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

Consultation Regulatory Impact Statement 2

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

December 2019

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Disclaimer

This document has been released to seek feedback on possible reforms to retirement villages' legislation in Western Australia and does not represent, or purport to represent, legal advice or constitute Government policy.

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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* (Cth)
ACL	Australian Consumer Law.
ARCF	Average Resident Comparative Figure
CCLSWA	Consumer Credit Legal Service of Western Australia
Consumer Protection/ Department	The Department of Mines, Industry Regulation and Safety – Consumer Protection Division
COTA	Council on the Ageing
CRIS	Consultation Regulatory Impact Statement (this document is CRIS 2)
DMF	Deferred Management Fee
Final Report	Statutory Review of Retirement Villages Legislation Final Report, November 2010
FTA	*Fair Trading Act 2010* (WA) under which the RV Code (WA) is made.
Operator	Operator/owner/manager of a retirement village
RACF	Residential Aged Care Facility
RIA	Regulatory Impact Assessment
RV	Retirement village
RV Act	*Retirement Villages Act 1992* (WA)
RV Code	Fair Trading (Retirement Villages Interim Code) Regulations (No.2) 2019 (WA)
RV Legislation	*Retirement Villages Act 1992* (WA), Retirement Villages Regulations 1992 (WA), and Fair Trading (Retirement Villages Interim Code) Regulations (No.2) 2019 (WA)
RV product	Retirement village product
RV Regulations	Retirement Villages Regulations 1992 (WA)
RV Unit	Includes a retirement village unit, villa, apartment
SAT	State Administrative Tribunal
SHAC	Seniors Housing Advisory Centre
STA	*Strata Titles Act 1985* (WA)
WARVRA	Western Australian Retirement Villages Residents Association

ABOUT THE CONSULTATION PROCESS

CRIS 2 is part of a broader consultation

This is the second in a series of six consultation papers (called a CRIS). Together these CRISs comprise the consultation on completing implementation of the recommendations made in the *Statutory Review of Retirement Villages Legislation Final Report* 2010. A broad range of issues are canvassed and many of the issues are intertwined with each other. As CRIS 1 explained, the consultation papers are being released on a staggered basis due to the range of the reforms.

Each CRIS comprises a thematic category. However some problems may be dealt with in more than one CRIS, with different aspects considered in each. The interrelationships between individual issues across the consultation papers have been taken into account in developing the reform proposals and in the CRIS release sequence. They will also be taken into account at the decision stage.

How do the consultation papers relate to decisions on what reforms will be made?

The consultation papers apply the Government's regulatory impact assessment process. They set out issues, summarise policy considerations, identify options for addressing the issues and identify the main benefits and detriments of taking or not taking action or particular action. They seek your comment to ensure public and sector input for the decision on whether reforms are required, policy should change and/or particular proposals are likely to be effective.

Your submissions will be analysed and used to assess the likely regulatory impact of the options in this paper. This includes consideration of any additional matters you raise and any alternate ways for dealing with an issue that you propose.

After its analysis, Consumer Protection will make recommendations to Government for what reforms should proceed. The Government will then decide whether to accept those recommendations.

What matters can you raise?

The CRISs contain a number of questions about the issues and 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.

You can suggest alternative options for addressing issues, raise any considerations that you think need to be taken into account but that do not appear in the CRISs and advise that you do not agree that reform is required. This is the case whether or not these are specific questions in the CRISs.

It would be helpful if you could include the reasons behind your choices or suggestions, along with what you see as the potential costs and benefits of them.

You can comment on an earlier CRIS when responding to a later CRIS

Each CRIS is being released with a due date for submissions. This helps us consider your responses as we develop the later CRISs. For most matters, the due date should pose no problems but if it does please seek an extension of time.

Where there is overlap between issues in different CRISs you may want to comment on the possible reforms out of sequence. For example, the practical issues discussed in this CRIS may trigger a comment on a CRIS 1 proposal that you did not previously respond to. Or you may wish to make a further comment.

You can comment at any stage of the consultation process on any matter raised in an earlier CRIS.

How to have your say

Making a submission

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

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

Written responses 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 13 March 2020.**

Who are you?

When making your submission please let us know which part of the retirement village sector you are from. For example, whether you are a resident, former resident, prospective resident, family member of a resident, operator, manager, landowner, adviser to residents or operators or a peak body.

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.

EXECUTIVE SUMMARY

CRIS 2 is the second of six consultation papers regarding implementation of the outstanding *Statutory Review of Retirement Villages Legislation, Final Report, 2010* (Final Report) recommendations for reform of retirement village legislation in WA. The first consultation paper (CRIS 1) was released in August 2019.

CRIS 1 took a 'back to basics' approach to the longstanding issues in contract and fee complexity. It looked at why many consumers continue to misunderstand what they are buying and what they must pay for it despite the retirement villages' legislation disclosure requirements. In particular, it identified that the unfamiliar, complex and voluminous nature of the disclosure information and that this information is disclosed late in the purchasing decision, lessened its effectiveness for consumers. CRIS 1 proposed reforms to assist consumers to better understand what the RV product includes and the price structure commonly associated with it earlier in their purchasing decision.

CRIS 1 was in some instances perceived as being more about prospective residents than current or former residents. It's 'back to basics' discussion of the RV product and its price however provides a foundation for addressing some of the more complex issues in subsequent CRISs.

CRIS 2 deals with matters more directly relevant to current and former residents. Its theme is operator obligations, both to the village community and to individual residents. CRIS 2 builds on CRIS 1. Rather than repeat material in the earlier CRIS, it refers to it. Consistent with the papers being part of the same consultation process, CRIS 2's Part numbering commences where CRIS 1 left off, as Part 6.

CRIS 2 addresses the following matters:

- ***Part 6 - Time limit for payment of exit entitlements and recurrent charges*****:** This Part discusses whether exit entitlements should be payable within a set time after a resident leaves a village. At present residence contracts dictate when an exit entitlement becomes payable and this is often when a new resident makes an upfront payment. When units remain vacant for a long time this can create financial problems for former residents or their estates. Part 6 looks at consumers' ability to make an informed decision about accepting the risk of long delay in an exit entitlement becoming payable. (In this, it relies on the CRIS 1 discussion of the RV product and its price. A link to this discussion is provided in the Part.) Part 6 also asks whether the cap on the period for which recurrent charges are payable by lessee residents should also apply to strata and purple title residents;

- ***Part 7 - Operator budget obligations*****:** This Part considers whether operators should be required to obtain resident consent to village budgets and have the ability to apply to SAT for budget approval if that is not given. Despite stage one reforms to budget process, village operating costs continue to give rise to disputes between residents and operators. Often budget disputes arise from insufficient information

about the budget being given to residents. Changing the onus from residents having to dispute a budget to operators being required to justify it could provide an incentive for operators to provide better budget information, minimising disputes. Part 7 also discusses allowing SAT to consider the fairness issues in budgets beyond a recurrent charges increase (such as whether residents' funds are being sought on the basis of a fair balance between their interests and those of an operator);

- ***Part 8 - Capital works and reserve funds*:** This Part discusses the implementation issues arising from the Final Report recommendation that reserve funds be mandatory in retirement villages. This recommendation was made to address the lack of funding for long term capital works by some village operators. The issues considered in this Part include whether there should be an obligation for operators to have capital works plans, options for differentiating between capital maintenance and capital replacement and a clearer identification of the funding source (recurrent charges or other payments to operators) that can be used for particular categories of capital works.

- **Part 9 - *Refurbishment*:** - This Part considers the reasons refurbishment disputes remain ongoing despite the stage one reforms regarding refurbishment. It asks whether distinguishing between reinstatement and improvement will give greater clarity to residents in the refurbishment works that can be included in an exit fee. This Part also discusses whether the RV legislation currently provides a fair balance in refurbishment funding having regard to the issues in consumers' ability to make informed decisions regarding likely refurbishment expense at the time they enter into residence contract (discussed in CRIS 1). It also considers a requirement for operators to provide property condition reports on entry and exit from a village.

- ***Part 10 – Complex operating structures and definition of administering body***: This Part discusses the issues complex operating structures are posing for identifying which entity is responsible for the obligations imposed in the retirement village legislation. The retirement villages legislation primarily imposes obligations on a village's "administering body". In complex operating structures it can be difficult to identify which entity is administering the village. This Part asks whether the retirement villages legislation should be modernised so that it imposes obligations on the person or entity that controls provision of the RV product and recognising that there are multiple layers of control through multiple layers of responsibility;

- ***Part 11 - Operator and resident conduct obligations*:** This Part asks whether additional, more enforceable operator conduct obligations such as exercising due skill, care and diligence and acting in good faith are required. It builds on the CRIS 1 discussion of better recognition in the retirement village legislation that the RV product involves a managed community. This Part also asks whether operators

need express obligations for resident conduct in the RV legislation to assist them in dealing with some problematic resident behaviour.

What is next?

A further four CRISs will be released over the next 12 months. The next paper, CRIS 3, will look at issues in when the RV Act applies. It looks at the way the retirement village legislation uses the term "retirement village scheme". As part of this, it examines confusion between the way the legislation uses the term and the broader contractual scheme under which a village operates. Other matters are how the RV legislation deals with short term residencies and rent arrangements in villages, looking at how the RV legislation interrelates with aged care legislation, tidying up some issues in resident partners not signing residence contracts and establishing a public database of WA villages.

Further topics for consultation will look at different aspects of the RV legislation including:

- new village developments – including sales 'off the plan', agreements to lease and pre contract disclosure, wait list and holding fees;
- memorials – including a process for adding and excising village land and rectifying historical problems of multiple memorials for a village;
- village redevelopment – including minimum resident consultation and rights;
- the process for terminating a retirement village scheme – including minimum resident consultation and rights; and
- compliance and enforcement – including moving the RV Code to under the RV Act, making the RV Code provisions more enforceable, creation of new offences and SAT powers.

During the next 12 months, Consumer Protection will also analyse submissions made to the first CRISs.

PART 6: EXIT ENTITLEMENTS AND RECURRENT CHARGES AFTER LEAVING A VILLAGE

This Part deals with exit entitlements. In summary:

- *Issue 6.1* – proposes a time limit for exit entitlements to become payable to a former resident. It discusses a number of implementation questions, such as how long the deadline should be.
- *Issue 6.2* – proposes clarifying the RV Act protections regarding exit entitlement payment, replacing some terms the RV legislation uses to better reflect emerging contractual arrangements and prohibiting contracts purporting to confer a right to an exit entitlement from a person who is not a party to the contract.
- *Issue 6.3* – asks whether the cap on the time for which former lessee residents can be required to pay recurrent charges should also apply to former strata and purple title residents.

A later CRIS will deal with other, related issues. These include: a new term "upfront payment" and redefining the term "premium", further RV Act consumer protections (for example, whether the protections regarding a village ceasing to operate are sufficient); and other issues in leaving a village (for example, marketing guidelines in addition to those proposed in Parts 4 and 5 of CRIS 1. Refurbishment is dealt with in this CRIS at Part 9).[1]

For clarity, the discussion in this Part refers to all exit entitlements whether or not they arise under a price structure that involves a DMF.

[1] This Part is not about residents' inability to leave a village due to insufficient money for alternate accommodation after payment of the DMF. As Parts 3 and 5 explain, the DMF/recurrent charges and exit fees are more properly the RV product price than the upfront payment. The issue with DMFs is in consumers not understanding their impact at the time they enter into a residence contract. Part 5 contains some proposals directed at this.

PART 6.1: TIME LIMIT FOR EXIT ENTITLEMENTS

Issue 6.1: Proposing a time limit for exit entitlements to become payable

CRIS1 Part 3 explained that residents generally make a significant upfront payment when entering a retirement village. It also explained that this payment is usually made on the promise that a portion of it will later be returned as an exit entitlement. The Final Report observed that paying "considerable amounts of money" upfront can leave residents "financially vulnerable".[2] One aspect of this financial vulnerability is that their monies are tied up in the upfront payment and so not available when they leave a village.[3] The RV Act currently requires an exit entitlement to be paid within a prescribed time of it becoming payable. Former residents have special debt recovery rights if that does not occur, including enforcing a statutory charge against village land.[4] The RV Act does not however regulate *when* an exit entitlement will become payable. This gap undermines the effectiveness of the current exit entitlement payment protections.

This is because the standard industry practice is that residence contracts provide that exit entitlements become payable when a vacated unit is reoccupied.[5] From reports to Consumer Protection, unit reoccupation can take up to four years. Contracts can provide that an exit entitlement also becomes payable if a unit is not reoccupied within a time specified in the residence contract but this does not always mean payment within a reasonable time. In some contracts the specified time is as short as 45 or 60 days, more frequently however the period is two or three years.

Waiting for their exit entitlement to become payable is causing former residents (and their families trying to manage transition into aged care or to wind up a deceased estate) significant financial hardship, health issues and distress. For many residents, the upfront payment ties up the bulk of their funds.[6] They therefore often need their exit entitlement to pay for accommodation outside the village when they leave. Uncertainty in when an exit entitlement will be paid, sometimes in combination with experience of long standing current village vacancies, means some residents either cannot afford to leave the village or face a precarious financial situation if they do.

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2 Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 42.

3 Frielich A, Levine P, Travia B and Webb E, *Security of tenure for the ageing population in Western Australia: Does current housing legislation support seniors' ongoing needs? Summary*, University of Western Australia. 82 (COTA Report). As the COTA Report expressed it, a: "resident's financial security may be significantly compromised."

4 *Retirement Villages Act 1992* (WA), sections 19 - 21. Issue 6.2 provides more information about these provisions.

5 This may be expressed as within a certain time of the new resident making an upfront payment.

6 McCrindle Baynes Villages Census Report 2013, Executive Summary, 6. As explained in CRIS1 Part 3, retirement village residents generally pay a sum roughly equivalent to housing purchase to enter a retirement village. For most residents, this means that their funds are tied up until their exit entitlement is paid. National research shows that consumers generally fund their retirement village upfront payment through the sale of their family home. The Census report put the figure at 90%. This means that many (likely most) residents 'invest' the bulk of their funds in the upfront payment and rely on the exit entitlement to fund alternate accommodation on leaving a village.

Table 6.1 sets out some of the problems former and current residents (and their families) experience:[7]

TABLE 6.1 – EXAMPLES OF CONSUMER HARDSHIP WHEN EXIT ENTITLEMENTS NOT PAID

Example 1 - An elderly couple had to leave the village due to one of them having dementia. Seven months later, their premium has not been repaid. The caller is caring for their spouse and is distraught. They desperately need the exit entitlement to fund aged care. It is difficult to even pay for medication.
Example 2 - A male resident is unhappy in a village with very few other male residents that does not cater well for men's interests (for example, there is no workshop). An equivalent unit has been vacant for over a year and he cannot cope financially waiting a year for his exit entitlement. He is depressed and feels that he is a "prisoner" in the village.
Example 3 - Former residents had to leave a village due to one suffering a stroke. Their daughter had to try to explain to them why they did not receive their exit entitlement on departure, as they had expected, and why it had not been paid since. Both died within 18 months. Three and a half years after they left the village, the vacated unit remains unoccupied and exit entitlements remain unpaid. The daughter's view is that there was no incentive for the operator to reoccupy the unit because the operator still had their parents' upfront payment.

The time taken for exit entitlements to become payable is commonly raised with Consumer Protection. It is not however recorded as a complaint. This is because contracts making exit entitlements payable only on a unit being reoccupied or after lengthy periods of time do not breach the RV legislation.

Objective

To ensure former residents receive their exit entitlements within a reasonable, fair and certain timeframe.

Discussion

Context – variety in exit entitlement arrangements and reasons for leaving

Before beginning the discussion of a time limit for exit entitlement payment, it is necessary to provide some context as to the variety of contractual arrangements and residents reasons for leaving a village.

Variety in exit entitlement arrangements

CRIS 1, Part 3 explained that there is considerable variety in what exit entitlements are called. They also vary in their technical legal character.[8] Some contracts describe exit entitlements as a complete or partial loan repayment or refund of the former

[7] These examples are from consumer complaints to Consumer Protection.

[8] 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, 18 (CRIS1).

resident's upfront payment.[9] Other exit entitlements are either described as the former resident receiving the new resident's upfront payment (after deductions) or are calculated on the new upfront payment's amount. The latter may represent the difference between the former and new resident's upfront payments and be described as the resident sharing in capital growth. A DMF can also be calculated on a new resident's upfront payment. Table 6.2 sets out the common combinations and proportion of contracts that fall into each category.

Regardless of the technical legal character of the exit payments and exit deductions, their practical net effect for consumers is the same – they receive back part of the amount they paid upfront.[10] For ease of reading, *Issue 6.1* uses this practical approach to describing exit entitlements. (*Issue 6.2* makes some technical distinctions.)

TABLE 6.2 – PRICE STRUCTURING

Price structure	Percentage of new resident offered structure 2017	Percentage of new resident offered structure 2018
Both exit entitlement and DMF calculated on new residents' upfront payment	14	26
Exit entitlements on new resident's upfront payment **DMF on former resident's upfront payment**	45	29
DMF on new resident's upfront payment **Exit entitlement on former resident's upfront payment**	21	4
New upfront payment not relevant – both exit entitlement and DMF on former resident's upfront payment	20	41

[9] When a residence contract describes an exit entitlement as a full repayment or as receiving the new resident's upfront payment, prospective residents do not always understand that a DMF (and other exit deductions) may mean that they do not get that sum in full.

[10] Unless there has been some extraordinary increase in the upfront payment and their share of it exceeds the exit deductions. This may occur for example, when different price structures apply to the former and new resident.

Variety in reasons for leaving a village

Residents may need or want to leave a village for a variety of reasons. Frequently it is because they move to residential aged care. Other common reasons for leaving (or wanting to leave) include that a resident can no longer afford village recurrent charges,[11] has clashes with management or other residents that make staying untenable or wants to be nearer to family. Executors and family are impacted when the resident passes away.

Final Report approach to exit entitlement payment

In the statutory review, residents proposed that operators be required to "buy back" their vacated units (their characterisation) to relieve the "stress and pressure" that delay in reoccupation caused them.[12] The Final Report noted operator concerns with this proposal that included disruption of business models and that delay in reoccupation was not always the operator's fault. Operator concerns are discussed in more detail below.

The Final Report dealt with delay in unit reoccupation as a marketing issue. **Recommendation 71** was that the RV legislation adopt a "remarketing policy".[13] The expectation was that better marketing would reduce the time taken for unit reoccupation and therefore lead to earlier exit entitlement payment.

Exit entitlement delay involves considerations beyond marketing

Consumer Protection considers that there are factors which warrant a reconsideration of the Final Report approach.

Security of tenure issue

Exit entitlements payable only on a new resident purchasing the RV product, or after passage of a significant time, is more fundamentally a security of tenure than marketing issue. If former residents do not have the funds for accommodation during the waiting period "the departing resident may be left with no alternate accommodation pending the sale or re-lease of their unit and no ability to use the [unit] as security for a bridging loan".[14]

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[11] These can increase significantly and unexpectedly. For example, in *Maclean and Beacon Hill Village Incorporated* [2005] WASAT 29, a resident claimed that management fees were significantly increased due to the operator's decision to change from "semi-professional" provision by a firm associated with a resident to "management of the highest professional standards available" [paragraph 45]. The new management concluded that the village had been under budgeted in the past [paragraph 53(ii)]. SAT found that it was not unreasonable to appoint an external manager and that the fees were not excessive [paragraph 53(ii)].

[12] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 116. In fact, most units are leased so are already owned by the operator.

[13] ibid, 119. The relevant Final Report chapter is titled "Selling premises within a retirement village".

[14] Frielich A, Levine P, Travia B and Webb E, *Security of tenure for the ageing population in Western Australia: Does current housing legislation support seniors' ongoing needs? Summary*, University of Western Australia. 82 (COTA Report), 83. The COTA Report defines security of tenure as: "the legal right or practical option that a resident has to remain in in their existing accommodation or acquire alternate accommodation."

The uncertainty about when an exit entitlement will be paid means that even former residents who can afford accommodation outside the village in the short term may be impacted. These residents may leave in the expectation that the unit will shortly be reoccupied and their exit entitlement paid. They expect to later use the exit entitlement together with their other funds for secure accommodation. After lengthy periods waiting for their exit entitlement however their other funds erode, particularly if they are renting or making a daily accommodation payment for residential aged care. This means that they can no longer afford secure accommodation when their exit entitlement is finally paid. Consumer Protection has received reports of former residents losing their financial or housing independence altogether, having to rely on family and friends, which they felt was demeaning.

As the Final Report observes, it is "particularly important" that the RV legislation protect (to the extent possible) residents' tenure and upfront investment.[15] For the reasons outlined below, a remarketing policy will not address this issue.

Restriction of residents' ability to change supplier represents market failure

Residents who do not have funds for accommodation during the uncertain time they will wait for their exit entitlement, or who are not willing to take the risk that their funds will run out, are effectively locked into the village. Illustrating this connection, some residents told the authors of the Council of the Ageing (COTA) Report that living in their respective villages was "so intolerable" that they would leave "tomorrow [if they] had the money"".[16] Worryingly, the COTA Report found that residents' primary concern was that village life would become untenable.[17]

When consumers are unable to change suppliers, competitive market forces do not operate to improve the product or its price. This constitutes market failure.[18] Regulatory settings directed at rectifying market failure need to address the issues beyond remarketing strategies.

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[15] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 42. *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013 WASC 219, paragraph 156]. Consistent with this, in the *Hollywood* case, the Supreme Court found that the RV Act's predominant purpose was to protect resident interests. It noted that residence contracts would be entered into by older persons at a time they desired long term security in their living arrangements but when many of them would not have any significant bargaining power in relation to the terms on which this was offered. Also that provision of an upfront payment: "might assume an even greater financial significance than it otherwise would", in the context that many would not be working and might not have a significant income stream

[16] ibid, 71-72.

[17] Inability of residents to leave a village when they wish to do so has ramifications for a village beyond the wellbeing of the particular residents themselves. Disgruntled residents can upset the tenor of the village, impeding other residents' enjoyment and peace of mind. They can also cause distress for management staff, posing occupational, safety and health issues and financial cost in responding to myriad complaints.

[18] OECD, *Roundtable on Demand-side Economics for Consumer Policy,* Summary Report, 20 April 2016, paragraph 8, quoted in Stephen G Corones, *The Australian Consumer Law* (Lawbook Co 2nd ed. 2013), 37.

Business model transfers business risk from the operator to residents

The RV market dynamic of an obligation to repay monies to a former consumer only arising when a new consumer purchases the product offered by an operator is highly unusual.[19] The fact that operators can retain the former resident's upfront payment until replacement monies are provided by a new resident means that:

- former residents effectively continue to pay for a product they no longer receive. This has also been characterised as former residents effectively providing an "interest-free loan" after their departure;[20] and
- the business risk that the RV product will not be attractive to new consumers is transferred from the operator to residents.

Transfer of business risk from a supplier to a consumer is not necessarily unfair.[21] A consumer may receive benefits that offset their acceptance of the risk. Operators say that resident benefits include a discounted price for access to a higher standard of accommodation, amenities and services than they would otherwise enjoy, access to the pension that would not be available if the funds were invested in other ways and (in some cases) a share in the business return (that is, any upfront payment increase – see Table 6.1 for the proportion of residents this applies to). However:

- the extent to which these (or other) benefits are present varies between arrangements;[22] and
- the longer the period before exit entitlements become payable, the less likely any benefit is a sufficient offset for the risk.

CRIS 1, Part 3, discussed how a consumer's ability to recognise this transfer of business risk and make an informed decision that the benefits they receive offset that risk is compromised. One of the reasons for this is that retirement village contracts and price structures are difficult to understand. In particular, consumers misunderstand contract 'capital gain' provisions so are often mistaken as to the benefit they receive from the new upfront payment. They also lack information as to matters relevant to assessing how long a unit may remain unoccupied (the degree of risk they

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[19] As distinct from the fact that businesses generally rely on turnover to fund any repayments, which are usually required whenever there has been an overpayment regardless of whether a replacement product has been bought by another consumer. Viewed through the prism of the 'single price' discussed in Part 5 (as the DMF, recurrent charges and other exit deductions are the 'price') the operator effectively retains monies overpaid upfront. Industry says this is reasonable as, it argues, the upfront payment represents a discount on what a resident would pay to purchase the unit and village amenities outright.

[20] Consumer Credit Legal Service (WA) Inc, *Report to Consumer Protection, Department of Mines, Industry Regulation and Safety*, September 2019, (CCLSWA Report), 15-16.

[21] Productivity Commission of Australia, *Review of Australia's Consumer Policy Framework*, Final Report, 2008, Canberra, vol 2, 159-160. Quoted in Stephen G Corones, *The Australian Consumer Law* (Lawbook Co 2nd ed. 2013), 234-235. The Productivity Commission of Australia concluded that any adverse or favourable effects on risk allocation were one of a number of factors to be taken into account by a regulator in deciding whether to bring an action under the Australian Consumer Law unfair contract terms provisions.

[22] https://www.youtube.com/watch?v=-TVuw3XmgHg The Weekly SOURCE, *Thurs 1135 S Bull*, uploaded 5 April 2019, viewed 19 November 2019.

are accepting), such as whether contracts or the RV product will change in the future so as to be less attractive to consumers and information as to usual village turnover times.

Regulation in respect of exit entitlement payment must therefore protect consumers against accepting unreasonable business risk as well as promote good marketing.

Relevant to this, the increasing size of villages in combination with the long term trend for higher upfront payments means potential for operators to carry increasing levels of contingent debt. Regulatory restrictions can encourage operators to make better provision for this risk.

Speedy unit reoccupation depends on matters beyond good marketing

How quickly a unit is reoccupied depends on a wide range of matters that include: the terms and conditions offered (including the price structure and village rules), an operator's management style and personnel, whether the accommodation, amenities and services meet current consumer standards and whether the village has been well maintained.

With regard to current standards and maintenance, Stephen Bull, the former CEO of a major national operator (Stockland) recently advised that capital investment in a village with 250 homes had increased RV product sales from eight per year to 45 per year over a three year period. In making this point, Mr Bull observed (in effect) that the industry as a whole had difficulty reconciling capital investment with its desire for short term profit.[23] Part 8 makes proposals regarding capital works and maintenance.

Operator concerns can largely be addressed

As noted above, operators raised a number of concerns in the statutory review regarding residents' proposal that they "buy back" the units they vacate.[24] The Final Report summarised these as:

- the proposal was not reasonable or practicable;
- reoccupation delay was not necessarily the operator's fault;
- if a unit had not previously changed hands, the market value could not be established;
- the underlying business model relied on a new resident's funds to pay the former resident's exit entitlement; and

[23] ibid. Mr Bull said: "… in a world where everything is judged by short term returns … it takes courage to say 'I am going to spend money on this asset' maybe to grow it but maybe just to maintain it … so, I think that's a real scenario that's facing the industry over the next five years plus as more village age - how we keep them relevant and fresh so that our customers want to live there". He then went on to provide the example of the turnover increase capital investment yielded.

[24] As CRIS1 explains, most residents do not in fact own the unit they occupy and in any event, it is the RV product that is sold and the sale is not resale of a product owned by a resident but sale of the operator's product.

- the proposal had potential to cause operator insolvency, which was not in the interests of consumers.[25]

A proposal for unit "buy back" is also problematic as it is not the units that are bought or sold but the RV product as a whole and, in any event, operators already own leased units.[26] The underlying issue in exit entitlements not being paid within a reasonable time was however clear.

With regard to the operator concerns:

A time limit for exit entitlement payment is not reasonable or practicable/ disrupts business models

Essentially these are the same concern – it is the disruption to the business model that renders the proposal impracticable. Business model disruption is not however in itself a reason to withhold reform. To a certain extent, consumer protection regulation will always disrupt an existing business model. The policy question is whether the disruption is disproportionate to the risk of consumer detriment. The level of consumer harm that can result from the risk is an important consideration in answering this question.

The prevalent RV industry business model risks that exit entitlement payment will occur long after a resident's departure from a village, sometimes several years. It presents a risk of considerable consumer detriment at a time when consumers are particularly vulnerable.

Imposing a time limit for exit entitlement payment reduces the risk of *unfair* delay in former residents receiving their exit entitlements. As noted above, not all RV business models are problematic - some villages have quite short deadlines for exit entitlement payment.

Risk of operator insolvency

It is notable that Tasmania has required exit entitlements to be paid within six months of departure from a village for the past 15 years without experiencing unusually high operator insolvencies. Also, as noted earlier, some WA villages currently have maximum payment periods of 45 days, 60 days or 12 months if a unit is not reoccupied earlier. This suggests that a time limit for exit entitlement payment is not a structural problem for the RV industry as a whole. It is only problematic for some business models.

As is evident from WA residence contracts, operators can plan for exit entitlements to be paid within set periods without relying on a new upfront payment. These include, putting a percentage of upfront payments into a trust account (or other easily realisable

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[25] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), n3, 116 - 117.

[26] This characterisation reflects the confusion of the RV product with property purchase discussed in CRIS 1, Part 4.

investment) to cover likely exit entitlement payments based on expected resident turnover. Industry has recently acknowledged adjustment can be made. For example, Ben Myers, Executive Director of the Retirement Living Council (the Property Council's vehicle for an operator peak body), in a recent interview for *CHOICE Magazine*, although calling New South Wales's proposed time limits for exit entitlement payment "diabolical", is quoted as saying that: "a prospective application of the six or 12-month time limits could work "If it's applied going forward, an operator can appropriately preserve the capital so they've got liquidity for buybacks".[27]

There have been some recent assertions in the press that Settlers Group's (Settlers) administration is due to Queensland's recent introduction of an 18 month maximum exit entitlement payment period. Whether this is correct is not yet known. In particular, Settlers' underlying financial position and the steps it took (if any) to prepare for Queensland's law coming into effect need to be taken into account when assigning a cause. Settlers' apparent failure to apply for an extension of time to pay (available under the Queensland retirement villages' legislation)[28] also requires some explanation.

Time limits for exit entitlement payment may discourage investors who rely on certain RV industry business models. For example, where:

- residents' upfront payments are used to fund development of further villages or other business (or charitable) enterprises undertaken by the operator or its group; and/or
- a development entity rather than the operator retains most (or all) of the profit from first round sales then sells the village, with the purchaser taking responsibility for exit entitlement payment.[29]

One of the objectives in making the RV Act however was to "discourage the involvement of undercapitalised companies keen on early profit taking".[30] This objective remains important.

Another consideration is that the general industry trend is for larger villages with higher upfront payments, which involve higher contingent operator debt. A reform that requires operators to retain sufficient capital to meet their exit entitlement obligations (or make other arrangements to do so), rather than residents being required to bear this risk, is consistent with the objective of discouraging undercapitalised operators.

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[27] Quoted in Andy Kollmorgen*, Have the recent retirement village reforms gone far enough? NSW wait and watches*, CHOICE Magazine, 31 October 2019 https://www.choice.com.au/health-and-body/healthy-ageing/ageing-and-retirement/articles/retirement-village-reforms-2019 viewed 5 November 2019.

[28] *Retirement Villages Act 1999* (Qld), section 171A.

[29] This scenario is sufficiently common for the Australian Taxation Office to issue a goods and services tax ruling, GSTR 2011/1, 2 concerning such arrangements. That ruling states: "The sale arrangement contemplates, either expressly or by implication, that the purchaser will repay ingoing contributions outstanding at the time of sale".

[30] Parliament of Western Australia, Legislative Assembly, Hon Y Henderson MLA, Minister for Consumer Affairs, *Second Reading Speech for the Retirement Villages Bill 1991*, Hansard,16 May 1991, 2050.

Making provision for operators to apply to State Administrative Tribunal (SAT) for an extension of time in the event of undue hardship (see below) will provide protection for operators who find themselves in difficulty notwithstanding prudent financial planning. For example, due to an unexpectedly high number of departures in a particular financial year.

Delay not operator's fault

Operators also pointed out that delay in unit reoccupation can arise from matters outside their control. For example, former residents can unreasonably delay providing vacant possession or refurbishment works. The need to obtain refurbishment quotes necessarily involves some delay in marketing and disputes as to the amount can also delay exit entitlement payment.[31]

These are however village and resident specific matters. When residents do not pay for refurbishment for example or their exit entitlement is calculated on the upfront payment they made not that of the new resident, there is less potential for these problems to arise.

A downturn in the general property market (as occurred subsequent to the Final Report) is a more general matter that is currently delaying unit reoccupation. Consumers often need to sell their home to fund the RV product upfront payment. The drop in general housing prices reduces the number of consumers able to sell their property and even if they do so, realise sufficient funds for a retirement village upfront payment. Former residents (or their families) unwilling to accept that their exit entitlement will be calculated on a reduced upfront payment can also frustrate unit reoccupation and the exit entitlement payment.

In Consumer Protection's view, it is appropriate that an operator bear the risk of the general market downturn notwithstanding that it is beyond their control. Former residents have little (if any) say in how the operator chooses to respond to market dynamics. Any unreasonable expectations a former resident may have of the market value for the RV product in a downturn can be managed through provision for an independent market valuation.

The other issues can be managed by setting a reasonable time limit.

Ability for an operator to apply for an extension of time to pay if the former resident unreasonably delays reoccupation will also minimise some of these issues. Other reforms such as those proposed in Part 9 regarding refurbishment, are also likely to assist.

Determining market value at payment date

A further issue raised by operators was difficulty in identifying a market value for the RV product if the unit is not reoccupied. This issue only arises where an exit

[31] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 116.

entitlement (or DMF) is calculated on a new resident's upfront payment. (See Table 6.1 for the percentage of residents affected).

In fact, most (if not all) operators already identify a market value for the RV product involving a vacated unit prior to it being reoccupied. When a RV product is offered to the public, operators must identify its market value and determine what part of that sum will be recovered through the upfront payment.[32] The market value and/or the amount of the upfront component is generally revised as time progresses.

As previously noted, many residence contracts currently require exit entitlements to be paid if the vacated unit is not reoccupied within a specified time. Some operators also pay exit entitlements early on an *ad hoc* basis when residents would otherwise experience severe hardship. If a unit is not reoccupied when an exit entitlement becomes payable, the current 'offer' market value is used to calculate any exit entitlement amount that is dependent on the new upfront payment. For example:

Case study 6.1A – residence contract provision for exit entitlement calculation when unit not reoccupied

A residence contract provides that an exit entitlement is to be calculated on a "Base Unit Price". "Base Unit Price" has several meanings including that: "if there is no New Ingoing Contribution because at the relevant date we have not yet entered into a New Lease for the Premises with the Next Resident, an amount equal to the Current Market Value".

There is no reason this would not also occur if the deadline arises by way of the RV legislation rather than a contract term. There is however need for a process to resolve disputes as to the current market value.

An issue in ascertaining the upfront payment component of the market value for the RV product is that a different price structure than that applying to the former resident may be offered to the public. This is dealt with as an implementation issue below.

[32] Australian Government, Australian Taxation Office *Retirement Villages Industry Partnership - Scenic Retirement Village, example C.* https://www.ato.gov.au/Business/GST/In-detail/GST-issues-registers/Retirement-Villages-Industry-Partnership---Scenic-Retirement-Village---example-C/ viewed 29 August 2019. .An operator also has to identify an expected future 'value' each year for GST purposes. As the ATO explains, to work out whether the supply of accommodation is less than 75% of the market value of the supply or cost to the supplier of providing the accommodation, it is first necessary to identify what residents are charged. The ATO requires the DMF to be annualised. When the DMF is calculated on a new resident's upfront payment, the operator must identify an expected market value at the end of average residence. The ATO notes that "In most cases, the organisation will already be setting aside an accrued amount for this purpose."

Other jurisdictions

With the exception of the NT, all other jurisdictions in Australia have introduced regulation to require exit entitlements to be paid within a maximum period to address the consumer detriment being experienced by lengthy delays in the payment of exit entitlements. Table 6.3 notes the major features of their retirement villages' legislation.

TABLE 6.3– OTHER JURISDICTIONS: MAXIMUM PERIOD FOR EXIT ENTITLEMENT PAYMENT

Does the RV legislation:	NSW and ACT: Current provisions	NSW: Proposed provisions	QLD	SA	TAS and NT	VIC
Require exit entitlement payment within specified months:	6	6 (Sydney) 12 (Rural)	18	18	6	6
Apply to all residents:	×	✓	✓	✓	✓	×
Make special provision for residents moving to a RACF:	×	Consulting	×	✓	×	✓
Allow an operator to apply for an extension of time:	✓	✓	✓	✓	✓	✓
Apply to existing as well as new contracts?	✓	Consulting	✓	?	N/A	×

Issue 6.1: Proposal for consultation

That the RV Act:

- **set a time limit for exit entitlement payment;**
- **allow contracts to set contingencies for payment before that deadline; and**
- **allow an operator to apply to SAT for an extension of time (and/or payment by instalment) on the basis of undue hardship.**

Benefits of time limit for paying exit entitlements

Consumer Protection considers that introducing a time limit for paying exit entitlements will have the following benefits, it will:

- reduce the number of residents:
    - who are unable to access residential aged care when needed;
    - who are either not able to afford to leave a village despite needing to do so or who face security of tenure issues and financial hardship and distress if they do leave; and
    - whose estates cannot be wound up within reasonable time;
- provide certainty as to the date by which payment will be made, allowing for future planning, further reducing residents' risks and distress; and
- give greater consistency across the RV market, reducing the complexity in the purchasing decision.

Flow on benefits from a time limit include:

- increased resident ability to change accommodation supplier encourages operators to respond to consumer demand to improve their product, practices and price;
- a disincentive for another issue noted in the Final Report as leading to delay in unit reoccupation - that operators sometimes favour occupation of new units over reoccupation of vacated units;[33]
- an incentive for operators to address the underlying reasons a unit is not speedily reoccupied – for example to properly maintain a village, ensure the

[33] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 114. This issue arises because what is at stake for operators with regard to a vacated unit is not the full upfront payment made by the new resident but their share in any increase in the new upfront payment over the monies they already hold. When a new unit is occupied, the operator receives the full benefit of the new upfront payment amount.

contract terms and conditions are attractive to prospective residents and engage in good marketing practices. This has benefits for remaining residents, as well as former residents;

- an incentive for operators to give a fixed value to DMFs and exit entitlements, rather than calculate these on unknown figures. This will minimise disputes about their amount and avoid market valuation costs; and
- consumer confidence that their exit entitlement will be paid within a reasonable time and so be available when they need it to fund aged care (or alternate accommodation if they need or want to leave the village) addressing a major deterrent to consumers entering a retirement village.[34] This will benefit operators as well as former and remaining residents.

Measures to address operator concerns

Operator application to SAT for extension of time to pay

As noted above:

- former residents (or their families) may unreasonably impede an operator being able to market the RV product as it relates to the unit they vacate and so effectively reduce the time the operator has to reoccupy the unit; and
- even with prudent management, operators may face unexpected circumstances that limit their ability to make exit entitlement payments within the time limit. For example, a period of historically high resident turnover or unexpected need to bring forward major capital replacement. Prudent investment may not yield expected return.

To address these circumstances, operators should be able to apply for an extension of time to pay.

These circumstances require a difficult balancing of operator and individual former resident interests. They also require balancing an individual resident's interests against the communal interests of remaining residents. It is therefore appropriate that SAT should determine when an extension of time is appropriate. The proposal is that the application can be made when paying within the time limit will cause undue hardship or have an unduly harsh impact on remaining residents.

The precise meaning of "undue hardship" will be the subject of discussion during drafting. As will identifying the factors that SAT should be required to consider. These could include the hardship the former resident will experience if the payment is not made and whether the operator took prudent steps to ensure the payment deadline could be met. The proposal includes power for SAT to order that exit entitlement

[34] Consumer Credit Legal Service (WA) Inc, *Report to Consumer Protection, Department of Mines, Industry Regulation and Safety*, September 2019, (CCLSWA Report), 17.

payment occur by instalment and for interest to accrue during any delayed payment period.

Other options: CCLSWA Report recommendation - Industry funded guarantee scheme

A recent report published by the Consumer Credit Legal Service of Western Australia (CCLSWA) has recommended that Consumer Protection examine the benefits of an industry funded "refund guarantee scheme" for exit entitlement payment.[35] If set up by industry, such a scheme could provide operators with funds to cover any shortfall in the event of difficulty in paying exit entitlements when they become due, including due to imposition of a time limit for payment.

Stakeholder feedback on this option is sought below as the first stage of Consumer Protection's examination. It follows that it is too early for Consumer Protection to have a view as to the merits of such a fund.

Risk of some adverse outcomes

The benefits noted above are significant. There are however some potential adverse consequences of introducing a time limit for exit entitlement that stakeholders need to consider in deciding whether to support the proposal.

Lower exit entitlements

A time limit for payment could put pressure on operators to ensure the unit is reoccupied, and a new upfront payment is received, prior to the deadline. Operators may respond to this pressure by reducing the new upfront payment, especially towards the end of the deadline. This may decrease the amount of exit entitlement a former resident receives.

Accepting unsuitable residents

The time limit may also increase the prospect of operators accepting residents who might not be suitable. For example, a person whose health issues indicate that they will shortly cease to be able to live independently,[36] someone who cannot afford likely recurrent charge increases or someone whose personality means that they are not suited to communal living. Time limits could therefore increase the incidence of problems within a village.

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[35] Consumer Credit Legal Service (WA) Inc, *Report to Consumer Protection, Department of Mines, Industry Regulation and Safety*, September 2019, (CCLSWA Report), 17.

[36] One operator, for example, was concerned that an elderly, recent widower insisted on moving to the village despite their concern (discussed with the resident and their family) that the person would shortly move to residential aged care. In the event, this occurred after a few months residence only. In this case, the operator did not rely on the contract and paid the exit entitlement early. There were nonetheless a DMF and some refurbishment expenses. As both the former resident and their family were aware of the financial consequences of moving to the village, they had no complaint. This could be different with a less scrupulous operator feeling pressure to obtain the new upfront payment before a looming deadline.

In resident owned and operated villages, it is the residents who will have to find the funds

Some retirement villages are resident owned and operated. This generally occurs through the vehicle of an incorporated association. If the village management has not made sufficient provision for an exit entitlement payment, it may be that the remaining residents will have to contribute to the payment.

Impact analysis

The following table summarises the benefits and disadvantages of the proposal.

Potential benefits	Potential disadvantages
More residents receive their exit entitlements within a reasonable time, reducing the problems in funding alternate accommodation after leaving a village.	May result in lower prices/upfront payments and so lead to lower exit entitlements for some residents.
Market consistency reduces the complexity of the decision whether to purchase the RV product and potential for uninformed decisions.	May result in cost shifting as operators seek to replace the value of use of the upfront payment while the unit remains unoccupied through other fees/fee increases.
Provides an incentive for operators to maintain villages, ensure contract terms and price are attractive and engage in good marketing practices.	May result in increased admission of residents who are not suited to the village.
Provides an incentive for more certain exit entitlement (and DMF) amounts.	May result in investors leaving the market, or insolvencies, if unwilling to adjust business models. (Though note discussion above as to whether this is necessarily undesirable).

Questions

6.1.1	*Is there any reason this proposal should not proceed?*
6.1.2	*Is there any reason SAT should not be able to grant operators an extension of time?*
6.1.3	*Are there any grounds beyond undue hardship on which an operator should be able to apply for an extension of time?*
6.1.4	*Should SAT be required to consider certain criteria in weighing the former resident and operator interests? If so what should those criteria be?* *For example, should the village communal interests be a factor? Should SAT need to be satisfied that operators have made prudent arrangements to meet their liabilities?*
6.1.5	*Should SAT be able to order payment by instalment on an application for an extension of time to pay?*
6.1.6	*What are your views on the CCLSWA Report recommendation that industry set up a refund guarantee scheme? What matters do you think need to be considered in making a decision on this recommendation?*

Implementation issues

A time limit for exit entitlement payment involves a number of considerations. These are discussed below.

Options

The following options are being considered in relation to this issue. Whether there should be special provision for residential aged care is considered separately below.

That the RV Act specify the time limit time for exit entitlement payment to be:

- **Option A – 6 months**
- **Option B – 12 months**
- **Option C – 18 months**

after a resident leaves the village.

Contracts will still be permitted to stipulate an earlier time for payment.

Impact analysis

These options are consistent with the other jurisdictions. New South Wales and Tasmania have a six month time limit for certain lessee residents and is currently consulting on extending it to all residents. Queensland and South Australia have 18 month time limits. The shorter the exit entitlement period, the more residents will benefit. The longer the period the less disruption to operator business models and risk of the potential detriments noted above.

Questions

6.1.7	*Should the time limit for paying exit entitlements be 6, 12 or 18 months? What is the reason for your choice?*
6.1.8	*What are the cost implications of the different options? Please provide quantifiable information if possible.*

Should residents be able to opt out of the time limit?

Some former residents (or their families) may not need their exit entitlement to be paid within the time prescribed. These former residents may prefer to wait until a more favourable upfront payment is achieved in say a stronger market. This raises the question as to whether former residents should be able to opt out of the time limit.

If there is to be such an option, Consumer Protection believes that it must be a decision by the resident or family and only initiated by them. In particular, it should not form part of the residence contract. The issues discussed in Part 3 require that such an option only be exercised on or after leaving the village. At this time, the former resident's financial situation and state of the RV market are known and the decision can be made on an informed basis.

There are a number of matters that will need to be decided if this right is supported. These include what notice an operator must be given. If the proposal proceeds, these details will be discussed in implementation.

Questions

6.1.9	*Should former residents be able to opt out of the deadline at the time of exit? If not, why not?*
6.1.10	*If so, what conditions (if any) should be attached to this ability?*

Should there be special provision for residents moving into residential aged care?

Funding Residential Aged Care Facility (RACF) accommodation

RACF residents pay for their accommodation (as distinct from care) through any of:

- a lump sum called a Refundable Accommodation Deposit (RAD);
- a Daily Accommodation Payment (DAP); or
- a mixture of part RAD and part DAP.

An RAD is refundable. A DAP (which is calculated on a prescribed percentage of the RAD per annum) is not. RV residents who cannot afford the RAD risk their funds being eroded and not being able to afford continued residence in the RACF.

A resident must decide how they will pay for the RACF within 28 days from entry. If they want to pay a RAD (in full or part), they have 6 months from entry to pay. Interest accrues during this period. Interest can be up to 4.98%.[37]

As noted above, many residents leave a retirement village because they can no longer live independently - they need to enter a RACF.[38] A former retirement village resident may however be unable to enter an RACF if they need their exit entitlement to fund the RAD or DAP. They can also incur interest costs, and non-refundable payments, without it.

Delay in exit entitlement payment can therefore have significant health and financial consequences for former residents and their families. This consequence of investment of the substantial upfront payment in purchasing the RV product raises the question of whether the RV Act should make special provision for residents moving into aged care.

[37] Commonwealth Department of Health https://agedcare.health.gov.au/aged-care-funding/refundable-deposit-balance-and-accommodation-bond-balance-refund-interest-rates viewed 14 October 2019.

[38] NSW, Fair Trading, *Retirement villages exit entitlements and recurrent charges cap, Discussion Paper, July 2019*, 20. NSW puts the figure at more than 60 per cent.

Some operators already pay exit entitlements early when a resident is moving to a RACF, particularly when the operator (or a related entity) operates the RACF. This however tends to be dependent on operator goodwill not a contractual right.

South Australia and Victoria make special provision for advanced, partial exit entitlement payment when a resident is moving to an RACF. New South Wales is currently consulting on whether it should have a provision equivalent to any of these options:

TABLE 6.4 –PAYMENT OF RACF ACCOMMODATION PRIOR TO EXIT ENTITLEMENT PAYMENT: OTHER JURISDICTIONS

South Australia	Victoria (after 30.07.17)	Victoria (before 30.07.17)
An operator must make DAP payments to an RACF up to 85% of the estimated exit entitlement, or until the exit entitlement is paid, if a resident who does not have ready access to funds, or whose finances may be seriously affected if they do, asks the operator to do so.	Same as SA except: • only for non-owner residents. • No means test.	Operator must either fund the DAP for a non-owner resident until the exit entitlement is paid or pay the RAD no later than 6 months after the resident enters the RACF.

The limit on advance payments to 85% of the estimated exit entitlement recognises that the precise figure cannot be known at the time the payments are made and protects operators from overpayment.

Options

The following options are being considered in relation to this issue.

Option D – no special provision for residents moving to an RACF

Option E – if requested by a former resident, an operator must pay DAP of up to 85% of the estimated exit entitlement

Option F – if requested by a former resident, an operator must pay either the RAD or DAP of up to 85% of the estimated exit entitlement. The RAD to be paid within 6 months of the resident's departure from the village

Impact analysis

Consumer Protection considers that Option F provides the best outcome for former residents as it allows them to avoid making payments that are not refundable. Option

F will not however be necessary if the deadline for exit entitlement payment is 6 months. Option E may be preferable to industry.

Options E and F provide an incentive for operators to reoccupy units vacated by residents moving to an RACF in preference to those vacated for other reasons. Option D may therefore be better for equity amongst village residents.

Questions

6.1.11	*Which option do you prefer (D, E or F)? Why?*
6.1.12	*What would be the cost implications of the different options? Please provide quantifiable information if possible*

Should a resident have the option to remain in the unit while the time limit for payment runs?

South Australia, which has an 18 month time limit for exit entitlement payment, currently gives residents a right to remain in a unit until a new resident enters into an agreement to occupy it or the deadline for payment expires. It requires the resident to leave within a prescribed time of the new contract or the deadline.

Resident ability to remain in the village while the exit entitlement payment period runs could significantly reduce the financial burden for those residents who do not need to immediately leave the village. There could be complications if the resident does not vacate the premises by the time refurbishment is required DAP for the new resident. At present, operators have no power to evict a resident. An option to remain in the unit during its marketing period raises the question of whether that power may be necessary.

Questions

6.1.13	*Should residents have the option to remain in a unit pending its reoccupation or the deadline for exit entitlement payment? If not, why not?*
6.1.14	*Would you support amendment to the RV Act to allow operators to evict residents who have exercised an option to remain in the unit until their exit entitlement is payable but who do not vacate it by the required date? If not, why not?*

If an exit entitlement is to be calculated on a new resident's upfront payment, how will it be determined?

As noted above:

- some exit entitlements are required by contract to be calculated on the upfront payment a new resident makes;

- introduction of a deadline requires provision for the figure on which an exit entitlement will be calculated as the deadline will apply when no new upfront payment has been made; and
- standard industry practice is that when an exit entitlement becomes payable under a contract after a specified period rather than unit reoccupation, the current market value is used to calculate the amount (as well as the amount of any DMF required to be calculated on a new upfront payment).

CRIS 1, Parts 3 and 5 explained that the amount paid upfront is not the RV product's price and so it is not in itself the current market value for the RV product. What needs to be determined is the upfront component of that market value.

When a village offers prospective residents the same price structure as applied to the former resident, the appropriate RV legislation provision nonetheless appears fairly simple – relevant exit entitlements are calculated on the upfront component of the current market value for the RV product. If a former resident is not happy with the advertised amount at the time the deadline occurs, an independent valuation can help determine the correct figure.

Variety in price structures based on the same market value poses issues

If a village offers a variety of price structures however a question arises as to which price structure should be used to determine the upfront component of the current market value. The same question arises if at the time the deadline occurs, the village is offering a single, different price structure to the one that applied to the former resident. It also arises when a unit is reoccupied under a different price structure to that applying to the former resident.

This issue arises because, although different price structures are developed from the same total price (market value), their upfront component – and therefore its amount - varies. The same exit entitlement could therefore be calculated on a range of different upfront amounts. The problem is that applying the former resident's contract to the different upfront amounts, produces different exit entitlement amounts for that former resident.

Table 3 in CRIS 1, Part 3 illustrated the difference in the amounts asked for upfront under different price structures. It set out the three price structures currently offered in one WA village. Each represents the same market value (price) but the upfront payments were respectively:

- Option 1 price structure – $550,000;
- Option 2 price structure – $750,000; and
- Option 3 price structure – $1,000,000.

Table 6.5 uses these three price structures to calculate the same exit entitlement. For the purposes of this illustration, it assumes that the former resident:

- paid $450,000 upfront;

- is entitled to a refund of their upfront payment, less a DMF calculated on that payment (and less other exit deductions); and
- is also entitled to a 50% share in any upfront payment increase.

This Table calculates only the 50% share in upfront payment increase. It does not calculate the 'refund' exit entitlement as the new price structure is not relevant to its amount.

TABLE 6.5: DIFFERENT PRICE STRUCTURES MEAN DIFFERENT EXIT ENTITLEMENT AMOUNTS

Impost	Option 1	Option 2	Option 3
Former resident's upfront payment	450,000	450,000	450,000
New resident's upfront payment (from Table 3 in Part 3)	550,000	750,000	1,000,000
Former resident's exit entitlement – 50% share in upfront payment increase	(550,000 – 450,000) x 0.5 50,000	(750,000 – 450,000) x 0.5 150,000	(1,000,000 – 450,000) x 0.5 275,000

It can be seen that even though the former resident's percentage share in the new upfront payment is the same, changing the price structure changes the amount the former resident will receive - if the former resident entered the village under the Option 1 price structure, they may get a higher than expected exit entitlement if it is worked out under Option 3 price structure (higher upfront payment/lower DMF). If they entered under Option 3 however and their exit entitlement is worked out under Options 1 or 2, they will get a much lower exit entitlement. [39]

Some operators take different price structures into account

Some (perhaps all) villages that offer multiple price structures to new residents take this issue into account. Case Study 6.1A is an example contract from a village that offers a choice of three price structures. It deals with the third scenario noted above – a new resident chooses a different price structure to that applying to the former resident but the approach is equally applicable to the other circumstances. It is the same contract used in Case Study 6.1A. Some defined terms have been replaced with their meanings in Case Study 6.1B. We use these examples to show why consumers find residence contracts difficult to understand remains clear.

[39] This is a simplification. If the DMF is also calculated on the new upfront payment, which is best for the operator or resident will depend on the DMF and exit entitlement percentages.

Case Study 6.1B

A resident enters into a Base Contract. The Base Contract provides that the resident is entitled to the following exit entitlements:

- a part refund of their upfront payment; and
- a share in [defined term meaning, in summary] the amount by which the "Base Unit Price" exceeds (or is lower than) the former resident's upfront payment.

As noted in Case Study 6.1A, Base Unit Price has a number of meanings. Relevant to the current issue:

- Base Unit Price means: "If the Next Resident elects to enter into another form of contract with us that is not the Base Contract, the ingoing contribution the Next Resident would have provided if [they] had entered into a Base Contract, being an amount equal to the Current Market Value; and
- Current Market Value means the ingoing contribution (upfront payment) a new resident would be prepared to pay for a Base Contract, without discount or increase.

Translating Case Study 6.1B – regardless of what price structure is offered to or chosen by a new resident, a former resident's exit entitlement is calculated on the same price structure as applies to the former resident.

Going back to Table 6.5, if the Option 1 price structure applied to the former resident, their exit entitlement would be $50,000, if the Option 3 price structure applied, it would be $275,000.

These are of course simplified examples. In reality, Options 1 and 3 have different DMFs and exit entitlements so the actual difference in amounts would be less. The point that different price structures can mean the exit entitlements predicted at entry are impacted is nonetheless still valid. DMFs calculated on the new upfront payment will also be impacted by any price structure differences.

Other jurisdictions

Appendix 6.1 of this paper sets out the main features of the other jurisdictions' legislation regarding calculating the exit entitlements paid under their time limits for payment. Two jurisdictions, New South Wales and Queensland, make specific provision for different price structures applying to the former and new resident (or being offered to a new resident if the unit is not reoccupied when the exit entitlement becomes payable). Table 6.6 below summarises these provisions:

TABLE 6.6 – DETERMINING AMOUNT OF EXIT ENTITLEMENT WHEN DIFFERENT PRICE STRUCTURE OFFERED TO NEW RESIDENT

NSW	QLD
Former resident can apply to the Tribunal if operator's conduct in calculating exit entitlement "has unfairly had a negative financial impact" on them. Includes entering into a contract with a new resident containing terms that are "substantially different" from the former resident's contract to their detriment.	Valuer is to have regard to the exit fee/share in upfront payment increase arrangements applying to former resident and not to regard those applying to a new or prospective resident

Queensland's provision is more direct and sets a clearer standard for what is required.

Options

The following options are being considered in relation to this issue.

Option G – the RV legislation require that a residence contract provide how an exit entitlement will be calculated if a unit is not reoccupied when it falls due.

Option H – the RV legislation provide that if a residence contract makes an exit entitlement amount dependent the amount of a new resident's upfront payment or a stipulated time, the unit is not reoccupied when an exit entitlement becomes payable and the former resident and operator cannot agree the upfront payment amount:

- **the operator must obtain an independent valuation of the current market value (price); and**
- **the upfront payment component of that value.**

Option I – Option H with the additional requirement that the price structure applying to the former resident must be used.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option G – the RV legislation require that a residence contract provide how an exit entitlement will be calculated if a unit is not reoccupied when it falls due	Least prescriptive option. Consistent with stage one reforms prescribing what should or should not be in a contract.	Another matter for consumers to compare in context of complex arrangements that overwhelm them. Higher risk of unfair contract terms than Options H or I. Risk of inequity within villages.
Option H – the RV legislation provide that if the former resident and operator cannot agree the sum on which an exit entitlement will be calculated, the operator must obtain an independent valuation, including the upfront payment component of the value	Less consumer comparison burden than Option G. Same protection applies to all affected consumers. Minimises risk of unfair contract term. Permits regulator enforcement.	Risk that either the former resident or operator suffers adverse consequences due to under or overestimate/ new price structures. Former residents' ability to determine whether a particular upfront payment is reasonable is limited (if ARCF proposals not accepted).[40] Valuer understanding of the RV product and price structures is not widespread. Valuation involves costs.
Option I – Option H with the additional requirement that the price structure applying to the former resident must be used	The Option H benefits. Unlike Options G and H, provides a fair resolution of the impact different former and prospective resident price structures have on exit entitlements.	The Option H disadvantages, though to a lesser degree.

Consumer Protection prefers Option I.

[40] See CRIS1, Part 5 for these proposals.

Questions

6.1.15	*Which option do you prefer (G, H or I)? Why?*
6.1.16	*Can you think of other ways to address this issue?*
6.1.17	*Should the provision also apply when a unit is reoccupied under a different price structure to that applying to the former resident? If not, why not?*
6.1.18	*Should the provision also apply when a DMF is calculated on a new resident's upfront payment? If not, why not?*
6.1.19	*What would be the cost implications of the different options? Please provide quantifiable information if possible.*
6.1.20	*Should the RV legislation provide:* • *that if the parties cannot agree the valuer, the operator is to ask the Australian Property Institute to nominate a valuer.* • *that an operator is to provide the valuer with the information necessary to undertake the valuation;* • *that the parties can make submissions to the valuer; and* • *who pays for the valuation?* *If so, who should it say? (see Appendix 6.1, for some options)*
6.1.21	*What additional matters need to be addressed? (see Appendix 6.1, for some options).*

Should the time limit for payment period apply to existing as well as new contracts?

Whether the time limit for exit entitlement payment should apply to existing contracts – that is contracts entered into before the amendment is made – is an important question for both operators and current residents. There are rule of law principles about why this is generally undesirable. This general position is not however automatically applied in the RV industry context.

Section 6(2) of the RV Act – application to existing contracts sometimes appropriate

Prior to the stage one reforms, section 6(2) of the RV Act provided that RV Act amendments applied only to contracts entered into after they had come into effect. The Final Report however concluded that some reforms should apply to contracts entered into before an amendment comes into effect. Its reasons were that:

- the restriction was inconsistent with existing RV legislation rights that applied to all residents regardless of when they entered into a contract; and
- removing the restriction was necessary to maintain equity between village residents.[41]

[41] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 143. Essentially the issue was that section 6(2) of the RV Act (WA) previously gave precedence to preserving individual contracts rights over the interests of village residents as a whole.

The Final Report therefore recommended that the RV Act be amended to allow amendments to apply to existing contracts when appropriate (**Recommendation 82**). Stage one reforms implemented this recommendation.

Obligation will be prospective in the sense that it governs future behaviour

It is generally accepted that a person should have the opportunity to know the laws regulating their conduct before that conduct occurs. A law that applies to conduct that occurred before it was made is generally called 'retrospective'. Retrospective laws are undesirable because persons have no opportunity to ensure their conduct is lawful or was intended by the parties.[42]

A requirement that exit entitlements be paid within a specified time that begins to run only from the time the amendment is made is however prospective with regard to conduct – an operator will know what is required before the time for payment arises.

Reliance on existing contractual rights and obligations

An operator may however have taken lawful steps prior to the amendment being made - on the basis of existing contractual rights and obligations - that compromise their ability to meet the new obligation after the amendment is made. For example, an operator may not have set aside the monies required to pay exit entitlements by a deadline because a residence contract allows them to rely on a new resident's upfront payment for the funds. This issue in past lawful conduct impeding ability to comply with a new obligation means that it is generally accepted that legislation will not *unnecessarily* interfere with existing rights and obligations. **Recommendation 82** was that the RV Act reflect this general position.

The question therefore is whether applying the proposed time limit for exit entitlement payment to all residence contracts is necessary. Relevant to this, the problems exit entitlements that are contingent on a new resident making an upfront payment pose are the same for all residents, regardless of when they enter into their contract. Also, applying the deadline only to new contracts has the following disadvantages. It creates:

- an incentive for operators to reoccupy units vacated under new contracts before those vacated under existing or already terminated contracts; and
- inequity in rights between village residents leading to perceptions of unfairness and also risks dissatisfaction and disharmony within a village.

[42] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report),142. The Final Report referred to Bennion: "… contrary to the general principle that legislation by which the conduct of mankind is to be regulated, ought not to change the character of past transactions carried upon the faith of the exiting law."

These factors bring the reform squarely within the matters **Recommendation 82** was directed at addressing.

Lead in time and ability to apply for extension of time minimises operator harm

Further considerations are that: operators will have a significant time to prepare for the new obligations, with the reform unlikely to be presented to Parliament in under 18 months; and, should this prove insufficient, an operator is able to apply to SAT for an extension of time to pay on the grounds of undue hardship.

Time limit maximum period of exit entitlement payment

The time limit maximum period for exit entitlement payment applies to all current and former residents who have not received their exit entitlement.

Questions

6.1.22	*Is there any evidence that the time limit for exit entitlement payment should not apply to current as well as future residents? If so, please provide that evidence.*
6.1.23	*Can you think of other ways to address this issue?*
6.1.24	*What would be the cost implications of the different options? Please provide quantifiable information if possible.*
6.1.25	*What are the likely costs of each option?*

PART 6.2: UPDATING RV ACT TERMS AND PROHIBITING UNENFORCEABLE ENTITLEMENTS

Issue 6.2: Updating RV Act terms and prohibiting unenforceable entitlements

Sections 19, 20 and 21 of the RV Act provide that, in summary:

- section 19(3) - if a resident has a contingent contractual right to their "premium" being "repaid" (including part repayment), it must be repaid within a specified time of the contingency occurring (section 19(3) right to repayment);[43]
- section 19(4) - any amount not paid within the time specified in section 19(3) can be recovered as a debt from the "administering body for the time being" (statutory debt);
- section 20(1) - the section 19(3) right to repayment (statutory charge) is protected by a charge against RV land (land owned by residents is excluded); and
- sections 20(1) to (3)(a) - if the resident has brought proceedings against the administering body for the time being for "recovery of the resident's premium", has obtained judgment and has tried to execute that judgment without success, the resident can apply to the Supreme Court to enforce the statutory charge through an order that RV land be sold.

As discussed in CRIS 1, Part 3 and Issue 6.1 above, not all residence contracts describe an upfront payment as a "premium" or an exit entitlement as a "repayment".[44] The RV Act language does not therefore gel well with the current variety in contractual terms.

Objective

To clarify that the RV Act exit entitlement protections apply to all exit entitlement payments regardless of the way contracts describe them.

Discussion

Final Report and Stage one reforms

Recommendation 87 was that any RV legislation terms identified as requiring redefinition should be redefined.[45]

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[43] The specified time varies depending on whether or not the contingency is that the unit is reoccupied.

[44] As CRIS 1, Part 3 explains, regardless of these technical distinctions the net effect is largely the same for consumers – they receive in hand a sum that is in the region of two thirds of what they paid upfront.

[45] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report),, 24.The Final Report noted the "the diversity of arrangements" in the industry meant that contract standardisation was unlikely to be achievable.

Policy intent that RV Act protections apply to all exit entitlements

The RV Act statutory debt and charge provisions are generally understood as applying to all exit entitlements regardless of how they are described in the contract.[46] For example, in one recent operator contact, the operator said an upfront payment was not a premium but nonetheless maintained that the statutory charge applied to their obligation to repay it to residents (sections 6(1) and (3) of the RV Act).

This understanding is consistent with the policy intent, which is that the same consumer investment protections apply to the full range of contractual arrangements.[47] It is in fact an offence to enter into a contract or arrangement with the intention (either directly or indirectly) of defeating, evading or preventing the RV Act's operation and no contract or arrangement operates so as to annul, vary or exclude any of its provisions.[48]

Clearer language is desirable, reduces potential for stakeholder confusion

The difference in terminology between the RV Act and some residence contracts however is problematic for some stakeholders. Attention was drawn to the mismatch during consultation on stage one reforms. Stakeholders felt it required correction as the different language raised questions in trying to understand the RV Act. There appears to be a concern that the different language could provide a basis for resisting exit entitlement payment or enforcement of the statutory charge. Liquidators for example may be obliged to raise technical arguments. The preference is not to risk a court interpreting the provisions differently from the policy intent. In particular, few residents have the resources to engage in protracted litigation that will in any event further reduce their funds while waiting for the exit entitlement to be paid. Amending the RV legislation so that it is clearer to consumers that the important investment protections apply to all contracts will support industry through reducing consumer anxiety that contract diversity leaves them vulnerable to exploitation.[49]

Other jurisdictions

In their RV legislation, Queensland and South Australia use the term "exit entitlement" for contingent operator payments to a resident. Victoria's approach is similar to WA's

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[46] CRIS 1, Part 3 made the point that the practical effect of an exit entitlement is the same regardless of its technical legal character.

[47] Parliament of Western Australia, Legislative Assembly, Hon Y Henderson MLA, Minister for Consumer Affairs, *Second Reading Speech for the Retirement Villages Bill 1991*, Hansard,16 May 1991, 2049 - 2050. In proposing the RV Act (WA), the then Minister said in the Second Reading Speech for the RV Bill: "The Retirement Villages Bill aims to provide the same levels of protection for all resident funded schemes" in the context of an earlier remark that the existing regulatory regime "did not have enough scope to cover the various legal and financial arrangements prevalent in the industry." The Minister also observed that exit entitlement protection was required because village advertising and promotion appealed to seniors' need for a "financially viable investment" and residents with a lease for life "are in an extremely vulnerable position in the event of a financial collapse of the village" because despite paying an amount "possibly equivalent to .the market value of the unit, they have no equity in their property."

[48] RV Act (WA), section 6.

[49] Consumer Affairs Victoria, *Extra retirement village contract terms about exit entitlements.*

and it appears to have the same problem. It calls all payments an operator must make to a former resident a "refundable in-going contribution" in its RV legislation. Consumer Affairs Victoria however uses the term "exit entitlement" on its website, [50] not "refundable ingoing contribution", when talking about the relevant payments.

Issue 6.2: Proposal for consultation

Insert new term "exit entitlement" for all payments

That the RV legislation be amended to:

- **insert a new term "exit entitlement" for all the payments an operator may make to a former resident, however they are calculated and however they arise; and**
- **use that term in relevant provisions, including sections 19 to 21 of the RV Act.**

The precise wording as to what "exit entitlement" means will be determined during drafting.

Impact analysis

Benefits of this proposal include:

- improved consumer confidence that sections 19 to 21 of the RV Act apply to all exit entitlements regardless of how they are described in a contract has been achieved;
- the RV Act is easier to read and understand;
- less scope for technical disputes to lead to unnecessary costs and delay in enforcing exit entitlement payment; and
- removes the prospect of an unexpected court decision limiting consumer protections.

If the protections have been misunderstood as only applying to exit entitlements called a premium "repayment" in contracts, there could be disruption of some operator business models. (Sections 6(1) and (3) of the RV Act, which prohibit contractual arrangements that exclude RV Act protections, would however pose issues for those business models in any event).

https://www.consumer.vic.gov.au/housing/retirement-villages/leaving-a-retirement-village/exit-entitlements-and-aged-care-accommodation-payments viewed 29 November 2019 It is also useful to have terms that can be clearly understood by persons who do not have the industry knowledge to understand their intent, for example other secured creditors dealing in the village land.

Questions

6.2.1 *Do you agree that this amendment should be made? If not, why not?*

6.2.2 *Can you think of other ways to address this issue?*

Issue 6.2.1 – Exit entitlements that cannot be enforced

Problem – Persons who are not party to a contract are not bound by it

Some residence contracts involving leases purport to give a resident a right to a payment from the next resident for the vacated unit. For example, one contract provides:

Example of contractual term:

Entitlement to future Value Growth Sum on re-letting

The Next Resident must pay you the Value Growth Sum which is payable under the terms of the New Lease on settlement of the grant of the New Lease.

The next resident is not however a party to the residence contract. Persons who are not a party to a contract are not bound by it.[51] This means that the resident has no legal right to a payment from the next resident.[52] Also, a former resident will not under this term have an operator debt to prove in the event of operator insolvency.

Possible breach of section 6 of the *RV Act*

Contract terms that purport to confer an obligation on a person who is not a party to the contract to make a payment to a resident may breach section 6 of the RV Act (see discussion of Issue 6.2.1 above).[53] Section 6 of the RV makes a contract term that evades the RV Act protections void. It does not however create a right to payment from the operator.

Other jurisdictions

This issue does not appear to have been raised in legislation reviews in other jurisdictions. Some of the other jurisdictions however provide that exit entitlements are paid by an operator, so the problem of contracts purporting to confer an obligation on someone else to pay them is unlikely to arise.

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[51] This is why the RV Act (WA) needs to provide that successive landowners and operators are bound by residence and service contracts and that the right to an exit entitlement payment can be enforced against the administering body for the time being.

[52] The resident must rely on the operator having included a requirement in the new lease for the new resident to pay the former resident and on the operator being willing to enforce the obligation the new resident owes to them.

[53] They also arguably represent an unfair transfer of business risk from the operator to the consumer (see discussion of this issue in Part 6, Issue 6.1). For example, an operator could agree to make an exit entitlement payment to a resident but in the new resident's contract, direct that some of the purchase price be paid to the former resident rather than the operator.

Options

The following options are being considered in relation to this issue.

Option J - The RV legislation prohibit terms in residence contracts that purport to confer an obligation to make a payment on a person who is not a party to the contract.

Option K – the RV legislation provide that residence contracts must provide that exit entitlements are payable by an operator.

Impact analysis

Option J allows for exit entitlement payment by an entity that is a party to the contract but is not an operator. It therefore has more flexibility with regard to complex ownership and operating structures (See Part 10). Sections 19 to 21 of the RV Act may need amending to ensure the resident is able to pursue an operator for the time being for the exit entitlement and that the statutory charge over village land arises in respect of it.

Option K poses fewer issues for the current RV Act exit entitlement protections.

Questions

6.2.1.1 *Which option do you prefer (J or K)? Why?*

6.2.1.2 *Can you think of other ways to address this issue?*

PART 6.3: STRATA AND PURPLE TITLE RESIDENTS

Issue 6.3: Strata and purple title residents – cap on recurrent charges after leaving a village

The RV legislation currently caps the time for which former lessee residents can be required to continue paying recurrent charges after they permanently vacate a village. The cap is six or three months, depending on whether their residence contract was signed before or after the cap came into effect. This cap does not apply to residents who own strata lots or a share in a purple title ownership scheme. Strata and purple title residents say their exclusion from this consumer protection is unfair. They say they experience no significant extra benefit to their ownership of retirement village property as distinct from lessee residents.

As well as the additional costs strata and purple title residents incur, exclusion from the recurrent charge cap can make strata and purple titles villages less attractive to potential residents than lease villages and so extend the time for which these units remain unoccupied.

Objective

To ensure RV Act consumer protections apply appropriately to all residents.

Discussion

Final Report and stage one reforms

The Final Report recommended that "outgoing non-owner residents only pay the ongoing charges for a prescribed period of time" (**Recommendation 73**)[54] and this recommendation was implemented in stage one reforms.[55] Restriction of the recommendation to non-owner residents reflects:

- that a "significant proportion" of residents supported this;[56] and
- an expectation that owner residents would have an "increased involvement in sale of their property" under the recommended remarketing policy (**Recommendation 71**).[57]

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[54] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 123. As noted in Part 6, Issue 6.1, the Final Report found that "people who have left a retirement village do not benefit from the services and facilities for which the recurrent charges are levied."

[55] RV Act (WA), sections 23 and 24 and RV Regulations (WA), regulations 9 and 10.

[56] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 121.

[57] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 123.

Reasons to consider extending the cap on recurrent charges to all residents

Limitations in marketing policy approach

As discussed in reform 6.1, improving marketing practices only partially addresses reasons for slow reoccupation. It also assumes residents can determine price when contract terms (and the complexity of price structures) limit their ability to do so.

The fact that a person acquiring a former resident's strata lot or interest in a purple title scheme also has to agree to purchase the balance of the RV product limits the degree to which a former resident (or their representatives) can control unit reoccupation.

The extent to which former residents can or should be involved in making representations about the RV product and the operator's contract terms and conditions is also open to question. For example:

- prospective residents must agree the RV product price structure, not just the price for the strata lot; and
- whether a prospective resident should be allowed to enter the village depends on a range of matters relevant to communal interests, such as whether they can afford the recurrent charges, live independently or are otherwise suited to the village. For example, if they have a recent history of assault they may not be suited to village living.

Resident detriment the same, regardless of property ownership

As the Final Report noted, the issue of people who have left a village continuing to pay for services and amenities they do not receive applies to owner residents as well as lessee residents. To some extent, this is the case for general residential strata and purple title owners who vacate a complex. Differences are that:

- binding the strata lot or purple title to the broader RV product limits the pool of potential consumers (to persons over 55 and of those, only some 5 to 7% want to live in a retirement village); and
- persons in general residential strata or purple title complexes usually continue to live in the property until it is sold. This minimises the number of people paying strata charges without receiving services and the period for which that occurs.

Other jurisdictions

TABLE 6.7 – CAP ON REUCRRENT CHARGES

Does the RV legislation:	NSW and the ACT	QLD	VIC	NT, SA and TAS
Cap recurrent charges	✓	✓	✓	×
Apply a cap to former strata and purple title residents	✓	✓	×	×
Cap former strata and purple title residents' recurrent charges to the extent to which they share in any upfront payment increase (example: 50% or 20%)	✓ (After 42 days)	✓ (After 90 days – ceases altogether after 9 months)	×	×

Issue 6.3: Proposal for consultation

That the current caps on paying recurrent charges after leaving a village (3 months for new contracts and 6 months for existing contracts) apply to all former residents regardless of property ownership model.

Impact analysis

The proposal ensures equity in rights for all consumers. As with the proposed time limit for exit entitlement payment, it will likely have some financial impact on operators.

Questions

6.3.1 Do you support this proposal? If not why not?

6.3.2 Can you think of other ways to address this issue?

List of Questions for Part 6

Issue 6.1	**Time limit for payment of exit entitlements**
Proposal for consultation	That the RV Act: • set a time limit for exit entitlement payment; • allow contracts to set contingencies for payment before that deadline; and • allow an operator to apply to SAT for an extension of time (and/or payment by instalment) on the basis of undue hardship.
Questions	
6.1.1	Is there any reason this proposal should not proceed?
6.1.2	Is there any reason SAT should not be able to grant operators an extension of time?
6.1.3	Are there any grounds beyond undue hardship on which an operator should be able to apply for an extension of time?
6.1.4	Should SAT be required to consider certain criteria in weighing the former resident and operator interests? If so what should those criteria be? For example, should the village communal interests be a factor? Should SAT need to be satisfied that operators have made prudent arrangements to meet their liabilities?
6.1.5	Should SAT be able to order payment by instalment on an application for an extension of time to pay?
6.1.6	What are your views on the CCLSWA Report recommendation that industry set up a refund guarantee scheme? What matters do you think need to be considered in making a decision on this recommendation?
Options for consultation	That the RV Act specify the time limit for exit entitlements payment to be: • Option A – 6 months • Option B – 12 months • Option C – 18 months After a resident leaves the village. Contracts will still be permitted to stipulate an earlier time.
6.1.7	Should the time limit for paying exit entitlements be 6, 12 or 18 months? What is the reason for your choice?
6.1.8	What are the cost implications of the different options? Please provide quantifiable information if possible.
6.1.9	Should former residents be able to opt out of the deadline at the time of exit? If not, why not?
6.1.10	If so, what conditions (if any) should be attached to this ability?
Options for consultation	Option D – no special provision for residents moving to an RACF Option E – if requested by a former resident, an operator must pay DAP of up to 85% of the estimated exit entitlement

	Option F – if requested by a former resident, an operator must pay either the RAD or DAP of up to 85% of the estimated exit entitlement. The RAD to be paid within 6 months of the resident's departure from the village
6.1.11	Which option (D, E or F) do you prefer? Why?
6.1.12	What would be the cost implications of the different options? Please provide quantifiable information if possible.
6.1.13	Should residents have the option to remain in a unit pending its reoccupation or the deadline for exit entitlement payment? If not, why not?
6.1.14	Would you support amendment to the RV Act to allow operators to evict residents who have exercised an option to remain in the unit until their exit entitlement is payable but who do not vacate it by the required date? If not, why not?
Options for consultation	Option G – the RV legislation require that a residence contract provide how an exit entitlement will be calculated if a unit is not reoccupied when it falls due. Option H – the RV legislation provide that if a residence contract makes an exit entitlement amount dependent the amount of a new resident's upfront payment or a stipulated time, the unit is not reoccupied when an exit entitlement becomes payable and the former resident and operator cannot agree the upfront payment amount: • the operator must obtain an independent valuation of the current market value (price); and • the upfront payment component of that value. Option I – Option H with the additional requirement that the price structure applying to the former resident must be used.
6.1.15	Which option do you prefer (G, H or I) ? Why?
6.1.16	Can you think of other ways to address this issue?
6.1.17	Should the provision also apply when a unit is reoccupied under a different price structure to that applying to the former resident? If not, why not?
6.1.18	Should the provision also apply when a DMF is calculated on a new resident's upfront payment? If not, why not?
6.1.19	What would be the cost implications of the different options? Please provide quantifiable information if possible
6.1.20	Should the RV legislation provide: • that if the parties cannot agree the valuer, the operator is to ask the Australian Property Institute to nominate a valuer. • that an operator is to provide the valuer with the information necessary to undertake the valuation; • that the parties can make submissions to the valuer; and • who pays for the valuation? If so, who should it say? (see Appendix 6.1 for some options)
6.1.21	What additional matters need to be addressed? (see Appendix 6.1, for some options).

6.1.22	Is there any evidence that the time limit for exit entitlement payment should not apply to current as well as future residents? If so, please provide that evidence.
6.1.23	Can you think of other ways to address this issue?
6.1.24	What would be the cost implications of the different options? Please provide quantifiable information if possible.
6.1.25	What are the likely costs of each option?
Issue 6.2	**Ensuring that RV Act exit entitlements provisions apply to all exist entitlement payments**
Proposal for consultation	**That the RV legislation be amended to:** • **insert a new term "exit entitlement" for all the payments an operator may make to a former resident, however they are calculated and however they arise; and** • **use that term in relevant provisions, including sections 19 to 21 of the RV Act.**
Questions	
6.2.1	Do you agree that this amendment should be made? If not, why not?
6.2.2	Can you think of other ways to address this issue?
Issue 6.2.1	**Exit entitlements that cannot be enforced**
Options for consultation	**Option J - The RV legislation prohibit terms in residence contracts that purport to confer an obligation to make a payment on a person who is not a party to the contract.** **Option K – the RV legislation provide that residence contracts must provide that exit entitlements are payable by an operator.**
Questions	
6.2.1.1	Which option do you prefer (J or K)? Why?
6.2.1.2	Can you think of other ways to address this issue?
Issue 6.3	**Strata and purple title residents – cap on recurrent charges after leaving a village**
Proposal for consultation	**That the current caps on paying recurrent charges after leaving a village (3 months for new contracts and 6 months for existing contracts) apply to all former residents regardless of property ownership model.**
6.3.1	Do you support this proposal? If not why not?
6.3.2	Can you think of other ways to address this issue?

PART 7: BUDGET OBLIGATIONS

This Part deals with village budget issues. In summary, it proposes that:

- operators obtain residents' consent to village budgets;
- operators be able to apply to SAT for the budget to be approved if resident consent is not given;
- SAT powers be improved with regard to budget disputes; and
- operators have an express obligation to spend money in accord with the approved budget.

This Part builds on the CRIS 1 Parts 3 and 5 discussion of RV price structures and recurrent charges as part of the price. It also represents part of the reforms with regard to improving SAT dispute resolution powers. Additional proposals with regard to SAT powers are made in later CRIS.

PART 7.1: FINANCIAL TRANSPARENCY AND ACCOUNTABILITY

Issue 7.1: Financial transparency and accountability obligations of operators

Residents are required to pay recurrent charges for the ongoing expenses of the village. Operators are expected under the RV legislation to be transparent and accountable to residents about budget setting and village operating expenditure.

Stage one reforms significantly strengthened the requirements for operators to provide financial information to residents and establish procedures to promote meaningful consultation. The RV Code sets out the current financial transparency and accountability obligations on operators for the ongoing operating costs of the village.[58] These obligations are summarised in the flow chart on page 55 of this paper.

Despite the above requirements, many residents complain that their right to request information, such as the right to see invoices for repair or maintenance work, is arbitrarily refused or dismissed by operators.

Some residents are also concerned that although the legislation now gives them the right to dispute a budget increase in the SAT, they have difficulty getting the information that they need from operators.[59] This is particularly a problem for residents

[58] Budget and other financial transparency obligations of operators are set out in the RV Code (WA) clauses 16 - 20 and 26.

[59] The right of residents to deal with a dispute regarding an increase in recurrent charges or an imposition of a levy is provided under section 57A(2) of the RV Act (WA). This states that if residents pass a special resolution that authorises the application to be made, the residents may make an application in relation to the matter in dispute to SAT. This provision was introduced in the stage one review.

who need certain information to establish that proposed budget increases are unjustified. The SAT's powers in regards to budget disputes are also limited.[60]

Residents' complaints about budgets also often raise the concern that in increasing recurrent charges, operators are transferring costs from the upfront payment, DMF or exit entitlement part of the RV product price to the recurrent charges component. For example, a monitoring service that the operator says it was subsidising then becomes a recurrent charges budget item. This can mean that increases in recurrent charges are actually increasing the overall price of the RV product that residents initially agreed to pay.

Objective

To ensure that residents can meaningfully participate in the village budget setting process and that disputes about budgets are resolved in a way that is fair to all parties.

Discussion

Final report and stage one reforms

Lack of meaningful participation by residents in village budget processes

Increases in recurrent charges in retirement villages was identified as one of the most significant concerns of residents in the Final Report.[61] The degree of input residents should have into proposed annual expenditure and village budgets was also identified as an issue in the Final Report. During consultation many residents expressed the view that they would like to have more control over village budgets and in particular, the recurrent charges that they are required to pay. One suggestion to address concerns raised by residents with their limited involvement in the budget process, was that residents should have the right to accept or reject the budget.[62]

The Final Report noted, however, that responses to issues regarding village budgets were polarised between residents and operators. The Report stated "Almost all residents advocated greater regulation, whilst the majority of industry respondents advocated maintaining the status quo as set out in the Code of Practice." [63]

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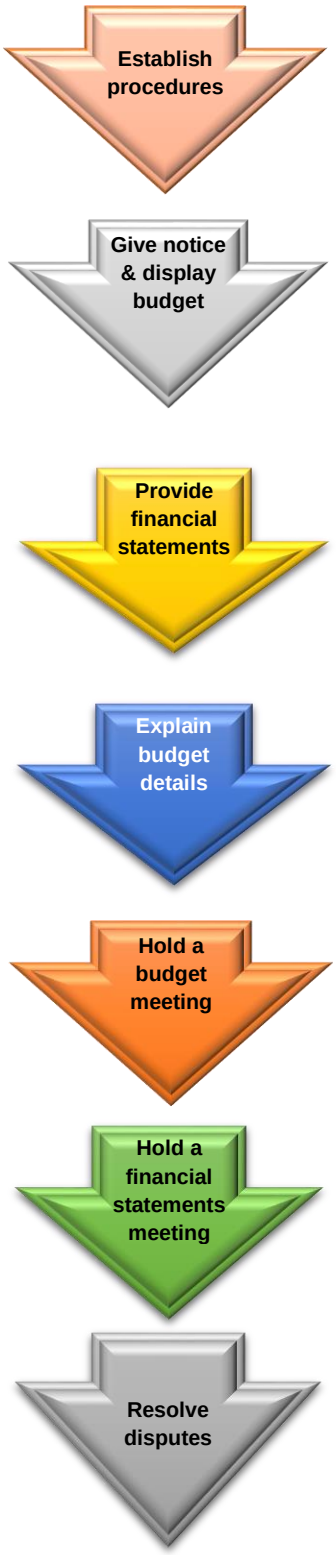
[60] The Administrative Appeals Tribunal (ACAT) in the ACT and the Civil and Administrative Tribunal (NCAT) in NSW have significantly more powers to make orders, in relation to retirement village budgets. These are discussed in the next section of this paper.

[61] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 57.

[62] ibid, 63.

[63] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 62.

DIAGRAM 7.1 – OPERATORS CURRENT BUDGET AND OTHER FINANCIAL OBLIGATIONS [64]



Operators must establish appropriate procedures for:
- consulting with residents on future planning and budgeting;
- proposed change to the operating financial arrangements of the village; and
- access to management information about the operating financial arrangements of the village.

Operators must give notice of proposed operational and reserve fund annual budgets by displaying separate budgets in the village no later than one month before the end of each financial year and include:
- proposed income and expenses;
- annual accounts of actual expenditure;
- proposed changes in fees, amenities and services; and
- consistent and separate line items.

Operators must provide:
- quarterly financial statements no later than one month after each quarter; and
- annual statements presenting the financial performance of the village.

Statements must show actual and budget amounts for each line item.
Operators must respond to reasonable requests for additional financial information within 10 working days of the request.

Operators must explain:
- how recurrent charges are calculated;
- operators' and residents' contributions to any reserve fund and interest earned;
- total reserve fund income and expenditure;
- management and administration fees; and
- auditor's remuneration.

Operators must give residents a minimum of 10 working days to consider the budgets.
Operators must hold an annual budget meeting of residents before the end of each financial year.

Operators must hold a financial statements residents' meeting within 5 months of the end of each financial year.
To enable monitoring of expenditure, the line items must be the same as those in the proposed budget.

The SAT may hear disputes in relation to increases in recurrent charges in the proposed budgets payable by residents.
Residents must pass a special resolution that authorises the application to the SAT (RV Act section 57A).

[64] The flow chart above is based on the budget and other financial obligations of operators as set out in RV Code (WA) clauses 16 - 20 and 26.

Ultimately, the Final Report did not address providing for residents to be able to consent to or reject a proposed operating budget. Recommendations were however made to enable residents to take action where they considered a recurrent charge increase might amount to a price increase of the RV product overall and to prevent operators from making unilateral changes without the residents' consent to amenities and services that could increase recurrent charges. **Recommendations 35 and 37** were respectively that residents be able to apply to SAT where they believed increases to recurrent charges were excessive or unwarranted and for new services and amenities that were not included in contracts to be approved by special resolution **(Recommendation 37)**.

Stage one reforms implemented Final Report **Recommendations 35 to 38** which deal with recurrent charges and **Recommendations 39 to 43** which deal with village budgets, and improved the level of financial information available to residents in regards to the village budget processes.

The reforms also provided a mechanism for residents to be able to challenge increases in recurrent charges.

Amendments to the legislation were made to improve the general level of financial information available to residents and to improve the accountability of operators to residents for the operating budget. In particular, to require annual financial statements to be audited **(Recommendation 43)** and to address specific issues of concern such as the application of budget surpluses **(Recommendation 41)** and to prevent certain fees from being including in the village operating budget **(Recommendation 42).** An amendment was also made to require a village operator to demonstrate to residents that reasonable steps had been taken to minimise increases in village operating costs **(Recommendation 40)**.

The flow chart on page 56 shows the clear requirements that exist under the RV Code to ensure that residents receive sufficient information about the village finances. Residents must be given at least one month's notice of proposed operating and reserve fund annual budgets and information explaining proposed fee changes and any changes to the provision or availability of amenities or services. It is also clearly intended that residents be able to obtain such further information as required by them to understand the financial budgets presented. The operator is required to comply with reasonable requests by residents for such information.[65]

In addition, operators are required to consult with residents on the future planning and budgeting of the retirement village. They must also establish procedures for consulting with residents on the future planning and budgeting of the village, as well as on any changes to the operating financial arrangements, and provide access to management information relating to the operating financial arrangements of the village.[66]

[65] RV Code (WA), clause 16(3).

[66] ibid, clause 16(1) (b) and (c).

Notes inserted into the RV Code in the stage one reforms provide guidelines for consultation between residents, residents' committees and operators to be effective. Information must be provided, but this alone does not constitute effective consultation. For consultation to be effective, operators need to also engage in a more substantial way with residents.[67]

Examples of effective consultation include

1. the operator giving residents or residents' committees the opportunity to express views on matters that affect the operation of, or experience of living in, the retirement village;
2. the operator listening to, and considering the views, comments and concerns of residents or residents' committees before making a decision;
3. the operator responding in writing within a reasonable time to concerns raised by a majority of residents or the residents' committee;
4. the operator giving reasons why requests can or cannot be carried out;
5. the operator taking steps, where appropriate and reasonable, to implement requests;
6. if there is a dispute, the operator documenting the concerns raised and actions taken to resolve the dispute; and
7. the operator establishing processes for regular communication with residents about village matters.

Increasing regulatory requirements for the provision of information and consultation in villages has not been effective in resolving the issue

It was noted in the Final Report that some villages already have effective systems permitting resident participation in the monitoring of accounts and formulation of the budget. For example, finance sub-committees of the residents' committee have been set up in some villages. Statements, including ledger statements, are given to these sub-committees monthly and adjustments are made through discussion and negotiation between management and residents on an ongoing basis over the year. Notably, in these villages, residents and management work together to formulate the budget. When this process occurs, acceptance of the final budget by residents at a general meeting is consequently quite straightforward.[68]

[67] ibid, guide notes regarding consultation are provided after clause 4 in a grey box.

[68] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 63. Information in the Final Report regarding residents' participation in budget setting was submitted by WARVRA.

However, this approach is not used in all villages. Despite the implementation of the Final Report recommendations in the stage one reforms, Consumer Protection continues to get complaints about the budgeting process. Even though operators are required to provide residents with both operating and reserve fund budget information, difficulty getting access to this information remains an issue that leads to disputes in some villages. Complaints and enquiries to Consumer Protection indicate that in many cases residents still do not get to view information which they are entitled to, such as invoices of expenditure and other budget documents, as allowed by the RV Code. [69]

Further, although operators must consult with residents about proposed changes to the village budget, in effect the level of meaningful consultation varies from village to village. Some residents complain that the level of consultation on village budgets in their village is either non-existent or not sufficient. Consultation in some villages is cursory and does not provide residents with any real say in how budgets are set.

Example 1: Complaints regarding financial matters and budgets

- **The budget in a certain village contained line items for expenses such as $30 000 for external maintenance and $25 000 for painting work. Residents complained that no such work was done, and when they asked the operator for an explanation, they were told that village expenditure did not need to be justified to residents.**
- **An operator committed $80 000 for the painting of the village without first discussing this expenditure with residents. This expenditure depleted the village reserve funds and put the residents in about $15 000 debt which had to be recovered by a levy paid by residents.**
- **Residents complained that they were not able to get any explanation from the village operator about certain budget line items which would increase their recurrent charges by over $100 per month. Most residents in this village were over 80 years of age and claimed that they could not afford such a substantial increase.**

In such cases residents complain that little or no information or explanations have been provided about how or why the increases have occurred. Without this information, residents are unable to determine whether increases in recurrent charges are fair.

This inability to obtain relevant information then impacts on the residents' ability to bring an action in SAT to dispute budget increases because without the relevant

[69] Enforcement of operator obligations will be dealt with in a future paper.

information about the budget increases, residents are unable to make the case that the increases are unfair or unjustified.

A further burden on residents in bringing SAT claims is that the complexity in price structures and contracts makes it difficult for them to identify when a recurrent charge increase amounts to an increase in the overall price. This can occur, for example, when an operator changes their policy from partially recovering operating costs by way of recurrent charges to fully recovering them. Residents can find themselves paying for something in recurrent charges that they understood on entry to the village was included in their upfront payment or DMF.

In effect these issues mean that the existing provisions which seek to increase protections for residents in regards to increases in recurrent charges are, in practice, of limited value.

Increasing resident involvement in budget setting

Consumer Protection considers that one option to promote more meaningful resident involvement in managing the ongoing operating expenses of the village and reduce the burden on residents of challenging increases in recurrent charges, would be to require operators to obtain the consent of residents to the proposed annual budget before it can be finalised. [70] New South Wales and the Australian Capital Territory both already provide residents with an active role in budget setting. Retirement villages legislation in these jurisdictions requires the operator to seek resident consent to the proposed budget. Resident consent is provided by way of a simple majority vote. Operators must also provide such information as is reasonably requested by the residents' committee (or if there is no residents' committee, a resident) for the purpose of deciding whether consent should be given. A summary of the resident consent process in New South Wales is at Illustration 7.2 below.[71]

[70] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 62 - 63.

[71] These provisions do not apply if the recurrent charges payable by the residents: have not been varied, or have been varied in accordance with the CPI or other allowable variations detailed in section 104 of the RV Act 1999 (NSW).

ILLUSTRATION 7.2: RESIDENT CONSENT PROCESS IN NEW SOUTH WALES

Residents consent to annual budget expenditure (section 114)

1. At least 60 days before the commencement of each financial year of a retirement village, (or other time as prescribed by the regulations) the operator must supply each resident of the village with a proposed annual budget itemising the way in which the operator proposes to spend the money to be received by way of recurrent charges from the residents during the financial year.
2. Operators must seek the consent of the residents to the expenditure itemised in the proposed annual budget.
3. The operator must provide information to the residents' committee (or, if there is no residents' committee, any resident) in relation to the proposed expenditure as reasonably requested for the purpose of deciding whether consent should be given to the budget. It is reasonable for the residents' committee or a resident to request to see quotations for any work proposed to be carried out or for any service or facility proposed to be provided.
4. The residents must, within 30 days after receiving a request for consent to a proposed budget (or an amended budget) meet, consider and vote on the budget, and advise the operator that they consent, or do not consent to the budget, and if they do not consent to the budget, specify the item or items in the budget to which they object.
5. If the operator is not advised as required the residents are taken to have refused consent to the budget. If the operator fails to seek the consent of the residents, the residents are taken to have refused consent to the budget.
6. if residents do not consent to the budget, the operator may apply to the NCAT for an order in relation to the expenditure in the proposed budget. Residents can also apply (section 115).

A requirement to obtain residents consent to the annual operating budget may provide operators with greater motivation to work with residents in regards to the budget process. As such, operators may be more forthcoming to provide information requested by residents and required by them to approve the budget. It also puts the onus on operators to demonstrate that the recurrent charges increase is justified – for example, that it is not increasing the overall price that residents will pay. The benefits of extra resident involvement in the ongoing finances of the village would however need to be weighed against the possibility that not all residents may want this greater involvement. There may also be a risk that current residents choose to focus on short term concerns rather than looking at the longer term interests of the village.

Issue 7.1: Proposal for consultation

Resident consent for proposed budget

That an operator be required to seek residents consent to the proposed budget and provide such information as is reasonably requested by the residents (or the residents' committee) for the purpose of deciding whether consent should be given.

Impact analysis

The following table outlines some potential benefits and disadvantages of the proposal.

	Potential benefits	Potential disadvantages
PROPOSALS THAT OPERATORS: 1. Seek resident consent to the proposed budget. 2. Provide such information as is reasonably requested by the residents for the purpose of deciding whether consent should be given.	Increases operator transparency and accountability. Encourages operators to provide the required information or risk budgets being rejected by residents. Requires operators to work with residents in achieving agreement. Provides residents with greater control over the budget and the financial expenditure of the village. Improves residents' involvement in expenditure decisions. Reduces the risks of residents being required to unfairly pay recurrent charges for items that they do not want or cannot afford. Increases resident satisfaction with the budget process.	Introduces a risk that residents focus on short term individual preferences for expenditure rather than on longer term communal interests. Requires a considerable change in culture in some villages - operators may resist greater resident involvement in budget setting. May increase disputes over ongoing expenses. Some residents may not wish to be involved in budget setting.

Questions

7.1.1 Do you agree with the proposal that residents be required to consent to the village annual operating budget?

7.1.2 Can you think of other ways to address the issue of residents not being meaningfully involved in the village budget process?

Implementation issues

Processes for consent and dispute resolution

If the consent of residents is required as part of the budget approval process, certain questions arise in regards to the process by which this should occur, and how disputes over budget approval will be resolved.

Process for residents consent

If residents are required to consent to the budget each year, a question arises as to whether consent should be given by a simple majority or whether a special resolution should be required. A special resolution would be more onerous for operators to pass a budget. A simple majority vote would be more practical and easier to obtain.[72]

Questions

7.1.3 If all residents vote to consent to an operating budget, should consent be able to be given by a simple majority or should a special resolution be required?

Should the residents' committee be able to give consent on behalf of residents?

The financial expenditure on the operating expenses of the village and the recurrent charges which need to be imposed to cover this expenditure can be a matter of great concern to some residents. However, in practice, it may be difficult for all residents to participate in voting on the budget. As noted above, in some WA villages residents already use the residents' committee to focus on financial issues. Where a village has a residents' committee, it may be preferred that this committee be able to give consent to the budget on behalf of the residents.

Questions

7.1.4 If residents are required to consent to the village operating budget, should a residents committee be able to be authorised by residents to give consent?

Recurrent charges during the dispute

Where consent has not been given by the residents, a village will still need to work to an operating budget. New South Wales and the Australian Capital Territory both provide that recurrent charges remain at the previous year's level until the Tribunal

[72] RV Code (WA) clause 15 requires that to pass a special resolution there must be a quorum present at a meeting of 30 per cent of the total number of residents entitled to vote and the resolution must be carried by at least 75 per cent of the number of residents who vote at the meeting. For example if a village comprised 100 residents and the required quorum of 30 per cent (that is 30 people) attended the meeting and voted, the special resolution would to be carried by 75 per cent of residents in favour of the motion (i.e. it would require at least 23 people to support the proposal). A simple majority requires more than 50 per cent of residents at a meeting, in person or by proxy, to agree to a proposal. For example, if a village comprises 100 residents and all residents attended a meeting a simple majority would number at least 51 residents. RV legislation does not prescribe a quorum for meetings where a simple majority vote is to be taken.

makes a contrary order. Interim orders can also be made for an increase (or decrease) in part or in full pending resolution of all matters in dispute. This ensures the village does not run into financial difficulty where only a few line items may be in dispute or the matters take some time to resolve.

Questions

7.1.5 While a proposed annual budget remains under review, should recurrent charges remain at their current level pending a decision of SAT?

Resolving disagreements about the budget – process for operators to apply to SAT

Where resident consent is not obtained for the proposed budget, a process is required in order to be able to resolve the dispute. In New South Wales and the Australian Capital Territory, the legislation provides that an operator can apply to the Tribunal if resident consent is not given within 30 days of the proposed budget being provided.

Process for operators to apply to the NCAT in New South Wales and powers of the NCAT

Section 115 of the RV Act (NSW) provides that if the residents do not consent to the proposed budget within 30 days, an operator may apply to NCAT for an order regarding proposed expenditure.

An operator may, until the NCAT makes the orders, expend money received for recurrent charges to meet reasonable and necessary operating costs.

The NCAT may take the following actions:

- make interim orders;
- make recommendations about expenditure;
- order that expenditure is to be as itemised, reduce or increase expenditure (including that there be no expenditure) on any particular item;
- order that there is to be expenditure on an item not appearing in the proposed annual budget;
- determine liability for expenses in the interim between the commencement of the financial year and the order; and
- may review expenditure to order that the operator is liable for expenditure that is not reasonable or necessary.

In Western Australian residents already have a right (by special resolution) to apply to the SAT to dispute any increase in recurrent charges or imposition of a levy. An increase in the overall budget can be referred to the SAT, but residents have to establish that the increase is not justified. This creates several issues for residents. Firstly, as noted earlier, residents often have difficulties obtaining the relevant information from operators to determine whether an increase in recurrent charges is unjustified so as to warrant an application to the SAT. The process outlined above means that the onus is reversed and operators are required to demonstrate that an increase is justified.

Secondly, Western Australian residents' right to dispute an increase in recurrent charges has other limitations. For example, it is not clear in the legislation if residents can make an application regarding an increase of a particular budget line item or items. That is they may not be able to dispute an operator's decision to spend less on one item and more on another while keeping the budget the same or reducing it. If the SAT's powers were increased in line with those in New South Wales and the Australian Capital Territory, the tribunal would have broad powers to make orders relating to the budget, including the power to approve a proposed budget in whole or specific lines and reduce or increase line items as it considers appropriate.[73] Adopting the

[73] In a particular ACT case it was only after an operator provided ACAT with documents describing the work to be performed under the "rubbish management" budget line item that ACAT was able to identify that that line item duplicated services claimed under the "cleaning" budget line item. Also maintenance of operator land that did not form part of the village was

mechanism currently used in New South Wales and the Australian Capital Territory may address some of these issues with the current SAT process for reviewing village operating budgets.

Questions

7.1.6 Do you think that 30 days is an appropriate period of time within which residents can consider the budget and make a decision as to whether to give consent?

7.1.7 Do you think that the operator should be able to apply to the SAT for an order if residents have not given consent to the budget within 30 days. Do you think this is an adequate process for resolving disputes about the annual budget?

7.1.8 Do you agree that the SAT's powers should be increased to enable the SAT to deal with whole of budget increases as well as examining line by line items?

7.1.9 Do you agree that the dispute process should be reversed to place the onus on operators to apply to the SAT when residents do not give consent to the proposed budget and that it should be the responsibility of operators to provide the SAT with the information required to justify the budget?

Requirement to spend money in accordance with the approved operating budget

Where budgets are approved by residents, there is an expectation that the operator will spend in accordance with the approved budget. If this does not occur, the involvement of the residents may be illusory.

Example: Operator not spending budgeted money

Residents in a village were concerned that vacant village units were not selling. They authorised the operator to levy an amount for professional website development. The operator however spent only half the agreed money. Residents were not pleased with the 'saving' as they considered the new website was not to the professional standard necessary to attract prospective residents.
This expenditure by the operator was also contrary to what the residents had agreed to.

New South Wales and the Australian Capital Territory expressly require operators to spend money in accordance with the approved budget. This requirement could also be introduced in Western Australia.

found to be a significant component of the village gardening budget line item. On each occasion, the information casting doubt on the proposed village budget only became available because under ACT legislation, the operator was required to obtain approval for the proposed budget if residents do not give their consent.

One concern may arise as to what flexibility this provides operators to deal with any required adjustments to the budget for changing circumstances. Operators arguably need some flexibility if budgeted amounts require adjustment through the financial year. This could be accommodated by requiring operators to seek consent from residents to make budget adjustments, as in New South Wales, if expenditure is to be more or less than what was budgeted for. This consent would be required for major budget adjustments and not for minor amounts that do not significantly affect the level of recurrent charges. This is the residents consent process used in New South Wales as required by section 117 of the RV Act (NSW).

Amendment to an approved budget in RV Act (NSW) (section 117)

1. If an operator in New South Wales wishes to amend an approved budget the consent of the residents must be given.
2. If residents do not consent to the amendment, the operator may apply to the NCAT for an order approving the amendment.
3. The NCAT will not make an order unless it is satisfied that there is an urgent need for further expenditure and the further expenditure was not reasonably foreseeable when the proposed budget was approved by the residents.

Questions

7.1.10 Should a provision be introduced into the RV legislation (WA) to expressly require operators to spend money in accordance with the approved budget, save for minor adjustments?

List of Questions for Part 7

Issue 7.1	**Financial Transparency and accountability obligations of operators**
Proposal for consultation	**That an operator be required to seek residents consent to the proposed budget and provide such information as is reasonably requested by the residents (or the residents' committee) for the purpose of deciding whether consent should be given.**
Questions	
7.1.1	Do you agree with the proposal that residents be required to consent to the village annual operating budget?
7.1.2	Can you think of other ways to address the issue of residents not being meaningfully involved in the village budget process?
7.1.3	If all residents vote to consent to an operating budget, should consent be able to be given by a simple majority or should a special resolution be required?
7.1.4	If residents are required to consent to the village operating budget, should a residents' committee be able to be authorised by residents to give consent?
7.1.5	While a proposed annual budget remains under review, should recurrent charges remain at their current level pending a decision of the SAT?
7.1.6	Do you think that 30 days is an appropriate period of time within which residents can consider the budget and make a decision as to whether to give consent?
7.1.7	Do you think that the operator should be able to apply to the SAT for an order if residents have not given consent to the budget within 30 days. Do you think this is an adequate process for resolving disputes about the annual budget?
7.1.8	Do you agree that the SAT's powers should be increased to enable the SAT to deal with whole of budget increases as well to examining line by line items?
7.1.9	Do you agree that the dispute process should be reversed to place the onus on operators to apply to the SAT when residents do not give consent to the proposed budget and that it should be the responsibility of operators to provide the SAT with the information required to justify the budget?
7.1.10	Should a provision be introduced into the RV legislation (WA) to expressly require operators to spend money in accordance with the approved budget, save for minor adjustments?

PART 8: PLANNING FOR THE FUTURE: MANDATORY RESERVE FUNDS AND CAPITAL WORKS PLANS

Residents have an interest in their well-being in ensuring that the village at which they reside is well maintained and provides them with a comfortable environment to live. The residents also have a financial interest to ensure that the village is maintained to a reasonable standard, making it attractive to prospective purchasers when they depart the village.

Retirement village building and facilities age and funds are required to maintain and replace capital items in the village. Operators of retirement villages have a clear responsibility to plan for the capital works requirements in the village and ensure that there are sufficient funds available to maintain the village in a reasonable condition.

PART 8.1: MANDATORY RESERVE FUNDS

Issue 8.1: Adequacy of Funds for Long Terms Capital Works Funding

The issue of the adequacy of funding for long term capital works in a village, as well as the security of funds being collected from residents for that purpose, continues to be the subject of many complaints and enquiries to Consumer Protection. Residents are often concerned that there may not be sufficient funds for long term capital works in their village. They also raise concerns about how funds which are collected from them for capital works are used.

Long term asset management planning is essential for ensuring that funds are put aside for long term capital needs of the village and used in accordance with the purposes for which the monies were collected. The extent to which this occurs depends on the individual operator. Where plans for capital works are not clearly disclosed to residents, residents are unable to ascertain whether the operator has adequately planned for the long term capital needs of the village.

To deal with these issues, the Final Report recommended that retirement villages be required to establish mandatory reserve funds, that the legislation prescribe where reserve funds collected from residents be held and how they can be used. Importantly transparency provisions in the legislation should be increased relating to information provided to residents about these reserve funds.

Following the Final Report, the stage one reforms increased transparency requirements around reserve funds held in retirement villages. It is now intended to implement the remaining recommendations of the Final Report regarding introducing mandatory reserve funds. This part considers the implementation issues which arise.

Objective

Assisting residents to have certainty that operators plan for long term capital works in their villages and that adequate funds are available for such works. Residents should also have certainty that any funds provided by them for capital works are secure and will only be used for the purpose for which they were collected.

Discussion

Final Report and stage one reforms

The Final Report noted that the lack of a reserve fund in a retirement village to provide for the long term capital works expenses means that residents risk being charged large amounts of money unexpectedly. These expenses are incurred when major repairs, replacements and renovations are required, especially where contracts provide for residents to contribute to or be solely responsible for the cost of such works.[74] It was also noted that this risk of large unexpected expenses causes great concern to residents.[75]

The key recommendation of the Final Report was that mandatory reserve funds be introduced in retirement villages to ensure that there are clear arrangements and adequate planning for long term capital works required to keep the village in a reasonable condition (**Recommendations 44 – 55**).[76] The Final Report also recommended that the legislation make provision to prescribe in regulations where reserve funds are to be held and the purposes for which a reserve fund may or may not be used (**Recommendation 50**).[77]

The Final Report noted that the legislation required operators to consult with residents on planning, budgeting and provide residents with access to management information relating to the administrative or operating financial arrangements of the retirement village.[78] The Final Report did not make any recommendations about capital works plans.

Increasing transparency measures for capital works planning in the village

During consultations in the implementation of the stage one reforms, industry opposed the introduction of **Recommendation 48** (requiring mandatory reserve funds) to existing villages, asserting that it would affect existing contractual relationships,

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[74] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report),, 74.

[75] ibid, 74.

[76] ibid, 71.

[77] ibid, 80.

[78] ibid, 61.

including financial obligations between operators and residents.[79] Instead, industry supported increasing transparency requirements in residence contracts and pre-disclosure material about capital works arrangements.

Stage one reforms introduced increased transparency requirements relating to both pre-contract disclosure, residence contract requirements and the information provided to residents during occupancy. These transparency requirements are discussed below.

Pre-contractual disclosure

The legislation in WA defines a reserve fund as "a fund that is, or is proposed to be established for the purpose of accumulating funds to meet the costs of repairs, replacements, maintenance and renovations within a retirement village".[80]

Although the legislation in WA does not require a RV to have a reserve fund, it requires that prospective residents be provided with information[81] about capital works arrangements including:

- if there is a reserve fund for repairs, replacement, maintenance and renovation with the retirement village, the purpose of the fund and the method of calculation used to determine contributions to the reserve fund;[82]
- how the costs of capital works are managed and the point at which any payments are made by residents to the funds;[83]
- the amount payable to the reserve fund by the former resident after permanently vacating;[84] and
- if there is no provision for a reserve fund, what the arrangements are for carrying out maintenance, repair, renovation or replacement works in respect of buildings, structures, fixtures, chattels and other capital items in the village.[85]

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79 Retirement Villages Legislation Consultation Meeting, Retirement Villages Association Response to Questions Regarding Reserve Funds, 4 August 2011, 1-6.

80 RV Code (WA), clause 14, definition of "reserve fund"; RV Regulations (WA) regulation 7G, Item 3.

81 *RV Act 1992* (WA), section 13.

82 RV Regulations 1992 (WA), regulation 7F, item 6.

83 ibid, Form 1, item 11.

84 ibid, Form 1, item 11.

85 ibid, regulation 7F, item 6.

Residence contracts

The legislation requires residence contracts to include details of any reserve fund, including the purpose of the fund and any payment the resident is required to make to the fund.[86] If there is no reserve fund, the residence contract must contain a provision setting out the contributions to be made by the resident to capital works expenses, the method of calculation to determine contributions and how contributions are to be paid.[87]

During occupancy

Financial information about reserve funds is also required to be provided to residents on an ongoing basis, including:

- quarterly financial statements;[88] and
- audited annual statements for the reserve fund.[89]

The legislation also requires operators to consult with residents in regards to the reserve fund budget, as well as any proposals for the upgrading of capital items in the village.[90]

Capital works planning

Planning for the future of retirement villages is of great importance to both residents and operators. A core part of planning for a village involves operators having adequate funds to maintain the village and a long-term plan for expenditure of those funds. Although not compulsory under the legislation, many villages in WA already have a reserve fund to accumulate funds for the long term maintenance of the village. However, the legislation does not require villages to have specific capital works plans for a village

In relation to capital works planning, the RV legislation requires that the operator:

- provide prudent, efficient and economical management of the retirement village, as well as consulting with residents as to the future planning and budgeting of the retirement village;[91]

[86] ibid, regulation 7F, item 5.

[87] ibid, regulation 7F, item 6.

[88] RV Code (WA), clause 18(1).

[89] ibid, clause 19(1).

[90] ibid, clause 16(1)(b).

[91] ibid, clause 16(1)(a).

- establish appropriate procedures for consulting with residents on the future planning and budgeting of the retirement village and any other proposed change to the operating financial arrangements of the village;[92]

- prepare a proposed budget for any reserve funds in the village to which residents are contractually required to contribute;[93] and

- establish appropriate procedures to provide the residents with access to management information relating to the operating financial arrangements of the retirement village (these include any reserve fund budgets).[94]

The current RV legislative framework means that the collection and expenditure of reserve funds is largely at the discretion of operators, subject to requirements for the operator to provide specific financial information to residents before entering into a contract during their residency.[95]

The focus of the current RV legislation on transparency measures provides operators with flexibility when dealing with reserve funds and determining arrangements for capital works planning. This flexibility allows operators to adapt to changing circumstances and allocate resources in a manner that they see fit in accordance with the overall financial operations of their business.

Problems persisting since Final Report

Despite increasing transparency measures, Consumer Protection continues to receive communications from residents expressing concern about both the adequacy and security of reserve funds established for long-term capital works in their village. In particular, residents have concerns about:

- possible unexpected liabilities, including unexpected levies, especially where residents are contractually responsible for capital works expenses;
- potentially insufficient funds, including for necessary capital to replace ageing village infrastructure and to maintain the amenity and asset value of the village;
- security of the capital works funds;
- inappropriate use of reserve fund contributions (e.g. funding capital improvements, new developments and non-capital items);
- contractual ambiguity and lack of transparency about the purpose and use of funds;

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92 ibid, clause 16(1)(b).

93 ibid, clause 17(1)(b).

94 ibid, clause 17(1)(c) and 16(1)(c).

95 ibid, clause 18 (1) and 19 (1), RV Regulations 1992 (WA), regulation 7F, item 6 and Form 1, item 11.

- delays and inaction, partly due to disputes about responsibility and liability, in carrying out capital works;
- financial obligations and contributions of operators for capital works; and
- cross subsidisation of funds amongst retirement villages operated by the same entity.

Consumer Protection considers that the persistence of complaints about the funding of capital works means that it is appropriate to now increase the regulation of capital works. This will provide additional assurance to residents about the use and security of monies they contribute for capital works in their village.

Mandatory Reserve Funds in retirement villages: Recommendations 44 – 50 of the Final Report

As noted earlier, the Final Report recommended that mandatory reserve funds be introduced in villages to ensure that there are clear arrangements and adequate planning for long term capital works required to keep the village in a reasonable condition.[96]

The current transparency requirements for reserve funds only apply where residents are contractually obliged to pay money towards such purposes under the terms of their contracts. There is however no requirement that an operator be required to put aside any funds for long term capital works.

The continuation of complaints to Consumer Protection about this issue indicates that residents are still not satisfied about the planning for long term capital works in their villages despite the increase in transparency measures introduced in the stage one reforms. Consumer Protection considers that there may now be increased support for implementing recommendations made by the Final Report relating to reserve funds, including legislative amendment to require the operator to be responsible for establishing and being accountable for administering a mandatory reserve fund (**Recommendation 48**).

In considering this reform, Consumer Protection appreciates that the vast majority of retirement village operators in WA already set aside funds for long-term capital works as part of their standard business practices. However, Consumer Protection is concerned that villages that do not collect sufficient funds for capital works may be at risk of not adequately planning for such future expenses. This may leave residents vulnerable to funds being sought at a later stage and village capital items falling into disrepair.

[96] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 71.

Other jurisdictions

Compulsory capital works planning for retirement villages by way of a mandatory reserve fund is already required in Queensland. In Queensland, operators are required to:

- maintain a capital replacement fund for replacement of a village's capital items;[97]
- maintain a maintenance reserve fund for maintaining and repairing capital items;[98]
- only use the reserve fund monies for a specific purpose;[99]
- keep interest from reserve funds in the fund;[100]
- hold the reserve fund monies in a separate account; and[101]
- a statutory charge is also created over the reserve fund for the benefit of the residents of the village.[102]

Other jurisdictions such as Australian Capital Territory, New South Wales, Northern Territory and South Australia do not make reserve funds compulsory but do make it mandatory for operators to establish a separate reserve fund when residents are contractually required to contribute to such costs.[103] These jurisdictions also limit the purposes for which these funds may be used.

Table 8.1 below illustrates the different legislative requirements relating to reserve funds in Australia.

97 *Retirement Villages Act 1999* (Qld), section 91(1)(a).

98 *ibid,* section 97(1)(a).

99 *ibid,* sections 91(1)(b) and 97(1)(b).

100 *ibid,* section 94(1)(b) and 100(1)(b).

101 *ibid,* section 91(1)(b).

102 *ibid,* section 91(6).

103 Retirement *Villages Act 2012* (ACT), section 143(1), *Retirement Villages Act 1999* (NSW), section 99(1), *Retirement Villages Act 2016* (SA), section 28 and *Retirement Villages Act 1995* (NT), section 38(1).

TABLE 8.1 – COMPARISON OF MANDATORY RESERVE FUNDS IN RV LEGISLATION IN AUSTRALIA

Does the RV legislation:	QLD	NSW	ACT	SA	NT	TAS & VIC
Make it compulsory to have a capital works fund	✓	×	×	×	×	×
Require a capital works fund if income is received/deducted for capital works	✓	✓	✓	✓	✓	×

Mandatory reserve funds to be required in strata title properties in WA

Mandatory reserve funds will also be required in WA for larger strata title properties as part of recent reforms to the *Strata Titles Act 1985* (WA). Under these reforms, a designated strata company must: [104]

- establish a reserve fund for the purpose of accumulating funds to meet contingent expenses, other than those of a routine nature, and other major expenses of the strata company likely to arise in the future;
- determine the amount to be raised for payment into the reserve fund;
- ensure that there is a 10 year plan that sets out the common property and the personal property of the strata company that is anticipated to require maintenance, repair, renewal or replacement in the period covered by the plan, along with estimated costs; and
- ensure that the 10 year plan is revised at least once every 5 years and that, when revised, the plan is extended to cover the 10 years following the revision.[105]

[104] *Strata Titles Amendment Act 2018 (WA)* which contains proposed reform provisions: assented to on 19 November 2018 but has not been proclaimed and operating as law at the time of publication of CRIS 2. A designated strata company means a strata company for a scheme with 10 or more lots or a strata company included by the regulations, *Strata Titles Amendment Act 2018 (WA)*, section 49(7).

[105] *Strata Titles Amendment Act 2018 (WA)*, section 49(2), Division 2, amending section 36 of the *Strata Titles Act 1985 (WA)* and to be renumbered as section 100 of the *Strata Titles Act 1985 (WA)*: assented to on 19 November 2018 but not as yet proclaimed and operating as law.

Issue 8.1: Proposal for consultation

Introducing Mandatory Reserve Funds – Recommendations 44 - 50

It is proposed to implement Recommendations 44 – 50 of the Final Report to require operators to introduce mandatory reserve funds in retirement villages in WA. Implementing this recommendation would address concerns of residents about the adequacy of funds available for long term capital works in the village.

Implementing the recommendation would also be consistent with the approach taken in other jurisdictions in regards to capital works planning. Consumer Protection also considers that as capital works planning is being required for congregated living/strata in the general community, it should also be required for retirement villages

Recommendations 44 - 50

Recommendations 44 – 50 of the Final Report proposed that:

- the legislation be amended to require the mandatory introduction of a reserve fund within each retirement village scheme within two years of the commencement of the relevant amendment (**Recommendation 44**);

- the legislation be amended to require that the amount held in a mandatory reserve fund and/or the ongoing contributions to the fund are sufficient to ensure that the village can be maintained in a reasonable condition, having regard to the age, and prospective life of the capital items at the time the reserve fund is established. The legislation to also be amended to require the relevant amount and/or ongoing contributions to be in place for all reserve funds within five years of the commencement of the relevant amendment. Further, amendments to allow the Commissioner for Consumer Protection (Commissioner) to extend the five year period and provide for a decision by the Commissioner to be reviewable on application to the SAT (**Recommendation 45**);

- where residents believe that the application of a levy or a proposed increase in their contribution to a reserve fund is inconsistent with existing contractual arrangements (including changing the proportionality of existing obligations), or excessive or unwarranted, they may, if the matter cannot be resolved by any other means under the legislation and within a reasonable time, and if agreed by a special resolution of residents, make an application to SAT for the matter to be reviewed; and that this recommendation also apply to reserve funds already in existence (**Recommendation 46**);

- the Department consult further with the RVA (Retirement Village Association, now merged with the Property Council), ACSWA (Aged & Community Services

WA) and WARCRA (now WARVRA) on matters of detail and implementation concerning the establishment of mandatory reserve funds (**Recommendation 47**);

- the legislation require the village owner of a retirement village to be responsible for establishing and being accountable for administering a mandatory reserve fund (**Recommendation 48**);
- the Department investigate and consult on alternatives for the way in which reserve funds may be held and administered in the future (**Recommendation 49**); and
- that the legislation make provision to prescribe in regulations where reserve funds are to be held and purposes for which a reserve fund may or may not be used (**Recommendation 50**).

Impact Analysis

	Potential benefits	**Potential disadvantages**
Proposal – mandatory introduction of mandatory reserve funds	• Protects funds designated for capital works. • Provides assurance to residents about the holding and use of reserve funds and that funds are used for purposes for which collected. • Increased transparency in regards to funds collected for capital works. • Minimises unexpected expenses for elderly residents who have limited resources. • Is consistent with current financial management practices in other jurisdictions and legislative contexts.[106] • Ensures that long term capital expenses relating to the operation of the village are distributed amongst all of the village residents. • Is consistent with recent reforms to the *Strata Titles Act 1985 (WA).*[107]	• Limits operator flexibility in dealing with reserve funds. • Additional administrative costs for operators in setting up and managing reserve funds. • May increase costs to residents where operators are not already providing for capital works expenses.

[106] Queensland already requires the establishment of mandatory reserve funds in retirement villages. NSW and the ACT require that any funds accumulated for the purposes of capital maintenance or capital replacement be kept in a separate reserve fund.

[107] Recent reforms to the *Strata Titles Act 1985 (WA)* have introduced mandatory reserve funds for prescribed strata title properties (strata properties of 10 or more units).

Questions

8.1.1 *Are there any reasons why **Recommendations 44 - 50** of the Final Report should not be implemented?*

8.1.2 *Can you think of other ways to address this issue?*

8.1.3 *What impact would mandatory reserve funds have on existing retirement village operations and how might this be addressed?*

Implementation issues

Recommendation 44: Time period for introduction of mandatory reserve funds

The Final Report recommended that the legislation be amended to require the introduction of a reserve fund within two years of the commencement of the relevant amendment (**Recommendation 44**). It was considered that a two year time period would provide sufficient time to allow operators to restructure their financial arrangements and residence contracts to prepare for the introduction of mandatory reserve funds. This means that the introduction of laws requiring mandatory reserve funds would apply to all operators after two years.

Questions

8.1.4 *Do you consider that the two year period (**Recommendation 44**) is sufficient time to require introduction of reserve funds following the commencement of the legislation?*

Reserve amount to be held in fund and time scale for accumulation of fund

The reserve is the minimum amount that must be available in the capital works fund. The Final Report recommended that the legislation be amended to require that the reserve amount held in a mandatory fund and/or ongoing contributions to the fund are sufficient to ensure that the village can be maintained in a reasonable condition having regard to the age and prospective life of capital items at the time the reserve fund is established. The amount was required to be in place for all reserve funds within five years of the commencement of the relevant amendment. It was recommended that the Commissioner be able to extend the five year period (**Recommendation 45**).

In Queensland, the operator may decide the amount to be held in the funds by having regard to the fund's purpose, the quantity surveyor's report and any amounts that were transferred during the transition phase.[108] The operator must also use their "best endeavours" to implement the surveyor's recommendations in the context of the

[108] *Retirement Villages Act 1999* (Qld), section 92(3).

objects of the Act and any circumstances relevant to the retirement village that were not considered by the quantity surveyor.[109]

This discretion provided to operators in considering the surveyor's report for maintenance reserve funds will however be removed when the amendments made in the Housing Legislation (Building Better Futures) Amendment Bill 2017 (Qld) come into effect. These amendments will require the operator to adopt a maintenance reserve fund budget that is consistent with and implements any recommendations in the quantity surveyor's report, except to the extent that any part of the budget has been agreed by special resolution of the residents.[110]

The proposed reform to the Strata Titles Act in Western Australia is that a strata company must, if it is a designated company, determine the amounts to be raised for the payment into the reserve fund. The designated company must prepare a 10 year plan which is to include the estimated costs for maintenance, repairs, renewal or replacement.[111] Proposed reforms to the Victorian legislation are also considering introducing capital works plans for retirement villages.[112]

Questions

8.1.5 Do you agree with the five year period to accumulate funds in the reserve fund? Please explain your reasons.

8.1.6 Should operators be required to determine the reserve fund amount in accordance with the recommendations from a quantity surveyor (Queensland approach)? Please provide reasons.

Should a separate reserve fund be required for each category of capital works or a single reserve fund?

A reserve fund is currently defined as a fund that is, or is proposed to be, established for the purpose of accumulating funds to meet the costs of repairs, replacements, maintenance and renovations within a retirement village, regardless of whether or not the money in the fund is held in a separate account.[113] This means that funds relating to all capital works may be held in the same fund.

Different funds for different categories of capital works can help provide more transparency to residents about the expenditure and planning for capital works in their

109 *ibid,* section 92(4).

110 Housing Legislation (Building Better Futures) Amendment Bill 2017 (Qld), clause 125.

111 *Strata Titles Amendment Act 2018* (WA), sections 49(2)(b) and 49(2A).

112 Review of the *Retirement Villages Act 1986* (Vic), Issues Paper, 2019, Consumer Affairs, Victoria.

113 RV Code (WA), clause 14(1).

village. It can also help residents better understand the arrangements in the village for capital works and how expenses are being funded.

For instance, in Queensland, the legislation provides that a separate reserve fund must be established for "capital maintenance" and "capital replacement".[114] In the ACT, the capital works fund is only for capital maintenance expenses.[115]

It is noted that Part 8.2 of this paper discusses the question of whether the funding of different categories of capital works should be split between different income sources. If such a reform is introduced, it would require different reserve funds for different categories of capital works.

Administrative funds

A related question is whether there is a need to require operators to maintain separate administrative funds for the operating costs which do not relate to capital works. Other legislation has introduced such requirements. For example, proposed amendments to the Queensland retirement villages' legislation are that an operator will also be required to establish and keep a fund for general services.[116] Examples of general services are management and administration, gardening and general maintenance, shop or other facility for supplying goods to residents and a service or facility for the recreation or entertainment of residents.[117]

Reforms to the strata title legislation in WA will also require the strata company to establish an administrative fund. The administrative fund is to be applied to expenses necessary to control and manage the common property, for the payment of insurances and discharge of any other obligations of the strata company.[118] The strata manager is also required to be able to account separately for money paid or received on behalf of a strata company.[119]

Questions

8.1.7 *Should a separate reserve fund be established by the operator for each category of capital works for which the funds are collected, for example, capital maintenance or capital replacement (Queensland model), or should a single reserve fund be permitted for all capital works?*

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114 *Retirement Villages Act 1999* (Qld), section 91(1) and 97(1).

115 *Retirement Villages Act 2012 (ACT)* section 143

116 Housing Legislation (Building Better Futures) Amendment Bill 2017 (Qld) clause 125, assented to 10 November 2017 but division not as yet proclaimed and operating as law.

117 *Retirement Villages Act 1999* (Qld), section 4.

118 *Strata Titles Amendment Act 2018 (WA)*, section 49(1)(a).

119 ibid, section 148(3).

8.1.8	*Should any operators be required to establish any other funds in addition to capital works fund(s), such as the proposed administrative fund (Western Australia strata titles) or general services fund (Queensland)? Please explain your reasons.*

Should interest from investments be credited to the reserve fund account?

Funds being accumulated in a reserve fund over a significant period of time will accumulate interest. The RV legislation already requires interest on any money in a reserve fund to be identified in the budget.[120] There are no restrictions however on the use of this interest and where it is to be kept.

In the Australian Capital Territory, New South Wales and Queensland they require the operator to ensure that interest from investment of amounts held in the fund are paid into the reserve fund.[121]

TABLE 8.2 – INTEREST RECEIVED FROM RESERVE FUNDS IN RV LEGISLATION IN AUSTRALIA

Does the RV legislation require:	QLD	NSW	ACT	SA	NT	TAS & VIC
Interest to be credited to fund account	✓	✓	✓	×	×	×

Questions

8.1.9	*Are there any reasons why interest received from reserve funds should not be credited to the fund account?*

Recommendation 50: Prescribing where reserve funds are held and the purposes for which funds may or may not be used

Consumer Protection has received a number of contacts from residents concerned about how account operators hold reserve funds in. Some think that holding reserve funds in the operator's general accounts does not provide sufficient security in the event the operator goes into receivership or prevents funds being used for other purposes.

120 RV Code (WA), clause 17(4)(e).

121 *Retirement Villages Act 1999* (Qld), section 94(1)(b), *Retirement Villages Act 1999* (NSW), section 99(4)(b) and *Retirement Villages Act 2012* (ACT), section 143(5).

Queensland requires fund monies to be held in a separate account identified for "secured capital"[122] with a statutory charge created over the account for the benefit of the residents.[123] The Queensland legislation also provides that the fund monies must be invested in accordance with the *Trusts Act 1973* (Qld).[124] New South Wales and the Australian Capital Territory require that reserve funds be held in an authorised deposit institution (ADI) account, with the Northern Territory also requiring that the ADI account is a trust account.

Reforms to the strata titles legislation in Western Australia will also require money received on behalf of a strata company to be paid into a separate ADI trust account for the strata company.[125]

TABLE 8.3 – REQUIREMENTS FOR SECURITY OF RESERVE FUNDS IN RETIREMENT VILLAGES

Does the RV legislation require funds to be held in:	QLD	NSW	ACT	SA	NT	TAS & VIC
Authorised deposit institute (ADI) account	×	✓	✓	×	✓	×
Trust account	✓	×	×	×	✓	×
Secured capital account with a statutory charge over account	✓	×	×	×	×	×

Questions

8.1.10 Should mandatory reserve funds be:

a) held in an authorised deposit institution (ADI) account;
b) trust account and only to be invested in accordance with Trustees Act 1962 (WA); or
c) an account that is identified as being for "secured capital" and has a statutory charge over the account for the benefit of residents?

122 *Retirement Villages Act 1999* (Qld), section 91(1)(b).

123 ibid, section 91(6).

124 ibid, section 95.

125 *Strata Titles Amendment Act 2018* (WA), section 148(1).

Recommendation 50: Restricting the use of funds collected from residents for capital to the purposes for which they were collected?

Recommendation 50 provided that a power to prescribe the purposes for which mandatory reserve funds could or could not be used should be inserted. The uses of reserve fund monies is not currently restricted under the RV legislation. Operators must prepare and present a reserve fund budget as part of the operating budget, however may use funds for other purposes. This means that funds could be transferred from reserve fund accounts to other accounts for other purposes. Where this occurs, residents have little recourse under the legislation.

Consumer Protection often receives complaints about reserve funds being used for purposes which residents do not agree with, we also appreciate that the village owners need to make commercial decisions about management of the facilities and buildings. **Recommendation 50** was intended to address such concerns about the proper use of reserve funds. One option to implement **Recommendation 50** is that the legislation only permit the use of reserve funds for the purposes for which they were collected. This would mean that funds collected for capital works expenses would only be permitted to be spent on such expenses.

The legislation in the Australian Capital Territory, New South Wales, Northern Territory and South Australia restrict the use for which operators may use funds collected from residents for the purpose of capital works.[126]

TABLE 8.4 – COMPARISON OF MANDATORY RESERVE FUNDS IN RV LEGISLATION IN AUSTRALIA

Does the RV legislation:	QLD	NSW	ACT	SA	NT	TAS & VIC
Require fund to be used for the specific purpose	✓	✓	✓	✓	✓	✗

Questions

8.1.11 *Are there any reasons against amending the legislation to ensure that funds collected from residents by the operator for capital works be restricted to the purpose for which they were collected?*

8.1.12 *Should residents be able to consent to the use of funds for other purposes?*

[126] *Retirement Villages Act 2012* (ACT), section 143(1), *Retirement Villages Act 1999* (NSW), section 99(1), *Retirement Villages Act 2016* (SA), section 28 and *Retirement Villages Act 1995* (NT), section 38(1).

Should capital works plans be required as part of reserve fund planning?

Increasing transparency around the long term capital works plans in a village could provide residents with more assurance about the expenditure of funds on capital works items. Capital works plans may assist residents to understand the arrangements for the long term maintenance of the village, as well as assessing the adequacy of these arrangements.

One jurisdiction, Queensland, requires retirement villages to have a capital works plan. The plans must be assessed by a quantity surveyor and a written report provided about the expected capital replacement and maintenance costs for the village for the next 10 years.[127] The report must be revised every three years or if there is a substantial change to the village.[128]

The Queensland legislation also requires operators to prepare a budget for both the capital replacement fund[129] and the maintenance reserve fund for each financial year.[130] Separate accounts must also be kept for the capital replacement and maintenance reserve fund.[131]

Similar to Queensland, the Strata Titles Act in Western Australia also requires a strata title company to have a capital works plan (10 year plan), to be revised once every five years. It is not a requirement that the plan be prepared by a quantity surveyor.[132] Capital works plans for villages are also being proposed in Victoria.[133]

127 *Retirement Villages Act 1999* (Qld), section 92(1) and section 98(1).

128 ibid, section 92(2)(a) and section 98(2)(a).

129 ibid, section 93(1).

130 ibid, section 99(1).

131 ibid, section 111.

132 *Strata Titles Amendment Act 2018* (WA), section 49(2), Division 2, amending section 36 of the *Strata Titles Act 1985 (WA)* and to be renumbered as section 100 of the *Strata Titles Act 1985 (WA)* - assented to on 19 November 2018 but not as yet proclaimed and operating as law.

133 *Review of the Retirement Villages Act 1986* (Vic) Issues Paper, 2019, Consumer Affairs, Victoria.

TABLE 8.5 – CAPITAL WORKS PLANS AND RESERVE FUND PROVISIONS

	A capital works plan	Plan to be prepared by independent person	Plan to be prepared for set period	Plan to be for set period	Reserve fund monies held in an ADI account
Does Queensland RV Act require	✓	✓	✓	✓ 10 years to be revised every 3 years	✓
Does Strata Titles Act in Western Australia require	✓	✗	✓	✓ 10 years to be revised every 5 years	✓
Proposed amendments to Victorian RV legislation	✓	N/A	N/A	N/A	N/A

Questions

8.1.13 Should operators be required to prepare long-term capital works plans for retirement villages? If so, what period of time do you think the plans should be for?

8.1.14 Should capital works plans be prepared by an independent person such as a quantity surveyor? Please explain your reasons.

8.1.15 Should capital works plans be for a period of 5 or 10 years? If 10 years, should the plan being revised after 3 or 5 years, or such other time?

SAT jurisdiction over reserve funds

The Final Report noted that there was a risk that some village owners may seek to levy from residents a contribution to a reserve fund that is inconsistent with existing contractual obligations or that residents believe to be excessive or unwarranted. The Final Report recommended that the legislation be amended to provide for residents who believe that the application of a levy or a proposed increase in their obligations is excessive or unwarranted they may apply to SAT for the matter to be reviewed (**Recommendation 46**).

Questions

8.1.16 Should SAT have any other powers in regards to reserve funds in retirement villages?

Transitional arrangements

A requirement to establish mandatory reserve funds may involve the transfer of funds from an operator's general account to the reserve fund account. A question arises as to what transitional provisions might be required to facilitate the introduction of mandatory reserve funds. In Queensland transitional provisions required existing funds to be transferred to the relevant reserve within 90 days after commencement of the provisions.[134]

In WA, the current requirements for operators to prepare separate financial statements for reserve fund accounts[135] are likely to allow for the proper and accurate identification of funds to facilitate the implementation of mandatory reserve funds. However, there may be situations where operators experience difficulties in being able to accurately identify past payments made by existing residents towards a reserve fund. This could be exacerbated when the reserve funds are combined with other funds in the operator's general account.

Reforms to the Strata Titles Act in Western Australia contain transitional provisions in relation to reserve funds,[136] including that contributions to reserve funds as in force immediately before commencement day (for mandatory reserve funds) are taken to be contributions or arrangements determined under new provisions.

Questions

8.1.17	*Do you anticipate any difficulties in operators being able to accurately identify past payments made for capital works expenses to ensure that all relevant funds can be transferred to a mandatory reserve fund?*
8.1.18	*What time period do you consider appropriate for operators to transfer any capital works funds into the relevant account(s) if mandatory reserve funds are established?*
8.1.19	*Should there be any other transitional arrangements if reserve funds become mandatory for retirement villages in Western Australia?*

Application to strata title?

The new strata title laws in WA mean that retirement villages which are strata titled properties will now be required to establish a mandatory reserve fund in respect of the strata title common property. Residents who are strata lot owners will be required to contribute to the fund.[137] Items that are covered by the reserve fund may include

134 *Retirement Villages Act 1999* (Qld), sections 234 and 235.

135 RV Code (WA), clauses 18(4) and 19(5).

136 *Strata Titles Amendment Act 2018* (WA), section 119.

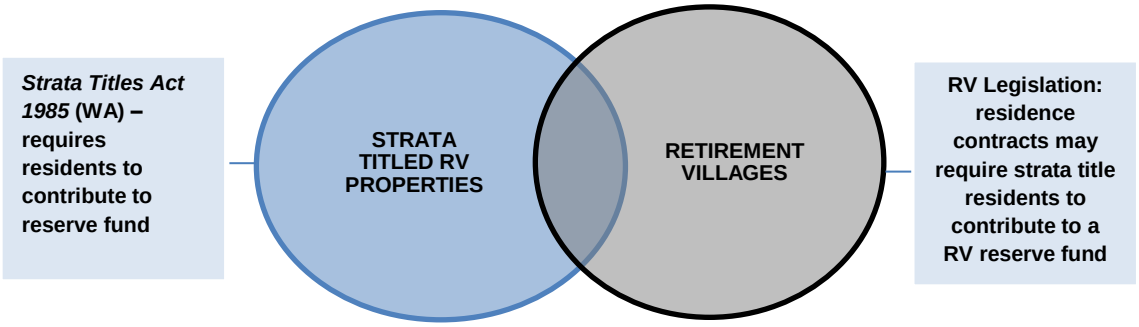
137 A reserve fund established before commencement of the amended legislation will be taken to be a reserve fund established under the revised *Strata Titles Act 1985 (WA). Strata Titles Amendment Act 2018 (WA)*, section 119, Division

painting buildings, roofing, fences or boundary walls, entrances, gardens, foyers and visitor parking. Strata property reserve funds will not however cover retirement village capital items which are not common property under the strata plan. These, items will be covered by the RV legislation[138] and may include such items as retirement village pools or communal rooms.

Operators may also impose costs on strata title residents for the capital works expenses of property belonging to the operator. In such cases residents would pay reserve fund levies under the *Strata Title Act 1985*, as well as separate fees and charges under the residence contract. This would already presumably occur if the strata village already had a reserve fund.

Consumer Protection acknowledges the potential overlap between strata title properties and retirement villages if mandatory reserve funds are introduced for retirement villages. In this regard, Consumer Protection acknowledges the confusion that may occur if there is an overlap and also seeks to ensure that residents living in a strata retirement village will not pay twice for capital works.

DIAGRAM 8.6 – OVERLAP BETWEEN STRATA TITLES AND RETIREMENT VILLAGE LAWS



It is proposed that reserve fund requirements under the RV legislation will not apply to property covered by the *Strata Titles Act 1985*. Consumer Protection would like feedback on whether there are any other modifications which might be required regarding strata properties.

Questions

8.1.20 *Are there any other modifications that would be required in relation to strata title properties?*

7, inserting Schedule 5 into the *Strata Titles Act 1985 (WA)*: Assented to on 19 November 2018 but not as yet proclaimed and operating as law.

138 RV Code (WA), clause 14 provides that a reserve fund includes any reserve fund established by the relevant strata company under the *Strata Titles Act 1985* (WA).

PART 8.2: CAPITAL WORKS FUNDING

ISSUE 8.2: FUNDING ARRANGEMENTS FOR CAPITAL WORKS

Many villages already collect funds from residents for capital works expenses. Contractual variations and discretions mean however that arrangements for how these funds are spent in a village can be unclear to residents. Many disputes occur about how such funds should be spent and allocated. A particular concern of residents is the use of recurrent charges for capital works.

Objective

To provide greater clarity to residents about the funding arrangements for capital works in their retirement village and to clarify which works fall within the various categories of capital works.

Discussion

As discussed in Part 8.1, transparency requirements already apply to funds collected from residents for the purposes of capital works expenses.[139] They require that a residence contract must include provisions setting out the details of costs of carrying out maintenance, repair, renovation or replacement works in the village.[140] Residents are also entitled to access to proposed budgets and to receive quarterly and financial statements.[141]

These transparency provisions mean that residents will therefore be informed of the total amount of the funds which have been collected and how they are proposed to be used and have been used.[142] However, the use of the funds is determined in accordance with the contract between the residents and operators.

Contractual provisions may be very broad, giving a large discretion to operators to determine what works fall into either the category of maintenance or replacement. Different capital works categories will apply in different villages, and contracts commonly give a very wide discretion to operators to determine what works belong to a particular category.

This can make it difficult for residents to fully understand the precise nature of the works being funded. Disputes can also occur as to whether an item is being correctly allocated to a capital works category.

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139 Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report).

140 RV Regulations, regulation 7F, item 6.

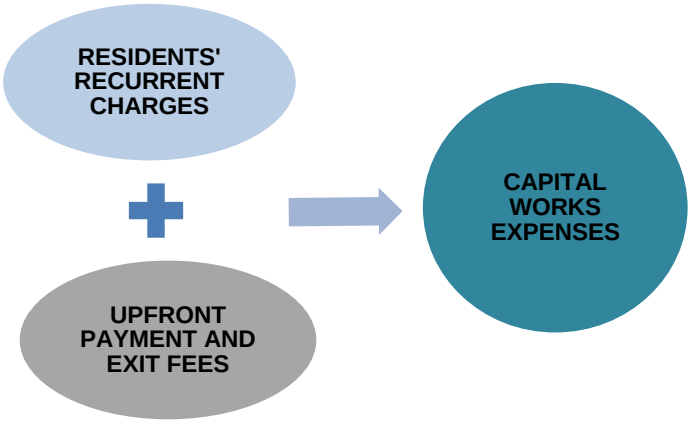
141 RV Code (WA), clauses 17(1), 18 and 19.

142 ibid, clause 17(1).

An interconnected issue which gives rise to significant dispute between residents and operators in retirement villages is the source of funding for capital works in a retirement village.

Capital works expenses for a retirement village will generally be funded by the income operators receive from residents. This will be either directly, through cost recovery in the recurrent charges for operating costs, or specific exit fees, or reserve fund contributions, or more indirectly through the upfront payment. It is however important to residents to know how such expenses are funded. In particular, residents often have limited capacity for the payment of recurrent charges for operating costs and take issue when these costs seek to include expenses which are not considered by residents to be operating costs.

DIAGRAM 8.7 – SOURCES OF INCOME FOR CAPITAL WORKS



Disputes can occur when residents object to the income source that the operator uses to fund certain capital works in retirement villages, especially when major capital works expenses are deducted from the ongoing recurrent charges paid by residents.

Final Report and stage one reforms

The Final Report noted that there was a lack of clarity in defining capital works terms due to it often being unclear what is meant by terms such as “maintenance”, “replacements”, “facilities”, “common facilities”, “works of a structural or capital nature”, “routine repairs” and “major replacements”.[143] This lack of clarity contributed to residents’ difficulty in understanding how reserve funds and operating costs were to be used, and the difference between the two.[144] The Final Report recommended that

[143] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 71.

[144] The lack of clarity around capital works definitions was identified in the New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report) as a key concern of consumers.[144] In particular, the Report noted that “many residents sought further information about assurance that the allocation of capital maintenance was correctly applied”.

the legislation be amended to more clearly set out the differences between reserve fund maintenance and operating cost maintenance.[145]

The Final Report also found that residents were confused over contractual arrangements for the funding of capital works and that this confusion led to delays in the work being carried out.[146] It was noted that there was considerable variation across the industry in the way capital maintenance and replacement is funded and that residents need to be clear from the outset as to who is responsible and what financial arrangements are in place to fund the capital works.[147]

The Final Report recommended increasing transparency requirements around the funding of capital works expenses. In particular that the RV legislation be amended to more clearly set out the requirements for administering bodies to provide information to residents specifying the source of the fund's income, including what residents will be required to contribute and what administering bodies will be required to contribute.[148] The Final Report also recommended that the legislation be amended to more clearly set out the differences between reserve fund maintenance and operating cost maintenance.[149]

Increasing transparency measures for the funding of capital works in the village

As noted, the stage one reforms reviewed and revised the pre-disclosure documents for residents.[150] The current RV legislation does not define the various categories of capitals works but requires operators to include details about:

- recurrent charges for capital works in the pre-contractual disclosure and residence contracts;[151]
- details of reserve funds;[152] and
- financial information about capital works and reserve funds in the village budget process.[153]

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145 Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), Recommendation 52, 81.

146 ibid, 72.

147 ibid, 74.

148 ibid, 81.

149 ibid, Recommendation 52, 81.

150 ibid, Recommendation 9.

151 Retirement Villages Regulations 1992 (WA), regulation 7F Items 3 and 4, Form 1 questions 6A and 6C.

152 ibid, regulation 7F, Item 5.

153 RV Code (WA), clauses 17(4), 17(6) and 18(a)

Problems persisting since Final Report

Despite increased transparency about funding arrangements, it is clear that problems have also persisted since the Final Report about the division of capital works funding responsibilities between residents and operators. A large number of the complaints and enquiries received by Consumer Protection are centred on residents' claims the recurrent charges should be restricted to maintenance expenses only. The residents' position is that all other capital works expenses should be paid from other income sources, such as fees that the operator receives from upfront payments or exit fees.

Problems have also persisted relating to defining the capital works categories, with both residents and operators finding it difficult to agree on the capital works category that the expense falls within. Disputes commonly deal with claims by residents that:

- they should not pay for capital works as they do not own their unit and such expenses should be the responsibility of the operator;
- large scale and costly capital works expenses should be the responsibility of the operator and not deducted from recurrent charges;
- using recurrent charges for capital works expenses should be limited and clearly defined as residents often have limited resources, many relying on a pension to pay recurrent charges; and
- resident confusion about whether the capital works have been sourced from recurrent charges or reserve funds, which may result in a perception that the operator is double dipping.

Further difficulties may arise when expenses are incurred for long term capital works. Although it is common practice for operators to have a reserve fund to manage such long term capital works in the village, if the residence contracts are not clear as to the category of capital works, expenses relating to capital replacement may be defined as maintenance and deducted from recurrent charges. This means that these expenses will not be apportioned over a longer period of time than the usual 12 month financial year, causing resident concern about the fairness.

The following case study is an example of disputes that occur about funding capital works in retirement villages.

CASE STUDY 8.1

Consumer Protection was approached by several residents of a retirement village with concerns regarding the operator's financial plan to fund a one-off painting programme. The painting was planned to take place over an extended period and was for external buildings, carports, fencing and gates.

The residents maintained that funding for painting should be paid out of the reserve fund. The operator maintained the cost of painting should be recovered from residents via recurrent charges.

The residents' argument included referring to a statement in the reserve fund budget that "provision for expenditure on the following categories: repairs, replacements, maintenance and renovations of a capital nature. Items include, but are not limited to – provision of painting of the village".

The operator's argument was that the residents contract specifically provided that operating costs included external painting and other maintenance work.

Consumer Protection determined that relevant contractual provisions meant that payment for the external painting of the common facilities and common areas were properly classified as being operating costs, to be recovered from residents.

It was also noted that the operator had a discretion whether or not to use the reserve fund for painting, with there being no provisions in the RV Code mandating the use of the fund for particular categories of capital works.

CASE STUDY 8.2

Consumer Protection received a complaint from a resident that the operator of the retirement village had requested a 50 percent contribution to the cost of a repair to his toilet. The repair involved replacing the concrete base with a silicon seal. The resident disputed contributing to the cost, maintaining that this should be the responsibility of the operator. Following further discussions, the operator agreed to pay for the entire cost of the repair to the toilet.

These case studies illustrate that it is often difficult for both residents and operators to determine responsibility for the funding of capital works. Disputes commonly involve interpretation of contractual documents and the way certain contract provisions interact with the RV legislation. The task of interpreting both contracts and the legislation is invariably complex and costly, causing both distress and expense for both residents and operators.

Categories of capital works

Treatment of capital works expenses generally distinguish between "capital maintenance" and "capital replacement". Capital maintenance charges relate to expenses incurred in maintaining the capital item, and include repairs to capital works items. The expenses are in most cases paid by monthly or quarterly recurrent charges. The maintenance charges must be specified in pre-contract disclosure and residence contract for the duration of the occupancy.

"Capital replacement" relates to the replacement of capital items and does not include repairs. The distinction between these two categories can however be a source of disagreement. For example, there is often disagreement between operators and residents as to whether a substantial repair to a capital item should fall within the replacement category rather than maintenance category.[154]

Other jurisdictions

Three Australian jurisdictions, the Australian Capital Territory, New South Wales and Queensland, currently define capital works terms.[155] Two of these jurisdictions, New South Wales and the Australian Capital Territory, have provisions allowing for the further prescription of capital works items and capital maintenance.

The Australian Capital Territory legislation allows the Minister to make guidelines about the distinction between capital maintenance and capital replacement.[156] The Australian Capital Territory's *Retirement Villages (Capital maintenance and replacement) Guidelines 2019*[157] provide examples of commonly encountered capital maintenance and capital replacement issues to assist residents.

The New South Wales legislation allows regulations to prescribe works that are not capital maintenance.[158] The works are prescribed as not including work done to substantially improve an item of capital beyond its original condition and work done to maintain or repair an item of capital in circumstances where it would have been more cost effective to replace the item of capital.[159]

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154 New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report)., 56.

155 *Retirement Villages Act 2012* (ACT) section 135, *Retirement Villages Act 1999* (NSW) section 4 and *Retirement Villages Act 1999* (Qld), section 4.

156 *Retirement Villages Act 2012* (ACT) section 136A.

157 https://www.legislation.act.gov.au/View/ni/2019-405/current/PDF/2019-405.PDF

158 *Retirement Villages Act 1999* (Qld), section 4.

159 Retirement Villages Regulations 2017 (NSW), regulation 4.

The Queensland legislation links the definition of capital replacement to Australian Taxation Office (ATO) Rulings[160] made under the *Taxation Administration Act 1953* (Cth). For example, the ATO Taxation Ruling on deductions for repairs includes:

- *the word 'repairs' has its ordinary meaning. It ordinarily means the remedying or making good of defects in, damage to, or deterioration of, property to be repaired (being defects, damage or deterioration in a mechanical and physical sense) and contemplates the continued existence of the property;*
- *work done to prevent or anticipate defects, damage or deterioration (in a mechanical or physical sense) in property is not in itself a 'repair' unless it is done in conjunction with remedying or making good defects in, damage to, or deterioration of, the property;*
- *repair for the most part is occasional and partial. It involves restoration of the efficiency of function of the property being repaired without changing its character and may include restoration to its former appearance, form, state or condition. A repair merely replaces a part of something or corrects something that is already there and has become worn out or dilapidated. Works can fairly be described as 'repairs' if they are done to make good damage or deterioration that has occurred by ordinary wear and tear, by accidental or deliberate damage or by the operation of natural causes (whether expected or unexpected) during the passage of time; and*
- *to repair property improves to some extent the condition it was in immediately before repair. A minor and incidental degree of improvement, addition or alteration may be done to property and still be a repair. If the work amounts to a substantial improvement, addition or alteration, it is not a repair.*

TABLE 8.8 – CAPITAL WORKS TERMS DEFINED IN RETIREMENT VILLAGE LEGISLATION

Does RV legislation define:	QLD	NSW	ACT	VIC, SA, NT, TAS
Capital item	✓	✓	✓	✗
Capital maintenance	✓	✓	✓	✗
Capital replacement	✓	✓	✓	✗

[160] https://www.ato.gov.au/law/view/document?docid=TXR/TR9723/nat/ato/00001

Issue 8.2.1: Proposal for Consultation

Insert definitions for capital works categories

That the RV legislation be amended to insert definitions in the legislation for categories of capital works

One option which may assist with the problems residents experience in understanding and agreeing on how funds should be spent is to insert specific definitions into the RV legislation for certain capital works expenses.

As discussed above, one of the key areas for dispute is the determination of what works fall into the category of 'maintenance' and what works fall into the category of 'replacement' or 'improvements'. Defining these terms could assist residents and village owners to understand how funds collected for the purposes of capital works expenses will be spent.

It is noted however that statutory definitions can also become the subject of dispute and may exacerbate the problem. Flexibility in prescribing additional elements to such definitions would be necessary to ensure legislation could provide further clarity if issues arise. However, Consumer Protection considers it would be beneficial to define other capital works terms.

The New South Wales Greiner Report considered that a further explanation of which costs are considered capital maintenance and which costs are considered capital replacement would be beneficial. It was noted that "the definitions are too broad and the ability to apply these concepts to village costs in practice needs to be improved. Ambiguity surrounding these definitions leads to concerns over the fairness and transparency of the budget".[161]

[161] New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report).

Impact analysis

The following table outlines some potential advantages and disadvantages of amending the RV legislation to insert specific definitions for capital works terms.

	Potential benefits	Potential disadvantages
Proposal 8.2.1: Amend the legislation to insert definitions for specific categories of capital works.	• Improve clarity and consistency within retirement villages in regards to capital works. • Assists with identifying the funding responsibilities which are different for the various categories. • May encourage the provision of more detail to be included about capital works in the RV contractual documents.	• Limits flexibility in contracts. • Disputes may still occur about the interpretation of definitions in the legislation. • May impact existing financial arrangements in the retirement village. • Specific definitions may not always match the legal/tax definitions.

Questions

8.2.1.1 *Should statutory definitions be inserted into the RV legislation for capital maintenance and capital replacement rather than leaving the meaning of these terms to the contract between the operators and residents?*

Implementation issues

What definitions of capital maintenance and capital replacement should be used?

Other legislation adopts the view that the key distinction between expenses which can be classified as capital maintenance and expenses which are classified as capital replacement lies in the nature of the work done and the effect on the capital item. Generally, the approach is to focus on whether the work is to 'repair or maintain' the property, or keep it in working order, in which case it is likely to be regarded as capital maintenance. Alternatively, if the work done can be said to replace or substantially improve the property, then it can more properly be regarded as capital replacement. This approach is also reflected in taxation rulings administered by the ATO.

The method by which these definitions are provided for in the legislation in other jurisdictions differs. The legislation in the Australian Capital Territory, New South Wales and Queensland all define capital maintenance and capital replacement.[162] However, the Australian Capital Territory and New South Wales enable further detail to be provided in regulations as to what is capital maintenance. In Queensland the

[162] *Retirement Villages Act 1999 (NSW),* section 4. Retirement Villages Regulation 2017 (NSW), regulation 4, *Retirement Villages Act 2012 (ACT),* section 135(1), Retirement Villages Regulations 2013 (ACT), regulations 24 and 25.

definitions of capital maintenance and capital replacement include relevant ATO rulings.

The linking of the capital works definitions to ATO rulings ensures that such terms are consistent with the approach used in taxation law. While it may be difficult for some residents to understand and apply ATO rulings to interpret the definitions in the legislation, it does provide a sound basis for understanding what is generally accepted to be a reasonable approach to such issues that may grow and change over a period of time.

TABLE 8.9 – CAPITAL WORKS TERMS DEFINED IN NEW SOUTH WALES, AUSTRALIAN CAPITAL TERRITORY AND QUEENSLAND

	NSW/ACT	QLD (ATO approach)
Capital maintenance	**Capital maintenance is:** Works carried out for repairing or maintaining a capital item.[163] **Not capital maintenance:** Works done to substantially improve a capital item beyond its original condition and work done to repair a capital item in circumstances where it should have been more cost effective to replace the capital item.[164]	**Capital maintenance is:** • the upkeep of the capital item in good condition and efficient working order; and • to the extent that it is not inconsistent, includes doing something that, under a ruling under the *Taxation Administration Act 1953* (Cth) dealing with maintenance of capital items, is maintenance of the capital item.
Capital replacement	**Capital replacement is:** Work carried out for replacing a capital item but not including capital maintenance.[165] **Capital replacement is not:** Replacing part of a capital item unless replacing the part substantially improves, adds to or alters the capital item.	**Capital replacement is:** The substitution of the same type of item or an equivalent item and includes (if not inconsistent) doing something that under a ruling under the *Taxation Administration Act 1953* (Cth) dealing with replacement of capital items.[166]

163 *Retirement Villages Act 2012 (ACT),* section 135(1) and *Retirement Villages Act 1999 (NSW),* section 4.

164 Retirement Villages Regulations 2013 *(ACT),* regulation 25. Retirement Villages Regulation 2017 (NSW), regulation 4.

165 *Retirement Villages Act 2012 (ACT)*, section 135(1) and *Retirement Villages Act 1999 (NSW),* section 4.

166 *Retirement Villages Act 1999 (Qld)*, section 4.

Other capital works terms

The Queensland legislation also includes a number of additional capital works definitions being:

- "capital improvement" defined to mean "the first time provision of a capital item and to the extent that it is not inconsistent, includes a thing that is a capital improvement under a ruling under *Taxation Administration Act 1953* (Cth) dealing with capital improvement";[167]
- "day to day maintenance" of a capital item means maintenance of the item that is carried out regularly and with little expense;[168] and
- "capital repair" defined as a repair to a capital item to mean the restoration of the item by fixing or replacing parts of the item includes (to the extent of not being inconsistent) doing something that, under a ruling under the *Taxation Administration Act 1953* (Cth) dealing with repairs to capital items, is repairs to the capital item.[169]

In Queensland, the significance of these definitions is that they provide further clarification as to how certain capital works expenses will be funded, namely:

- capital improvement expenses will be the sole responsibility of the operator and cannot be paid out of the capital replacement fund;[170]
- day to day maintenance costs cannot be paid out of the maintenance reserve fund;[171] and
- capital repair expenses cannot be paid out of the capital replacement fund.[172]

Any further definitions required will depend on the extent to which funding responsibilities are regulated under the legislation. This issue is discussed in the next section.

Questions

8.2.1.2	*Do you prefer the Australian Capital Territory and New South Wales approach to defining capital maintenance and capital replacement, or the Queensland definition which links to the ATO rulings?*
8.2.1.3	*Do you have any other suggestions for defining capital works terms?*

[167] ibid, section 4.

[168] ibid, section 4.

[169] ibid, section 4.

[170] ibid, sections 90 and 91(5).

[171] ibid, sections 97(4).

[172] ibid, sections 91(5).

Issue 8.2.2: Proposal for consultation

Amend legislation to regulate funding sources for capital works

That the RV legislation be amended to regulate the funding sources which can be used for certain capital works.

One option to assist residents with concerns about the funding of capital works in retirement villages would be to regulate the funding sources which can be used for certain capital works.

As noted above, the funding arrangements for the repair, maintenance and replacement of capital items in a village differ from village to village according to contracts with residents. Villages may charge these expenses through recurrent charges, and or by way of a reserve fund contribution on the entry to a village or as an exit fee. Some villages might only fund capital maintenance expenses from residents' recurrent charges whereas other villages might fund expenses for any capital works through recurrent charges. Some villages also raise levies from residents for specific capital maintenance or replacement works.

Retirement village residents are often concerned about the use of recurrent charges for capital works expenses and take the view that the use of recurrent charges should be restricted to day to day maintenance of the retirement village.

Other jurisdictions

Three Australian jurisdictions, the Australian Capital Territory, New South Wales and Queensland, currently have provisions that regulate the income sources to be used for funding capital works.[173] All three of these jurisdictions also exclude strata title villages from regulation around the funding income source for capital works.[174]

[173] *Retirement Villages Act 2012* (ACT) section 141(2), *Retirement Villages Act 2012* (ACT) section 141 (1), *Retirement Villages Act 1999 (NSW)* section 97(2), *Retirement Villages Act 1999 (Qld),* sections 90, *Retirement Villages Act 1999 (Qld),* sections 97(2).

[174] *Retirement Villages Act 2012 (ACT)*, section 135(1)(b), *Retirement Villages Act 1999 (NSW)* section 92(1)(b) and *Retirement Villages Act 1999 (Qld)* section 91(5)(b).

TABLE 8.10 – CAPITAL WORKS TERMS IN RETIREMENT VILLAGE LEGISLATION

Does legislation:	QLD	NSW	ACT	WA	VIC, SA, NT, TAS
Regulate income sources for funding capital works	✓	✓	✓	×	×
Exclude strata title property from regulation	✓	✓	✓	×	×

There are two key options that Consumer Protection considers may be appropriate for regulating the funding of income sources for capital works expenses in villages. The approach used in New South Wales/ Australian Capital Territory and Queensland is to restrict residents' responsibility for capital works expenses to capital maintenance expenses paid by their recurrent charges (**Option A**).

Another option is that the operator should be responsible for both capital maintenance and capital replacement expenses, similar to what occurs with landlord / tenancy arrangements (**Option B**). The key features of these options are discussed below along with some key advantages and disadvantages.

OPTION A: Recurrent charges can only be used for capital maintenance expenses

New South Wales/Australian Capital Territory and Queensland regulate the funding of capital works in retirement villages with a 'split-funding' approach. This approach sees operators responsible for the funding of capital replacement expenses, and limits the direct funding responsibility of residents to capital maintenance expenses.[175]

The legislation provides for a cost-recovery approach for capital maintenance expenses from residents by recurrent charges. Capital replacement expenses or improvement expenses are not permitted to be recovered from residents by recurrent charges and are recovered from other funds available to the operator, such as entry or exit fees.

Regulating the funding of capital works in retirement villages may address residents' uncertainty and confusion about such funding. Regulation would also create a uniform arrangement across different retirement villages for the funding sources for capital works. This may also assist prospective residents in comparing different villages.

The regulation of funding arrangements in villages may not entirely prevent disputes arising between residents and operators. This has been the case in New South Wales where it was noted in the New South Wales Greiner Report that there were practical

[175] *Retirement Villages Act 1999 (NSW)* section 97; *Retirement Villages Act 1999* (Qld) sections 91 and 97.

difficulties in "determining whether an item is a repair or a replacement, considered by many to be 'grey areas' … examples included … if a compressor of an air conditioner needs to be replaced is it an item of maintenance or capital replacement?"[176] Residents reported that operators were prolonging the life of capital items by repeated repairs rather than replacing the items. It was also suggested that the discretion exercised in determining funding allocations favoured operators.[177]

The New South Wales Greiner Report recommended that further details be provided in the regulations about the categories of maintenance and replacement to provide better clarity in the application of these rules. Specifically, it was stated that 'the definitions are too broad and the ability to apply these concepts to village costs in practice need to be improved. Ambiguity surrounding these definitions leads to concerns over the fairness and transparency of the budget".[178]

OPTION B: Operator to be responsible for all capital works

Another option would be to make the operator responsible for funding *all* capital works expenses in a retirement village under lease agreements. Under this option, residents would only be responsible for funding loss or damage and the operator would be prohibited from seeking to recover capital works expenses from residents directly.

In many sectors, the cost of maintaining and replacing capital assets rests with the ownership of the capital item. For instance, in the case of residential tenancies, a tenant will generally be responsible for costs associated with the use of the asset, or for loss or damage, but will not be responsible for other costs associated with the capital item, such as capital maintenance, repairs or replacement costs.[179]

The option of moving from an approach where residents are responsible only for capital maintenance expenses to an approach that the operator should be responsible for all capital works expenses was canvassed in the New South Wales Greiner Report. It was argued that leaseholders should be subject to the same capital works rules which apply in general tenancy arrangements, which sees the landlord responsible for all capital works, save those caused by tenancy damage.[180] The New South Wales Report recommended that consideration be given to adopting this approach for leasehold residents in order to simplify funding arrangements in these villages.[181]

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176 New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report).

177 ibid, 57.

178 ibid, 60.

179 An exception to this is where the tenant is responsible for damage to the property.

180 ibid, 58.

181 New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report).

An approach which makes the operator responsible for all capital works funding in a village may simplify capital works arrangements and therefore may reduce disputes over this issue. It may also seem fairer to residents to be aligned with the principles which apply to other tenancy arrangements and as such reduce the level of concern in villages about capital works funding issues. The alignment with residential tenancy was noted in the New South Wales Greiner Report with suggestions that as residents only lease their units, the maintenance should be entirely the responsibility of the operator.[182]

Removing maintenance costs from recurrent charges may also represent a benefit for residents who are concerned about increases in these charges, or who prefer to see maintenance expenses recouped from exit fees. For example, in Option A, only capital maintenance costs can be recouped as operating costs from recurrent charges. Capital replacement costs are then likely to be recouped at the entry to or exit from the village. In Option B, all capital works costs would need to be recouped at entry or exit points. The issue of unfairness will therefore be a question about the point of recovery of such expenses rather than the recovery of the expenses themselves.

A possible disadvantage of the operator being responsible for all capital works costs is that it may simply involve a shift of costs to other income sources. This may mean that the change in funding responsibility may not involve any change in the overall cost of retirement village living, but rather change the point at which it is recovered. It may also mean that operators build in a significant margin for capital works costs, rather than have some of these costs paid by recurrent charges and reviewed annually.

The New South Wales Greiner Report noted that an approach which shifts the funding responsibility for capital works entirely to operators could allow for greater operator control in regards to the planning for longer term and significant maintenance costs in the village.[183] This is because operators can then recover these costs from all residents over time (in a similar way that a landlord will recover the cost of capital expenses through a tenant's rent), rather than simply through the residents who are at the village at the time the expense is incurred. This is particularly important in cases where an adequate long term maintenance reserve fund has not been established. However, it is also the case that similar benefits can be obtained by establishing proper capital works planning arrangements as well as capital works reserve funds.

Another possible disadvantage of operators being responsible for all capital works expense is that residents may lose control of expenditure for some capital works. For example, the RV legislation in WA currently requires that residence contracts include all relevant details in contracts relating to recurrent charges.[184] This means that

[182] ibid

[183] ibid.

[184] RV Regulations (WA), regulation 7F, Item 3.

residents have a degree of control about the matters to be included in recurrent charges but in reality this may be illusory.

Impact analysis

	Potential benefits	Potential disadvantages
Option A – regulate the funding income sources for capital works in the RV legislation by providing that residents' recurrent charges are to be used only for funding capital works expenses and capital replacement expenses to be funded from operators' funds.	• Residents are provided with consistency and clarity as to how capital works expenses are funded in retirement villages and have certainty that operators are following the funding rules. • Residents will only be responsible for capital maintenance expenses, meaning they can better plan for paying these expenses via recurrent charges. • Reduces disputes in retirement villages regarding capital works.	• Limits flexibility in contracts to provide for funding responsibility for capital works. • Disputes may occur over the application of the statutory funding rules. • Operators may have difficulty applying these rules to existing arrangements where strata and purple titles exist.
Option B – the operator to be responsible under the RV legislation for all capital works costs, apart from loss or damage caused by residents.	• Provides clarity in villages for funding responsibility for capital works expenses. • Allows residents to be able to more adequately plan their finances, with both the day to day expenses and long terms capital works expenses being the responsibility of the operator. • Reduces disputes in the village regarding capital works. • Aligns leasehold villages with tenancy principles. • Provides for greater operator control in regards to the planning for longer term and significant maintenance costs in the village. • Capital works expenses can be recovered over a planned period of time, rather than simply through the residents who are at the village at the time the expense is incurred.	• Limits flexibility in contracts to provide for funding responsibility for capital works. • Shifting costs to other income sources would increase other fees. Residents also lose control of expenditure for some capital works.

Questions

8.2.2.1	*Do you prefer the approach of making residents only responsible for capital maintenance expenses paid by recurrent charges or an approach that the operator should be responsible for both capital maintenance and capital replacement expenses? Please explain your reasons*
8.2.2.2	*Do you have concerns about proposal(s) for regulation reducing the ability of industry to provide flexible arrangements for the funding of capital works in retirement villages? If so, please provide details of these concerns.*
8.2.2.3	*Can you think of other ways to address this issue?*
8.2.2.4	*What would be the cost implications of the different options? Please provide quantifiable information if possible.*

Implementation issues

What property should funding rules apply to?

If funding rules are introduced, the property to which they will apply needs to be defined. In other jurisdictions, the term 'item of capital' denotes the property subject to the funding rules.

The current RV legislation in WA does not include a definition for the term "capital item", but does make a number of references to "capital item" in the RV Regulations.[185] The Australian Capital Territory, New South Wales and Queensland all define a capital item as being a building or structure in the village and plant, machinery or equipment used in the village's operation and any part of a building or structure in the village[186], but not including items that are body corporate property[187] or owned by the resident[188] or excluded by regulations.[189]

Both the Australian Capital Territory and New South Wales allow for further items to be prescribed. In both New South Wales and the Australian Capital Territory, items prescribed to be an "item of capital" are fixtures, fittings, furnishings and non-fixed items.[190]

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185 RV Regulations (WA), regulation 7F, item 6, regulation 7G, items 1 and 3 and regulation 7H(2)(a).

186 *Retirement Villages Act 2012 (ACT),* section 135(1), Retirement Villages Regulation 2017 (NSW), section 4 and *Retirement Villages Act 1999 (Qld)*, section 4.

187 *Retirement Villages Act 1999* (*Qld*), section 4.

188 *Retirement Villages Act 2012 (ACT),* section 135(1)

189 Retirement Villages Regulation 2017 (NSW), regulations 4

190 Retirement Villages Regulation 2017 (NSW), regulation 5 and *Retirement Villages Act 2012 (ACT),* section 24.

Questions

8.2.2.5 *Do you consider that the Australian Capital Territory, New South Wales and Queensland definition for capital item adequately defines the term "capital item"? If no, please detail any other items which you think should be included in the definition of a capital item?*

Application of capital works funding regulation to strata title properties

The funding responsibility rules in New South Wales/Australian Capital Territory and Queensland currently exclude application to capital owned by the resident or items of capital which are common property in a strata title arrangement. This means that in those jurisdictions which currently regulate the funding of capital works in retirement villages, do not apply the rules to the residences and common property of strata title villages. Property which is not owned by a resident or which does not form part of the common property in the strata complex will however be subject to the funding rules.

The different arrangements in place for strata titled retirement villages, as well as the views held by some residents that capital expenses lie with the ownership of property, raises the question about whether the regulation of capital works funding in a retirement village should apply differently to strata title retirement villages. By the same token, there are other contractual arrangements where leasehold residents will share in any capital gain or loss incurred by an operator in respect of a new resident's entry to the village.

Questions

8.2.2.6 *Should arrangements exclude items of capital owned by residents (either by way of strata title or other forms of title), and strata title common property from the capital works funding rules? If so, please provide reasons.*

8.2.2.7 *Should arrangements for determining responsibility for capital works differ where contractual arrangements confer capital gains or loss sharing arrangements to leasehold residents?*

PART 8.3: CONDITION OF CAPITAL ITEMS IN A RETIREMENT VILLAGE

Issue 8.3: Obligation of operator to maintain village in reasonable condition

It is important to both residents and operators that the RV be kept in good condition. Currently there is no express legislative obligation requiring operators to maintain the retirement village in a reasonable condition. Residents who have concerns about the condition of the village must therefore pursue contractual remedies, which can be expensive and stressful.

Objective

To ensure that retirement villages are maintained in a reasonable condition by operators for the use and benefit of residents and future residents.

Discussion

Final Report

The Final Report did not specifically address a requirement for villages to be maintained in a reasonable condition. However, the Final Report did note that the recommendation to establish a mandatory reserve fund was to ensure sufficient funds were available to maintain the village in a reasonable condition, having regard to the age, and the prospective life of capital items at the time the reserve fund is established.[191] It was also noted that, with respect to "reasonable condition", it is a term that is "commonly used at law" and is intended to be a "generic and relative term that applies to that which is appropriate to a particular situation".[192]

Since the Final Report, the issue of maintenance of capital items in villages has continued to be important to both residents and operators. Residents who live in a retirement village have a personal well-being interest in the ongoing maintenance of the village's amenities and facilities so that they may use and enjoy these facilities during their residence. This interest is also a contractual entitlement under their residence contract as part of the amenities and services included in the contract price.

Many residence contracts also link a resident's premium repayment to the payment of a premium by a new resident. As such, residents also have a financial interest under their contract in the village being able to attract new residents to the village. The

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191 Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report).

192 Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 75.

ongoing viability of a retirement village requires the village to be maintained according to current living standards.

As the owners of the village, operators have a financial interest in making sure a village is properly maintained to current lifestyle standards. However, poor financial management can lead to decisions to reduce expenditure for short term financial benefits. Unfortunately this may lead to long term problems in the village and the ability of residents to enjoy the lifestyle they have been contractually promised.

It is also the case that the interests of operators in the ongoing maintenance of the village may at times separate from that of the residents, especially where an operator seeks to redevelop or terminate the retirement village scheme. It is important however that the lifetime promise to the residents of accommodation and lifestyle be maintained to adequate standards to ensure the contractual promises made by operators are kept.

Current legislation

The current legislation contains provisions allowing residents to express their views about the maintenance and condition of the village.[193] However, there are limited options for residents who continue to have concerns about a failure of the village operator to sufficiently maintain the village in a reasonable condition.[194]

Other jurisdictions

The ACT imposes an obligation on operators to maintain capital works items in a reasonable condition. The legislation also imposes an obligation on residents to notify the operator as soon practicable if a capital item needs to be repaired or replaced.

[193] RV Code (WA), clause 16(1)(b) and 16 (2)(a), (e), (f).

[194] A resident in such a situation could request that the Commissioner apply to SAT for the appointment of a statutory manager under section 75B of the RV Act on the basis that the wellbeing or financial interests of the residents were at risk, however this would be a significant step to take which would be of limited assistance in requiring an operator to appropriately maintain a village. Such as application would only be suited as a last resort.

Strata title laws in WA

In WA, a strata company has a duty to keep in good and serviceable repair, properly maintain and, where necessary, renew and replace the common property, including the fittings, fixtures and lifts used in connection with the common property.[195]

TABLE 8.11 – COMPARISON BETWEEN WESTERN AUSTRALIA STRATA TITLE LAWS AND THE RETIREMENT VILLAGE LEGISLATION IN THE AUSTRALIAN CAPITAL TERRITORY

	Operator/strata company to maintain capital items in reasonable condition	Operator to replace a capital item if not practical to maintain the item	Residents to notify operators if a capital item requires replacement or repair	Allow resident to apply for an order to enforce operator to maintain capital items in reasonable condition
RV Legislation in the ACT requires:	✓	✓	✓	✓
Strata Titles Act in WA requires:	✓	✓	✗	✓

[195] *Strata Titles Act 1985* (WA), section 35(1)(c).

Issue 8.3: Proposal for consultation

Obligation of operator to maintain village in reasonable condition

That the RV legislation be amended to provide an express provision imposing an obligation on operators to maintain the capital items owned by the operator in a retirement village in a reasonable condition.

Consumer Protection considers that this proposal could provide a clear obligation for operators to maintain the retirement village in a reasonable condition, reducing the risk of retirement villages running into disrepair. It would also provide residents with an accessible avenue for enforcement of the obligation to maintain the retirement village in a reasonable condition.

Questions

8.3.1 Are there any reasons why the legislation should not be amended to provide an express provision imposing an obligation on operators to maintain the capital items in a retirement village in a reasonable condition?

8.3.2 How does an operator manage infrastructure that has reached the end of its life and needs replacing?

List of Questions for Part 8

Issue 8.1	**Introduction of mandatory reserve funds**
Proposal for Consultation	**It is proposed to implement recommendations 44 – 50 of the Final Report to require operators to introduce mandatory reserve funds in retirement villages in WA. Implementing this recommendation would address concerns of residents about the adequacy of funds available for long term capital works in the village.**
Questions	
8.1.1	Are there any reasons why **Recommendations 44 - 50** of the Final Report should not be implemented?
8.1.2	Can you think of other ways to address this issue?
8.1.3	What impact would mandatory reserve funds have on existing retirement village operations and how might this be addressed?
8.1.4	Do you consider that the two year period (**Recommendation 44**) is sufficient time to require introduction of reserve funds following the commencement of the legislation?
8.1.5	Do you agree with the five year period to accumulate funds in the reserve fund? Please explain your reasons.
8.1.6	Should operators be required to determine the reserve fund amount in accordance with the recommendations from a quantity surveyor (Queensland approach)? Please provide reasons.
8.1.7	Should a separate reserve fund be established by the operator for each category of capital works for which the funds are collected, for example, capital maintenance or capital replacement (Queensland model), or should a single reserve fund be permitted for all capital works?
8.1.8	Should any operators be required to establish any other funds in addition to capital works fund(s), such as the proposed administrative fund (WA strata titles) or general services fund (Queensland)? Please explain your reasons.
8.1.9	Are there any reasons why interest received from reserve funds should not be credited to the fund account?
8.1.10	Should mandatory reserve funds be: a) held in an authorised deposit institution (ADI) account; b) trust account and only to be invested in accordance with *Trustees Act 1962 (WA)*; or c) an account that is identified as being for "secured capital" and has a statutory charge over the account for the benefit of residents?
8.1.11	Are there any reasons against amending the legislation to ensure that funds collected from residents by the operator for capital works be restricted to the purpose for which they were collected?
8.1.12	Should residents be able to consent to the use of funds for other purposes?
8.1.13	Should operators be required to prepare long-term capital works plans for retirement villages? If so, what period of time do you think the plans should be for?

8.1.14	Should operators be required to prepare long-term capital works plans for retirement villages? If so, what period of time do you think the plans should be for?
8.1.15	Should capital works plans be for a period of 5 or 10 years? If 10 years, should the plan being revised after 3 or 5 years, or such other time?
8.1.16	Should SAT have any other powers in regards to reserve funds in retirement villages?
8.1.17	Do you anticipate any difficulties in operators being able to accurately identify past payments made for capital works expenses to ensure that all relevant funds can be transferred to a mandatory reserve fund?
8.1.18	What time period do you consider appropriate for operators to transfer any capital works funds into the relevant account(s) if mandatory reserve funds are established?
8.1.19	Should there be any other transitional arrangements if reserve funds become mandatory for retirement villages in Western Australia?
8.1.20	Are there any other modifications that would be required in relation to strata title properties?
Issue 8.2.1	**Insert definitions for capital works categories.**
Proposal for consultation	**That the RV legislation be amended to insert definitions in the legislation for categories of capital works.**
Questions	
8.2.1.1	Should statutory definitions be inserted into the RV legislation for capital maintenance and capital replacement rather than leaving the meaning of these terms to the contract between the operators and residents?
8.2.1.2	Do you prefer the Australian Capital Territory and New South Wales approach to defining capital maintenance and capital replacement, or the Queensland definition which links to the ATO rulings?
8.2.1.3	Do you have any other suggestions for defining capital works terms?
Issue 8.2.2	**Amend legislation to regulate funding sources for capital works**
Proposal for consultation	**That the RV legislation be amended to regulate the funding sources which can be used for certain capital works.**
Option A	**Recurrent changes can only be used for capital maintenance expenses**
Option B	**Operator to be responsible for all capital works**
Questions	
8.2.2.1	Do you prefer the approach of making residents only responsible for capital maintenance expenses paid by recurrent charges or an approach that the operator should be responsible for both capital maintenance and capital replacement expenses? Please explain your reasons.
8.2.2.2	Do you have concerns about proposal(s) for regulation reducing the ability of industry to provide flexible arrangements for the funding of capital works in retirement villages? If so, please provide details of these concerns.
8.2.2.3	Can you think of other ways to address this issue?

8.2.2.4	What would be the cost implications of the different options? Please provide quantifiable information if possible.
8.2.2.5	Do you consider that the Australian Capital Territory, New South Wales and Queensland definition for capital item adequately defines the term “capital item”? If no, please detail any other items which you think should be included in the definition of a capital item?
8.2.2.6	Should arrangements exclude items of capital owned by residents (either by way of strata title or other forms of title), and strata title common property from the capital works funding rules? If so, please provide reasons.
8.2.2.7	Should arrangements for determining responsibility for capital works differ where contractual arrangements confer capital gains or loss sharing arrangements to leasehold residents?
Issue 8.3	Condition of capital items in a retirement village
Proposal for consultation	**That the RV legislation be amended to provide an express provision imposing an obligation on operators to maintain the capital items owned by the operator in a retirement village in a reasonable condition.**
Questions	
8.3.1	Are there any reasons why the legislation should not be amended to provide an express provision imposing an obligation on operators to maintain the capital items in a retirement village in a reasonable condition?
8.3.2	How does an operator manage infrastructure that has reached the end of its life and needs replacing?

PART 9: MAKING RESIDENT REFURBISHMENT OBLIGATIONS CLEARER AND FAIRER

This Part examines the reasons for refurbishment disputes continuing to arise notwithstanding the significant stage one reforms to refurbishment regulation. In summary, it:

- *Issue 9.1* – proposes clarifying what works residents can currently be asked to fund through an exit fee;
- *Issue 9.2* - asks whether the RV legislation should impose direct resident refurbishment obligations rather than indirectly regulating what a contract can or cannot require a resident to fund and whether those obligations should be more limited; and
- *Issue 9.3* – proposes requiring operators to provide residents with property condition reports.

This Part's discussion of refurbishment relies in part on discussion of the distinctions between repair, maintenance, replacement and improvement in Part 8.2 above. The proposal that the RV legislation deal with matters currently left to the residence contract is in part directed at reducing contract complexity.

PART 9.1: CLARIFY IN THE REFURBISHMENT WORKS A RESIDENT CAN CURRENTLY BE ASKED TO FUND

Issue 9.1: Meaning of term "Refurbishment work"

Many residence contracts require former residents to pay (in whole or in part) for refurbishment of the unit they vacate through a specific exit fee – a refurbishment fee. Despite stage one reforms about what can and cannot be included in a refurbishment fee, disputes continue to arise.

It is apparent that residents and operators still find the RV legislation ambiguous as to the standard of work that contracts can require residents to fund. Evidence given to a Victorian Parliamentary inquiry suggests one reason for this - the word "refurbishment" means different things to some operators than it does to residents[196] (see Box 9.1). For some operators it means returning a unit to the current market standard, for some residents it means reinstatement. The different understandings can have significant financial consequences. Reinstatement may be $1,000 to 2,000 only. Some consumers in WA have reported being asked to fund refurbishment in the region of $85,000.

[196] Parliament of Victoria, *Inquiry into the Retirement Housing Sector* 8 March 2017

Another reason disputes arise is that the way the RV legislation's refurbishment requirements and obligations are structured has proven difficult for stakeholders to navigate. The provisions are currently dispersed between two pieces of the RV legislation, the RV Regulations and the RV Code and within the RV Regulations in three different sets of regulations that are primarily directed at different matters. This means that what the RV legislation requires is not always clear to stakeholders.

BOX 9.1

Ms Lane's evidence to Victorian Parliamentary inquiry:

"[*I]ndustry uses [both] 'reinstatement' and 'refurbishment'. Reinstatement is what most people think refurbishment is, which is basically put it back the way you found it …. Refurbishment means bring it up to today's standard, whatever that standard is. People do not understand that those two words have very, very different connotations … for a prospective resident you are talking about a difference in reinstatement of $1500 or $2000, something like that, versus refurbishment, which can easily be $60 000 ….*"

Comment by Ms Rachel Lane.[199]

As noted in the Final Report, refurbishment issues arise when former residents are "highly vulnerable" as they generally depart a village to move to residential aged care.[197] Not only are residents less likely to have the health capacity to engage in dispute resolution, their financial ability to do so can be curtailed.[198] Part 6 noted that residents often need their exit entitlements to be released to pay for alternate accommodation. Refurbishment disputes can delay that occurring. Uncertainty in what the RV legislation permits regarding resident funded refurbishment is therefore highly problematic.

197 Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 126. The Final Report noted that the right to challenge refurbishment expense was problematic because the challenge could delay settlement. It said that "[i]t is clear that at such times residents are highly vulnerable and are in an unequal bargaining position. It is often the case that residents require funds as quickly as possible to enable them to move to more appropriate care facilities".

198 Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 126. Families can also be at a disadvantage where an operator asserts that the former resident knew or agreed to interpretations of contract terms or that certain works fell within those terms, both in not knowing what precisely was discussed and in dealing with grief.

199 Parliament of Victoria, *Inquiry into the Retirement Housing Sector* 8 March 2017.

Objective

To ensure residents' refurbishment obligations are easily identifiable and understood.

Discussion

Final Report and stage one reforms

The 2007 Issues Paper identified an issue in residents paying for vacated premises to be upgraded to a "first class condition" in the circumstance that operators received "a portion of the enhanced value".[200] The Final Report observed that there "may be some confusion on the part of residents about the meaning of the term 'refurbishment' and how it must be applied".[1] It also identified a wider range of refurbishment problems that included the process by which it was undertaken.[201] It recommended that:

- **Recommendation 76** – the legislation be amended to require that contracts clearly distinguish between residents' responsibility for ongoing maintenance during residence and unit refurbishment after departing a village and clearly specify the obligations of the resident and operator for refurbishment; and
- **Recommendation 77** – that Consumer Protection conciliate certain refurbishment disputes.

Stage one reforms limited a resident's payment to the actual costs incurred by an operator and set out a process for itemised information to be provided to a resident as to the works contemplated, the cost for each item and time taken to complete. Residents are now able to make an application to SAT regarding these matters. SAT must consider (amongst other things) whether the works are "reasonably required to return the residential premises to a condition required by the residence contract".[202] Relevant to this, a definition for "refurbishment works" was inserted into the RV legislation. It is located in the RV Code, clause 22(1) (see box). The intent in this definition was to limit residents' responsibility for refurbishment to returning premises to a reasonable condition. Renovation was included to allow operators and residents to negotiate on whether a resident would contribute to works beyond reinstatement so that a vacated unit would be in a more marketable condition. It was not contemplated

> Clause 22(1) of the RV Code:
>
> *In this clause* "refurbishment work" means maintenance, repair, replacement or renovation work carried out in respect on residential premises to a *reasonable condition*".
>
> (Consumer Protection emphasis)

[200] Department of Consumer and Employment Protection, Review of retirement villages' legislation, Issues paper June 2007, 79.

[201] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), n3,125.

[202] Clause 22(3)(a) of the RV Code.

that renovation works that amounted to an upgrade would fall within the ambit of returning premises to a reasonable condition.

Consumer Protection has increased its conciliation role. It has had some success in assisting former residents (and their families) to negotiate a reduction in refurbishment fees. Different operator and resident views as to what refurbishment standard clause 22(1) of the RV Code intends however has impeded conciliated outcomes. Conciliation is also only accessed by some former residents and so is likely to be underutilised.

Current RV legislation refurbishment provisions

The current RV legislation refurbishment provisions are:

RV Regulations:

- regulation 7G, item 2(a) (item in 'Matters relating to conditions of premises to be included in residence contract' regulations) - residence contracts must set out who will arrange refurbishment works "in accordance with" the RV Code;
- regulation 7G, item 2(b) (sub-regulation in 'conditions of premises' contractual requirements regulations) – contracts must state the contributions to be made by the resident and operator to "the cost of carrying out the work referred to in paragraph (a)";
- regulation 7K(1) (sub-regulation in financial matters not to be included in a residence contract regulations) - residence contracts must not include a provision that requires a resident to contribute to the "costs of all or part of any maintenance, repair, replacement or renovation of the residential premises that would exceed or be inconsistent with the requirements in relation to refurbishment work set out in the [RV Code]"; and
- regulation 11(3)(i) (sub-regulation in matters in respect of which an administering body is not to require payment regulations) - an operator cannot require a resident to pay for refurbishment to the extent a demand exceeds costs the operator has actually incurred.

RV Code:

- clause 22(1) – the meaning for “refurbishment work” is set out in the box above.
- clause 22(2) – prescribes a process for undertaking refurbishment that includes a written statement that list and details each item of work proposed, an estimate of the cost for each and indications of starting and completion dates and provides that no demand for payment is to be made until the work is complete; and
- clause 22(3)(a) – provides a process for resolving refurbishment disputes. A former resident can apply to SAT if (amongst other things) they consider particular work an operator proposes is not required to return the residential premises “to a condition required by the residence contract”, the proportion of the cost that they will bear is excessive or the commencement or completion date is not acceptable.

Clarifying what works a resident can currently be asked to fund

The word "refurbishment" in the term "refurbishment works" is part of the problem

Different resident and operator understandings as to what refurbishment means have undermined the effectiveness of the stage one reforms regarding the works a resident can be asked to fund.[203] In particular because of the different views held as to what works are entailed in returning premises to the "reasonable condition" under clause 22(1) of the RV Code. Both views have some basis because in common usage refurbishment can be used for both reinstatement and improvement. It is variously defined as: "to make a building look new again by doing work such as painting, repairing, and cleaning", "the act or process of repairing and improving something, especially a building" and "overhaul, revamping, doing up".[204]

Use of the word "refurbishment" in the RV legislation to describe the works a resident can be required to fund is therefore part of the problem.

Consumer Protection considers that the term "refurbishment work" should be replaced in the RV legislation with a less ambiguous descriptor and definition that clearly identifies for both residents and operators the standard of works a resident is required to fund – reinstatement to previous condition or improvement to the current market standard having regard to the standard of the village as a whole.

Before discussing what the term "refurbishment works" should be replaced with and how the new term should be defined, it is necessary to pay closer attention to the types of refurbishment works that are disputed.

The different issue of, having regard to the barriers to informed consumer decision making discussed in CRIS 1 Part 3, whether clarity in the works a resident can currently be asked to fund is a sufficient consumer protection regarding refurbishment fees is dealt with in Issue 9.2.

[203] The reforms to the process for refurbishment work to take place have however worked well.

[204] Cambridge dictionary on line

Examples of the type of works that are disputed

Refurbishment disputes can arise regarding repair works. For example, the repair of cracked tiles. If the original tiles are no longer available, all the tiles in a bathroom or kitchen may have to be replaced as part of the repair. Former residents say that in these cases the cost is disproportionate to the actual repair required. Prospective residents and operators however say that inserting different tiles into the middle of the existing tilework is not reinstating the premises to their original condition.

Disputes can also arise as to whether a resident has to pay for fair wear and tear to be rectified.

Refurbishment disputes tend to centre however on replacement and renovation. Former residents say a new kitchen or bathroom, or completely replacing floor coverings, is an upgrade that they should not be asked to fund under refurbishment requirements. Significant improvements in age friendly design may however have occurred since the former resident moved in. Shower recesses may require redesign to be now considered safe and suitable for older people to use. Two toilets may be expected. Older units may not be designed for 'in home' aged care aids or wheelchairs. Doorways may need expanding. Benches may not be at the optimum height. Some consider dishwashers to be an essential white good rather than a luxury item. Increasing integration of technology with household goods also means chattels can require replacing. For prospective residents "reasonable condition" for unit reoccupation is not just a case of good paintwork.

The distinction between repair or replacement that uses original material or equipment, necessary replacement with more modern material or equipment and works so extensive that they should be regarded as upgrade or improvement is hazy.[205] There are however existing definitions / guides / approaches which can be used. Part 8.3 discussed the way the ATO distinguishes between three categories of capital works – repair, maintenance and improvement. In summary:

- repair – usually partial and restores something already there to its original state or function efficiency. Can involve renewal or replacement of subsidiary parts of a whole. Can include a minor, incidental degree of improvement, addition or alteration. Repairs can improve a part of the property without amounting to an improvement of the property as a whole;

- maintenance – work that prevents or anticipates deterioration including loss of function (example, painting or oiling wood). Work on current deterioration that prevents further deterioration is generally a repair; [206] and

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[205] A recent Supreme Court decision observed, the RV Regulations (WA) (not the RV Code (WA)) draw a distinction between "repair and replacement on the one hand and upgrades on the other" with regard to reserve funds. (*Bales v CHC (St Louis) Pty Ltd* [2018] WASC 137, paragraphs 19 and 20.) However, what this means in practice and in regard to refurbishment is often unclear.

[206] Australian Taxation Rulings, TR 97/23. https://www.ato.gov.au/law/view/document?docid=TXR/TR9723/nat/ato/00001

- improvement – makes something better than it was originally or provides something in a new and more valuable or desirable form. Improves the property's income production, significantly enhances its saleability or market value or extends its expected life. Use of different, more modern materials is not determinative – this may simply restore function that is marginally more efficient or marketable, rather than alter the character of the item or function.

Consumer Protection considers that these distinctions would be useful in clarifying a former resident's refurbishment obligations.

Other jurisdictions

The Australian Capital Territory, New South Wales and Queensland currently regulate the extent to which residents fund refurbishment through an exit fee. Each requires all former residents to fund reinstatement. They differ in whether a residence contract can also require residents who share in an upfront payment increase to contribute to improvements (upgrade). Table 9.1 sets out the main features of the other jurisdictions' legislation. Table 9.2 provides detail as to their differences:

Victoria is currently consulting on whether it should regulate refurbishment.[207]

TABLE 9.1 – REFURBISHMENT OBLIGATIONS OTHER JURISDICTIONS

ACT	NSW	QLD
A resident who is not a registered interest holder (ie must receive at least 50% of any upfront payment increase): • must leave the premises as nearly as possible in the same condition as the property report excluding fair wear and tear and agreed renovations or alterations during residence; and • cannot be required to fund refurbishment. "Refurbishment" means any improvement of the premises that is more than what is needed to restore them to the condition they were in (excluding fair wear and tear) at the start of their occupation.[208]	A resident who is not a registered interest holder (ie must receive at least 50% of any upfront payment increase) must leave the premises as nearly as possible in the same condition fair wear and tear excepted as they were in at the beginning of the residence contract. New contracts cannot require a resident to fund refurbishment. "Refurbishment" means any improvement of the premises in excess of that required to reinstate the premises to the condition they were in (fair wear and tear excepted) at the commencement of their occupation.[209]	Section 58(1) - a resident must leave the accommodation in the same condition as it was in when occupation commenced save for fair wear and tear and agreed renovations or other changes during residence.[210] The cost of renovation work must be paid by the resident in the same proportion that they share in any increase in the price, and otherwise by the operator.[211] "Renovation work" means replacement or repairs other than reinstatement work. "Reinstatement work" means replacements or repairs reasonably necessary to reinstate the accommodation unit to the condition required under section 58(1).[212]

207 Review of the *Retirement Villages Act 1986* (Vic), Issues Paper, 2019, Consumer Affairs, Victoria, 47.

208 *Retirement Villages Act 2012* (ACT) Division 10.4.

209 *Retirement Villages Act 1999* (NSW) Division 10.4.

210 *Retirement Villages Act 1999* section 58.

211 Retirement Villages Act 1999 (Qld) section 59A(5).

212 ibid, section 59A and 56

TABLE 9.2 – OTHER JURISDICTIONS: REFURBISHMENT REGULATION

Does the RV legislation:	ACT	NSW	QLD	NT, SA, TAS, VIC
Deal with refurbishment:	✓	✓	✓	×
Distinguish between reinstatement and renovation and improvement:	✓	✓	✓	×
Limit resident obligations to reinstatement:	✓	✓ Since 1999 new contracts cannot require a resident to pay for any refurbishment	✓	×
If resident shares upfront payment increase – require them to pay for renovation or allow contract to do so:	✓	×	✓ In proportion to the share	×

Proposal 9.1 – clarifying current RV legislation refurbishment obligations

The continuing refurbishment disputes and discussion above raises the question of whether the RV legislation's current balance between reinstatement and improvement and between contract and legislation is correct. This reform proposal focuses on the first question.

The RV legislation distinguishes between reinstatement works and improvement works by:

- **replacing the term refurbishment works with terms that distinguish between reinstatement and improvement;**
- **providing that reinstatement means (words to the effect) the works reasonably necessary to restore vacated premises to the condition they were in when first occupied (the precise meaning will be settled in drafting);**
- **expressly excluding:**
  - **fair wear and tear; and**
  - **alterations made with the operator's consent without a requirement for premises to be restored to their original condition on departure,**

  from the works required to reinstate the vacated unit to its previous condition;
- **providing that improvement means (words to the effect) works that improve the vacated unit's value or marketability as part of the RV product or that extends the life of a unit or changes the function of part of it or a fixture (ATO approach - the precise meaning will be settled in drafting); and**
- **expressly providing that reinstatement includes a minor, incidental level of improvement but not work that alters the function or character of a fixture or the property or that significantly enhances the marketability or sale value of an RV product relating to the vacated unit (ATO approach).**

Impact analysis

The following table summarises the benefits and disadvantages of the proposal.

Potential benefits	Potential disadvantages
• Clarifies resident refurbishment obligations. • Provides a necessary standard for judging where to draw the line between reinstatement and improvements that go beyond restoring premises to a reasonable condition having regard to current village standards. • Provides additional transparency in the level of refurbishment a contract requires a resident to fund through an exit fee.	• Does not resolve issues in contracts using different terms or consumers' ability to make an informed decision as to accepting the risks in agreeing to fund improvement. This can be addressed separately, see Issue 9.2 below.

Questions

9.1.1	*Do you agree that the RV legislation should distinguish between reinstatement works and improvement works? If not, why not?*
9.1.2	*Do you agree with the meaning of reinstatement used in New South Wales and Queensland? If not, why not and what should be different?*
9.1.3	*In particular, do you agree that rectifying fair wear and tear should be expected from the works required to restore premises to their original condition? If not, why not?*
9.1.4	*Do you agree that rectifying alterations the operator has agreed to without a requirement for the premises to be returned to their original condition on departure should be excluded from reinstatement works?*
9.1.5	*Do you agree that the meaning of improvement should be in line with the ATO meaning? If not, why not and what should the meaning be?*
9.1.6	*Do you agree that the RV legislation should expressly include minor, incidental improvements in reinstatement? If not, why not?*
9.1.7	*What are the cost implications of the proposal?*
9.1.8	*Is there a better way to deal with this issue?*

Implementation issues

Do 'reinstatement' and 'improvement' need to be further defined?

When replacement ceases to be reinstatement and becomes improvement can be a difficult line to draw. Part 8 provided a link to current ACT Guidelines for capital maintenance and replacement in retirement villages. Similar guidelines could be developed for WA.

An issue in providing guidelines is that there is a higher risk of loopholes being found than just a general statement of the standard in the RV legislation. It will also take considerable government and stakeholder resources to develop and require more constant updating than the general standard.

There is also a question in whether guidelines should remain administrative only, so that they do not bind operators or residents, or should be given legislative force. For example, through requiring SAT to have regard to them in resolving refurbishment disputes or deciding whether the RV legislation has been breached. If they are given legislative force, the resources required to develop and update them will be greater.

Questions

9.1.9	*Should guidelines similar to those used in the ACT be produced to give greater clarity to the distinction between reinstatement and improvement? If not, why not?*
9.1.10	*If guidelines are introduced, do you agree that SAT should be required to have regard to them in resolving refurbishment disputes? If not, why not?*
9.1.11	*Can you think of another way to address this issue?*

Contract terms

As discussed above, there is an issue in the potential for contracts to use different terms to the RV legislation to describe resident refurbishment obligations. Requiring contracts to use the RV legislation terms for reinstatement and improvement may involve some operator cost in altering standard form contracts. It will however significantly reduce contract complexity and resident understanding of the works they will fund.

Questions

9.1.12	*Should residence contracts be required to use the RV legislation terms for reinstatement and improvement when identifying the refurbishment works a resident is required to fund through an exit fee?*

PART 9.2: SHOULD CONTRACTS DETERMINE THE REFURBISHMENT WORKS RESIDENTS CAN BE REQUIRED TO FUND THROUGH EXIT FEES?

Issue 9.2: Fairness in Exit Fees

The reforms proposed in Issue 9.1 increase clarity for consumers. A question not addressed however is: having regard to the impediments to informed consumer decision making identified in CRIS 1, Part 3, does clarity in contractual obligations achieve fairness between resident and operator interests? There may need to be some limits on what an operator and resident can agree through negotiation prior to entering into a residence contract.

Objective

To ensure residents' refurbishment obligations with respect to the unit they vacate are fair.

Discussion

Variety in ways refurbishment can be funded increases complexity of purchasing decision

Refurbishment is a business expense that village operators will recoup from their residents. Most do so through a combination of requiring former residents to pay a separate refurbishment fee that partially or wholly funds certain works and setting the upfront payment/DMF/exit entitlement mix so that it covers any works beyond those the resident funds through that fee. Other operators do not impose a refurbishment fee. They recover refurbishment in full through the upfront payment/DMF/exit entitlement mix. The difference to residents and operators in which funding model is used is in where the business risk lies.

Some residents do not benefit from improvements

The greater the extent to which refurbishment is paid for through a separate fee, the less risk an operator bears of underestimating the cost of refurbishment in their upfront payment/DMF/exit entitlement mix, and so receiving less profit at the end of the day. Separate fees for refurbishment pass on this business risk to the consumer. As discussed in Part 6, Issue 6.1, consumer acceptance of risk is not inherently unfair. A consumer may receive benefits that offset that risk. A separate refurbishment fee can have certain consumer benefits. It may result in a lower upfront payment, making the RV product more initially affordable. This benefit assumes however that consumers are in a position to be able to make an informed decision about the relationship between the upfront payment and refurbishment fees.

There are two issues with separate refurbishment fees. The extent of refurbishment a unit will require depends on an unknown, the length of residence. For the reasons discussed in CRIS 1, Part 3, prospective residents are likely to underestimate the amount of a refurbishment fee and its impact on their exit entitlement.[213] In these circumstances, it is not clear that consumers are able to make an informed decision as to the relative merits of a price structure with or without a separate refurbishment fee or that the benefit they receive offsets their acceptance of the risk of refurbishment costs beyond reinstatement. Whether resident benefit offsets their acceptance of the business risk inherent in separate refurbishment fees is also particularly questionable when a resident does not share in any return from the unit upgrade - that is, they have no share in any upfront payment increase. As seen in Table 6.2 in Part 6, not all residents share in an upfront payment increase.

Both these matters raise the questions of whether the RV legislation should restrict resident funding of improvements to price structures in which they share in any upfront payment increase.

Some former residents agree to fund additional refurbishment after leaving a village

In considering restrictions on refurbishment funding, it is necessary to recognise that some former residents (or their families) want refurbishment works beyond those an operator may contemplate to occur. Some former residents reach agreement after their departure from the village to partially fund an upgrade beyond the standard their contract requires. This may be because the former resident wants the unit to be brought to current market standards to speed exit entitlement payment or increase the amount of that payment. This dynamic confirms that some residents do see themselves as receiving a return on their refurbishment expenditure.

Agreement on sharing refurbishment expense at the conclusion of a residence lease does not raise the same issues as agreement prior to residence.

Complexity of the RV legislation structure – indirect regulation[214]

The RV legislation's refurbishment provisions are summarised above. It was noted in Issue 9.1 that one reason for refurbishment disputes continuing is that both residents and operators find the provisions difficult to apply. The RV legislation indirectly addresses refurbishment through providing what a contract can or cannot provide, rather than clearly setting refurbishment obligations in the RV legislation itself. This indirect approach gives rise to some uncertainty in the degree to which contracts can set the standard of the refurbishment a resident can be required to fund. As seen in Table 9.2, some of the other jurisdictions directly regulate refurbishment. Their RV legislation sets out resident obligations rather than provides what a contract may or

[213] Part 3 explained why fees payable on exit are difficult for consumers to properly value and take into account in their decision making.

[214] The RV legislation structure for refurbishment regulation will be reviewed once the substantive reforms have been settled.

may not include by imposing refurbishment obligations on a resident. This gives less scope for uncertainty in what a contract may or may not require.

Increasing regulation of refurbishment will provide Consumer Protection with a greater role in enforcement

The discussion above noted that refurbishment disputes occur when residents are particularly vulnerable and the reasons why they might not pursue them. Consumer Protection is aware that residents have not referred many refurbishment disputes to SAT.[215]

Practical realities appear to be undermining the effectiveness of the comprehensive powers stage one reforms gave the SAT over refurbishment disputes. As with other problems facing retirement village residents, the ability for Consumer Protection to take enforcement action may be a more effective deterrent to excessive refurbishment demands than the ability for residents to refer a matter to SAT. Setting resident funded refurbishment standards in the RV legislation rather than leaving them to contracts, as occurs in some other jurisdictions, would provide a basis for this.[216]

Other jurisdictions

As seen in Table 9.2, the Australian Capital Territory, New South Wales and Queensland require all residents to fund reinstatement through an exit fee. In New South Wales this is restricted to residents living in a village under old contracts only. Contracts entered into after section 164 of the New South Wales Retirement Villages Act came into effect in 1999 cannot require a resident to pay for any refurbishment, including reinstatement.

The Australian Capital Territory and New South Wales do not allow operators to recover improvement costs through an exit fee. Queensland allows a contract to require a resident to fund improvement but only in proportion to the share of any upfront payment increase that the resident will receive.

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[215] There is no clear public record as SAT public records do not always reveal the subject of applications withdrawn at mediation stage.

[216] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report). This is consistent with the intent in Final Report Recommendation 77. It is also consistent with Final Report recommendation 90, that Consumer Protection continue to strengthen its investigation, compliance, prosecution and dispute resolution functions.

TABLE 9.3 – OTHER JURISDICTIONS: PROPERTY CONDITION REPORT

Does the RV legislation	ACT	NSW	QLD	SA
Require a property condition report on entry	✓	✓	✓	✓
If so, is that provided before or after occupation	Attached to first contract entered into	14 days before contract signed If premises still being constructed – 14 days before occupation	Before	After 10 business days
Give a resident a right to be present at inspections	✓	✓	✓	×
Allows residents to provide their comments on the report **If so, how long do residents have to consider the report**	✓ 14 days of provision	✓ 14 days of provision	✓ 14 days of provision	×
Require a property condition report on departure	×	×	✓	✓
Prescribe a form for the report	×	✓	✓	×
Require the operator to keep the report for a specified time after resident departure	×	×	✓ 2 years	×
Make a failure to provide the report/complete in accord with prescribed process and offence	✓ Operator cannot recover payment for any damage to the premises	✓ Operator cannot recover payment for any damage to the premises	✓	×

Options

The following options are being considered.

Option A – status quo. The RV legislation continues to allow residence contracts to require residents to fund improvements.

Option B – The RV legislation be amended to provide that:

- **all residents are required to pay for reinstatement through a refurbishment fee; and**
- **contracts can require former residents to fund improvements but only in proportion to their share in any upfront payment increase (Queensland approach).**

Option C – The RV legislation be amended to provide that all residents must fund reinstatement but cannot be required to fund improvement (Australian Capital Territory and previous New South Wales approach).

Impact analysis

All options clarify the works a resident can be asked to fund. They differ in the extent to which refurbishment obligations remain a contract matter.

The following table outlines some potential benefits and disadvantages of the options.

	Potential benefits	Potential disadvantages
Option A – status quo	• Provides transparency in the unit refurbishment works a resident will fund on departure. • Simplifies contracts making comparison easier. • No disruption to operator business models.	• Unlike Options B and C, does not reduce the issues in informed consumer decision making. • Permits unfair resident obligations when a resident does not share in any upfront payment increase. • More limited Consumer Protection enforcement role than Options B or C as disputes remain largely a breach of contract matter. • Some business cost in reviewing standard contract terms.
Option B – the RV legislation be amended to provide that: • all residents are required to pay for "reinstatement" through a refurbishment fee; and • contracts can require residents to fund improvements but only in proportion to their share in any upfront payment increase.	• The same advantages as Option A. • Represents a fairer allocation of risk than Option A – relates acceptance of improvement expense (risk) to the prospect of return (benefit from accepting the risk). • Provides better equity in obligations for all residents across villages than Option A. • Has greater scope for Consumer Protection involvement in enforcement than Option A.	• Disrupts operator price structures that do not involve a separate refurbishment fee. • Residents may prefer inclusion of refurbishment in their upfront payment/DMF/exit entitlement mix. • May lead to a higher upfront payment/DMF/exit entitlement mix.
Option C – the RV legislation be amended to provide that: • all residents are required to pay for "reinstatement" through a refurbishment fee; and • residents cannot be asked to fund improvements.	• The advantages of Options A and B. • Goes further than Option B to simplify contracts and the RV legislation. • Provides equity in obligations between all village residents, simplifying comparison between RV products.	• The Option B disadvantages are more widespread and likely to occur. • May be unfair when residents share in any increase in value generated by improvements.

Questions

9.2.1	*Which option do you prefer? Why?*
9.2.2	*If you prefer Option B, should contracts be restricted to requiring residents to fund improvements in proportion to their share in any total price or upfront payment increase? If not, why not?*
9.2.3	*What are the cost implications of each Option?*
9.2.4	*Is there a better way to deal with this issue?*

Implementation issues

Should former residents who are not required to fund upgrades be able to agree to contribute to funding after leaving a village?

As noted above some former residents (or their families) currently enter into agreements with operators after they leave a village to fund more extensive refurbishment works than their residence contract requires. They do this to maximise their exit entitlement and/or encourage its more speedy payment through making the unit more attractive to prospective residents and so more quickly reoccupied.

If Option C above is implemented, the RV legislation might prevent this occurring. Entering into a refurbishment agreement at the end of a residence lease does not pose the same issues for informed decision making as doing so prior to entering into a village. At the end of a residence lease, the expense can be quantified and the risk is lower as the market conditions and expected return can be assessed. A decision made on entry to a village is likely to undervalue the expense and risk that will arise in the distant future.

There may be a risk of exploitation of vulnerable residents who require speedy exit entitlement payment. This could be managed through requiring any agreement as to resident contribution to limit the contribution to the proportion of the share in increased market value that they will receive.

Questions

9.2.5	*Should former residents be able to enter into an agreement with the operator to contribute to upgrade (or increase their contribution) after they leave a village? If so, why?*
9.2.6	*If so, should the extent to which they can do so be limited to their proportion of any share in the increase in market value (or increased share they will enjoy as a result of funding the additional works)? If not, why not?*
9.2.7	*Can you think of another way to address this issue?*

PART 9.3: PROVISION OF PROPERTY CONDITION REPORTS

Issue 9.3: providing a property condition report to residents

Refurbishment disputes can involve different views as to the condition of the premises at the time they were occupied by the former resident. In part, this can be because memories fade over a lengthy residence. Refurbishment may also involve persons without personal knowledge of the premises condition at the time they were occupied. For example, former residents' family members (or executors of their estate) or new management staff.

A property condition report at the time of entry into a village has potential to reduce refurbishment disputes after those premises are vacated. It also has potential to reduce the disputes that arise from time to time as to the work to be performed before a resident moves into the premises.

In Consumer Protection's experience not all retirement villages provide a property condition report to a new village resident.

Objective

To minimise the scope for disputes regarding works to be performed prior to entry into occupation of a unit or that are required for reinstatement of vacated premises.

Discussion

Final Report and stage one reforms

Final Report **Recommendation 71** was that the RV legislation be amended to adopt a remarketing policy with provisions similar to those then contained in the South Australian legislation. One of the provisions in the SA remarketing policy legislation was that an operator had to have a remarketing policy that set out the requirements for a property condition report regarding the vacated premises.

The RV legislation does not currently require an operator to provide a resident with a property condition report on entry to or exit from the premises.

Property condition report helpful in similar contexts

The *Residential Tenancies Act 1987* (WA) has since 2011 required lessors to provide tenants with a property condition report on entering into occupation and departure. Consumer Protection's experience is that this has proved useful in minimising disputes. It has also provided useful evidence in investigations and any eventual court proceedings.

The main features of section 27C of the *Residential Tenancies Act 1987 (WA)* are:

- a landlord must provide a tenant with two copies of a property condition report within 7 days of entry into occupation;
- regulations prescribe the information to be in the report and a minimum information form. The relevant form is at Appendix 9.1. This could be adapted for use in retirement villages. Provision could also be made for photographs or video records;
- a tenant who disagrees with any information in the report must mark it to indicate the disagreement and return a copy to the landlord within 7 days;
- if the tenant does not return a copy of the report, they are taken to have agreed it is accurate;
- within 14 days of a tenant departing a unit, the landlord must inspect the unit, prepare a final report as to its condition and provide a copy of that report to the resident; and
- the tenant is to be given a reasonable opportunity to be present during the inspection.

If a similar process were adopted, some of the detail requires adapting for the RV context. The time limits on entry for example need to align with cooling off periods. These matters are discussed as implementation details below.

Other jurisdictions

The Australian Capital Territory, New South Wales, South Australia and Queensland make provision for operators to provide residents with a property condition report on entry, on departure or both. The main features of each jurisdiction's legislation are set out in Table 9.4.

TABLE 9.4 – OTHER JURISDICTIONS PROPERTY CONDITION REPORT

Does the RV legislation:	ACT	NSW	QLD	SA
Require a property condition report on entry	✓	✓	✓	✓
If so, is that provided before or after occupation	Attached to first contract entered into	14 days before contract signed. If premises still being constructed – 14 days before occupation	Before	After 10 business days
Give a resident a right to be present at inspections	✓	✓	✓	×
Allow residents to provide their comments on the report: If so, how long do residents have to consider the report	✓ 14 days of provision	✓ 14 days of provision	✓ 7 days of occupation	×
Require a property condition report on departure	×	×	✓	✓
Prescribe a form for the report	×	✓	✓	×
Require the operator to keep the report for a specified time after resident departure	×	×	✓ 2 years	×
Make failure to provide or complete the report in the prescribed form an offence	✓ Operator cannot recover payment for any damage to the premises	✓ Operator cannot recover payment for any damage to the premises	✓	×

Issue 9.3: Proposal for consultation

The following proposal is being considered:

The RV legislation be amended to require:

- **operators to provide prospective residents with a property condition report for the unit they will occupy within a prescribed period prior to signing a residence contract;**
- **that the inspection for the report occur in the presence of the resident or their representative, unless the resident agrees in writing that it will occur in their absence;**
- **a prospective resident is to either sign the report as accurate or return a copy to the operator with areas of disagreement marked within a prescribed period; and**
- **the property condition report to contain the detail and be in the form prescribed in the RV legislation.**

Timing for report provision

As seen in Table 9.4, some jurisdictions require a property condition report to be provided before a resident enters into occupation of a unit and some, after that has occurred. Consumer Protection proposes that the property condition report be provided *prior* to a resident signing the residence contract, and for a resident to be present during the inspection for that report. This allows a resident time to consider the report, and the operator to provide its response to any resident disagreement with it, during the period residents have to consider the contract and disclosure information. There are a number of reasons why this might be beneficial.

As well as clarifying the unit's current condition prior to the prospective resident entering into the contract, early provision of the property report allows the operator and resident to reach agreement as to any works required for the resident to take up occupation. This avoids some of the issues in consumers being reluctant to reconsider the decision to enter the village after a contract has been signed (see CRIS 1, Part 3). It allows both the prospective resident and operator to take into account the manner in which any issues are approached and resolved in the decision to enter the village.

Also, Consumer Protection's experience in residential tenancy is that premises can be damaged during moving in. Provision of a property condition report prior to the resident moving in, reduces the potential for residents to dispute responsibility for any significant damage caused in the moving in process.

Finally, provision of the property condition report prior to residence may permit simplification of the current prescribed pre-contract disclosure form and perhaps

contracts. This is because there may be some overlap in the information that the report contains and the information in the other documents. This benefit is not included in the analysis table below as the extent to which this can occur will depend on what information is prescribed for the property condition report.

Impact analysis

The following table outlines some potential benefits and disadvantages of the proposal.

Potential benefits	Potential disadvantages
With regard to refurbishment disputes: • reduces scope for disputes as to the condition of premises at occupation and therefore the extent of works required; • provides a basis for persons who did not inspect the premises at occupation to make decisions as to what works are necessary; and • provides evidence for speedier resolution of disputes that do arise. With regard to disputes as to the works required on entry, provides a written record of the agreed works with the advantages noted above. Uniform consumer rights and information across the RV market. May provide a useful opportunity for residents and operators to develop an understanding of each other's approach to property condition, maintenance and repair within the cooling off period (see implementation details below).	May be an additional cost for operators who do not already provide a property condition report. A prescribed form may not be consistent with some current forms, resulting in some conversion costs. Inspection with the resident requires a new inspection if the resident does not proceed to signing the residence contract/exercises their right to terminate the contract during the cooling off period.

Questions

9.3.1	*Do you agree that operators should be required to provide prospective residents with a property condition report about their unit? If not, why not?*
9.3.2	*If so, do you agree that report should be provided before a resident signs their residence contract? If not, why not?*
9.3.3	*Do you agree that a resident should have the right to be present during the inspection for the property condition report? If not, why not?*
9.3.4	*Do you agree that a resident should be required to either sign the property condition report as accurate or provide the operator with a copy on which disagreements are marked within a prescribed period? If not, why not?*
9.3.5	*Should a property condition report be in a prescribed form? If not, why not?*
9.3.6	*Do you think the Residential Tenancies Act 1987 (WA) property condition report can be adapted for use in retirement villages? (see Appendix 9.1) If so, what changes are required? If not, why not?*
9.3.7	*Should operators be required to keep the property condition report for a specified period of time after leaving a village? If not, why not? If so, what should that period be?*
9.3.8	*Can you think of other ways to address this issue?*
9.3.9	*What would be the cost implications of this proposal? Please provide quantifiable information.*

Implementation issues

Should a resident be required to respond to the property condition report before or after they move into the unit?

If a requirement to provide a property condition report is introduced, one issue that needs to be considered is whether a resident should be required to provide their acceptance or disagreement with the property condition report before or after entering into occupation of the unit. As discussed above, providing it before allows any disputes to be identified and resolved during the cooling off period (this expires on entry into occupation). It minimises potential for a resident to raise damage occurring on moving in as a pre-existing issue. Time limits may however be tight as an operator is unlikely to want to conduct the inspection before a resident signals serious interest in the unit.

Requiring a resident to provide their comment after they move in (as occurs in the residential tenancies context) however allows the resident to record any issue that

would not necessarily be apparent on an inspection. For example, low water pressure or a tile that is loose.

As seen in Table 9.4, Queensland requires the property condition report to be returned to an operator within seven days of entry into occupation. The Australian Capital Territory and New South Wales require it to be returned within 14 days of being provided. Both the Australian Capital Territory and New South Wales have a settling in period for a resident to rescind a retirement village contract without penalty (other than paying rent and recurrent charges for the residence period). This means that whether or not a resident has moved into the premises is less significant in the Australian Capital Territory and New South Wales.

A later CRIS will consult on whether Western Australian residents should have a settling in period.

Questions

9.3.10	*Should a resident be required to provide their acceptance or disagreement with the property condition report before or after entering into occupation of the unit?*
9.3.11	*How long should a resident have to consider the property condition report?*
9.3.12	*Can you think of other ways to address this issue?*

Should operators be required to provide a property condition report on departure?

The discussion about Issue 9.1 noted that the RV Code currently requires operators to provide detailed statements of the refurbishment works required, their cost and a schedule for them to occur. There is not however an obligation to provide a property condition report after departure from the unit. This raises the question of whether a property condition report would assist in reducing the scope for dispute.

Questions

9.3.13	*Do you think an operator should be required to provide a former resident with a property condition report about the vacated unit shortly after they leave the village?*
9.3.14	*If so, why? What benefits do you see?*
9.3.15	*If not, why not? What adverse consequences do you see?*

What should the consequence of an operator not providing a property condition report/a resident not signing the report or returning it with comments should be?

Table 9.3 notes that the Australian Capital Territory and New South Wales provide that an operator cannot recover reinstatement expenses if the property condition report is not provided.

The other jurisdictions also make failure to provide a property condition report an offence. Some make failure to prepare the report in the manner prescribed and with the detail required an offence. Consumer Protection considers this is a more appropriate enforcement mechanism than a SAT application. A criminal offence provision however provides no remedy for residents.

Together these provisions provide a strong incentive for operators to comply with the RV legislation regarding property condition reports.

If a resident neither signs the property condition report as correct nor returns it with areas of disagreement marked, the potential for later dispute remains open. The *Residential Tenancies Act 1987* (WA) deals with this by deeming a report accepted as accurate if no disagreement is raised within the prescribed time period. This provides a strong incentive for residents to raise issues at the outset, minimising later disputes arising from memory faults or a vexatious approach to refurbishment.

Questions

9.3.16 *Do you think that an operator who does not provide a property condition report should be prevented from recovering reinstatement costs from a former resident? If not, why not?*

9.3.17 *Do you think failure to provide a property condition report should also be an offence? If not, why not?*

9.3.18 *Do you think that a resident who does not return a copy of the property condition report to an operator within the prescribed period (whether signed or raising areas of disagreement) should be taken to have agreed the report is accurate? If not, why?*

List of Questions for Part 9

Issue 9.1	Clarifying the refurbishment works a resident can be asked for fund.

Proposal for consultation	The RV legislation distinguish between reinstatement works and improvement works by:
	• replacing the term refurbishment works with terms that distinguish between reinstatement and improvement;
	• providing that reinstatement means (words to the effect) the works reasonably necessary to restore vacated premises to the condition they were in when first occupied (the precise meaning will be settled in drafting);
	• expressly excluding:
	  • fair wear and tear; and
	  • alterations made with the operator's consent without a requirement for premises to be restored to their original condition on departure,
	from the works required to reinstate the vacated unit to its previous condition;
	• providing that improvement means (words to the effect) works that improve the vacated unit's value or marketability as part of the RV product or that extends the life of a unit or changes the function of part of it or a fixture (ATO approach - the precise meaning will be settled in drafting); and
	• expressly providing that reinstatement includes a minor, incidental level of improvement but not work that alters the function or character of a fixture or the property or that significantly enhances the marketability or sale value of an RV product relating to the vacated unit (ATO approach).

Questions	
9.1.1	Do you agree that the RV legislation should distinguish between reinstatement works and improvement works? If not, why not?
9.1.2	Do you agree with the meaning of reinstatement used in New South Wales and Queensland? If not, why not and what should be different?
9.1.3	In particular, do you agree that rectifying fair wear and rear should be expected from the works required to restore premises to their original condition? If not, why not?
9.1.4	Do you agree that rectifying alterations the operator has agreed to without a requirement for the premises to be returned to their original condition on departure should be excluded from reinstatement works?
9.1.5	Do you agree that the meaning of improvement should be in line with the ATO meaning? If not, why not and what should the meaning be?
9.1.6	Do you agree that the RV legislation should expressly include minor, incidental improvements in reinstatement? If not, why not?
9.1.7	What are the cost implications of the proposal?
9.1.8	Is there a better way to deal with this issue?

9.1.9	Should guidelines similar to those used in the ACT be produced to give greater clarity to the distinction between reinstatement and improvement? If not, why not?
9.1.10	If guidelines are introduced, do you agree that SAT should be required to have regard to them in resolving refurbishment disputes? If not, why not?
9.1.11	Can you think of another way to address this issue?
9.1.12	Should residence contracts be required to use the RV legislation terms for reinstatement and improvement when identifying the refurbishment works a resident is required to fund through an exit fee?
Issue 9.2	**How should resident refurbishment obligations be charged?**
Options for consultation	**Option A – status quo. The RV legislation continues to allow residence contracts to require residents to fund improvements.** **Option B – The RV legislation be amended to provide that:** • **all residents are required to pay for reinstatement through a refurbishment fee; and** • **contracts can require former residents to fund improvements but only in proportion to their share in any upfront payment increase (Queensland approach).** **Option C – The RV legislation be amended to provide that all residents must fund reinstatement but cannot be required to fund improvement (Australian Capital Territory and previous New South Wales approach).**
Questions	
9.2.1	Which option (A, B or C) do you prefer? Why?
9.2.2	If you prefer Option B, should contracts be restricted to requiring residents to fund improvements in proportion to their share in any total price or upfront payment increase? If not, why not?
9.2.3	What are the cost implications of each Option?
9.2.4	Is there a better way to deal with this issue?
9.2.5	Should former residents be able to enter into an agreement with the operator to contribute to upgrade (or increase their contribution) after they leave a village? If so, why?
9.2.6	If so, should they extent to which they can do so be limited to their proportion of any share in the increase in market value (or increased share they will enjoy as a result of funding the additional works)? If not, why not?
9.2.7	Can you think of another way to address this issue?

Issue 9.3	Provision of property condition reports
Proposal for consultation	**The RV legislation be amended to require:** • **operators to provide prospective residents with a property condition report for the unit they will occupy within a prescribed period prior to signing a residence contract;** • **that the inspection for the report occur in the presence of the resident or their representative, unless the resident agrees in writing that it will occur in their absence;** • **a prospective resident is to either sign the report as accurate or return a copy to the operator with areas of disagreement marked within a prescribed period; and** • **the property condition report to contain the detail and be in the form prescribed in the RV legislation.**
Questions	
9.3.1	Do you agree that operators should be required to provide prospective residents with a property condition report about their unit? If not, why not?
9.3.2	If so, do you agree that report should be provided before a resident signs their residence contract? If not, why not?
9.3.3	*Do you agree that a resident should have the right to be present during the inspection for the property condition report? If not, why not*
9.3.4	Do you agree that a resident should be required to either sign the property condition report as accurate or provide the operator with a copy on which disagreements are marked within a prescribed period? If not, why not?
9.3.5	Should a property condition report be in a prescribed form? If not, why not?
9.3.6	Do you think the *Residential Tenancies Act 1987 (WA)* property condition report can be adapted for use in retirement villages? (see Appendix 9.1) If so, what changes are required? If not, why not?
9.3.7	Should operators be required to keep the property condition report for a specified period of time after leaving a village? If not, why not? If so, what should that period be?
9.3.8	Can you think of other ways to address this issue?
9.3.9	What would be the cost implications of this proposal? Please provide quantifiable information.
9.3.10	Should a resident be required to provide their acceptance or disagreement with the property condition report before or after entering into occupation of the unit?
9.3.11	How long should a resident have to consider the property condition report?
9.3.12	Can you think of other ways to address this issue?
9.3.13	Do you think an operator should be required to provide a former resident with a property condition report about the vacated unit shortly after they leave the village?
9.3.14	If so, why? What benefits do you see?

9.3.15	If not, why not? What adverse consequences do you see?
9.3.16	Do you think that an operator who does not provide a property condition report should be prevented from recovering reinstatement costs from a former resident? If not, why not?
9.3.17	Do you think failure to provide a property condition report should also be an offence? If not, why not?
9.3.18	Do you think that a resident who does not return a copy of the property condition report to an operator within the prescribed period (whether signed or raising areas of disagreement) should be taken to have agreed the report is accurate? If not, why?

PART 10: RECOGNISING COMPLEX OPERATING STRUCTURES AND REDEFINING "ADMINISTERING BODY"

This Part deals with issues arising from complex village ownership and operating structures.

In summary, it proposes options for implementing the Final Report recommendation that the RV legislation term "administering body" be redefined (**Recommendation 87**). Proposals include that:

- the entity (or entities) that controls provision of the RV product have primary responsibility for ensuring RV legislative obligations are met;
- a new level of manager responsibility; and
- better clarity in landowner responsibilities.

This Part continues the re-examination (commenced in CRIS 1) of the way the RV legislation deals with fundamental RV industry features. The proposals and discussion provide context for later CRIS issues, including: whether the RV Act term "retirement village scheme" requires redefinition; broader issues posed by joint venture and other complex operating structures (for example, villages co-located with other land use); and implementing the Final Recommendation for a public village database (as it provides the basis for deciding the details as to ownership and operating structures that database needs to contain).[217]

More immediately, the proposal for the new level of manager responsibility supports the Part 7 (capital works and reserve funds), Part 9 (operator budget obligations) and Part 11 (operator conduct obligations) proposals. In particular, it allows consideration of what operator obligations mean for day to day management. (Part 11 provides an example of how the operator obligations it proposes can be applied to improve management standards.)

PART 10.1: REDEFINING ADMINISTERING BODY

Issue 10.1: Redefining term "administering body"

The RV legislation uses the term "administering body" to identify the entity on which it imposes operator obligations. It is therefore a critical term.

At present, "administering body" means: "the person by whom, or on whose behalf, the retirement village is administered and includes a person (other than a resident) who is

[217] One of the problems issue 10.1 considers is that village owners may lease land rather than own it. This Part therefore also begins the process of implementing Final Report Recommendation 92 - that the RV legislation make better provision for the circumstance of Crown land leased by a village operator. As this Part's proposals address some enforcement issues, it also partly implements Final Report Recommendation 90 - that Consumer Protection strengthen its investigation and compliance functions.

the owner of land within the retirement village".[218] As noted, Final Report **Recommendation 87** was that "administering body" be redefined. The Final Report identified two problems with the current definition. These problems were that stakeholders:

- were "unclear as to whom the definition refers to"[219] - this is not fully explored in the Final Report itself but appears to relate to complex ownership and operating arrangements in which a number of different entities are involved in administering the village; and/or

- considered "use of the term "owner" [which means landowner] within the definition problematic in that lessees of land may have certain obligations in lieu of landowners".[220] This is also not fully explored but is often linked to villages situated on land leased from the Crown.[221]

Although **Recommendation 87** is linked to leases of Crown land, the Crown is not the only landowner that leases land for use as a retirement village but that is not itself involved in the village business. There is a wider, related problem. The RV Act is ambiguous in whether all landowners are necessarily administering bodies. In some provisions this appears to be the case but in others it does not.[222]

It probably does not need stating that the RV legislation should clearly identify the person or persons upon whom it imposes obligations. If it does not, those persons will not be aware of their responsibilities under it. Lack of clarity in who the administering body is (whether due to complex operating structures or uncertainty in whether it is the landowner) also creates uncertainty in resident and Consumer Protection rights enforcement. This uncertainty complicates, delays, makes more expensive and therefore discourages rights enforcement, which undermines the RV legislation protections.

Relevant to this, identification of the village administering body is likely to become even more complex with the emergence of multiuse developments and community title arrangements.

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218 *Retirement Villages Act 1992* (WA), section 3

219 Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 147.

220 ibid, 147.

221 ibid..Relevant to this, Recommendation 92 **-** that the RV legislation be amended to take into account situations whether retirement village land is Crown land – is a related recommendation. The Department of Regional Development and Lands concerns was that the RV Act protections such as the RV Act statutory charge should affect the operator's interests not those of the landowner in the circumstance that Crown leases have another mechanism that can be called upon for equivalent protections. That this was in fact the case was not determined during the review. A later CRIS deals with this aspect of Recommendation 92. (Final Report, 158-9.)

222 There is also some stakeholder uncertainty in whether obligations imposed directly on the landowner can be fulfilled by another person - for example, the RV Act states that a landowner can "cause" a memorial to be lodged (section 15(4)) but that they must notify the persons listed in section 15(5) of the RV Act that that has occurred. This type of ambiguity can be resolved in the drafting process once the reform proposals have been settled.

Objective

To:

- clarify the entity that has responsibility for ensuring RV legislation obligations are met; and
- ensure persons who control matters relevant to village operation have appropriate responsibilities.

Discussion

Why is identifying the administering body difficult?

Complex ownership and operating structures

One reason for it not being clear who the term "administering body" refers to is the complexity of village ownership and operating structures. Ownership and operating structures can involve multiple entities. Sometimes these are independent parties who operate the village as a joint venture, sometimes these are related entities within the same corporate group and sometimes there are complex sub-contract and share-holding arrangements.[223] Table 10.1, which summarises the ownership/operating structures in three villages, illustrates this complexity.

[223] A later CRIS will include in the proposal for a public retirement village database the question: of whether operators should be required to reveal the related entities in ownership and operating structures so there is transparency in profit points for a corporate group.

TABLE 10.1 – OWNERSHIP/OPERATING STRUCTURES IN THREE RETIREMENT VILLAGES[224]

Village 1 – There is a retirement village on land that is sometimes described as A's land and sometimes as B's land. A and B are members of the same corporate group. B is described as a property investor and wholly owned subsidiary of A. Generally B holds land which it leases to A. Another wholly owned subsidiary of A, C, manages B's property investment. It is not however clear whether A, or C on behalf of B, has built the retirement village. D, a further wholly owned subsidiary of A, either leases the village land from B or subleases it from A. D has contracted an entity that is not part of the corporate group, E, to manage the land and buildings – effectively the retirement village as D requires E to use the land and buildings as a retirement village. E advertises the village under its branding. E has a related entity, F, which undertakes RV product sale. It is D however who contracts with prospective residents, receives the upfront payments and recurrent charges and the village operational expenses are recorded against it (these operational expenses include lease fees it pays to A, possibly through B or C). D 'donates' the upfront payments it receives from residents, in part or in full, to A.
Village 2 - A retirement village is developed as part of a managed investment scheme. Village land is owned by company X. Management Company Y operates village. Numerous partnerships and sub-partnerships exist between the parties. Numerous agreements are entered into between the parties, including lease agreements, management and sub-management agreements, profit share agreements and loan agreements.
Village 3 - G, H and J are members of the same corporate group. G and H are different, wholly owned subsidiaries of J. G is the managing entity. H is the developer. G is located in a head office. There is also an onsite employee who is called 'the manager'. The village contractual scheme provides for an Advisory Board. The Advisory Board's members are: a person nominated by G; a person nominated by H; two persons nominated by the residents' committee and one independent member. G reports to the Advisory Board. The Advisory Board can (amongst other things) give the onsite employee manager directions. G can also give its employee directions. The Advisory Board has equal power with H to authorise village improvement, modernisation, extension or reduction to be funded from a village reserve fund. It can also amend village rules.

The current definition for "administering body" means that operator obligations are imposed on the person by whom, or on whose behalf, a village is *administered*. Applying the description *administered* does not greatly assist in identifying which entity or entities in the structures set out in Table 10.1 is responsible for RV legislation compliance. This is because in common usage the word *administer* has a range of meanings – "to manage and be responsible for the running of (a business, organization [sic]...)"; "to give help or

[224] Villages 1 and 3 are publicly available information regarding two WA villages. The managed investment scheme example is taken from a judgment in a court case. Villages operate under similar structures in WA.

service"; and "to direct or control (the affairs of a business, government …).[225] Any of these meanings could apply to different entities in Villages 1, 2 or 3.

Single or multiple administering bodies?

Retirement villages that have several owners and/or layers of management entities raise the question: does the RV Act contemplate one administering body only or can there be several?

Assuming there can be multiple administering bodies, a question arises as to whether they are all responsible for all RV legislation obligations being met? Or is an administering body only responsible for the specific obligations that relate to their individual responsibilities under their contracts with each other and residents?

Tribunals have tended to take the second approach. They rely on the contracts between the various operator entities and between those entities and residents to determine which entity is responsible for ensuring a specific RV legislation requirement is met.[226] One issue in this approach is that responsibilities can overlap. Diagram 10.2 illustrates the roles different entities may have in preparing a village budget.

Other issues in allowing private contracts between operating entities to dictate which entity will bear RV legislation responsibility include:

- a $2 corporation having technical responsibility;
- difficulty in obtaining copies of confidential operator ownership and operating documents;
- even when obtained, the complexity and opacity of these contractual arrangements make identifying the relevant party difficult;[227]
- delay, expense and possible dismissal of claims if the wrong entity is pursued; and
- some entities or bodies that exercise control over the village are not parties to a residence contract.

For example, (as occurs in Village 1) an entity that wholly owns an administering subsidiary may exercise considerable control over the village business and day to day matters without entering into a residence contract. Another example is the administering body in Village 3, which is not a legal entity and does not enter into contracts but exercises control over some village matters.

This last issue points to a need in redefining administering body to ensure that ultimate responsibility for RV Act compliance rests with the entity (or entities) that exercise

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225 https://www.bing.com/search?q=administer+meaning&src=IE-SearchBox&FORM=IESR3A (viewed 15 August .2019)

226 See, for example, Pines Management (ACT) Pty Ltd v Eastick and Ors [2017] ACAT 109.

227 Illustrating this, SAT (and court) retirement villages cases reveal substitution of respondents as responsibilities become clearer during the course of the proceedings is quite common.

ultimate control over village business decisions, rather than with an entity operating under others' control or the landowners who simply lease land to them.

Ambiguity in whether a landowner is always an administering body

Ambiguity in whether all landowners are administering bodies arises in part from the unusual and somewhat counterintuitive way the RV Act identifies what a retirement village is.

To be a retirement village, residential premises and land must be used or intended to be used for a "retirement village scheme".[228] As the *Hollywood* case found, a retirement village scheme must necessarily be implemented by the *landowner*, not the village business owner, because the landowner ultimately controls the use their land will be put to.[229] Looked at from the perspective of who controls a retirement village scheme, a retirement village is always either administered by the landowner or administered on its behalf. From this technical perspective, including landowners in the RV Act term "administering body" makes sense - whether the landowner is actually involved in the retirement village business is irrelevant.

This technical perspective is not well understood by stakeholders who tend to assume that the retirement village scheme is the contractual arrangements and village rules and so a scheme implemented by an operator.[230] When the entity that owns the land on which the village is situated and the entity that operates the village as a business are not the same, inclusion of the landowner in the meaning for "administering body" does not make sense to them. It appears artificial to say that the village is administered on the landowner's behalf by the business owners.

Compounding the confusion arising from the counterintuitive purpose for the term retirement village scheme, the RV Act is not consistent in this technical approach. Some RV Act provisions assume landowners are always administering bodies. Other provisions however state what is to occur if the landowner is not an administering body.[231]

Importantly, inconsistency in the RV legislation treatment of landowner means that the way a court or tribunal will interpret "administering body" in complex operating structures cannot be predicted. This makes it difficult for entities to understand their responsibilities under the RV legislation.

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228 Meaning for "retirement village", section 3 of the RV Act (WA).

229 *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013 WASC 219, paragraph 87. A retirement village scheme has three features that are not relevant to the present discussion. These are that it is a scheme for residential premises to be occupied: predominantly by retired persons, under certain specified arrangements and for at least one resident to pay a premium for admission to the complex (paragraphs 78 to 87). The meaning for retirement village scheme is discussed in more depth in CRIS three..

230 In fact, the RV Act term for these arrangements is "residence contract". "Residence contract" means the "scheme or arrangement" that gives rise to a right to occupy residential premises in a village as well as a contract or agreement (section 3 of the RV Act). The relationship between "retirement village scheme" and "residence contract", and how to clarify this for stakeholders, is considered in more detail in CRIS three.

231 A plain reading of the meaning for "administering body" suggests that owners of village land are always included but other provisions – such as section 13(3) of the RV Act, which refers to the situation "where the owner is not an administering body" suggest that is not the case.

Control over the RV Product

CRIS 1 explained the RV product as the provision of accommodation with at least one amenity or service in a managed community. Consumer Protection considers that asking who exercises *control* over provision of the RV product provides a clearer path for identifying who should have ultimate responsibility for ensuring relevant statutory and contractual obligations are met, rather than asking who implements the retirement village scheme, who *administers* the village or who is responsible for a particular matter under a contract. Importantly, control of the RV product captures business ownership – the entity (or entities) that makes decisions regarding the product, including its managed community aspect.

Control also provides a clearer basis than *administration* for multiple levels of responsibility. As seen above, the concept of administration can lead to segregated responsibilities that is not consistent with the practical reality of often overlapping responsibilities and complex identification issues (See Diagram 10.2). Asking who has control provides a basis for multiple, overlapping levels of responsibility depending on the degree of control.

The concept of control has been used to delineate multiple levels of responsibility in other complex operating environments. Occupational, health and safety (OSH) regulation illustrates how multiple layers of responsibility can work seamlessly through obligations commensurate with degrees of control. Under OSH regulation, an employer has responsibility for ensuring the workplace is (so far as practicable) a safe working environment. Other persons with control over the workplace (such as the building owner and employees of other businesses or contractors who enter the workplace) also have responsibilities commensurate with their degree of control. To explain: the *Occupational Safety and Health Act 1984* (WA) requires employers to provide and maintain (so far as practicable) a safe working environment. Any person who has, to any extent, control of a workplace where employees work or are likely to work or controls access to a workplace must take the practicable measures required to ensure the workplace is safe. Persons who have a contractual or lease obligation of any extent to repair or maintain the workplace are included in the persons who have control of the workplace.[232]

An example of how this would work in the retirement village context is that: a managing entity must prepare the village budget in accordance with the RV legislation requirements but the retirement village business owner is also ultimately responsible for ensuring this occurs. The business owner can do this through ensuring management staff are familiar with the RV legislation, proper accounting and budget preparation practices and processes that allow it to monitor compliance.

New term "operator"

To signal the shift in focus from administration of the retirement village to control of provision of the RV product, the term "administering body" can be replaced with

[232] *Occupational Safety and Health Act 1984* (WA), sections 19 and 22.

"operator". This also aligns the legislative term with the term commonly used in the industry.

New term "manager"

With regard to multiple levels of control, the RV legislation does not currently have a term for an entity (or entities) that controls day to day village operations (or some aspect of it). Within the RV industry, these persons are generally referred to as the "manager" and this term is proposed.

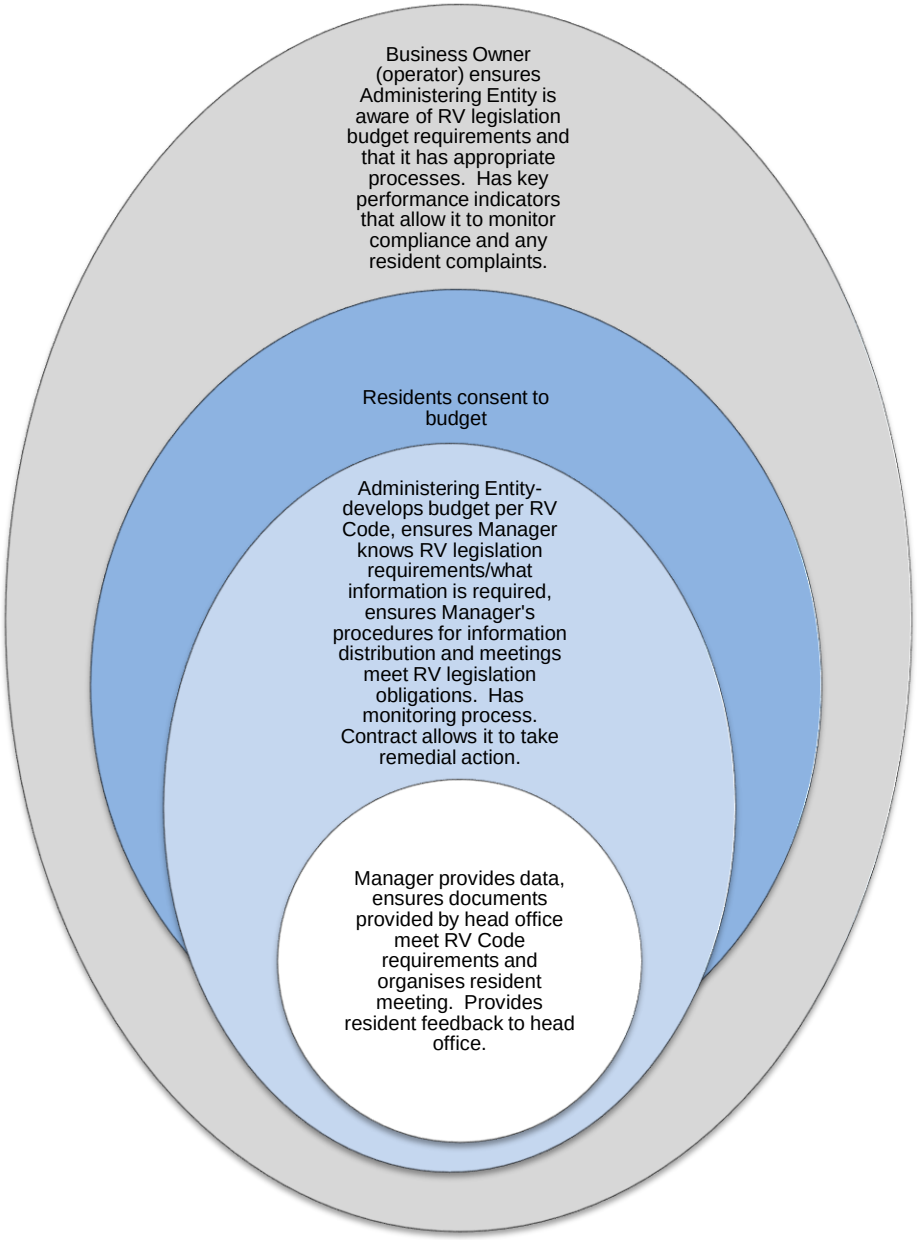
In addition to having some control over matters relevant to RV legislation compliance, the New South Wales Greiner Report noted a further, important dynamic that merits separation of a manager (whether a natural person or entity) from the entity that ultimately controls provision of the RV product – although the manager reports to the operator, their wages (or fees) are paid by residents through recurrent charges.[233] The manager role therefore requires balancing resident interests that can on occasion conflict with that of the operator. For example: residents' desire for their upfront payments to be used to fund infrastructure maintenance versus operator demand for short term profit. It is necessary to have some way to distinguish which entity is being referred to in the RV legislation – the operator or the manager.

A new category *manager* would also support the reforms proposed in Part 11 through allowing clearer identification of the matters on which management should be more responsive to residents as distinct from the business owners.

RV legislation obligations that could be appropriate for a manager (as well as the operator) include: responding to resident requests for information; resident/resident dispute resolution; minor adjustments to services and amenities that do not amount to a variation; undertaking unit refurbishment and convening resident meetings.

[233] New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report), 97 and 100-101.

DIAGRAM 10.2 – EXISTING MULTIPLE LAYERS OF CONTROL OVER VILLAGE BUDGETS (NEW TERMS)



Separating landowners who do not control the RV product from operators

Landowner role under *RV Act*

As noted above, landowners are not always involved in the retirement village business. Defining an operator as meaning the person who controls the RV product necessarily excludes landowners who are not involved in village ownership or operation.

Landowners nonetheless play an important role under the RV legislation as the entity that ultimately controls whether a retirement village scheme is implemented. The RV Act also imposes some obligations specifically on village landowners purely as landowners.

These include:

- to lodge the RV Act memorial and remove it if the retirement village scheme is terminated; and
- successors in title are bound to residence contracts and take the land subject to its statutory charge.

There is no intent to change the landowner's role as the person who controls implementation of the retirement village scheme or the other obligations that arise from use of the land for a retirement village. In particular, it is important to residents' security of tenure, village continuation and resident's exit entitlement payment that retirement village land continues to be subject to the RV Act statutory debt, charge and termination provisions (see Part 6, Issue 6.2) regardless of whether an operator owns it.[234] Retirement village landlords benefit from use of their land as a retirement village and it is appropriate that they participate in providing consumer protections.

These considerations mean that it is appropriate to retain a separate category, village landowner, as an entity responsible for specific landowner obligations.

Some obligations currently imposed on landowners under the RV Act would however more properly lie with the operator. Examples are set out below.

BOX 9.1 – RV ACT LANDOWNER OBLIGATIONS MORE APPROPRIATE FOR OPERATORS

The "owner of the residential premises to which a residence contract applies" must give pre contract disclosure. [235]

Residence contracts are taken to include an owner warranty as to the correctness of the pre contract disclosure, even though there is no requirement for the landowner to be party to that contract.[236]

A landowner (rather than the administering body) is not to enter into a residence contract if the RV Act memorial is not lodged. [237]

Only residence contracts entered into with landowners bind successors in title.[238]

234 Relevant to this, landowners derive profit (or fulfil their charitable mission or local government obligations) through their land being used for retirement villages.

235 RV Act (WA), section 13(3).

236 ibid, section 13(4).

237 Ibid, section 16(2).

238 ibid , section 17(1).

New term "village landowner"

The RV Act currently has a term "owner" for a registered proprietor of land. It does not however describe a village land owner consistently. Variations include: "owner of village land"; "owner of the residential premises to which a residence contract applies"; and just "owner". This means that in some contexts it is not clear whether the 'owner' being referred to is the owner of the business or owner of the land.

A new term "village landowner" for persons or entities (other than a resident) who owns village land, provides the basis for greater clarity as to what obligations a landowner who is not an operator should have.

Issue 10.1: Proposal for consultation

The following proposal is being considered in relation to this issue.

The RV legislation be amended to:

- **replace the term "administering body" with "operator";**
- **provide that "operator" means the entity (or entities or persons) that control the RV product (the precise wording will depend on the outcome of consultation on the Part 4, Issue 4.1 reform proposals);**
- **insert a new term "manager" for an entity (or entities or person) who has some control over day to day village operations (and allocating appropriate RV legislation obligations to that entity/person); and**
- **insert a new term "village landowner" for the owner of land used for a retirement village (other than a resident) and allocating responsibilities appropriate to village land ownership.**

An implementation matter with regard to multiple operators and overlapping control is dealt with below.

Other jurisdictions

The other jurisdictions' legislation is summarised in Table 10.3 below.

TABLE 10.3 – OTHER JURISDICTIONS ADMINISTERING BODY PROVISIONS

The RV legislation:	NSW & ACT Current	NT	QLD	SA	VIC	TAS
Primarily imposes obligations on	Operator	Administering authority	Scheme operator	Operator	Owner	Operator
Meaning for terms depend on	Manages or controls the village	Administers the village	Controls the retirement village scheme	Administers the retirement village scheme	Owns village land	Controls the retirement village
Include landowners as operators	✓	✓	✗	✗	✓	✗
Uses the term manager	✗	✗	✓	✓ Village manager and senior manager	✓	✗
Expressly provides for multiple operators	✓	✗	✓	✗	✓	✓

As can be seen from Table 10.3, each jurisdiction has a concept of an overall responsible entity (or entities) but they vary in whether this depends on management and control of the retirement village (New South Wales and Australian Capital Territory), administration of the village (Northern Territory), control of the retirement village scheme (Queensland) or ownership of village land (Victoria). Except for the Northern Territory and Victoria, the other jurisdictions use the term "operator" for this entity.[239]

The jurisdictions also vary in whether independent obligations are imposed on landowners; express recognition that there may be multiple operators; and ensuring that contractual obligations correspond with statutory responsibilities through requiring any operator/landowner be a party to the residence contract. (The last matter is dealt with in a later CRIS.)

[239] New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report). . Interestingly, the Greiner Report used "operator" in a slightly different way from the NSW legislation, as meaning a retirement village owner, manager, employee or representative (12). Confirming the need for separate terms, it also on occasion treated operators and managers as being separate categories. See, for example, 17, 50, 60 and 98.

Two jurisdictions – Victoria and Queensland - have a term “manager” for the person responsible for day to day village operation. In New South Wales, the Greiner Report observed that the manager is generally responsible for the day to day running of the village, which included: managing the village budget; managing property and facilities; informal dispute resolution; and sales and marketing on behalf of the operator.[240] This is consistent with Queensland’s term rather than Victoria’s concept.

Benefits and disadvantages

An important anticipated benefit of the proposal is greater clarity in the entity responsible for ensuring RV legislation obligations are met and ability to ensure obligations are appropriate to multiple layers of control. Amongst other things this has potential to improve compliance and simplify enforcement of rights.

[240] New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report)., 96.

Impact Analysis

The following table outlines some potential benefits and disadvantages of the proposal.

	Potential benefits	Potential disadvantages
Obligation placed on entity/entities that control the RV product.	Ultimate responsibility more appropriately rests with the entity that exercises control over provision of the RV product rather than on an administrator taking direction. Addresses issues in identifying which entity is responsible for each RV legislation obligation – allows for overlapping responsibilities. Provides a clear and logical basis for separating the entity that controls land use (the retirement village scheme) from the entity that owns the retirement village as a business. Control of the RV product supports the reforms proposed in Part 4. Concept of control gives greater consistency in operator obligations between the jurisdictions.	Where more than one operator, questions as to which is responsible will still arise – the proposal to resolve this is in the implementation details below. May run counter to operating models that fragment responsibilities. May incur business expense in renegotiating ownership and operating contracts to reflect RV legislation obligations.
New term 'manager', with control over day to day matters and obligations appropriate to that control.	Allows responsibility to be commensurate with level of control. Supports the Part 10 proposals for enforceable manager conduct obligations.	As above.
Separating land ownership responsibilities from operator responsibilities.	Resolves the current ambiguity in whether all landowners are responsible for all administering body obligations. Addresses issue in inappropriate responsibilities when a landowner is not involved in operating the retirement village as a business (any landowner who is an operator will have responsibilities as an operator).	No disadvantages were raised in the Final Report.

Questions

10.1.1	*Do you see any problems with replacing the term "administering body" with "operator"? If so, please explain your concerns.*
10.1.2	*Do you agree that the obligations that the RV legislation currently imposes on an entity administering the village are better suited to the entity that controls the RV product? If not, why not?*
10.1.3	*Can you think of other ways to address this issue?*
10.1.4	*Do you agree that persons who exercise some control over day to day village operations should have responsibility for complying with the RV legislation requirements relevant to the matters that they control? If not, why not?*
10.1.5	*Do you agree that village landowner specific obligations should be separated from those imposed on an entity as an operator? If not, why not?*
10.1.6	*If so, what current administering body obligations should village landowners have?*
10.1.7	*Do you agree that the obligations set out in Box 10.1 should be imposed on operators not village landowners? If not, why not? Are they any other village landowner obligations that are more appropriate for operators?*

PART 10.2: JOINT AND SEVERAL LIABILITY

Issue 10.2: Should the RV Act expressly provide for joint and several liability?

As Table 10.1 illustrates, villages can operate under multiple owner models. For example, joint ventures, corporate groups or partnerships. There can also be multiple entities involved in land ownership and management. Compliance by any operator, landowner or manager will be sufficient however it is apparent that this is not always clear to stakeholders. From time to time, they ask whether every entity involved in village ownership or operation must itself undertake an action – for example, whether each must lodge the RV Act memorial.

What is required is for each operator and each layer of control to have a process by which they can ensure an RV legislation obligation is met. For example, an operator will need either a process to confirm that the landowner has lodged the RV Act memorial or authority to lodge it on the landowner's behalf. Breach of any obligation each owes the other under their contractual arrangements will be a matter for private action between those entities. It should not, as is currently the case, be an issue in resident claims.

In legal terms, multiple persons each being responsible for an obligation is known as joint and several liability.

Joint and several liability means that each can be held accountable for a legislation breach but it is not necessary to always make a complaint against everyone who shares the responsibility. There will be circumstances in which only one person or entity should be pursued. For example, an operator may train a manager on budget preparation and satisfy themselves that a final draft is compliant. The manager may then change the document prior to presenting it to residents so that it no longer complies. In this circumstance, Consumer Protection may not consider it appropriate to pursue the operator.

Issue 10.2: Proposal for consultation

The following proposal is being considered in relation to this issue.

The RV legislation be amended to expressly state that:

- **unless otherwise indicated, all responsibilities are joint and several; and**
- **when an obligation requires a particular act or actions, compliance by one responsible entity is sufficient.**

Impact analysis

The benefit of this proposal is that it provides clarity for stakeholders as to how overlapping obligations operate in practice. In particular, that contracts cannot effectively

shed responsibility through delegation (as obligations are joint). It also provides clarity that multiple acts of compliance are not required.

Questions

10.2.1	*Should there be an express RV Act provision that an operator can comply with the RV legislation through an agent exercising any of their functions and that compliance by one operator is sufficient?*
10.2.2	*Should there be an express provision that an operator is to take all practicable steps required to ensure that all persons involved in operating a retirement village comply with the RV legislation?*
10.2.3	*Can you think of other ways to address this issue?*
10.2.4	*What would be the cost implications of the different options? Please provide quantifiable information if possible.*

What obligations should managers have?

Recognition of day to day control of a retirement village raises the question of what obligations a manager should have. The New South Wales Greiner Report identified managing the village budget; managing property and facilities; informal dispute resolution; and sales and marketing on behalf of the operator as usual day to day obligations.[241] These seem appropriate.

In the event the proposal for recognition of a manger in the RV legislation proceeds, the precise manager obligations will be the subject of more detailed consultation in the later drafting process. It is however useful to begin consideration of which current administering body obligations should be shared operator and manager obligations and whether managers should have any obligations separate from those imposed on operators.

Questions

10.2.5	*Which current RV legislation administering body obligations should operators and managers share? Why should these also be manager obligations?*
10.2.6	*Are there any current administering body obligations that should only be borne by managers? If so, what are they and why should they be manager not operator obligations?*
10.2.7	*Should managers have any obligations that are not current administering body obligations? If so, what should these be and why should managers have these obligations?*

[241] New South Wales Government, *Inquiry into the NSW Retirement Village Sector Report*, December 2017 (Greiner Report). 96.

List of Questions for Part 10

Issue 10.1	Identifying the term "administering body".
Proposal for consultation	**The RV legislation be amended to:** • **replace the term "administering body" with "operator";** • **provide that "operator" means the entity (or entities or persons) that control the RV product (the precise wording will depend on the outcome of consultation on the Part 4, Issue 4.1 reform proposals);** • **insert a new term "manager" for an entity (or entities or person) who has some control over day to day village operations (and allocating appropriate RV legislation obligations to that entity/person); and** **insert a new term "village landowner" for the owner of land used for a retirement village (other than a resident) and allocating responsibilities appropriate to village land ownership.**
Questions	
10.1.1	*Do you see any problems with replacing the term "administering body" with "operator"? If so, please explain your concerns.*
10.1.2	*Do you agree that the obligations that the RV legislation currently imposes on an entity administering the village are better suited to the entity that controls the RV product? If not, why not?*
10.1.3	Can you think of other ways to address this issue?
10.1.4	Do you agree that persons who exercise some control over day to day village operations should have responsibility for complying with the RV legislation requirements relevant to the matters that they control? If not, why not?
10.1.5	Do you agree that village landowner specific obligations should be separated from those imposed on an entity as an operator? If not, why not?
10.1.6	If so, what current administering body obligations should village landowners have?
10.1.7	Do you agree that the obligations set out in Box 10.1 should be imposed on operators not village landowners? If not, why not? Are they any other village landowner obligations that are more appropriate for operators?

Issue 10.2	Should the RV Act expressly provide for joint and several liability
Proposal for consultation	**The RV legislation be amended to expressly state that:** • **unless otherwise indicated, all responsibilities are joint and several; and** • **when an obligation requires a particular act or actions, compliance by one responsible entity is sufficient.**
Questions	
10.2.1	Should there be an express RV Act provision that an operator can comply with the RV legislation through an agent exercising any of their functions and that compliance by one operator is sufficient?
10.2.2	Should there be an express provision that an operator is to take the practicable steps required to ensure that all persons involved in operating a retirement village comply with the RV legislation?
10.2.3	Can you think of other ways to address this issue?
10.2.4	What would be the cost implications of the different options? Please provide quantifiable information if possible.
10.2.5	Which current RV legislation administering body obligations should operators and managers share? Why should these also be manager obligations?
10.2.6	Are there any current administering body obligations that should only be borne by managers? If so, what are they and why should they be manager not operator obligations?
10.2.7	Should managers have any obligations that are not current administering body obligations? If so, what should these be and why should managers have these obligations?

PART 11: OPERATOR CONDUCT OBLIGATIONS

This Part deals with issue in the RV legislation's current conduct obligations and management standards. In summary, it:

- *Issue 11.1* – proposes new and more enforceable conduct obligations for operators. Proposals include that the RV legislation provide guidance on how conflicting interests should be prioritised and the skills and knowledge required for good management (for example, knowledge of relevant laws);
- *Issue 11*.2 - proposes new and more enforceable conduct obligations for residents. Proposals include an obligation to respect the peace, comfort and privacy of other residents and comply with residence rules; and
- *Issue 11*.3 – asks whether operators should be required to have a strategy to recognise and deal with elder abuse.

This Part builds on Part 4's proposal for a 'whole of RV product' approach to regulation, in particular the managed community aspect of the product. It identifies some gaps in particular in operator obligations to resolve communal issues, builds on the Part 10 proposal for the RV legislation to recognise a new level of control and relates to a later CRIS dealing with enforcement matters, including SAT's jurisdiction. Final Report **Recommendations 89 to 91** were for increased enforcement options and penalties. For this to occur, some current operator conduct obligations need to be made express or otherwise be couched in more enforceable language.

PART 11.1: ENFORCEABLE CONDUCT OBLIGATIONS

Issue 11.1: ENFORCEABLE CONDUCT OBLIGATIONS

The poor manner in which some operators carry out their obligations in managing retirement villages is a common concern raised with Consumer Protection through complaints and requests for advice. There are also many reports in studies, inquiries, reviews and the media, about problems with the behaviour and conduct of operators towards residents in their management of these unique communities.[242]

The RV Code (WA) already contains certain principles in clauses 3, 5 and 16 regarding the conduct obligations of operators towards residents.[243] However the RV Code does not fully address the complex role that operators must perform in carrying out their management obligations. Nor does the RV Code deal with the standards of conduct expected of residents.

Given the inappropriate conduct of some operators and residents reported to Consumer Protection, it may be appropriate to insert additional conduct obligations in the RV legislation to make clear the standards of behaviour that are expected of both parties.

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[242] *Behaviour* relates to on-going actions and *conduct* relates to the relationship between actions and norms of behaviour.

[243] The details of RV Code (WA) clauses 3, 5 and 16 are provided on page 167 and in Appendix 11.1.

This part considers general conduct obligations which apply to operators. The obligations of operators relating to specific functions such as village budgeting, maintenance and repair, and repayment of exit entitlements are not considered in this part. These specific matters have been examined in earlier parts of this CRIS.[244]

Objective

To provide a clear statement of the standards of conduct expected from operators in retirement villages. To also provide some expectations for resident behaviour in retirement villages.

Discussion

Final Report and stage one reforms

The Final Report identified a number of issues in village management. These included the level of management skills and knowledge.[245] There was consensus at that time that these could be improved.

Stage one reforms included improved clarity in operator obligations through new obligations in the RV legislation (including specification of matters that residents could not be asked to pay for) and making a new RV Code (WA). Some issues however remain.[1]

[244] See CRIS2 parts 6 -10.

[245] Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report,* November 2010 (Final Report), 51.

Current conduct obligations in RV legislation

The principles applying to operator conduct that currently exist in the RV Code (WA) in clauses 3, 5 and 16 are summarised below (see details in Appendix 11.1). Consumer Protection considers that these principles are important and should be retained in RV legislation.

Management obligations of operators currently in the RV Code

Clause 3 requires operators to:

- consider the well-being and interests of residents;
- not restrict the freedom of decision and action of residents;
- recognise the relationship of residents with their families; and
- treat residents fairly and not abuse or exploit them.

Clause 5 outlines a number of resident rights that operators must observe, such as the right to privacy, the right to quiet enjoyment, and the right to complete autonomy over their property and personal and financial affairs.

Clause 16 outlines operators' obligations to provide prudent, efficient and economical management of the village, to establish procedures for consulting with residents about the day-to-day running and future planning of the village and access to management information relating to the operating financial arrangements of the retirement village.

Problems that need to be addressed

Retirement villages are complex operating environments for operators. Operators must respond to the needs of individual residents as well as the village community as a whole. Corporate operators are also responsible to boards of management and meeting the investment expectations of shareholders. Conflicting interests may therefore arise between the different parties involved and generate inappropriate behaviours. Example 11.1 below illustrates the conflicts and inappropriate conduct that have been reported to Consumer Protection in recent years. The diagram 11.1 on the next page shows the types of inappropriate behaviours that have been reported.

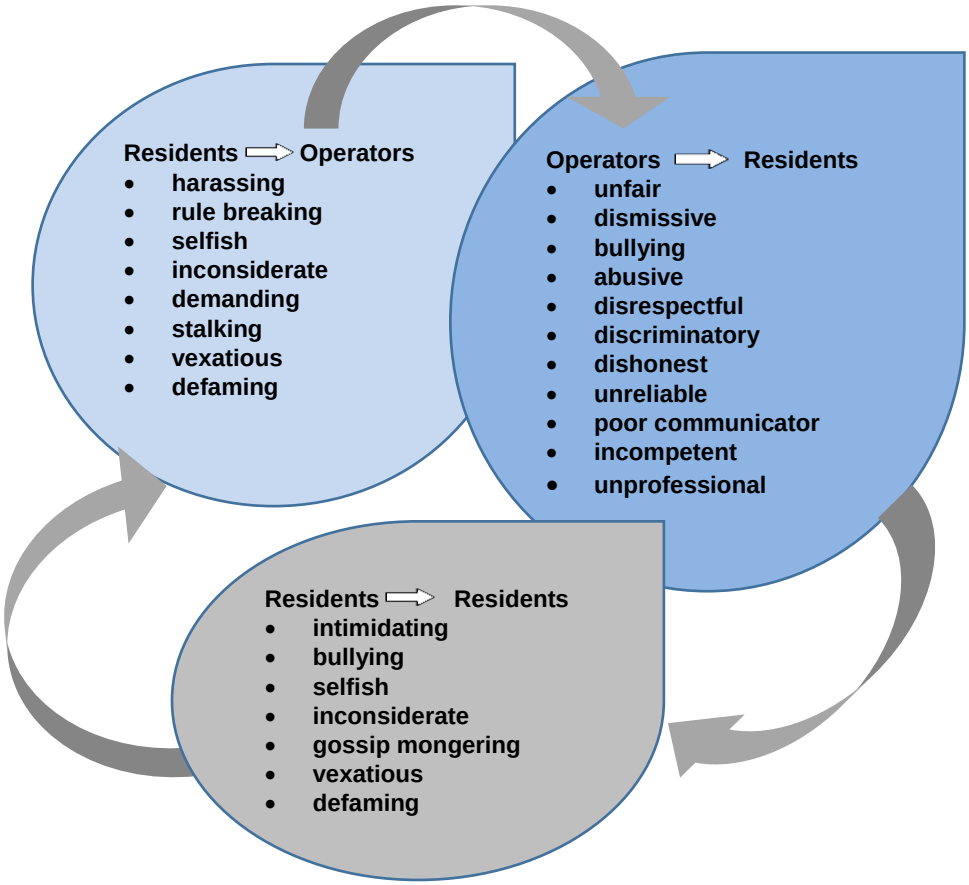
Case study 11.1: Types of conflicts and inappropriate conduct in retirement villages

Residents have complained to Consumer Protection about operators not treating them with respect, dignity and fairness. Residents have also voiced dissatisfaction about the way operators manage their retirement villages, that operators do not provide the financial information that they need to query expenditure, and that operators often dismiss residents' concerns about matters such as ongoing maintenance, recurrent charges and village budgets.

Residents also report difficulties with other residents, such as where vocal groups of residents have intimidated more timid residents.

Operators have reported inappropriate behaviours by residents, such as residents harassing, bullying, intimidating, and not acting with respect to other residents or towards village operators. They have also reported that residents that some continually harass operators with vexatious complaints and do not comply with village rules.

DIAGRAM 11.1 - TYPES OF INAPPROPIRATE BEHAVIOURS OF OPERATORS AND RESIDENTS



Conflicting interests in a village can also contribute to a complex operating environment. An example of such a conflict between the longer term interests of the village manager in marketing the village and the more immediate concerns of the residents in regard to their present recurrent charges is given below.

Case study 11.2: Conflicting interests

An operator announced that the village reserve fund was being considered to provide funds to replace roof tiles throughout the village with colourbond. Some residents were delighted that roofs in the village were to be upgraded and supported the proposal. Other residents did not want the fund to be depleted, arguing that all the roofs did not need replacing immediately. They were concerned that their recurrent charges would be increased or that they would need to pay a substantial levy to replenish the diminishing reserve fund.

The operator argued that the roofs had been examined and that there were signs of deterioration. Apart from health and safety issues, replacement would make the village appear more modern and therefore attract prospective residents to occupy the units that had remained vacant for some time. The operator stated that the majority of roofs would require replacement in the near future and emphasised that it would be better to commence the whole project now before the roofs started deteriorating any further and causing damage in future.

Conduct obligations can assist operators and residents in understanding what is expected of them in dealing with complex management issues. For example, the following questions could be asked in considering whether an operator has behaved in an appropriate manner in managing the proposal in Example 11.2 above:

- Did the operator act in an honest, fair and professional way in explaining the proposal and resolving the conflict?
- Did the operator have regard to the best interests of the residents as a whole affected by the proposal to replace the village roofs?
- Did the operator act in good faith by balancing individual residents' interests with the communal interests of all the residents, as well as the interests of the village as a business enterprise to ensure that there would be no detriment to any of the parties involved?
- Did the operator have knowledge and consider other relevant laws such as laws pertaining to the wellbeing and safety of residents?
- Did the operator exercise skill, care and diligence in handling the conflict?
- If the above matter was put to a vote, did the operator keep information confidential as to how particular people voted on the matter?
- Did the operator use their position improperly, for example by favouring one group of residents and victimising others who did not show support for the proposal?
- Did the operator ensure that any conflicts of interest were disclosed? For example in the above roofing case the operator's relative owned a roofing company in which the operator had substantial shares. Where problems of conduct in a retirement village occur, the problem for Consumer Protection as the regulator, is that the current

principles in clauses 3, 5 and 16 of the RV Code (WA) are not sufficient to deal with the range of inappropriate behaviours and conduct problems that can occur.[246]

Conduct obligations in other legislation

Conduct provisions in other legislation provide a guide as to what additional obligations may be appropriate in retirement villages. The final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Report) recognised the importance of adhering to the following basic norms of commercial conduct:

- obey the law;
- do not mislead or deceive;
- act fairly;
- provide services that are fit for purposes;
- deliver services with reasonable care and skill; and
- when acting for another, act in the best interests of that other.[247]

These principles are also reflected in WA legislation such as, the ACL (WA),[248] the *Strata Titles Act 1985* (WA), the *Associations Incorporation Act 2015* (WA), and the *Cooperatives Act 2009* (WA) (see Table 11.3 on the next page). The legislation in other jurisdictions, such as the New South Wales draft amendment regulations containing operator conduct rules[249], the South Australian retirement village regulations,[250] provisions in the Franchising Code of Conduct (Cth)[251], and duties of loyalty in the *Corporations Act 2001* (Cth)[252] and the *Insurance Contracts Act 1984* (Cth)[253] also contain obligations that may be appropriate in retirement villages.

A comparison of the various conduct obligations which exist in other regulation is provided at Table 11.2 below.

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246 Other issues also arise with enforcement of the current obligations because they are located in the RV Code. These issues will be discussed in a later CRIS paper on compliance and enforcement of RV legislation.

247 Hayne, KM, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report (Cth), 1 February 2019, vol1, 8-9.

248 *Fair Trading Act 2010 (WA)* Schedule 2, Australian Consumer Law.

249 Retirement Villages Amendment (Rules of Conduct for Operators) Regulations 2019 (NSW) (Public consultation draft).

250 Retirement Villages Regulations 2017 (SA).

251 Competition and Consumer (Industry Code – Franchising) Regulations 2014 (Franchising Code). This instrument is made under section 51AE of the *Competition and Consumer Act 2010* (Cth).

252 *Corporations Act 2001 (Cth)*, sections 601FC and 601FD.

253 The *Insurance Contracts Act 1984* (Cth) Part 2 provides that parties to an insurance contract have a duty to act with the *utmost good faith*. The duty covers any matters in relation to the insurance contract including negotiating before the contract is signed and claims handling after a contract has been formed.

TABLE 11.2 -- COMPARISON OF CONDUCT OBLIGATIONS IN THE RV CODE (WA) WITH OTHER LEGISLATION

PRINCIPLE	RV CODE (WA)	STRATA TITLES ACT (WA)	ASSOCIATIONS ACT (WA)	COOPERATIVES ACT (WA)	RV AMENDMENT REGS (NSW)	RV REGS (SA)	FRANCHISING CODE (CTH)	CORPORATIONS ACT (CTH)	INSURANCE ACT (CTH)
Knowledge and understanding of all relevant laws		✓			✓			✓	
Act in best interests of members			✓	✓	✓	✓		✓	
Skill, care and diligence		✓	✓	✓	✓			✓	
Honesty, fairness and professionalism	✓	✓			✓	✓		✓	
Good faith		✓	✓	✓			✓	✓	✓
Use of information		✓	✓	✓	✓			✓	
Use of position		✓	✓	✓	✓			✓	
Conflicts of interest		✓	✓	✓	✓			✓	
Right to autonomy	✓					✓			
Right to privacy	✓				✓	✓			

Additional operator obligations which could be considered

The approaches used in other regulation suggest that inserting additional obligations in the RV legislation may provide more clarity for operators about what is expected when they perform their functions in a managed community. They may also assist residents to understand what can be expected of operators as well as what can be expected of their own conduct.

The following principles represent the key conduct obligations found in other regulation of commercial entities. These are considered suitable for additional conduct obligations to be imposed on operators.

Proposed principles for operator conduct

1. Have knowledge and understanding of all relevant laws.
2. Have regard to the best interests of residents.
3. Exercise skill, care and diligence.
4. Act with honesty, fairness and professionalism.
5. Act in good faith.
6. Protect information – keep information confidential and not use it improperly.
7. Not to use position improperly.
8. Manage conflicts of interest.

1. Have knowledge and understanding of all relevant laws

Knowledge and understanding of all relevant laws is essential for the operator to exercise the operator's functions lawfully and professionally. The RV Act, RV Regulations and RV Code are the primary pieces of legislation that impact on the operation of a retirement village in Western Australia. There are many other laws that impact on retirement villages. The case studies below are relevant to the functions of retirement village operators.

TABLE 11.3 – LAWS THAT IMPACT ON RETIREMENT VILLAGES

Strata Titles Act 1985 (WA)	Applies to villages where strata units are sold to residents.
Associations Incorporation Act 2015 (WA)	Provides rules for some villages and residents' committees that are incorporated associations.
ACL (WA)	Applies to contracts with residents as consumers.
Corporations Act 2001 (Cth)	Applies to the management of companies.

As managers of the village, operators are also obliged to know and understand other laws relevant to the management and operation of a retirement village, such as those that regulate contracts, health and safety, building, fair trading, insurance, discrimination and privacy.

Case study 11.3: Have knowledge and understanding of all relevant laws

A resident of a village had previously had a very tough and active life.
He was often bored living in the village and frequently sought ways to voluntarily contribute to the repair and maintenance of the village. On a number of occasions the operator needed to restrain the resident's involvement in matters such as maintaining the fire equipment and building operations because of safety, insurance and liability concerns.

2. Have regard to the best interests of residents

Many laws which regulate commercial organisations that manage the interests of others require that they act in the best interests of their members or clients. This ensures that persons in charge of such organisations consider and put first the interests of those persons. The following case study illustrates where the operator placed its own interests ahead of the communal interests of the residents.

Case study 11.4: Have regard to the best interests of residents

An operator contracted security work to a business owned by the operator at a fee that was greater than would be offered by other independent companies. The arrangement was to the direct advantage and interests of the operator but the increased costs were to the detriment of all the village residents.

RV legislation could also provide specific criteria for the obligation to act in the best interests of residents to which an operator should have regard. One such example is that where the communal interests of residents' conflict with an individual interest, communal interests should prevail.

This approach has been taken in New South Wales which provides the following additional criteria about best interests which operators are required to consider before making a decision:

- the age and health of residents or the prospective residents;
- views expressed by residents or the prospective residents;
- requests made by residents or the prospective residents;
- the impact a decision or action might have on the health and well-being of the residents or of the prospective residents; and
- past complaints, issues or concerns raised by all residents.[254]

[254] The criteria for decision making are taken from the NSW Retirement Villages Amendment (Rules of Conduct for Operators) Regulations 2019 (Public Consultation Draft), 4-5.

3. Exercise skill, care and diligence

Exercising skill, care and diligence is a common law duty that applies to people who perform functions which affect others. As a manager of a retirement village community, an operator makes decisions and undertakes tasks that can greatly affect residents. Therefore operators should take reasonable skill, care and diligence when carrying out the role of that position.

Case study 11.5: Exercise skill, care and diligence

A local business appointed a family member to manage a family owned chain of retirement villages.

The family member appointed had no relevant people or business skills. Disputes became rife and many of the residents became distressed. For example, in disputes about day-to-day simple matters, such as deciding on gardening areas for residents, this manager was inconsistent and showed favouritism to some residents and not to others. When challenged, this manager frequently told residents they had no right to dispute management decisions.

This manager intimidated and bullied residents and threatened that if they continued to complain and challenge village authority, their contracts would be terminated. The situation in the village became so toxic that eventually the business operator appointed an experienced manager to manage the chain of villages. This person competently resolved the village disputes by managing with skill, care and diligence.

4. Act with honesty, fairness and professionalism

Acting with honesty, fairness and professionalism are fundamental behaviours and basic norms of conduct that are expected in any business relationship. As noted earlier, dishonesty and acting unfairly or unprofessionally are some of the complaints residents make to Consumer Protection. Obligations such as the ones in the example below set out clear rules in regards to these issues.

Act with honesty, fairness and professionalism

In New South Wales a village operator is required to:

- **act honestly, fairly and professionally with all parties to negotiations, transactions or any other dealings relating to a resident or prospective resident;**
- **not misinform or otherwise mislead or deceive any parties to negotiations, transactions or any other dealings relating to a resident or prospective resident; and**
- **not engage in high pressure tactics, harassment or harsh or unconscionable conduct in negotiations, transactions or any other dealings relating to a resident or prospective resident.**

5. Act in good faith

The principle of "good faith" requires that parties who have contractual rights exercise them reasonably and do not abuse them.[255] A party must have regard to the legitimate interests of the other party. Exercise of a contractual right in a way that undermines or denies the other party the benefits of a contract would not be an exercise of good faith.[256]

Good faith obligations apply to franchising agreements under the Commonwealth Franchising Code of Conduct.[257] This Code outlines certain matters that a court may consider when determining whether a party to a franchise agreement has acted in good faith. These matters are whether the party acted honestly and not arbitrarily and cooperated to achieve the purposes of the agreement. The obligation extends to all aspects of the franchising relationship, including pre-contractual negotiations, the performance of the contract, dispute resolution processes, and at the end (including termination) of an agreement. Australian courts have found business dealings to be not

[255] *Virk Pty Ltd v Yum! Restaurants Australia Pty Ltd* [2017] FCAFC 190, paragraphs 164 to 188.

[256] 'Acting in good faith', ACCC; https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct/acting-in-good-faith.

[257] The obligation to act in good faith, contained in clause 6 of the Code, states: "*Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter aiding under or in relation to the agreement and the franchising code.*"

in good faith when they involve one party acting for some ulterior motive, or in a way that undermines or denies the other party the benefits of a contract.

RV legislation in WA could adopt a similar principle to require operators to act in good faith when exercising contractual rights with residents. As operators often have broad discretions under contracts with residents, it is important that they exercise good faith in relation to these contracts. The operator can exercise these obligations in ways that are fair to residents and do not overly advantage the operator. It is an obligation that relates to other important obligations, such as acting in the interests of the residents, acting with honesty, fairness and professionalism, and exercising skill, care and diligence.

Case study 11.6: Act in good faith

An operator in a retirement village had the contractual rights to require residents to refurbish their units upon leaving the village. This operator had a reputation for exercising these rights in an arbitrary way. For example, he normally overlooked the fair wear and tear of carpets and always demanded that all residents in the village replace perfectly good carpets when leaving the village. Even residents who had only stayed in the village for a short period of time were required to replace the carpets in their units.

An operator who abided by the principle of good faith in exercising contractual rights might only require replacement of carpets when necessary, rather than relying on a contractual provision which enabled the operator to require replacement at the end of every tenancy.

Other legislation that also contains good faith principles includes the following:

TABLE 11.4 – GOOD FAITH PRINCIPLES IN LEGISLATION

Act	Specific principles
Strata Titles Act 1985 (WA)	A person to whom this section applies — (a) must at all times act honestly, with loyalty and in good faith in the performance of functions as a member of the council or an officer of the strata company - section137(2)(a). A strata manager of a strata company — (a) must at all times act honestly and in good faith in the performance of the strata manager's functions - section 146(1)(a).
Associations Incorporation Act 2015 (WA)	An officer of an incorporated association must exercise their powers and discharge duties in good faith in the best interests of the association and for a proper purpose - section 45.
Corporations Act 2001 (Cth)	A director or other officer of a corporation must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose - section 181(1).

6. Protect information – keep information confidential and not use it improperly

As with many office holders in other commercial contexts, operators hold a responsible position in the village and may be privy to personal and confidential information about residents that should be kept confidential and used only for proper purposes. Case study 11.7 below shows how the misuse of personal information can cause distress to residents.

Case study 11.7: Protect information – keep information confidential and not use it improperly

A couple took residence in a resort style retirement village and sometime later invested a substantial amount of their life savings in a venture that turned out to be a financial scam. They were no longer able to afford to live in the village. They confided the details of their financial situation and other personal information to the operator who then divulged these details to other residents in the village.

7. Not use the position as operator improperly

Improper use of a position is unethical because it represents a misuse of power. Persons who act in positions of authority which can affect other persons have a responsibility not to misuse these positions. There are several ways in which operators may abuse their position, for example:

- to gain directly or indirectly an advantage for themselves or for another person; or
- to cause detriment to a resident or a number of residents in a village.

Case study 11.8: Not use the position as operator improperly

- One of the owners of a village resided in the village. The village manager's internet was accessed through an NBN box located in the owner's unit. The owner used the internet service for personal use in operating another business. The owner also used a proportion of the village manager's time and skill to do personal work while billing the full cost of management fees to the residents of the village. (*Pines Management (ACT) Pty Ltd v Eastick and Ors (Retirement Villages)* [2017] ACAT 109).

- An operator used their position to their advantage by drawing a series of cheques upon the retirement village's account and using the funds for personal purposes, such as gambling. *(Commissioner for Fair Trading v Taukeiaho & Anor [2005] NSWSC 722* – convicted under the *Cooperatives Act 1992* (NSW) s 223(2) for improper use of the position of director and secretary of the co-operative.)

8. Manage conflicts of interest

Conflicts of interest can naturally occur in some situations, however they must be managed appropriately. Where an operator has a conflict of interest this should be disclosed as this may influence decisions and adversely affect residents and steps taken to avoid or minimise any adverse impact.

The following case relates to case study 11.2 where the village operator proposed to change the tiled roofs throughout the village.

Case study 11.9: Manage conflicts of interest

The operator in this case had a possible conflict of interest, because a family member owned a roofing company in which the operator had substantial shares. The roofs in the retirement village showed signs of deterioration. The roof replacement project was very lucrative for the operator and family because there was a considerable down turn in the building industry at the time and ways had to be found to keep the business viable.

The operator disclosed ownership of shares in the family roofing business to the residents. He asked the accountant working in the village to get three quotes for the reroofing of the village.

The family business submitted the best and cheapest quote. Following several meetings the residents voted to consent to the reroofing project and accepted the quote, not only on the basis of price, but also on the reputation of the builder.

This case study illustrates the importance of having appropriate policies and procedures to manage conflicts of interest should they arise. Had the operator not disclosed this interest, residents may have concerns that the operator was using its position for personal benefit rather than for the benefit of residents of the village.

Issue 11.1: Proposal for consultation

It is proposed that the following obligations of operators be inserted into the RV legislation.

That an operator of a retirement village be required to:

1. **Have knowledge and understanding of all relevant laws.**
2. **Have regard to best interests of residents.**
3. **Exercise skill, care and diligence.**
4. **Act with honesty, fairness and professionalism.**
5. **Act in good faith.**
6. **Protect information – keep it confidential and not use it improperly.**
7. **Not use their position improperly.**
8. **Manage conflicts of interest.**

Impact analysis

The following table outlines some potential benefits and disadvantages of the proposal.

	Potential benefits	**Potential disadvantages**
PROPOSALS THAT OPERATORS: Insert additional principles into the RV legislation that apply to operators	Provides a clear set of conduct obligations and rules for operators of retirement villages. Encourages operators to have a greater focus on conduct responsibilities in managing the village. Helps to address the power asymmetry between operators and residents.	Moves some disputes about behaviour into more formal avenues for compliance that may have been able to be dealt with through village dispute processes. May increase tensions in the village between operators and residents. May result in additional compliance costs to industry.

Questions

11.1.1 Do you agree with the proposal to insert additional operator obligations that are enforceable into RV legislation?

11.1.2 Are there any other operator obligations which are not included and which should apply?

11.1.3 Operator conduct obligations would also apply to managers of retirement villages (see part 10 of this paper). Do you agree with this?

PART 11.2: RESIDENT OBLIGATIONS

Issue 11.2 - Obligations of residents

The appropriate conduct of residents is also important in a well-functioning village. Problems occur in some villages because of the inappropriate behaviour and conduct of some residents. Residents who engage in problem behaviour can be difficult to live with in a shared community. Some problems can be solved through village dispute resolution or mediation under the direction of SAT. In other cases the best option may be for problem residents to move out of the village as it is evident that they are unable to live harmoniously in a village community.

Example 11.11: Dealing with poorly behaved residents

Some operators have used mediation processes to provide incentives for poorly behaved residents to leave the village. For example, there was an instance where the operator made an application to SAT for a breach of contract on the grounds that a resident was persistently abusive and even violent towards management and contractors. SAT requested a mediation process which resulted in the difficult resident voluntarily leaving the village.

Issue 11.2: Proposal for consultation

It is proposed that the following obligations of residents be inserted into the RV legislation.[258]

The following proposal is being considered in relation to this issue.

Residents must:

1. **respect the peace, comfort and privacy of other residents and persons in the retirement village;**
2. **not harass or intimidate other residents and persons in the retirement village (including the operator and any person employed in the retirement village scheme);**
3. **not act in a manner that may place the safety of other residents and persons in the retirement village at risk of harm; and**
4. **comply with the residence rules.**

[258] The proposed principles are based on those in the Retirement Villages Regulations 2017 (SA).

Impact analysis

The following table outlines some potential benefits and disadvantages of the proposals.

	Potential benefits	Potential disadvantages
PROPOSALS THAT OPERATORS: Insert conduct principles into the RV legislation. that apply to residents	Will assist operators in dealing with resident behaviour issues. Provides a clear set of conduct obligations and rules for residents of retirement villages.	Moves some disputes about behaviour into more formal avenues for compliance that may have been able to be dealt with through the village dispute processes. May increase tensions amongst residents in the village.

Questions

11.2.1 Do you think that RV legislation should also include principles that lead to conduct obligations for residents?

11.2.2 Are there any other principles which should apply to residents?

PART 11.3: ELDER ABUSE

Issue 11.3 – Elder abuse (including domestic violence)

Elder abuse has been recognised in recent years as a significant community problem.[259] The WA government released the *WA Strategy to Respond to the Abuse of Older People (Elder Abuse) 2019-2029* this month.[260] Priority area 1 in this strategy is: "Raising Awareness and early identification".[261]

> Elder abuse includes a wide range of experiences but is generally understood as: "a single or repeated act, or lack of appropriate action, that occurs in a relationship with an older person where there is an expectation of trust and where that action causes harm or distress to the older person".
>
> *(WHO, 2008)*

There is no basis to believe that there is a particular problem with elder abuse in retirement villages as distinct from in the community as a whole. Elder abuse however occurs mainly in the home, so is likely to be present in some villages.

The WA elder abuse strategy observes: "Service providers who interact with older people on a regular basis – regardless of industry – are well placed to detect the signs of elder abuse. It is therefore important that they have the knowledge and capability to identify the signs, symptoms and behaviours associated with elder abuse and are aware of available information, support services and avenues for reporting abuse".[262] This raises the questions of whether retirement village operators should be required to have an elder abuse strategy and to train staff to recognise and respond to elder abuse. New South Wales currently requires this.[263]

Questions

11.3.1	*Do you think operators should be required to have an elder abuse strategy? Why?*
11.3.2	*If so, do you think that strategy should provide for staff and contractor training on recognising the signs of elder abuse and options to assist residents in engaging support services?*

[259] Parliament Legislative Council Western Australia *Final Report of the Select Committee into Elder Abuse*, *'I never thought it would happen to me: When trust is broken*'. September 2018.

[260] Council of Attorneys General, *National Plan to Respond to the Abuse of Oder Australians (Elder Abuse), 2019-2023.* The WA strategy above is part of this broader, high level National strategy

[261] ibid, 9.

[262] ibid, 14.

[263] Retirement Villages Amendment (Rules of Conduct for Operators) Regulations 2019 (NSW) (Public consultation draft).

Issues to be further explored in the future

Specific conduct obligations

The conduct obligations discussed in this part may also need to be supported by more specific conduct provisions to give clarity about what is required of operators in particular contexts. These could be prescribed later by way of regulations as is currently being proposed in New South Wales.[264]

Enforcement of obligations

Operators' conduct obligations and residents' rights are currently contained in the RV Code (WA). Enforcement options under the Code are limited and it is intended that relevant provisions will be moved to the RV Act or RV Regulations. As such, it is expected that conduct obligations in the RV legislation discussed in this part will be enforceable under the legislation through specific offence provisions, as is the case in other regulation. Options for the enforcement of existing and new conduct obligations will be discussed in a later consultation paper.

[264] Retirement Villages Amendment (Rules of Conduct for Operators) Regulations 2019 (NSW) (Public consultation draft).

List of Questions for Part 11

Issue 11.1	Enforceable conduct obligations
Proposal for consultation	**That an operator of a retirement village be required to:** **1. Have knowledge and understanding of all relevant laws.** **2. Have regard to best interests of residents.** **3. Exercise skill, care and diligence.** **4. Act with honesty, fairness and professionalism.** **5. Act in good faith.** **6. Protect information – keep it confidential and not use it improperly.** **7. Not use their position improperly.** **8. Manage conflicts of interest.**
Questions	
11.1.1	Do you agree with the proposal to insert additional operator obligations that are enforceable into RV legislation?
11.1.2	Are there any other operator obligations which are not included and which should apply?
11.1.3	Operator conduct obligations would also apply to managers of retirement villages (see part 10 of this paper). Do you agree with this?
Issue 11.2	Obligations of residents
Proposal for consultation	**Residents must:** **1. respect the peace, comfort and privacy of other residents and persons in the retirement village;** **2. not harass or intimidate other residents and persons in the retirement village (including the operator and any person employed in the retirement village scheme);** **3. not act in a manner that may place the safety of other residents and persons in the retirement village at risk of harm; and** **4. comply with the residence rules.**
Questions	
11.2.1	Do you think that RV legislation should also include principles that lead to conduct obligations for residents?
11.2.2	Are there any other principles which should apply to residents?
Issue 11.3	Elder abuse (including domestic violence)
Questions	
11.3.1	Do you think operators should be required to have an elder abuse strategy? Why?
11.3.2	If so, do you think that strategy should provide for staff and contractor training on recognising the signs of elder abuse and options to assist residents in engaging support services?

APPENDICES

Appendix 6.1: Determining exit entitlement amounts

Does the RV legislation:	NSW and ACT: Current	NSW: Consulting on	QLD	SA	VIC
Apply the payment period to certain exit entitlements only:	Applies to refund of former residents' upfront payment only	×	×	×	×
Provide for independent valuation if market value not agreed:	×	✓	✓	✓	✓
Impose operator obligations to provide information to a valuer:	×	✓	✓	×	×
Give the parties a right to make submissions to the valuer:	×	×	✓	×	×
Limit former residents' valuation costs:	×	Share equally	Former resident pays to extent of share in upfront payment increase	Share equally	Former resident pays to extent of share in upfront payment increase

Appendix 9.1: Property Condition report – RESIDENTIAL TENANCY ACT (WA)

FORM 1

RESIDENTIAL TENANCIES ACT 1987

Section 27C(6)

PROPERTY CONDITION REPORT

HOW TO COMPLETE THIS FORM

1. Before the tenancy begins, the lessor or the property manager should inspect the residential premises and record the condition of the premises by indicating whether the particular room item is clean, undamaged and working by placing “Y” (YES) or “N” (NO) in the appropriate column. Where necessary, comments should be included in the report.

2. Two copies of the report, which has been filled out and signed by the lessor or the property manager, must be given to the tenant within 7 days of the tenant moving into the premises.

3. As soon as possible after the tenant receives the property condition report, the tenant should inspect the residential premises and complete the tenant section on both copies of the report. The tenant indicates agreement or disagreement with the condition indicated by the lessor or the property manager by placing “Y” (YES) or “N” (NO) in the appropriate column and by making any appropriate comments on the form.

4. The tenant must return one copy of the completed property condition report to the lessor or the property manager within 7 days after receiving it. The tenant should keep the second copy of the property condition report.

5. If photographs or video recordings are taken at the time the property inspection is carried out, it is recommended that all photographs or video recordings are signed and dated by all parties. NOTE: Photographs and/or video recordings are not a substitute for accurate written descriptions of the condition of the property.

6. As soon as practicable, and in any event within 14 days after the termination of the tenancy agreement, the lessor or the property manager should complete a property condition report, indicating the condition of the premises at the end of the tenancy. This should be done in the presence of the tenant, unless the tenant has been given a reasonable opportunity to be present and has not attended the inspection.

IMPORTANT NOTES ABOUT THIS PROPERTY CONDITION REPORT

1. This property condition report is an important record of the condition of the residential premises when the tenancy begins. It may be used as evidence of the state of repair or general condition of the premises at the commencement of the tenancy if there is a dispute, particularly about the return of the security bond money and any damage to the premises. It is important to complete the property condition report accurately.

2. A property condition report must be filled out whether or not a security bond is paid.

3. At the end of the tenancy the premises must be inspected and the condition of the premises at that time will be compared to that stated in the original property condition report.

4. A tenant is not responsible for fair wear and tear to the premises. Fair wear and tear is a general term for anything that occurs through ordinary use such as the carpet

becoming worn in frequently used areas. Wilful and intentional damage, or damage caused by negligence, is not fair wear and tear.

5. If you do not have enough space on the report, attach a separate sheet. All attachments should be signed and dated by all of the parties to the residential tenancy agreement.

6. Information about the rights and responsibilities of lessors and tenants may be obtained by contacting the Department of Commerce on 1300 30 40 54 or visiting <www.commerce.wa.gov.au/ConsumerProtection>.

ADDRESS OF RESIDENTIAL PREMISES: _____

	Clean	Undamaged	Working	Tenant agrees	Comments
ENTRY					
front door					
screen door/ security door					
walls/picture hooks					
windows/screens					
ceiling					
light fittings					
blinds/curtains					
power points					
floorcoverings					
LOUNGE ROOM					
doors/doorway frames					
walls/picture hooks					
windows/screens					
ceiling					
light fittings					
blinds/curtains					
TV/power points					
floorcoverings					
DINING ROOM					
doors/doorway frames					
walls/picture hooks					
windows/screens					
ceiling					
light fittings					
blinds/curtains					
power points					
floorcoverings					
KITCHEN					
doors/doorway frames					
walls/picture hooks					
windows/screens					
ceiling					
light fittings					
blinds/curtains					

	Clean	Undamaged	Working	Tenant agrees	Comments
power points					
floorcoverings					
cupboards/drawers					
bench tops/tiling					
sink/taps					
stove top/hot plates					
oven/griller					
exhaust fan/ range hood					
EACH BEDROOM					
doors/doorway frames					
walls/picture hooks					
windows/screens					
ceiling					
light fittings					
blinds/curtains					
power points					
floorcoverings					
EACH BATHROOM					
doors/doorway frames					
walls/tiles					
windows/screens					
ceiling					
light fittings					
blinds/curtains					
power points					
floorcoverings					
bath/taps					
shower/screen/taps					
wash basin/taps					
mirror/cabinet/vanity					
towel rails					
toilet/cistern/seat					
toilet roll holder					
heating/exhaust fan/vent					
LAUNDRY					

	Clean	Undamaged	Working	Tenant agrees	Comments
doors/doorway frames					
walls/tiles					
windows/screens					
ceiling					
light fittings					
blinds/curtains					
power points					
floorcoverings					
washing machine taps					
exhaust fan/vent					
washing tub					
SECURITY/ SAFETY					
smoke alarms					
electrical safety switch					
keys/other opening devices					
GENERAL					
garden					
lawn/edges					
letterbox/ street number					
water tanks/ septic tanks					
garbage bins					
paving/driveways					
clothesline					
garage/carport/ storeroom					
garden shed					
hot water system					
gutters/downpipes					

APPROXIMATE DATES WHEN WORK LAST DONE ON RESIDENTIAL PREMISES

Painting of premises (external): .....

Painting of premises (internal): .....

Floorcoverings laid: .....

Floorcoverings professionally cleaned: .....

Note: *Further items and comments may be recorded on a separate sheet, signed by the lessor/property manager and the tenant, and attached to this report.*

.....
Lessor/property manager's signature

Date: .....

.....
Tenant's signature

Date: .....

Appendix 11.1:Operator conduct obligations in the RV Code (WA)

RV Code (WA): clause 3

General principles

The general principles guiding all those involved in the provision of retirement villages and related services are that:

(a) the well-being and interests of residents, together with the rights of administering bodies, must be given due consideration;
(b) the freedom of decision and action of each resident must be restricted as little as possible and must be recognised in the relationship between a resident and the administering body of a retirement village;
(c) the relationship of residents with their family and past and present communities is important and must be recognised taking into account the cultural, religious and linguistic background of each resident;
(d) residents must be treated fairly and not be subject to abuse or exploitation.

RV Code (WA): clause 5

Residents' rights

The operator of a retirement village must

(1) respect a resident's right to privacy in the resident's residential premises, subject to the right of the administering body to inspect the premises as set out in the residence rules and the residence contract;
(2) respect a resident's right to quiet enjoyment of the resident's residential premises and any communal amenities; and
(3) respect a resident's right to complete autonomy over the resident's property and personal and financial affairs, subject to any legislative restriction or any other restriction provided for in the residence contract.

RV Code (WA): clause 16

Management procedures and resident consultation

The operator of a retirement village must:

(a) provide prudent, efficient and economical management of the retirement village, having regard to the terms and conditions of the residence contract and any related contracts;
(b) establish appropriate procedures for consulting with residents on the future planning and budgeting of the retirement village and any other proposed change to the operating financial arrangements of the village;
(c) establish appropriate procedures to provide the residents with access to management information relating to the operating financial arrangements of the retirement village;
(d) establish appropriate procedures for consulting with the residents on the day-to-day running of the retirement village and any issues or proposals raised by the residents; and
(e) establish appropriate procedures for consulting with a residents' committee established under clause 24.

Consumer Protection | Department of Mines, Industry Regulation and Safety
1300 304 054

8.30 am – 5.00 pm Mon, Tue, Wed and Fri
9.00 am – 5.00 pm Thurs
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Mid-West	(08) 9920 9800
North-West	(08) 9185 0900
South-West	(08) 9722 2888

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