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Aged & Community Services
Association of NSW & ACT
Incorporated

Retirement Villages Bill 2010 (ACT):
Exposure Draft
Submission to Mary Porter - Supplementary#

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The RVA and ACS would like to once again thank you for the opportunity to provide a submission in relation to the Retirement Villages Bill 2010 (ACT): Exposure Draft. We agree with your commitment for an outcome which will offer certainty to both operators and residents in terms of their respective responsibilities.

This submission is supplementary to the initial submission dated July 2010 which was emailed to you on 10 August 2010. While we continue in our position put forward in our July submission, this report deals primarily with those clauses in the Exposure Draft which are of primary concern to us. We support provisions that work for the ongoing viability and growth of the industry and in particular the impact the industry has on the overall ACT economy.

No doubt you will appreciate the importance of providing transparency and simplicity and particularly sound management practices as an appropriate framework for the delivery of your desired outcomes. We note this is reflected in Section 6 of the Exposure Draft and we fully support the objectives outlined in Section 6.

Item	Section	Issue / Recommendation
1.	S7 Meaning of retirement village	<p>Issue:</p> <p>There is no age definition only “older members of the community” whereas Section 57 (b) allows for the “age limits” of residents to be specified in the public information document.</p> <p>It is argued that the above definition is too vague and the flexibility for each village to set their own age limits means that there will be no consistency across the industry, creating confusion when prospective residents are researching their options for retirement living.</p> <p>The “age limits” also implies that there could be an upper limit stipulated by an operator.</p> <p>Recommendation:</p> <p>Use the same definition used in Section 5 of the Retirement Villages Act 1999 (NSW)</p>
2.	S11 Meaning of scheme operator	<p>Issue:</p> <p>This section does not make it clear that a scheme operator can be an organisation or business.</p> <p>Recommendation:</p> <p>State that a scheme operator can be an organisation or a business.</p>
3.	S12(1) Registration of retirement village scheme	<p>Issue:</p> <p>The section states that a person <i>may</i> apply to register a scheme ie it is not compulsory. Yet later in the Draft, it states that it is an offence to enter into residence contracts if a scheme is not registered (section 24 and 85).</p> <p>Recommendation:</p> <p>Reword this section to read that if a person is to operate a retirement village, a person must first register a retirement village scheme.</p>

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4.	S12(3) Registration of retirement village scheme	<p>Issue:</p> <p>It is uncertain as to what impact the requirement to register the retirement village scheme will have on operators. What are the costs involved? How often is renewal of registration required?</p> <p>The required information to be supplied is overly prescriptive. Does this mean that a scheme must be re-registered for example every time there are changes to terms offered under contracts or communal facilities?</p> <p>Recommendations:</p> <p>Restrict information required to items which won't change over time.</p> <p>Provide details of costs involved.</p> <p>Perusal of Section 24A of Retirement Villages Act 1999 (NSW) may also assist.</p>
5.	S26(1)(b) Offence—failure to give copies of residence contracts to other parties	<p>Issue:</p> <p>“As soon as practicable” is not specific enough.</p> <p>Recommendation:</p> <p>Provide a specific timeframe of 10 working days.</p>
6.	S34(c) Offence—failure to repay amounts after residence contracts rescinded	<p>Issue:</p> <p>“Immediately” is not specific enough.</p> <p>Recommendation:</p> <p>Provide a specific timeframe, say 7 days.</p>
7.	S36 Cooling off period	<p>Issue:</p> <p>We support the changes regarding the cooling off period. However, there is no provision in the event that retirement units are sold off the plan.</p> <p>Recommendation:</p> <p>Also apply the cooling off period to a Deed of Agreement.</p>
8.	S34 and S36 Trustee must repay amount if contract rescinded during cooling-off period	<p>Issue:</p> <p>If the contract is rescinded during the cooling-off period, the operator receives no financial compensation. The Draft cooling-off period is 21 days which is too long. The NSW legislation provides for 7 business days.</p> <p>Recommendations:</p> <p>Reduce the cooling-off period to 7 business days.</p> <p>Add “the cooling-off period is waived if the resident commences to live in the residential premises”.</p>

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<p>9.</p>	<p>S46 Ingoing contribution -operator must refund full amount within 30 days after contract ends</p>	<p>Issue:</p> <p>We do not support the timing of the refund of the ingoing contribution within 30 days. This would be more onerous for operators, result in serious cash-flow issues for operators and would seriously affect the industry. This is not required in any other jurisdiction.</p> <p>We fail to understand that there is a buy-back clause at all. No other property asset exists whereby the vendor is guaranteed payment before the asset is sold. Why should the operator take all the risk in the transaction?</p> <p>In the directory a reference is made to “own”. If the resident would “own” the retirement unit, then surely this clause should not apply but the sales process and obligation to pay the general services charges until the unit is sold should be handled similar to ordinary real estate sales.</p> <p>In the event there would be a buy-back clause this could prove onerous to the operator. Operators may be required additional equity to be contributed upfront to allow facilities to be maintained within proposed LVR ratios.</p> <p>Additionally we fear that it may delay projects moving to the next stage as bank covenants may be breached (i.e. no more than say 6 vacant ILU’s prior to moving to the next stage however with the buyback clause this may then mean that the covenant is not met, - becomes 7 vacant ILU’s) and as such this cannot be beneficial for the existing residents either.</p> <p>The proposed amendment takes no account of prevailing market conditions. An older village will be more dated than newer competitive offerings. The operator may have to spend additional capital making the ILUs somewhat more comparable to new alternative stock. The possibly dated/out-dated nature of the older village entices more residents to depart, as they see the re-sale of vacant units not occurring, so an oversupply begins to develop, potentially impacting the lifestyle of residual residents, as general services fee income reduces in line with vacancies. Such a scenario does not even need to be reflective of stock obsolescence. Look at the situation over the past two years, where residential property sales slowed markedly, thereby restricted the ability of potential residents to sell their own properties in order to fund the purchase of an ILU in a retirement village.</p>
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10.	S56 Definitions - ACAT	<p>Issue:</p> <p>This is the first reference to the ACT Civil and Administrative Tribunal (ACAT). Using the Acronym ACAT is very confusing as ACAT referring to the Aged Care Assessment Team throughout Australia is known by this acronym to both providers and residents.</p> <p>Recommendation:</p> <p>Include a definition of ACAT.</p>
11.	S69(2) and S69(3) Condition reports	<p>Issue:</p> <p>By waiting for up to 2 weeks after occupation for the resident to complete the condition report provides an environment for potential dispute</p> <p>Recommendation:</p> <p>Set condition reports to be completed by the operator and resident prior to occupation.</p>

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12.	S72 and S73 Resident may set the sale price of the unit and appoint a selling agent	<p>Issue:</p> <p>We do not see the need for scheme operators to be licensed agents as we are selling our “own” real estate.</p> <p>Recommendation:</p> <p>Remove the provision for the need for a selling agent.</p> <p>Issue:</p> <p>We do not support the option for residents setting the sale price.</p> <p>Recommendation:</p> <p>Set the sale price to be agreed by both the resident and the operator as the result affects both. If no agreement can be reached on the sale price, the parties are to go to a registered valuer who will set the price.</p>
13.	S78(2) Definition of long term resident	<p>Issue:</p> <p>There needs to be clear distinction between owner and non-owner arrangements throughout the Draft. Of particular conflict is the definition of <i>long term resident</i>. The definition of 'own' in the dictionary in the Draft refers to the person who has a leasehold interest. Yet S78(2) defines a long term resident as a person who does not own an accommodation unit but whose contract is in the form of a long term lease. The confusion follows through in S71, S72 and S73.</p> <p>Recommendation:</p> <p>Correct S78(2) definition of <i>long term resident</i> to clear up the conflict.</p> <p>Review and revise the Exposure Draft to make a clear distinction for owner and non-owner arrangements as applicable.</p>
14.	S99(2) Capital replacement fund	<p>Issue:</p> <p>It is misleading to say “the scheme operator is solely responsible for contributing to the capital replacement fund” when Section 97 states that contributions come from new resident ingoing contributions. In the case of the maintenance reserve fund, Section 110 and 112(2) similarly describes how residents are solely responsible for contributing to this fund.</p> <p>Recommendation:</p> <p>In S99(2), replace “scheme operator” with “residents of the retirement village”.</p>
15.	S103(1)(c) Tax on amounts paid	<p>Issue:</p> <p>Drafting error.</p> <p>Recommendation:</p> <p>This should read “under section 101(1)(d)” referring to tax on interest.</p>
16.	S105 & S118 Capital replacement reserve and maintenance reserve reports	<p>Issue:</p> <p>To engage a quantity surveyor may represent a high relative cost burden for small villages (annual total recurrent charges not exceeding \$50,000).</p> <p>Recommendation:</p> <p>For small villages (annual total recurrent charges not exceeding \$50,000) allow “or other qualified personnel” in S105(2)(a) and S118(2)(a) by resident consent</p>

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17.	S110 Meaning of maintenance reserve fund contribution	<p>Issue:</p> <p>The definition that contributions to the fund are from a proportion of ingoing contributions may be incorrect. We believe that the intention is that contributions to the fund are made by residents out of general service charges.</p> <p>Recommendation:</p> <p>Change the definition to indicate that contributions to the fund are made by residents out of general service charges.</p>
18.	S124 General services charge budget	<p>Issue:</p> <p>Dealing with what to do with any deficit or surplus should be left to the residents and management. Carrying forward surpluses could have serious consequences in years to come.</p> <p>Recommendation:</p> <p>Allow for resident consent on what to do with surpluses including options to carry forward or put them into the maintenance reserve fund.</p>
19.	S127 Working out and paying general services charges	<p>Issue:</p> <p>If a resident is deemed an owner, then we believe that they should remain liable for the general services charges until the unit is sold.</p> <p>Recommendation:</p> <p>Add a sub-section which deals with residents who are owners of units stating that they are liable for general services charges until the unit is sold. Section 152 of the Retirement Villages Act 1999 (NSW) provides a good model.</p>
20.	S130 Scheme operators paying general services charge	<p>Issue:</p> <p>The impact of this section would mean that there is a potential shortfall to the general services operating budget.</p> <p>Recommendation:</p> <p>Any general services charges to be paid by the operator should be paid into the general services operating account and not the maintenance reserve fund.</p>
21.	S131 Increasing general services charge by more than CPI	<p>Issue:</p> <p>There is no provision to allow variation to general services charges to be based on a fixed formula such as the pension rates. The NSW legislation allows three options - variation by fixed formula, up to CPI variation with resident consent not required, above CPI which requires resident consent.</p> <p>Recommendation:</p> <p>To streamline the process for operators and provide greater certainty for residents, adopt the NSW Retirement Villages Act 1999 Part 7 Division 4 for recurrent charges.</p>

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22.	S131(3) CPI percentage increase - definition	<p>Issue:</p> <p>The CPI percentage increase definition will need to change as the timing doesn't fit in with the timing of the budget preparation and presentation.</p> <p>Recommendation:</p> <p>Define CPI published dates early enough to fit the timing of the budget preparation and presentation.</p> <p>Issue:</p> <p>CPI percentage increase is defined as the movement of CPI from only one quarter to another which is not adequate.</p> <p>Recommendation:</p> <p>Define CPI percentage increase to be the movement of CPI from the end of a quarter from one 12-month period to another.</p>
23.	S145 Quarterly financial statement	<p>Issue:</p> <p>This is a high relative cost burden for small villages. The NSW retirement villages legislation allows small villages (annual total recurrent charges not exceeding \$50,000), if residents agree to not provide quarterly accounts.</p> <p>Recommendation:</p> <p>Adapt Section 119B from the NSW Retirement Villages Act 1999 for inclusion in the Draft.</p>
24.	S146 Have annual financial statement audited	<p>Issue:</p> <p>This is a high relative cost burden for small villages. The NSW retirement villages legislation allows small villages (annual total recurrent charges not exceeding \$50,000), if residents agree to not have the annual accounts audited.</p> <p>Recommendation:</p> <p>Adapt Section 119A from the NSW Retirement Villages Act 1999 for inclusion in the Draft.</p>
25.	S146(b) Have annual financial statement audited	<p>Issue:</p> <p>There needs to be clarification of what audit means.</p> <p>Recommendation:</p> <p>Adopt the NSW legislation description ie that the accounts for the village are audited annually by a person qualified to audit accounts for the purposes of the <i>Corporations Act 2001</i> of the Commonwealth S118(1).</p>
26.	S147(1) Copy of the annual financial statement to Chief Executive	<p>Issue:</p> <p>Giving a copy of the annual financial statement to the Chief Executive (of the public sector administrative unit, per Legislation Act 2001 S163) is unnecessary. The Exposure Draft does not refer to any financial oversight role by the Chief Executive.</p> <p>Recommendation:</p> <p>Remove section 147 (1).</p>

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27.	S149 Statutory charge	<p>Issue:</p> <p>This is not clearly described.</p> <p>Recommendation:</p> <p>Clearly describe the implications are on operations or valuations.</p>
28.	S151(1)(5) Statutory charges - exemptions	<p>Issue:</p> <p>The sections state that the chief executive can decide that a statutory charge should not apply because of specified circumstances. We believe that organisations that are religious, charitable or community purposes ie those with not-for-profit status should be automatically exempt.</p> <p>Recommendation:</p> <p>Reword section 151(5) to make not-for-profit status organisations automatically exempt from statutory charges.</p>
29.	S163 to S178 Resident committees and resident meetings	<p>Issue:</p> <p>These sections are too prescriptive and require clarification.</p> <p>There is no clear distinction between the formation and operation of the resident committee and that of the meetings of the residents. For example, 163(1) provides for the election of a residents committee. Yet S169 to S172 refer to meeting of the residents. For example, resolutions according to S171 and S172 are made by “a meeting of the residents” – ie what is the role of the residents committee?</p> <p>Recommendation:</p> <p>Review references to residents committees and meeting of residents throughout the Exposure Draft. Rework them into a coherent and cohesive use of these terms. The current Code provides a simple and streamlined approach.</p>
30.	S164 to S178 The operation of residents committees	<p>Issue:</p> <p>We support the establishment and operation of a residents committee.</p> <p>However, resident decisions can “take effect” on matters including S164(1)(c)(ii) “any other matter affecting the management or operation of the retirement village” without operator consent. This level of management control by residents is not workable.</p> <p>Recommendation:</p> <p>Add Section 74(2) from the NSW <i>Retirement Villages Act 1999</i> – “A vote of the residents on a matter referred to in subsection [(1)(c)(ii)] does not bind the operator of the village”.</p>
31.	S168(1)(b)(ii) Retirement villages without residents committees – formula for number of residents	<p>Issue:</p> <p>The formula for determining the number of residents that may give a written request to the operator for a meeting has a drafting error.</p> <p>Recommendation:</p> <p>Before the term “a majority of the occupied units” insert “residents from”.</p>

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32.	S171 Special resolutions	<p>Issue:</p> <p>The description of how to calculate the number of votes to pass a special resolution is unnecessarily complex.</p> <p>Recommendation:</p> <p>Adopt the wording of Schedule 1 Part 3 Number 6 of the NSW <i>Retirement Villages Act 1999</i> "A special resolution is carried only if it is passed by at least [two-thirds] of the number of residents who participate in the ballot".</p>
33.	S175 Offences - postal votes	<p>Issue:</p> <p>The process for managing postal votes is overly prescriptive and comes with penalty points for getting any one of the very specific requirements wrong.</p> <p>Recommendation:</p> <p>Adopt Schedule 7 Provisions relating to consent of residents (3 Postal votes) of the NSW <i>Retirement Villages Regulation 2009</i>.</p>
34.	S176 to S178 Quorums and meetings adjourned	<p>Issue:</p> <p>The process for determining quorums and meetings adjourned is overly prescriptive and complex. NSW has quorum provisions for only special resolutions.</p> <p>Recommendation:</p> <p>Apply quorum requirements to special resolutions only and not ordinary resolutions and simplify these provisions. Consider using Schedule 7 Provisions relating to consent of residents (4 Quorum required for special resolution) from the NSW <i>Retirement Villages Regulation 2009</i>.</p>
35.	S182 Dispute resolution – referral to mediation	<p>Issue:</p> <p>It appears that the Dispute Resolution mechanism from the Code of Practice has disappeared. This mechanism included a Disputes Resolution Committee, and does not involve ACAT or the ORS until a later stage in the process. It avoids early applications to ACAT.</p> <p>Recommendation:</p> <p>Adopt an interim step for dispute resolution between tier one – the resident and operator meets to discuss, and tier two – application to ACAT.</p> <p>The Code Administration Committee made up of representatives from residents and operators and chaired by a representative of the ORS, seems a cost effective alternative to dealing with disputes, keeping the costs to residents, operators and government to a minimum.</p>

Disclaimer

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