

RETIREMENT VILLAGES IN AUSTRALIA: THE CASE FOR COMMONWEALTH INTERVENTION

BRITTANY SMEED*

I. INTRODUCTION

When ABC aired their Four Corners exposé, *Bleed Them Dry Until They Die*¹, viewers around Australia were shocked to learn about the exploitation of vulnerable elderly people by the retirement village industry.² The public outcry and media attention surrounding these issues quickly led to calls for reform and regulatory action across Australia. While some state and territory governments have demonstrated a commitment to addressing the issues raised by the media, we need to reconsider the capacity of state and territory governments to adequately respond to a problem that clearly exists on a national scale. This article will discuss the retirement village industry in Australia, consider the shortcomings of state and territory level regulation, and suggest that further reform needs to be implemented at a federal level to account for the changing nature of the industry in the context of our ageing population. It is argued that the federal government would be capable of regulating retirement villages as financial products, with the Australian Securities and Investments Commission ('ASIC') and the Australian Competition and Consumer Commission ('ACCC') playing a stronger role in monitoring consumer protection. However this requires a significant shift in the way that retirement villages are viewed from a legal perspective.

II. A NEW APPROACH

*BA/LLB (Hons) (UQ), GDLP (ANU), Lawyer at Caxton Legal Centre Inc.'s Park and Village Information Link. With thanks to Dr Maree Petersen, Senior Lecturer, Social Work at the University of Queensland; Katherine Temple, Senior Policy Officer at Consumer Action Law Centre; Scott Seefeld, Barrister at Queensland Bar Association; Bridget Burton and Nastassja Milevskiy, Lawyers at Caxton Legal Centre Inc; and Dr Rebecca Ananian-Welsh, Senior Lecturer, TC Beirne School of Law at the University of Queensland for comments on an earlier draft of this article.

¹ *Bleed Them Dry Until They Die* (Directed by Klaus Toft, Four Corners/ABC TV, 26 June 2017).

² Four Corners describes itself as 'Australia's leading investigative journalism program', and currently airs on a weekly basis on the Australian Broadcasting Channel ('ABC'). The program has been running for over 50 years, is highly regarded for its independent, non-commercial public broadcasting, and has won many Australian and international awards for journalism and film-making. See Four Corners, *About Us* <<http://www.abc.net.au/4corners/about-us/>>.

In considering current issues with retirement village living, it is useful to understand that the way we define complex issues as social problems ‘depends to a large extent on the perspectives of those in power’.³ For this reason, when considering how policy can be developed to address the problems that have been identified, we first need to consider how the definition of retirement living has been shaped by those in power – namely, the retirement village industry itself.

Here it is relevant to consider the fact that retirement housing was initially developed by charitable organisations in an attempt to cater for the needs of the elderly. While the industry has grown and changed significantly in nature, to the point where for-profit businesses are now major players, those businesses continue to rely on the old narrative that they are, first and foremost, providing a necessary housing service for the elderly. Industry lobbyists insist that retirement villages make up an important part of our housing landscape in Australia, offering an ideal ‘lifestyle’ and accommodation option for seniors to ‘downsize’ from their existing homes and free up the housing market for the younger generation.⁴ Likewise, the commonly held view amongst consumers is that living in a retirement village is not a financial investment, but rather an ‘investment in a lifestyle’.⁵ As founder of the ‘Find My Retirement Home’ service has stated ‘[y]ou certainly don’t buy into a retirement village to make money... It’s a lifestyle choice’.⁶

As part of this discourse, village operators have traditionally tried to distance themselves from providers of aged care services. Instead, retirement villages have been framed as a housing choice (as distinct from provision of aged care in nursing homes and associated

³ Carole B. Cox, *Social Policy for an Aging Society: A Human Rights Perspective* (Springer Publishing Company, 1st ed, 2015) 2.

⁴ Property Council of Australia, Retirement Living and Grant Thornton, *National Overview of the Retirement Village Sector* (October 2014) <<http://www.retirementliving.org.au/wp-content/uploads/2015/03/National-overview-of-the-retirement-village-sector-Grant-Thornton.pdf>> 4.

⁵ Richard McCullagh, ‘Care in Australian Retirement Villages’ (2014) 8 *Elder Law Review*. See also Maree Petersen, John Minnery, ‘Understanding Daily Life of Older People in a Residential Complex: The Contribution of Lefebvre’s Social Space’ (2013) 28(6) *Housing Studies*, 830 and The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, *The Retirement Village Industry in Australia: Evolution, Prospects, Challenges* (University of Queensland Press, 1st ed, 2002) 63.

⁶ Lesley Parker, *Lifestyle’s hidden costs* (16 February 2011) <<https://www.smh.com.au/money/planning-and-budgeting/lifestyles-hidden-costs-20110215-1auny.html>>.

institutionalisation).⁷ However this aspect of the industry is changing, with the ageing baby boomer population driving an increased interest in housing options that cater for ‘ageing in place’.⁸ For example, recent advertisements for Aveo’s ‘Freedom Aged Care’ seek to distinguish themselves as ‘[a] genuine alternative to traditional aged care’ and ‘a community rather than a care institution or nursing home’, using language such as ‘living independently’, ‘in control’, ‘choice, independence and freedom’ to emphasise the idea that they are still selling a housing and lifestyle choice.⁹ Despite this evolving aspect of the industry, the traditional distinction between retirement village and aged care living is maintained by the segregation of regulation, legislation and policy for each type of living option. Retirement villages continue to be treated by the state and territory legislation as a housing product, whereas the Commonwealth government’s aged-care legislation is based on the conception of aged-care as a necessary accommodation and care service which needs to remain financially viable. The issue with these two disparate approaches is that the various pieces of legislation do not operate consistently, and can complicate the transitions from retirement village living to aged care.

Moreover, the views regarding the nature of retirement living do not accurately reflect the way retirement villages operate in Australia today. Rather, they mirror the industry’s lobbying and marketing techniques, which rely on outdated narratives to present retirement villages as a housing and lifestyle choice, and also an important solution to the problems posed by our ageing population.¹⁰ By deconstructing this approach, we can consider retirement villages in a different light, and develop policy responses that adequately address the issues with retirement living in contemporary Australia. The reality is that purchasing a right to reside in a retirement village is a transaction that has materially increased in financial complexity and cost over the years, with financial factors identified as a key influence amongst retirees contemplating the move into a village.¹¹ It is argued that, above all else, the decision to move to a retirement village needs to be understood as a significant and complex financial

⁷ Kirsten Bevin, ‘Shaping the Housing Grey Zone: An Australian Retirement Villages Case Study’ (2017) *Routledge Urban Policy and Research*, 9.

⁸ Ibid.

⁹ Aveo, *Freedom Aged Care – A genuine alternative to traditional aged care* (2018) <<https://www.aveo.com.au/retirement-living-options/aged-care/freedom-aged-care/>>.

¹⁰ Bevin, above n 7.

¹¹ James Finn, Vera Younis Mukhtar, David J. Kennedy, Hal Kendig, Philip Bohle and Olivia Rawlings-Way, ‘Financial Planning for Retirement Village Living: A Qualitative Exploration’ (2011) 25(2) *Journal of Housing For the Elderly*, 219.

investment, and should be regulated at a national level (in alignment with existing consumer protection laws).¹²

III. DEVELOPMENT OF THE INDUSTRY: FROM CHARITY TO CORPORATE

Retirement housing in Australia was born out of humble origins in the late 19th century, when the church and charitable sector intended to provide not-for-profit housing to the “deserving” working aged of modest means.¹³ Presumably these organisations were motivated by religious or charitable principles when they started to develop a portfolio of retirement housing assets, and in the early 1950’s there were nearly 200 not-for-profit organisations in Australia dedicated to providing housing for the elderly.¹⁴

Industry growth was encouraged during the post-war period when the *Aged Persons Homes Act 1954* (Cth) granted capital subsidies for the purpose of constructing homes for the aged.¹⁵ This resulted in the construction of approximately 30,000 independent living units (which were largely for the financially disadvantaged), and firmly established the not-for-profit sector as leaders of the industry.¹⁶ Financial arrangements between these organisations and residents varied, from standard rental agreements to the payment of an upfront capital donation – something akin to today’s ingoing contribution fee.¹⁷ The capital subsidies offered under the *Aged Persons Homes Act 1954* (Cth) were then phased out in 1974, and for-profit investment in the industry commenced shortly afterwards, resulting in the introduction of more complex financial arrangements that in some ways resemble the retirement village contracts that are still in use.¹⁸

¹² Xin Hu, Bo Xia, Laurie Buys, Martin Skitmore, Rosemary Kennedy, Robin Drogemuller, ‘Stakeholder analysis of a retirement village development in Australia: insights from an interdisciplinary workshop’ (1 October 2015) *International Journal of Construction Management*, 305.

¹³ Bevin, above n 7, 5.

¹⁴ Roxane Le Guen, *Parliamentary Research Service Background Paper Number 32 1993 – Residential Care for the Aged: An overview of Government policy from 1962 to 1993* (24 November 1993) Department of the Parliamentary Library <<https://www.aph.gov.au/binaries/library/pubs/bp/1993/93bp32.pdf>>.

¹⁵ Ibid.

¹⁶ Bevin, above n 7, 5.

¹⁷ Dennis Barton, ‘The Retirement Village Industry – Opportunities for Actuarial Improvement’ (Paper presented at the Institute of Actuaries of Australia 2009 Biennial Convention, Sydney, 19-22 April 2009) <https://www.actuaries.asn.au/Library/Con09_paper_Barton_The%20retirement%20village%20industry.pdf>, 4.

¹⁸ Ibid.

Further changes to the industry were brought about in 1981, when retirement villages were included as a ‘prescribed interest’ under the *Companies Act 1981* (Cth) and accompanying codes, and regulated by the National Companies and Securities Commission (‘NCSC’), which has since been replaced by ASIC.¹⁹ However, the definition of ‘prescribed interest’ was amended in 1985 to specifically exclude retirement villages, with the justification being that buying-in to a retirement village is ‘not an investment. Its purpose is to provide long-term accommodation on a freehold basis for retirees’.²⁰ Both the not-for-profit and private sector supported this amendment, as they viewed retirement villages as a local issue that could be suitably regulated by state and territory governments.²¹ Accordingly, the NCSC delegated its authority to the states and territories, who were expected to pass their own legislation regulating retirement villages by mid-1987.²² While this period of federal regulation was short-lived, it does provide some precedent for a return to a national approach with ASIC as the regulatory body. In addition, it should be noted that has now been over 30 years since the NCSC determined that retirement villages should be treated as a proprietary interest, and this view is no longer relevant when we consider the state of the industry today.

For-profit investment continued to expand in the early 2000s, when a large number of property developers and investors acquired a number of existing villages and began to increase the private sector’s share of the market.²³ However there was very little new built development during this period, which was further stalled by the 2008 global financial crisis (‘GFC’).²⁴ This changed with the 2011 consolidation and national merger of the state-level Retirement Associations with the Property Council of Australia, which strengthened the industry’s ability to advocate for targeted government policy.²⁵ For many this was viewed as the peak body that the larger operators needed to move away from their ‘cottage industry’ reputation and effectively present their interests to governments.²⁶

¹⁹ Paul Latimer, ‘It’s Time for Federal Regulation of Retirement Villages’ (2017) 45 *Federal Law Review*, 23.

²⁰ Law Reform Commission and Company and Securities Advisory Committee, *Collective Investments: Other People’s Money* (Report 65, 1993) 21.

²¹ Latimer, above n 19, 24.

²² NCSC, Sixth Annual Report and Financial Statements 1 July 1984 to 30 June 1986 (1986) 22.

²³ Bevin, above n 7, 5-6.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

Today almost 60 percent of the retirement village market share is held by private investors, with large national organisations such as Aveo, Stockland and Lendlease holding approximately 7-9% each.²⁷ The other 40 percent remains with not-for-profit organisations, who have also become increasingly sophisticated in their investment in the industry.²⁸ This demonstrates a major change in the nature of retirement villages since the states and territories began legislating in this area, and raises questions about the ability of state and territory governments to manage an industry that now exists on a national scale.

IV. THE CURRENT CONTEXT

A. *Market Demographics*

Retirement village living has been the fastest growing type of age-specific housing since the 1970's.²⁹ Figures from 2014 indicate that 5.7% of Australians over the age of 65 were living in retirement villages.³⁰ While this percentage may seem small, it has risen by 0.4% since 2010, and the Retirement Village Association estimate that it will continue to increase to approximately 7.5-8% by 2025.³¹ These statistics suggest that the popularity of retirement villages has increased faster than any other housing option designed specifically for older Australians, and will continue to follow this upwards trajectory.³²

As our ageing population grows there will be a rising demand for housing options that are suitable for the specific needs of older Australians.³³ The Commonwealth Parliamentary Committee's 2007 *Inquiry into Older People and the Law* (the '*Parliamentary Inquiry*') recognised that: '[a]ccess to housing is a basic human right. For older Australians, secure

²⁷ Adele Ferguson and Sarah Danckert, *The Price of Freedom* (24 June 2017) <<http://www.smh.com.au/interactive/2017/retirement-racket/the-price-of-freedom/>>.

²⁸ Helen Barrie, 'Retirement villages capitalise on aged care changes' (2 November 2017) *Australian Aging Agenda*, 18.

²⁹ Productivity Commission, *Caring for Older Australians - Productivity Commission Inquiry Report Volume 2* (28 June 2011) <<http://www.pc.gov.au/inquiries/completed/aged-care/report/aged-care-volume2.pdf>> 309.

³⁰ Property Council of Australia, Retirement Living and Grant Thornton, above n 4.

³¹ Retirement Village Association Ltd, Submission No 424 to the Productivity Commission, *Inquiry into Caring for Older Australians*, 24 August 2010.

³² Productivity Commission, *Housing Decisions of Older Australians – Productivity Commission Research Paper* (December 2015) <<http://www.pc.gov.au/research/completed/housing-decisions-older-australians/housing-decisions-older-australians.pdf>> 98.

³³ Barrie, above n 27.

accommodation, both in terms of personal security and tenure, are particularly important.³⁴ In this regard, Professor Anne Glass and Jane Skinner have noted that retirement communities are an option that can provide this level of safety and security, in addition to creating a sense of community that encourages older people to proactively care for themselves and alleviate some of the caregiving responsibilities of families.³⁵

For these reasons, it is important to appreciate the existing and growing role of retirement villages in the lives of older Australians. If our federal government truly intends to provide older Australians with access to appropriate housing in the form of retirement villages, then it is necessary to ensure that there is a comprehensive regulatory regime in place.

B. *Key Features of Retirement Village Contracts*

1. *An Overview of the State and Territory Legislation*

At present, retirement villages are treated as solely a state and territory responsibility, with each jurisdiction implementing different statutes regulating their operation.³⁶ The table below sets out the various pieces of legislation and regulations that are currently in force, along with the relevant dispute resolution body for each state and territory.

State	Statute	Regulation	Dispute Resolution body
ACT	<i>Retirement Villages Act 2012</i>	<i>Retirement Villages Regulation 2017</i>	ACT Civil and Administrative Tribunal ('ACAT')

³⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs Committee, *Inquiry into Older People and the Law* (2007) <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/laca/olderpeople/report.htm> 203.

³⁵ Anne P. Glass and Jane Skinner, 'Retirement Communities: We Know What They Are ... or Do We?' (2013) 27 *Journal of Housing for the Elderly*, 62-63.

³⁶ McCullagh, above n 5.

NSW	<i>Retirement Villages Act 1999</i>	<i>Retirement Villages Regulation 2017</i>	NSW Civil and Administrative Tribunal ('NCAT')
NT	<i>Retirement Villages Act 1995</i>	<i>Retirement Villages Regulations 2016</i>	Local Court
Qld	<i>Retirement Villages Act 1999</i>	<i>Retirement Villages Regulation 2010</i>	Queensland Civil and Administrative Tribunal ('QCAT')
SA	<i>Retirement Villages Act 2016</i>	<i>Retirement Villages Regulations 2017</i> <i>Retirement Villages (Fees) Regulations 2017</i>	South Australian Civil and Administrative Tribunal ('SACAT')
Tas	<i>Retirement Villages Act 2004</i>	<i>Retirement Village Regulations 2015</i>	Director of Consumer Affairs & Fair Trading, Supreme Court
Vic	<i>Retirement Villages Act 1986</i>	<i>Retirement Villages (Contractual Arrangements) Regulations 2017</i> <i>Retirement Villages (Records and Notices) Regulations 2015</i> <i>Estate Agent (Retirement Villages) Regulations 2016</i>	Victorian Civil and Administrative Tribunal ('VCAT')
WA	<i>Retirement Villages Act 1992 and Fair Trading Act 2010</i>	<i>Retirement Villages Regulations 1992 and Fair Trading (Retirement Villages Code) Regulations 2015</i>	State Administrative Tribunal ('SAT')/Commissioner for Consumer Protection

While this article does not intend to provide a detailed review of the nuances of retirement village legislation and contracts across those different jurisdictions, there are some common features of retirement village contracts which need to be understood before they can be discussed in the context of the reforms that are proposed. A general overview is provided below, though it should be acknowledged that some of the problems that have been identified are applicable only to certain jurisdictions (given the diverse range of issues that arise under the different legislation).

2. *Entry into a Village*

One of the distinguishing features of retirement village accommodation in Australia is that the legal interest that a resident receives in their home will vary, depending on the terms of their residence contract.³⁷ In most circumstances, residents do not actually own their home or the land upon which it is situated, despite the significant price that is paid to move in to a village. Instead contracts can involve complex tenure arrangements ranging from leases, licences, company titles and unit trusts, whereby the resident usually acquires what is known as a ‘right to reside’ in their home.³⁸ The manner in which a resident’s security of tenure is protected will depend on the legislation of that jurisdiction and the terms of their residence contract. These arrangements can be confusing for lawyers who do not have experience in this area, let alone older people who may have limited experience with complex legal and financial matters, or have not encountered this unique tenure and fee structure before.³⁹ This is a problem that is further exacerbated by the different use of terminology across jurisdictions.

³⁷ It is interesting to note that back in 1993, the Law Reform Commission relied on retirement village accommodation being provided on a freehold basis, in determining that retirement villages were a type of real estate rather than investment and should be removed from the definition of ‘prescribed interest’. In the current context, owning a pure freehold interest in a retirement village unit is rare, with leaseholds, combined freehold/lease back or licence arrangements being the most common type of interest acquired. See Law Reform Commission and Company and Securities Advisory Committee, above n 19, and Andrea Blake and Lucy Cradduck, ‘What is the impact of land tenure on the sustainability of retirement village communities in Australia?’ (Paper presented at the Proceedings of 2010 International Conference on Construction & Real Estate Management, 1-3 December 2010, Royal on the Park Hotel, Brisbane).

³⁸ Productivity Commission, above n 29.

³⁹ This is particularly the case for individuals who may have previously owned their own home and understand housing tenure in that context. For those who are selling a real property asset (that has accrued in value for decades) to fund their entry into a retirement village, it may be difficult to appreciate that the interest they are purchasing is likely to be a diminishing asset.

Governments have attempted to address these issues by requiring operators to provide pre-contractual disclosure documents in the form set out in the legislation and accompanying regulations.⁴⁰ Residence contracts may also need to be presented in a standard form or contain certain standard terms, and will generally set out all fees and charges that are payable by the resident, the parties' obligations regarding budgeting, repairs and maintenance, any village rules that will apply, provisions governing how the agreement can be terminated, and the proportion in which the resident and village will share any capital gain (or loss) on the resale of the unit.⁴¹ This goes some way to providing increased transparency for prospective residents, though as Brian Herd has noted '[t]he down side of this approach is the production of contractual documents of biblical dimensions which may be more intimidating than transparent'.⁴² In addition, standard form contracts and disclosure requirements differ between jurisdictions, and the complex fee structures which vary from village to village make it difficult for residents to compare price and housing options. These difficulties suggest that the current disclosure-based approach has been ineffective, and in 2015 the Productivity Commission noted that '[w]hile these [disclosure requirements] were introduced in an attempt to assist consumers, researchers suggest that this has not lessened the complexity of the documentation'.⁴³

There are also be cooling-off periods associated with the provision of disclosure documents and signing of the residence contract, during which a prospective resident may be able to terminate the agreement without penalty.⁴⁴ This provides prospective residents with an

⁴⁰ See s 24 *Retirement Villages Act 2012* (ACT), s 18 *Retirement Villages Act 1999* (NSW), Schedule 2, Part 3 *Retirement Villages Regulations 2016* (NT), s 74 *Retirement Villages Act 1999* (Qld), s 21 *Retirement Villages Act 2016* (SA), Schedules 1 – 3 *Retirement Villages Act 2004* (Tas), s 19 *Retirement Villages Act 1986* (Vic) and s 13 *Retirement Villages Act 1992* (WA).

⁴¹ See s 66-67 *Retirement Villages Act 2012* (ACT), s 43 *Retirement Villages Act 1999* (NSW), Schedule 2, Part 3 *Retirement Villages Regulations 2016* (NT), s 45 *Retirement Villages Act 1999* (Qld), s 20 *Retirement Villages Act 2016* (SA), Schedule 1 *Retirement Villages Act 2004* (Tas), s 19 *Retirement Villages Act 1986* (Vic) and s 14A *Retirement Villages Act 1992* (WA).

⁴² Herd, Brian, 'The Retirement Villages Act 1999 (Qld)' (2000) *Television Education Network (TEN)* < http://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=http://www.tved.net.au/PublicPapers/February_2000,_Sound_Education_in_Law,_The_Retirement_Villages_Act_1999__Qld_.html>.

⁴³ Productivity Commission, above n 32, 102.

⁴⁴ See s 53 *Retirement Villages Act 2012* (ACT), s 32 *Retirement Villages Act 1999* (NSW), Schedule 2, Part 3, s 19 *Retirement Villages Regulations 2016* (NT), s 48 *Retirement Villages Act 1999* (Qld), s 24 *Retirement Villages Act 2016* (SA), Schedule 2 *Retirement Villages Act 2004* (Tas), s 24 *Retirement Villages Act 1986* (Vic) and s 14 *Retirement Villages Act 1992* (WA). The Australian Capital Territory, New South Wales and South Australia have also legislated an additional 'settling-in period' of 90 days, where the resident still has an option to terminate after they commence living in the unit (with only limited liability for associated costs). See s 71 and s 72 *Retirement Villages Act 2012* (ACT), s 44A and s 44B *Retirement Villages Act 1999* (NSW), and s 44(4)-(7) *Retirement Villages Act 2016* (SA).

additional period of time in which they can review the disclosure documents, seek further advice about their decision, and change their mind with minimal consequences. Whether prospective residents take advantage of these disclosure and cooling-off periods to seek appropriate advice is another question, with a recent survey of a group of residents in Queensland finding that 69% sought legal advice and 38% sought financial advice before moving in, though many felt that the advice they had obtained was not comprehensive enough.⁴⁵

When entering a village, residents typically pay what is known as an ‘ingoing contribution’. The ingoing contribution is an upfront payment that is often viewed as being akin to the purchase price for real property, and usually reflects an amount that is equivalent to, or slightly less than, the market value of the unit.⁴⁶ There are no guidelines restricting the amount that can be set as the ingoing contribution.⁴⁷ This ingoing contribution is then treated as a bond or interest-free loan to the village, and will be retained by the village until the resident’s unit is re-sold to another incoming resident, or the legislation requires it to be refunded.⁴⁸ This can sometimes result in the former resident being unable to access those funds for an excessively long period of time, although some states have attempted to address this problem by introducing mandated ‘buy-back’ provisions – in which the village must purchase the right to reside from the former resident if it remains unsold after a certain period of time.⁴⁹ Residents may be able to negotiate with their village to receive an early pay-out of

⁴⁵ Maree Petersen, Cheryl Tilse and Tina Cockburn, ‘Living in a Retirement Village: Choice, Contracts and Constraints’ (2017) 31 *Journal of Housing for the Elderly*, 234. See also Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into the retirement housing sector* (March 2017) <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Retirement_Housing/Report/LSIC_58-06_Text_WEB.pdf> 37 – 41 which noted *inter alia* the paucity of lawyers with expertise in retirement villages. This was also discussed in the Queensland Parliament, Public Works and Utilities Committee, *Public Hearing – Inquiry into the Housing Legislation (Building Better Futures) Amendment Bill 2017*, Brisbane, Wednesday 13 September 2017, <<http://www.parliament.qld.gov.au/documents/committees/TUC/2017/I48HsngBetterFutures/I48-trns-13Sep2017.pdf>> 4 – 5.

⁴⁶ See Finn, Mukhtar, Kennedy, Kendig, Bohle, Rawlings-Way, above n 10, 217-242; The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, above n 5, 40; and Property Council of Australia, *2017 PwC/Property Council Retirement Census* (November 2017) <http://www.retirementliving.org.au/wp-content/uploads/2017/11/127054715_2017-PwC-Property-Co_v10-17.11.09-Final-Web-Version.pdf>.

⁴⁷ The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, above n 5, 37.

⁴⁸ Kirsten Bevin has noted that this resident-funded model has developed in response to what she calls ‘assumed home-ownership’ in Australia, where retirees sell their family home on the understanding that they are purchasing a different type of housing asset. See Bevin, above n 7, 3.

⁴⁹ For example, recent amendments to the *Retirement Villages Act 1999* (Qld) have introduced an 18-month time limit for the resale of a former resident’s home. If the sale cannot be effected within that time frame, then

their ingoing contribution, though there is no guarantee that this would be on favourable terms.

3. *Living in a Retirement Village*

In addition to the upfront payment of the resident's ingoing contribution, there are also continuing fees, commonly known as 'general service charges' and 'personal service charges', which are payable by the resident throughout the term of their occupation. Not only are these fees a significant ongoing expense for residents, but they usually continue to be payable for a period after the resident has vacated (or died) until the unit is resold. These fees are paid in exchange for services that are provided by the village – both general services which are provided to all residents, and personal services which are specifically requested by an individual.

The minimum services that must be provided by village operators are set out in the legislation and regulations that apply in each state and territory. . Standard obligations for village operators include maintaining the village's common areas and facilities, ensuring residents have access to their unit along with the common areas and facilities, keeping proper budgets and financial accounts for the village and making these available for review by residents or a residents committee.⁵⁰ Additional services that a village offers may be stipulated in a resident's contract. If village operators breach the obligations that they owe to residents, residents may seek recourse by bringing a claim through a tribunal, commencing other legal action through the courts, or making a formal complaint to the regulatory body who is capable of investigating breaches of that legislation.⁵¹ However there is currently a lack of minimum training and qualification requirements for village managers, which has raised concerns about the standard of services provided and the suitability of employees who are working with vulnerable elderly people.

the village is obliged to 'buy back' the residents' home at an agreed or valued price. Extensions of time can be granted in special circumstances, for example if this would cause financial hardship for the village. See s 63 and s 171A *Retirement Villages Act 1999* (Qld). Similar provisions exist under s 27 *Retirement Villages 2016* (SA). In Victoria, s 26 *Retirement Villages Act 1986* (Vic) imposes a shorter six month buy-back period for former non-owner residents.

⁵⁰ Rodney Lewis, *Elder Law in Australia* (LexisNexis, 2nd ed, 2012) 315-316 and The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, above n 5, 336-339.

⁵¹ Ibid.

There are also similar obligations regarding unit maintenance and behavioural standards which are owed by residents towards other residents, the village operator and their employees. Some of these restrictions can be overly onerous, for example, there may be limitations on residents' use of parking facilities (particularly in relation to caravans or visitor vehicles), visitors may be required to 'sign-in' and are subject to restrictions on the amount of time they spend at the village and how they can use communal facilities, if a resident intends to make alterations or additions to their home this usually need to be approved by the village first, and the village may retain the discretion to accept or reject an application to keep a pet (including if a pet is initially approved but is later determined to be a nuisance). These restrictions mean that residents may not necessarily be living the lifestyle of independence and choice that they believed they were buying into.

4. *Moving Out*

Further costs are involved at the stage when a resident wishes to exit the village and re-sell their right to reside in their unit. Often the resale process will not commence until the resident has terminated their contract and vacated the unit. Even once the unit has been vacated, ongoing charges – such as the general services charge – may continue to be payable for a period after termination.⁵² This can make it extremely difficult for elderly people who have spent a significant portion of their life savings on the ingoing contribution, and simply cannot afford to move to alternative accommodation while waiting to resell their home. In some cases this leaves residents feeling like they are 'trapped', as they have no option but to continue living in an environment that has become unsuitable for their needs.⁵³

The village also has a large amount of control over how the resale process is carried out, as they are usually responsible for arranging any refurbishment or renovation works and acting

⁵² For example, s 104 of the *Retirement Villages Act 1999* (Qld) provides that unless a unit is resold or the exit entitlement is paid out, residents remain liable for the full portion of their general services charges for a period of 90 days from the date of vacation, and then a percentage of those fees (based on the terms of their residence contract) for a further 6 months. See also The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, above n 5, 123.

⁵³ See Petersen, Tilse and Cockburn, above n 43, 239 and Meredith Griffiths, *Retirees spending thousands waiting for retirement village properties to sell* (17 August 2017) <<http://www.abc.net.au/7.30/retirees-spending-thousands-waiting-for-retirement/8818094>>.

as the sales agent for the unit. While the former resident will be liable for part or all of the selling costs, legislation in some states has limited the extent to which residents are responsible for reinstatement or refurbishment of the unit.⁵⁴ That said, in many of the jurisdictions there is little incentive for villages to act quickly when trying to promote the resale of a unit, given that they are able to retain the ingoing contribution and receive continuing payments of general service charges in the interim. Residents may have the option of engaging an independent agent to effect the sale, however this often comes with its own problems – not least of which is their limited ability to access to the home and host inspections in the village.

When a right to reside is re-sold, the village deducts a number of expenses from the resident's ingoing contribution before repaying the remaining amount to the resident (known as the resident's 'exit entitlement'). Deductions generally include the cost of selling the unit (both marketing and legal costs), sale commissions, share of capital gains or losses, the costs of refurbishing the unit before it is sold (this can involve significant renovation work and is more than just a 'bond clean' that would be performed at the end of a residential tenancy), and any 'exit fees' that are payable to the village. The most controversial of these costs is the exit fee (also known as a 'deferred management fee'), which is commonly between 25 and 40 percent of the resident's ingoing contribution or resale price.⁵⁵ This fee is calculated using complex formulas which are set out in the residence contract, with the amount of the fee usually increasing in proportion to the length of the resident's occupation of their unit.

It has been suggested that the 'exit fee' method of payment originated from the not-for-profit sector's desire to assist struggling retirees to enter a home for a lower upfront cost,⁵⁶ though village operators now make the vast majority of their profits from collecting these exit fees.⁵⁷ As Kirsten Bevin has explained, the rationale behind these payment structures seems to be

⁵⁴ For example, in Queensland the parties must negotiate in good faith to agree on what reinstatement work needs to be completed, this obligation only extends to making 'replacements or repairs that are reasonably necessary to be done to reinstate the accommodation to a marketable condition', and the work must be done within a fixed timeframe to minimise delays - see s 58 *Retirement Villages Act 1999* (Qld). Similar protections also exist in the Australian Capital Territory under s 218 – 220 *Retirement Villages Act 2012* (ACT) and New South Wales under s 162 – 165 *Retirement Villages Act 1999* (NSW).

⁵⁵ Latimer, above n 19, 15.

⁵⁶ See Finn, Mukhtar, Kennedy, Kendig, Bohle, Rawlings-Way, above n 11, 66 and Parker, above n 6.

⁵⁷ Adele Ferguson and Sarah Danckert, *Bleed Them Dry Until They Die* (26 June 2017) <<http://www.smh.com.au/interactive/2017/retirement-racket/bleed-them-dry/>>.

that, from the village operator's perspective, the longer a resident lives in the unit, the longer the village is delayed in profiting from that investment.⁵⁸ Industry advocates have defended exit fees as providing 'the only avenue for an operator to make a return on their investment in a village', with recurring service fees being set on a 'cost-recovery basis only'.⁵⁹ However, it is noteworthy to consider the allegations made by the joint Fairfax Media and Four Corners investigation, which stated that Aveo (one of the largest retirement villages companies in Australia) has a specific business strategy to "turn over" or churn approximately 10-12% of residents a year for profit⁶⁰ – with '[t]he more residents that leave and pay exit fees, the more profit for Aveo'.⁶¹

The continued use of 'exit fee' payment structures are problematic for a number of reasons. Firstly, the fees charged are excessive, and do not directly relate to the value of the services provided.⁶² Secondly, exit fees are also confusing for prospective residents as the fee structure and resale arrangements are unique to the retirement housing sector.⁶³ Because exit fees are often calculated using a number of factors that depend on the resale process and the resident's length of stay in the village, it is almost impossible for a resident to accurately predict what their future liabilities will be when deciding to enter into a village (or comparing options). Also, affordability is often a concern for those who would like to move into a retirement community, but are prevented from doing so because of the upfront cost.⁶⁴ If residents are already having difficulty paying upfront costs associated with buying-in to a village, then it is likely that the imposition of further exit fees will only serve to place them in a position of greater financial hardship when they choose to leave. This is particularly the case when a resident becomes unwell and, for medical reasons, needs to be relocated to other accommodation that offers a higher level of care. The reality, though, is that many residents do not account for these possibilities and simply expect that they will 'leave the village in a

⁵⁸ Bevin, above n 7, 9.

⁵⁹ Parker, above n 6.

⁶⁰ Adele Ferguson, *Aveo retirement village investigation has put the sector under a spotlight* (1 July 2017) <<http://www.smh.com.au/business/comment-and-analysis/aveo-retirement-village-investigation-has-put-the-sector-under-a-spotlight-20170630-gx2490.html>>. See also Adele Ferguson and Sarah Danckert, above n 27.

⁶¹ Adele Ferguson, Klaus Toft and Sarah Danckert, *Aveo: Exploitation of the elderly rife in retirement villages* (4 July 2017) <<http://www.abc.net.au/news/2017-06-24/elderly-exploited-in-aveo-retirement-villages/8645876>>.

⁶² For example, Aveo contracts require an exit fee payment of 35% of the entry price after just three years. See Aveo, *Aveo Statement* (26 June 2017) <https://www.aveo.com.au/wp-content/uploads/2017/06/GEG-2017_0626-Aveo-Statements.pdf>.

⁶³ See Finn, Mukhtar, Kennedy, Kendig, Bohle, Rawlings-Way, above n 11, 221-223.

⁶⁴ Ibid.

box’⁶⁵, with their children’s inheritance (rather than their own financial situation) being affected.⁶⁶

5. Summary of Issues

Despite these complexities, industry representatives continue to present the view that residence contracts are simply akin to a residential lease that also offers greater lifestyle benefits and security of tenancy. For example, in ‘A Guide to Aged Care and Retirement Villages in Australia for Investors and Prospective Operators’, an industry lawyer explains that residence contracts are:

‘the form of the agreement made between an operator and a resident to define the terms upon which a resident resides in the village and their rights upon departure. They act in a manner similar to a typical residential tenancy agreement but differ because retirement villages are a particular form of accommodation that provides additional elements of services, care, hospitality and community to the particular resident and the body of residents as a whole’.⁶⁷

The reality is that residence contracts are not as simple as a standard lease agreement. Retirement village contracts often exceed 100 pages in length, contain complex tenure and fee structures, and impose arguably more onerous obligations on residents.⁶⁸ Another key difference is that the ingoing contribution paid upfront by residents is usually an amount that is slightly less than would be paid to purchase real property at market value. Industry members have attempted to justify this ingoing contribution by suggesting that this amount is really similar in nature to a ‘bond’ payment for a lease, with the exit fees and other costs being deducted from that bond to compensate the village for the services and facilities provided over the course of the residency.⁶⁹ However it is clear that a departing resident is always going to be in a ‘far more precarious position than a departing tenant in a residential tenancy arrangement’, particularly with regards to the lengthy period that many outgoing

⁶⁵ David Wise, ‘Elder law: Retirement villages - who’d ever want to leave?: Helping your client avoid the exit pitfalls’ (2017) 37 *Proctor*, 20-22.

⁶⁶ Petersen, Minnery, above n 5, 830.

⁶⁷ Arthur Koumoukelis, *A Guide to Aged Care and Retirement Villages in Australia – For Investors and Prospective Operators* (2014) <<http://www.gadens.com/publications/Documents/A%20guide%20to%20Aged%20Care%20and%20Retirement%20Villages%20in%20Australia.pdf>> 6.

⁶⁸ Herd, above n 42.

⁶⁹ The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, above n 5.

residents must have to wait before receiving payment of their exit entitlement from the village.⁷⁰ The amounts involved are also vastly different, as a residential tenant can easily access any surplus equity that they hold, whereas a former retirement village resident will be left waiting to recoup their significant investment. If the right to reside in a retirement village is truly a tenancy product, then surely the tenancy component can only be viewed as one part of the agreement with the village – with the other component being a financial investment.⁷¹

C. *Issues with State and Territory Regulation*

While many of the problems with retirement village contracts exist on a national scale, there are further issues that have been brought about (or are exacerbated by) the state and territory level regulation that has been introduced over the last 30 years.⁷² In particular, state and territory governments have acted in a responsive manner in developing legislation to address problems with retirement villages as they arise. The current legislation and regulations can therefore be viewed as a product of evolution rather than design, which has resulted in a consistent failure by the states and territories to anticipate or keep up with changes in the industry. For example, there is a continued reliance on disclosure as a primary form of consumer protection, although federal regulators and policymakers have long dismissed disclosure regimes as being an ineffective regulatory tool (without other protective measures in place).⁷³

The most obvious problem with state and territory regulation is the lack of uniformity between those jurisdictions, which creates difficulties for residents and operators alike. For residents, the differences in legislation across jurisdictions hinders their ability to make comparisons between villages located in different states. The lack of uniformity may also

⁷⁰ Pnina Levine, ‘Security of tenure for retirement village residents in WA – Does the law walk the walk or just talk the talk?’ (2015) 40:1 *University of Western Australia Law Review*, 456.

⁷¹ Ibid. It has also been reported that other industry insiders have attempted to define the relationship between operators and residents as ‘co-venturers’, in that the departing resident and the operator both want to obtain the highest resale price possible from an incoming purchaser. However, as Pnina Levine points out, there is a very pronounced discrepancy between the rights and obligations of a departing resident and the village operator, and if any such ‘co-venturer’ relationship exists, it is most certainly an unequal one.

⁷² Lucy M Cradduck and Andrea Blake, ‘Retirement villages: time for a change?’ (2012) 3(8) *Australia and New Zealand Property Journal*.

⁷³ See Financial System Inquiry Committee, *Financial System Inquiry – Final Report* (7 December 2014) <http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf> 193 and Explanatory Memorandum, *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* (Cth) 5.

prevent residents from obtaining specialised legal and financial advice, and this issue was identified as a concern in a study of Queensland residents.⁷⁴ This perhaps reflects the reality that, because of the complexity and sheer length of these contracts, it can be prohibitively expensive for older people to engage a specialist lawyer or financial advisor to review them. This difficulty in accessing specialised advice may be even more onerous for retirees who are planning to move inter-state to be closer to family or coastal areas, and find themselves unable to obtain adequate advice from their existing solicitor and/or financial planner. It is important to consider that advice has the potential to guide resident decision-making, and as the Productivity Commission noted, '[t]he consequences for consumers of making the wrong decision are exacerbated by high exit costs'.⁷⁵ If uniformity was able to be achieved by legislating at a national level, it would be possible to simplify contracts to facilitate easy review and comparison between villages around Australia. It is also suggested that there would be a greater incentive for lawyers and financial advisors to specialise in this field as their potential client range would expand across jurisdictions.

Similarly, from an operator's perspective, the differences in legislation have inhibited industry investment, expansion and development.⁷⁶ In what an industry lawyer has described as a 'legislative minefield', the lack of uniformity means that operators need to consider the particular legislative requirements for each jurisdiction when considering opportunities for expansion, applying for development approvals, creating contract and disclosure documentation for prospective residents, and meeting ongoing management obligations.⁷⁷ The need to prepare different contracts for different jurisdictions creates uncertainty and increases legal and administrative costs, with a risk of incurring further financial penalties if regulations are breached.⁷⁸ In addition, operators must remain conscious of any amendments that are made to existing laws, and respond with changes to their contracts or practices if necessary. Here it is interesting to observe that even the more 'sophisticated' organisations who have been operating across jurisdictions for many years are still unable to produce a single contract that is capable of conforming with all of the state and territory legislation.

⁷⁴ See Lisa Bielby, 'Buyer beware.' (2014) Mar/Apr 2014 *Australian Ageing Agenda*: 28 and Petersen, Tilse and Cockburn, above n 45, 238 - 239.

⁷⁵ Productivity Commission, above n 32, 17.

⁷⁶ See Productivity Commission, above n 29, and The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, above n 5, 25.

⁷⁷ Lawyers Weekly, *Minters drives retirement overhaul* (18 November 2009)

⁷⁸ <https://www.lawyersweekly.com.au/news/13469-minters-drives-retirement-overhaul>; Herd, above n 42.

While achieving compliance across jurisdictions may be easier for those operators who are accustomed to managing large national portfolios, the costs involved could be prohibitive for smaller organisations who are considering expanding to other states or territories.⁷⁹ This inference can be drawn from the disparity in the market shares between some of the larger national operators, compared to other operators who own villages within one or a few jurisdictions, suggesting that there is a distinct lack of cross-jurisdictional competition between larger and smaller operators.

From a policy perspective, the different legislative regimes make it difficult to identify and respond to systemic issues that exist – with each state or territory being slow to acknowledge these problems and amend their existing legislation. In addition, many residents' complaints may not be actionable because of the under-resourced state departments who are responsible for administering the legislation. In 2011 the Productivity Commission's *Caring for Older Australians - Productivity Commission Inquiry Report* (the '*Productivity Commission Report*') recommended that retirement village regulation and enforcement should remain the responsibility of state and territory governments, with ASIC, the ACCC and the Australian Prudential Regulation Authority ('APRA') available to address broader consumer disputes that may arise.⁸⁰ However, as the ABC and Fairfax Media have noted, these state departments are 'overstretched and underfunded', which often results in only the most serious complaints being investigated.⁸¹ Similarly, these departments are usually incapable of pursuing matters unless they involve breaches of penalty provisions under the legislation. The crux of the problem, as Pnina Levine has explained, is that 'regulation of the retirement village industry, including any reforms made to this, will only be as effective as the extent to which there are adequate regulatory mechanisms to enforce compliance'.⁸² It is suggested that ASIC and the ACCC would be able to provide a stronger level of regulation and consumer protection that is necessary in this industry. While similar issues regarding the treatment of individual complaints may still arise at a federal level, the benefit of this broader

⁷⁹ The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, above n 5, 107.

⁸⁰ Productivity Commission, above n 29, 315-317.

⁸¹ Adele Ferguson, Sarah Danckert and Fergus Hunter, *Calls for federal inquiry into retirement villages amid Aveo scandal* (27 June 2017) <<http://www.smh.com.au/business/banking-and-finance/calls-for-federal-inquiry-into-retirement-villages-amid-aveo-scandal-20170627-gwz8nb.html>>.

⁸² Levine, n 70, 436.

approach is that the cases that are investigated and prosecuted by ASIC or the ACCC would have a wider-reaching impact as they would be followed nationally.⁸³

Another issue that has become increasingly apparent as we are faced with the challenges of an ageing population is the integration of aged-care facilities into retirement villages. As discussed above, it is now the case that some operators have expanded their business into the aged-care industry, and are offering in-home aged care packages, or co-locating aged-care facilities with retirement villages to cater to residents who want to smoothly transition to higher care when needed.⁸⁴ However, inconsistencies between the state laws governing retirement villages and federal laws governing aged care mean that residents cannot be guaranteed a place in the co-located aged care facility when it is needed, and it is unclear the extent to which the two jurisdictions overlap.⁸⁵ An important point here is that aged care placements require an assessment by MyAgedCare under the existing Commonwealth legislation, and that legislation has not been designed to operate in conjunction with the state and territory retirement village laws. Another issue is that aged-care facilities usually require an upfront capital payment, which can be deferred (subject to interest) while the resident waits to re-sell their right to reside in the unit that they have now vacated. This clearly places village operators in a position of conflicted interests, when they are responsible for the re-selling of a resident's home, but are simultaneously collecting interest on that upfront payment for the aged care home until the sale is finalised.

In considering the need for reform at a federal level, it is significant to note that the *Parliamentary Inquiry* recognised many of these issues back in 2007, but proceeded to make a recommendation that state and territory governments should continue to be responsible for regulation, and aim to pursue nationally consistent retirement village legislation.⁸⁶ Other

⁸³ In addition, by bringing retirement villages within the scope of federal consumer credit regulation and with legal precedent applying across borders, there would be an increased capacity for the consumer protection legal sector to move into the space of retirement village law. It is expected that this would result in greater efficiencies in the non-government service delivery sector (creating better value for government funding that is dedicated to consumer advocacy services). Likewise, it could be envisioned that there would be a shift away from state-based private sector specialists in retirement village law, with room for general consumer credit lawyers to extend their areas of practice to this sector. By shifting regulation from a niche area of state-based law to a national system that is aligned with existing consumer credit laws, it could be possible to reduce the legal costs associated with retirement village contracts for both consumers and operators.

⁸⁴ Productivity Commission, above n 32, 33.

⁸⁵ Ibid, 103.

⁸⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs Committee, above n 34, 226.

recommendations included that the ACCC (together with state and territory fair trading offices) should form a working party to examine the nature of retirement village contracts, with a view to improving consumer protection provisions.⁸⁷ It is now ten years since those recommendations were made, and no such reform has been achieved. On the contrary, recent amendments in some jurisdictions have not been directed towards unification and instead have focused on addressing local issues that have arisen under their existing legislative regime. In an industry that is rapidly expanding and evolving, state and territory legislation is incapable of adequately responding to issues that arise on a national scale. For these reasons, it is apparent that the existing approach to unified regulation has failed, and there is a clear need for national intervention to address these issues.

V. THE CALL FOR NATIONAL REGULATION

A. *Public Support for Reform*

In June 2017 Federal Aged Care Minister Ken Wyatt suggested that the federal government would expedite a review of the existing legislation with all states and territories, in light of the issues raised by the joint ABC and Fairfax Media investigation, the 2007 *Parliamentary Inquiry* and the 2011 *Productivity Commission Report*.⁸⁸ This approach is supported by former ACCC chairman Allan Fels who described the issues surrounding the industry as the ‘greatest untouched consumer protection issue’, stating that ‘vigorous’ action was needed from all relevant law enforcement agencies to clean up the industry.⁸⁹ A similar position has also been taken by Age Discrimination Commissioner Kay Patterson.⁹⁰

In addition, there appears to be bipartisan support for reform of this nature, with Labor opposition leader Bill Shorten calling for urgent action to be taken by the federal government, and the Greens spokesperson on Ageing, Senator Rachel Siewert, also suggesting there is a

⁸⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs Committee, above n 34, 215.

⁸⁸ The Hon Ken Wyatt AM, MP, *Ministerial statement on retirement homes regulation* (27 June 2017) <<http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2017-wyatt055.htm>>.

⁸⁹ Ferguson, Danckert and Hunter, above n 83.

⁹⁰ Meredith Griffiths, *Ken Wyatt promises action on regulating retirement villages after ‘exploitation’ exposed by Four Corners* (27 June 2017) <<http://www.abc.net.au/news/2017-06-27/calls-for-tougher-laws-regulating-retirement-villages/8653314>>.

need for national action.⁹¹ On 31 August 2017 the Legislative and Governance Forum on Consumer Affairs (comprising ministerial representatives from the Commonwealth, Australian states and territories, and New Zealand) noted the recent allegations of unfair practices against older Australians in retirement villages. The ministers agreed to direct Consumer Affairs Australia and New Zealand ('CAANZ') to undertake further investigation into the industry, with the specific aim of identifying regulatory gaps that allow unfair practices to continue.⁹²

Many advocacy organisations have also publicly expressed the view that national regulation is needed to adequately address these issues. The chief executive for the Council on the Ageing Australia ('COTA'), Ian Yates, has argued that consistent legislation is essential, particularly for multi-jurisdictional operators who may have higher resident costs depending on the complexity of their contracts (from 20-30 pages in South Australia to more than 100 in New South Wales).⁹³ COTA also share the view that retirement village contracts are a financial product and should be regulated by ASIC and the ACCC.⁹⁴ Ian Henschke, the chief advocate for National Seniors Australia, has also made similar statements about the need for a national approach.⁹⁵

B. Basis for National Regulation

While there is clearly support for Commonwealth intervention in this area, it is also necessary to consider how this can be achieved constitutionally. No matter how strong the policy arguments may be, it will not be possible to implement a federal overhaul of the system without a legitimate constitutional basis. Under the *Constitution*, the Commonwealth does not have any power to specifically regulate the retirement village industry, however there are

⁹¹ Ferguson, Danckert and Hunter, above n 83.

⁹² Legislative and Governance Forum on Consumer Affairs, *Joint Communiqué – Meeting of Ministers for Consumer Affairs* (31 August 2017)

<https://cdn.tspace.gov.au/uploads/sites/86/2017/08/CAF_Communique_August_2017.pdf> 3.

⁹³ Charles Miranda, *Federal Government tells states to create uniform retirement village laws to protect seniors* (4 November 2017) <<http://www.adelaidenow.com.au/lifestyle/federal-government-tells-states-to-create-uniform-retirement-village-laws-to-protect-seniors/news-story/43a69d3620f342eb215da484d0e54b32>>.

⁹⁴ COTA Australia, *Retirement Village Residents Often Left in the Dark Over Complex Contracts* (27 June 2017) <<http://www.cota.org.au/australia/news/newslist/2017/retirement-village-residents-often-left-in-the-dark-over-complex-contracts.aspx>>.

⁹⁵ Gail Burke, *Retirement village fees, contract reform proposed in Queensland to better protect seniors' rights* (9 July 2017) <<http://www.abc.net.au/news/2017-07-09/retirement-village-laws-change-qld-better-protect-seniors-rights/8691632>>.

multiple avenues which the federal government could look to as a source of legislative power.

Firstly, it is argued that the federal government could rely upon the corporations power under s 51(xx) of the *Constitution*, as was done previously to regulate retirement villages under the *Companies Act 1981* (Cth) before the 1985 amendments. Section 51(xx) authorises the Commonwealth to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. The scope of that power has been broadly interpreted in the recent case law, with the significant expansion of the interpretation of ‘constitutional corporation’ since the *New South Wales v Commonwealth* (2006) 229 CLR 1 (‘*WorkChoices*’) case extending coverage to charitable or not-for-profit corporations, including incorporated associations.⁹⁶ It is suggested that the trading and financial activities of those entities could be governed under this power, in a similar manner to the federal regulation of charitable organisations under the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth). In this regard, it is of note that the 2007 *Parliamentary Inquiry* clearly contemplated this when stating that:

The Committee believes that the ACCC, in consultation with its state and territory fair trading colleagues, should be playing a stronger role in monitoring consumer protection for retirement village residents. While the matter should continue to be managed at the state level for the time being, should there be insufficient improvement in the level of protection for consumers, the Australian Government should consider regulating this industry using its powers under Corporation legislation.⁹⁷

The difficulty with this approach is that the makeup of the retirement village industry currently involves a mix of public or private corporate entities and not-for-profit organisations (whose structure ranges from private or public companies, incorporated associations, or other unincorporated entities).⁹⁸ As the power under section 51(xx) is

⁹⁶ See M. McGregor-Lowndes and S. Bitomsky, ‘Do Nonprofit Organisations “Trade” Under The New Work Choices Legislation?’ (2007) 59(1) *Keeping Good Companies*; John Williams, ‘The Constitution and Workplace Relations Act 1996’ (2006) 16(2) *The Economics and Labour Relations Review*, 62; Andrew Stewart and Elizabeth Priest, ‘The Work Choices Legislation: An Overview’ (2006) *Federation Press* <<http://www.federationpress.com.au/pdf/WorkChoicesLegislation0206>>

⁹⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs Committee, above n 34, 215.

⁹⁸ For example, according to the Queensland Government’s Department of Housing and Public Works’ database of registered retirement village schemes in Queensland, approximately 44% are operated by private corporations, and approximately 23% are operated by public corporations (with some of these public and private

unlikely to extend to some of those other entities such as trusts, partnerships or unincorporated associations, the Commonwealth would need to look elsewhere for a basis to regulate those other types of organisations (or force them to incorporate).

If the corporations power is unable to provide a sufficient basis for legislating in this area, the federal government could seek a state referral of power under section 51(xxxvii) of the *Constitution*. This approach would mirror the strategy that was adopted by COAG in relation to competition and consumer laws in 2008, when it was agreed that greater consumer protections needed to be implemented on a national scale in response to the GFC.⁹⁹ However it should be acknowledged that states are generally reluctant to agree to a referral of powers unless there is substantial political will backing the decision, which will generally require the states to agree that the issue is one of national importance.¹⁰⁰ As for retirement villages that are located in the Northern Territory or the Australian Capital Territory, the Commonwealth can simply rely on the territories power under section 122 of the *Constitution* to make laws about the operation of retirement villages in those territories.

If federal regulation is not constitutionally possible, an alternative option would be for COAG to revisit this issue and determine whether harmonisation of legislation across the states and territories would be viable. This follows the recommendations from the 2011 *Productivity Commission Report*, which suggested that ‘while the development of consistent principles

corporations also being registered as charities with the Australian Charities and Not-for-profits Commission ('ACNC')). The remainder are operated by registered as charities with ACNC (with approximately 19% being incorporated associations and 13% being unincorporated associations). Only one village appears to be listed in the name of an individual person, and it does not actually have any accommodation units (so would not be operational). See Queensland Government, Department of Housing and Public Works, *Retirement Village Schemes registered with the Department of Housing and Public Works* (12 February 2018).
<<https://data.qld.gov.au/dataset/retirement-village-schemes-registered-with-the-department-of-housing-and-public-works/resource/4868bd92-438a-46b9-b28e-d3e57d093f04>>.

⁹⁹ That 2008 COAG agreement provided the basis for the development of the *National Consumer Credit Protection Act 2009* (Cth), the *Competition and Consumer Act 2010* (Cth) and other national reforms. Before those reforms were introduced, fair trading and consumer credit were regulated at a state and territory level, and faced many similar problems to those that are encountered by retirement villages today. See Council of Australian Governments, *Council of Australian Governments Meeting Communiqué* (2 October 2008) <<http://webarchive.nla.gov.au/20130329014000/http://www.coag.gov.au/node/290>> and Gail Pearson and Richard Batten, *Understanding Australian Consumer Credit Law: A practical guide to the National Consumer Credit reforms* (CCH Australia Limited, 1st ed, 2010) 3.

¹⁰⁰ For example, in relation to anti-terror laws COAG agreed that given ‘the importance of comprehensive, national coverage of terrorism offences... the states would remove any lingering constitutional uncertainty by means of constitutional “references” to the Commonwealth Parliament in accordance with s 51 (xxxvii)’ – see Andrew Lynch, ‘State Referrals and Terrorism Law Reform Paralysis: Cause and Effect?’ (2011) 35 *University of New South Wales Faculty of Law Research Series*; see also Justice Robert French, ‘The referral of state powers – cooperative federalism lives?’ (2003) 3 *Federal Judicial Scholarship*.

and regulation should proceed at the state and territory government level, [the Council of Australian Governments] COAG would be an appropriate vehicle to oversee the development of nationally consistent legislation'.¹⁰¹

C. Regulation of Retirement Village Contracts as a Financial Product

At this stage it is relevant to consider that the reluctance of the 2007 *Parliamentary Inquiry* to make any proposals about federal regulation of retirement villages should be viewed as a ‘point in time’ issue, which has lost its relevance in the post-GFC landscape. Competition and consumer laws (including consumer credit regulation) have now been successfully implemented at a federal level, successive ombudsman services have been introduced (and are now transitioning into the Australian Financial Complaints Authority (‘AFCA’) ‘one-stop-shop dispute resolution scheme’), and there is a broad movement towards better and more efficient consumer protection on a national scale.¹⁰² Federal regulation of retirement villages is no longer the radical concept it may have seemed in 2007, with a clear framework already available in the form of financial product regulation, which offers a range of benefits to consumers.

Retirement villages could easily be brought within the scope of financial product regulation by amending the *Corporations Act 2001* (Cth) (the ‘*Corporations Act*’) and the *Australian Securities and Investments Commission Act 2001* (Cth) (the ‘*ASIC Act*’) to specifically include investment in a retirement village as a type of ‘financial product’. Under both of those acts, a ‘financial product’ is generally defined as a facility through which, or through the acquisition of which, a person does one or more of the following: (a) makes a financial investment; (b) manages financial risk; or (c) makes non-cash payments.¹⁰³ It is easy to see that this definition could encompass the type of rights that residents acquire when they buy-in to a village; for example, the definition of ‘makes a financial investment’ applies where an investor gives money to another person and ‘the other person uses the contribution to generate a financial return, or other benefit, for the investor; and the investor has no day-to-

¹⁰¹ Productivity Commission, above n 29, 322.

¹⁰² Australian Government – The Treasury, *Australian Financial Complaints Authority* (2017) <<https://treasury.gov.au/consultation/c2017-232832/>>.

¹⁰³ See *Corporations Act* s 763A, *ASIC Act* s 12BAA.

day control over that use of the money to generate the benefit.¹⁰⁴ Purchasing an interest in a retirement village is clearly an upfront payment of money that is made by the resident to another person (i.e. the village), which is then used by the village to generate a benefit (i.e. the right to reside and other accompanying facilities/services) along with a possible financial return upon resale of the unit. However, section 765A prohibits an ‘excluded security’ from being a financial product – and section 9 specifically states that an interest in a retirement village is an excluded security. This means that a resident’s interest in a retirement village will not fall within the definition of ‘financial product’ unless these sections were amended.

The current exclusion of retirement villages from the *Corporations Act* and the *ASIC Act* reflects the amendments that were made to the *Companies Act 1981* (Cth) back in 1985, when retirement villages were excluded from the definition of ‘prescribed interest’ because interests in retirement village schemes were viewed as ‘real estate’ rather than ‘investments’.¹⁰⁵ While this amendment may have been justified at the time it was made, the industry has changed significantly since then, and it needs to be acknowledged that ownership of the right to reside in a retirement village is in no way synonymous with ‘real estate’ as that term is understood today. To support this position, Adjunct Professor Paul Latimer draws an analogy with time-shares, which are considered ‘managed investment schemes’ and therefore regulated as ‘financial products’.¹⁰⁶ It is noted that many retirement villages resemble time-shares in that they provide a similar style of accommodation with accompanying facilities, with the only significant difference being that time-shares cater for short term vacations whereas retirement villages are specifically marketed as long term accommodation for elderly people.¹⁰⁷

A similar position is taken by Professor Timothy Kyng, who argues that retirement village contracts should be distinguished from agreements to purchase real estate, as they are closer in nature to complex financial and insurance products.¹⁰⁸ He explains that when residents are purchasing their ‘right to reside’, the lack of actual ownership means that the interest

¹⁰⁴ *Corporations Act* s 763B.

¹⁰⁵ Latimer, above n 19, 23.

¹⁰⁶ Ibid.

¹⁰⁷ See also *Corporations Act* s 763B, *ASIC Act* s 12BAA(4) and Australian Securities and Investments Commission, *Regulatory Guide 160 – Time-sharing schemes* (June 2012) <<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-160-time-sharing-schemes/>>.

¹⁰⁸ Timothy Kyng, *Why retirement village contracts need to be regulated like insurance* (27 June 2017) <<http://theconversation.com/why-retirement-village-contracts-need-to-be-regulated-like-insurance-80059>>.

acquired is really similar to a life interest in a property.¹⁰⁹ Recurring general services charges can then be viewed as a kind of ‘life annuity’, with the payment of the exit entitlement (minus the exit fee, which is based on how many years they have resided in the village) being a complex type of life insurance product.¹¹⁰ As he explains:

Using actuarial methods we can compute the economic value of each of the different components, and we can then figure out the component of the cost that they paid that pays for the right to reside there as a sort of lump sum amount. We can then convert that to an income stream as a kind of life annuity. There would be an indexed life annuity of the equivalent rent that they have been paying. That is what I have been calling the comparison rent...¹¹¹

For example, ‘for the 85-year-old female, two-thirds of the \$1 million is going on buying an insurance product. Approximately one-third is going on buying the right to live there.’¹¹² On this basis, Kyng argues that individuals are paying excessive amounts for what should be viewed as an insurance product, despite the fact that the village is not licensed to sell insurance or regulated like an insurance company. The particular risk here is that these companies are not governed by the same strict regulations with regards to capital adequacy or solvency, so residents are exposed to the risk that they may not be paid out the amount that they are entitled to when their contract is terminated.¹¹³

It is proposed that these risks could be appropriately dealt with by amending the definition of ‘financial product’ to expressly include a resident’s investment in a retirement village scheme. Including retirement village contracts within the definition of ‘financial products’ would bring them within the scope of ASIC’s function to ‘promote the confident and informed participation of investors and consumers in the financial system’.¹¹⁴ In particular, retirement villages would be subject to financial services regulation under Chapter 7 of the *Corporations Act* and the consumer protections under Part 2 Division 2 of the *ASIC Act*.¹¹⁵ This would benefit consumers by providing additional protections against unconscionable conduct, misleading representations and unfair terms under the *ASIC Act*, and would make

¹⁰⁹ Transcript of Proceedings, *Inquiry into the retirement housing sector* (Standing Committee on Legal and Social Issues, 16 November 2016)

<https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Retirement_Housing/FINAL-SCLSI-RHS-16112016-MU.pdf> 10-13.

¹¹⁰ Ibid.

¹¹¹ Ibid, 11-12.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ *ASIC Act* s 1(2)(a)

¹¹⁵ Ibid, 25.

room for an industry code to be developed and taken into account when assessing a village operator's behaviour in light of those protections. This level of regulation would also impose high standards of conduct and expertise on village sales agents, including requiring them to be licensed by ASIC before giving advice about or dealing in the 'financial product' and requiring villages to provide comprehensive product disclosure.¹¹⁶ If classified as a financial product, retirement village contracts would also be covered by the proposed design and distribution obligations and ASIC product intervention power, which would mean the retirement village product would need to be designed and distributed appropriately, and ASIC would have greater power to intervene.¹¹⁷ Imposing this higher level of ASIC regulation and control would represent a significant step towards addressing the imbalance of power that currently exists between villages and residents, particularly by creating additional compliance obligations in relation to the terms of residence contracts. This would recognise the need for greater regulatory intervention at the pre-contractual stage (rather than simply relying upon disclosure documentation as an effective method of protecting consumers).

D. Overarching Legislative Framework

When considering how retirement village contracts could be regulated by our federal credit laws, it should also be recognised that the financial product only forms one component of a retirement village contract – with the other component being an agreement to provide accommodation and accompanying services to a resident (such as maintenance services, management of village operations, and personal services). This second component is closer in nature to the type of services that are delivered by other accommodation services or aged care facilities, and should also be regulated to ensure that residents' interests continue to be protected once they have moved into a village. While these are really two discrete aspects of retirement village contracts which operate separately from one another, they are currently lumped together under state and territory laws that fail to recognise the complex, dualistic nature of these contracts. By drawing a distinction between the two separate parts of a retirement village contract – the financial product and the services agreement – we can appreciate the need for national legislation to create a two-pronged regulatory approach. It is

¹¹⁶ Ibid.

¹¹⁷ Australian Government, The Treasury, *Design and Distribution Obligations and Product Intervention Power – Draft Legislation* (21 December 2017) <<https://treasury.gov.au/consultation/c2017-t247556>>.

proposed that a framework for national regulation of retirement villages should be broken into two main parts; one regulating the financial product component of a retirement village contract (via our existing consumer credit legislation), and one regulating the service delivery component. ASIC would then be able to operate as the regulatory body for the financial product aspect of the contract, whereas the ACCC would have a similar role in regulating the services delivered by the operator.

Although it might seem unusual to attempt to regulate the services component of the retirement village contract under financial product legislation, it should be noted that there is already a structure within the existing financial products regime to deal with financial products that are linked with goods and services.¹¹⁸ A similar structure could be followed to ensure that the provider of the financial product remains liable under the services contract in certain circumstances, and so there are clear rules setting out the resident's liability in the event that they choose to terminate either contract. Following this approach, retirement village contracts themselves could potentially be presented in a standard form as two separate but connected contracts. This would make it easier for consumers to recognise the distinction between the financial product that they are purchasing and the contract for services that they are entering into.

E. Development of an Industry Code

In addition to the consumer protections that could be introduced under the financial product legislation, s 1101A of the *Corporations Act* would allow ASIC to approve an industry code of conduct to set legally enforceable standards for retirement villages. The Retirement Living Council (as a division of the Property Council of Australia) have already drafted the *Retirement Living Code of Conduct*, which they state has been developed in consultation with industry stakeholders, including governments, operators, and resident leaders through the Australian Retirement Village Residents Association.¹¹⁹ However that code adds little to the existing state and territory regulatory regime, except for creating a complaints handling

¹¹⁸ See Part 7, Division 4 of the NCCP Act regarding linked credit providers and tied contracts.

¹¹⁹ Retirement Living Council, *Retirement Living Code of Conduct Draft for Consultation* (29 August 2017) <<http://www.retirementliving.org.au/wp-content/uploads/2017/12/Retirement-Living-Code-of-Conduct-Draft-for-Consultation.pdf>>.

process and providing assessment and compliance standards. In addition, as a document prepared by the leading industry representative body, there are clear concerns about whether the code adequately balances the interests of operators with the need to protect the rights of residents. Rather than accepting this unsatisfactory draft *Retirement Living Code of Conduct*, it is proposed that a uniform best practice code for the industry could be developed in accordance with ASIC *Regulatory Guide 183*.¹²⁰

Alternatively, Professor Timothy Kyng has suggested that the NCC itself could be used as a potential model code.¹²¹ Here, it is not proposed that interests in retirement villages should fall within the scope of ‘credit products’ as that term is defined under the NCCP Act (although it is certainly the case that if a credit contract is entered into to pay for the interest in the retirement village, then that Act may also apply). Rather, there are a number of provisions in the NCC which could easily be adopted to regulate the retirement village industry. For example, Professor Timothy Kyng has noted that the comparison rate regime under Part 10 of the NCC could also be implemented in the retirement village sector, using similar metrics to calculate a ‘comparison rent’ that must be disclosed to prospective residents.¹²² This would make it easier for prospective buyers to calculate the expected cost of their retirement village investment, and also make financial comparisons between different villages and other accommodation options.¹²³

In addition, the NCC creates obligations regarding the content of contracts and disclosure, imposes limitations on representations made in advertising or by salespeople, governs how changes to contracts can be made, regulates how credit can be offered and payment can be accepted, sets restrictions on how fees and interest can be imposed (including setting fixed costs), imposes a requirement to provide statements of account and notification of certain

¹²⁰ Australian Securities and Investments Commission, *Regulatory Guide 183 – Approval of financial services sector codes of conduct* (1 March 2013) <<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-183-approval-of-financial-services-sector-codes-of-conduct/>>.

¹²¹ Transcript of Proceedings, *Inquiry into the retirement housing sector*, above n 103, 10-14.

¹²² Timothy Kyng, ‘Retirement Villages: Comparison Rent and other Metrics’ (Presentation to the Parliament of Victoria Inquiry into the retirement housing sector, 16 November 2016, *Legislative Council Committee Room, Parliament House, Spring Street, Melbourne*)

<https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Retirement_Housing/RH-Presentation-16112016-MU.pdf>.

¹²³ Kyng has also developed an online calculator tool to allow prospective residents to make these comparisons themselves. See The Senior, *Comparing retirement villages made easy* (31 August 2017) <<https://www.thesenior.com.au/lifestyle/comparing-retirement-villages-made-easy/>>.

charges, creates provisions for consumers suffering from hardship, provides remedies for consumers affected by unjust transactions, regulates termination and enforcement of contracts against consumers, creates offences for breaching the code, and empowers ASIC to represent the interests of consumers in proceedings. This framework has provided the basis for the comprehensive regulation of consumer credit at a national level, and could be adopted in developing a similar code to regulate retirement villages – which may provide a new way of overcoming some of the problems that exist at a state level. For example, if villages were required to take prospective buyers' financial positions into account when offering units for sale, this could reduce the number of residents who move into a village without fully appreciating the financial consequences of that decision. Similarly, if villages had to give due consideration to residents who were legitimately in situations of financial hardship, they may not be able to justify withholding exit entitlements for a lengthy period of time (for example when residents are forced to relocate to aged care). These are mechanisms that have been in place for many years to reduce unconscionable practices by credit providers, and could also be used for a similar purpose in the area of retirement villages.

F. Dispute Resolution

In considering how our existing financial product regime could be applied to retirement villages, it is important to appreciate that many older people currently experience difficulty representing their interests to village operators or advocating on their own behalf in mediation or tribunal proceedings, particularly given the imbalance of power that exists between residents and village operators, along with the cost, time and complexity involved in bringing a matter before a tribunal.¹²⁴ Where there has been a breach of consumer law by a village operator and the state or territory law does not create its own cause of action, residents may be even less willing to bring the matter before a higher court due to the additional cost and difficulties involved. Also, from an operator's perspective, relying on litigation as a dispute resolution mechanism can also be damaging for resident's health and welfare, and has the potential to create an unhappy atmosphere of 'disaffected residents' at a village.¹²⁵ For these reasons, it is expected that similar issues will continue to exist under a federal regime,

¹²⁴ Michael Barnett and Robert Hayes, 'Not Seen and Not Heard: Protecting Elder Human Rights in Aged Care' (2010) 45 *University of Western Sydney Law Review*.

¹²⁵ The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, above n 5, 124.

and in order to implement meaningful change in this area, there is a need to consider the enforcement and dispute resolution mechanisms that are available, and whether they will actually be accessible for the people who need them most.

Firstly, in relation to ASIC's proposed regulatory role, it would be necessary to ensure that ASIC are adequately resourced to administer the licensing regime and enforce federal regulations against village operators.¹²⁶ In this regard it is important to note the concerns raised by the New South Wales' Retirement Village Residents Association, who suggested that large federal bodies such as ASIC will not have the capacity to deal with numerous complaints from individual residents (in the manner that state-based enforcement agencies currently do).¹²⁷ While it is admitted that issues with ASIC's resourcing could create difficulties with this approach, the advantage of a federal scheme is the possibility that ASIC enforcement will have a deterrent impact across the country – with the prospect of federal court actions having broader reaching implications in comparison to actions brought at a state or territory level. There is also capacity for this workload to be shared with the ACCC, who could have greater involvement in the issues that arise when 'living in' a village (as opposed to the role of ASIC in relation to the financial aspects of these transactions).

However it is important to acknowledge that the role of large federal bodies such as ASIC is not to advocate on behalf of individual issues, but rather to pursue strategic litigation of systemic issues. Accordingly, individuals would need to be provided with other avenues to resolve 'day to day' issues that arise under their retirement village contracts, and there is a clear need for a federal regime to also introduce an accessible, timely, low-cost and binding dispute resolution mechanism for this purpose. In this regard, it is helpful to note that the recent Victorian parliamentary *Inquiry into the retirement housing sector* recommended that a dispute resolution body or ombudsman be introduced to determine disputes.¹²⁸ For some

¹²⁶ It is acknowledged that since around 2009, ASIC's workload has significantly increased as they have taken on the supervision of credit activity (which was previously performed by the states), and similarly in relation to the supervision of the stock exchange from the ASX. Over this time, ASIC's ability to take enforcement action has also been hampered by decreases to their resources. Without the necessary resources being provided to allow ASIC to perform this role in relation to retirement villages, a federal regime may be of little practical worth.

¹²⁷ Miranda, above n 87.

¹²⁸ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into the retirement housing sector* (March 2017) <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Retirement_Housing/Report/LSIC_58-06_Text_WEB.pdf> xi.

time now, resident advocacy bodies have also been calling for the introduction of an ombudsman-type service at a state level to provide an alternative to court or tribunal litigation.¹²⁹ Following these recommendations, it is proposed that a national retirement village ombudsman should be established as an ASIC-approved external dispute resolution scheme, which could then be appropriately and efficiently included as a specialist branch of AFCA.¹³⁰ Not only would a Commonwealth ombudsman provide a practical dispute resolution mechanism for residents, but it would also encourage both parties to resolve minor issues in a quick and inexpensive manner, and hopefully build the capacity of residents to self-advocate where possible.¹³¹

VI. CONCLUSION

The Four Corners and Fairfax Media joint investigation in 2017 significantly raised the public awareness of the issues surrounding retirement villages. In drawing attention to this topic, many existing and prospective residents were prompted to question the terms of their residence contracts and reconsider whether their ‘investment in a lifestyle’ was really worth it. Meanwhile, village operators have been engaged in extensive public-relations exercises to rebuild their reputations amongst an atmosphere of dwindling consumer confidence. Most notably, Aveo have suffered from falling share prices and have responded with new residence contracts that are marketed as having simplified terms, ‘no exit fees’ and guaranteed resale within 6 months of termination.¹³² This appears to have resulted in positive outcomes for prospective residents, who now occupy a better bargaining position when it comes to negotiating the terms of their residence contract. However the situation is not so promising for those residents who are already locked-in to their existing contracts, and may be finding it

¹²⁹ See Pat McGrath, *Consumers Rights Group Push for Ombudsman to Oversee Retirement Village Sector* (1 September 2015) <http://www.abc.net.au/news/2015-09-01/push-for-retirement-village-sector-ombudsman/6741438?utm_source=sm>.

¹³⁰ This would form part of the Australian Financial Services Licence requirement - see *Corporations Act* 912A(1)(g) and (2), and Australian Securities and Investments Commission, *Regulatory Guide 165 – Licensing: Internal and external dispute resolution* (2 July 2015) <<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-165-licensing-internal-and-external-dispute-resolution/>>

¹³¹ Latimer, above n 19, 20-21.

¹³² Adele Ferguson and Sarah Danckert, *Aveo shares sink on allegations of poor treatment* (26 June 2017) <<https://www.smh.com.au/business/banking-and-finance/aveo-shares-sink-on-allegations-of-poor-treatment-20170626-gwyi7d.html>>; Sarah Danckert, *Aveo’s sales of existing retirement units slump 42 per cent* (14 February 2018) <<https://www.smh.com.au/business/banking-and-finance/aveo-s-sales-of-existing-retirement-units-slump-42-per-cent-20180214-p4z0cn.html>>; Aveo, *Fees and charges* (2018) <<https://www.aveo.com.au/retirement-resources/fees-and-charges/>>

even harder to negotiate with their village operator or re-sell their home in the current market. Ultimately, it is difficult to imagine that any long-term change will occur without legislative action being taken to improve the rights of existing (as well as prospective) residents.

At a policy level, the recent media attention has breathed new life into a topic that has been sitting on the backburner for over 10 years since the 2007 *Parliamentary Inquiry* and the subsequent recommendations made by the 2011 *Productivity Commission Report*. While some state and territory governments have attempted to respond to the media attention with amendments to their existing legislation, it has become apparent that uniformity will not be achieved through the disparate state-level laws that are currently in place. In addition, there are problems which continue to exist on a national level and should be regulated by the federal government in collaboration with ASIC and the ACCC. There is a clear argument that national intervention through the regulation of retirement village contracts as ‘financial products’ would be beneficial for residents and operators alike, and the major political parties and resident advocacy bodies have expressed public support for reform of this nature.

Accordingly, it is proposed that now is an appropriate time for the federal government to intervene, while there is considerable public and political support for national regulation of the sector. Retirement village contracts are financial products, and it’s time for them to be treated accordingly.

BIBLIOGRAPHY

A. Articles

Barnett, Michael and Robert Hayes, ‘Not Seen and Not Heard: Protecting Elder Human Rights in Aged Care’ (2010) 45 *University of Western Sydney Law Review*

Barrie, Helen, ‘Retirement villages capitalise on aged care changes’ (2 November 2017) *Australian Aging Agenda*, 18

Bevin, Kirsten, ‘Shaping the Housing Grey Zone: An Australian Retirement Villages Case Study’ (2017) *Routledge Urban Policy and Research*

Bielby, Lisa, ‘Buyer beware.’ (2014) Mar/Apr 2014 *Australian Ageing Agenda*

Cradduck, Lucy M. and Andrea Blake, ‘Retirement villages: time for a change?’ (2012) 3(8) *Australia and New Zealand Property Journal*

Finn, James, Vera Younis Mukhtar, David J. Kennedy, Hal Kendig, Philip Bohle and Olivia Rawlings-Way, 'Financial Planning for Retirement Village Living: A Qualitative Exploration' (2011) 25(2) *Journal of Housing For the Elderly*, 645-654.

French, Justice Robert, 'The referral of state powers – cooperative federalism lives?' (2003) 3 *Federal Judicial Scholarship*

Glass, Anne P. and Jane Skinner, 'Retirement Communities: We Know What They Are ... or Do We?' (2013) 27 *Journal of Housing for the Elderly*

Herd, Brian, 'The Retirement Villages Act 1999 (Qld)' (2000) *Television Education Network (TEN)*

<http://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=http://www.tved.net.au/PublicPapers/February_2000,_Sound_Education_in_Law,_The_Retirement_Villages_Act_1999__Qld_.html>

Hu, Xin, Bo Xia, Laurie Buys, Martin Skitmore, Rosemary Kennedy, Robin Drogemuller, 'Stakeholder analysis of a retirement village development in Australia: insights from an interdisciplinary workshop' (1 October 2015) *International Journal of Construction Management*, 1-11

Latimer, Paul, 'It's Time for Federal Regulation of Retirement Villages' (2017) 45 *Federal Law Review*

Levine, Pnina, 'Security of tenure for retirement village residents in WA – Does the law walk the walk or just talk the talk?' (2015) 40:1 *University of Western Australia Law Review*

Lynch, Andrew, 'State Referrals and Terrorism Law Reform Paralysis: Cause and Effect?' (2011) 35 *University of New South Wales Faculty of Law Research Series*

McCullagh, Richard, 'Care in Australian Retirement Villages' (2014) 8 *Elder Law Review*

Petersen, Maree, Cheryl Tilse and Tina Cockburn, 'Living in a Retirement Village: Choice, Contracts and Constraints' (2017) 31 *Journal of Housing for the Elderly*

Petersen, Maree and John Minnery, 'Understanding Daily Life of Older People in a Residential Complex: The Contribution of Lefebvre's Social Space' (2013) 28(6) *Housing Studies*, 822 – 844

Stewart, Andrew and Elizabeth Priest, 'The Work Choices Legislation: An Overview' (2006) *Federation Press* <<http://www.federationpress.com.au/pdf/WorkChoicesLegislation0206>>

Williams, John, ‘The Constitution and Workplace Relations Act 1996’ (2006) 16(2) *The Economics and Labour Relations Review*, 62

Wise, David, ‘Elder law: Retirement villages - who'd ever want to leave?: Helping your client avoid the exit pitfalls’ (2017) 37 *Proctor* 20-22

B. Cases

New South Wales v Commonwealth (2006) 229 CLR 1 (‘WorkChoices’)

C. Books

Andrews, Richard, *Don't Buy Your Retirement Home Without Me!* (Wrightbooks, 1st ed, 2012)

Cox, Carole B., *Social Policy for an Aging Society: A Human Rights Perspective* (Springer Publishing Company, 1st ed, 2015)

Lewis, Rodney, *Elder Law in Australia* (LexisNexis, 2nd ed, 2012)

Pearson, Gail and Richard Batten, *Understanding Australian Consumer Credit Law: A practical guide to the National Consumer Credit reforms* (CCH Australia Limited, 1st ed, 2010)

The University of Queensland, Centre for Research into Sustainable Urban and Regional Futures, *The Retirement Village Industry in Australia: Evolution, Prospects, Challenges* (University of Queensland Press, 1st ed, 2002)

D. Reports

Australian Bureau of Statistics, *2071.0 - Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (23 October 2017)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Ageing%20Population~14>>

Australian Bureau of Statistics, *3222.0 - Population Projections, Australia, 2012 (base) to 2101* (26 November 2013)

<[http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3222.0main+features52012%20\(base\)%20to%202101](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3222.0main+features52012%20(base)%20to%202101)>

Financial System Inquiry Committee, *Financial System Inquiry – Final Report* (7 December 2014) <http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf>

House of Representatives Standing Committee on Legal and Constitutional Affairs Committee, *Inquiry into Older People and the Law* (2007) <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/laca/olderpeople/report.htm>

Law Reform Commission and Company and Securities Advisory Committee, *Collective Investments: Other People's Money* (Report 65, 1993)

Le Guen, Roxane, *Parliamentary Research Service Background Paper Number 32 1993 – Residential Care for the Aged: An overview of Government policy from 1962 to 1993* (24 November 1993) Department of the Parliamentary Library <<https://www.aph.gov.au/binaries/library/pubs/bp/1993/93bp32.pdf>>

NCSC, Sixth Annual Report and Financial Statements 1 July 1984 to 30 June 1986 (1986)

Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, *Inquiry into the retirement housing sector* (March 2017) <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Retirement_Housing_Report/LSIC_58-06_Text_WEB.pdf>

Productivity Commission, *Caring for Older Australians - Productivity Commission Inquiry Report Volume 2* (28 June 2011) <<http://www.pc.gov.au/inquiries/completed/aged-care/report/aged-care-volume2.pdf>>

Productivity Commission, *Housing Decisions of Older Australians – Productivity Commission Research Paper* (December 2015)

<<http://www.pc.gov.au/research/completed/housing-decisions-older-australians/housing-decisions-older-australians.pdf>>

Property Council of Australia, Retirement Living and Grant Thornton, *National Overview of the Retirement Village Sector*, (October 2014) <<http://www.retirementliving.org.au/wp-content/uploads/2015/03/National-overview-of-the-retirement-village-sector-Grant-Thornton.pdf>>

E. Legislation

Retirement Villages Act 2012 (ACT)

Retirement Villages Regulation 2017 (ACT)

Aged Persons Homes Act 1954 (Cth)

Australian Charities and Not-for-profits Commission Regulation 2013 (Cth)

Australian Constitution (Cth)

Australian Securities and Investments Commission Act 2001 (Cth)

Companies Act 1981 (Cth)

Competition and Consumer Act 2010 (Cth)

Corporations Act 2001 (Cth)

National Consumer Credit Protection Act 2009 (Cth)

Retirement Villages Act 1999 (NSW)

Retirement Villages Regulation 2017 (NSW)

Retirement Villages Act 1995 (NT)

Retirement Villages Regulations 1995 (NT)

Retirement Villages Act 1999 (Qld)

Retirement Villages Regulation 2010 (Qld)

Retirement Villages Act 2016 (SA)

Retirement Villages Regulations 2017 (SA)

Retirement Villages (Fees) Regulations 2017 (SA)

Retirement Villages Act 2004 (Tas)

Retirement Villages Regulation 2013 (Tas)

Retirement Villages Act 1986 (Vic)

Retirement Villages (Contractual Arrangements) Regulations 2017 (Vic)

Retirement Villages (Records and Notices) Regulations 2015 (Vic)

Estate Agent (Retirement Villages) Regulations 2016 (Vic)

Fair Trading Act 2010 (WA)

Fair Trading (Retirement Villages Interim Code) Regulation (No 2) 2013 (WA)

Retirement Villages Act 1992 (WA)

Retirement Villages Regulations 1992 (WA)

F. *Other*

Australian Securities and Investments Commission, *Regulatory Guide 160 – Time-sharing schemes* (June 2012) <<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-160-time-sharing-schemes/>>

Australian Securities and Investments Commission, *Regulatory Guide 165 – Licensing: Internal and external dispute resolution* (2 July 2015) <<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-165-licensing-internal-and-external-dispute-resolution/>>

Australian Securities and Investments Commission, *Regulatory Guide 183 – Approval of financial services sector codes of conduct* (1 March 2013) <<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-183-approval-of-financial-services-sector-codes-of-conduct/>>

Australian Government, The Treasury, *Design and Distribution Obligations and Product Intervention Power – Draft Legislation* (21 December 2017)
<<https://treasury.gov.au/consultation/c2017-t247556>>

Aveo, *Aveo Statement* (26 June 2017) <https://www.aveo.com.au/wp-content/uploads/2017/06/GEG-2017_0626-Aveo-Statements.pdf>

Aveo, *Fees and charges* (2018) <<https://www.aveo.com.au/retirement-resources/fees-and-charges/>>

Aveo, *Freedom Aged Care – A genuine alternative to traditional aged care* (2018)
<<https://www.aveo.com.au/retirement-living-options/aged-care/freedom-aged-care/>>.

Barton, Dennis, ‘The Retirement Village Industry – Opportunities for Actuarial Improvement’ (Paper presented at the Institute of Actuaries of Australia 2009 Biennial Convention, Sydney, 19-22 April 2009)
<https://www.actuaries.asn.au/Library/Con09_paper_Barton_The%20retirement%20village%20industry.pdf>

Blake, Andrea and Lucy Cradduck, ‘What is the impact of land tenure on the sustainability of retirement village communities in Australia?’ (Paper presented at the Proceedings of 2010

International Conference on Construction & Real Estate Management, 1-3 December 2010,
Royal on the Park Hotel, Brisbane)

Bleed Them Dry Until They Die (Directed by Klaus Toft, Four Corners/ABC TV, 26 June 2017)

Burke, Gail, *Retirement village fees, contract reform proposed in Queensland to better protect seniors' rights* (9 July 2017) <<http://www.abc.net.au/news/2017-07-09/retirement-village-laws-change-qld-better-protect-seniors-rights/8691632>>

COTA Australia, *Retirement Village Residents Often Left in the Dark Over Complex Contracts* (27 June 2017) <<http://www.cota.org.au/australia/news/newslist/2017/retirement-village-residents-often-left-in-the-dark-over-complex-contracts.aspx>>

Council of Australian Governments, *Council of Australian Governments Meeting Communique* (2 October 2008)

<<http://webarchive.nla.gov.au/gov/20130329014000/http://www.coag.gov.au/node/290>>

Danckert, Sarah, *Aveo's sales of existing retirement units slump 42 per cent* (14 February 2018) <<https://www.smh.com.au/business/banking-and-finance/aveo-s-sales-of-existing-retirement-units-slump-42-per-cent-20180214-p4z0cn.html>>.

Explanatory Memorandum, *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* (Cth) 5

Ferguson, Adele, *Aveo retirement village investigation has put the sector under a spotlight* (1 July 2017) <<http://www.smh.com.au/business/comment-and-analysis/aveo-retirement-village-investigation-has-put-the-sector-under-a-spotlight-20170630-gx2490.html>>

Ferguson, Adele and Sarah Danckert, *The Price of Freedom* (24 June 2017)

<<http://www.smh.com.au/interactive/2017/retirement-racket/the-price-of-freedom/>>

Ferguson, Adele and Sarah Danckert, *Bleed Them Dry Until They Die* (26 June 2017)

<<http://www.smh.com.au/interactive/2017/retirement-racket/bleed-them-dry/>>

Ferguson, Adele and Sarah Danckert, *Aveo shares sink on allegations of poor treatment* (26 June 2017) <<https://www.smh.com.au/business/banking-and-finance/aveo-shares-sink-on-allegations-of-poor-treatment-20170626-gwyi7d.html>>

Ferguson, Adele, Sarah Danckert and Fergus Hunter, *Calls for federal inquiry into retirement villages amid Aveo scandal* (27 June 2017) <<http://www.smh.com.au/business/banking-and->

[finance/calls-for-federal-inquiry-into-retirement-villages-amid-aveo-scandal-20170627-gwz8nb.html](http://www.abc.net.au/news/2017-06-27/finance-calls-for-federal-inquiry-into-retirement-villages-amid-aveo-scandal-20170627-gwz8nb.html)

Ferguson, Adele, Klaus Toft and Sarah Danckert, *Aveo: Exploitation of the elderly rife in retirement villages* (4 July 2017) <<http://www.abc.net.au/news/2017-06-24/elderly-exploited-in-aveo-retirement-villages/8645876>>

Four Corners, *About Us* <<http://www.abc.net.au/4corners/about-us>>

Griffiths, Meredith, *Ken Wyatt promises action on regulating retirement villages after 'exploitation' exposed by Four Corners* (27 June 2017) <<http://www.abc.net.au/news/2017-06-27/calls-for-tougher-laws-regulating-retirement-villages/8653314>>

Griffiths, Meredith, *Retirees spending thousands waiting for retirement village properties to sell* (17 August 2017) <<http://www.abc.net.au/7.30/retirees-spending-thousands-waiting-for-retirement/8818094>>

Koumoukelis, Arthur, *A Guide to Aged Care and Retirement Villages in Australia – For Investors and Prospective Operators* (2014)
<<http://www.gadens.com/publications/Documents/A%20guide%20to%20Aged%20Care%20and%20Retirement%20Villages%20in%20Australia.pdf>>.

Kyng, Timothy, *Why retirement village contracts need to be regulated like insurance* (27 June 2017) <<https://theconversation.com/why-retirement-village-contracts-need-to-be-regulated-like-insurance-80059>>

Kyng, Timothy, ‘Retirement Villages: Comparison Rent and other Metrics’ (Presentation to the Parliament of Victoria Inquiry into the retirement housing sector, 16 November 2016, *Legislative Council Committee Room, Parliament House, Spring Street, Melbourne*)
<https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Retirement_Housing/RH-Presentation-16112016-MU.pdf>

Lawyers Weekly, *Minters drives retirement overhaul* (18 November 2009)
<<https://www.lawyersweekly.com.au/news/13469-minters-drives-retirement-overhaul>>

Legislative and Governance Forum on Consumer Affairs, *Joint Communique – Meeting of Ministers for Consumer Affairs* (31 August 2017)
<https://cdn.tspace.gov.au/uploads/sites/86/2017/08/CAF_Communique_August_2017.pdf>

McGrath, Pat, *Consumers Rights Group Push for Ombudsman to Oversee Retirement Village Sector* (1 September 2015) <<http://www.abc.net.au/news/2015-09-01/push-for-retirement-village-sector-ombudsman/6741438?pfmredir=sm>>

Miranda, Charles, *Federal Government tells states to create uniform retirement village laws to protect seniors* (4 November 2017) <<http://www.adelaidenow.com.au/lifestyle/federal-government-tells-states-to-create-uniform-retirement-village-laws-to-protect-seniors/news-story/43a69d3620f342eb215da484d0e54b32>>

Parker, Lesley, *Lifestyle's hidden costs* (16 February 2011)
<<https://www.smh.com.au/money/planning-and-budgeting/lifestyles-hidden-costs-20110215-1auny.html>>

Property Council of Australia, *2017 PwC/Property Council Retirement Census* (November 2017) <http://www.retirementliving.org.au/wp-content/uploads/2017/11/127054715_2017-PwC-Property-Co_v10-17.11.09-Final-Web-Version.pdf>

Queensland Parliament, Public Works and Utilities Committee, *Public Hearing – Inquiry into the Housing Legislation (Building Better Futures) Amendment Bill 2017*, Brisbane, Wednesday 13 September 2017,
<<http://www.parliament.qld.gov.au/documents/committees/TUC/2017/I48HsngBetterFutures/I48-trns-13Sep2017.pdf>>

Queensland Government, Department of Housing and Public Works, *Retirement Village Schemes registered with the Department of Housing and Public Works* (12 February 2018) <<https://data.qld.gov.au/dataset/retirement-village-schemes-registered-with-the-department-of-housing-and-public-works/resource/4868bd92-438a-46b9-b28e-d3e57d093f04>>

Retirement Village Association Ltd, Submission No 424 to the Productivity Commission, *Inquiry into Caring for Older Australians*, 24 August 2010

Retirement Living Council, *Retirement Living Code of Conduct Draft for Consultation* (29 August 2017) <<http://www.retirementliving.org.au/wp-content/uploads/2017/12/Retirement-Living-Code-of-Conduct-Draft-for-Consultation.pdf>>

The Senior, *Comparing retirement villages made easy* (31 August 2017)
<<https://www.thesenior.com.au/lifestyle/comparing-retirement-villages-made-easy/>>.

Transcript of Proceedings, *Inquiry into the retirement housing sector* (Standing Committee on Legal and Social Issues, 16 November 2016)

<https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Retirement_Housing/FINAL-SCLSI-RHS-16112016-MU.pdf>

Wyatt AM, MP, The Hon Ken, *Ministerial statement on retirement homes regulation* (27 June 2017) <<http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2017-wyatt055.htm>>