

15 September 2020

Retirement Village Feedback

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Dear Exit Entitlements Project Team,

Submissions to independent review of timeframes for exit payments in Queensland retirement villages

Thank you for the opportunity to provide our feedback on the timeframes for exit payments in Queensland retirement villages. Throughout this submission we will refer to the timeframe for payment of an exit entitlement under the *Retirement Villages Act 1999* (Qld), specifically the 18-month period under section 63(1)(c), as the “18-month mandatory buy-back period”.

About Caxton Legal Centre

Caxton Legal Centre is Queensland’s largest community legal centre. Caxton Legal Centre’s objects are to provide legal and social welfare services to low income and disadvantaged persons in need of relief from poverty, distress, misfortune, destitution and helplessness, and to educate such people in legal, social welfare and related matters. We are an independent, non-profit community organisation providing free legal advice, social work services, information and referrals.

Within Caxton Legal Centre, the Queensland Retirement Village and Park Advice Service (**QRVPAS**) is a community legal service that is funded by the Department of Housing and Public Works, and has been delivered by Caxton Legal Centre since the program was first piloted in 2014. We aim to provide increased housing security to Queenslanders living in retirement villages by assisting them to:

- understand their rights and responsibilities under the relevant legislation
- build capacity to present their interests to scheme operators, and
- have increased access to appropriate legal advice services.

To achieve these aims, QRVPAS provides free legal advice, information, community legal education and referral services to residents of retirement villages across Queensland.

We are also involved in ongoing consultation with other stakeholders (including the Queensland Government's Department of Housing and Public Works, resident advocacy groups, seniors organisations and industry representatives) who contribute to the development of legislation, community education and policy in this area.

As the only community legal centre program in Queensland that has a specific focus on this area of law, we are uniquely placed to comment on the timeframes for exit payments in Queensland retirement villages. For these reasons, this submission is aimed at addressing issues that we have identified as being of concern to residents, based on our experience working in this area.

Background

We understand that, prior to the introduction of these amendments, one of the most common issues affecting retirement village residents was their inability to access exit entitlement payments when units remained unsold after a prolonged period of time.¹

Our service assisted many residents who remained living in a village, despite unfavourable circumstances, because they simply could not afford to move out and cover their living expenses without knowing when the exit entitlement would be paid. For those residents their legal options were limited, and while they could attempt to negotiate an early payment of the exit entitlement, this would be entirely at the village's discretion. In those negotiations the balance of power was clearly in favour of the village operator and residents may have felt pressured to accept an early payment of the exit entitlement on less favourable terms, simply because they were desperate to gain access to those funds.

For some residents with increased care needs, the delay in receiving payment of the exit entitlement also complicated the process of transitioning to aged care. Many needed to obtain a loan to cover upfront costs associated with entry into an aged care facility, and incurred further interest charges while waiting for their exit entitlement to be paid out.

In addition, we also assisted representatives of deceased estates who had concerns that a village was not actively trying to promote the resale of the unit, where the resident had passed away and family members did not clearly understand the resale or exit entitlement process.

This issue was also the focus of media reporting and had a negative impact on the reputation of the retirement village industry.² At community legal education sessions that we delivered to prospective residents, we noted a significant number of prospective residents were familiar with media coverage of this issue and noted that potential delays in the resale process were a disincentive when comparing retirement villages to other forms of housing.

¹ Explanatory Notes, Housing Legislation (Building Better Futures) Amendment Bill 2017 (Qld), 10.

² Explanatory Notes, Housing Legislation (Building Better Futures) Amendment Bill 2017 (Qld), 11.

The 18-month mandatory buy-back period

Like many resident advocacy groups, we were pleased to see the introduction of the 18-month mandatory buy-back period for both freehold and leasehold villages under the *Retirement Villages Act 1999* (Qld).

These laws now require operators to pay residents their exit entitlement 18 months after the resident leaves the village, unless doing so would cause the operator undue hardship. Those amendments were introduced for leasehold villages as part of the *Housing Legislation (Building Better Future) Amendment Bill 2017* (Qld) and later extended to freehold villages in the *Health and Other Legislation Amendment Bill 2018* (Qld), with the aim of providing greater housing affordability, security and confidence to residents, and balancing this with continued industry viability.³

In our view, these changes have helped “level the playing field” by balancing the power between village operators and outgoing residents. The introduction of the 18-month mandatory buy-back period means that residents can now exit their village on fairer terms, with greater certainty about their financial position as they plan for their next stage in life.

In particular, we have observed a significant reduction in the number of residents who are contacting QRVPAS for advice about the selling and moving out process, or to dispute their exit entitlement. When we do offer advice on these issues, it is largely to provide clarification on the recent legislative changes – rather than to assist with resolving any specific dispute. We are no longer seeing examples of residents who are experiencing financial hardship because of the delays in the payment of their exit entitlement. We are also seeing minimal enquiries from appointed decision-makers (i.e. adult children acting under a power of attorney for their elderly parent who may have moved to aged care, or executors of deceased estates).

Freehold vs leasehold retirement villages

The 18-month buy-back period was introduced under the *Housing Legislation (Building Better Future) Amendment Bill 2017* and, at first instance, applied to leasehold villages only. The term “leasehold” refers to retirement villages where the residence contract is based on a leasehold or licence type arrangement – typically a resident will purchase a “right to reside” in the unit under a 99 year lease or licence. Leasehold villages comprise approximately 93% of the current retirement village market and so make up the majority of retirement villages in Queensland.⁴

Aside from the general issues regarding financial viability of the industry (which are discussed below), we are not aware of any specific complaints that have been raised about the 18-month buy-back provisions in the context of leasehold villages. Instead we have observed that feedback from prospective and existing residents has been mostly positive.

³ Housing Legislation (Building Better Futures) Amendment Bill 2017 Explanatory Notes, p3 - <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2017-004>

⁴ Report No. 18, Health and Other Legislation Amendment Bill 2018 (Qld), 36.

In contrast to leasehold villages, in “freehold” villages the resident will actually acquire freehold title to their unit (usually as part of a Body Corporate) and enter into a separate agreement with the retirement village regarding the services provided, common areas and facilities, and resale process that applies – which is of course subject to the provisions of the *Retirement Villages Act 1999 (Qld)*. As freehold villages comprise approximately 7% of retirement villages in Queensland, they are less commonly available.⁵ Of those, the Department of Housing and Public Works identified 10 retirement villages where the residents were the village operator (in some capacity).⁶

Because the amendments introduced under the *Housing Legislation (Building Better Future) Amendment Bill 2017 (Qld)* did not clearly state that the 18-month mandatory buy-back provisions also extended to “freehold” retirement villages, this was later clarified by the *Health and Other Legislation Amendment Bill 2018 (Qld)*.

With regards to freehold villages, we have been made aware of a few occasions where residents of owner-operated villages expressed concerns about their ability to adhere to the 18 month buy-back provisions. We understand that a separate legal service was funded by the Department of Housing and Public Works for residents of those owner-operated villages to seek advice on this point. In our view, it would be entirely suitable for those villages to consider de-registration as a retirement village, particularly in circumstances where there is likely to be a Body Corporate to continue carrying out the shared property maintenance responsibilities.

Another issue raised by owner-operated villages is that de-registration as a retirement village would result in the loss of age-discrimination exemptions under the *Retirement Villages Act 1999 (Qld)*, thereby prohibiting residents from excluding younger persons from moving into the complex. However, if an owner-operated village were to de-register, they would have the option to apply to the Queensland Human Rights Commission for an exemption under the *Anti-Discrimination Act 1991 (Qld)*. As there are no published decisions of the Queensland Civil and Administrative Tribunal (**QCAT**) considering this issue, it appears that no such applications have been made (or have not yet reached the QCAT decision stage).

Further, if owner-operated villages decide to maintain their registration, but later face difficulties complying with the 18-month mandatory buyback provisions, they can seek relief under section 171A of the *Retirement Villages Act 1999 (Qld)* which allows them to apply to QCAT for an extension of time to pay the exit entitlement or complete the buy-back purchase. Section 171A does not limit the length of any such extension, so conceivably an extension could be granted for as long as is necessary until the unit is resold.

In our view, the concerns raised by a small number of residents of owner-occupied freehold villages do not outweigh the many positive benefits of the 18-month mandatory buy-back laws for the vast majority of retirement village residents in Queensland.

⁵ Report No. 18, Health and Other Legislation Amendment Bill 2018 (Qld), 33.

⁶ Report No. 18, Health and Other Legislation Amendment Bill 2018 (Qld), 40.

Financial viability of the industry

In our previous submissions on the *Housing Legislation (Building Better Future) Amendment Bill 2017* (Qld) and the *Health and Other Legislation Amendment Bill 2018* (Qld), we raised significant concerns about financial stress experienced by elderly people living in retirement villages, as a direct consequence of difficulties around the payment of exit entitlements. We noted that many residents were unable to move out of their village for financial reasons, because of uncertainty about when they would be able to receive their exit entitlement. This resulted in many elderly people living in retirement village accommodation that no longer suited their needs (perhaps due to changes in their health requirements, needing to be closer to family/friends, needing to leave a domestic violence situation, issues with the unit which rendered it uninhabitable, or for other reasons).

Similarly, we encountered many situations where former residents had vacated their retirement village unit, but were living in a situation of financial hardship while waiting over 18 months for the unit to be resold and for their exit entitlement to be paid out. Many were struggling to afford the cost of new accommodation or aged care services without access to the funds that were invested in the retirement village unit. Meanwhile, the village operator may have been doing little to promote the sale of the vacant unit, because they had no real incentive to finalise the sale. For elderly people who may be moving to aged care, with limited remaining years of their lives, this situation was clearly undesirable.

From these experiences, we understand that delayed exit entitlement payments can have serious impacts on the lives of seniors in our community; in particular it can place them in a situation of financial hardship and affect their ability to find safe and secure housing.

Further, it should be recognised that the *Retirement Villages Act 1999* (Qld) doesn't create specific protections to preserve a resident's ingoing contribution (usually a large sum of money, equivalent to the purchase price of a new home) beyond a short initial period. For this reason, buying into a retirement village is a financial decision that carries significant risk for residents. In our view, it is not appropriate for that risk to be solely borne by residents.

The 18-month mandatory buy-back provisions now hold retirement villages accountable to protect this significant financial investment, and also creates an incentive for village operators to act quickly to secure the resale of the unit. Given that the village operator has a large amount of control over the resale process (being automatically appointed as the sales agent for at least the first 6 months after the unit is vacated), we consider it appropriate that they should bear the financial risk associated with a low turnover of units – particularly where the operator has the access to sales and marketing services, and ability to make changes to enhance the amenity of the village, if this is necessary to improve sales.

Against this background, we consider that the 18-month mandatory buy-back provisions have made necessary steps to redistribute this financial risk between residents and village operators.

That said, we anticipate that many village operators and property industry representatives will be suggesting that the 18-month mandatory buy-back provisions have threatened the financial viability of the industry. In particular, we are aware of media reports from two village operators who have complained that the mandatory buy-back provisions have triggered insolvency events. We first became aware of reports that Settler's Retirement Villages (with locations in Rockhampton and Forest Lake) were placed into receivership in August 2019⁷, and more recently that the Cooloola Waters Retirement Resort at Tin Can Bay was placed under administration earlier this year⁸. Both reports cited the mandatory buy-back laws as being the primary cause of their insolvency, although we do not have access to the financial information of those organisations to confirm if this accurately reflects their position.

We are also aware of anecdotal reports that operators are reluctant to make an application to QCAT under s 171A of the *Retirement Villages Act 1999* (Qld) for an extension of time, because such an application would require the operator to demonstrate their inability to pay the exit entitlement within the 18 month timeframe (which could itself be considered an act of insolvency). We suggest that it may be appropriate for the wording of section 171A to be revisited to remove this risk, and make it less onerous for village operators to bring this type of application.

We do not support more drastic changes to these provisions, for example shifting the onus onto residents to apply for the payment if the unit is not sold within the 18 month timeframe, because applying to QCAT can be a lengthy and intimidating process for older people who do not have the same level of sophistication or resources as village operators. In the past, one of the only options available to residents under the *Retirement Villages Act 1999* (Qld) was to apply to QCAT for payment of the exit entitlement if they could demonstrate that they had been "materially prejudiced" by the operator's failure to properly engage in the resale/reinstatement process. In our experience, former residents were unwilling to commence that QCAT application process because of the potential time, stress and risk involved.

We also wish to note that some operators have made proactive changes to their residence contracts to offer more favourable terms than the minimum mandatory buy-back timeframes under the *Retirement Villages Act 1999* (Qld). For example, we understand that Bolton Clarke operated villages are now offering residence contracts with 6 month buy-back periods as a standard term across their 21 Queensland villages.⁹ In our view, this evidences that some

⁷ Australian Financial Review, *Queensland buy back rules behind retirement village group collapse* (29 August 2019) <<https://www.afr.com/property/commercial/queensland-buy-back-rules-behind-retirement-village-group-collapse-20190829-p52m0g>>

⁸ The Australian, *Retirement village in liquidation after legislation change* (7 July 2020) <<https://www.afr.com/property/commercial/queensland-buy-back-rules-behind-retirement-village-group-collapse-20190829-p52m0g>>

⁹ Starts at 60, *Worried about big exit fees? It's not a risk at all retirement villages* (7 June 2018) <<https://startsat60.com/media/money/property/worried-about-big-exit-fees-its-not-a-risk-at-all-retirement-villages>>

villages have used mandatory buy-backs as a method to enhance their appeal to consumers by improving their contract terms, while maintaining their financial viability.

In the Explanatory Note to the *Housing Legislation (Building Better Future) Amendment Bill 2017* it was noted that these amendments would provide residents with greater confidence in their choice of accommodation, and that increased consumer confidence should also benefit operators by improving consumer attitudes towards the retirement village model. In this regard, we have observed positive responses from members of the community when discussing the 18-month buy-back period in community legal education sessions. Similarly, we have noted mostly positive responses from existing residents when they are informed about the 18-month buy-back period in advice appointments.

Conclusion

In summary, our view is that the amendments appropriately balance the financial viability of the industry with the need to ensure that older people have access to secure and affordable housing in retirement. We do not support any changes to the 18-month mandatory buy-back provisions, except amending the wording of section 171A to address operator's concerns regarding insolvency.

Thank you for providing us with the opportunity to share our feedback on the timeframes for exit payments in Queensland retirement villages. This submission was prepared by Caxton's QRVPAS lawyer, Brittany Smeed.

Should you wish to discuss any aspect of this submission, please do not hesitate to contact our office.

Yours faithfully



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