whether the statements are audited.

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	are matters that the Act allows residents to control.	
5.6	The prohibition on terms that require the resident to pay the operator's costs of enforcing a contract against them should be deleted, as operators should be entitled to these costs and they are a standard part of contracts of sale of land.	Not supported. Sales of strata-title residences in a retirement village are considered to be qualitatively different from other types of residential sales because the former transaction, unlike the latter, is part of a larger, ongoing arrangement between the resident and the operator. The Act and the proposed regulations are based on the belief that residents require certain protections in their dealings with operators. In this case, the proposed prohibition ensures that residents are not intimidated from asserting perceived rights.
5.7	The prohibition on terms allowing relocation of residents without consent should be modified to assist operators who are redeveloping their village, so relocation without consent should be permitted if the new unit is at least the same size and amenity as the old unit; if there is no cost to the resident; and if reasonable notice is given.	Not supported. The proposed requirement for the resident not to withhold consent unreasonably is considered to be sufficient protection for operators and would normally protect them in this situation (if the resident refused consent).
5.8	The prohibition on 'entire agreement' terms should be deleted as it will reduce contractual certainty and encourage false claims by residents that non-contractual promises were made to them. Residents are adequately protected by the prohibitions on the making of false or misleading statements in the Act and in the Australian Consumer Law. 'Entire agreement' terms are a standard part of contracts of sale of land.	Not supported. 'Entire agreement' terms do not necessarily operate at law to preclude residents from litigating claims that non-contractual promises were made to them, that induced them to enter into the contract. However, it is considered that the terms can discourage residents from pursuing those claims and are therefore considered unfair. The possibility that some residents might pursue bogus claims is not considered sufficient to outweigh the detriment to the larger number of residents who would be deterred from pursuing genuine claims. Also, the costs penalties imposed by courts on unsuccessful litigants are considered sufficient deterrent to those considering pursuing bogus claims. See response to 5.6 regarding contracts of sale of land for retirement villages.

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5.9	The prohibition of 'liquidated damages' terms will mean that deposits cannot be forfeited.	Supported in part. Terms requiring the forfeiture of deposits for failure to proceed with a contract are not considered to be 'liquidated damages' terms, but the matter will be expressly covered in the regulations.
5.10	The prohibition on imposition of post-departure operating costs should explicitly not extend to ongoing maintenance charges and personal services fees, as permitted under the Act.	Supported. The item will be amended accordingly.
5.11	The prohibition on a requirement for a resident to pay more than half of any valuation costs should expressly be made subject to the existing prescribed term under regulation 7 regarding liability for costs of a valuation for the purposes of estimating certain exit entitlements.	Supported. The item will be amended accordingly.
5.12	The requirement to include fixtures etc in a residence contract should be deleted: <ul style="list-style-type: none"> • for a completed dwelling, as the incoming resident can inspect the unit beforehand; and • on a resale, as the outgoing resident may have added fixtures etc of which the operator is unaware and, in any case, the incoming resident can do an inspection beforehand. 	Not supported. The requirement addresses the need to record what items the operator owns, to reduce disputes over ownership and damage, a consideration that applies in both of these situations.
5.13	The requirement to state when promised services will be available should be deleted, as it is not possible to be certain.	Supported. The regulation will only require the operator to include any date it has promised.
5.14	The requirement to include the dispute resolution processes stipulated under the Act should be deleted as the Act already requires these to be provided to residents.	Supported. The item will be deleted.

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5.15	Suggestions that several matters required to be included in contracts could better be left to Consumer Affairs Victoria's protocols for dealing with key issues in retirement villages (entitled <i>Retirement villages: Good practice to address key issues</i>).	Not supported. Compliance with the protocols is voluntary whereas it is considered that the proposals to require certain matters to be included in retirement village contracts necessarily go beyond mere voluntary compliance.
6. Prescribed terms		
6.1	The proposed regulation goes beyond the proposal in the 'Other Issues for resolution' papers published by Consumer Affairs Victoria in 2012, which only referred to 'a limited set of basic terms to be prescribed for residence contracts'.	Not supported. The proposal as set out in the Discussion Paper was for 'certain basic terms' to be implied, to ensure that retirement village contracts 'operated fairly and properly', and suggested a list of 18 terms. The finalised proposal set out in the 'Other issues' paper, which was based on the consensus of the Discussion Paper submissions, was for a 'basic set of standard terms in retirement village contracts' - with the rationale of 'establishing the basic rights and obligations of operators and residents'. It listed 17 terms.
6.2	The prescribed terms are vague and unclear.	Not supported. Most of the prescribed terms have been adopted from those that have applied in NSW for several years. The proposal for prescribed terms has been subjected to the same extensive consultation process as the other proposals, beginning with the Discussion paper.
7. Standard contract layouts		
7.1	The standard layouts will result in more complex and lengthy contracts; will make comparisons harder; and will restrict innovation in contract content and layout.	Not supported. It is considered that standard layouts can only increase comparability of retirement village contracts, particularly given the significant differences in headings, clause ordering and general contract structure of existing contracts, which make comparison almost impossible, even for residents' solicitors. Also, it is considered that residents' solicitors will benefit from easier reading, which may reduce costs to residents; and when prospective residents

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		<p>become residents, it will be easier for them to locate their rights and obligations.</p> <p>While the proposed factsheet will assist retirees to compare offerings at a general level, the proposal for standard layouts is intended to assist comparison in detail.</p>
7.2	<p>The proposal was not in the Discussion Paper or the 'Other issues for resolution' papers published by Consumer Affairs Victoria in 2012.</p>	<p>Not supported.</p> <p>The Discussion Paper proposed 'a prescribed layout for residence and management contracts', including 'headings for matters that must be addressed in the contract'. The 'Other issues' papers dealt with issues on which the submissions on the Discussion Paper showed a degree of consensus. The proposals on which there was no consensus, including standard contract layouts, were dealt with at the stakeholder forum in February 2012, where modified proposals were presented for discussion and comment. The further-developed proposals for standard layouts, that came out of that forum, were presented for technical analysis to a workshop of lawyers working in the retirement village sector (including those acting for industry associations) in July 2012. The proposals set out in the RIS are those that emerged from the lawyers' workshop.</p>
7.3	<p>The layouts for 'residence contracts' do not accommodate the different tenure-types in villages.</p>	<p>Not supported.</p> <p>The proposed standard layouts for residence contracts will not apply to residence contracts constituted by agreements to lease or contracts of sale of land (or of a share in a company-title village or of a unit in a unit-trust village). Therefore, the layouts will only apply to lease or licence tenure. The precise basis of tenure (lease or licence) may be inserted in the 'Operative words' section.</p>
7.4	<p>The layouts involve a large amount of duplicated information.</p>	<p>Not supported.</p> <p>The relevant submissions did not give details of what information is said to be duplicated and the claim is not considered to be correct.</p>

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8. General drafting matters		
8.1	<p>Various suggestions to amend or define certain terminology, for example:</p> <ul style="list-style-type: none"> • replace ‘deposits’ and ‘donations’ with ‘in-going contribution’; and ‘refundable amount’ and ‘exit entitlement’ with ‘refundable in-going contribution’, as per the Act; • define ‘departure fee’, ‘resale price’ and ‘capital gain/loss’; • refer to ‘permanent departure from the unit’ rather than ‘from the village’, as the former is treated in the same way as the latter. 	<p>Supported in part. Several of the suggestions will be adopted and several will not; for instance, the relevant documents will:</p> <ul style="list-style-type: none"> • refer only to ‘in-going contribution’ and ‘refundable in-going contribution’; • not attempt to define references to ‘departure fee’ etc as they are well-known terms and, in some cases, their precise meaning will depend on the terms of the particular contract; • refer only to ‘permanent departure’ or ‘permanent departure from the premises’.