Government of Western Australia
Department of Mines, Industry Regulation and Safety

Consultation Regulatory Impact Statement 1

Stage Two of proposed reforms to Retirement Villages Legislation in Western Australia

August 2019

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Message from the Commissioner of Consumer Protection

The *Statutory Review of Retirement Villages Legislation Final Report, November 2010* (Final Report) resulted in considerable reform to the retirement villages industry in Western Australia. These reforms focused on increasing transparency around retirement village contracts to assist consumers make better informed decisions.

The Final Report made over 100 recommendations for reform. Stage one of the implementation of reforms (stage one) occurred between 2012 and 2016 and included amendments to the *Retirement Villages Act 1992* (RV Act), amendments to the Retirement Villages Regulations 1992 and to the Retirement Villages Code of Conduct. Stage one implemented 79 recommendations either in full or in part from the Final Report.

Despite these reforms, some problems have persisted including consumers continuing to enter into retirement village contracts without fully understanding their legal rights and obligations. Over the last 24 months, some outstanding recommendations have required reconsideration to reflect issues that have emerged since 2010. This current review and consultation process represents the second stage (stage two) of the reform process regarding the retirement village industry in Western Australia.

As there are a large number of issues to be consulted on, outstanding recommendations from the Final Report have been grouped in categories to deal with common issues and themes. A consultation paper will be released for each category for stakeholders to comment on any issues of interest to them.

The first category will focus on **improving Western Australian consumers' understanding of the retirement village product and its price**.

Subsequent categories (in no particular order) include:

- **Operator management responsibilities to the village community** including clarifying issues such as the owner/operator dichotomy, payment of exit entitlements, capital works, approval of budgets and refurbishment obligations.

- **Clarifying the scope of the RV Act** including issues such as application to short-term residents, residents' relatives and partners, aged care facilities on retirement village land and the need for a public database of retirement villages.

- **Multi-site villages, scheme termination, memorials and the statutory charge** including clarifying current uncertainty about the regulation of multi-site villages, the memorial requirements of the RV Act, statutory charge provisions and the process for terminating a retirement village scheme.

- **New village developments (staged developments and redevelopments) leasing off the plan, and multiple residence contracts** including issues relating to wait list and holding fees, staged developments and redevelopment and processes for land to be excisable from village land.

- **Compliance and enforcement** including issues such as whether the head of power for the Fair Trading (Retirement Villages Interim Code) Regulations 2019 should move from the *Fair Trading Act 2010* to the RV Act, what enforcement tools the Act should contain and the State Administrative Tribunals jurisdiction.

The above list may be subject to change.

A staged approach to consultation recognises the time stakeholders need to devote to considering proposals and providing their input. The objective of splitting the papers into categories is to make it easier for stakeholders to focus on those issues of importance to them. Consumer Protection looks forward to engaging with stakeholders as we embark on stage two.

David Hillyard
COMMISSIONER FOR CONSUMER PROTECTION

Glossary

The following is a summary of key terms frequently used in this document. The definitions listed apply, unless otherwise indicated

Key Terms	***Definition***
ACA	*Aged Care Act 1997* (Cwlth)
ACL	Australian Consumer Law. The ACL replaced previous Commonwealth, state and territory consumer protection legislation in fair trading Acts. The provisions are contained in Part XI and Schedule 2 of the *Competition and Consumer Act 2010* (Cwlth) (formerly the *Trade Practices Act 1974* (Cwlth). Relevant provisions are mirrored in the Australian Consumer Law (WA) which is a schedule to the *Fair Trading Act 2010* (WA)
ARCF	Average Resident Comparative Figure
CRIS	Consultation Regulatory Impact Statement (this document)
DRIS	Decision Regulatory Impact Statement
Department	The Department of Mines, Industry Regulation and Safety – Consumer Protection Division
DMF	Deferred Management Fee
Final Report	Statutory Review of Retirement Villages Legislation Final Report, November 2010
FTA	*Fair Trading Act 2010* under which the RV Code is made and which applies the Australian Consumer Law (ACL) in WA.
Operator	Operator/owner/manager of a retirement village
RIA	Regulatory Impact Assessment
RV	Retirement village
RV Act	*Retirement Villages Act 1992*
RV Code	Fair Trading (Retirement Villages Interim Code) Regulations 2019
RV Legislation	*Retirement Villages Act 1992,* Retirement Villages Regulations 1992, and Fair Trading (Retirement Villages Interim Code) Regulations 2019
RV product	Retirement village product
RV Regulations	Retirement Villages Regulations 1992
RV Unit	Includes a retirement village unit, villa, apartment
SAT	State Administrative Tribunal
SHAC	Seniors Housing Advisory Centre
STA	*Strata Titles Act 1985*
WARVRA	Western Australian Retirement Villages Residents Association

PART 1: ABOUT THIS PAPER

Purpose of this CRIS

This Consultation Regulatory Impact Statement (CRIS) applies the Government's regulatory impact assessment process to examine the need for changes to regulation. This CRIS presents possible reform options for feedback from stakeholders, including how to more accurately define a retirement village (RV) in the *Retirement Villages Act 1992*, how to ensure advertising of retirement villages is not misleading and how to improve consumer understanding of the dominant pricing model used by the industry.

Particular focus is placed on reforms recommended in the *Statutory Review of Retirement Villages Legislation Final Report, November 2010* (Final Report) which have either not been implemented or only partially implemented.

Stakeholder feedback will be analysed and used to assess the regulatory impact of proposals and enable Consumer Protection to make recommendations in the form of a Decision Regulatory Impact Statement (DRIS) to Government.

Why is a CRIS needed?

This CRIS forms part of Western Australia's commitment under the Council of Australian Governments to ensure that the impact of proposed regulatory instruments are made fully transparent as soon as possible to the decision maker and to the public in advance of decisions being made. The assessment will help to determine whether regulatory action is required or whether reforms can be achieved by alternative means, with lower costs for business and the community.

In Western Australia (WA) proposals for new or amended regulation, and policy proposals that may result in new or amending regulation, must be undertaken in accordance with the principles set out in Department of Treasury's Regulatory Impact Assessment Guidelines for Western Australia (2010).

How to have your say

Making a submission

A number of questions are included throughout the CRIS about the proposed reform options. You do not have to respond to all the questions or all the options. Please feel free to focus on the areas that are important and relevant to you.

There is no specified format for submissions or responses. You are welcome to:

- write a letter outlining your views; or
- respond specifically to the questions included in the CRIS.

You are also welcome to suggest alternative options for addressing matters of concern to you. When providing your submission or response to questions, it would be helpful if you could include the reasons behind your suggestions, along with the potential costs and benefits of them.

This will help the Government to better understand your viewpoint and will assist assessing the potential impact of the most suitable options for reform.

Written submissions or letters can be emailed to consultations@dmirs.wa.gov.au or posted in hard copy to the following address:

Attention: Retirement Villages Consultation
Department of Mines, Industry Regulation and Safety
(Consumer Protection Division)
Locked Bag 100
EAST PERTH WA 6892

Closing date

The closing date for providing comments on this CRIS is Friday 27 September 2019.

Who are you?

When making your submission please let us know which part of the retirement village industry you are from. For example, whether you are an owner, operator, resident or industry body.

How your input will be used?

The Government will carefully consider all the information gathered through this consultation process and will publish a DRIS outlining its final policy position.

Information provided may become public

After the period for comment concludes, all responses received may be made publicly available on Consumer Protection's website. Please note that as your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate this in your submission.

As all submissions made in response to this paper will be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become publically available.

Structure and release of this consultation paper

Including this introduction (Part 1), this paper comprises five parts. Part 2 provides background information with an overview of the retirement villages industry and historical information about the Final Report and stage one of implementation of the reforms (stage one).

Part 3 contains some insights that have been identified as impeding the operation of competitive market forces in the retirement villages industry.

The focus of Part 3 is on problems such as information failure, consumer economic behaviours and a lack of secondary markets that have informed the approach taken in the development of proposals.

Part 4 focusses on the RV product. It proposes reforms to better define the RV product in the legislation. It also proposes requirements for advertising of the RV product helping consumers to more fully understand competing products on offer.

Part 5 focusses on helping consumers to more fully understand the RV product price including the range of fees and charges associated with the predominant pricing model. It proposes reforms so consumers at an early point in time can understand the price associated with the RV product on offer. Parts 1 to 5 (inclusive) form the first category of the proposed stage 2 reforms (stage two).

Appendix 1 provides further information regarding the DMF model.

Appendix 2 provides further information regarding the RV product price.

Appendix 3 provides details of the extended ARCF proposed for WA.

PART 2: BACKGROUND

The regulatory framework

Retirement villages in WA are regulated by the following specific legislation which is collectively referred to as the RV legislation in this paper:

- the *Retirement Villages Act 1992* (**the RV Act**);
- Retirement Villages Regulations 1992 (**RV Regulations**); and
- Fair Trading (Retirement Villages Interim Code) Regulations 2019 (WA) (**RV Code**).

The proposed reforms discussed in this consultation paper relate primarily to the RV Act. This paper proposes reform to subsidiary legislation (RV Regulations and RV Code) where necessary to provide a clear explanation of a proposed reform. Further reform to subsidiary legislation will be considered following the outcome of this consultation. In the meantime, interim RV Codes will continue to be made to ensure regulatory continuity of legislation.

In addition to the RV legislation, a number of other Acts also apply to either or both consumers, operators and retirement villages. RV legislation reforms need to be consistent with that broader context. The Acts most frequently referenced in this paper are the:

- *Fair Trading Act 2010* (**FTA**) under which the RV Code is made and which applies the Australian Consumer Law (**ACL**) in WA; and
- *Strata Titles Act 1985* (**STA**).

Overview of the retirement village industry

The retirement village industry is an important part of the economic and social fabric of WA. The industry comprises villages operated by private companies and not-for-profit organisations that include local authorities.

Retirement villages provide a broad range of living options including serviced apartments and hostel accommodation. They mainly cater for retired persons living independently in self-care units with management provided within the retirement village structure.[1] It is important to distinguish retirement villages from residential aged care (formerly nursing homes and aged care hostels) which provide a higher level of resident care and are regulated by Federal legislation[2] and as such do not form part of this review.

It is also important to recognise that a wide-range of retirement village schemes operate in WA and provide different ownership and occupancy transactions.

[1] McCrindle Research, *McCrindle Baynes Villages Census Report: 2013 (Executive Summary)*, 4. This national census of Australia's retirement village population, commissioned by villages.com.au and supported by the Retirement Village Association, Retirement Living Council and Aged & Community Services Australia, found that seven out of the top ten reasons for moving to a retirement village were health related.

[2] *Aged Care Act 1997* (Cwlth); *Aged Care (Single Quality Framework) Reform Act 2018* (Cwlth).

These include licence/lease transactions, freehold (strata title) transactions and the less common purple title transactions. Overall, the basis for arrangements between the resident and the retirement village operator is a residence contract signed by both parties prior to entry.

The McCrindle Baynes Villages Census Report 2013 (McCrindle survey) results show that a large majority of residents (90 percent) fund their purchase of a retirement village unit through the sale of their previous home with 77 percent of these residents declaring their main source of income as a full or part government pension or allowance.[3] The main reasons for choosing a retirement village are the desire to downsize, the family home becoming too difficult to manage and concerns about physical health.[4]

The McCrindle survey results also show high overall resident satisfaction with 75 percent were happy with their decision to move into their village and would make the decision again. Only 6 percent of survey recipients indicated they would choose to stay in their family home if they had to make the same decision again and 8 percent indicated they would move to another village.[5] The survey results also revealed the key factors in selecting a retirement village being lifestyle rather than the contract or fees, with lifestyle criteria including a safe environment, design for easy ageing, on-site maintenance, and access to medical services, public transport and shops.[6] The McCrindle survey results are consistent with a survey conducted in Victoria in 2015 which scored the quality of life satisfaction ranking at 7.9 out of 10.[7]

Despite evidence of high level of residence satisfaction in surveys such as the McCrindle survey, the industry has been subject to intense media attention in relation to resident complaints. In particular, Consumer Protection also continues to receive complaints from residents in relation to financial matters. The RV pricing model means that many residents do not become aware of the full financial cost, which includes various exit fees, until their departure from the village.

As part of the research undertaken in stage 2, Consumer Protection sought information during 2015 and 2016 from operators of retirement villages in WA. It was estimated that there were 18,317 residents in retirement villages in WA in 2015 [8] and over 25,000 residents in WA retirement villages in 2017.[9]

The membership of Western Australian Retirement Villages Residents Association (WARVRA) alone as at April 2019 was reported as being approximately 17,000 with ambitions to increase to 20,000.[10]

[3] above n1, 6.

[4] above n1, 7.

[5] above n1, 5,4.

[6] above n1, 6.

[7] National Ageing Research Institute Ltd (NARI), *Retirement Village Residents' Experiences of Contracts and Outcomes: Pilot Project: Synopsis of Results*, February 2016, 8.

[8] Property Council of Australia and One Fell Swoop, *The critical need for retirement living in Western Australia*, October 2015, 5.

[9] WARVRA Newsletter, vol 17, n3, 3, July 2017.

[10] WARVRA Newsletter, vol 19, n2, 2, April 2019.

Consumer Protection's internal register of retirement villages maintained by the Seniors Housing Advisory Centre (SHAC) estimates that there are currently 224 retirement villages in WA. This statistic is largely consistent with a 2017 estimate by WARVRA that there were 228 retirement villages in WA.[11]

The difficulty with obtaining precise statistics relating to the retirement village industry in WA was noted in the Final Report.[12] Despite this Consumer Protection's register and other sources as footnoted below indicate that:

- 75 percent of the retirement villages were located in the Perth Metropolitan area, 17 percent in regional locations with 8 percent specifically located in the Mandurah 6210 postcode area;[13]
- the majority of regional retirement villages are located in the south-west region of WA;
- individual retirement village sizes vary from six to over 500 accommodation units;
- 35 percent of the retirement villages had aged care facilities;[14]
- 20 percent of units have one bedroom, 47 percent of units - two bedrooms, 32.7 percent - three bedrooms and 0.3% - four bedrooms;
- 88 percent of retirement village units are occupied under a lease/licence arrangement, 11 percent are strata or purple title;
- 20 percent of the retirement villages offered a lease/licence and rent combination;
- 85 percent of the retirement villages had a community centre, 64 percent hairdressing,
- 9 percent of the retirement village operators had retirement villages in other states or territories;
- 15 percent of retirement village operators were related to a national entity external from WA;
- 70 percent of retirement villages are operated by top 15 operators: these comprise nine not-for-profit, church and charitable organisations and six private sector operators;[15]
- there is a 89 percent occupancy rate at the retirement villages;[16]
- there is an average of 1.3 residents per unit;[17]
- the entry age of most residents is between 73 and 78 years; and
- the average time residents live in a village is 8-9 years.[18]

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[11] above n9, 3.

[12] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation* (Final Report), November 2010, 11. The Final Report noted that the "precise structure of the retirement villages sector in Western Australia is not fully known".

[13].above n8, 28. The 2015 Property Council report identified that 71 percent of retirement villages in Western Australia were in the metropolitan area and 29 percent were classified as being regional.

[14] Aged care facilities are regulated under the *Aged Care Act 1997* (Cwlth). Under this Act, there is no guarantee that residents will transition from an 'independent living' unit to the village's 'residential aged care facility'.

[15] above n8, 4.

[16] 2018 PwC/ Property Council Retirement Census, https://www.pwc.com.au/deals/assets/real-estate-advisory/2018-retirement-living-census.pdf, 1.

[17] above n8, 28.

[18] above n16, 1. See also Appendix 1 for further information about industry statistics.

Final Report and stage 1 reforms

Significant stage one reforms included:

- the establishment of the SHAC, revision of the Department's website and printed guides;
- a time limit on the time for which a village operator can continue to recover recurrent charges from former leasehold residents;
- an obligation on an operator to put a vacated unit on the market as soon as reasonable;
- a restriction on refurbishment costs to actual costs;
- better standardisation and comparison of contracts through matters that must or must not be in residence contracts;
- increased transparency in pre-contract and contract disclosure of fees charged whilst a resident lives in the village and on departure;
- specification of certain matters for which a resident cannot be charged under a residence contract;
- greater transparency in reserve fund purposes and expenditure;
- provision for the appointment of a statutory manager to a village;
- increased penalties for breach of the legislation; and
- wider access to the State Administrative Tribunal (SAT) for determination of disputes.

Events since the Final Report

The reforms proposed in this paper address a number of recommendations by the Final Report and not implemented as part of the stage one reforms. Since the Final Report a number of additional elements have informed the research undertaken to develop proposals for stage two. These include:

- two Supreme Court decisions on key terms in the RV Act, in 2013 (the *Hollywood* case)[19] and in 2014 (the *Swancare* case);[20]
- significant amendments to retirement villages legislation in other jurisdictions;[21]
- amendments to other state and Commonwealth legislation affecting retirement villages and their residents – e.g. extensive strata title reforms in WA and community directed care amendments to the *Aged Care Act 1997* (Cwlth);
- emerging village models such as mixed developments in which retirement villages are co-located with other uses (sporting clubs or medical facilities); vertical villages occupying certain floors only of a high rise complex, with increasingly complex operating structures with different parts of a village and different amenities and services owned or provided by different entities;

[19] Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection [2013] WASC 219.

[20] Swancare Group Inc -v- Commissioner for Consumer Protection [2014] WASC 80. Court decisions continue to be handed down in regards to the retirement villages' legislation. For example, see Amana Living, Amana Living Incorporated -v- Commissioner of Titles [2019] WASC 203 in regards to memorials lodged over retirement village land.

[21] For example: South Australia introduced a new Act in 2018, Queensland significantly amended its legislation in 2017, and New South Wales and Victoria significantly amended their legislation through 2014 to 2018.

- increasing choice in the retirement village fee structure, for example whether an upfront payment will be higher for a lower deferred payment or lower for a higher deferred payment;
- a wide range of government inquiries and reviews, both in Australia and overseas;[22] and
- significant adverse media attention to the retirement village sector in the past several years leading to increased consumer expectations of regulators.

[22] Examples of relevant reports include:

- Law Commission (United Kingdom) *Event Fees in Retirement Properties,* March 2017;
- United States Government Accountability Office *Older Americans, Continuing Care Retirement Communities Can Provide Benefits, but Not Without some Risk*, June 2010;
- Productivity Commission *Housing Decisions of Older Australians* (Research Paper) December 2015;
- Parliament of Victoria, Legislative Council, Legal and Social Issues Committee *Inquiry into the retirement housing sector* March 2017; and
- New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (The Greiner Report).

PART 3: INFORMATION FAILURE IN THE RETIREMENT VILLAGES MARKET

Introduction

This part provides some policy context for reforms proposed to retirement villages' legislation in this consultation paper. It discusses:

- the information gap between consumers and industry (information asymmetry);
- consumer economic behaviours; and
- the role of secondary markets.

What is information failure?

Informed decision-making is essential to properly functioning markets. It facilitates competition by rewarding good value and signals to suppliers the product characteristics consumers want.[23] It also puts pressure on price. As the Productivity Commission explains: "informed choice has two dimensions – knowing the alternatives on offer and having the ability to judge their price and quality differences … as a general rule, competition works best when the bulk of consumers are reasonably well-informed and willing to act on that information".[24] When consumers do not understand the product, the price or the rights and responsibilities relating to the product, a market suffers information failure.

What is information asymmetry?

Information asymmetry is a problematic type of information failure. It occurs when one party to the transaction has the necessary information to understand the transaction but the other does not. When information is asymmetric, only one party to the transaction is in a position to evaluate how a product differs from other products, including by assessing the products benefits, detriments, risks and price.

The Final Report

Addressing information failure has been a policy priority of the RV Act since commencement. The Final Report observed this stating, "much of the protection afforded to consumers under retirement villages' legislation is based on disclosure of information".[25]

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[23] Productivity Commission, *Review of Australia's Consumer Policy Framework* (Inquiry Report), 30 April 2008, vol 2, n 45, 28: "The role of consumers in facilitating competition, and promoting well-functioning markets, has long been recognised. In seeking the "best" value (the good or service and price/quality combination most appropriate for them) consumers not only advance their own self-interest, but also provide signals to suppliers on the product characteristics they require. Competition between suppliers, who respond to these signals, can variously lead to lower costs, improved product quality, greater innovation and higher productivity. However, poorly informed consumers send weak and confused signals to the market, limiting the benefits they receive from transactions and reducing gains from competition more generally".

[24] ibid 28.

[25] above n12, 11.

The Final Report highlighted consumer difficulty in:

- distinguishing the RV product from other seniors' accommodation options (Final Report recommendations 84 and 93 to 96);
- accessing relevant, objective and comprehensible information about the RV product and its price (Final Report recommendations 9 to 17); and
- comparing and valuing different village offerings given the variety of contractual and financial arrangements (Final Report recommendations 10 and 17).

Even people who have been in a village for some time "have significant misconceptions about their rights and responsibilities".[26]

Stage 1 reform improved the content and format of the pre-contract disclosure information that must be provided to consumers prior to purchasing a RV product. For example, it ensured prospective residents receive detailed information as to the:

- amenities and services that form part of the RV product;
- amounts payable after moving into a village (including exit fees); and
- the estimated exit entitlement they will receive based on prescribed periods of residence.

Provision of information in a standardised format gives consumers a better estimate of the moneys they will likely receive after leaving a village and makes it easier to compare different village products.

Consumer complaints and feedback confirms that information failure continues to cause problems in the RV market. It is apparent that information *disclosure* alone is only partially successful. When consumers are unfamiliar with a complex transaction, simply providing information about the transaction may not be sufficient, because lack of familiarity limits their ability to use the information provided.[27]

Additional measures are required so consumers can better understand and use information about the RV product, its pricing structure and contracts.

Factors in the RV market contributing to information asymmetry

Product framing – the dominant messaging about the RV product

The RV product comprises a managed community in which accommodation, amenities and services are provided. Underpinning the product is an unusual transaction that is generally once off. The transaction takes the form of a residence contract signed by both parties. The once-off nature of the transaction means consumers have not necessarily had the chance to build familiarity with the product by engaging in multiple similar transactions throughout life.

Variety in RV products and price structures makes it difficult for consumers to identify a standard product or price through background research. This variety also makes

[26] above n12, 39.

[27] Jeanie Marie Paterson and Gerard Brody, '"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' *Journal of Consumer Policy (2015) 38,*338.

comparison with other accommodation options difficult.[28] In this context, industry framing of the RV product and price (in advertising and promotional materials) as similar or equivalent to a residential housing purchase, makes it harder for consumers to understand the transaction. Consumers frequently misunderstand the RV product as just another property sales transaction with similar price structures, rights and obligations to those achieved in a residential housing purchase.

It is perhaps noteworthy that consumer misunderstanding persists even after consumers have information about the product, price and contract terms. This is because amongst other things, the information itself (contracts and other documents) is complex and difficult to understand.

Part 4 discusses in more detail how product framing contributes to consumers' misunderstanding the RV product.

Price framing – the dominant price model

One of the more complex aspects of the RV product is the pricing model. The dominant model operating in WA has a four-stage price structure known as the DMF model. Table 1[29] sets out and explains four key components of the DMF pricing model used in the retirement villages industry. It is noted that different villages can use different names for imposts. The table identifies in the second column, the names this consultation paper uses.

[28] above n22, 100 to 101. On this, the Productivity Commission said: "There is a considerable variation in villages' fees, and at times, different residents within the village may be subject to different fee structures … the different fee structures make it difficult to compare the affordability of different villages, and may create uncertainty and confusion for prospective residents." It went on to observe that lack of access to secondary markets means this was not remedied. A further concern for prospective residents is the availability of professional legal and financial advice before signing a contract. The cost of this advice can be high and only a limited number of solicitors specialise in this area.

[29] Appendix 2 further explains the DMF model, in particular the large number of variations that exist in the market. Appendix 2 also includes the varying industry explanations for the purposes of the upfront payment, the DMF and recurrent charges.

TABLE 1 – KEY COMPONENTS OF DMF PRICING		
Stage	**Impost/payment to resident**	**Description**
Stage 1 – before, at or shortly after entry to a village.[30]	**Upfront payment**	A resident makes a substantial upfront payment before or on entry to the village. This payment may be called a loan, lease premium, ingoing contribution or have various other names in the village contracts. It is generally partially refundable. The payment is generally identified as a single payment but can be split into two instalments, a deposit and balance. A separate holding or similar fee may also be imposed prior to signing the residence contract. The RV legislation has no specific term for an upfront payment. The RV Act term **premium** - being a payment made for or in contemplation of admission to a village – includes, but is not limited to, the upfront payment. As a premium is identified by its purpose, not the stage of residence that it is paid, some third stage payments can also be premiums. This discussion paper uses the generic term **upfront payment** for premiums paid prior to, at or around entry that are not holding, expression of interest or waiting list fees.

[30] This stage includes a payment made after any settling in period expires.

TABLE 1 – KEY COMPONENTS OF DMF PRICING		
Stage	**Impost/payment to resident**	**Description**
Stage 2 - during residence.	**Recurrent charges** Levies and personal service and amenity fees.	A resident pays recurrent charges, levies, personal service and amenity fees while residing in a village. Recurrent charges may continue beyond residence up to the time limit imposed by legislation or, in strata and purple title villages, until a unit is re-occupied. Recurrent charges and levies generally cover operating costs, including management services, provision of communal amenities and services, administration costs and general maintenance. They can also have a capital maintenance and replacement component. The particular expenses that are included and the relationship between actual operating cost and the ongoing charges varies significantly from village to village. Some villages only partially recover operating costs through recurrent charges, using the upfront payment or DMF for the balance. Personal services and amenity fees relate to services and amenities provided to some residents only on a user pays, rather than village pays, basis. For example, in home care or a private pool. All of these imposts are called "**recurrent charges**" in the RV legislation and in this paper. (Where it is necessary to distinguish between them that distinction is made in the relevant reform). Residents may also make other payments directly to a service provider that is not the operator – such as internet and water use or a private monitoring service. These payments are not recurrent charges under the RV legislation or in this paper because they are not paid to the operator.[31]

[31] The RV Act, section 3 definition of "recurrent charge". Some residence contracts require a resident to pay monies directly to a third party service provider, even though the operator is responsible for paying the third party. This could mean that former residents remain liable for these payments despite the cap on the period for which recurrent charges are payable after leaving a village. Proposals to deal with this will be contained in a later consultation paper.

TABLE 1 – KEY COMPONENTS OF DMF PRICING		
Stage	**Impost/payment to resident**	**Description**
Stage 3 – after departure.	**Exit deductions (**including DMFs). **DMF** – exit deductions including a profit/provision for future capital works element.	A resident pays a variety of fees after vacating a village. Historically, there was generally only one of these known as a 'deferred management fee' or DMF. The DMF bundled fees for different things into one fee and included provision for operator profit. The DMF gives the common village impost structure its generic name – the DMF model. These imposts have fragmented into fees for different things so that in addition to the DMF there may be: • at cost imposts for identified expense or services: such as fees for refurbishment or marketing a vacated unit;[32] and • imposts that include an operator profit/provision for future capital works/subsidising village operation element. These are usually calculated on formulae that include factors such as length of residence in the village and the upfront payment made by the former or new resident. Names for these fees include deferred facilities fees or reserve fund contributions. The precise amount of the exit deductions cannot be known at the time of entry into the village – either the cost has not yet been incurred or the formula requires figures that are not known at that time. Although these fees are imposed at exit, or on the vacated unit being occupied by a new resident, they are retained by the operator deducting the fees from the upfront payment prior to refunding the amount due to the former resident under the residence contract. The RV legislation uses a variety of terms for these imposts. In this paper, exit deduction is used to indicate all imposts imposed at departure, the unit being reoccupied or during residence. "DMF" is used to indicate all exit deductions that include a profit element. Where a distinction between individual DMF imposts is relevant, it is made in the paper (for example in discussion of capital expenditure).

[32] Retirement Villages Regulations 1992 restrict an operator's ability to include a profit element in providing certain services. For example, Regulation 7K regulates the charging of costs on maintenance, repair, replacement and renovation work on residential premises. Regulation 11 regulates a number of matters for which an administering body is not to require payment from residents, for example costs related to marketing or advertising of residential premises to the extent that the payment exceeds the expenses or does not relate to the residential premises.

TABLE 1 – KEY COMPONENTS OF DMF PRICING		
Stage	**Impost/payment to resident**	**Description**
Stage 4 – after departure. Usually on a new resident occupying unit	**Exit entitlement**	A resident is entitled to a payment after they leave a village. Usually this is paid when a new upfront payment is made by a resident who will occupy the vacated unit. In some villages, it is paid on expiry of a specified period of time if the unit is not reoccupied. Like the DMF, the exit entitlement is generally calculated on formulae that use length of time in a village and the upfront payment made by either the departed resident or the new resident. Again, this payment may have a number of names. It may be characterised as partial or full refund of the upfront payment or as an independent payment or payments. Where it includes part of any increase in the upfront payment made by the new resident over that made by the former resident, it may be described as capital gain. The RV legislation uses a variety of terms not specifically defined for these resident entitlements, including: **repayment of a premium** and **entitlement** to an increase in value of the residential premises. In this discussion, this payment/s is called an **exit entitlement**.

Price framing – the connection between the exit entitlement and the DMF

A complicated aspect of the DMF pricing model that is difficult to work out is the connections between payments made at different stages. For example, the upfront payment, the exit entitlement and the DMF are often interconnected and difficult for the consumer to separate.

Table 2 illustrates how the exit entitlement and DMF can be linked by comparing three options currently offered by one WA village (figures have been altered to avoid village identification).

TABLE 2 – DIFFERENT DMF AND EXIT ENTITLEMENT MIXES

Impost	Option 1 DMF	Option 2 No DMF	Option 3 DMF - paid on entry
Upfront payment	$400,000	$400,000	$400,000
New upfront payment	$420,000	$420,000	$420,000
DMF	$75,600	No DMF	$80,000 (paid on entry)
Exit entitlement based on new upfront payment	$324,400	$400,000	$420,000

Options 1 and 2 reveals how the application of a DMF or not, can impact on the exit entitlement. Option 3's inclusion of an advanced deferred fee needs to be read carefully because the resident is paying $480,000 upfront not $400,000. Such options expect consumers to take care when reading impost tables to understand that although Option 3 provides an exit entitlement of $420,000 the DMF which is paid on entry is $4,400 more than the DMF amount deducted under Option 1.

Table 2 also illustrates how the way an impost is labelled makes it harder for consumers to make informed decisions.

Table 3 provides additional examples of connections between different imposts in the DMF model. It was developed by a financial advisor to show operators how different upfront payment/DMF combinations can provide the same return to the operator. Table 3 illustrates how it can be difficult to identify a single price for comparison purposes. It also illustrates how presentation of different prices and different imposts require consumers to make complex calculations before making decisions.

TABLE 3 – DIFFERENT UPFRONT PAYMENT DMF AND EXIT ENTITLEMENTS

Impost	Option 1	Option 2	Option 3
Upfront payment	$550,000	$750,000	$1,000,000
Recurrent charges	$714 per fortnight	$714 per fortnight	$714 per fortnight
DMF after 5 years	$133,100 24.2%	$127,500 17%	$102,500 10.25%
At cost exit deductions	Not included in example	Not included in example	Not included in example
Resident exit entitlement at 5 years	$416,900	$622,500	$897,500

When comparing prices between different villages, consumers must take all DMF model imposts into account to work out the total price. Simply looking for the lowest upfront payment or lowest DMF will not identify the lowest total price. For simplicity of reading, readers should note that Table 3 does not estimate how much recurrent charges will increase over the five-year sample.

Table 3 demonstrates how the relationship between the upfront payment and the DMF operates in practice. For example, it is obvious that lower DMFs mean higher upfront payments. This is consistent with industry's view that if DMFs are banned, upfront payments will rise.[33]

Working out the impact of lower DMFs or no DMFs on upfront payments is complex. It is not just a matter of addition or subtraction. For example, Option 1's DMF is $5,600 higher than Option 2's but the upfront payment in Option 2 is $200,000 higher than the upfront payment in Option 1. This comparison illustrates that the upfront payment amount is not the total price. Rather, the upfront payment is a component of the total price being the amount paid to the operator.

Part 5 goes into more detail about the problems for consumers with the current DMF pricing model.[34] In particular, it discusses how relationships between imposts in the four stage pricing structure creates difficulties for consumers wanting to identify a single price.

[33] above n12, chapter 27, 131.

[34] See Appendix 1 for further details about the DMF model.

In 1995, the focus of the regulation was the protection of residents' financial interest in the village. The Second Reading Speech for the Retirement Villages Bill stated:

> *"Over the past 10 years resident funded accommodation has become more heavily marketed. … The promotion and advertising of villages appeals to seniors' needs for a low maintenance lifestyle with guaranteed security of tenure, smooth and efficient administration providing a safe, financially viable investment. Following the financial collapse of a large village in Victoria some hundreds of residents lost the secure future in which they believed they had invested. In Victoria, five years' experience has suggested that regulation can stabilise the industry by discouraging the involvement of undercapitalised companies keen on early profit taking. The Retirement Villages Bill aims to provide the same levels of protection for all types of resident funded schemes. Without this Bill people who purchase under the lease for life or similar tenure arrangements are in an extremely vulnerable position in the event of financial collapse of the village."*[35]

The contracting arrangements and in particular the pricing model used by the industry were not specific concerns at the time when the RV Bill was considered by the Parliament.

Consumer economic behaviours

Over one third of consumers (36 percent) find dealing with money stressful and overwhelming.[36] Often consumers entering into retirement villages can be vulnerable to push factors which make their decision urgent such as the need to relocate due to an adverse health diagnosis or following the loss of their spouse. In addition, certain features of the RV product, price and advertising trigger common and problematic consumer economic behaviours. These include:

- ***Consumers do not read standard form contracts*** – standard form contracts contain the supplier's standard terms and conditions, which do not vary with each purchase. Consumers are not motivated to read a complex legal document that they cannot negotiate. Standard form contracts rely on the consumer's desire for the product so that attention is focussed on features of the product rather than on its contractual terms.[37]

- ***Anchoring and adjustment*** – consumers tend to deal with complex decisions by focussing on a few key matters, such as the amount of the advertised upfront payment, proximity to family, healthcare and whether pets are allowed. Consumers tend not to adjust their assessment of the total offer when information about additional costs is available.

[35] Western Australia, Legislative Assembly, Hansard 16 May 1991, 2049 - 2051.

[36] ASCIC, *Australian Financial Attitudes and Behaviour Tracker (*Key findings report, Wave 5), March 2017, 16.

[37] This consumer economic behaviour is one reason why creating a standard form retirement village contract is problematic. The variety in arrangements, and lack of consensus on what is the best model (as individual consumers have different priorities and financial circumstances themselves) means that standardisation will involve variations. There is a risk that consumer perception that the contract is a generic standard form applying to all villages will encourage them not to read their contracts and so not understand the variations that apply to them.

For example, if a consumer's key concerns are whether they can afford the upfront payment and monthly fees and whether pets are allowed, their decision will be based on those concerns and not on whether they will have to wait until another consumer purchases the product to get their exit entitlement.

- ***Confirmation bias*** – this is similar to anchoring and adjustment. Consumers unconsciously reject information that casts doubt on the wisdom of a decision or emotional commitment already made. By the time pre-contract disclosure occurs, a consumer has already formed their view about the RV product and is looking forward to moving into the village. Unexpected or new information at this point is likely to be rejected or misunderstood unless it confirms what the consumer has already decided. For example, confirmation bias can lead a consumer to rely on advice that pets are allowed, even if later they are given a copy of village residence rules which state that pets are forbidden.

- ***Bounded rationality*** – consumers make purchasing decisions on less than perfect information because of a limited capacity to undertake complex and costly research and analysis. This behaviour occurs when the time cost of searching for information outweighs the expected benefits. For example, if there is little prospect of identifying a lower price or a more satisfactory product, consumers won't look any further.[38] Consumers can also be overloaded by volume and complexity of information so that decisions are based on a rule of thumb rather than on the information provided.[39]

- ***Difficulty in assessing deferred cost*** – consumers make more mistakes when assessing transactions involving delayed fees. They attribute less value to the amount of a deferred payment than to immediate benefits. To obtain a saving now, or immediate access to a worry free lifestyle, consumers are willing to pay a higher price later. Industry narratives that the upfront payment is lower due to the DMF align with a consumer's desire for savings now even at the cost of higher price later. Uncertainty in what the DMF amount will be, amplifies consumer error when valuing this deferred payment. Consumers are less likely to appreciate the practical effect of contract terms delaying exit entitlement payment.[40]

[38] Stephen G Corones, *The Australian Consumer Law*, Lawbook Co., 2nd ed. 2013, 37-8.

[39] Stephen P King and Rhonda L Smith, *The Shaky Economic Foundations of Consumer Protection Policy and Law* (2010) 18 *Competition & Consumer Law Journal* 71, 82. See also: Chris M Wilson and Catherine Waddams Price, *Do Consumers Switch to the Best Supplier?, Oxford Economic Papers (*New Series, vol 62, n 4, October 2010) 647-668, *Oxford University Press.*

[40] Office of Fair Trading (UK), *OFT investigation into retirement home transfer fee terms: a report on the OFT's findings* (OFT1476, February 2013). In its review of exit deductions, called "transfer fees" in the UK, the UK Office of Fair Trading found: "There are a number of aspects to consumer behaviour which mean that they are unlikely to be able to judge well the implications of transfer fee terms and their attitude to transfer fees may change over time." In addition (above n 22, 41-42), the Greiner Report noted a submission that: "Many residents are not concerned when joining the Village with the exit fees. They have been told that they have a home for life and will never have to move … they become disenchanted and then realise that the exit fees are a barrier to them leaving the Village and continue living in the Village and are unhappy".

Secondary markets

In the retirement village context, secondary markets include expert lawyers and financial advisers who are able to explain the RV product and its financial implications to consumers. As explained to a recent Victorian Parliamentary inquiry, "[y]ou really do need the legal advice, because cost is only one piece of the puzzle. What we would not want to do is incentivise consumers to go for the cheapest but not understand their legal obligations under that price; likewise, we do not want them to go for the most expensive with the expectation that that somehow gives them greater rights and fewer responsibilities, because that is not true either".[41]

The Victorian Parliamentary Inquiry concluded that although the majority of residents obtain legal advice, that advice: "is not always easily accessed". The Inquiry noted the lack of specialised expertise available and found that even when advice had been obtained residents remained confused as to the practical effect of residence contracts.[42]

The Final Report noted that access to legal advice might be required to assist prospective residents to understand their contracts. It also noted that: "[s]ome residents spoke of encountering difficulties in accessing expert legal advice before signing a contract".[43] Consumer Protection's experience of secondary markets in WA is consistent with other jurisdictions' in that legal expertise tends to be available to operators, not residents or consumers.[44]

Advice from WA residents who have sought legal advice is that it amounted to nothing more than a statement about whether the residence contract complies with RV legislation or not. That is, residents received little or no information as to the practical or financial consequences of the contract for them personally.

One resident reported that a lawyer refused to accept them as a client, saying that they could not reasonably charge the resident for the hours it would take to understand the retirement village contract sufficiently to provide proper advice.

The lack of accessible consumer friendly secondary markets is a significant problem in WA. RV contracts are complex and in large part non-negotiable which contributes to consumers not obtaining legal or financial advice. Similarly, consumers not seeking professional advice leads professional advisers to believe that there is not enough demand to recover the cost of developing and maintaining expertise in the RV market, especially given the variety of arrangements to master.

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[41] above n 22, chapter 3, 27.

[42] above n 22, xvi.

[43] above n 12, 15. See also above n 9, 1.

[44] Department of Justice, Consumer Affairs, Victoria, Retirement Villages Amendment (Records and Notices) Regulations 2013 and Retirement Villages Amendment (Contractual Arrangements) Regulations 2013 (Regulatory Impact Statement, 2013), 24. See, for example, the Victorian Regulatory Impact Statement: "where specialised retirement village advisory services are available, it appears that advisors are more experienced in providing advice to retirement village operators rather than to residents."

PART 4: ENABLING A BETTER UNDERSTANDING OF THE RETIREMENT VILLAGE PRODUCT

Introduction

As Part 3 identified, consumers frequently misunderstand the RV product as just another property sales transaction with similar price structures, rights and obligations to those achieved in a residential housing purchase.

RV product transactions are not the same or equivalent to residential housing transactions. Typically, the RV transaction requires consumers to enter into a residence contract that creates or gives rise to rights to occupy particular premises, access amenities and services and share in the benefits of living in a managed community. In most cases the transaction restricts rights. Ownership of premises does not transfer from operator to consumer and the consumer does not have the right to transfer any aspect of the RV product to another person. Similar restrictions can apply to a resident who owns a strata lot in an RV whereby the ability to transfer the lot is restricted to persons whom the operator has first approved.

Industry advertising equating the RV product to a residential housing purchase

Part 3 also noted that industry advertising and promotional materials contribute to consumers misunderstanding their RV product purchase as just another residential housing transaction. Industry framing of the RV product transaction as the same or equivalent to the purchase of a new home encourages consumers to think that the transaction will confer the same benefits including any capital gain when the property is sold.

Focus on one component of the RV product – accommodation

As the RV Product is a complex contractual transaction, historically the approach taken by industry and consumers has been to simplify the RV product into separate components. For example, just the unit rather than the whole product is advertised for sale. The upfront payment only is advertised without reference to the other fees and charges that will be payable. This simplification has led to problems, for example, when consumers discover there are other costs payable for the RV product.

Lack of clarity and fragmentation in the RV legislation provisions

Over time, provisions in RV legislation that deal with components of the RV product have become fragmented. For example, the main right to occupy provisions are in the RV Act, the main amenities and services provisions are in the RV Regulations and the main managed community provisions are in the RV Code. Key definitions in the RV Act, such as “retirement village”, “residence contract” and “retirement village scheme”, primarily focus on the right to occupy residential premises in the village and not on the provision of amenities and services in a managed community.

Although RV legislation currently identifies all the components of the RV product, their location in different provisions means that the community continues to have difficulty understanding and identifying exactly what the legislation is regulating.

This part proposes options to amend key definitions in the RV Act to provide an express statement capturing each component of the RV product in the RV Act. It also proposes options to address problematic marketing practices which frame the RV product transaction as the same as or equivalent to other residential property transactions. These proposals aim to enable consumers to better understand the nature of the RV product.

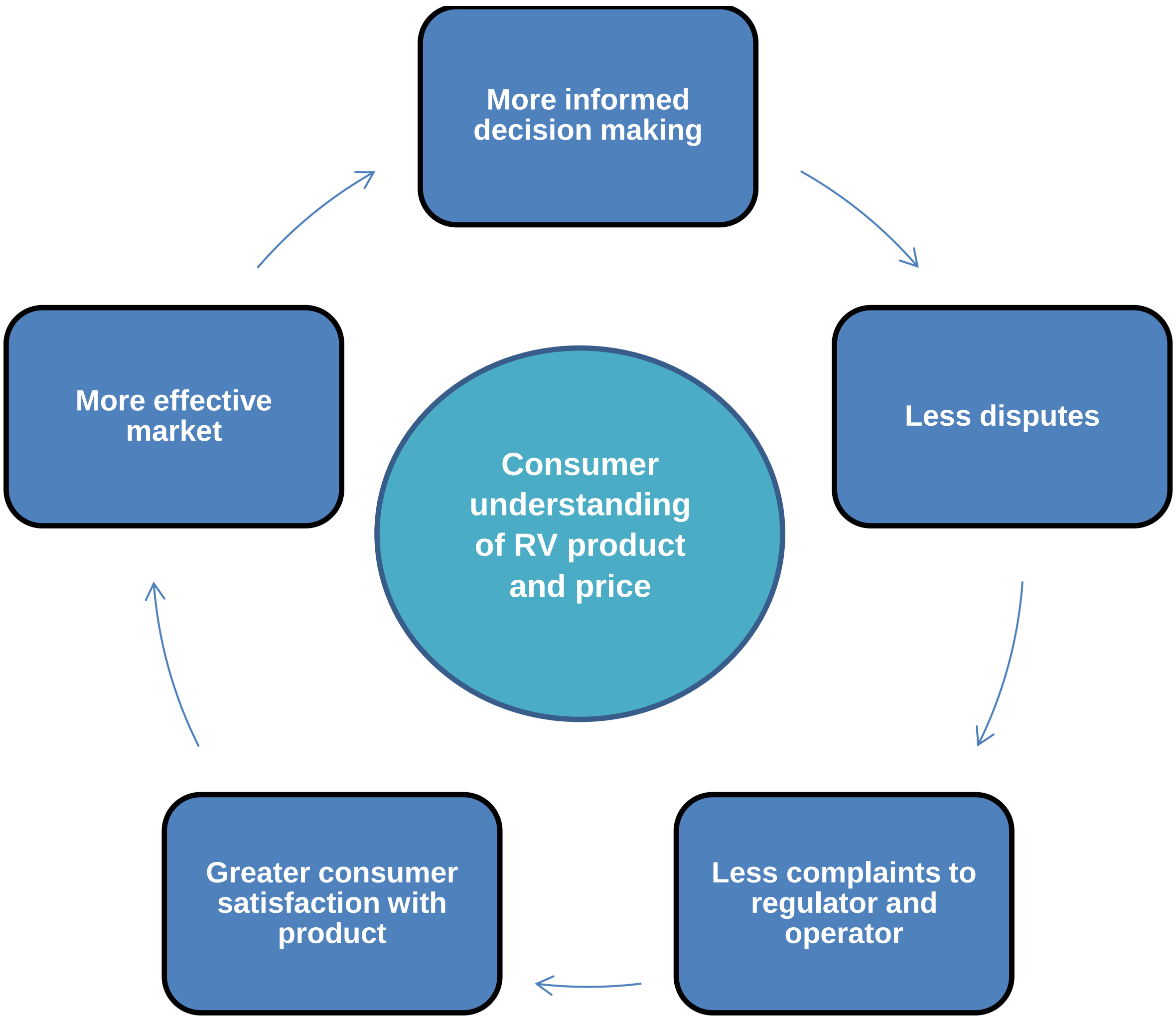

Figure 1: The Retirement Village Product

Proposal 4.1 – Update key RV Act definitions to fully reflect the RV product and implement Final Report recommendations 18, 84 and 100(3)

Objectives of proposal 4.1

1. Amend key definitions to:
    a. capture the individual components of the RV product in a clear unified statement of the RV product; and
    b. improve the WA community's understanding of the RV product currently regulated by RV legislation.
2. Complete the implementation of recommendation 18 to ensure that agreements for the provision of amenities and services are treated as part of the residence contract under the legislation.
3. Implement recommendation 84 to ensure that the definition of retirement village is broad enough to capture new and emerging retirement villages.
4. Implement recommendation 100(3) so that the definition of retirement village includes communal, community service and support facilities.

What the Final Report recommended and stage 1 reforms

Final Report

The Final Report[45] considered some key definitions used in the RV Act and made the following recommendations regarding the definitions of retirement village and residence contract:

- retirement village:
    - **recommendation 84** suggested consideration be given to redefining the term retirement village to reflect the changed nature of retirement village complexes.[46]
    - **recommendation 100** [47] supported the carrying forward of recommendation 3 of the 2002 Statutory Review [48] that "the definition of 'retirement village' … be written in plain language (in particular, replacing the word 'appurtenant') and expanded to include communal, community service and support facilities within the village which are available to the village residents";

[45] above n12.

[46] above n12, 146 to 148. Recommendation 84 of the Final Report responded to an early proposal from the then Retirement Villages Association (RVA) that "retirement village" means: "the land and improvements comprising a complex of residential premises together with any communal lifestyle facilities, services facilities, or management facilities used or intended to be used for or in connection with a retirement village scheme". The RVA also suggested that the definition be amended to include not only "a complex of residential premises" but also "several complexes of residences closely located to one another, the residents of which share the same communal facilities".. The Final Report observed that the term "retirement village" might be too limited to capture new villages being developed and that the sharing of communal facilities, rather than the reference to "a complex of residential premises" should identify an RV.

[47] above n12, 171.

[48] Department of Consumer and Employment Protection *Review of the Regulation of the Western Australian Retirement Village Industry Final Report, February 2002* (2002 Statutory Review), 172. Recommendation 3 of the 2002 Statutory Review sought to recognise that residents of retirement villages also access various services and amenities as part of their residence in a village.

- residence contract:
    - **recommendation 18** suggested that the legislation be amended to incorporate concepts from the definition of service contract into the residence contract definition so that a residence contract also deals with the provision of non-elective amenities and services promised to residents as part of the retirement village scheme.[49]

Stage 1 reforms

Stage 1 reforms partially implemented recommendation 18 – by introducing regulations requiring each residence contract to include matters relating to elective and non-elective communal amenities and communal services.[50] This means that there is now contractual but not legislative alignment of the components of the RV product. The other recommendations referenced above are yet to be addressed.

[49] above n 12, 30. Final Report Recommendation 18 was that the definition of residence contract be extended only to include non-elective services. During stage 1 reforms, after further consultation with stakeholders, it was determined that elective amenities and services should also be included in residence contracts. This does not mean that there can only be a single document. The Final Report at page 29 explained that where there are several documents dealing with these matters, they will all be residence contracts. .

[50] Retirement Villages Regulations 1992 (WA) (RV Regulations), regulations 7C and 7E

Discussion

Various individual provisions in the legislation cumulatively indicate the RV product is a managed community, in which accommodation is occupied (or proposed to be occupied) and amenities and services are used (or intended for use) under a retirement village scheme. [51]

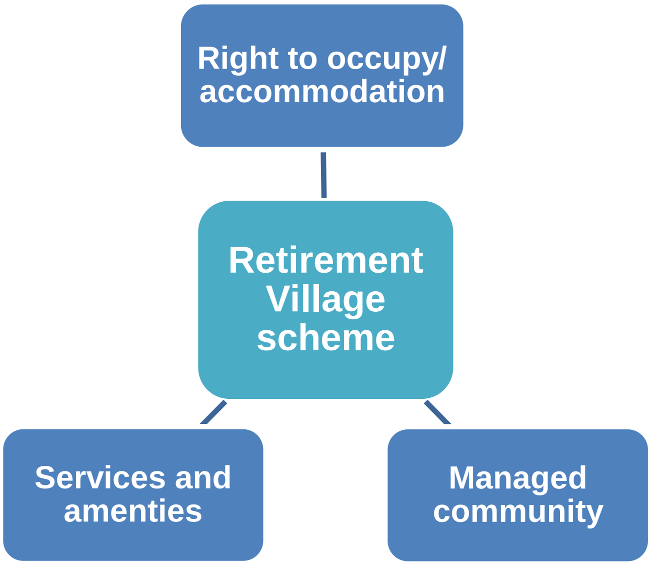

Figure 2: The elements of the RV product

Managed community

A feature of the RV product is the fact that the occupation rights are provided in a managed community.

This notion that community is integral to the RV product is supported by the finding by SAT that even in a minimal retirement village (no meeting room, no amenities, no social activities and an alarm system that notified residents not the operator) seniors nonetheless benefitted beyond what they would have acquired in a general strata title complex. SAT noted "Living in a strata title complex involves living in relatively close proximity with others, but residents of a strata title complex may not have anything in common apart from their shared address. The fact that the units [in the RV] are leased only to aged persons, all of whom are of a similar age, are retirees, and are members of [the operating entity], facilitates the sense of community, companionship and mutual support … and in turn addresses the needs of aged persons for fraternity, a sense of belonging, and interaction".[52]

[51] For example, the following provisions: RV Act, section 3, RV Regulations, regulations 7A-7L, RV Code, clauses 4,5,7,8,13, 16, 17.

[52] Retirees WA (Inc) and City of Belmont, 2010 WASAT 56, 34-35.

The requirement, in regulations, that a residence contract include provisions allowing alteration of communal amenities and services by resident special resolution also reflects the community living component of the RV product.[53]

The role of the operator

An important aspect of the managed community component is the role of the operator. For example, decisions an operator makes when designing village infrastructure, choosing amenities and services, selecting management and other staff, and establishing residence rules, contracts and policies all display the managed community aspects of a retirement village. Proper management cultivates the community and minimises conflicts between residents. Many of the regulatory obligations currently contained in the RV Code reflect the role played by the operator in managing the village community.

Accommodation

Under the RV Act, provision of accommodation (in which "residential premises are occupied or intended to be occupied under a retirement village scheme")[54] is central to the RV product. Residential premises can take a variety of forms including houses, villas, apartments and hostel rooms.

Most WA RV products use real property tenure models such as leases or property ownership.[55] Other models such as company share purchase, purchase of units in a trust or membership of an association are less common.

A feature of the RV product transaction is that it offers greater security of tenure than residential tenancy transactions. Occupation of residential premises is generally for life or for long periods that effectively mean for life given the current average entry age is 75 years.[56] The long-term nature of the transaction means that the accommodation model sits somewhere between residential tenancy and full property ownership. It operates as a hybrid model which has little basis for comparison in the residential property market.

One issue for consumers in understanding the RV product is that, where real property tenure models are used, contractual arrangements establish different rights and obligations to those normally associated with leases or property ownership.[57] For example, a resident may own a lot in a strata title village but there may be restrictions on the sale requiring the purchaser to sign a contract with the operator for provision of the RV product. The amount charged for the lot also reflects not just the value of the

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[53] RV Regulations, regs 7C(1) Item 4, reg 7E(1) Item 3.

[54] RV Act section 3(1) defines a "retirement village scheme" as a scheme for occupation of residential premises by retired persons. The definition of "retirement village" in s 3(1) is that it comprises a complex of residential premises and "appurtenant land" and there are various consumer protections for the right to reside in the village, including inability for the operator to terminate a residence contract without a SAT order for that to occur.

[55] Reflecting that the right to occupy may arise in complex ways: section 3(1) of the RV Act defines a residence contract as any "scheme or arrangement" that gives rise to a right to occupy a village unit, not a contract conferring that right. A premium is defined in section 3(1) as a payment made for, or in contemplation of admission to a village, not only a payment for the right to occupy a village unit.

[56] above n16, 1

[57] P Nugent, 'Two Approaches to Retirement Industry Regulation: Queensland v New South Wales' *Bond Law Review* (1990) vol 2, issue 2, 240. Nugent's analysis summarises the regulatory models in forthright and perhaps contentious terms, saying that in an RV context: "Lease or Licence tenure is … an artificial title structured for the benefit of the operator."

residential premises but also the value of amenities, services and managed community obligations.

Amenities and services

Provision of at least one amenity or service is also central to the RV product and forms an integral part of the resident's right to reside in a village. Some provisions in the legislation already reflect this. For instance, the rescission of contract provision in the RV Act applies to residence contracts, service contracts and all collateral contracts the resident enters into. Similarly, RV Regulations require residence contracts to set out any amenities and services to be provided to the resident.[58]

The inclusion of amenities and services as a core component of the RV product is consistent with the way most operators currently identify the product. For example, many operator websites refer to the provision of lifestyle amenities and services as part of retirement village living. In an internet advice aimed at investors and prospective village operators, a law firm notes "…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".[59]

The Final Report also found that shared amenities form a core component of the RV product within a retirement village scheme.[60]

Retirement village scheme

It is important to note that the RV product is delivered for or in connection with an RV scheme. The definition of retirement village scheme under the Act identifies the restrictions and financial arrangements that must apply for a village to be a retirement village regulated by the Act.

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[58] RV Act, section 75; RV Regulations, regs 7B, 7C, 7D, 7E.

[59] Gadens, Koumoukelis A, *A Guide to Aged Care and Retirement Villages in Australia: for Investors and Prospective Operators*, 2014, 6.

[60] above n 1, 49: Recommendation 29.

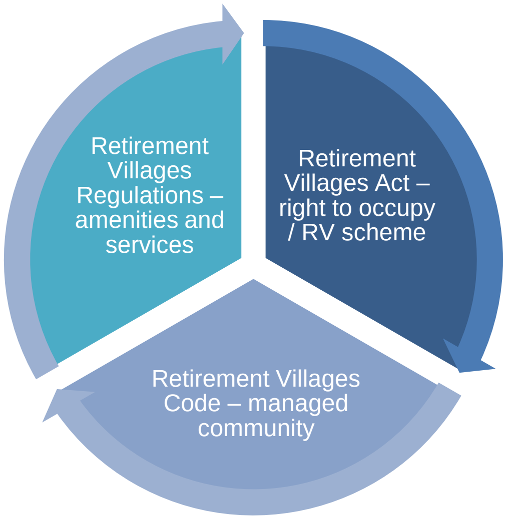

Figure 3: Problem is core definitions in the RV Act do not reflect all RV product components

The section above establishes that there are three main components that make up the RV product: the managed community, accommodation and the provision of amenities and services in connection with a RV scheme. As noted earlier however, one of the factors which Consumer Protection considers contributes to lack of understanding about the RV product is that the legislation does not have a clear definition that unites all components of the RV product. Instead, core definitions focus on the physical residential premises and a resident's right to *occupy* premises and the RV scheme. For instance:

- The RV Act states that it regulates retirement villages and defines retirement village by referring to physical premises occupied or intended to be occupied and land used, or intended to be used "in connection with a 'retirement village scheme'".
- The definition of retirement village scheme refers to various kinds of occupation right for residential premises in the village, as well as the financial consideration paid for those rights (the premium).
- The residence contract definition refers to the contractual basis for the creation of rights to occupy residential premises in a village.

The remaining components of the RV product, the managed community and amenities and services, are referenced in other parts of the legislation with separate provisions dealing with these elements.[61]

This means that core definitions do not in fact fully capture the RV product. The RV product does not simply comprise the *right to occupy residential premises in the village* but also the *provision* of *amenities* and *services in a managed community*. The lack of a clear definition in the legislation makes it difficult for the community to understand

[61] For example the RV Regulations require amenities and services which are to be provided to residents to be included in the residence contract (Division 3); the Fair Trading (Retirement Villages Interim Code) Regulations 2019 (RV Code) has provisions relating to management procedures , resident consultation and village budgeting.

exactly what the legislation is regulating. In circumstances where there is misunderstanding about what is being purchased, the legislation needs to clearly identify what is being regulated.

Options to address this problem are identified below.

Proposal 4.1 – Options

Option A – Preferred option – Amend the definitions of retirement village and residence contract to incorporate additional components of the RV product and implement recommendations 18, 84 and 100(3)

It is proposed to amend the definitions of retirement village and residence contract as outlined below.

Definition of *Retirement village* Amend the definition of retirement village to: • insert the additional components of a managed community and the provision of amenities and services; • retain the reference to complex(s) of residential premises occupied or intended for occupation under a retirement village scheme; and • retain the reference to land used or intended to be used for or in connection with a retirement village scheme.
Definition of *Residence contract* Amend the definition of residence contract to: • insert a reference to agreements for communal and personal amenities and communal and personal services; and • delete the words "and may take the form of a lease or licence" because the variety of tenure models means they are no longer appropriate.

Option A seeks to expressly incorporate into the definition of retirement village the additional components of the RV product. The proposal retains core elements of the current definition being the physical premises and land which form part of a retirement village, as well as the occupation and use of those premises and land under a retirement village scheme. The words "whether or not including hostel units" would be deleted because hostel units fall within the current definition of residential premises. This proposal would also remove the reference to "appurtentant" to implement recommendation 100(3) of the Final Report.[62]

[62] above n12. Recommendation 100 of the Final Report recommended that those recommendations of the *Review of the Regulation of the Western Australian Retirement Village Industry Final Report, February 2002* (2002 Statutory Review) that were supported by the Department of Commerce be carried forward as recommendations of the 2010 Final Report.

Option A is preferred because it will achieve the objectives of Proposal 1 without substantially impacting on key concepts embedded in the RV Act.

Option A will also address Final Report recommendations 84 and 18.

Final Report recommendation 84 – definition of retirement village

As discussed above, Final Report recommendation 84 recommended consideration be given to amending the definition of "retirement village to reflect the changed nature of retirement village complexes because as new villages are developed the current term could be too limited".[63] An issue with new village models is that amenities and services are being promised to residents from locations that may not be within the physical boundaries of the village. If we include amenities and services in a managed community in the retirement village definition, this would have the effect of capturing amenities and services outside the physical boundaries of the village and may protect the interests of those residents who have been promised access to the amenities and services to entice them into signing a contract.

Final Report Recommendation 18 – definition of residence contract

As well as supporting the proposal that the term retirement village describe the RV product, this proposal completes implementation of recommendation 18 that residence contract mean "any contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy as well as any contract … for provision of a service that is essentially non-elective".[64] This will mean both contractual and legislative alignment of the components of the RV product in the definition of residence contract.

[63] above n12, 148-149.

[64] above n12, 30. Final Report Recommendation 18 was partially implemented in stage 1 by requirements for residence contracts to deal with village amenities and services – however the current definition of residence contract sits at odds with those requirements because it just focuses on the "occupation of residential premises in the village". Stage 1 reforms also extended the application of Recommendation 18 to elective amenities and services.

Option B – Amend the definitions of retirement village scheme and residence contract to incorporate additional components of the RV product

This option proposes capturing all components of the RV product in the definition of retirement village scheme rather than in the retirement village definition. This would allow the retirement village definition to continue its current focus on the residential premises and land occupied or used, or intended to be occupied or used under the retirement village scheme. This option would also amend the definition of residence contract as per option A.

Definition of *retirement village scheme* Amend the definition of "retirement village scheme" to incorporate all of the components of the RV Product.
Definition of *residence contract* Amend the definition of residence contract to: • include a reference to the right to use or receive communal or personal amenities and services; and • delete the words "and may take the form of a lease or licence" which are no longer appropriate.

Final Report recommendations

Option B would also address most of the problems identified by Final Report recommendations 18 and 84. The incorporation of amenities and services in the RV scheme definition would provide a unified statement of the RV product and address the problems underlying recommendation 84 with new and emerging villages.

Option B includes a minor amendment to remove the word appurtenant from the definition of retirement village to implement Final Report recommendation 100(3).

Potential problems with Option B

A potential difficulty with this option is that amending the RV scheme definition may not be possible without also compromising the purpose of the current definition which the Supreme Court identified as being an overarching higher level concept containing three core criteria. Currently, to be an RV scheme under the RV Act a scheme must be one:

i. for occupation of residential premises by persons over 55 (or predominantly over 55); and
ii. for occupation of residential premises under one of the specified arrangements listed in the definition; and

iii. in which at least one resident must have paid a premium in consideration for, or in contemplation of, admission as a resident, under the scheme.[65]

In the *Hollywood* case,[66] the Supreme Court rejected an argument that retirement village scheme included the relationships established in the contractual arrangements applying in a village.[67] That is, the court found that an RV scheme operates at a 'higher level' and can be viewed as an overarching 'umbrella concept' that operates separately from the specific details (such as contractual arrangements, types of accommodation, amenities and services) of the village product.[68] This umbrella concept provides flexibility so that retirement villages can operate for extended periods over many different residence contract arrangements.

Expanding the definition of retirement village scheme to incorporate additional components of the RV product (accommodation, amenities and services in a managed community) risks changing the term from a high level umbrella concept to one grounded in detailed arrangements that apply in villages.

Option B would also likely require significant consequential amendments to the RV Act because its purpose in the legislation would likely change such that strategies for ensuring village continuity would need to be developed.

For this reason, Option B is not the preferred option.

[65] RV Act, section 3(1).

[66] Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection, [2013] WASC 219.

[67] The relevant submissions in the Hollywood case are summarised at paragraphs 76 and 77. The court's analysis of what a retirement village scheme means for the purposes of the RV Act is provided at paragraphs 78 to 87.

[68] ibid, paragraph 120.

TABLE 4 – BENEFITS AND DISADVANTAGES OF OPTIONS		
	Potential benefits	**Potential disadvantages**
Option A amend RV Act definitions of: a. **retirement village to incorporate managed community and amenities and services; and** b. **residence contract to include contracts which give the right to receive or use amenities and services.**	**Amendment to definition of retirement village in RV Act** • Provides an express unified concept of RV product in the RV legislation. • Identifies and accurately reflects all components of the RV product, being managed community, amenities and services. • Implements Final Report Rec. 84. • Reflects components of the RV product currently regulated by RV legislation. • Captures emerging RV models. Links well to reform proposal 3.2 consistent with how industry and residents view the RV product. **Amendment to definition of residence contract in RV Act** • Supports the amendment to retirement village by linking amenities and services provided as part of the RV product to the residence contract. • Removes confusion as to whether amenities and services chosen by a resident are part of the RV product, even when they are optional. • Completes the implementation of Final Report recommendation 18. • Implements recommendation 100 in relation to recommendation 3 of the 2002 Statutory Review.	**Amendment to definition of retirement village in RV Act** • The new term of managed community may give rise to different interpretations increasing confusion amongst stakeholders. • The amendments may increase rather than decrease the complexity of the legislation. **Amendment to definition of residence contract in the RV Act** • May increase regulatory burden for a small number of contracts for amenities and services which have not been incorporated into residence contracts following the 2016 amendments, by extending residence contract requirements to amenities and services.

TABLE 4 – BENEFITS AND DISADVANTAGES OF OPTIONS		
	Potential benefits	**Potential disadvantages**
Option B amend the RV Act definition of: **a. retirement village scheme to capture the RV product by incorporating managed community and amenities and services; and** **b. residence contract to include contracts which give the right to receive or use amenities and services**	**Amendment to definition of retirement village scheme in RV Act** • Provides an express unified concept of the RV product in the RV legislation. • Completes the implementation of Final Report recommendation 18. • Implements recommendation 100 in relation to recommendation 3 of the 2002 Statutory Review. • Implements the intention of recommendation 84. **Amendment to definition of residence contract in RV Act** • Supports the amendment to retirement village by linking amenities and services provided as part of the RV product to the residence contract. • Removes confusion as to whether amenities and services chosen by a resident are part of the RV product, even when they are optional. • Completes the implementation of Final Report recommendation 18. • Implements recommendation 100 in relation to recommendation 3 of the 2002 Statutory Review.	**Amendment to definition of retirement village scheme in RV Act** • The amendments may restrict the current interpretation of the definition of retirement village scheme, namely that it is seen as overarching and inclusive of different residential premises, amenities, resident contracts and redevelopment over the entire life of the village. • The inclusion of the additional RV product components may mean that the definition becomes too broad and possibly captures arrangements not intended to be covered by the legislation. • New term of managed community may be give rise to different interpretations increasing confusion amongst stakeholders. **Amendment to definition of residence contract in the RV Act** May Increase regulatory burden for a small number of contracts for amenities and services which have not been incorporated into residence contracts following the 2016 amendments, by extending residence contract requirements to amenities and services.

Questions

4.1.1	Do you agree that the RV product should be described as a managed community in which accommodation is occupied (or proposed to be occupied) and amenities and services are used (or intended for use) under a retirement village scheme? If not, how should it be described?
4.1.2	Do you support the proposal to amend the RV Act so that key terms are updated to incorporate the additional components of the RV product (managed community and amenities and services) to create a unified concept of the RV product?
4.1.3	If so, do you prefer Option A or B and why?
4.1.4	Are there any other options that would address the issues raised in Proposal 4.1? Please identify any additional benefits or disadvantages.
4.1.5	What, if any, are the cost implications of Options A or B? Please include quantifiable information if possible.

Proposal 4.2 – Accurate advertising and promotion of the RV product

Objectives for proposal 4.2

1. Implement final report recommendation 1 to guide industry on legislative requirements to accurately advertise and promote the RV product; and
2. increase the community's understanding of how the RV product is different to a residential property purchase.

Discussion

What the Final Report found and recommended and stage 1 reforms

Final Report

The RV Code requires promotional and sales material about retirement villages to be "truthful, accurate and unambiguous".[69]

The Final Report noted problems associated with marketing and in the following extract noted the importance of truthful, accurate and unambiguous promotional and sales materials.

> "Given that the decision to enter a retirement village is a significant one, and that often prospective residents need to consider contractual arrangements that are often different to those which a normal home owner need to consider, it is important that they receive promotional and sale material that is truthful, accurate and unambiguous".[70]

The Final Report recommended that Consumer Protection work with stakeholders to develop guidelines for appropriate marketing and promotion (**recommendation 1**) "to ensure that industry is clear as to the requirements of the legislation"[71] and that a senior housing information service be established to provide consumers with unbiased information (**recommendation 26**).[72]

The Final Report also recommended addressing non-delivery of advertised amenities and services by requiring operators to provide more detailed information so that they could be held accountable for promised amenities and services (**recommendation 2**).[73]

[69] Currently clause 6, previously clause 2.1. The Code provision was the same at the time of the Final Report.

[70] above n 1, 3.

[71] above n12, 3 and 4.

[72] above n12, xi. The seniors housing information service was established in 2011 in consultation with non-government organisations and named the Senior Housing Advisory Centre (SHAC). SHAC is a service provided by Consumer Protection offering free, independent and accurate information to seniors on their future housing options.

[73] above n12, viii.

Stage 1 reforms

Stage 1 reforms implemented recommendations 2 and 26. Recommendation 1 is yet to be addressed. A question to consider in relation to Recommendation 1 is whether guidelines will address advertising and marketing practices of operators. For example, as Part 4 and the discussion in proposal 4.1 identify, widespread industry marketing practices that promote the RV product as being the same or equivalent to a residential housing purchase, are resulting in consumers misunderstanding the RV product. This misunderstanding can lead to significant consumer detriment and operates to undermine consumer confidence in the RV product. It is therefore important to consider whether specific prohibitions would be more effective than guidelines in addressing the problem.

The issue

Advertising and marketing of retirement villages

As discussed in Part 3, industry advertising and marketing practices often ‘frame’ the RV product as similar or equivalent to a residential housing purchase.

Examples of this framing[74] include:

- Advertisements for an RV unit that read “Homes for sale” “[address] [suburb] $225,000” or “[address] [suburb] $799,000” but do not advise consumers that it is a lease that is being offered or that additional fees and charges will be payable.
- Advertisements for strata retirement villages that read “What could be better than owning your own home in an exclusive resort …? … At [village name] you own your own villa *like you own your own home now*” but do not advise consumers that the residents rights will be restricted.

The above examples demonstrate how advertising and marketing materials contain insufficient information for consumers to understand the nature of the RV product on offer and how it differs from just another residential property transaction. In particular, there is usually no clear description of the type of tenure offered or that regardless of the type of tenure residents’ rights are restricted. A further problem arises when only the entry contribution is referenced so that consumers think this is the only price payable.[75] Omitting price information from advertisements and marketing materials lead consumers to fill gaps in their knowledge by relying on more familiar property transactions such as residential housing purchases and results in some of the consumer economic behaviours discussed in Part 3.

[74] Such examples can be commonly found on real estate websites advertising retirement villages.

[75] The issue of the advertisement of the ‘price’ of the RV product is dealt with further in part 5 as part of the discussions of the proposal to introduce an Average Resident Comparison Figure.

Consumer detriment

As discussed in part 4.1 the RV product includes a number of different amenities and services provided to the resident in a managed community. These additional components have various costs, fees and charges and confer legal rights and obligations that may be unfamiliar.

When consumers think the product is the same as a residential housing transaction, they understandably expect it to have similar financial benefits and features. For example, consumers commonly perceive the RV product to have a property investment component and so expect some form of capital gain. This perception is reinforced by industry’s practice of describing the upfront payment as a loan, advertising units for sale and describing exit entitlements as a capital gain. The significant fees and charges which are payable at the end of their residency can come as a shock to those who regard the transaction as similar to a housing purchase.

When the reality of the transaction does not match consumers’ expectations, they experience detriment in the form of unmet expectations. This can cause significant consumer distress and dissatisfaction with the RV product.

Case study – An example of problems caused by consumers understanding the RV product as a residential property transaction

The following case study which draws on a recent contact with Consumer Protection illustrates this problem of unmet expectations caused by product framing:[76]

Case Study

Pat is considering moving into lease/loan village that has a DMF of 40% of the entry fee after 10 years. On leaving the village, Pat will receive 20% of what she describes as the capital gain. Pat provided the following table:

Fee/payment	$
Entry fee	600,000
DMF	(240,000)
20% of Capital Gain @ 5% per annum[77]	76,000
Exit entitlement	484,000 (actually $436,000)

Pat complained that after 10 years her refund would be less than her entry fee no matter how much capital gain had occurred. She said that taking what she described as the purchase price - $600,000 - plus the capital gain, the unit value after 10 years would be $980,000. She considered it unfair that the operator would keep $496,000. i.e., it was unfair that - assuming a 10 year residence - the operator would keep the balance of the $980,000 after the exit entitlement she expected - $484,000 - was deducted.

Even though Pat knows she will occupy the unit under a lease and must pay a DMF, she thinks the entry fee alone is the product price and thinks the transaction is equivalent to a residential property purchase or investment. This understanding results in her view that she is entitled to most of the capital gain as an investment return on her upfront payment. Pat is then disappointed that she will not see an increase in her investment. Part of her disappointment arises from her incorrect perceptions about the RV product.

Residents are typically unhappy when they do not get most or all of the capital gain. They view the portion going to the operator as an additional payment by them.[78] In contrast, operators consider residents entitled to a share of the capital gain are

[76] The figures are those provided by the complainant. The name 'Pat' is fictional.

[77] The 5 percent per annum 'capital gain' is problematic. As noted in Appendix 2, the Form 1 stipulates a 2 percent annual increase for estimating any resident share in an increase in the upfront payment. The 5 percent may be taken from the Property Council's website. Whether or not this is the case, it illustrates the way a consumer's assumption that capital gain means market rate returns for general property overrides the more specific information given in the Form 1.

[78] above n22, 42. The Greiner Report observed that there were concerns on the part of residents that capital gain arrangements centred around the fairness of paying a capital gain amount to the operator in addition to the [DMF].

receiving a benefit because the capital gain is on the operator's asset, as residents lease the accommodation.

The substantial upfront payment, returned to a former resident on a replacement resident paying an upfront payment gives the RV product an investment appearance.[79] Introducing the Retirement Villages Bill 1992 (RV Bill) to Parliament in 1992, the then Minister said: "the promotion and advertising of villages appeals to seniors' needs for a low maintenance lifestyle with guaranteed security of tenure, [and] smooth and efficient administration providing a safe, financially viable investment …".[80] Consistent with this, the Final Report said "Residents in retirement villages can be financially vulnerable and for this reason, having their investment protected, as well as providing security of tenure, is particularly important".[81] Importantly, the upfront payment secures the right to provision of accommodation, amenities and services in a managed community throughout the term of residence. The investment in this sense is in the operator's business, not in the specific unit or village.[82]

As the case study illustrates, consumers' expectations that a retirement village transaction is similar to a residential housing purchase can cause the consumer significant detriment, both financially and in the form of their disappointment if the product does not meet their expectations.

Evidence industry framing in marketing and advertising is contributing to consumer's misunderstanding the RV product

Consumer Protection considers that there is sufficient evidence showing that consumers misunderstand the RV product as being a residential housing purchase. This is borne out in the complaints received by SHAC. Retirement village residents in WA indicate that they essentially understand the RV product to be like a residential housing purchase and cannot understand why their rights are restricted and residence contracts are so long and confusing.

Evidence of this problem also exists in other Australian jurisdictions. Notably, one resident submission to the NSW Greiner Inquiry commented: "This concept of buying into the village and ultimately selling your property is constantly reinforced and this is where the real problem comes about".[83]

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[79] Retirement villages: how grandma and grandpa become corporate financiers Online article by investigative journalist Michael West at https://www.michaelwest.com.au/retirement-villages-how-grandma-and-grandpa-become-corporate-financiers/ 27 Jun 2018.

[80] Western Australia, Legislative Assembly, 16 May 1991, Retirement Villages Bill Second Reading, 2029 (Hon Yvonne Henderson, Minister for Consumer Affairs).

[81] above n12, 42.

[82] Slatter M, *Licences: A Real Advance?* (1997) 5 APLJ 181. The following comments with respect to issues in New Zealand's regulation of retirement villages as an investment product are pertinent to why Australian jurisdiction's stopped regulating it as a 'financial product' under the then Commonwealth's *Companies Act 1981* (Cwlth): "Obviously, where people pay a significant part of their capital to enter a retirement village, the investment aspect of the transaction is important. However, it is clear that residents of retirement villages have other primary concerns too, which may be of more immediate daily interest to them, namely: the reliable ongoing provision of facilities and management services; the maintenance of the ambience of the village they have selected; the security of tenure, especially (but not exclusively) vis-à-vis third party managers/operators/owners. The Securities Act is not an obvious vehicle for regulating these matters".

[83] above n22, 24.

The Greiner Report observed “the marketing of retirement village living is very influential and formative in shaping the expectations of future residents. This underpins the importance of ensuring that marketing materials and supporting claims are accurate and create realistic expectations for prospective residents”.[84] The Report also makes the observation “sales terminology in the sector and the level of understanding of critical terms and conditions unique to retirement village transactions may contribute to these perceptions” being perceptions that the purchase is much like freehold and an investment.[85]

The Greiner Report also observed “Across the submissions and community forums, current residents repeatedly referred to entering into a retirement village as an investment, much like a contract for a freehold property purchase. This is in contrast with understanding retirement village living as a lifestyle choice with associated fees and charges”.[86]

Independent research conducted by Macquarie University researchers, Dr Timothy Kyng and Ms Linda Drake, provides further evidence of the problems that arise from industry’s framing of the RV product. Their research concluded that marketing terminology for retirement villages was “often misleading and factually incorrect.” In addition, terms like purchase, buy, sale, owner and price were likely to confuse consumers in this context.[87]

Final report recommendation 1 – that guidelines be developed in regards to marketing issues

The Final Report recommended that guidelines be developed for appropriate marketing and promotion “to ensure that industry is clear as to the requirements of the legislation” (**recommendation 1**).[88]

Consumer Protection is concerned that problems associated with the marketing of retirement villages, may not be addressed by guidelines to increase industry understanding of their legislative obligations. The existence of RV specific provisions and general legislative prohibitions in the ACL against false and misleading statements, has not resulted in industry shifting its framing of the RV product.[89]

The 2007 Issues paper[90], as well as the 2010 Final Report identified marketing practices as an issue. These reports and complaints suggest that despite the passage of time since this issue was identified, and findings that consumers are being misled

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[84] above n22, 22.

[85] above n22, 23.

[86] above n22, 22 to 23.

[87] above n 22, 23.

[88] above n12, 4.

[89] Western Australia, Parliament, Legislative Assembly, Economics and Industry Standing Committee, Report 10, 2008, 61. The Committee identified issues with industry marketing practices and noted “…the lack of accurate and unambiguous information in relation to the sales and marketing” as an issue for the residents of the village. The inquiry made a finding that “Sales information and promotional material should comply with legislative requirements and the Code in particular (Finding 9, page 61). These requirements that promotional or sales material should be truthful, accurate and unambiguous are the same now as they were then.

[90] Government of Western Australia, Department of Consumer and Employment Protection, *Review of retirement villages legislation*, *Issues paper* June 2007 (2007 Issues paper).

by industry marketing in various reports and research since, there has been little voluntary industry change. This suggests the recommendation of the Final Report to develop guidelines to educate industry in regards to acceptable marketing practices may not be sufficient to bring about industry change.

Consumer Protection considers that there is an opportunity for advertising and marketing materials in the retirement villages sector to provide clearer information to consumers to assist consumers make more informed decisions.[91]

[91] New South Wales, NSW Fair Trading, *Rules of Conduct for Operators of Retirement Villages, Retirement Villages Amendment Regulation 2019,* 10. The consultation paper released by the NSW Government is also currently proposing requirements for advertising and marketing materials to ensure claims made in those materials are "accurate and create realistic expectations for residents and prospective residents."

Proposal 4.2 – That advertisements and marketing material for retirement villages be required to contain certain information about the RV product

The following options are proposed.

Option A: That guidelines be developed to guide industry on existing provisions in the RV Code and ACL.

Option B: That RV legislation be amended to require advertisements or marketing material for retirement villages to include the following information:

- the specific type of tenure offered (lease for life, licence, occupation by shares, strata title etc…);
- that accommodation is provided in a managed community with non-elective amenities and services; and
- any other prescribed information.

Option C: That RV legislation be amended to prohibit the following kinds of statements in advertisements and marketing material about retirement villages:

- statements which represent that accommodation which is for a type of tenure that is not freehold (such as a lease or licence) is the same as or equivalent to freehold tenure (e.g. units for long term lease are 'for sale'), and

- that RV legislation require advertising and marketing materials for a type of tenure that is freehold to specify whether or not the tenure is subject to terms and conditions that restrict that tenure e.g. strata title units that are purchased subject to restrictions imposed on the resident about disposal.

Example of advertisement descriptions of the RV product before and after proposed regulatory requirements [92]

Beachside village

72 Ocean Beach Road

Located between pristine beaches and the rolling hills, every day will feel like a holiday.

2 Bed Villas

Beachside village

72 Ocean Beach Road

Located between pristine beaches and the rolling hills, every day will feel like a holiday.

2 Bed Villa **accommodation (lease for life) and amenities and services**

[92] These examples show only the description of the RV product in the advertisement to focus on the proposed requirements in proposal 4.2. Proposed requirements for the advertising of the price of the RV product are dealt with in the next section.

TABLE 5A – BENEFITS AND DISADVANTGES OF OPTIONS		
	Potential benefits	**Potential disadvantages**
Option A – Develop guidelines	• Does not require legislative change. • Implements recommendation 1 of the final report.	• May be ineffective in addressing industry’s framing of the RV product in advertising and marketing.
Option B – Require advertisements and marketing material to contain tenure information and information about whether a kind of tenure restricts the rights of residents in relation to that kind of tenure **Option C –** **Prohibit advertising statements which represent that accommodation which is not freehold is the same as or equivalent as freehold, example. ‘for sale’**	• Specifically addresses the problems caused by the framing of RV products as residential housing transactions and omitting important information about the product. • Provides clear guidance to operators in regards to the advertising and promotion of RV products. • Implements the *intent* of recommendation 1 of the Final Report. • Increases the accuracy of information about RV products in the market place and thereby increases community understanding of the product. • Prevents the development of unmet expectations about the RV product. • Encourages best practice in the RV market.	• May increase costs of industry advertising and marketing, especially in the short-term. • Limit industry flexibility in marketing retirement villages.

Questions

4.2.4	Do you support the option of guidelines? Why/why not?
4.2.5	Do you support the option of advertising and marketing material for retirement villages to be required to contain the specified information about the type of tenure? If there are any problems with this option, please specify them.
4.2.6	Are there any other options for increasing consumer understanding of the RV product in advertising and marketing materials? Please identify any additional benefits or disadvantages.
4.2.7	Are there any additional advertising and promotional practices about the RV product that should be addressed?
4.2.8	What, if any, are the cost implications of Options A, B or C? Please include quantifiable information if possible.

PART 5: IMPROVING CONSUMERS' UNDERSTANDING OF THE RV PRODUCT PRICE

Introduction

Issue

Despite stage 1 reforms requiring pre-contract disclosure of all retirement village fees and charges, complaints received by Consumer Protection indicate that consumers continue to misunderstand the RV product price. Essentially there are two problems. First, consumers may misunderstand the upfront payment, or the upfront payment and recurrent charges alone, as the price.[93] Second, consumers have difficulty working out what the single or total price will be from the fragmented information they receive regarding each of the various individual DMF model imposts.[94]

Why consumers misunderstand the RV product price

These problems are contributed to by the following factors of the retirement villages market:

DMF pricing model unusual and complex

As discussed in Part 3 (and further illustrated in Appendices 1 and 2), the DMF model is both unusual and complex. Both of these features impede consumers' ability to understand the model. A significant number of consumers therefore struggle to understand this price structure and its defining fee, the DMF.[95] Further, as there is no equivalent in general housing to the DMF, its purpose and meaning is also unclear to consumers and those outside of the industry itself.

Advertising and marketing framing of RV product as a residential housing purchase

Part 3 sets out how industry advertising and marketing commonly frames the RV product transaction as equivalent to a general residential housing purchase. This framing encourages consumers to understand individual village fees and charges in a general housing purchase context rather than in terms of the DMF model price

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[93] See, for example, the consumer complaint in Case study 4.1.

[94] R Lane, "Your Money: The real cost of moving to a retirement village", *The West Australian*, 22 June 2018.

The article in *The West Australian* observed that the "biggest mistake most people make in working out if making the move [to a retirement village] is affordable" was considering whether sale of the family home funded the upfront payment. They did not take into account recurrent charges and exit deductions (including the DMF). It describes the mistake as "comparing the sale price of their present house with the purchase of their new one" because "[their] conclusion is if they are selling for more than they are paying it is affordable. But this only examines one of three parts of the transaction". Ms Lane says the parts consumers are not considering are "ongoing and outgoing" costs. Part 3 explains the different imposts in the DMF pricing model.

[95] villages.com.au *National Resident Survey 2018: The Independent Study of Todays Retirement Village Residents*, 24, 36,37, 99, 100, 101. The survey found that only 47percent of potential consumers reported some familiarity with RV price structures. Only 35 percent were aware of DMFs. This suggests that even consumers reporting a familiarity with the price structures may not in fact understand them, as the percentage of consumers who had heard of the DMF is 13 percent less than the number reporting some familiarity with the price structures. The survey also found that only 17 percent of residents felt that they understood the end of contract fees extremely well and only half said they were completely clear on what the regular fees were for. The Greiner Report (above, n22, 39 and 45) made similar findings. Consistent with these findings, the ACSA 'factsheet' *Retirement Villages – What are they?* (December 2017), 4, states, regarding the DMF, "How this works and how it is calculated is poorly understood by the general community".

structure with which they are unfamiliar. For example, consumers may incorrectly understand the upfront payment as the sale price and the exit entitlement as their capital gain on their unit. This misunderstanding was illustrated in case study 4.1. The DMF is not generally advertised and is not well explained when it is later revealed in pre-contractual disclosure.

DMF and other fees and charges not revealed at time purchasing decisions are made

The DMF and other fees and charges additional to the upfront payment are generally not revealed to consumers until pre-contractual disclosure is provided under the RV Act, (usually 10 days prior to the signing of the residence contract).[96] By this time, consumers are likely to have already developed their own understanding of the price as the upfront payment, being the amount commonly featured in advertising. In this context, and especially as there is no equivalent in the general housing market to the DMF, the DMFs purpose can confuse consumers. By the time it is actually deducted upon exit from the village, the DMF can seem disconnected from the product price.

Total cost not ascertainable upfront

The final amount of charges payable also depends on variables such as the length of residence or the amount paid upfront by a new resident. Even consumers that have some understanding of the DMF model, cannot know the total amount payable until they leave a village when costs incurred following their departure become known. This triggers certain consumer economic behaviours noted in Part 3 that leave consumers vulnerable to an incorrect, simplified understanding of the DMF model in which both the DMF and other exit fees are underestimated.

This part proposes options to provide consumers with a better, earlier understanding of the RV product price. The proposals aim to give consumers more accurate upfront pricing information in advertising and marketing of retirement villages as well as a better framework for developing an understanding of the DMF model. The proposals also aim to provide consumers with information which is independent of industry marketing processes. This will provide a basis for them to ask questions of operators and later understand the more detailed information provided during the prescribed pre-contract disclosure (including their contractual obligations).

The importance of price transparency

Transparency in price is an important consumer protection principle. It is essential for informed decision making, in particular for comparing with other options such as downsizing in general housing, renting over 55 strata or residential parks and for comparison between retirement villages. Markets do not properly function where consumers' ability to make informed purchasing decisions is compromised.

Below are examples of problems in the retirement villages market which relate to misunderstanding of price by consumers.

[96] RV Act section13 requires Form 1 to be provided at least 10 days before a person enters into a residence contract.

Consumers are unable to compare different pricing models for retirement villages in the market

Consumers are currently unable to understand (and therefore properly assess) different price models in the market. For example, at present, consumers do not know what they will pay under a particular upfront payment/recurrent charge/DMF/exit fee/exit entitlement mix. This means that they cannot work out whether a lower DMF/higher upfront payment or lower DMF and higher recurrent charges means that they will pay the same or less. This means that there is little competition on price between different villages, instead, industry tends to primarily compete on generating an emotional response to advertising for the village.[97]

Consumers are unable to compare different products in the market

Consumers also have difficulty comparing the RV product with alternate accommodation options offered by other markets, for example, residential parks, on the basis of price and value. The lack of understanding of price of the RV product means that consumers are not able to select with confidence the accommodation option which might best suit their financial needs.

Misguided consumer advocacy focuses on amount of DMF

Consumers often do not understand that the DMF is only one *part* of the RV product price. For example, consumers can focus on the DMF as the problematic fee, rather than on the overall price payable for the RV product.[98] This lack of understanding compromises their ability to assess risk in the RV product purchase. It is actually the upfront payment which poses the greatest consumer risk because it is a payment in advance of accommodation and services to be received over a number of years.

Consumer advocacy tends to pressure operators to reduce DMFs (so that more money is available on leaving a village). However, this fails to recognise that reducing DMFs may simply lead to increases in upfront payments and in turn to increased consumer risk in the event of operator insolvency. Consumers fail to recognise the interdependence between these two aspects of the RV product price.

Consumer misunderstanding causes problems for consumer well-being

Ill informed decisions regarding purchase of the RV product are particularly problematic because the exit deductions or delay in payment of an exit entitlement often mean that consumers cannot switch suppliers (whether to a more suitable RV product or an alternate accommodation product such as residential aged care).

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[97] Hobbs, Ben Martin, *But are they any good? The value of service quality information in complex markets*, Consumer Research Centre, 2018, Melbourne, Victoria, 21, 3 to 4. https://cprc.org.au/wp-content/uploads/CPRC-2018-But-are-they-any-good-1.pdf

[98] Consumer advocacy around problems with the DMF and reducing the DMF is commonly found in inquiries into the sector. Relevant inquiries include:

- Parliament of Victoria, Legislative Council, Legal and Social Issues Committee Inquiry into the retirement housing sector March 2017
- Dr K McDougall and Dr H Barrie, *South Australia Retirement Village Survey 2016*, University of Adelaide, May 2017
- Western Australia, Parliament, Legislative Assembly, Economics and Industry Standing Committee, Report 10, 2008
- Law Commission (United Kingdom) Event Fees in Retirement Properties, March 2017

Residents can also be left with insufficient funds for alternate accommodation or aged care.

Further, poorly informed decisions in the RV market gives rise to consumer concerns that:

- they pay more for the RV product than they would agree to pay if they had been provided with a single, inclusive amount;[99]
- the number of different imposts masks double dipping or price gouging; and
- the DMF is unfair[100] and does not in fact lower the upfront payment.[101]

If not addressed, these concerns have the potential to erode community confidence in the sector.

Where consumers do not understand the financial contract they have entered into, this also leads to consumer dissatisfaction with retirement village living. Although resident surveys often point to resident satisfaction with life in the village, the financial concerns with the retirement village contract often do not become evident until residents seek to exit the village, or have left the village. Many complaints received by Consumer Protection cannot be addressed by way of compliance action because they result from resident misunderstandings of the contract they have entered into.

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[99] https://www.9news.com.au/national/2017/05/25/19/08/retirement-village-residents-revolting-against-confusing-contracts, viewed 16 August 2018. The media article states, for example: "The big gripe these senior citizens have with their retirement village contracts is that they pay large sums of money to essentially lease a unit in a retirement village. But because they do not know how long they will be there, it is like an open cheque. … Just keep on paying, paying, paying until you die".

[100] above, n3, 130. The survey found that only 26 percent of former residents thought the DMF was fair, with 41 percent considering it unfair and 33 percent not sure.

[101] Industry's position is summarised in the *National Resident Survey 2018, 36*: "Some critics recommend that the operator's fee be charged upfront. This would make the village home around 20 percent more expensive. It would also preclude providing the resident with a financial 'nest egg' to support them in their last years of their life." A consumer recently contacted Consumer Protection's. Seniors Housing Advisory Centre (SHAC) wanting to know whether the government had compared "purchase prices", accommodation and facilities offered in RVs with those in commercial properties offered by developers to investigate whether operator claims that village "buy in prices" were discounted by an amount equivalent to the exit fees charged was true (SHAC, February 2018).

What the Final Report found and recommended and stage 1 reform

Final Report

The Final Report identified most of the issues and problems noted above. For example, it notes resident submissions that a "detailed explanation of the costs of living in a village needs to be provided to incoming residents *well before* they enter into a contract to reside" and "that the *true costs* of entering a village should be disclosed upfront"[102] (Consumer Protection emphasis on both occasions). It also notes that:

- residents are expected to consider contractual arrangements different to those applying to housing purchase;[103]
- significant asymmetry in the RV market gives operators a "clear and significant market advantage" over consumers;[104]
- consumers considered pre-2016 pre-contract disclosure information too complex and wanted earlier, simpler disclosure to occur;[105] and
- guidelines to assist industry to meet their obligation to provide truthful, accurate and unambiguous material should be developed.[106] In this context, it found there is "significant regulatory market failure" in the main source of information about seniors' housing options being "marketing information produced by providers for the specific purpose of attracting business".[107]

In regards to the complexity of the DMF model, and misunderstanding about the DMF, the Final Report noted that consumers were "particularly concerned" about identifying the DMF's purpose.[108]

The Final Report's recommendations were:

- Recommendation 1: That Consumer Protection work with stakeholder peak bodies to develop guidelines for industry as to appropriate marketing and promotion of villages;
- Recommendation 10: That two levels of pre-contract disclosure be prescribed, one for initial enquiries (a "key terms summary") and one to be supplied "once genuine interest in a particular residence is shown";[109]
- Recommendation 26: That a seniors housing information service be established;[110] and

[102] above, n12, 130.

[103] above, n12, 19.

[104] above, n12, 38.

[105] above, n12, 12.

[106] above, n12, 3.

[107] above, n12, 38 and 40. The Final Report at page two had earlier noted the Council on the Ageing (COTA) submission that (as paraphrased in the Final Report) "there is a critical need for an independent advisory service for prospective residents … such a service would prove to be the most effective in addressing problems associated with the marketing of retirement villages".

[108] above, n12, 130 -131.

[109] above, n12, 11 and 14.

[110] above, n12, 40.

- Recommendation 87: That the RV Act term premium be redefined.[111]

Recommendations 1, 10 and 26 were directed at providing better information to consumers about the price of living in a retirement village. Recommendation 87 was directed at clarifying the purpose of the DMF and making it clear that it formed part of the price of the RV product.

Stage 1 reforms

Stage 1 reforms implemented:

- Recommendation 26: The Seniors Housing Advisory Centre was established to provide independent information, including costs, to consumers and residents.
- Recommendation 10: (Partially) Pending further consideration of the introduction of a 'key terms summary, the RV legislation was amended to provide further assistance to consumers in regards to pricing and improve consumers' ability to compare the cost of residing in particular villages. In particular amendments were made to legislation to:
  - Introduce a more streamlined Form 1 to require more precise information as follows:
    - Form 1 already required operators to state the upfront payment monies that would be returned after 1, 2, 5 and 10 years residence but there was no consistency or transparency in how those figures were derived. An "Estimated Refund Entitlement" table was introduced to ensure calculations are done on a prescribed annual percentage increase, so the calculation method does not vary between villages.
    - The estimated amount of the DMF and each exit fee must now be stated, together with the annual percentage increase used for any refurbishment or marketing/sale commission amounts.
    - A new table showing the historical increase in recurrent charges over the previous three financial years, allowing the trajectory of those charges to be better predicted.
  - Prohibit certain business expenses from being included in recurrent charges as an additional expense.
  - Limiting some expenses to the actual cost incurred in recognition of the fact that the upfront payment/DMF/exit entitlement impost mix already provides for operator profit. For example, management services must now be rendered at actual cost.
  - Restrict certain exit fees, such as refurbishment, to actual cost.

[111] Premium is "a payment made in consideration for or in contemplation of admission to the village as a resident." The Final Report at page 148, states that the intent (in part) is to clarify that a DMF is part of the payment price for admission to the village. This recommendation was supported by the RVA who submitted that the term needed to be amended to include "payment of consideration on a deferred basis."

- Require operators to provide more specific information as to the purpose for every fee or charge.

Feedback on the Estimated Refund Entitlement Table in the new Form 1 is that it has been helpful in letting consumers know what their exit entitlement is likely to be.[112]

These changes do not however fully address problems consumers experience with understanding the pricing model. Although the Estimated Refund Entitlement Table has improved consumer understanding of what they will have in hand on leaving a village, three issues remain:

- The consumer receives the information too late and in conjunction with a significant volume of complex contractual documents.
- The Estimated Refund Entitlement Table does not give consumers an accurate estimate of the *total* cost of residing in the village.
- Consumers still do not understand the DMF price model that underpins the financial arrangements they enter into.

Delays in consumers receiving pricing information

The Estimated Refund Entitlement Table is required to be provided at least 10 working days before a residence contract is signed.[113] Consumers report that it is not provided prior to a resident selecting a unit and paying a significant holding fee, which restricts its usefulness for comparison purposes. This generally occurs only after a consumer has chosen a village and a unit in it. As noted earlier, research on consumer economic behaviours (Part 3) suggests the provision of this information at this time may have little impact on a consumer's purchasing decision, especially if emotional considerations have been activated. There are three key behaviour influences which are relevant here:

- once the purchasing process is sufficiently underway, expectations may have been formed that compromise their ability to objectively understand the pre-contract price information;
- where a consumer has already made the emotional decision to purchase, a consumer is also likely to give more attention to information regarding the anticipated lifestyle benefits than to that about additional fees and charges; and

[112] above n22, 32 to 33, 37 to 38, and 54, 55. This is consistent with findings in other jurisdictions that require similar pre contract disclosure. See for example, the Victorian Parliamentary Inquiry Parliament into the retirement housing sector. The Victorian Parliamentary Inquiry Committee noted that "since 2014 retirement village contracts must include estimates of exit fees residents would expect to pay at one, two, five and ten years. This is undoubtedly helpful for retirees planning to enter a village". The Committee further noted that because detail was specific to each contract, specialist advice was required for a resident to fully understand the contract and its implications as relevant to their personal circumstances. In particular, consumers could assume that the pre contract disclosure included everything relevant and not appreciate that contract terms moderated the disclosure information. Consumers also tend to make an emotional decision to enter a village and gloss over the contractual arrangements. The Committee found a need to "improve the understanding, transparency and operation of [the DMF] model" and made recommendations directed at that objective.

[113] RV Act, section 13(2).

- consumers also tend to discount imposts that are uncertain or deferred.[114] Concern about the DMF therefore generally arises only when payment becomes imminent when a resident has left or is considering leaving a village.

Under all of these behavioural influences, when the DMF and exit fees are eventually revealed during pre-contractual disclosure, these costs can be seen as irrelevant or unimportant to the decision to purchase.[115]

Consumers not informed of the total price

Consumers do not currently get information to understand the cost of the RV product having regard to ongoing and deferred fees. The Estimated Refund Table compares what consumers will have in hand on leaving a village rather than the total cost of the product. Consumers are therefore still unable to identify from the information they receive, whether they will pay more under one upfront payment/recurrent charges/exit deduction/exit entitlement mix than under another.[116]

Consumer lack of understanding of DMF Price Model

More fundamentally, there does not appear to have been any significant increase in consumer understanding of the DMF model price structure. The DMF continues to be seen as an unfair fee unconnected with the product purchase rather than as an integral component of the price structure. Consumer advocacy for a cap on exit fees continues to ignore the likelihood of this causing increases in the upfront payment and/or recurrent charges.[117]

Conclusion

Based on the above, Consumer Protection believes what is required to assist consumers are measures that will:

- Firstly, address the advertising and marketing practices which provide the framework within which consumers consider or first obtain the price information ; and
- Secondly, enable consumers to build a better understanding of the complex price structure – in particular, to better understand the DMF's role in price, the

[114] above, n22, 7 and 10. The UK Office of Fair Trading found that DMFs: "may exploit consumers' "behavioural biases", which means that consumers may not take them into account in their decision-making". It also observed that: "their attitude to transfer fees may change over time." The UK Law Commission, however, concluded that DMFs should not be prohibited.

[115] World Bank 2015, World Development Report 2015: Mind, Society and Behaviour, Washington DC, World Bank, 5, 3 and 4. The book observes that people simplify problems through seeing them through a narrow frame. They fill in missing information based on assumptions and evaluate situations through associations.

[116] above n22, Table 2.2. Relevant to consumer concern that the DMF is not fair, the UK Office of Fair Trading found that a problem with the DMF model was that it has no "effective constraint" ensuring the upfront payment is sufficiently low to balance the large DMF. That is, there is no standard formula that a 5 percent increase in the DMF will result in an equivalent decrease in the upfront payment (Table 2.2 illustrates this).

[117] Regarding advocacy, see, for example, Western Australia, Parliament. Legislative Council, Hansard, 28 November 2018, 8743-8750 (Retirement Villages Act Reform, Hon. Alison Xamon MLC). See also above n3, 100. The *National Resident Survey 2018* found that among potential consumers who were aware of RV product price structures, 63 percent viewed them as "unappealing" and that the fee structure was a key reason for persons who advised they were unlikely to consider entering a village.

overall amount they will pay under each individual DMF model price structure so that price comparisons can be made between villages.

Stage 1 reforms approached the price by requiring the purposes of key individual imposts to be specified. However, the DMF model is predicated on an overlap between impost purposes. This means that what consumers desire, absolute delineation, may not be achievable.

The proposals below recognise that what may give consumers greater confidence about what they will pay is a simple way to determine the cumulative cost of the RV product. If consumers can be provided with a way to convert the individual DMF imposts to a single figure, they will not only be given a single price for the RV product purchase, they will also be able to see the impact of a change in one component on the total product cost.

Proposals

This chapter proposes:

- **reform 5.1** Introducing requirements for the advertising and marketing of the RV product price to provide additional pricing information to consumers.
- **reform 5.2** Introducing options for displaying fees and charges associated with a RV product, to present a single price, for consumers considering entering into a retirement village.

Objective

To enable consumers to better understand in regards to the RV product price:

- what they will pay upfront;
- what they will pay in total across the term of residence; and
- the actual cost to the consumer of the RV product.

Proposal 5.1 – Requirements for the advertising and marketing of the RV product price

This reform addresses the advertising and marketing of the RV Product price to assist consumers to understand the price they will be paying if they choose to enter a retirement village.

Currently, advertising and marketing of retirement villages will provide only the upfront payment as an indication of the price. Generally no information is provided as to the other fees and charges payable for residency in a retirement village. The example illustrates a typical advertisement. Whilst some information on these fees and charges is provided during pre-contract disclosure, as discussed earlier, there are problems with consumers receiving this information after they have already engaged with the process of moving into a village.

> Beachside village
>
> 72 Ocean Beach Road
>
> Located between pristine beaches and the rolling hills, every day will feel like a holiday.
>
> 2 Bed Villas
>
> from $330,000

In order that consumers be better informed at an earlier stage, it is important that clear early pricing information is provided in the market. Reliance on the ACL and the development of guidelines have been proposed as a means to address price advertising. The following sections explain why Consumer Protection does not think these options are sufficient to address problems.

Section 48 of the ACL (no 'drip pricing' – single price required)

The requirement to provide clear early pricing is already a requirement under the ACL. Section 48 of the ACL requires suppliers to provide consumers with a single price for a product. Single price means the "minimum quantifiable consideration" for a product. This is an amount that represents the total of all the mandatory and quantifiable fees and charges the consumer must pay. The Greiner Report identified section 48 of the ACL as a "key provision" ensuring price transparency. It observed that a "more thorough application" of the principle underlying it to RV product advertising would enable consumers to make more informed decisions.

The principle underlying section 48 is that drip pricing exploits consumers and frustrates competitive market forces. Drip pricing is advertising an amount as the price for a product or service then, when the purchase is underway, revealing that there are additional fees and charges for what the supplier claims are other products or services. For example, prior to section 48 being enacted, airlines advertised a ticket price then added other fees, such as taxes, airport fees, mandatory baggage fees and fuel surcharges, when the consumer went to pay. Suppliers argued that the additional imposts were not part of the 'ticket' price because they were for different things. However, that was considered illusory. A person who purchased an airline ticket had no option with regard to paying the so called "additional fees".[118]

Section 48 recognises that price structures may involve a number of imposts and that when this is the case, consumers are interested in what must be paid up front and what part of the product price is allocated to each component as well as the total price. For this reason, section 48 does not prohibit advertising part only of a product price.

[118] For example, airlines adding unadvertised taxes, airport fees and fuel charges in the booking process.

Instead it provides that when a representation is made about an amount that is part only of the product price (such as an advertisement for the product), a single price must also be provided with predominant presence.

Section 48 also recognises that price structures may have some imposts that are quantifiable when the representation is made and others that are not. In this case, advertising and promotional material must state (as well as the part price):

- an amount that is the total amount of all the quantifiable imposts; and
- that not all fees and charges are included in that amount.[119]

Minimum quantifiable consideration can be provided on a rate/minimum period of provision basis. For example, if a car rental business offers a car at $74 per day with $1 charge for each kilometre driven, the advertising must state $74 day plus $1 kilometre surcharge.[120]

Retirement villages' industry compliance with section 48 of the ACL

Section 48 already applies to the advertising of the RV product. To comply with the ACL, the RV product advertising, marketing and promotion should already include single price information.

Consumer Protection has some concerns about the extent to which there is compliance with section 48 of the ACL.

The DMF price model used in the retirement villages market, together with the long term nature of the RV product makes it difficult for all of the fees and charges payable to be quantified prior to a consumer entering the village. As such, operators might argue that they already provide the total amount of quantifiable imposts by advertising the upfront payment. On the other hand, it might be argued that greater efforts could be made by industry to provide a more accurate representation of the total price payable for the RV product.

Consumer Protection regularly conducts proactive checks to provide education and to ensure that advertising is in line with ACL requirements. Lack of compliance with advertising requirements is a common issue during these compliance checks.

Implementation of Recommendation 1 – Development of guidelines

Recommendation 1 of the Final Report was that the Department work with industry and residents' bodies to develop guidelines for industry as to appropriate marketing and promotion of villages. This was in response to concerns raised about promises made in advertising and marketing materials which were not ultimately delivered to

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[119] Stephen G Corones, *The Australian Consumer Law* (Lawbook Co. 2nd ed. 2013), 351. Section 48 was directed at consumers not knowing the full price until they commenced the purchasing process, for example, airlines adding unadvertised taxes, airport fees and fuel charges in the booking process. It is also directed at the fact that partial pricing prevents consumers from comparing 'like for like'.

[120] ibid, 351. ACL section 48 was directed at consumers not knowing the full price until they commenced the purchasing process. It is also directed at the fact that partial pricing prevents consumers from comparing "like for like".

residents.[121] Guidelines developed to implement Recommendation 1 could also be used to increase compliance with the requirements of the ACL around pricing and what the product is that is being sold.

Are additional regulatory measures required in regards to advertising and marketing practices?

It is arguable that implementing Recommendation 1 of the Final Report with administrative guidelines as to better advertising and marketing practices will be insufficient to address advertising and marketing issues around the pricing of the RV product. Despite proactive compliance visits and regular education by Consumer Protection, problems still remain. The ACCC also already publishes many general guides as to the requirements which apply to advertising and selling practices. Further, breach of the ACL is a difficult, expensive and protracted process whether undertaken by the regulator or a consumer and the available remedies are often not commensurate with that exercise.

A further option is to also insert a specific requirement in the retirement villages' legislation to set out clear expectations as to the advertising and marketing of the price of the RV product and compliance with the intent of section 48 of the ACL. This could accompany the issue of guidelines and provide a more practical and effective enforcement mechanism for breaches of these requirements.[122]

Specific industry requirements can offer a more efficient process because the practical steps an operator is required to take are clear and more easily proved than compliance with higher level, principle based obligations. In this respect, provision in RV legislation offers benefits to operators as well as consumers and regulators. Remedies can also be more tailored to any established breach.

[121] above n12, 1 to 4 and above n6, 85-105; the non-delivery of promised amenities and services was a key issue raised in the EISC Report into the Karrinyup Lakes Inquiry.

[122] For instance, if infringement notices are introduced, clear breaches of advertising and marketing requirements could be quickly and efficiently addressed by the issue of an infringement notices rather than prosecution action.

Proposal 5.1 – Options

Option A – Develop guidelines to assist industry in developing more accurate advertising and marketing practices (Recommendation 1 of the Final Report)

Development of guidelines That guidelines be developed by Consumer Protection to assist industry to develop more accurate advertising and marketing practices, including compliance with section 48 of the ACL.

These guidelines would aim to assist industry improve current marketing practices by providing clear direction on practices that are not acceptable under the ACL. For example, the guidelines could identify that section 48 of the ACL requires that where advertising and marketing states an amount which is only part of the price, it must make it clear that not all payments, fees and charges are included in that amount and explain why.

These guidelines would supplement existing general guidelines on marketing and advertising made available by the ACCC by focusing specifically on the retirement villages industry. This option would implement Final Report recommendation 1 and build on existing educational initiatives taken by Consumer Protection.[123]

Option B – Advertisements which display only part of the price of retirement villages be required to also display further information about the other fees and charges.

Amend the RV legislation That RV legislation be amended to require advertising and marketing of retirement villages which states an amount which is only part of the price, to provide the following information about other fees and charges that are payable : - the amount of recurrent fees and charges which are payable in the village' - the minimum or maximum DMF payable; - the minimum of any other fees payable; and - other prescribed information.

The ACL currently requires that where only part of a price is stated in an advertisement, the advertisement must also state that not all fees and charges are included. This indicates to consumers that they must obtain further information about other fees and charges themselves.

A variant of this option for improving consumer understanding of the price about the RV product, is that advertisements could be required to provide further information about fees and charges that are not included and maximum/minimums for payments,

[123] For instance as part of its proactive compliance activities, Consumer Protection issues a retirement villages bulletin to assist industry operators to better understand their regulatory obligations.

fees and charges that are not currently quantifiable. For example, an advertisement for a village which states that the upfront payment is $500,000 could also state: "does not include recurrent charges, currently $400 per month or the DMF and other fees and charges. Maximum DMF $150,000". Option B would alert consumers to the presence of other fees and charges *and* provide consumers with some basic information about these fees and charges.

TABLE 5B - BENEFITS AND DISADVANTAGES OF OPTIONS		
	Potential benefits	**Potential disadvantages**
Option A **Introduce guidelines for industry in regards to marketing and advertising regulatory requirements**	• Facilitates more accurate advertising of retirement villages. • Provides clear guidance to industry about requirements. • Flexible to respond to different practices in industry. • Implements Final Report recommendation 1. • ACL legislation can be used to enforce obligations. • RV legislation can be used to enforce obligations. Provides consumers with fuller/more complete information about the fees and charges payable.	• On its own, may not be effective to bring about industry change. • May not give consumers sufficient information about pricing – consumers must ascertain fees and charges independently.
Option B **Introduce requirement under retirement village's legislation for advertisements which only state part of the price to also contain further information about additional fees and charges.**	• More accurate advertising of the price of the RV Product. • Alerts consumers to the fact that the stated price is not the total price and that other fees and charges are payable. • RV legislation can be used to enforce obligations. Provides consumers with fuller/more complete information about the fees and charges payable.	• Reduces industry flexibility in advertising and marketing practices. • May be difficult for industry to provide sufficient information about extra costs in advertising to be meaningful for consumers. • May cost industry more, example, increase advertising costs.

Questions

5.1.1	Do you support the proposal to introduce guidelines for industry to comply with current advertising and marketing regulatory requirements such as s 48 of the ACL (Option A)?
5.1.2	Do you support the proposal to require further pricing information in advertisements of the RV Product (Option B)?
5.1.3	Are there any other options that would address the issues raised in Proposal 5.1? Please identify any additional benefits or disadvantages.
5.1.4	What, if any, are the cost implications of Options A and B? Please include quantifiable information if possible.
5.1.5	Should the proposed advertising requirements apply to all advertisements including secondary markets and publishers such as village sales agents and real estate agents?

Proposal 5.2 – Early provision of more complete, publicly available price information

Discussion

As discussed earlier, consumers have difficulty working out what the single or total price of residence in a retirement village will be. Partly, this is due to the fragmented information they receive regarding each of the various individual DMF model imposts. Further, the information about fees and charges consumers do receive by way of the current pre-contractual disclosure requirements, is often provided too late to be effective in the decision making process.

To address this, two models from other jurisdictions to improve the price information which is provided to consumers about the RV product are worth considering:

1. require operators to provide consumers with a monthly average resident comparison figure for their village (NSW's Average Resident Comparison Figure); or
2. require operators to advertise to consumers the upfront payment amount both with and without the DMF (Victorian Parliamentary Committee recommendation).

1. NSW average resident comparison figure (ARCF)

Overview

NSW requires operators to provide a price comparison figure to prospective residents to help them understand and compare the financial cost of living in different villages. This figure is an estimate of the cost per month over a seven year residence. It is calculated by estimating the main fees a resident is likely to be charged in a particular village over seven years, estimating what investment return a resident will not receive from the upfront payment, totalling those estimates then averaging the total over the 84 months that seven years represents. This gives consumers an estimate of the average *cost per month* of living in a village before they make a decision whether to enter that village.[124] The figure must be provided to consumers upon request.

Fees and charges used to calculate average cost

Operators must calculate the following fees and charges for the ARCF:

1. recurrent charges payable under the residence contract;
2. the departure fee estimated on the calculation required by the residence contract (that is, the percentages per year and whether on the departing resident or new resident's upfront payment) and using ABS statistics as to general residential property movements to estimate the new resident's upfront payment; and
3. any part of the estimated increase in the upfront payment over seven years that the resident will not get.[125]

[124] RV Act (NSW), section18 (3A) and Retirement Village Regulation 2017 (NSW), regulation 11.

[125] NSW RV legislation uses the term "capital gain" to describe the difference between an incoming and outgoing resident's upfront payment, less any exit fees. The WA RV legislation does not use this terminology.

The estimated seven years residence for calculating the ARCF corresponds to industry research (at a national level) on the average period of residence at the time the ARCF was developed. It also corresponds to industry research as to the usual period within which maximum DMF payments are reached.[126]

Document showing how the NSW ARCF is calculated (the ARCF Table)

Below is a table that NSW Fair Trading has published on its website showing how the ARCF is to be calculated (the ARCF Table), together with that website's background to the calculations set out in the table (explanation of the examples and ABS statistics used). The following example is taken from the NSW Fair Trading website.[127] (Terms used in this paper have been substituted for the equivalent NSW terms to assist in understanding):

[126] This period was consistent over 2015 to 2017. However, the 2018 PwC/Property Council Retirement Census suggests the average length of residence is now 8-10 years.

[127] The NSW Fair Trading webpage which provides the examples for calculating the ARCF is at https://www.fairtrading.nsw.gov.au/resource-library/housing-and-property/retirement-villages/average-resident-comparison-figure.

TABLE 5.1 – NSW FAIR TRADING ARCF CALCULATION TABLE, WITH EXAMPLES AND ABS STATISTICS FOR ESTIMATING NEW UPFRONT PAYMENT

Example 1:

- A detached, 2 bedroom villa within in a retirement village in regional NSW has an [upfront payment] of $400,000.
- The contract includes a fee of $300 each week in recurrent charges.
- The [DMF] is based on the next resident's [upfront payment]. The [DMF] is 4% each year for the first 3 years, and 3% each year for years 4 to 7.
- The resident is entitled to 100% of any variance in their [upfront payment] and the next resident's [upfront payment].

Example 2:

- An attached, 2 bedroom unit in the Sydney metropolitan area is available for an [upfront payment] of $650,000.
- Recurrent charges for the ongoing costs are $2,500 each month.
- The [DMF] is based on the next resident's [upfront payment]. The [DMF] is 5% each year for the first 3 years and 3% each year for years 4 to 7.
- The operator and resident share 50/50 in any variance in their [upfront payment] and the next resident's [upfront payment].

Percentage rate of property value increase each year. [Consumer Protection comment - this table uses ABS statistics]

Type of dwelling	Sydney	Rest of NSW
Median Price of Established House Transfers (unstratified)	7.31%	4.52% (example 1)
Median Price of Attached Dwelling Transfers (unstratified)	6.23% (example 2)	3.35%

	Table 5.1[128] Requirement	Example 1	Example 2
[Item A]	Total amount of recurrent charges over 7 years (A)	($300 x 52 weeks x 7 years) = **$109,200**	($2500 x 12 months x 7 years) = **$210,000**
	Estimating the variation (capital gains) and next resident's entry price using the ABS data in Table 1[129]	($400,000 x 4.52% x 7 years) = **$126,560** variance[130] $400,000 + $126,650 = **$526,560** (new entry price[131] after 7 years)	($650,000 x 6.23% x 7 years) = **$283,465** variance[132] $650,000 + $283,456 = **$933,465** (new entry price after 7 years)
[Item B]	The Departure Fee[133] payable after 7 years	($526,560 x 24%*) = **$126,374** *(4% x 3 years) + (3% x 4 years)[134]	($933,465 x 27%*) = **$252,036** *(5% x 3 years) + (3% x 4 years)
[Item C]	Capital gains[135] if any, payable to the operator by the resident at the end of 7 years (C)[136]	N/A = $0	($283,465 x 50%) = **$141,733**
	ARCF = (A + B +C)/84	**ARCF = $2,804**	**ARCF = $7,188**

[128] NB this table is updated from time to time. This table uses the NSW table published as at 13 June 2019.

[129] This calculation is to be used where the departure fees (item B) (DMF) is calculated on the incoming (next) resident/s upfront payment.

[130] This calculation is not made on a compound basis. When the annual percentage increase is compounded, the increase over 7 years is $128,072.

[131] NSW uses the term entry price. In WA and in this paper this payment is generally referred to as the upfront payment.

[132] This calculation is a compound calculation in which each successive year is calculated on the basis of a 0.0452% increase in the previous year.

[133] DMF.

[134] The 24% and 27% figures is the second set of calculations in the line, which repeats the information in the examples as to how the DMF is to be calculated.

[135] This amount represents the proportion of any increase in the upfront payment payable by an incoming resident which is retained by the exiting resident, which is payable to the operator on exit. NSW uses the term capital gains to describe this amount.

[136] This is the 'investment' return a consumer who becomes a retirement village resident forgoes in comparison to what they could reasonably have expected to receive if they had invested their upfront payment in general housing that was not part of a retirement village.

How an ARCF Table might assist consumers

The ARCF provides residents with an average monthly figure for comparison purposes. However, the calculations in the ARCF Table could also be useful to consumers in providing them with a better understanding of the DMF model. In particular, the ARCF Table's calculations illustrate the way that various parts of the DMF model operate together to provide a single price. This might assist consumers to better understand that the upfront payment is not the RV product price but rather the price is the total of the fees and charges that they will pay over the period of their residence and after they leave the village. It is apparent form the ARCF Table that the upfront payment represents a cost to the consumer only to the extent that they will lose part of it at the end of their residence via a DMF, and that they will lose the value of use of the amount for the time which it is with the operator.

Providing consumers with the calculation table would give more transparency about the RV product pricing model, as well as the particular version of the model that a particular village offers. Setting out fees and charges in this way can also assist consumers when comparing, providing more information than simply the net result between different DMF model impost mixes.

Comparison with WA Form 1 Estimated Refund Entitlement Table

Both the ARCF and the WA Form 1 Estimated Refund Entitlement Table provide consumers with standardised fee and cost estimates but the information they provide differs.

The ARCF is a single figure. As noted above, it combines the main fees which a resident will have to pay over the course of their residency into an average monthly cost. This monthly figure can easily be converted to a single figure for seven years. It does not take into account variations in the DMF over that period – for example, whether a particular village frontloads or spreads the DMF evenly over the residence period. By contrast, the Form 1 Estimated Refund Entitlement Table gives consumers an estimate of the amount that will be *returned to them* after a more varied period of residence (1, 2, 5 and 10 years).

An ARCF would not therefore replace the Form 1. It simply fills a gap by providing consumers with early information as to the main fees and charges, giving a better estimate of total price than is currently available in NSW.

2. Extended ARCF for WA

The ARCF model in NSW provides important information to a consumer, but it could be adapted to provide a more accurate estimate of a 'single price' and so be more informative for WA consumers. In particular, there are several fees and charges which are not included in the ARCF for example, refurbishment and marketing fees. Also, NSW does not calculate the recurrent charges on an annual increase basis. NSW only requires the final ARCF figure to be provided to consumers, not the ARCF Table itself. The actual table can be useful for consumers to see as it provides some transparency about how the RV product pricing model works. This might lead to better consumer understanding of the RV product price. It is also possible to adapt the

ARCF Table so that it provides a figure that consumers can use to compare purchase of the RV product with purchase of general residential housing.

Table 5.2 is an example of what could be provided to WA consumers.[137] For ease of comparison with the NSW website table (Table 5.1 above), NSW figures have been used. These are not average figures for WA. Appendix 3 provides a detailed explanation of the way what is proposed for WA differs from the NSW model.

[137] An operator must calculate the figures in the document on the basis of the contract that will be offered, using amounts current at the time the unit is first advertised.

TABLE 5.2 – EXAMPLE OF ARCF TABLE FOR WA CONSUMERS

Item	How to calculate the ARCF in WA	Example based on NSW Table, Example 2
Item A: Recurrent charges .	Estimated total amount of recurrent charges over 7 years, allowing for increase each year	(Monthly recurrent charges in the village x 12 months. Current monthly payment + 3% x 12 months etc for 7 years).[138] Example: $2,500 per month works out to be: $229,752
Item B: Exit deductions (DMF and other exit fees)	**B1 – New resident's upfront payment** If contract says that the DMF is calculated on the new resident's upfront payment - first estimate the next resident's upfront payment assuming a 2% increase per annum	(Upfront payment the consumer will make x 2% increase each year for 7 years)[139] Example: $650,000 upfront payment works out to be: $831,457
	B2 - Estimated DMF payable after 7 years Calculate DMF at 7 years based on the proposed contract. Each DMF, and the calculations that apply to them, are to be set out	(DMF based on estimated new upfront payment - contract provides that DMF is calculated at 5% for 3 years then 3% for 4 years. At 7 years, the DMF is 27%)[140] Example: 27% of $831,457 works out to be: $224,493
	B3 – Total estimated exit fees additional to any DMF Example: Refurbishment, marketing Set out each fee and calculate in accord with the contract terms/estimate based on village historical information	Example: Refurbishment fee – at cost, estimated: $10,000[141] Marketing and sales fees: at cost, estimated $5,000[142] Estimated total: $15,000
	Total – Item B (B2 + B3)	$224,493 + $15,000 = $239,493

[138] An assumption of a 3% increase aligns with the current Form 1 requirement. The average village annual recurrent charge increase over the past three years can be used if the village is more than three years old.
[139] The new upfront payment is calculated at 2%, being the prescribed annual rate of increase for pre contract disclosure.
[140] If the DMF is based on the consumer's upfront payment, this would read: **DMF Based on your upfront payment** – the contract in this example provides that a DMF is calculated at 5% for 3 years then 3% for 4 years. At 7 years, the DMF is 27%: ($650,000 x 27%) = $175,500.
[141] NB – this is not intended to suggest an average or reasonable refurbishment fee. The figure was chosen for ease of the calculations below.
[142] NB – this is not intended to suggest an average or reasonable marketing fee. The figure was chosen for ease of the calculations below.

Item	How to calculate the ARCF in WA	Example based on NSW Table, Example 2
Item C **Lost opportunity cost** Estimating what investing the upfront payment in the RV product costs (or benefits a consumer) Difference between return on upfront payment for the RV product and investment return a consumer could expect from investing the upfront payment in general housing	**C1 – Estimated share in any increase/decrease in the upfront payment after 7 years** State percentage of difference between upfront payment that consumer receives/must pay	New upfront payment (amount at B1) less old upfront payment. In example, consumer receives (or pays) 50% of any difference. Example: $831,457 - $650,000 = $181,457. 50% of $181, 457 is: $90,728
	C2 - Estimated return on upfront payment monies if they had been invested in general residential property for 7 years.	Calculate expected general residential property movement for the same type of unit. Example: $650,000 x local property movement over 7 years - in NSW, 6.23%[143] x 7 years works out to be: $283,465[144]
ARCF for comparing RV products	**Item C Total** **(C2 – C1)**	Lost opportunity cost: estimated return that could have been received in general housing less the estimated share in any increase/decrease in the upfront payment over 7 years Example: $283,465 – $90,728 = $192,737
	Estimated ARCF over 7 years ARCF = A + B +C	Total recurrent charges + exit deductions (DMF and other exit fees) + lost investment return (or minus any benefit) Example: $229,752 + $239,493 + $192,737 = $661,982
	Estimated ARCF per month	$661,982/84 months (7 x 12 months) = $7,881

143 NSW uses ABS statistics. An alternate is to use more specific REIWA information on average general housing price increase for an equivalent unit type in the village locality over the past 7 years.

144 NB – in WA house prices have fallen over the past few years. This return would not be expected and, in fact, consumers may well have lost money on a general residential property investment.

Table 5.2 provides consumers with an estimate of what living in a village will cost them. It is useful for comparison between villages. It shows what the figure will be under the different contracts.

However, it does not allow like for like comparison between the RV product and general housing in terms of lost opportunity. A consumer will likely incur cost related to general housing that is not incurred when purchasing the RV product. There will also be general housing expenses that are the same as some included in recurrent charges. A consumer needs to deduct general housing expenses such as maintenance, council rates, strata levies and other recurrent expenses to make a like for like comparison.

Table 5.2A illustrates how extra lines could be added to Table 5.2 so consumers can consider this if they want to.

Table 5.2 and 5.2A illustrate the complexity an RV product decision involves.

TABLE 5.2A – ADDITIONAL LINES FOR TABLE 5.2 FOR COMPARISON OF RV PRODUCT PRICE WITH GENERAL RESIDENTIAL HOUSING COSTS

Item	How to calculate	Example of costs associated with general residential property purchase
Item D ARCF for comparing the RV product with general housing	D1 - add together expenses that will be incurred in *purchasing* a general residential property that is not incurred in purchasing the RV product	Staying in the family home - N/A Downsizing: - Stamp duty - Bringing the new property to desired standard Example: Say $30,000
	D2 - estimate the ongoing costs of living in general residential property for 7 years as compared to the costs of living in the village Consider whether any expenses the operator does not include in recurrent charges – for example, electricity, water or internet expenses - are equivalent	Example: - Annual maintenance - building insurance - council rates - strata levies To illustrate how a difference may arise, in comparison with the NSW figures in the example above, say: Example A: $2,000 per month increasing at 3% over 7 years = $183,896 Example B: $2,700 per month increasing at 3% over 7 years = $250,533 [145]
	D3 - estimate refurbishment and selling costs after 7 years	Example: Refurbishment: $10,000 Marketing and sales fees: $5,000 Estimated total: $15,000
	Total Item D D1 + D2 (EG A) + D3 D1 + D2 (EG B) + D3	 $228,896 $295,533
	Estimated ARCF at the end of 7 years Deduct the expenses that would have been incurred in relation to a general residential property from the village comparison ARCF	**Using D2, Example A** $661,982 - $228,896 = $433,086 **Using D2, Example B** $661,982 - $295,533 = $366,449
	Estimated ARCF per month	For Example A, $5,156 For Example B, $4,363

[145] Examples are set slightly below and above estimated village recurrent charges of $2,500 per month in Item A for comparative purposes.

3. Victorian model: advertise the upfront payment with and without the DMF

An alternative model which could be used in WA to clarify consumer understanding of the DMF model is that proposed by the Victorian Parliamentary Committee Report (2017). The committee heard submissions that consumer misunderstanding about the DMF was a key source of concern and confusion about retirement village contracts.[146] Further, consumers were often sceptical about industry explanations that one of the purposes of the DMF was to lower the cost of entry for residents.[147]

The Victorian Committee adopted a proposal made in some of the submissions that this consumer confusion and scepticism about the purpose of the DMF could be addressed by requiring operators to disclose ingoing prices to a retirement village, with or without deferred management fees.[148] This would mean that operators would have to provide two prices to consumers, for example: $450,000 with a 36% DMF calculated over 12 years, or $650,000 upfront with no DMF.

Possible issues with this approach

The Victorian proposal offers a simple approach for improving price transparency of the RV product and clarifying consumer understanding of the DMF. However as discussed earlier, one key source of consumer misunderstanding about retirement village pricing results from the presentation of the upfront payment alone as *the price* of the RV product. Requiring operators to present the upfront payment with or without the DMF could exacerbate this issue.

This type of price presentation might further impede consumer understanding by suggesting that there is no relationship between the recurrent charges, exit fees and exit entitlement. It will also be difficult and expensive to determine whether the advertised value is accurate given the upfront payment/DMF mix actually offered. The simplicity of the price information may therefore create less rather than more understanding.

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[146] above n22, 54, recommendation 7.

[147] above, n22, 51.

[148] ibid, 55, recommendation 7.

Proposal 5.2 – Options

Option A – Require operators to provide an ARCF and the ARCF Table for any units advertised available for occupation

Option A would implement the approach currently used in NSW and require an operator to provide to consumers an ARCF for any unit advertised as available for occupation. Option A would depart from the NSW model by also requiring the ARCF Table to be made publically available.

Option B – Require operators to provide an extended ARCF (with additional information) and the extended ARCF Table for any units advertised available for occupation

Option B would be a variation of Option A and require an operator to provide to consumers an extended ARCF for any unit advertised available for occupation. Option B would also require the ARCF Table to be publically available. Further consultation would be undertaken on the variations to the ARCF Table if this option is preferred.

Option C – Require operators to advertise the upfront payment with and without the DMF

Option C would implement recommendation 7 of the 2017 Victorian Report. Advertisements and promotional material would be required to state two prices, the upfront payment for the unit with a DMF payable on exit and the upfront payment for the unit without a DMF payable on exit.

TABLE 5.3 – BENEFITS AND DISADVANTAGES OF OPTIONS		
	Potential benefits	**Potential disadvantages**
Option A Require operators to provide an ARCF based on the model used in NSW.	• Implements the Final Report recommendations 1 and 10. • Consistent with requirements of section 48 of the ACL. • Assists consumers to understand DMF model pricing and interaction between fees. • Assists consumers to have a single price figure for comparison between villages. • Assists consumers to understand the pricing model as different to a general housing purchase. • Provides consumers with greater information about the different fees charged. • Provides consumers with better price information at an earlier stage in the purchasing process. • Provides consumers with sufficient information to understand different pricing proposals in the market.	• Consumers may not understand that the figures are an estimate only. • The ARCF is not able to list every individual fee that will be payable as this would result in a considerable burden for operators, with costs being passed on to consumers. • There may be costs incurred as a result of presenting the ARCF which are passed on to consumers.
Option B Require operators to provide an extended ARCF and ARCF Table, and to publish this on their website.	• As above. • Provides a more comprehensive calculation of an average monthly figure with additional fees included. • ARCF Table is more accurate for conditions in WA.	• As above. • Consumers are not able to understand the ARCF Table. • The ARCF Table becomes too complex with the additional information. • Imposes additional costs for operators.
Option C Require RV product advertising that states an upfront payment amount to also state what that amount would be without a DMF.	• Will likely cost less for operators to implement than Option A. • Can be implemented more quickly than Option A as it involves less consultation than required to develop the WA ARCF. • Provides consumers with information about the relationship between the DMF and the upfront payment. • Assists consumers to better understand the DMF. • Provides some assistance to consumers to negotiate and compare different upfront payment/DMF mixes.	• The simplified presentation of the price as the upfront payment with or without the DMF may exacerbate problems of consumer misunderstanding of the RV product price. • The presentation of the upfront payment and DMF without other components may be misleading to consumers.

Questions

5.2.1	Do you support the proposal to provide additional and earlier price information to consumers about the price of the RV product? (If not, please provide reasons)
5.2.2	If so, do you prefer Option A, B or C and why?
5.2.3	Are there any other options that would address the issues raised in Proposal 5.2? Please identify any additional benefits or disadvantages.
5.2.4	What, if any, are the cost implications of Options A, B or C? Please include quantifiable information if possible. Please provide an estimated figure and breakdown of how it was calculated – estimated number of resident turnovers per year, estimated number of staff hours per unit turnover, rates per hour and web design/internet services costs.
5.2.5	If you support Options A or B, should the ARCF Table be required to be published on an operator's website?
5.2.6	If you prefer Option B (extended ARCF Table): • should the Table 5.2 document specify each individual impost? • should the Table 5.2 document include the line item C2 that allows consumers to calculate the forgone return on the upfront payment if monies were invested in something other than general residential property, for example, a term deposit or shares? • what period of time should the Table 5.2 document be calculated over? Should it be calculated over two periods of residence? If so, is two and 10 years appropriate? • should RV product advertisements be required to also state the ARCF (or, if you think there should be two, both of them)?
5.2.7	The proposal is that the information in the Table 5.2 document must be accurate at the time the unit is advertised. It will require updating if the operator changes the contract that will be offered or makes some other relevant change, such as significantly increasing recurrent charges or dropping the upfront payment amount. Should certain changes be prescribed as requiring the document to be updated?

Appendix 1 – Further information about the DMF model

The purpose

Part 3 of the CRIS provides an overview of the DMF model. This Appendix provides additional information about the various forms of the DMF and the reasons for its wide use in the retirement village industry.

DMF model not only price structure available in retirement villages

While the DMF model is the prevalent retirement village price structure, it is not the only price structure operating in villages. Some villages now offer contracts without a DMF.

Current RV legislation

The RV Act makes certain assumptions regarding village structure and arrangements. For example, section 3 of the RV Act provides that the payment [149] for admission is made to the administering body. In practice, the RV structures can be far more complex and many arrangements fall outside the current ambit of the legislation.

Variety of DMF structures used in retirement villages

The basic price structure of DMFs is largely consistent across retirement villages. However, the contracts through which they are imposed, their legal nature, terms they are given and purpose(s) specified in the contract documents vary widely depending on:

- the village ownership and operating structure, which may include multiple entities that can be considered as administering bodies for the purposes of the RV legislation or who own individual parcels of land, amenities or businesses within the village;
- any individual operator's corporate structure;
- the type of tenure offered; and
- the tax implications of particular imposts.[150]

[149] Section 3 provides that a "premium" to mean a payment (including a gift) made to the administering body of a retirement village.

[150] The form of the village contract, and price structure, is influenced to a large degree by an operator's corporate structure and tax, including GST, considerations. The type of the upfront payment and DMF has tax implications in being treated as income or capital and in determining when it is received for tax purposes. (Gadens, *A Guide to Aged Care and Retirement Villages in Australia: for investors and prospective operators*, 2014, pp5 and 7) "A major contributor to the complexity is the range of different legal structures that have developed over time and which now exist together." (http://www.itsyourlife.com.au/retirement_villages_complicated.asp).

The range of DMF structures operating in WA are too diverse and numerous to list but the following is noted:

- the prevalent tenure in WA is a lease for life or a fixed term in the region of 30 to 60 years. Although the documents may indicate that the resident has a licence only, many so called licences are in fact leases as they grant exclusive possession of the residential unit.[151]
- resident ownership of village units generally occurs in purple and strata title villages. Purple title ownership may occur through units in a trust but there are schemes emerging under the *Corporations Act 2001* in which ownership of assets may occur through shares. For example, the operator owns the shares in the company but residents own a particular class of share that confers occupancy rights;
- whether the residents own community amenities in strata (through the body corporate) or purple title villages varies, depending on whether the land on which the amenities are situated is common property and part of the strata plan or scheme or has been issued a separate title;
- the right to reside in the village may not be conferred by any village operator, it may arise from a contract with a former resident (strata village) or agreement between all residents. For example, a right to reside may be contained in an organisation’s articles of association rather than a residence contract;
- where the right to occupy a unit in the village arises from allocation of a class of shares, the document conferring the share may not deal with the DMF, recurrent charges or exit entitlement;
- where a village has a manager that is not the business owner, recurrent charges may be payable to the manager not the owner;
- the various imposts (upfront payment, DMF, other exit deductions and recurrent charges) may be payable to different legal entities. Sometimes these are part of the same corporate group and sometimes not; and
- an emerging trend is for village infrastructure owners to engage an entity as a manager and/or other service provider, for example, agents to market vacant units. The other entity includes a profit component in the fees it charges the operator entity, which then passes that fee on to the residents as part of the recurrent charges. Residents can see this as problematic where the separate legal entity providing management or other services is a related entity to the village business owner entity and/or part of the same corporate group. Further, even where the service entity is an unrelated third

[151] See, for example, *Taxation Ruling TR 2002/14*, paragraph 24, which concludes that the label ‘licence fee' as used in a retirement village arrangement is generally a mischaracterisation: “Usually, these arrangements involve leases rather than licences and the tax treatment will depend on the proper characterisation of the particular arrangements.”

(https://www.ato.gov.au/law/view/document?src=hs&pit=99991231235958&arc=false&start=11&pageSize=10&total=27&num=4&docid=EV%2F1012870528060&dc=false&df=00_cat_0900_1_Edited%20private%20advice&tm=phrase-basic retirement%20villageshttps://www.ato.gov.au/law/view/document?src=hs&pit=99991231235958&arc=false&start=11&pageSize=10&total=27&num=4&docid=EV%2F1012870528060&dc=false&df=00_cat_0900_1_Edited%20private%20advice&tm=phrase-basic-retirement%20villages).

party provider, operators may receive a commission from that third party that it does not pass on when invoicing residents.[152]

The upfront payments

The upfront payment is a core component of the DMF model. As at mid-2019, advertised upfront payments in WA ranged between approximately $55,000 [153] to over $1.225[154] million.

The ATO recognises four categories of upfront payment that are not strata title, purple title or other company shares or title arrangements:

- prepaid rent - payment received for rent in advance;
- licence fees - the ATO observes that many so called licence fees in fact involve leases;
- lease premiums - a payment for grant of a lease that is not rent in advance where repayment (in full or in part, and that may be subject to deductions) is dependent on a new resident occupying a vacated unit;[155] and
- interest free loan or security deposit - an amount that is refundable in full, or in part, regardless of whether a new resident occupies a vacated unit and that may be subject to deductions. The ATO explains that "the fact that the repayment of a loan is contingent on a new resident being found, and even that may not happen, means that an essential element of a loan – the obligation to repay – is absent" and that the payment is therefore either a lease premium or rent in advance.[156]

The ATO rulings demonstrate the complexity arising from individual operators using different descriptors for upfront payments, resulting in a complicated environment and impedes the capacity for residents to obtain independent professional advice. The legal character of the upfront payment (whether it is a loan, rent in advance or some other type of payment) has important tax consequences for an operator, but little practical consequence for a consumer.[157]

Variety in accrual rates, caps and whether calculated on former resident's upfront payment or new payment

It is clear that consumers have difficulty in working out the total price of the RV product. Contributing to this difficulty is the complexity of the DMF pricing model, which is unique to this industry, as well as the interaction between pricing options and the age pension entitlement.

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[152] See the voluntary code of conduct industry has drafted - clause B1.10 is that signatories will "where possible" advise residents if they receive a commission from independent third parties operating in the village.

[153] Amanaliving.com.au advertise 1 bedroom units with a non-refundable deposit of $55,000.

[154] Oceangardens.com.au advertise 2 bedroom units for $1,225,000.

[155] TR 2002/2014, paragraph 29.

[156] TR 2002/14 as at December 2017.

[157] McCullagh R, *Australian Elder Law: Accommodation, Agency and Remedies*, Lawbook Co, 2018, paragraph 6,110.

Part 5 of the CRIS looks at options for providing better information to consumers about the price of the RV product, including the DMF pricing model. These options take into account variations in the DMF model that include:

- the percentage of the upfront payment that will be payable for each year of residence;
- whether the percentage is the same for each year of residence;
- the year of residence at which any cap on accumulation of DMF applies. For example, some villages now impose the maximum DMF after three years, such as a 35 percent exit fee after three years residence with no other exit deductions; [158]
- whether the DMF or part of it is payable prior to departure; and
- whether the DMF is calculated on the basis of the upfront payment a former resident made or the upfront payment a new resident will make.

The table below was prepared by an advisor to the industry and illustrates the range of options available for the DMF model. What it shows are three different impost mixes that could be offered to a resident. Each option delivers the same return to an operator, but has different upfront payments and exit entitlements. It illustrates the complexity of the interaction between the upfront payment, DMF, age pension and other fees and charges.

TABLE A1 – DMF PRICING EXAMPLES

IMPOST	OPTION 1	OPTION 2	OPTION 3
Upfront payment	$550,000	$750,000	$1,000,000
Recurrent charges	$714 per fortnight	$714 per fortnight	$714 per fortnight
DMF after 5 years	$133,189	$127,500	$102,500
At cost exit imposts	Not included in example	Not included in example	Not included in example
Resident exit entitlement at 5 years	$416,811	$622,500	$897,500
Resident age pension entitlement (as at May 2019)[159]	$377 per fortnight	$677 per fortnight	$874 per fortnight

Although there are currently pre-contractual disclosure requirements in the legislation these do not seem to be working as intended, especially in terms of increasing consumer understanding of the DMF model price structure. Unfortunately, although options for pricing might be a positive step to provide more choice to consumers, the complexity of the model and lack of any consistency in how it is presented means that

[158] The Weekly Source, 19 December 2017 and Retire Australia website https://retireaustralia.com.au/cost-ownership/salescontract/ (viewed 20 December 2017).

[159] This table assumes that residents in each option have $1 million.

consumers (and even financial advisers) can struggle to interpret the information meaningfully.

Table A2 below, published by the Property Council of Australia,[160] suggests that the number of villages with the higher maximum DMF percentages dropped over 2016 to 2017.

TABLE A2 – PROPERTY COUNCIL'S RETIREMENT CENSUS 2015, 2016, 2017 AND 2018

	2015	2016	2017	2018
The most common first year percentage for the DMF	6%	6%	6%	Not recorded
Percentage of villages with a maximum DMF of 30% or below	N/A	25%	60% (This is heavily clustered at 25 to 30%. A very small percentage - some 1 or 2% - have a maximum DMF under 25%)	38%
Percentage of villages with a maximum DMF between 30 and 40%	N/A	75%	Around 34 to 38%	Approximately 60%
Length of residence at which approximately 50% of villages reach their DMF cap	N/A	7 years (the shortest period to reach the DMF cap appears to be one year and the longest is 12 years)	(The shortest period to reach the DMF cap is one year and longest is 10 years)	

Purpose of the DMF

The Final Report reported advice of multiple purposes for the DMF. It stated that industry had advised that deferred fees:

- lowered the cost of entry;
- lowered ongoing costs "because costs are factored into profit calculations"; and
- lowered ongoing costs because the cost of provision of some services is covered by the deferred fee; and
- provided funding for long term expense.[161]

160 2015, 2016, 2017, 2018 PwC/ Property Council Retirement Census, https://www.pwc.com.au/deals/assets/real-estate-advisory/2018-retirement-living-census.pdf.

161 above n12, 131.

The current prevalent industry explanation for the DMF model is that the upfront payment is a lower discounted price, for which the operator is compensated by the DMF.[162] An operator explained that "the deferred payment method that operates in our industry comprises two components to the price of a unit: "you pay some when you move into the village and you pay some when you leave the village, and it is the combination of those two components that makes up the full purchase price of a unit that provides an adequate return for the developer to want to actually do this in the first place".[163]

More specific reasons given for the upfront payment/DMF are that:

- it includes a component for the costs of running a village, as distinct from providing a return on or recovering the costs of establishing it;
- recurrent charges are set below actual operating expenditure, for example, at a specified percentage of the pension[164] or under a policy not to fully cost recover through recurrent charges;
- an operator 'subsidises' recurrent charges while a village is under staged development (which could be up to 10 years);
- it can be difficult to draw a clear line between capital works that are ongoing costs, such as maintenance, repair and replacement, and those that are upgrade; and
- RV legislation restricts profit generation through management or administration charges.[165]

A further explanation for the DMF is that it offers a financial advantage to consumers by allowing them to receive a full or part pension. If the money were in a bank or otherwise invested, with the resident drawing down on it for 'pay as you go' rent, the resident might not receive the pension in full (or at all). While comparing the DMF, lost return on the upfront payment and other retirement village costs, to median rent might suggest rent was the better financial decision, for some residents, access to the pension might reverse that calculation.

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[162] See, for example: "The letter to de Wever from Stockland contains a paragraph claiming that the unit was sold to her at what it refers to as a "wholesale price". It states: "By way of refreshing your memory, when we sold the unit to you, the price charged was significantly less than the price that would have been able to be obtained if the unit had been sold on a 'full retail basis'. (*http://www.theage.com.au/victoria/paying-a-high-price-to-retire-20110121-1a02v.html Viewed 29 November 2017*) and: "The exit fee helps to compensate the village owner for the cost of building the village, and allows the resident to part-pay for this at the end of their residency rather than the start. The exit fee is designed to ensure the entrance price (ingoing fee) into the village is more affordable." (http://www.retirementliving.org.au/village-life/retirement-villages/fees-charges/exit-fees/ viewed 4 July 2018.)

[163] In the 2016 to 2017 Victorian Parliamentary Committee inquiry.

[164] In 2017, the Victorian Parliamentary Committee report found that deferred fees were also used (in the not for profit sector) to subsidise recurrent charges. (Vic Parl Report, p52)

[165] "Departure fees are payable when a resident permanently leaves the village. Some departure fee structures let the resident participate in future increases in the value of the home and some do not. Although it is much maligned, there is a logical and historical rationale for having such a fee and in many cases the need to have it is actually enshrined in the relevant retirement village legislation because village operators are prevented from recovering certain expenses any other way" and the advice that consumers must "understand what expenses the operator must recover from the departure fee that it is not otherwise able to (or chooses not to) recover through the ongoing recurring charges (which largely depends on the particular legal structure of the village and the applicable legislation). (http://www.itsyourlife.com.au/retirement_villages_complicated.asp, and http://www.itsyourlife.com.au/retirement_villages_departure_fees_what_for.asp, viewed 18 June 2018).

Exit entitlement and the DMF

Exit entitlements are often linked to the DMF. When they are calculated on the same upfront payment, whether that made by the former resident or that made by the new resident, the amount of each may be determined by the other. However, they can also be calculated on the basis of different upfront payments.

Consumer confusion

Consumers are concerned that they do not understand the DMF and the overall total cost of purchasing a retirement village unit. In a recent inquiry, a resident said that: "the DMF had been explained to him in a variety of ways, including a return on investment that would not be possible if residences were priced at market rate, a recovery of administration overheads, a direct link to capital appreciation".[166]

Adding to consumer confusion, courts and tribunals can find an impost's legal character or purpose is different from its name in contracts or the purpose ascribed by an operator. For example, in a 2016 tax case an operator characterised the DMF as being a "deferred service payment". However, the tribunal found that it was for: "the supply of the units to the residents".[167]

The role of the DMF in the retirement village industry

There is no single purpose for the DMF – it is simply part of the unique pricing structure for the RV product. Rather than try to define it, the aim of this paper is to consider how to assist consumers to better understand it, so they better assess the cost and can form a judgement about the value of retirement village living to them.

[166] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee *Inquiry into the retirement housing sector* March 2017, 53.

[167] ATO Ruling Paras 43, 41 and 43.

Appendix 2 – Retirement village product price

Introduction

This appendix builds on Parts 3 and 5 and Appendix 1 regarding the RV product price. It provides additional information about the RV product price and outlines the impact that various factors such as the DMF calculation, residents sharing any increase in an upfront payment, length of stay and recurrent charges have on the overall cost of the RV product.

Tables are used in this appendix to illustrate the interactions between the various components of the RV product price. The tables have been developed by Consumer Protection. Where information is available, the figures are within the range of average costs of a RV product involving a two bedroom unit in WA.

Background

Research on retirement villages tends to be generated by industry peak bodies. For example, the national PwC/Property Council 2017 Census (2017 Census) involved 36 operators of 550 villages with approximately 56,000 units. [168] The national PwC/Property Council 2018 Census (2018 Census) involved 52 operators of 610 villages with approximately 68,000 units.[169] A national resident survey was conducted in 2018 (National Resident Survey 2018)[170] , it was commissioned by an industry commentator and received 19,476 responses from residents of villages involving 57 operators.

Factors impacting the RV product price

RV product price – the average upfront payment and variations in the market

There is currently no database in WA recording the upfront payment amount made by residents on entering into retirement villages. The tables in this appendix use an upfront figure of $420,000.

Industry research[171] identified the average RV upfront payment in Western Australia in 2015 at $445,000, with new units being offered for an average of $465,000.[172] The 2017 Census said that upfront payments in WA were just below or equivalent to the median price for housing.[173] In 2018, the Census finding was that the average RV

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[168] 2017 PwC/ Property Council Retirement Census, https://www.pwc.com.au/deals/assets/real-estate-advisory/2018-retirement-living-census.pdf, 1.

[169] 2018 PwC/ Property Council Retirement Census, https://www.pwc.com.au/deals/assets/real-estate-advisory/2018-retirement-living-census.pdf, 1.

[170] villages.com.au *National Resident Survey 2018: The Independent Study of Todays Retirement Village Residents*.

[171] One Fell Swoop, Property Council of Australia and One Fell Swoop, The critical need for retirement living in Western Australia, October 2015.

[172] The *PwC/Property Council Retirement Census 2016* reported that upfront payments in newer villages were higher. The later censuses do not comment on this. This is consistent with cost modelling published in 2002 which found that approximately 20% of variation in upfront payments related to the age and size of a village – the larger and newer a village, the higher the upfront payment was likely to be. (Editor Stimson R, *The Retirement Village Industry in Australia*, p 83.) Nationally, the average price for a two bedroom village unit in 2015 was $385,000, suggesting WA was then above average. 2015 PwC/Property Council Retirement Census, 1.

[173] Editor Stimson R, *The Retirement Village Industry in Australia*, 83.

upfront payment in WA was approximately $366,000, being 67% of median house prices.[174] At January 2019, the average Perth detached house was $546,281[175] – but this would not be for a two bedroom property. Most retirement village units in WA are two bedroom.[176]

The information provided by industry research shows that there has been a considerable variation in the relativity between the upfront payments and average house prices in WA between 2015 and 2019. To this extent, it is recognised that upfront payments may decrease and are dependent on the normal economic factors that impact the property market.

The tables in this appendix use an increase of 2% per annum for upfront payments.

RV product price - residents share any increase in upfront payment

The 2017 Census and 2018 Census report the statistics of those residents that share any increases in the upfront payment as 59 percent and 57 percent respectively. There are no available statistics on the average proportion that residents share.

The tables below are based on residents sharing in 50 percent of any increase.

Table A2.1 below illustrates the impact that sharing in upfront payments has on the overall cost of the RV product over five to ten years residence assuming a maximum DMF of 30% that accrues 6% annually.

[174] In the falling WA general housing market, this is consistent with cost modelling published in 2002 which found that the sale price for their home was “the most important predictor of the level of the entry contribution”. The more a resident received, the higher the upfront payment they were likely to make. Editor Stimson R, *The Retirement Village Industry in Australia*, 83.

[175] https://www.domain.com.au/news/perth-house-prices-fell-further-in-2018-amid-hopes-a-trough-is-near/ Compared to $555,788 in June 2017. (https://www.domain.com.au/news/perth-median-house-price-drops-again-in-june-2017-quarter-domain-state-of-the-market-report-20170719-gxe928/).

[176] The PwC Property Council 2015 Census found that 71% of WA units were 2 bedroom, 2.

TABLE A2.1 – IMPACT OF RESIDENTS SHARING IN UPFRONT PAYMENTS FOR RV PRODUCT

Length of residence and share in upfront payment	**5 years** No share	**10 years** No share	**5 years** 50% share in increase in upfront payment	**10 years** 50% share in increase in upfront payment
Former resident's upfront payment [**A**]	$420,000	$420,000	$420,000	$420,000
New resident's upfront payment (2% annual increase) [**B**]	N/A	N/A	$463,714	$511,978
DMF (30% maximum accruing at 6% per annum) [**C**]	$126,000 30% of A	$126,000	$126,000	$126,000
50 % share increase [**D**]	N/A	N/A	$21,857	$45,989
Exit entitlement (the exit entitlement is the amount that the resident receives in hand on leaving a village after the DMF and any share in an increased upfront payment is taken into account)[177] [**E**]	$294,000 A - C	$294,000 A - C	$315,857 A – C + D	$339,989 A – C + D
Loss of opportunity on upfront payment (share in upfront payment increase that the former resident does not receive)[178] [**F**]	$43,714 2 x F3	$91,978 2 x F4	$21,857 B – A / 2	$45,989 B – A / 2
Cost of residing in village (having regard only to upfront payment/DMF/share in increase in upfront payment) [**G**]	$169,714 C + F	$217,978 C + F	$147,857 C + F	$171,989 C + F
Divide by the number of years for the annual cost of residing in village (having regard only to upfront payment/DMF/share in increase in upfront payment that the former resident does not receive) [**H**]	$33,943 G/5	$21,978 G/10	$29,571 G/5	$17,199 G/10

[177] Other exit deductions are not included in this table.
[178] As Part 5 explains in the Reform 5.2 proposals, loss of opportunity cost can also be assessed with reference to the investment return expected from general residential property purchase or other investment.

RV product price – impact of length of residency

The RV product price is invariably dependant on the length of stay of the resident. The 2018 Census found that current WA residents had been in their village for 8.5 years and that former WA residents had resided for an average 9.9 years. The National Resident survey 2018 found that residents tended to enter not for profit villages later and have shorter stays.[179]

Table A2.2 below shows the impact of the different DMF models on a shorter residency of two years. It includes, in the final column, a price structure without a DMF but a 20 percent higher upfront payment. It also uses a 30 percent maximum DMF, accumulating at 6 percent per annum.

TABLE A2.2 – IMPACT ON DIFFERENT DMF MODLES ON A SHORTER RESIDENCE OF TWO YEARS

DMF Calculation	DMF on former resident's upfront payment with no share in increase – 2 years	DMF on former resident's upfront payment with 50% share of increase – 2 years	DMF and exit entitlement on new upfront payment – 2 years	No DMF, 20% increase in former resident's upfront payment and 50% share in increase – 2 years
Former resident's upfront payment [A]	$420,000	$420,000	$420,000	$504,000
New resident's upfront payment (assuming 2% annual increase) [B]	$436,968	$436,968	$436,968	$524,362
Variation between upfront payments [C]	$16,968	$16,968	$16,968	$20,363
DMF (12% - based on 2 years residence) [D]	$50,400	$50,400	$52,436	N/A
50 % share increase [E]	N/A	$8,484 C/2	N/A	$10,180
Exit entitlement[180] [F]	$369,600 A-D	$378,084 A-D+E	$384,532 B-D	$514,180 A + E
Loss of opportunity on use of upfront payment[181] [G]	$16,969 C	$8,484 C/2	$5,090 12% of C [182]	$10,180 C/2
Cost of residing in village (having regard only to upfront payment/DMF/share in increase in upfront payment) [H]	$67,368 D+G	$58,884 D+G	$57,526 D+G	$10,180 D+G
Annual cost of residing in village (having regard only to upfront payment/DMF/share in increase in upfront payment) [I]	$33,684 H/2	$29,442 H/2	$28,763 H/2	$5,090 H/2

[179] above, n3.
[180] The exit entitlement is the amount that the resident receives in hand on leaving a village after the DMF and any share in an increased upfront payment is taken into account.
[181] Share in upfront payment increase that the former resident does not receive. Other exit deductions are not included in this table.
[182] After two years 88% of the variation between the new resident's upfront payment and the former resident's upfront payment is included in the exit entitlement (F). This means 12% of the variation is the lost opportunity cost.

RV product price – calculation of DMF

The RV product price is impacted by whether the DMF is calculated on a former resident's upfront payment or a new resident's upfront payment.

Table A2.2 below compares the difference when a former resident's DMF is calculated on their upfront payment and it being calculated on the new resident's upfront payment. In some arrangements, both the DMF and the share in any increase in the upfront payment are calculated on the new resident's upfront payment. In other arrangements, the DMF is calculated on the former resident's upfront payment. In the first case, the former resident gets a 50 percent share of any increase in the upfront payment. In the second case, the former resident receives the new resident's upfront payment after the DMF (and other exit fees) are deducted.

TABLE A2.3 – COMPARISON OF DMF CALCULATED ON DIFFERENT UPFRONT PAYMENTS

Length of residence and DMF calculation and how exit entitlement is calculated	**5 years** DMF on former resident's upfront payment with 50% share of upfront payment increase	**10 years** DMF on former resident's upfront payment with 50% share of upfront payment increase	**5 years** DMF and exit entitlement calculated on new upfront payment	**10 years** DMF and exit entitlement calculated on new upfront payment
Former resident's upfront payment [A]	$420,000	$420,000	$420,000	$420,000
New resident's upfront payment (assume 2% annual increase) [B]	$463,714	$511,978	$463,714	$511,978
Variation between upfront payments [C]	$43,714	$91,978	$43,714	$91,978
DMF (30% maximum accruing at 6% per annum) [D]	$126,000	$126,000	$139,114	$153,593
50 % share in upfront payment increase [E]	$21,857 C/2	$45,989 C/2	N/A	N/A
Exit entitlement (the exit entitlement is the amount that the resident receives in hand on leaving a village after the DMF and any share in an increased upfront payment is taken into account) [F]	$315,857 A-D+E	$339,989 A-D+E	$324,600 B-D	$358,385 B-D
Loss of opportunity [183] on use of upfront payment (forgone share in upfront payment increase) [G]	$21,857 E	$45,989 E	$13,114 30% of C [184]	$27,593 30% of C
Cost of residing in village (having regard only to upfront payment/DMF/share in increase in upfront payment) [H]	$147,857 D+G	$171,989 D+G	$152,228 D+G	$181,186 D+G
Annual cost of residing in village (having regard only to upfront payment/DMF/share in increase in upfront payment) [I]	$29,571 H/5	$17,199 H/10	$30,446 H/5	$18,119 H/10

[183] As Part 5 explains in the Reform 5.2 proposals, loss of opportunity cost can also be assessed with reference to the investment return expected from general residential property purchase or other investment.

[184] After five years the maximum DMF is 30%. At five years 70% of the variation between the new resident's upfront payment and the former resident's upfront payment is included in the exit entitlement (F). This means 30% of the variation is the lost opportunity cost.

RV product price – DMF maximum percentage and time at which it accrues

The 2017 Census found that 50 percent of villages reached their DMF cap by five years. The 2018 Census says approximately 50 percent of villages reach their maximum by 6 years. The 2018 Census found that 35 percent of villages had a maximum DMF of 30 percent or less - 15 percent fell between 30 and 35 percent. When the DMF cap is reached is another factor consumers must take into account in deciding whether a particular RV product suits them.

RV product price – recurrent charges and annual increase

The 2017 Census found that the national average monthly service fee was $453[185] and the 2018 Census recorded the fee as being $564. The National Resident Survey 2018 found that annualised, average recurrent charges were $5876, being $490 per month.[186] The survey observes that this is 26 percent of the single pension and 17 percent of the couple pension.

To explain the increase, the 2018 Census noted that these amounts were not comparable due to the 2017 Census being based on a single resident payment whereas 2018 is based on the number of bedrooms in a unit.

The 2017 Census also found that on a per resident basis, recurrent charges were similar for both the profit and not for profit sectors, being $454 and $432 respectively. However, the 2018 Census found that there was a significant difference between four categories on a per unit basis being:

- public group for profit recurrent charges being on average $602;
- private group for profit recurrent charges being $483;
- not for profit charges being $459; and
- other being $370.[187]

The 2017 Census showed an increase in recurrent charges of 4.37 percent over two years, being above the national CPI of 1.9 percent.[188]

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[185] above, n1, 4.

[186] above n1, 65. The survey found that residents paying weekly or fortnightly tended to pay more annually than those paying monthly recurrent charges - for example, the average weekly payment of $216 worked out to $11,232 annually but the average quarterly payment of $854 is $3416 annually - but most residents - 76% - paid monthly.

[187] There is a notes that data has been collected from Property Council members and 'other contributors', so this may be operator who are not members of the Property Council.

[188] http://www.treasury.wa.gov.au/uploadedFiles/_Treasury/Economic_Data/annual-cpi-growth-2017-18.pdf. Perth CPI is lower still.

Recurrent charges and exit fees

As Part 5 explains, recurrent charges are a significant component of the RV product price and are an additional fee to the DMF. The National Resident Survey 2018 found that:

- 36 percent of residents found their regular expenses (including maintenance, insurance and rates) were about the same as those living in the family home;
- 32 percent found them slightly or significantly lower and 32 percent found them slightly or significantly higher;[189] and
- 17 percent of residents reported that recurrent charges were either "somewhat clear" or "not clear at all".[190]

The many factors impacting the RV product price

It is clear that there are many factors that impact the RV product price such as the percentage, rate of accrual and maximum of the DMF, resident's share in an upfront payment, length of the stay, recurrent charges and exit fees. The interconnections between these factors are illustrated in the tables above and demonstrate the variations and complexity of RV product pricing. Such complexity forms part of the difficulties that consumers experience in trying to accurately ascertain a total cost for the RV product.

[189] above, n2, 35.
[190] above, n2, 34.

APPENDIX 3

WA modifications to NSW ARCF Table with additional information

Table A3.1 provides additional information on the differences between Tables 5.1 (the NSW Fair Trading ARCF Table) and 5.2 (a table that could be distributed to WA consumers) in Part 5. The differences are in green and red font. For ease of comparison, the figures from the NSW ARCF Table example 2 have been used. These are not average figures for WA. For example, the ABS figures as to general housing increase in Sydney are higher than those for Perth. Where calculations produce an amount in both dollars and cents, the figures have been rounded to the nearest dollar. Rounding is appropriate where the figures are estimates only.

TABLE A3.1 – EXAMPLE OF EXTENDED ARCF WITH ADDITIONAL INFORMATION

Item	Item Details	Example 2 from NSW ARCF Table	WA Proposal	Explanation of differences
Difference to NSW ARCF Table layout: the WA version will have this column for easy identification of items A, B and C.				Note: this column will not be in the document given to consumers.
Item A: Recurrent charges	**Estimated** Total amount of recurrent charges over 7 years, allowing for increase each year.	($2500 x 12 months x 7 years) = **$210,000**	($2500 x 12 months x 7 years **at 3% increase each year**) = **$229,752** (Calculation of example amount is in footnote)[191]	The description identifies the amount as an estimate only. Consistent with the Form 1, the average historical recurrent charge annual percentage increase in the village over the past 3 year[192] will be applied to each of the 7 years – in the example, a 3% increase is assumed. (For villages less than 3 years old, the rate can be prescribed).
Item B: Exit deductions (DMF and other fees).				Note: estimating the next resident's upfront payment is only necessary where a contract will provide that a DMF is calculated on the basis of the next resident's upfront payment. New line to ensure clarity as to what will occur where the/a DMF is calculated on the basis of the upfront payment made by the consumer not the new resident (Example 1 in Table 5.1).

[191] Year 1: 2500 x 12 months = 30,000. Year 2: 30,000 x 0.03 = 900. 30,000 + 900 = 30,900. Year 3: 30,900 x 0.03 = 927. 30,900 + 927 = 31,827. Year 4: 31,827 x 0.03 = 955. 31,827 + 955 = 32,782. Year 5: 32,782 x 0.03 = 983. 32,782 + 983 = 33,765. Year 6: 33,705 x 0.03 = 1,013. 33,705 + 1,013 = 34,718. Year 7: 34,718 x 0.03 = 1,042. 34,718 + 1,042 = 35,760. Year 1 + year 2 + Year 3 + Year 4 + Year 5 + Year 6 + Year 7 = 229,752.

[192] This aligns with pre contract disclosure of recurrent charge increases over the previous three years.

Item	Item Details	Example 2 from NSW ARCF Table	WA Proposal	Explanation of differences
	B1 - Estimating the new resident's upfront payment.	Estimating the variation (capital gains) and next resident's upfront payment using the ABS data. $650,000 + $283,456 = **$933,465** (new upfront payment after 7 years)	($650,000 **x 2% annual increase** x 7 years **cumulative**) = **$831,457** (Calculation of example amount is in footnote)[193]	Introduction of sub-item numbers to make final calculation of item B clearer. The B1 exercise is now clearly identified as part of the process for determining the Item B amount. The new upfront payment is calculated at 2%, being the Form 1 prescribed annual rate of increase for pre contract disclosure. This is preferred to ABS statistics on housing price movement, as it reflects that the RV product is not general residential property and that research suggests RV product upfront payment movements are not consistent with general housing price movement. The final figures have been given larger font to increase clarity. The description identifies the amount as an estimate only.
	B2 - Estimated DMF payable after 7 years **Calculate DMF at 7 years based on the proposed contract. Each DMF, and the calculations that apply to them, are to be set out.**	($933,465 x 27%*) = $252,036 *(5% x 3 years) + (3% x 4 years)	(DMF Based on new upfront payment - $831,457 x 27%*) = **$224,493** ***The contract terms that will be offered are:** (5% x 3 years) + (3% x 4 years)	Now a sub item. Express statement that the DMF is to be calculated per the contract and what is to occur when there are multiple DMFs. Express statement that the calculation is based on the consumer's upfront payment or the estimated new resident's upfront payment.

[193] Year 1: 650,000 x 0.02 = 13,000. 650,000 + 13,000 = 663,000. Year 2: 663,000 x 0.02 = 13,260. 663,000 + 13,260 = 676,260. Year 3: 676,260 x 0.02 = 13,525. 676,260 + 13,525 = 689,785. Year 4: 689,785 x 0.02 = 13,796. 689,785 + 13,796 = 703,581. Year 5: 783,501 x 0.02 = 15,670. 783,501 +15,670 = 799,171. Year 6: 799,171 x 0.02 = 15, 983. 799,171 + 15,983 = 815,154. Year 7: 815,154 x 0.02 = 16,303. 815,154 + 16,303 = 831,457. Upfront payment at Year 7 = $831,457.

Item	Item Details	Example 2 from NSW ARCF Table	WA Proposal	Explanation of differences
				If DMF is based on the consumer's upfront payment, this line would read: **DMF based on your upfront payment** – ($650,000 x 27%) = **$175,500**
	B3 – Total estimated exit fees additional to any DMF (refurbishment, marketing etc) **Set out each fee out and calculate in accord with the contract terms/estimate based on village historical information**		**Estimated:** **Refurbishment fee: $10,000** **Marketing and sales fees: $5,000** **Estimated total:** **$15,000**	New sub item. Provides consumers with a more accurate estimate of the total RV product cost. Provides a mechanism for more accurate comparison between villages that treat these matters as separate fees and those that include these expenses in any of the DMF/upfront payment/exit entitlement fees and payments. Ensures consumers are aware of all exit costs early in the purchasing process. (These fees vary significantly between villages. The figures in the example do not represent average or usual fees. They have been chosen for ease of calculation in the example).
	Item B Total **(B2 + B3)**		**$224,493 + $15,000 =** **$239,493**	New line necessary due to inclusion of the exit fees in the ARCF.
Item C – Lost opportunity cost: Estimating what investing the upfront payment in the RV product costs (or benefits) a consumer.				The NSW formulation equates purchasing an RV product with general property ownership. As Part 4 explains, the two products are not equivalent. Lost opportunity cost is less confusing to consumers that using property terms. The relevant figure is what is the difference between the RV product and general housing purchase in terms of

Item	Item Details	Example 2 from NSW ARCF Table	WA Proposal	Explanation of differences
				estimated 'return' on the amount invested in each as the upfront payment/housing purchase price.
	C1 – Estimated share in any increase/decrease in the upfront payment after 7 years.	($283,465 x 50%) = $141,733	($181,457 x 50%) = **$90,728**	New sub item. (The different amount in the WA column flows from using 2% annual increases per the Form 1 Estimated Refund Table instead of the 6.23% used in NSW.)
	C2 - Estimated return on upfront payment monies if they had been invested in general residential property for 7 years Calculation: **Use REIWA information on average general housing price increase for equivalent unit type in the village locality over the past 7 years.**		($650,000 x Local property movement over 7 years - in NSW, 6.23% x 7 years) = **$283,465** NB: WA property prices have been falling, so this figure does not reflect an actual return a consumer could expect in WA.	This item is essentially the NSW website ARCF Table item in the line "Estimating the variation […] and next resident's [upfront payment] using the ABS data in Table 1". The proposal is that REIWA data be used rather than ABS, as it is more accessible.
	Item C Total **(C2 – C1)**		($283,465 - $90,728) = **$192,737**	New line reflecting uncoupling of RV product upfront payment increase from movement in the general residential property market.
ARCF for comparing RV products	**Estimated ARCF over 7 years** **ARCF = A+B+C**		$661,982	New line. Provides an estimate total price over 7 years in addition to an estimated monthly cost.
	Estimated ARCF per month ARCF = (A + B +C)/84	**ARCF = $7,188**	($229,752 + $239,493 + $192,737 = $661,982. $661,982/84 = $7,881) **$7,881**	Expressly described as ARCF per month because a yearly ARCF is also proposed. Expressly identified as an estimate only. Consistent with other line, the calculation is included.

Item	Item Details	Example 2 from NSW ARCF Table	WA Proposal	Explanation of differences
	NB: the ARCF is only valid for comparison between RV products. To properly compare with residential housing purchase, a consumer will need to complete the line below and perform an additional calculation			New lines for ARCF Table. The new lines allow a consumer to better compare an RV product with general housing purchase. They alert a consumer to the need to take into account the costs associated with general housing, so that the consumer does not incorrectly look at the ARCFs and think that they represent how much more than general housing the RV product will cost. Lines to be completed by consumer not the operator.
Item D **ARCF for comparing the RV product with general housing.**	**D1 – any expense incurred in purchasing a general residential property that is not incurred in purchasing the RV product (eg stamp duty)**			Consumers will need to estimate what these will be for the comparison they are making. If they want to know what it will cost in comparison to staying in the family home, this line is not relevant.
		D2 – estimate the ongoing costs of living in general residential property for 7 years as compared to costs of living in the village.		Consumers will need to estimate what these will be based on their current expenditure/expected expenditure in the type of property they choose. They will need to consider any living expenses the operator does not include in recurrent charges – for example, electricity, water or internet expenses may be charged additional to recurrent charges. These may, or may not, be roughly equivalent in the village or in general residential housing.
		D3 – estimate refurbish-ment and selling costs after 7 years		Consumers will incur costs in refurbishing and selling general residential property. These fees will vary significantly.

Item	Item Details	Example 2 from NSW ARCF Table	WA Proposal	Explanation of differences
		Total Item D D1 + D2 + D3		
ARCF for comparing the RV product with general housing		Estimated ARCF at the end of 7 years (Estimated ARCF at the end of 7 years less D1, D2 and D3).		Deduct the expenses that would have been incurred in relation to a general residential property.

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