



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



# **Consultation Regulatory Impact Statement 3**

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

June 2020



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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.

<b>Key Terms</b>	<b>Definition</b>
ACA	<i>Aged Care Act 1997 (Cth)</i>
ACL	Australian Consumer Law.
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
DMF	Deferred Management Fee, Deferred Facilities Fee and other fees characterised as deferred
Final Report	Statutory Review of Retirement Villages Legislation Final Report, November 2010
FTA	<i>Fair Trading Act 2010 (WA)</i> 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 Act	<i>Retirement Villages Act 1992 (WA)</i>
RV Code	Fair Trading (Retirement Villages Interim Code) Regulations 2020 (WA)
RV Legislation	<i>Retirement Villages Act 1992 (WA)</i> , Retirement Villages Regulations 1992 (WA), and Fair Trading (Retirement Villages Interim Code) Regulations 2020 (WA)
RV product	Retirement village product
RV Regulations	Retirement Villages Regulations 1992 (WA)
2002 Statutory Review Report	The Review of the Regulation of the Western Australian Retirement Village Industry Final Report February 2002.
SAT	State Administrative Tribunal
SHAC	Seniors Housing Advisory Centre
STA	<i>Strata Titles Act 1985 (WA)</i>
WARVRA	Western Australian Retirement Villages Residents Association

## **ABOUT THE CONSULTATION PROCESS**

### **CRIS 3 is part of a broader consultation**

This is the third in a series of five 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. 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 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 the Government about 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.

## What does this CRIS deal with?

This CRIS looks at when, why and how the RV legislation applies. It has 6 parts:

- Part 12 provides background information only. It explains that the RV Act applies when a particular financial model is used to provide accommodation for older consumers, sets out how that model is described in the RV Act and the technical basis for determining whether the RV Act applies.
- Part 13 deals with helping consumers identify a retirement village regulated by the RV legislation. It proposes not implementing Recommendation 86, and contains options for the implementation of Recommendation 93 to establish a public register.
- Part 14 looks at the definition of retirement village scheme and how this concept interacts with residence contracts. It proposes a technical amendment to clarify confusion between these terms. It also asks some questions about resident concerns about community arrangements in retirement villages.
- Part 15 deals with implementing Final Report Recommendation 84 in regards to providing for multi-site villages in the RV Legislation.
- Part 16 deals with implementing Final Report Recommendations 31 and 87 relating to the protection of premiums paid by residents.
- Part 17 deals with the emerging issues of rent paying residents and sub-letting in retirement villages and how the RV Legislation should apply in these cases.

## What is next?

Initially it was anticipated that a further three CRIS papers would be released. The remaining topics have now been combined into two further papers (**CRIS 4**) and (**CRIS 5**) which will be released over the next six months. These will look at:

- 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;
- the intersection between the *Aged Care Act 1997* (Cth) and the RV legislation;
- the intersection between the *Strata Titles Act 1985* (WA) and the RV legislation; and
- dispute resolution and enforcement – including moving the RV Code under the RV Act, making the RV Code provisions more enforceable, creation of new offences and State Administrative Tribunal (SAT) powers.

## 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](mailto: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 **30 September 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.

## PART 12: BACKGROUND: THE RV ACT – WHEN, WHY AND HOW IT APPLIES

This Part provides an overview of the circumstances in which the RV Act applies – the when, why and how. It provides context for the reforms proposed in this CRIS which:

- make it easier for the public, consumers and operators to identify when the RV Act applies to an accommodation complex; and
- ensure that RV Act coverage remains appropriate to emerging business models, including the increased incidence of rental arrangements in villages.

This Part also refers to two Supreme Court cases that have already been discussed in CRIS 1 and 2 – the *Hollywood* and *Swancare* cases.<sup>1</sup> These are summarised in Appendix 14.

### Overview – Why the RV Act applies

The RV Act states that it applies to a retirement village<sup>2</sup> but in the RV legislation retirement village means something more specific than it does when used in general conversation or on websites. In general contexts, a retirement village can mean any place with houses or units and services intended for older people. The RV Act however only applies to these places when they operate (or will in the future operate) under a particular business/financial model – colloquially referred to as “resident funded accommodation”.<sup>3</sup> When other business/financial models are used, other legislation applies.

In summary, the RV Act regulates accommodation and services provided to older people only where at least one resident makes a payment (usually substantial and upfront) that is not rent or some other recurrent charge. Under the RV Act this payment is called a premium.

The RV Act provides protections for the particular consumer risks that arise from the financial model used in this sector. These risks can come from:

- payment of a large sum upfront for accommodation and services to be provided over a long period of time;
- a long term contract model which promises the payment of an exit entitlement after departure from the village;<sup>4</sup>

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<sup>1</sup> *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013] WASC 219 (*Hollywood* case) and *Swancare Group Inc v Commissioner for Consumer Protection* [2014] WASC 80 (*Swancare* case).

<sup>2</sup> RV Act, section 5(1).

<sup>3</sup> Parliament of Western Australia, Parliamentary Debates, Legislative Assembly, 16 May 1991, at 2049-2051 (Second Reading Speech).

<sup>4</sup> See, for example, *Hollywood* case, paragraphs 166-7, where “provision of a lump sum by way of an entry premium may assume an even greater financial significance than it otherwise would” is identified as “among the very concerns which lead to enactment of the RV Act”.



- complex and diverse contracts and uneven bargaining power between consumers and operators;<sup>5</sup>
- practical constraints on residents' ability to leave a village (that is, to change accommodation and service supplier);<sup>6</sup> and
- potential for conflicting interests by operators of the retirement village – for example, the operator business interests and communal interests that may not be consistent with an individual resident's interests.

The Final Report revealed that stakeholders often did not understand why or when the RV Act applies. It recommended easier identification of when the RV Act applies to a particular village. It also recommended that the RV Act needed to remain relevant to emerging retirement village models. These recommendations and proposals for how this should occur are discussed in this CRIS.

## What is a retirement village for RV Act purposes?

The RV Act states that it applies to a retirement village.<sup>7</sup> Under the RV Act there are two criteria which are required for a village to be a retirement village – it must be:

- a complex of residential premises and appurtenant land; and
- occupied or intended to be occupied under, or used or intended to be used, for or in connection with a retirement village scheme.<sup>8</sup>

To work out that the RV Act applies, a person must know that these two factors exist.

### Criteria 1 - What is a complex of residential premises and appurtenant land?

The RV Act does not specify further what these terms mean. However, there have been court cases which have provided some explanation of these terms.<sup>9</sup>

A **complex** can be thought of as configurations of residential premises as well as any buildings and facilities such as libraries, gymnasiums, conference rooms or social rooms associated with those premises.

**Appurtenant land** means land that belongs, pertains or is pertinent to residential premises or the complex as a whole. It is not restricted to land used for residential premises or other buildings. It includes amenities such as gardens and ponds.

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<sup>5</sup> Second Reading Speech and *Hollywood* case, paragraphs 166-7 notes many consumers “will not have any significant bargaining power” and quotes the Second Reading Speech regarding “diversity of legal and financial arrangements” and “lengthy and complex” contracts. CRIS 1, Part 3, discusses these factors (pp12-23).

<sup>6</sup> CRIS 2, Part 6, discusses some of these constraints.

<sup>7</sup> RV Act, section 5(1).

<sup>8</sup> “[R]etirement village means a complex of residential premises, whether or not including hostel units, and appurtenant land, occupied or intended for occupation under a retirement village scheme or used or intended to be used for or in connection with a retirement village scheme” (RV Act, section 3(1) – original emphasis).

<sup>9</sup> *Swancare* case, paragraph 65.

These cases also explain that the RV Act does not treat the RV product as just involving accommodation but also includes the amenities and services provided with that accommodation.<sup>10</sup>

## Criteria 2 - What is a retirement village scheme?

### Overview – a retirement village scheme has three elements

Establishing the second criteria that the residential premises and land must be used for or in connection with a retirement village scheme can be complex. For one thing, the particular model under which a village operates is rarely publicly available. For another, stakeholders need to correctly understand what a retirement village scheme is. The Final Report found that this was difficult for some people.<sup>11</sup>

Under the RV Act, a retirement village scheme has three elements. It is a programme of action or a plan or policy<sup>12</sup> for:

- retired persons or predominantly retired persons (element 1);
- to occupy residential premises under certain specified arrangements (element 2); and
- at least one resident or prospective resident to pay a premium (element 3).<sup>13</sup>

If these three elements are present in regards to the residential premises and land, it will be a retirement village and the RV Act will apply to it.

### Element 1 - What does retired person mean in the RV Act?

When it uses the term retired person, the RV Act does not mean just people who have retired from full time employment. It also means people who have retired part time, and people over 55 whether or not they are retired, and their partners.<sup>14</sup>

The word predominantly means that a retirement village scheme does not have to be exclusively for people who are over 55 or who have retired but it must be primarily for those people and their partners.

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<sup>10</sup> See the discussion in CRIS 1, Part 4: *Enabling a better understanding of the retirement village product*, 24-48.

<sup>11</sup> Final Report Recommendation 85 was: 'That consideration be given to redefining the term 'retirement village scheme' within the [RV] Act to enable it to be better understood' (149).

<sup>12</sup> *Hollywood* case, paragraph 80.

<sup>13</sup> The full meaning for "retirement village scheme or scheme" is: "a scheme established for **retired persons** or predominantly for retired persons, under which: (a) residential premises are occupied in pursuance of a residential tenancy agreement or any other lease or licence; or (b) a right to occupation of residential premises is conferred by ownership of shares; or (c) residential premises are purchased from the administering body subject to a right or option of repurchase; or (d) residential premises are purchased subject to conditions restricting the subsequent disposal of the premises; or (e) residential premises are occupied under any other scheme or arrangement prescribed for the purposes of this definition, but does not include any such scheme under which no resident or prospective resident of residential premises pays a premium in consideration for, or in contemplation of, admission as a resident under the scheme." (Consumer Protection emphasis - the RV Act defines the highlighted terms.) (RV Act, section 3(1))

<sup>14</sup> "[**R**etired **p**erson means a person who has attained the age of 55 years or retired from full-time employment or a person who is or was a spouse or de facto partner of such a person" (RV Act emphasis, section 3(1)).

## Element 2 - What accommodation arrangements suggest a retirement village scheme?

The RV Act specifies the accommodation arrangements that fall within a retirement village scheme. These include a wide range of occupancy arrangements, including leases, licences, residential tenancy, acquiring a right to occupy premises through purchase of shares and, in certain circumstances, buying residential premises.

A purchase of a unit (for example, a strata unit) will however only fall within a retirement village scheme when there are restrictions on the right to resell that unit. This is one of the main differences between an over 55 strata complex and a retirement village.

Other differences between retirement villages and over 55 complexes that are not subject to the RV Act, are that in a retirement village the accommodation is:

- provided in a complex that is managed by the operator for their business purposes (whether or not for profit), not by residents;<sup>15</sup> and
- tied to a contractual arrangement with the operator for the provision of amenities and services.

CRIS 1 contains proposals to make the management of the village and the provision of amenities and services as features of the retirement village model clearer in the RV Act.<sup>16</sup>

## Element 3 - What does the RV Act mean by premium?

A retirement village scheme is most clearly distinguished from other accommodation schemes for older residents through the requirement that at least one resident pay a premium. The word premium commonly means “an amount that is more than usual”.<sup>17</sup> In the RV Act, a premium is:

“a payment (including a gift) made to an administering body of a retirement village in consideration for, or in contemplation of, admission of the person ... as a resident in a retirement village (including any such payment made for the purchase of residential premises in a retirement village or for the purchase, issue or assignment of shares conferring a right to occupy any such residential premises)”, but that is not a recurrent charge, levy or prescribed payment.<sup>18</sup>

It is important to note that the RV Act does not require that in order to be a retirement village scheme, all or even most residents must pay a premium.<sup>19</sup> It also does not require that a payment be made prior to entry to be a premium.

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<sup>15</sup> Some retirement villages are run by an association where residents are Board members and are not for profit. These villages are an exception to this feature.

<sup>16</sup> CRIS 1, Part 4, makes proposals for the RV Act to expressly make this link.

<sup>17</sup> <https://dictionary.cambridge.org/dictionary/english/premium> (viewed 28 February 2020).

<sup>18</sup> A “levy means a single amount that the residents of a retirement village are required to pay to recover an unforeseen operating expense of the retirement village not provided for in recurrent charges” (RV Act, section 3(1) – original emphasis). Payment of \$1,500 or less relation to admission to a retirement village for a period of 12 months or less are prescribed payments and so are not premiums (RV Regulations, regulation 3A).

<sup>19</sup> *Hollywood case*, paragraphs 86 and 138.

A deferred fee or some other payment made during or after residence can be a premium.<sup>20</sup> Part 16 of this CRIS discusses some issues in the way the RV Act defines a premium.

## What about the other matters involved in operating a retirement village?

The business, financial and community model under which a particular retirement village operates is inevitably more detailed than the three elements the RV Act uses to say what a retirement village scheme is. For RV Act purposes however, only the three elements listed above are required for a retirement village scheme. It is these features alone that determine whether or not the RV Act applies.

The RV Act's minimal identification of a retirement village scheme is deliberate. It means that the RV Act applies to a wide variety of arrangements that include these three elements. It also means that for RV Act purposes, even if there are changes to the retirement village or to the more detailed business, financial or community models under which a retirement village operates, the same retirement village scheme continues. This is important because there are consumer protections under the RV Act which restrict termination of the retirement village scheme.

Parts 12 and 14 discuss further the concept of the retirement village scheme under the RV Act.

## When does a retirement village scheme exist for RV Act purposes?

When a retirement village scheme exists and when it comes into operation may be different. While most RV legislation obligations relate to a retirement village scheme that is actually being implemented, the RV Act also imposes obligations on the basis of an intent to bring a retirement village scheme into operation in the future. It can therefore be important to RV Act application to know at what stage a retirement village scheme is – what signals that it exists or that it is actually in operation.

**A retirement village scheme can be said to exist** when it is adopted and implemented by the owner of the land of the village.<sup>21</sup> This may involve some steps prior to any premium being paid such as applying for planning consent for a village.<sup>22</sup>

**A retirement village scheme can be said to have come into operation** once a resident or prospective resident pays a premium.<sup>23</sup>

The RV Act imposes different obligations depending on which stage the retirement village is at.

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<sup>20</sup> See CRIS 1, Part 3, 15.

<sup>21</sup> *Hollywood case*, paragraph 87.

<sup>22</sup> *Swancare case*, paragraphs 61 to 63. In the *Swancare case* for example, the retirement village scheme existed when the memorial was lodged in 1992 as something that would occur in the future even though no premium was paid until 2012.

<sup>23</sup> *Hollywood case*, paragraph 138 and *Swancare case*, paragraphs 61 to 63.

## RV legislation imposes obligations regarding future retirement villages

The RV legislation imposes some obligations on owners of land when it can be said that a retirement village scheme exists. This may be even where the retirement village has not yet been built.

For example, the RV Act provides various pre-occupation protections for consumers. These include to:

- lodge the RV Act memorial before a residence contract is entered into;<sup>24</sup> and
- obtain all development consents before sales promotion of the retirement village.<sup>25</sup>

Other RV legislation obligations, such as precontract disclosure, relate to future residence in a retirement village and so arise from existence of a retirement village scheme rather than the physical village.<sup>26</sup> Issues in these provisions are dealt with in a later CRIS.

### When does the RV Act cease to apply to a complex?

The RV Act ceases to apply when a retirement village scheme is terminated. The RV legislation does not specify how this occurs.<sup>27</sup> The RV Act however operates so that only a village landowner can terminate a retirement village scheme.

The RV Act also provides that unless a retirement village is empty, the operator (or landowner) cannot terminate a retirement village scheme without first obtaining Supreme Court approval.<sup>28</sup> Until it is lawfully terminated, a retirement village scheme continues even if the operator has ceased implementing it. For example, by moving to a 'rent only' business model. This means that the RV Act continues to apply to the complex, and it continues to be a retirement village, even when it may appear to be a rent only village.

The requirement for Supreme Court approval to terminate a retirement village scheme allows the court to ensure that resident interests are protected in the transition from RV Act regulation to regulation under other legislation.

For the same reason, the RV Act also operates so that there are restrictions on the RV Act ceasing to apply even when a village is empty. The Supreme Court found that it may not be possible to terminate a retirement village scheme while an exit entitlement remains outstanding.

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<sup>24</sup> RV Act, section 16.

<sup>25</sup> RV Code, clause 7(1).

<sup>26</sup> See, for example, RV Act, section 13.

<sup>27</sup> *Hollywood* case, paragraphs 134, 135 and 143.

<sup>28</sup> RV Act, section 22.

This is because the RV Act creates a statutory charge over retirement village land with regard to unpaid exit entitlements. While any RV Act statutory charge over land remains unsatisfied (that is, an exit entitlement has not been paid), it is likely the land continues to be used in connection with a retirement village scheme and so may remain a retirement village for RV Act purposes even if the complex is empty.<sup>29</sup>

The issues which relate to termination of a retirement village scheme will be discussed in CRIS 4.

### **Does the RV apply to residents who do not pay premiums?**

The RV Act applies to a retirement village as a whole. With the exception of certain residential aged care facility residents, it covers all the people who do or will reside in it. This includes residents who do not pay a premium but who enter a village under rent only arrangements.

Certain residential aged care facility residents are excluded from the RV Act as these residents are protected under the *Aged Care Act 1997* (Cth) (ACA).<sup>30</sup> Updating the relationship between the RV Act and the ACA in light of changes to the ACA and emerging village models will be discussed in CRIS 5.

Part 17 of this CRIS looks at whether the RV legislation makes sufficient provision for residents who pay rent but not a premium.

### **How do consumers know when the RV Act applies to a village?**

There is currently no specific database of retirement villages available for consumers to identify whether the RV Act applies to a village. The RV Act provides for a memorial process which serves to notify the public that the land is used for a retirement village. This process requires owners (other than residents) of land which is or will be used for a retirement village to lodge a memorial with the Register of Titles.<sup>31</sup> The memorial is recorded on the relevant certificates of title and so is part of the public land record.

The Registrar can remove the RV Act memorial when satisfied that no part of the land is currently, or is in the future intended to be used, for a retirement village scheme. Provision for ceasing to use part only of the land for a retirement village scheme will be considered in CRIS 4.

It is important to note that the RV Act memorial serves a notification purpose only. It does not determine whether the RV Act applies to a complex built on the relevant land.<sup>32</sup> That is, a complex can be a retirement village even if there is no RV Act memorial – the relevant question is whether it is used for the purposes of a retirement village scheme, not whether an RV Act memorial has been lodged.

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<sup>29</sup> See *Hollywood* case, paragraph 187: "Furthermore, by virtue of existence of the Charges, it is not possible to say that no part of Lot 889 is 'used or proposed to be used as a retirement village'. That is because Lot 889 forms part of the security to which the Charges attach, and in my view Lot 889 is therefore land which is being used for or in connection with the Scheme".

<sup>30</sup> RV Act, section 5(2).

<sup>31</sup> RV Act, section 15.

<sup>32</sup> *Hollywood* case, paragraphs 114 to 118 and 121 to 123.

Accessing Landgate records is cumbersome for consumers. The Final Report recommended that Consumer Protection establish a public database of the complexes to which the RV Act applies.<sup>33</sup> Part 13 of this CRIS considers options for implementing this recommendation.

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<sup>33</sup> Final Report, Recommendation 93, 163.

## PART 13: HELPING CONSUMERS IDENTIFY A RETIREMENT VILLAGE UNDER THE RV LEGISLATION

This part looks at what assistance consumers could be given to identify retirement villages regulated by the RV Act.<sup>34</sup> The Final Report made Recommendations 86 and 93 which relate to this issue.<sup>35</sup>

In summary:

*Issue 13.1* proposes that Final Report Recommendation 86 which recommended restricting the use of the term retirement village, not be implemented.

*Issue 13.2* considers implementation options for Final Report Recommendation 93 which recommended: that the legislation require operators to notify the Commissioner in writing that land comprising the retirement village is used as a retirement village, to provide specific information, as prescribed by regulation, and for the Commissioner to make this information publically available.

The discussion in CRIS 1 (Part 4) about consumer understanding of the RV product is also relevant to the issues in this part.

### Issue 13.1: Recommendation 86 - Restricting the use of the term retirement village

#### Issue

The Final Report recommended restricting the use of the term retirement village. However it also acknowledged that many villages have moved away from using the term retirement village in their name. In light of this, restricting the use of this term will do little to assist consumers. Enforcing such a restriction would also be unpopular and difficult.

#### Proposal for consultation

Consumer Protection proposes that Recommendation 86 to restrict the use of the term retirement village not be implemented.

#### Questions

*13.1.1 Do you agree that no restrictions should be placed on the use of the term retirement village? Please give your reasons if you disagree.*

<sup>34</sup> Seniors housing includes retirement villages regulated by the RV Act, as well as other arrangements, including over 55's strata villages of villas, units and apartments available for freehold and rental, and residential park , where seniors may own their home but lease the land on which it is built. These other arrangements are regulated by other legislation, such as the *Strata Titles Act 1985 (WA)* and the *Residential Parks (Long-stay Tenants) Act 2006 (WA)*. See also Part 13, table 13.2.

<sup>35</sup> Government of Western Australia, Department of Commerce, Statutory Review of Retirement Villages Legislation Final Report, November 2010, 149 and 163 (Final Report).



## Issue 13.2: Recommendation 93 - Establishing a public database of retirement villages regulated by the RV Act

### Issue

Final Report Recommendation 93 is that the RV Legislation require operators to notify the Commissioner about land that is used for a retirement village, as well as to provide other prescribed information, and for the Commissioner to make this information publicly available. This part proposes implementing Recommendation 93 by way of a public online database.

### Objective

To seek views on whether it would be worthwhile to require additional information so that the database could be used to compare villages.

### Discussion

#### Final Report

The Final Report found general support from residents and prospective residents for a database of comprehensive information. Industry groups also supported a database of current retirement villages and their schemes and suggested that it be established and maintained by Consumer Protection, be accessible to the public, and that the process should be simple and inexpensive.<sup>36</sup>

The Seniors Housing Advisory Centre (SHAC) was established as an information and advice service in 2013 to assist seniors with retirement housing matters. Although SHAC provides a service which helps seniors to identify villages regulated by the RV Act, it cannot ensure information is completely accurate.

#### Other jurisdictions

Other jurisdictions in Australia maintain databases but the approaches used vary. Queensland uses a registration system whereby all retirement villages schemes must be registered with the Department of Housing and Public Works (DHPW).<sup>37</sup> The public database provides basic information on the 323 registered schemes. This information includes village names, locations, number of units currently available, and names of scheme operators.<sup>38</sup> Additional details are submitted for registration purposes but are not made publicly available.

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<sup>36</sup> *ibid*, 160.

<sup>37</sup> Part 2 Div. 1 of *Retirement Villages Act 1999* (Qld) sets out the requirements for registration.

<sup>38</sup> Queensland [Link to register](#)

In New South Wales an online retirement village register is maintained by NSW Fair Trading.<sup>39</sup> Information is through an online database which provides the name of the village, its street address, telephone number and a link to the operator's webpage for the village.<sup>40</sup>

South Australia maintains a public online database that includes the village name, address and number of residences.<sup>41</sup> South Australia also operates a registration scheme.<sup>42</sup> A copy of the register is kept by the Office for the Ageing (OFTA) and can be viewed on request.<sup>43</sup>

Victoria requires operators to notify that they are operating a retirement village and to provide basic information, including the name of the retirement village, its location and postal address, and any exemptions that have been granted under the *Retirement Villages Act 1986* (Vic) section 38L.<sup>44</sup> The legislation in the ACT, Tasmania and the Northern Territory does not provide for a database or a registration scheme.

Table 13.1 shows the database and registration provisions in the retirement villages' legislation of other jurisdictions in Australia.

**TABLE 13.1 – DATABASE AND REGISTRATION PROVISIONS IN OTHER JURISDICTIONS**

Database and registration provisions	NSW	Qld	SA	VIC
Legislation enables an online database of retirement villages to be established.	✓	✓	✓	✓
Legislation provides for a registration scheme.	✗	✓	✓	✗
Operators must notify the regulator of retirement village information.	✓	✓	✓	✓
It is an offence to fail to provide the prescribed information.	✓	✓ <sup>45</sup>	✓	✓
It is an offence to fail to update information.	✓	✓ <sup>46</sup>	✓	✓

<sup>39</sup> The head of power for the Register derives from Section 24A(1) of the *Retirement Villages Act 1999 No.81* (NSW). This requires that the operator of a retirement village must, in accordance with this section, notify the Registrar-General in writing that the land comprising the retirement village (or land that is part of the retirement village) is used as a retirement village. The maximum penalty for a breach of this provision is 100 penalty units (this would incur a penalty of \$16,119 at current rates in NSW).

<sup>40</sup> NSW [Link to register](#)

<sup>41</sup> South Australia [Link to register](#)

<sup>42</sup> The information required by the South Australian register under section 12 of the *Retirement Villages Act 2016* (SA) is the:

- name and business address of the operator of the village;
- name and address of the village;
- references for the certificates of title of the land used for the village;
- name, address and contact details of the village land owner; village manager, and any senior manager; and
- any other information that the Registrar considers appropriate.

<sup>43</sup> [https://www.sa.gov.au/\\_data/assets/pdf\\_file/0003/392853/Operator-Retirement-Villages-Register.pdf](https://www.sa.gov.au/_data/assets/pdf_file/0003/392853/Operator-Retirement-Villages-Register.pdf)

<sup>44</sup> Victoria [Link to register](#)

<sup>45</sup> Section 34 of *Retirement Villages Act 1999* (Qld) makes it an offence to operate an unregistered retirement village but no offences are listed in relation to the provision of database information or the updating of that information.

<sup>46</sup> There are no specific offences however Queensland legislation requires registration and accurate details.

## Types of database Information

At its most basic level, a public database would inform consumers about which villages are regulated under the RV Act and provide very limited information about the village similar to the databases in Queensland, New South Wales, South Australia and Victoria.

However, as well as assisting consumers to identify retirement villages regulated by the RV Act, there are a number of other benefits which could be provided by a database. For example, it could provide information about the key features of each retirement village and consumers could use this to compare villages. The database could also be used to provide consumers with information which would assist them to assess how financially secure a village is. Potentially information already required to be given in part of precontract disclosure could be included in the database. This would help consumers compare villages and potentially be a more efficient way for operators to make this information available.

The greater the amount of information on the database, the more the database will cost in terms of operator time and effort spent to ensure the information is up-to-date. There is also a cost to government in terms of the resources needed for Consumer Protection to oversee the operation of the database. Two examples of the type of information that could be placed on the database are provided below.

**Example 1** - Basic information could be available, similar to that in databases in Queensland, New South Wales, South Australia and Victoria.

<b>Example 1 - Basic information</b>
<ul style="list-style-type: none"><li>• Name of the village.</li></ul>
<ul style="list-style-type: none"><li>• Street address of the village.</li></ul>
<ul style="list-style-type: none"><li>• Village operator or manager contact details.</li></ul>
<ul style="list-style-type: none"><li>• Number of residences currently available in the village.</li></ul>

**Example 2** – Alternatively, potential additional information could help consumers to not only identify that the village is regulated by the RV Act, but also understand more about the village, thus making comparisons between villages possible.

<b>Example 2 – Potential additional information</b>
<ul style="list-style-type: none"><li>• Number of independent living units, serviced units, single level units, apartment blocks, apartments.</li></ul>
<ul style="list-style-type: none"><li>• Number of strata, lease/licence or rental units.</li></ul>
<ul style="list-style-type: none"><li>• Communal and personal services, facilities, and amenities available in the village.</li></ul>
<ul style="list-style-type: none"><li>• Floor plans and map of the village.</li></ul>
<ul style="list-style-type: none"><li>• Details of any commercial arrangements within the village (e.g. in house care, retail, hairdresser, coffee shop, restaurant/bar, medical centre).</li></ul>

**Example 2 – Potential additional information**

- Restrictions on the use of village land and facilities by residents (e.g. parking, gardening, pets, alterations to the residential premises).
- Shared facilities that are not for the exclusive use or enjoyment of village residents (e.g. community hall, bar, coffee shop, library, bowling green).
- Anticipated date of first occupation by a resident if the village is yet to be built and when communal facilities and amenities will be provided.
- Copy of a current residence contract.
- Filled out example of a precontractual disclosure statements (Forms 1).
- Type of tenure (for example strata ownership, lease-for- life / licence, shares through purple title, rental).
- Age of the village or age of different stages of the village.
- Memorial number.
- Certificates of titles, any strata or community titles, and schemes pertaining to the village.
- Type of financial models available to residents in relation to premium, upfront payments and DMF.
- Statement of the financial position (statement of assets, liabilities and equity of the village).
- Outline of the purposes to which upfront payments are used.
- Value of the retirement village land.
- Details of the statutory charge under the RV Act.
- Details of encumbrances, easements affecting the land, and any mortgages.
- Lease / head lease or sublease arrangements.
- Sales activity (number of units sold in the last 12 months, price of each unit sold), finance availability, market conditions, and other relevant sales information
- Facilities proposed to be made available at further stages of development, proposed dates of further stages, and any contingencies influencing development of further stages.
- Capital works plan.
- Reserve fund statements showing amount in the fund and recent expenditure and how reserve fund contribution is calculated.
- Operating budgets and recurrent charges paid by residents and how recurrent charges are calculated.
- Forward projections of how much is owing to residents in exit repayments.
- Insurance arrangements for the village, including whether residents have responsibility for arranging any insurance and paying insurance costs (e.g. premiums and excess payable).
- A copy of the insurance Product Disclosure Statement.

### Questions

13.2.1 *Do you agree with the proposal to establish a public online database of information lodged by operators about retirement villages regulated by the RV Act?*

13.2.2 *Is there any other simple and affordable way that essential information about retirement villages regulated by the RV Act could be provided to the public?*

13.2.3 *Do you think that basic information, similar to that provided in other jurisdictions in Australia, is sufficient for a public online database?*

13.2.4 *If a database containing only basic information is not sufficient, what additional information do you think would be useful to put on the database?*

*Please give your reasons why the additional information that you list is necessary.*

### Transitional arrangements

The RV Act would need to contain transitional provisions to enable existing operators, sufficient time to provide the information for the database. The time required depends on how much information the database contains. Transitional arrangements would be determined in consultation with the sector once this is known.

## PART 14: RETIREMENT VILLAGE SCHEME – RESIDENCE CONTRACTS AND VILLAGE COMMUNITY ARRANGEMENTS

This Part looks at the differences between the concepts retirement village scheme and residence contract in the RV Act. It also considers resident concerns relating to village community arrangements.

This Part discusses issues relevant to Final Report recommendations that consideration be given to redefining the RV Act term retirement village scheme (Recommendation 85) and that the RV Regulations stipulate matters that must be in a residence contract (Recommendation 24).

In summary:

- Issue 14.1* proposes a technical correction to the RV Act to make the difference between a residence contract and a retirement village scheme clearer; and
- Issue 14.2* asks questions to obtain more information about concerns raised by residents regarding the interaction between individual residence contracts and village community arrangements.

Part 12 and Appendix 14, which summarise three recent Supreme Court cases on the RV Act, provide background for this part.

### **Issue 14.1: Confusion regarding retirement village scheme, scheme and residence contract**

#### **Issue**

Stakeholders appear to be confusing the RV Act terms *retirement village scheme* and *residence contract*. In particular, they can assume that when used in the RV Act:

- retirement village scheme means the detailed community arrangements that apply to a village beyond the three elements that actually comprise a retirement village scheme (see explanation of retirement village scheme in Part 12); and
- residence contract means only the lease or other document the resident specifically signs when in fact that term includes the more detailed arrangements under which a right to reside has arisen. For example, if the village operates under a trust arrangement, the trust deed will also be part of the residence contract even though the resident may not be party to that deed.

Confusion around these terms has resulted in misunderstanding that RV Act obligations which apply to a retirement village scheme also apply to residence contracts. One reason for this misunderstanding is how the RV Act defines and uses the term *scheme*, a word that is used in the meanings for both retirement village scheme and residence contract. To avoid misunderstandings about obligations under the RV Act, it is important that these meaning are clear.

## Objective

To reduce inadvertent noncompliance with the RV legislation, and disputes based on misunderstandings, by making the RV Act's use of the word scheme consistent.

## Discussion

### Final Report and Supreme Court cases

As noted above, Recommendation 85 – was that consideration be given to redefining the RV Act term retirement village scheme. The Final Report did not expressly identify the RV Act's use of the word scheme in the meanings for retirement village scheme and residence contract as an issue. The parties' arguments in the Supreme Court cases summarised in Appendix 14 (the Supreme Court cases) however drew attention to stakeholders misunderstanding the role that the terms retirement village scheme and residence contract played in the RV legislation and confusion as to which term means the detailed community arrangements. This misunderstanding has also been apparent in disputes referred to Consumer Protection and in concerns raised at public forums.

### Difference between retirement village scheme and residence contract

Part 12 explains that the term retirement village scheme only has 3 elements, it is a programme of action or a plan or policy for:

- retired persons or predominantly retired persons (element 1);
- to occupy residential premises under certain arrangements that the RV Act specifies (element 2); and
- at least one resident or prospective resident to pay a premium (element 3).<sup>47</sup>

This term is used to identify what is necessary for the RV Act to apply to a complex.

Part 12 also discussed that the term retirement village scheme does not capture the more detailed business, financial and community arrangements for the village. Instead, these arrangements are captured by the term, residence contract, which means: a contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy residential premises in a retirement village, and may take the form of a lease or licence.

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<sup>47</sup> The full definition of retirement village scheme is in RV Act s 3(1). Part 12 explains this more thoroughly.

## Problems caused by the misunderstanding in terms

As noted above, misunderstanding certain arrangements as being part of the retirement village scheme rather than the residence contract is leading to certain RV Act requirements being applied incorrectly. For example, some stakeholders think the restrictions on terminating a retirement village scheme apply to matters covered under the term residence contract. This type of misunderstanding is undermining RV legislation protections and leading to unnecessary disputes. Problems that are arising include:

- multiple RV Act memorials being lodged over the same land;<sup>48</sup>
- RV legislation rights and obligations regarding residence contracts are not applied to the village arrangements beyond the terms in the lease; and
- belief that varying a lease, or detail of the community scheme or arrangement, means that the retirement village scheme is varied or terminated.

## Reasons why this misunderstanding may be occurring

There are two reasons why this misunderstanding may be occurring. Firstly, the word scheme when used in its ordinary sense has different meanings in different contexts. It can indicate any degree of complexity from an intent to develop a plan or system to the detailed components of it.

**Example 14.1** illustrates this range through the example of a scheme for reducing landfill:

### **Example – scheme for reducing landfill**

In saying that a local government has a scheme to reduce landfill, a person may mean:

- the local government intends to reduce landfill;
- has developed a scheme with that objective;
- a landfill reduction scheme that involves households, businesses, the local government itself or all or any combination of these entities; or
- a scheme that has some or all of the details necessary for the objective to be achieved exists, such as: what will occur with the diverted waste, whether different categories of waste will be treated differently and if so what those categories will be, whether it will be collected or persons required to dispose of certain items themselves, if collected how that will occur, what costs will be saved/incurred, whether new contractors will be required and a range of other matters.

Retirement village scheme means scheme at the third dot point level.  
Residence contract means scheme at the fourth dot point level.

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<sup>48</sup> Due to an incorrect belief that each residence contract is a retirement village scheme requiring its own memorial.



This means that if the technical meaning for the term retirement village scheme in the RV Act is not understood (that is, that it only means three elements), the use of the word scheme can suggest the more detailed village arrangements as this can be how it may be ordinarily used.

The second reason contributing to stakeholders confusing a retirement village scheme with residence contract is that the RV Act currently provides that retirement village scheme and the word scheme when used on its own, have the same meaning. This suggests that they are interchangeable terms.<sup>49</sup>

However, as can be seen above, the definition of residence contract also refers to the term scheme on its own as part of the meaning of residence contract. When read together, these definitions suggest that residence contract also means the retirement village scheme.

The RV Act does not however treat a residence contract and retirement village scheme as the same thing in its substantive provisions (these are the provisions that impose rights and obligations). Differences between a retirement village scheme and residence contract include that:

- a village landowner, who may not be the operator (see CRIS 2, Part 10) establishes and terminates a retirement village scheme. The landowner must apply to the Supreme Court for approval to terminate it (unless the village is empty). A residence contract on the other hand, involves a contract with a resident. It can only be terminated by a resident or SAT (an operator must ask SAT to terminate a residence contract);<sup>50</sup>
- residence contract termination does not mean the retirement village scheme is terminated, nor does retirement village scheme termination mean a residence contract is terminated (the RV Act simply no longer applies to it);<sup>51</sup> and
- regulation of what must and must not be in a residence contract is not limited to the three retirement village scheme elements. It goes beyond them to the detail of village arrangements and matters personal to a resident.<sup>52</sup>

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<sup>49</sup> RV Act, section 3(1) provides that retirement village scheme or scheme means a scheme established for retired persons or predominantly for retired persons, under which [the three elements]”.

<sup>50</sup> A retirement village scheme can only be terminated by a landowner and (unless the village is empty) the landowner must first obtain Supreme Court approval. (RV Act section 22 as interpreted by the Supreme Court in the *Hollywood* case, paragraphs 124 to 129, 135, 136, 140 and 142. Residence contracts are terminated by a resident or SAT (RV Act section 17). An administering body (which as discussed in CRIS 2, Part 10 may or may not be the village landowner) can apply to SAT for a *residence* contract to be terminated only on the specific grounds set out in the RV Act. (Section 17 does not use the term residence contract but sections 57 and 65 to 70, which set out the grounds on which an administering body can make an application to terminate a residence contract do).

<sup>51</sup> See, for example, the *Hollywood* case, para 146.

<sup>52</sup> See, for example, RV Regulations 7A to 7L.

The word scheme is used alone on only four occasions in the RV Act and there is only one occasion that the meaning for retirement village scheme is appropriate.<sup>53</sup> The RV Act therefore appears to use the word scheme inconsistently with its defined meaning.

### Changing the meaning for *scheme* not retirement village scheme

The inconsistency issue could be addressed by changing the meaning for retirement village scheme, so that it does incorporate the detailed community scheme or arrangements and not just a scheme with three elements. Some residents have effectively called for this amendment.<sup>54</sup> As Part 12 explains and CRIS 1 Part 4 discussed however, restricting a retirement village scheme to three elements only serves a useful technical purpose. It means that it is an umbrella concept. It allows the same village to continue operating despite changes to residence contracts and the community scheme or arrangement detail.

For example, the same retirement village scheme continues despite changes in in business ownership, management structures, village rules, price structures, amenities and services, land or contract terms and conditions. Flexibility for these changes is essential given the lengthy life span of a retirement village.<sup>55</sup> It protects residents' security of tenure.

The minimal meaning for retirement village scheme also ensures that the RV Act applies to the wide variety of detail – different price structures, amenities and services and contract terms and conditions – involved in implementing a scheme with the prescribed three elements. This in turn ensures that necessary consumer protections apply whenever the financial model giving rise to a need for those protections is used. Increasing the detail in the meaning for retirement village scheme risks the RV Act not applying to a complex when the relevant financial model is used because a detail in the broader scheme under which it operates is different to a detail in the RV Act.

There appear to be other reasons for why residents might want the more detailed village arrangements incorporated into the concept of the retirement village scheme. These are discussed in Issue 14.2 which looks at concerns raised by residents about community arrangements.

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<sup>53</sup> The RV Act provisions are: section 3(1) – meaning for residence contract; section 3(2) also regarding the meaning for residence contract, section 6(1) which provides that no “scheme” operates to annul, vary or exclude any of the provisions of the RV Act; and section 22(1) which provides that a retirement village scheme cannot be terminated without Supreme Court approval while a person admitted to occupation of residential premises under “the scheme” remains in occupation. Section 22(1) alone uses scheme to refer to a retirement village scheme. In the other provisions, scheme means any scheme or scheme in a more detailed sense than retirement village scheme.

<sup>54</sup> For example, WARVRA's October 2019 newsletter calls for the meaning for retirement village scheme to be changed to allow residents to receive two documents, one “a residency contract to define who is taking up residence, including the financial arrangement such as entry and exit fees. The second document would describe the “scheme” such as pets, gardens and village rules and charges ...” which require resident consent to change. This issue is discussed in Issue 17.2.

<sup>55</sup> Issues relating to variation of either the detailed community scheme or arrangement that applies to a retirement village as a whole over the life of a retirement village are discussed in Issue 17.2.

## Amending the RV Act to address the confusion caused by using the term *scheme* in both retirement village scheme and residence contract

A simpler and preferred solution to address this issue is to amend the Act, so that the term *scheme* is not used in both the definitions of retirement village scheme and residence contract. This will ensure that the legislation does not conflate the two concepts in the way the terms are defined.

### Proposal for consultation

**That the RV Act definitions for retirement village scheme and residence contract be clarified by amending the RV Act so that it no longer provides that the word *scheme* (when used alone) has the same meaning as retirement village scheme.**

### Impact analysis

Correcting the inconsistency in the way the RV Act uses the word *scheme* may reduce inadvertent noncompliance with the RV legislation, failure to enforce rights or obligations due to misunderstandings and minimise disputes, arising from misunderstandings as to the rights and obligations that apply to a retirement village scheme or residence contract.

Considering the way relevant terms were interpreted in the Supreme Court cases (see Appendix 14), the proposal is unlikely to have any impact on the rights and obligations under the RV legislation. On the information currently available, the proposal is also unlikely to have any impact on contractual rights or obligations.

Costs savings include not lodging a separate RV Act memorial for each residence contract. There may however be some financial impacts for operators, for example, in correcting standard form contracts that use the terms retirement village scheme, residence contract and *scheme* interchangeably.

#### Questions

- 14.1.1 *Is there any reason why the word *scheme* should have the same meaning as the term retirement village scheme in the RV Act? If so, please explain.*
- 14.1.2 *Will clarifying that the word *scheme* does not mean retirement village scheme in the RV Act have any adverse financial impact on operators or residents? If so, please identify these and the likely cost?*

## **Issue 14.2: Emerging issue - Community wide village arrangements and individual contract terms**

### **Issue**

Some residents have complained that they have difficulty understanding what the administrative, operational and financial arrangements are in a village such as insurance policies, staffing arrangements and business models, and how they interact with individual contracts. They also raise concerns about changes made to such arrangements without resident consultation or consent.

This raises questions about whether there is a need for increased disclosure by operators of certain village community arrangements that apply to all residents, greater distinction between community arrangements and individual contract terms and rules around changes to these village community arrangements.

### **Objective**

To ensure that the RV Act appropriately describes and regulates retirement village arrangements, including balancing the relationship between the community arrangements that apply to all residents and individual resident's contract terms and conditions.

### **Discussion**

#### **Final Report and stage one reforms**

The Final Report made recommendations about the need to better identify the community arrangements in the village as distinct from the matters personal to an individual resident and requiring resident consent for certain changes to amenities and services provided as part of the RV product. These include, recommendations that:

- optional or elective matters be separated from the residence contract (Recommendation 19) (that is, these personal matters are not part of the community arrangements so should not be in the residence contract);
- the RV Regulations specify matters that must be in the residence contract (Recommendation 24); and
- operators obtain resident consent to introduce new services or amenities to the village which increase recurrent charges (Recommendation 37).

Stage one reforms began the process of identifying the features of village life and contractual arrangements that should be considered from a community perspective as distinct from a personal, resident specific contractual matter.<sup>56</sup> For example, amenities and services must now be identified as communal or personal.

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<sup>56</sup> See RV Regulations, 7A to 7L.

A special resolution from all residents is required to vary communal amenities and services but not personal amenities and services.<sup>57</sup>

### Community village arrangements and residence contracts under the RV Act

The RV Act currently uses the same term – residence contract - to mean both the community arrangement under which a right to occupy a unit in the village arises and the lease or other document that contains contractual terms specific to an individual resident. The residence contract must specify both personal and community amenities and services.

Some residents have complained however that:

- it is still difficult to identify the residence contract features that constitute the village’s community scheme or arrangement as distinct from the matters personal to themselves;
- their lease and/or other residence contract document/s do not fully describe the community scheme or arrangement;
- their residence contracts describe different village arrangements from those described in residence contracts for other residents in the same village, resulting in inequity amongst residents; and
- they do not know “how the village works”.<sup>58</sup>

Residents identify other problems that overlap with or can be seen to arise from these complaints. For example, complaints that they are unable to compare different villages’ RV product offerings at a community scheme or arrangement level. This impedes prospective residents’ ability to make an informed decision as to which retirement village to move into. Some residents have also complained that operators are able to change the community scheme or arrangements without their knowledge or consent. Where residents have chosen a village based on specific facilities or arrangements being available, this can be of great concern.

These complaints raise questions such as whether:

- there should be increased disclosure about community village arrangements?
- there should be different rules for changing community village arrangements and if so what these should be?
- all residence contracts should provide a level of equity across residents of the village?

In considering these questions, it is important to note that the meaning for the term residence contract serves a technical legal purpose in the RV Legislation. It provides the mechanism ensuring individual residents are legally bound to that arrangement of the village.

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<sup>57</sup> (RV Regulations, regulation 7C, item 4 and regulation 7E, item 3.

<sup>58</sup> Stakeholder submission to CRIS 1.

The RV Act rights and obligations regarding residence contracts apply to the broader scheme or arrangement, not just an individual lease or sale agreement. Any changes to better identify and distinguish community village arrangements need to also preserve contractual rights and remedies for residents.

### **Providing more information to residents about community village arrangements**

One of the concerns raised by residents is that they lack information about community village arrangements. The disclosure required by the RV Act is contained in the Form 1, the residence contract requirements set out in the RV Regulations and the village rules.<sup>59</sup> However, not all of the information is required to be in the residence contract. For example, the Form 1 requires operators to provide some information about village insurance, security arrangements and resident consultation arrangements. Residence contracts are not required to specify these matters (though in practice they generally do).

This means that information about how the village works must be gleaned from different sources and arrangements may not be clear. Residents can also be confused about how certain village arrangements interact with their contractual obligations. Example 14.2 illustrates the problems that can occur.

#### **Example 14.2**

Jack's lease provides that he is responsible for the costs of maintaining the unit he occupies, including the windows, pipes, plaster and door locks. The excess on the operator's building insurance policy is \$10,000. Jack is concerned that this large excess leaves him liable under his lease for works usually covered by an insurer. The operator advises Jack that its policy is not to enforce the lease term and that it covers the cost of works that the insurer does not fund due to the excess.

Ambiguity – Jack has different obligations under the operator's insurance excess policy than under his lease. Under contract law, change to a policy that is not set out in the lease, and which does not need change to any contractual terms, is not a change to legal obligations and so does not require Jack's consent. The operator's insurance excess policy is however arguably as much a part of Jack's residence contract as Jack's lease (because it is part of the community scheme or arrangement as it was when Jack entered the village). Which prevails? Can the operator change its policy regarding the insurance excess without Jack's agreement? Jack and the operator have different views.

In regards to Example 14.2, it may assist residents like Jack if the operator was required to disclose upfront what village policies, like the insurance excess policy, are and how these applied in regards to resident contractual obligations. Operator policies such as these are arguably important for residents to know so that they can better understand their rights and obligations in the village.

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<sup>59</sup> RV Act s section 13 and RV Regulations, regulations 4 to 6.

However, in deciding whether there should be increased disclosure about these types of community village arrangements, it is important to note that there are different views on:

- what the community arrangements are which should be disclosed; and
- where the line is drawn between matters that are individual resident specific and matters that constitute the community arrangements.

Proposals to require more information to be provided about community village arrangements need to therefore consider two issues. Firstly, *what are* the community arrangements for which information is sought? Secondly, what level of *detail* about this information is required?

### What arrangements form part of community village arrangements?

As noted above, the RV Regulations already require residence contracts to provide certain details about communal amenities and services in the village.<sup>60</sup> The details required focus predominantly on services and amenities available for the *use* of residents when they are in the village. Other community services for the running of the village, such as details of administrative and management services, are not required.<sup>61</sup> Are these details that residents are now seeking?

Residents have complained that their residence contracts do not describe ‘how a village works’. This suggests that some residents may consider details about operational details such as staffing arrangements, operator policies regarding enforcement of contractual rights (such as insurance policies) and how contractors for capital works to the village are selected (e.g. whether there is a tender process) as important details about community arrangements which should be disclosed upfront to residents. In considering which details should be disclosed it is also important to consider the level of detail which should be provided about community arrangements.

Example 14.3 illustrates different views residents of the same village can have as to the level of detail at which a monitoring service forms part of the community arrangements.

#### **Example 14.3**<sup>62</sup>

An operator wants to change from an emergency monitoring system staffed by an onsite nurse to an off-site monitoring arrangement, which involves a contractor organising a third party attendance depending on the circumstances. This will reduce the village recurrent charges. This proposal was rejected by a narrow resident majority. Different residents of the village complained that the onsite monitoring and response by a nurse:

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<sup>60</sup> RV Regulations, 7C.

<sup>61</sup> RV Regulations, 4A, definition of communal service expressly excludes these items.

<sup>62</sup> Different resident views regarding changes to an emergency monitoring service has arisen in several villages. Example 14.3 is therefore a generic summary. It does not accurately describe the circumstances of any of these villages.

- was a fundamental part of the community arrangements. It was the reason they had selected the village. They were concerned that the 75% majority that allowed the operator to vary this service meant that younger residents who did not use the service would eventually vote for its removal. The RV legislation should prevent this; and
- the essential part of the village scheme was that there was a monitoring service, not that it was onsite or staffed by a nurse. They did not see why they should subsidise a luxury service for others. They considered the proposed change appropriate. That the RV Legislation did not allow a simple majority to decide the matter was unreasonable.

### Is information about an operator’s financial position an important part of what should be disclosed about village arrangements?

As well as details relating to the operation and administration of the village, residents may also regard details about the operator’s business model and financial arrangements as part of the community arrangements which should be disclosed, for example:

- village operating structures;
- how their upfront payment is used by an operator; and
- whether entities involved in the village operation are related and if so how fair market prices for services are set.

Residents and operators agree that retirement village living is an investment in a lifestyle.<sup>63</sup> The ‘lifestyle investment’ narrative can however obscure the fact that residents’ upfront payments are an investment in the operator not a straightforward property purchase.

Example 14.4, an excerpt from an operator’s website, clearly identifies residents’ upfront payments as an investment fee (and, incidentally, provides an example of good advice for prospective residents from an operator).<sup>64</sup>

#### **Example 14.4: Transparency is key**

Understanding what you’re financially responsible for is essential for your sense of security and wellbeing. It’s a given you’ll have to sign a contract, pay an initial investment fee and monthly levies. Ask questions about long-term costs, and become acquainted with the notion of Deferred Management Fees. Speak to trusted advisors about your concerns because knowing exactly what your contract stipulates before you sign it will ensure there are no surprises down the track.

<sup>63</sup> Smeed, B *Retirement Villages in Australia: the Case for Commonwealth Intervention*, (2018) 11 Elder Law Review, Article 3, p2 and sources cited therein. Smeed concludes that this narrative, which she identifies as arising from industry lobbying, does not accurately reflect the way retirement villages operate in Australia today.

<sup>64</sup> Viewed 21.09.17. See also:” RV contracts are not really about Real Estate...rather, they are a financial product whereby people have a licence to live in an RV unit, and there a [sic] myriad of financial and personal risks attached to this model” (Ian Yates, CEO COTA in Retirement Village Residents often left in the dark over complex contracts, 27 June 2017, <https://www.cota.org.au/news-items/media-release-retirement-village-residents-often-left-dark-complex-contracts/>).



This information does not however provide any further detail about this investment. This dynamic raises the question: to what extent should residents be given information about the investment of their upfront payment?

One of the main purposes of the RV Act is to protect residents' financial investment in their long term security of tenure and smooth and efficient village administration.<sup>65</sup> Unlike other investors however, at present resident upfront payments can be made with little or no information as to operator's financial status or use to which their funds will be put.

CRIS 1 discussed how residents can confuse their investment in a retirement village with investment in a general residential property.<sup>66</sup> This may lead them to assume that the upfront payments they have paid are invested directly in the village. As CRIS 2 Part 6 noted, this is not necessarily the case. For example, upfront payments can be used to support other operator businesses or not for profit activities and so not be available for village purposes. This includes transferring monies through gifts or loans to other entities in a corporate group.

Retirement village contingent exit entitlement liabilities can be large. Public records establish that in 2017, one WA village had a contingent debt of some \$200 million dollars regarding future exit entitlement payments. In the ordinary course of events, new upfront payments will cover this. Downturns in the market however pose risk. Banks and other professional investors will undertake a significant due diligence prior to lending sums in the region of cumulative resident loans to operators.

While the RV Act provides robust protections for residents in the event of operator insolvency, the precedence of Commonwealth insolvency law means that there are some circumstances in which they may not be as robust as in others.

How an operator treats monies paid up front, whether they are invested in the village or are used for other purposes, and the overall liquidity position of the operator as against liabilities may be an important consideration, especially for prospective residents.

It is noted that information regarding the village alone may be deficient. This is because villages are often not stand alone businesses independent of other operator or group enterprises. Administration of the Settlers' Group highlights the importance of the underlying financial position of the operator, and a corporate group as a whole, to residents' security of tenure.

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<sup>65</sup> In introducing the legislation that would become the RV Act to Parliament in 1991, the then Minister emphasised the need to protect residents' financial investment in secure tenure and smooth and efficient village management, Second Reading Speech Western Australia, Legislative Assembly, 16 May 1991,

<sup>66</sup> See CRIS1, Part 4, Issue 4.1.

**Questions:**

14.4.1 *Do you think an operator should be required to provide information to residents and prospective residents, which are additional to the matters currently required to be disclosed in Form 1 and the Residence Contract? If so, what information do you think should be disclosed? Information about:*

- *staffing arrangements?*
- *administration arrangements?*
- *operator operational policies?*
- *operator insurance details?*
- *details about the management of capital works in the village (e.g. How contractors for capital works to the village are selected)?*
- *any other details?*

*In your answer please explain why this information is important to you.*

14.4.2 *Do you think prospective residents should be provided with information about:*

- *the operator's financial status? If so, should this include at a group level?*
- *the use an operator makes of upfront payments?*
- *whether the retirement village is part of a larger organisational group?*
- *where the retirement village is part of a larger group, whether the retirement village's finances are treated as independent or used for other purposes in that group?*
- *any other information? Please specify and explain.*

### **How should further information about village arrangements be provided?**

In considering whether additional information should be provided to residents in regards to community village arrangements such as administrative, operational and financial arrangements, it is also important to consider how this might be provided.

Disclosure material can become counterproductive if there is too much being provided. For example, residents already complain about the volume of information they receive. The Final Report also observed that the volume and complexity in current contracts and precontract disclosure tended to overwhelm prospective residents.

If there is a need for additional disclosure about community village arrangements consideration of how this information could be provided without significantly increasing the complexity or volume of information that residents already receive, will be needed.

For example, Part 13 proposes additional information that might be included in the public database of villages.

It is possible that this mechanism could also be used for providing information about a village's community arrangements. Are there other mechanisms that could be used outside the current disclosure requirements for residents to obtain this information?<sup>67</sup>

**Question:**

*14.2.3 How should information about the community village arrangements be made available to prospective residents? For example, should it be on a public database? Should it be part of existing disclosure requirements?*

### **Providing for different termination and variation regimes for village community arrangements**

As noted earlier, the RV Regulations now require amenities and services to be identified as communal or personal, with a special resolution from all residents required to vary the former but not the latter. Similarly, if additional community village arrangements are required to be identified, residents may require involvement in variations to some of these arrangements, especially if arrangements have a significant impact on a resident's life in the village.

To what extent residents of a village should have a say in changes to a village's administrative, operational or financial arrangements is a complex issue and will depend on the type of arrangement being discussed. Some residents are seeking a greater level of participation in how their villages are run. CRIS 2 for example proposes that resident consent be required for village budgets. Not all residents will however want additional participation. Management of the village and the community arrangements is part of the RV product. Other products, such as over 55 strata complexes offer residents more control over such arrangements.

It is also the case that village operators need to be able to make changes to how the village operates so that the village continues to run smoothly and efficiently. Different considerations therefore need to be taken into account when identifying different aspects of community village arrangements and whether variation requirements should apply. For instance, what mechanism is generally suitable for varying community village arrangements? What matters should be subject to a different mechanism? How should resident input be balanced with operator need to be able to make changes required to run the village?

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<sup>67</sup> For example Part 13 proposes the establishment of a public database with information about retirement villages. Would it be desired that some of this information be provided on the public database?

**Question:**

14.2.4 *If you think additional information should be disclosed about village administrative, operating and financial arrangements, in regards to these arrangements should:*

- *changes be notified to residents;*
- *residents be consulted on changes;*
- *resident consent be required for changes?*
- *be able to be changed by the operator without any of the above?*

*Please indicate the specific community arrangements to which your responses to the above are in regards to, e.g. staffing arrangements, insurance policies, village organisational group details etc.*

### **Equity between residents - should all contracts in the village be the same?**

Another issue raised by residents is that different residence contracts can describe different village arrangements. Residents are concerned that this can result in inequity amongst residents. Should some matters be required to be consistent across contracts in the same village?

The extent to which contracts should be the same is open to question. For example, as discussed in CRIS 1 Parts 3 and 5 and CRIS 2 Part 6, different price structures suit different consumers. Some of the current variety in offerings has been triggered by consumer demand.<sup>68</sup> Different occupancy arrangements can also be beneficial - rent only residents for example provide a village with revenue and vitality when premium paying residents are hard to locate.

Contracts also vary due to the need to adapt arrangements over the life of the retirement village. Consumer demand and external circumstances change over time. For example, different services may be sought or the RV Legislation may change and so require residence contracts to be amended. There will also be features that operators should be able to vary without resident consultation.

From a regulator perspective, it is important that operators' ability to offer variety in occupation rights or price structures or otherwise improve the RV product is not limited. There may however need to be more consistency in matters such as how terms like "operating costs" are described in all contracts that relate to a single village.<sup>69</sup>

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<sup>68</sup> As the meaning for retirement village scheme makes clear, the RV Act is predicated on prospective residents being able to enter into a wide variety of occupation arrangements. In requiring only one village resident to pay a premium, the RV Act also anticipates that price structures will vary.

<sup>69</sup> In a case concerning recurrent charges increase SAT had to consider 14 different residence contracts each of which provided that the resident was responsible for a percentage of the "total operating costs" but gave different meanings to that term.

Some village arrangements may also need to be varied because it becomes apparent that the village business model is unsustainable. Residents of one WA village are currently concerned that new residence contracts require a contribution to a reserve fund but old contracts do not. However, operators need to be able to adjust their business models for sustainability. What may be required in this circumstance is a clearer process for residents to be informed about changes such as these and how equity between residents will be maintained.<sup>70</sup>

**Questions:**

14.2.5 *Do you have concerns about different contracts in your village? If so, what are these concerns?*

14.2.6 *Do you think that there should be consistency in some matters between contracts in a village? If so, what matters should be treated consistently?*

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<sup>70</sup> For example, it could be explained to residents that although existing residents do not pay a designated reserve fund contribution, their contribution was (or will be) made through their upfront payment/DMF/exit entitlement mix. See the RV product price structure discussion in CRIS 1, Parts 3 and 5, and the capital works funding discussion in CRIS 2, Part 8.

## **PART 15: MULTISITE RETIREMENT VILLAGES AND SINGLE RETIREMENT VILLAGE SCHEME PER VILLAGE**

This Part looks at retirement villages that extend over more than one site and whether the same retirement village scheme can apply to multiple retirement villages.

In summary:

*Issue 15.1* proposes implementing Final Report Recommendation 84 by amending the RV Act to provide for multisite retirement villages. It also asks questions about implementation issues such as how a multisite retirement village should be identified and whether the RV legislation needs any special provisions for a village being multisite; and

*Issue 15.2* proposes that the RV Act expressly provide that each retirement village scheme applies to one retirement village only.

This Part also relies on Part 12 – The RV Act – when, why and how it applies. The Supreme Court cases to which it refers are summarised in Appendix 14.

The discussion of the Supreme Court cases in this Part touches on retirement village scheme termination and the role of the RV Act memorial in the RV Legislation. The current RV Act requirements with regard to these matters will be considered in CRIS 4 and 5.

### **Issue 15.1: Recommendation 84 - Multisite retirement villages**

#### **Issue**

Multisite retirement villages are villages that spread over two or more pieces of land that do not adjoin each other. The RV Act does not expressly state that a retirement village may be multisite. Operators raised this as an issue in the review leading to the Final Report, saying that multisite village were in fact being built. Final Report Recommendation 84 that consideration be given to redefining the term retirement village to reflect the changed nature of retirement villages was in part to ensure that the RV Act recognises multisite retirement villages.<sup>71</sup> Amendments are proposed in this part to implement Final Report Recommendation 84 and provide more certainty about multisite villages.

#### **Objective**

To ensure that the RV Act provides for multisite retirement villages.

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<sup>71</sup> Final Report, 148.

## Discussion

### Final Report

During the statutory review, operators expressed concern that the way the RV Act defines a retirement village - as a complex of residential premises and appurtenant land (see Part 12) – may mean that it does not recognise a retirement village with geographically separate sites. Operators advised that multisite villages, comprising clusters of residences on land that did not adjoin but which shared amenities and services, were being built due to difficulty in obtaining a single site large enough for the retirement village.<sup>72</sup> Final Report Recommendation 84 was to consider redefining retirement village “to reflect the changed nature of retirement village complexes”.<sup>73</sup>

Two Supreme Court cases (one in 2014, the other in 2019) considered whether the same retirement village operated over two geographically separate locations.<sup>74</sup> In each case, the court noted that the RV Act did not expressly preclude multisite retirement villages but made no finding that they were permitted.<sup>75</sup>

Lack of an express statement in the RV Act that a retirement village can be multisite means that, there is a risk that the RV Act will either be found not to apply to multisite villages or that multisite villages will be found to be in breach of the RV Act. As the Supreme Court cases illustrate, the RV Act’s silence on multisite villages complicates termination of a retirement village scheme and undermines the RV Act memorial’s notification function (see Appendix 14). The absence of specific recognition of multisite villages also gives rise to complications in determining whether an operator is complying with RV legislation obligations that apply to a single retirement village.

This uncertainty is undesirable for both industry and residents. In particular, residents become anxious when questions about what sites belong to the same village arise.

### How should a multisite retirement village be defined in the RV Act?

In the RV legislation review, the then operator peak body, the Retirement Villages Association (RVA) submitted that a multisite retirement village should be defined in the RV Act as, one in which several closely related complexes of residences share the same communal facilities.<sup>76</sup>

In the Supreme Court cases noted above, the court looked at a number of matters to decide whether two locations were the same retirement village.

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<sup>72</sup> Pp146-7.

<sup>73</sup> Pp146-7.

<sup>74</sup> Respectively, the *Swancare* and *Amana* cases.

<sup>75</sup> The court commented that the RV Act did not expressly preclude multisite villages but this is not a finding as the court would also have to consider what is implied in the RV Act. When something is not expressly stated, the operation and effect of provisions may mean that multisite villages are not permitted.

<sup>76</sup> Final Report, 147. This focus on shared amenities and services rather than residential premises is consistent with the CRIS 1, Part 4 identification of the RV product.

These matters included:

- whether the locations were geographically close;
- how similar the amenities and services (such as a social club and outings) were at each location;
- whether the operator's business records established the locations were managed as separate concerns; and
- whether the residence contracts differed.

Both of these approaches are considered to be problematic. The matters identified by the Supreme Court are subject to fine distinctions. For example, how far apart is too far for the locations to be one village? Given the variety in contracts discussed in Part 14, how different do the contracts have to be for locations to be separate villages? Operators can also use the same standard from contracts across all their villages.

Regarding the RVA's suggestion, some operators with several retirement villages currently use communal amenities and services across more than one village. For example, a bowling green located in one WA retirement village is used by residents of other villages run by the same operator (and also by a residents of a nearby village run by a different operator).<sup>77</sup> Working out whether two sites are the same retirement village or separate retirement villages can become very complex.

It is also considered that obligations under the RV Legislation, such having to have a single budget for the whole village, should flow from the fact that the different sites are the same retirement village, rather than be the basis for determining whether the different sites are the same village.

Consumer Protection is of the view that rather than defining a multisite village in the RV Act, operators should identify whether they will operate their sites as a single village, multisite village or separate villages. This approach minimises the need for complex analysis and potential for unexpected outcomes. It also allows operators to determine how their villages should be dealt with under the RV Act.

### **RV Act memorials can be used to indicate multisite villages**

The RV Act already provides a mechanism for operators to identify multisite villages. It requires that each retirement village have its own RV Act memorial.<sup>78</sup> The intent is that different RV Act memorials lodged against different locations owned by the same operator identify that each location relates to a separate retirement village.

The same RV Act memorial can currently be lodged against geographically separate parcels of land. The RV Act therefore currently operates so that the same RV Act memorial lodged against geographically separate parcels of land can formally identify that a retirement village has multiple sites.

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<sup>77</sup> According to information available on their websites as at 2017.

<sup>78</sup> See *Swancare* case, paragraph 132.



## Possibility of operator error when lodging the RV Act memorial

Relying on operators to lodge the same RV Act memorial to indicate a multisite village raises the question of what will occur in the event of operator error.

Relevant to this, the problem in both the *Swancare* and *Amana* cases was that the operators incorrectly lodged the same RV Act memorial against multiple sites without intending that they be the same retirement village.<sup>79</sup> From Landgate records, there appear to be other instances of this practice (as well as multiple RV Act memorials incorrectly being lodged against the same land).<sup>80</sup>

The *Transfer of Land Act 1893* (WA) currently contains a process for correcting these types of errors.<sup>81</sup>

## How will consumers know a village is multisite?

The Final Report observed that searching Landgate records was problematic for consumers. It involves a fee and searching several certificates of title to determine the extent of a retirement village could prove taxing for prospective residents.

To address this (and other issues) the Final Report recommended that a public database of complexes to which the RV Act applies be established (Recommendation 93). Proposals for implementing Recommendation 93 are set out in Part 13. If established, the public database can conveniently notify consumers that a village is multisite.

Advertising, precontract and contract requirements can also require operators to state that a village is multisite.

## Proposal for consultation

The following proposal is being considered in relation to this issue:

### That:

- the RV legislation be amended to expressly provide that a retirement village can be multisite; and
- an operator lodging the same RV Act memorial for all the village sites (and notification through the public database, advertising and precontract disclosure) will indicate that the retirement village is multisite.

<sup>79</sup> *Amana Living Incorporated v Commissioner of Titles* [2019] WASC 203 (*Amana* case).

<sup>80</sup> Landgate records indicate that in 2016 there were some 20 instances of the same RV Act memorial over multiple sites and 47 instances of multiple RV Act memorials being lodged over the same or adjoining land. Multiple RV Act memorials over the same village land may also reflect an issue raised in the Part 14 Issue 14.1 discussion – that there is some misunderstanding that different residence contracts are different retirement village schemes. The other issues multiple memorials pose will be discussed in CRIS 4.

<sup>81</sup> *Transfer of Land Act 1893* (WA), section 188(3).

## Impact Analysis

Potential benefits and disadvantages of the proposal are:

Potential benefits	Potential disadvantages
<ul style="list-style-type: none"><li>• Clarifies that the RV legislation permits/applies to multisite villages.</li><li>• Ensure there is no gap in the RV Act's coverage having regard to emerging village models.</li><li>• Provides a basis in the RV legislation for specifically addressing any issues relating to multisite villages.</li></ul>	<ul style="list-style-type: none"><li>• No disadvantages were identified in the Final Report.</li><li>• The risk of operator error in lodging the RV Act memorial. However this can be managed under the <i>Transfer of Land Act 1893</i> (WA).</li></ul>

### Questions

15.1.1 Do you see any problems with this proposal? If so, please give details.

[Note: issues arising in the implementation of this proposal are discussed below]

## Implementation Issues

### Is any amendment or special provision required for multisite villages?

If the RV Act is amended to expressly recognise multisite retirement villages, different locations of villages identified as multisite will be treated as a single village under the RV Legislation. Many existing RV Act obligations will not need to be amended. This is because they apply to a retirement village as a single entity, not specific locations within it. For example, budgets and other financial statements relate to the retirement village. The RV Code also provides that each retirement village is to have only one residents committee.<sup>82</sup> That these and matters such as the reserve fund apply to the retirement village as a single entity seems appropriate. Adjustments for multiple sites can be made within this framework. For example, resident committees can (if thought necessary) have subcommittees for each site.

How other RV Legislation obligations will apply to multisite villages is less clear. For example, do village rules have to be the same at each location for the retirement village. One site may be designated for pets but another pet free. Other differences may exist. Other questions include whether the proposal for a capital works plan in CRIS 2 (if implemented) should provide detail at a location specific level.<sup>83</sup>

Questions to help identify what amendments might need to be made to the RV Legislation to provide for multisite villages are asked below.

<sup>82</sup> RV Code, clause 24(3).

<sup>83</sup> See CRIS 2, Part 8, pp79-80.

### Questions

- 15.1.2 *Do you think that the village rules should be the same for all the sites within the same village? If not, why not? What matters should be site specific?*
- 15.1.3 *Should residents at one village site have preferential voting rights with regard to matters that affect that site only? (This would not include anything that impacts the village budget.) Why? Why not?*
- 15.1.4 *What rights and obligations do you think should be able to be varied across different village sites? (Bearing in mind that the sites are one village, so there should not be significant differences between them.)*
- 15.1.5 *What precontract information should be provided about multisite villages that is not currently required for single site villages?*

### Process for converting single site villages to a multisite village?

Providing for multisite villages in the RV Act also raises the question of whether some operators will want to convert multisite retirement villages into separate villages. Operators may also wish to add new land that is not contiguous to existing land to a village, effectively turning a single site village into a multisite village. If so, issues that might arise include resident consultation, how reserve funds will be amalgamated/split, whether there will be an impact on recurrent charges or changes to amenities and services at one site and any impact on the RV Act statutory charges protecting residents' interests at both sites.

As a first step to determining what the RV Legislation may require, the questions below seek information on whether conversion from multisite villages to separate villages (or vice versa) is something operators are contemplating, the circumstances in which it might occur and what RV Legislation measures may be required from both resident and operator perspectives.

## Questions

- 15.1.6 *If you are an operator, are you contemplating converting a single site village to a multisite village or vice versa? If so, why?*
- 15.1.7 *In what circumstances might an operator want to convert multisite villages to one or more separate villages or vice versa?*
- 15.1.8 *Do you think that the RV Legislation should provide a process for converting multisite villages to one or more separate villages or vice versa? If not, why not?*
- 15.1.9 *If you do think that the RV Legislation should provide a process for converting multisite villages to one or more separate villages or vice versa, should that process include:*
- *A – minimum resident consultation (including information to be provided)?*
  - *B – regulation of what is to occur with any reserve funds?*
  - *C – SAT approval?*
  - *D – other matters? (specify)*

## Issue 15.2: One retirement village for each retirement village scheme Issue

In the *Swancare* and *Amana* cases, the Supreme Court raised but did not answer the question of whether the RV Act permits more than one retirement village to be used for the same retirement village scheme.<sup>84</sup> The policy intent is that there be only one retirement village for each retirement village scheme.

Consumer Protection considers that to avoid doubt this principle should be expressly stated in the RV Act. Amongst other things, this will minimise the uncertainty, resident anxiety and complexity (and therefore costs) in processes such as retirement village scheme termination and RV Act memorial correction.

## Objective

To clarify that the RV Act permits only one retirement village for each retirement village scheme.

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<sup>84</sup> See, for example, *Swancare* case, paragraph 73.

## Discussion

### Final Report

This issue emerged subsequent to the Final Report and was not directly considered in it. Some matters it noted however raise a question relevant to this issue. These matters are discussed below.

#### Impact of uncertainty – termination of scheme

The question of whether two retirement villages are used for the purposes of the same retirement village scheme has ramifications for retirement village scheme termination. As explained in Part 12, the RV Act continues to apply to a retirement village until the retirement village scheme for that village is terminated. If two villages operate under the same retirement village scheme, both villages will continue to be subject to the RV Legislation until that scheme is terminated.

#### Issue raised in *Swancare* case

The *Swancare* case illustrates this issue. In that case, the operator applied for approval to terminate a retirement village scheme that it said applied to one of its retirement villages only.

The Supreme Court raised the question of whether the same retirement village scheme applied to all the retirement villages against which the operator had lodged the same RV Act memorial. If so, even though one retirement village was no longer used for the purpose of the retirement village scheme, the retirement village scheme was still continuing because another retirement village was still being used for it.

The court found that on the facts, each retirement village was used for the purposes of a different retirement village scheme.

If a retirement village scheme is not able to be terminated when it should be, RV Act rights and obligations continue to apply. This includes matters such as the obligation to prepare a village budget, which may not be appropriate for example if the complex has become strata titled general housing. This is clearly undesirable.

#### Criteria for different retirement village schemes same as for two villages

While it may be hypothetically possible for a retirement village scheme to have two retirement villages, the practical reality is that each retirement village is likely to be found to be used for the purposes of its own retirement village scheme. Relevant to this, in both the *Swancare* and *Amana* cases, the Supreme Court looked at essentially the same facts and circumstances to decide that a different retirement village scheme applied to each retirement village as it used to decide whether there were two retirement villages or a single village operating over two locations.

If the facts and circumstances suggest the same retirement village scheme is in place, the likelihood is that the complexes will be found to comprise a multisite retirement village. Expressly stating the policy position in the RV Act is therefore unlikely to have any impact on existing rights and obligations.

### **Transitional arrangements may be required to deal with cross subsidisation between villages**

Historically, the RV Legislation has responded to rather than dictated the operating structures and business models that operators use. The Final Report however noted issues in the way some operators with several villages treated them as being part of a single overarching business. For example, that one village's budget surplus was used against an operating deficit in another village owned by the same operator or absorbed into the operator's other business activities.<sup>85</sup> The need to confine reserve fund use to a single village (Final Report Recommendation 45) also suggests there could be a common, overarching business scheme that applies to every village an operator owns.

Another indicator is that some operators at least take out an insurance policy that applies more broadly than the relevant village. They can apply to several villages or even more broadly to all the operator's businesses or assets.

These indications of an overarching business scheme that operates across several villages raise the question of whether some operators consider that the same retirement village scheme does in fact apply to more than one village (despite the unlikelihood of a court finding that to be the case). Regardless of what the final legal characterisation may be, if this is the case, the proposal below may require a transition process. Feedback is sought on what issues may need to be considered for any transitional arrangements.

### **Proposal for consultation**

The following proposal is being considered in relation to this issue:

**That the RV Act be amended to expressly provide that a retirement village scheme applies to one retirement village only.**

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<sup>85</sup> Final Report p64.

## Impact Analysis

Potential benefits and disadvantages of the proposals are:

Potential benefits	Potential disadvantages
<ul style="list-style-type: none"><li>• Clarifies the RV legislation.</li><li>• Makes express the RV legislation's practical effect.</li><li>• Minimises disputes and reduces factual complexity in court cases and investigations.</li></ul>	<ul style="list-style-type: none"><li>• May require a transition process for operators who consider that they operate several <i>retirement villages</i> under the same retirement village scheme.</li></ul>

### Questions

15.2.1 *Do you think that the RV Act should expressly provide that a retirement village scheme applies to one retirement village only? If not, why not?*

15.2.2 *(For operators) Do you currently operate a retirement village scheme that you consider has more than one retirement village? If so, please specify the number of retirement villages and explain why you consider them to operate under the same, not separate, retirement village schemes.*

15.2.3 *What transitional arrangements would be required to change any multiple village retirement village schemes to single village schemes?*

## PART 16: DEFINITION OF PREMIUM

This Part outlines some technical amendments to the definition of premium recommended by the Final Report. It addresses the scope of payments captured by the term premium and whether deferred payments are included in a premium. It also addresses a possible loophole in the legislation in situations where a premium is paid to an entity other than an administering body.

In summary:

- Issue 16.1* proposes implementing Final Report Recommendation 31 by amending section 18 of the RV Act to include any person to whom the premium is paid; and
- Issue 16.2* proposes implementing Final Report Recommendation 87 to clarify that premium includes deferred fee.

### Issue 16.1: Recommendation 31 - Clarifying the application of section 18 of the RV Act

#### Issue

Section 18 of the RV Act protects a prospective resident's financial interest by requiring that the premium paid to the administering body be held in trust and not be released to the administering body until the prospective resident takes up occupation of the unit or it becomes apparent that they will not take up occupation.<sup>86</sup> However, retirement village financial models can involve a premium being paid to other legal entities rather than an administering body. Where this occurs, the protection provided by section 18 of the RV Act may not apply.<sup>87</sup>

#### Objective

To ensure that all premiums paid by residents are required to be held in trust under section 18 of the RV Act regardless of the entity to which they are paid.

#### Discussion

Final Report Recommendation 31 recommended that section 18 of the RV Act be amended to apply to the legal entity to which a premium is paid.<sup>88</sup>

In Qld, SA and VIC, an ingoing contribution is defined as the amount payable by a person to secure a right to reside. There is no reference as to the entity to which the contribution must be paid.<sup>89</sup>

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<sup>86</sup> RV Act (WA) section 18(1).

<sup>87</sup> RV Act (WA) section 20 secures a resident's right to repayment of all or part of a 'premium' paid against the land in the retirement village by a statutory charge. The statutory charge will be discussed in an upcoming consultation paper.

<sup>88</sup> Final Report, page 50. This was also Recommendation 10 of the 2002 Statutory Report.

<sup>89</sup> *Retirement Villages Act 1999* (Qld) sections 14(1), 46(1), *Retirement Villages Act 2016* (SA) section 4.



The ingoing contribution is protected with a requirement that it be held in trust until the person on whose behalf it was made enters into occupation of the residence.<sup>90</sup>

In contrast, the ACT, NSW, TAS and WA specify that the premium or ingoing contribution payments are made to the operator or administering body. On making such payments, the legislation offers protection by requiring that the monies be held in trust.<sup>91</sup> However, this means that any payments made to an entity other than the operator or administering body will not be afforded the protection of the requirement that the monies be held in trust.

**TABLE 16.1 – COMPARISON OF PAYMENT ENTITY AND TRUST REQUIREMENTS**

Does the RV legislation:	ACT/NSW/TAS/WA	NT	QLD/SA/VIC
Specify payment to	Operator/ Administering Body	Administering Authority	Not specified
Require payment held in trust	✓	✗	✓

## Proposal for consultation

**That Recommendation 31 be implemented by amending the RV Act to define a premium as a payment to any legal entity in connection with admission into a village.**

## Impact Analysis

The intention of section 18 of the RV Act is to protect all payments made by a resident as a premium prior to residence by requiring that such monies be held in trust until the person enters into occupation or it becomes apparent that they will not be occupying the residential premises.

<sup>90</sup> *Retirement Villages Act 2016* (SA) sections 4 and 26, *Retirement Villages Act 1999* (Qld) sections 14 and 46 and *Retirement Villages Act 1986* (VIC) sections 3 and 25.

<sup>91</sup> *Retirement Villages Act 2012* (ACT) sections 11 and 39(1), *Retirement Villages Act 1999* (NSW) sections 6 and 23, *Retirement Villages Act 2004* (TAS) sections 4 and 9 and RV Act (WA), sections 3 and 18.

The proposed amendment will simply this position and close a loophole whereby the protection of section 18 could be avoided if payment was made to a person other than the administering body. The proposed amendments are to ensure the protections currently contained within the RV Act extend to all residents regardless of the entity to which a premium is paid.<sup>92</sup>

### Questions

16.1.1 *Do you see any problems with the proposal that section 18 apply to payments of a premium made to any legal entity?*

## Implementation Issue

### Should the reform apply to premiums paid prior to the amendment coming into effect?

Application of section 18 to persons other than the administering body would require those persons to hold premiums paid to them on trust until the conditions for release are satisfied (see discussion above). If this amendment applies to premiums paid prior to the law changing, persons who are not the administering body but who have received premiums will, if they have not already done so, need to place the funds in trust accounts until the conditions section 18 imposes for release are met.<sup>93</sup> This would mean that the protections in section 18 apply to all premiums held at the time the law changes. It may however have cashflow implications for the person holding the money and operators.

Alternatively, the amendment could apply only to premiums paid after it becomes law. This would mean that premiums paid prior to the introduction of the amendment would not be subject to the section 18 protections.

### Questions

16.1.2 *If section 18 is amended to apply to, premiums paid persons who are not the operator, should it apply to premiums paid prior to the law changing? If so, why? If not, why not?*

16.1.3 *Does implementing Recommendation 31 raise any other transitional issues? Please specify the issue and how you think it could be addressed.*

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<sup>92</sup> This will also give effect to Recommendation 7 of the 2002 Statutory Review Report.

<sup>93</sup> The *Sale of Land Act 1970 (WA)* and *Strata Titles Act 1985 (WA)* require real estate agents and other people who receive deposits to hold them on trust. Not all premiums however fall within these provisions.

## Issue 16.2: Recommendation 87 - Clarifying that premium includes deferred fee

### Issue

The RV Act currently defines premium as payments made for, or in contemplation of, admission to the village as a resident.<sup>94</sup> Recommendation 87 of the Final Report was that the RV Act be amended to better define premiums. In particular, it recommended that the definition of premium be expanded to 'include the payment of consideration on a deferred basis to the administering body and to exclude nominal sums'.<sup>95</sup>

### Objective

To clarify the definition of premium under the RV Act.

### Discussion

The definition of premium under that RV Act is important because of the protection afforded to premiums by the RV Legislation.<sup>96</sup> The payment of a premium is also one of the key elements of a retirement village scheme.<sup>97</sup> A premium is generally identified as a single payment but can be split into two instalments, a deposit and balance. It may also be commonly referred to as loan, lease premium or ingoing contribution.<sup>98</sup>

The RV Act currently defines premium to mean a 'payment (including a gift) made to the administering body of a retirement village in consideration for, or in contemplation of, admission of the person by or on whose behalf the payment was made as a resident in a retirement village'. It includes payments made for the 'purchase of residential premises in a retirement village or for the purchase, issue or assignment of shares conferring a right to occupy any such residential premises'.<sup>99</sup>

### Final Report

The Final Report identified concern by stakeholders that premium would not include deferred payments. It recommended that the term premium be redefined (Recommendation 87) and that it should specifically include deferred payments.<sup>100</sup>

It is arguable that premium as currently defined already extends to deferred payments as there is no reference to when the payment made for or in contemplation of admission to a village must be made.

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<sup>94</sup> RV Act, section 3.

<sup>95</sup> Final Report, p 149.

<sup>96</sup> RV Act, section 18.

<sup>97</sup> Part 12, CRIS 3.

<sup>98</sup> CRIS 2 explains how the premium fits into the DMF pricing structure, page 15.

<sup>99</sup> RV Act, section 3.

<sup>100</sup> Final Report, pages 147 and 148.

Nevertheless, Consumer Protection considers that amending the definition of premium will address any concerns about its application and clarify that it includes payments for admission to a village regardless of when they were made.

In addition to clarifying, there may be other aspects of the definition that require revision. Feedback is sought as to how the definition of premium can be improved.

## Other jurisdictions

WA and the NT use the term premium being a payment made to the operator/administering body to secure a right to reside as a resident in a village. In these jurisdictions, there are no references in the legislation as to whether the payment can be made in a lump sum or instalments, how it is described and the stage at which payments are made.

The ACT, NSW, Qld, SA, TAS and VIC use the term ‘incoming contribution’ being a payment made to an operator to secure a right to reside in a village. The definition in both NSW and Qld is extended to include payments ‘regardless of how described’ and ‘whether paid in instalments or lump sum’. Payments made in VIC, TAS and WA specifically include a ‘donation’ or ‘gift’ made in ‘consideration for shares to become a resident’.

Table 16.2 compares how the different jurisdictions in Australia define an incoming contribution or premium.

**TABLE 16.2 – COMPARISON OF PAYMENTS CAPTURED BY DEFINITION IN DIFFERENT JURISDICTIONS**

Does the RV legislation:	NT/WA	NSW /QLD	ACT	SA	VIC/TAS
Describe payment as a premium	✓	x	x	x	x
Describe payment as an ‘incoming contribution’ and an amount payable under a residence contract	x	✓	✓	✓	✓
Include payments made in lump sum or instalments	x	✓	x	x	x
Include payments regardless of how described	x	✓	x	✓	x
Includes payment by way of donation, gift or bond	✓	x	x	x	✓

## Proposal for consultation

**That the RV Act definition of premium be amended to specifically include all payments made by a person in consideration of or in contemplation of admission to a village whether the payment is made before, during or after admission of the person to the village.**

## Impact Analysis

The proposal ensures it is clear that premium includes a deferred payment. As this proposal only clarifies the RV Act, it is not expected to have any significant impacts on the sector.

### Questions

- 16.2.1 *Are there any issues in clarifying that premium includes any payment regardless of the time of payment? Please provide your reasons.*
- 16.2.2 *Will this proposal have any financial or other impacts on you or the sector?*
- 16.2.3 *Are there any other types of payments which should be specifically covered by the definition of premium?*

## PART 17: RENTING AND SUB-LETTING IN A RETIREMENT VILLAGE

Part 17.1 deals with rent paying residents who do not pay a premium on entering the retirement village.<sup>101</sup> It asks whether the RV Legislation is suited to their leasing arrangements. In summary:

*Issue 17.1.1* asks whether the RV Legislation provides appropriate rights to rent paying residents? This issue will focus on the range of rights of residents and discuss whether they are appropriate to rent paying residents.

*Issue 17.1.2* asks whether the RV Act provides adequate and appropriate protections for rent paying residents? This issue will focus on protections available to rent paying residents in terms of increases to rent and whether precontract disclosure requirements are suited to rent paying residents.

*Issue 17.1.3* asks whether the RV Legislation requires adequate transparency for rental income received from residents? This issue will look at whether operators should be required to provide more disclosure about rent received from residents, including what amount, if any, is paid towards village operating and other costs.

*Issue 17.1.4* asks whether the rights, protections and interests of rent paying residents would be better addressed under the *Residential Tenancies Act 1987* (The RT Act)? This issue looks at whether the RT Act should apply to rent paying residents, and details how this occurs in a number of other Australian jurisdictions.

Part 17.2 deals with the issue of whether residents should be able to let or sub-let their retirement village unit and, if so, whether there should be any conditions on the letting.

### Issue 17.1: Rights and protections for rent paying residents

#### Issue

The RV Legislation does not distinguish between residents who pay a premium and recurrent charges and rent paying residents, treating both equally.<sup>102</sup> Consumer Protection is aware of an increase in the number of rent paying residents at retirement villages in WA. Differences in financial models for residents raises the issue of whether the interests of rent paying residents differ significantly from residents who pay a premium. If so, does the RV Legislation provides them with appropriate and adequate rights and protections?

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<sup>101</sup> A payment less than \$1,500 is not considered to be a premium – RV Regulations, regulation 4A definition of a short-term residence.

<sup>102</sup> The only exception to this is that the RV Regulations provide a modified disclosure information form for a short-term residence contract, being Form 1A.

## Objective

To ensure that the RV Act provisions apply appropriately to all residents of retirement villages, providing them with adequate rights and protections.

## Discussion

### Final Report and stage one reforms

The Final Report did not consider the application of RV Legislation to rent paying residents in retirement villages. However, during stage one reforms stakeholders raised questions relating to residents with short-term leases. In particular, issues were raised as to whether requirements for information disclosure suited the needs of these short-term/rent paying residents who did not have a financial investment in the village.

As a result, the stage one reforms included amending the RV Legislation to:

- define a short-term residence contract to mean a ‘residence contract that has a term of 12 months or less and does not require a payment of a total amount of more than \$1,500 to the administering body of a retirement village’;<sup>103</sup> and
- include a modification of the *Form 1 Disclosure of Information Statement* (Form 1A) which better suited the needs of short-term residents.<sup>104</sup>

The stage one reforms also resulted in substantial amendment to the RV Code to include detailed line items required to be presented in the village budget. The line items were to enable residents to have a clear view of the village budget’s income and expenditure and included a requirement for a line item for rental income from village residents.

### Problems emerging since the Final Report

The increasing trend in rent paying residents, as well as the move to make some distinction between these categories in the stage one reforms, raises a question as to whether the RV Legislation should make a distinction between residents who pay a premium and rent paying residents. In this context, rent paying residents include both residents on a short-term resident contract<sup>105</sup> and residents who enter rent only contracts exceeding 12 months where there is no payment of a premium.

Premium paying residents, who are also often longer term residents, may have significantly different concerns and interests to rent paying residents. Premium paying residents may have more interest in the long-term financial planning of the village,

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<sup>103</sup> RV Regulations, regulation 4B.

<sup>104</sup> RV Regulations, Form 1A.

<sup>105</sup> RV Regulations, regulation 4 provides that a short-term resident contract means a residence contract that has a term of 12 months or less and does not require a payment of a total amount of more than \$1 500 to the administering body of a retirement village in consideration for, or in contemplation of, admission of a person as a resident of a retirement village.

whereas the interests of the non-premium residents might be focused on amenities offered by the village and rental terms and conditions. Some provisions in the RV Act may not be suited to the interests of rent paying residents.

It might be asked whether the interests of rent paying residents more closely align with the RT Act, offering more appropriate and adequate rights and protections. These questions are considered by looking at the following key areas:

- the rights provided to residents under the RV legislation;
- the protections for residents under the RV legislation;
- financial transparency of different contributions of costs between residents; and
- whether the RT Act is more suited to rent paying residents?

### How should the RV Legislation address rent paying residents?

Consumer Protection recognises that the RV Legislation is predicated on a model of leasing involving residents making an upfront payment and recurrent fees to the operator. As such, many of the rights and obligations under the RV Legislation are directed towards this model.

#### 17.1.1 Should the RV Legislation provide appropriate rights to rent paying residents?

Currently, the RV Legislation provides these rights equally, to all residents, whether they pay a premium and ongoing charges or rent.<sup>106</sup> The RV Legislation provides the following rights to residents of retirement villages:

- be a member of a residents' committee;<sup>107</sup>
- amend village rules;<sup>108</sup>
- be provided with financial information about their village;<sup>109</sup>
- decide that annual financial statements do not need to be audited;
- appeal disputes about service contracts to the SAT;<sup>110</sup> and
- appeal disputes about recurrent charges or levies payable by residents to SAT.<sup>111</sup>

It is arguable however, that there are some rights that should be different for rent paying residents such as:

**Residents' voting rights:** Residents may vote to change residence rules and opt out of having financial statements audited. Should rent paying residents who do not have a financial investment in the village be able to vote on financial matters?

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<sup>106</sup> RV Act, section 4: definition of a 'resident'.

<sup>107</sup> RV Code, clause 24.

<sup>108</sup> RV Code, clause 23(4).

<sup>109</sup> RV Code, clauses 17, 18 and 19.

<sup>110</sup> RV Act, section 56.

<sup>111</sup> RV Act, section 57A.



**Residents' committees:** All residents may establish a residents' committee whose function is to consult with the administering body on behalf of the residents about the day-to-day running of the retirement village and any issues or proposals raised by the residents.<sup>112</sup> The residents' committee may request the administering body to hold a meeting of the residents.<sup>113</sup> Is it appropriate for rent paying residents to be provided with the same rights as premium paying residents in relation to representation on residents' committees?

**Dispute resolution:** All residents have a right to appeal disputes about recurrent charges or levies to the SAT. Many rent paying residents do not however pay separate fees for recurrent charges. Should rent paying residents be provided with the same rights as premium paying residents to appeal matters to the SAT about increases in recurrent charges or levies? Residents are also provided with dispute resolution procedures in the RV Code. These provisions enable residents to:

- serve a written notice on all other parties setting out the matters in dispute and calling on the other parties to rectify or otherwise attempt to settle those matters;<sup>114</sup>
- meet and to attempt to resolve the matters that are in dispute;<sup>115</sup> and
- to apply to the Commissioner to have the dispute referred to mediation.<sup>116</sup>

This dispute resolution procedure may however be considered appropriate to all residents regardless of the financial arrangements under which they occupy their unit.

**Financial transparency:** All residents of a retirement village have the right to be provided with financial information relating to the operation of the village such as proposed budgets, quarterly statements and annual financial statements. All residents also have a right to attend residents' meetings at which financial information is presented.<sup>117</sup> Should rent paying residents who do not have a financial investment in the village have the same rights to access financial information as premium paying residents?

**Disclosure:** Following the stage one reforms, rent paying residents who have a lease less than 12 months are provided with precontract disclosure under Form 1A of the RV Regulations. As discussed above, Form 1A is a shortened version of Form 1, but still requires a 10-day waiting period. For rent paying residents whose lease is over 12 months, precontract disclosure is made under Form 1. Questions arise as to whether those residents who rent for a period exceeding 12 months should have the same pre-disclosure as premium paying residents. Questions also arise as to whether Form 1A is providing appropriate disclosure for short-term rent-paying residents.

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<sup>112</sup> RV Code, clause 24.

<sup>113</sup> RV Code, clause 26(c).

<sup>114</sup> RV Code, clause 30(1).

<sup>115</sup> RV Code, clause 30(3)(a) and (b).

<sup>116</sup> RV Code, clause 31(1).

<sup>117</sup> RV Code, clause 26.

## Other jurisdictions

The RV Legislation in the NT, Qld and VIC does not distinguish between residents who pay a premium and those paying rent. Like WA, those jurisdictions provide equal rights to all residents. On the other hand, the retirement villages legislation in the ACT, NSW, SA and TAS distinguishes between residents who pay a premium and those that pay rent. In these jurisdictions, the legislation does not apply to residents who pay rent and they are treated as tenants under the relevant residential tenancies legislation. Table 17.1 below outlines the different approaches and how this impacts a person's rights when residing at a village.

**TABLE 17.1 – HOW RIGHTS APPLY TO RESIDENTS WHO PAY A PREMIUM AND RESIDENTS WHO PAY RENT**

	NT/WA/QLD/TAS/VIC	ACT/NSW/SA
Who can make or change village rules	All residents	Only premium paying residents
Who can be a member of a committee	All residents	Only premium paying residents
Who has a right to vote	All residents	Only premium paying residents
Who has a right to a copy of a proposed budget	All residents	Only premium paying residents
Who has a right to financial accounts	All residents	Only premium paying residents

### Questions

*17.1.1.1 Do you think residents who pay a premium and ongoing charges and rent paying residents should continue to be treated the same under the RV Legislation or differently? Please explain your reasons.*

### 17.1.2 Does the RV Act provide adequate protections for rent paying residents?

A further question is whether the RV Act provisions which are designed predominantly for premium paying residents, adequately *protect* rent paying residents. It may also be that some RV Act provisions are not appropriate for rent paying residents and additional protections are required.

Examples where the RV Legislation may not provide adequate or appropriate protection for rent paying residents are:

- rent increases; and
- pre-disclosure requirements.

#### Rent increases

As with general residential tenancies, rent paying residents are likely to be subject to rent increases. The RV Legislation does not however contain any provisions which regulate increases to rent for residents who do not pay a premium. As noted earlier, the RV Act provides for a model whereby residents pay recurrent charges. The consumer protection for increases in charges provisions relate to recurrent charges only and are limited to requiring the determination of recurrent charges to be included in the residence contract<sup>118</sup> and providing residents with a right to contest variation of recurrent charges in the SAT.<sup>119</sup>

Many rent paying residents pay a single amount to the operator with no component identified as being a contribution to recurrent charges. In this regard, the current legislation requirements around recurrent charges are arguably not suited or helpful to rent paying residents, offering minimal protection or rights to appeal.

By contrast, protections for tenants under the RT Act include requiring written notice of rent increases to be given to the tenant in an approved form.<sup>120</sup> The lessor must give the tenant notice at least 60 days before the increased rent becomes payable.<sup>121</sup> The lessor cannot increase the rent within the first six months of a tenancy agreement or within six months of the last rent increase.<sup>122</sup> The tenant can appeal to the Magistrates Court for an order declaring that the rent payable is excessive.<sup>123</sup>

Table 17.2 below compares the RTA Act and RV Act in relation to key renting provisions:

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<sup>118</sup> RV Regulations, regulation 7.

<sup>119</sup> RV Act, section 57A.

<sup>120</sup> Form 10, Notice to Tenant of Rent Increase.

<sup>121</sup> RT Act, section 30(1)(a).

<sup>122</sup> RT Act, section 30(1)(B).

<sup>123</sup> RT Act, section 32(1).

**TABLE 17.2 – COMPARISON OF RESIDENTIAL TENANCY AND RETIREMENT VILLAGE LEGISLATION IN WA FOR RECURRENT CHARGES/RENT**

	Prohibits increasing rent within first six months	Prohibits increasing rent within six months of the last increase	Restricts how many weeks rent can be paid upfront	Allows an individual resident to appeal a rent increase
RV legislation	x	x	x	x
RT Act legislation	✓	✓	✓	✓

### Questions

*17.1.2.1 Do you think rent paying residents need any additional protections under the RV Legislation? If so, what additional protections are required? Please explain your reasons.*

### Precontractual disclosure of information to residents

The RV Legislation requires that operators provide residents with a 10 day waiting period to consider contracts.<sup>124</sup> The basis for the 10 day waiting period is to provide protection to those residents who plan to make a financial commitment when paying a significant premium. The 10 day waiting period allows prospective residents sufficient time to gain an understanding of the contractual arrangements surrounding their proposed investment.

Residents who pay rent are also provided with the 10 day waiting period to consider contracts.<sup>125</sup> Many of these contracts require careful consideration and the 10 day waiting period provides the resident with a good opportunity to carefully consider all the information. However, there are some residents who require short-term and urgent rental arrangements in a village and experience difficulty with the 10 day waiting period.

<sup>124</sup> RV Act, section 13 and RV Regulations (WA), schedule 1, Form 1A and Form 1AA.

<sup>125</sup> If rent period is less than 12 months, 10 day disclosure still required but in accordance with Form 1A.

The example below illustrates problems that may arise:

#### Example 17

An operator enquired as to whether the 10 day period for considering contracts can be removed for short term rentals. The operator has explained that it offers short term rental to social housing tenants. These residents often need to move in immediately and have no other alternatives for accommodation. The 10 day waiting period causes them distress and is considered to be an unnecessary requirement for short term residents who will be on a rent only leasing arrangement.

#### Questions

17.1.2.2 *Do you think the 10 day waiting period provided to residents to consider contracts is appropriate for rent paying residents? Please explain your reasons.*

17.1.2.3 *Are there any other RV Legislation provisions which you think should not apply to rent paying residents?*

### 17.1.3 Does the RV Legislation require adequate transparency for rental income received from residents?

The RV Legislation requires operators who receive a rental income from residents to ensure that the:

- proposed operating budget includes a separate line item that presents rental income used to meet village operating costs;<sup>126</sup> and
- quarterly and annual financial statements include a statement of income for each line item included in the proposed budget.<sup>127</sup>

Despite requirements for financial statements to include a line item for rental income used to meet village operating costs, Consumer Protection is aware that some residents are querying whether operators are directing a fair proportion of rental income to recurrent charges and other funds, such as reserve funds where they exist, that residents are required to contribute to. Such concerns about inequitable arrangements for financial arrangements in the village can contribute to distrust between residents in the village.

Information is sought to assess whether additional transparency measures are required for disclosure about use of rent paid by residents of a village.

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<sup>126</sup> RV Code, clause 17(3)(c).

<sup>127</sup> RV Code, clauses 18(3) and 19(4).

### Questions

17.1.3.1 Do you think the transparency requirements around rental income from residents received by operators is adequate? Please explain your reasons.

17.1.3.2 Are there any other financial transparency provisions which should apply in regards to rent paying residents? Please explain your reasons.

### 17.1.4 Are the rights, protections and interests of rent paying residents better addressed under the Residential Tenancies Act 1987 (WA)?

In order to address the problems of inappropriate or inadequate regulation for rent paying residents of retirement villages, more appropriate provisions which apply only to rent paying residents could be inserted into the RV Act. An alternative option which is taken in some other jurisdictions is to directly apply the RT Act to rent paying residents. In these jurisdictions, the RV Legislation does not apply to rent paying tenants.

Table 17.3 outlines these different approaches.

**TABLE 17.3 – DEFINING RETIREMENT VILLAGE RESIDENTS IN VARIOUS AUSTRALIAN JURISDICTIONS**

	NT/WA/QLD/VIC	ACT/NSW/SA
Residential tenancies legislation applies to rent paying residents	x	✓

The potential advantages of directly applying RT Act provisions for rent paying residents include:

- residents who were formerly renting outside of the RV market will be accustomed to the RT Act rights and obligations;
- residents would have a model of regulation specifically designed for rent only leasing arrangements; and
- tenants would have access to resources and advice offered by Tenancy WA.

The potential disadvantages of directly applying RT Act provisions for rent paying residents include:

- two separate pieces of legislation will apply to residents in retirement villages;
- residents would lose protections provided by the RV Legislation; and

- having different regulation of residents does not align with the community model of retirement villages and may cause division between residents in villages.

### Questions

17.1.4.1 *Do you think rent paying residents should be subject to the RT Act or the RV Act? Please explain your reasons.*

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

## Issue 17.2: Letting or sub-letting by residents in retirement villages

### Issue

Many residence contracts prohibit residents of retirement villages from letting or sub-letting their retirement village unit. Residents who are absent from their retirement village unit for an extended period or who have permanently vacated their unit and are waiting for a new owner to take over their contractual arrangements may however wish to let or sub-let their unit. This raises the question of whether the RV Legislation should provide for the letting or sub-letting of units by residents and the circumstances in which this may occur.

### Objective

To assess whether the retirement village legislation should provide for residents to be able to let or sub-let their retirement village unit and if so, what conditions should apply.

### Discussion

#### Final Report and stage one reforms

The Final Report did not address the issue of residents being able to let or sub-let their retirement village units.

#### Emerging Issues

Consumer Protection has become aware of an increase in the number of residents wanting to let their units. This will often occur when residents have left the village and there is delay in locating a new permanent resident for their unit.<sup>128</sup> In these cases, arrangements are often wanted to let or sub-let the unit to assist in paying the ongoing financial obligations to the operator. Residents are however often advised by the operator that they are not permitted to let or sub-let their units.

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<sup>128</sup> CRIS 2, Part 6 deals with exit entitlements and proposed reform options include a requirement for operators to pay exit entitlements to residents within either 6, 12 or 18 months. Reform in this area is likely to reduce the length of time that units would remain vacant after residents had permanently departed the village.

There may be some advantages to residents and also operators for a unit to be sub-let during a period of vacancy. Tenants can contribute towards the financial obligations of former residents who are still required to make payments lessening any financial hardship which may arise. Short-term tenants can also improve the life of villages which are experiencing significant vacancies. However, operators may have concerns about the proposed tenant or other issues.

### Other jurisdictions

The RV Legislation in the ACT and NSW contains provisions allowing residents to let or sub-let. The retirement villages legislation in the NT, QLD, SA, TAS and VIC is similar to WA in that it does not contain any provisions relating to letting or sub-letting of retirement village units.

**TABLE 15.4 – LETTING AND SUB-LETTING IN RETIREMENT VILLAGES IN AUSTRALIA**

	ACT/NSW	NT/QLD/SA/TAS/VIC/WA
Resident may let or sub-let the premises	✓	x
The term of letting or sub-letting not to exceed 3 years	✓	n/a
Sub-letting is subject to conditions	✓	n/a

#### Questions

- 17.2.1 Do you think residents should have the right to let or sub-let their units? Please explain reasons.
- 17.2.2 Do you agree that conditions should be imposed on letting and sub-letting? If so, what conditions?
- 17.2.3 Are there any other issues which should be considered in regards to the sub-letting and letting of units by residents of retirement villages?



## APPENDIX 14 - THE SUPREME COURT CASES

### Introduction

In 2013 and 2014, the Supreme Court of Western Australia made two important decisions regarding the RV Act terms and its memorial, statutory charge and retirement village scheme termination provisions. These are called the *Hollywood* case (2013) and the *Swancare* case (2014) in this paper. A later case in 2019, the *Amana* case, also considered these matters.

These decisions revealed that some RV Act provisions were unclear, leading to some stakeholder misunderstanding as to their effect. The decisions also pointed to the RV Act being silent on some important matters, such as the number of villages that could operate under a single retirement village scheme.

### The *Hollywood* case

In the *Hollywood* case, an operator wanted to redevelop a retirement village. The operator sought and obtained approval to subdivide the village land into two lots, lot 888 and lot 889. The RV Act memorial that had been lodged against the land before it was subdivided then applied to both the new lots 888 and 889.

The operator moved residents from lot 889 land to lot 888 land and commenced demolishing the residential premises and facilities on lot 889. It intended selling lot 889 or some of it (there was an application to further subdivide the land), in part to fund the village redevelopment. The operator could not however remove the RV Act memorial from lot 889 because the RV Act does not currently allow an RV Act memorial to be partially removed. It can only be removed when none of the land to which it applies is used as a retirement village.

The operator applied to the Supreme Court for approval to terminate the retirement village scheme because it believed that would allow it to remove the RV Act memorial from lot 889. The court observed that the application raised “a number of difficult questions about the operation of the RV Act”.<sup>129</sup>

### Findings on key RV Act terms

The operator argued that because lot 889 was empty, it was no longer used for a retirement village scheme.

The court however found that the retirement village, in particular its land, was not part of the retirement village scheme for RV Act purposes. Part 12 sets out that a retirement village scheme has only three elements for RV Act purposes, none of which are the retirement village or land used for the retirement village scheme. This meant that the operator ceasing to use some of the retirement village land, lot 889, for the retirement village was not relevant to retirement village scheme termination.

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<sup>129</sup> *Hollywood* case, paragraph 3.

The court found that the operator did not in fact intend terminating the retirement village scheme. The operator intended to continue the retirement village scheme but only on lot 888.

The court did not in any event accept that moving the residents from lot 889 meant that land was no longer used in connection with a retirement village scheme. It noted for example that there were statutory charges against the land that had not been satisfied. The operator argued that when the retirement village scheme was terminated the statutory charges would cease to apply to lot 889. The court however found that the statutory charges were not part of the retirement village scheme for RV Act purposes. This meant that terminating the retirement village scheme would have no impact on the statutory charges. While the RV Act statutory charges continued to apply to lot 889, the court doubted that it could be said that the land was no longer used for a retirement village scheme.<sup>130</sup>

Similarly, the court found that removing an RV Act memorial from land would not mean that the retirement village scheme was terminated or the statutory charges were extinguished. The RV Act memorial served a notification function only, it did not determine whether the RV Act applied to a complex.<sup>131</sup>

The *Hollywood* case involved a number of other important findings, including:

- that there was nothing in the RV Act preventing land on which a residential aged care facility was situated from being part of a retirement village;<sup>132</sup> and
- outlining grounds on which the Supreme Court might approve retirement village scheme termination.<sup>133</sup>

The court's discussion of the termination provisions highlighted some gaps in the RV legislation. In particular, in the intent to cease using land for a retirement village scheme being given practical effect prior to approval to terminate it being sought from the Supreme Court. These matters, and other issues arising in the redevelopment, are discussed in a later CRIS.

### **The Swancare case**

On the RV Act coming into effect in 1992, an operator of several seniors' housing complexes lodged a single RV Act memorial regarding all of the relevant land. This case involved two sites, one in Bentley and the other in Carlisle. The Bentley site was occupied by a mix of premium paying and rental residents. Until 2008, the Carlisle site was occupied only by rent paying residents. The Carlisle residents were then relocated to Bentley and the Carlisle site was redeveloped to a strata complex.

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<sup>130</sup> *Hollywood* case, paragraphs 152 to 157.

<sup>131</sup> *Hollywood* case, paragraphs 98, 122, 148, 152 to 157 and 160 to 163.

<sup>132</sup> *Hollywood* case, paragraph 59.

<sup>133</sup> See *Hollywood* case, paragraphs 55, 127, 165 to 177 and 189 to 194.

The first premium paying resident entered the Carlisle site in 2012, after the redevelopment. The redevelopment had been directed at using the complex for a retirement village scheme but due to low take up, the operator later decided to offer the new strata units as general housing. The operator obtained the relevant planning approvals for change of land use and entered into agreements to sell. Some purchasers moved in. Planning approval was however conditional on the RV Act memorial being removed.

The operator applied to the Supreme Court for approval to terminate the retirement village scheme that applied to the Carlisle site as the first stage in removing the RV Act memorial from the Carlisle site only.

### Findings on key RV Act terms

The court found that the RV Act requires a different RV Act memorial for each retirement village.<sup>134</sup>

As the same RV Act memorial was lodged against multiple sites, and the Bentley site was continuing to be used for a retirement village scheme, the court had to determine whether the Bentley and Carlisle sites:

- were a single retirement village; or
- if they were two villages, were used for the purposes of the same retirement village scheme (in which case, the retirement village scheme would be continuing at Bentley so should not be terminated).

The first question was whether the Carlisle site was a retirement village, given that no resident paid a premium until 2012. The court found that when lodging the single RV Act memorial in 1992, the operator intended both the Bentley and Carlisle sites to be used for a retirement village scheme at some time in the future. The Carlisle complex was emptied in 2008 in order to implement the retirement village scheme, not to terminate it. The 2012 premium payment at Carlisle meant that the Carlisle site was in fact used for a retirement village scheme.<sup>135</sup> Once a retirement village scheme exists, all persons enter the residential premises under that scheme regardless of whether they pay a premium or the operator changes their mind about implementing it.

The court found that as there were people living in the Carlisle complex, the retirement village scheme could not be terminated without its approval.<sup>136</sup>

The court next considered whether the Bentley and Carlisle sites were different retirement villages. The court found that the single RV Act memorial was incorrectly lodged over the two sites (as well as a number of other sites).

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<sup>134</sup> *Swan care* case, paragraphs 132 to 137.

<sup>135</sup> *Swan care* case, paragraphs 42 to 45, 59 to 63 and 90 to 109.

<sup>136</sup> *Swan care* case, paragraph 95.

It decided on the facts and circumstances that they were and that they were used for the purposes of different retirement village schemes.<sup>137</sup> The facts and circumstances that the court considered are summarised below. It was satisfied that the premium paying resident at the Carlisle site had been given some assurances with regard to their expectations, there was no outstanding statutory charge and supported termination of the Carlisle retirement village scheme. It approved termination subject to the operator taking steps to correct the Register of Titles with regard to the RV Act memorial.<sup>138</sup>

### **The *Amana* case**

A third Supreme Court case in 2019, the *Amana* case was an application to correct an error in the Register of Titles.

As in the *Swancare* case, when the RV Act came into effect in 1992, the operator of several villages had lodged a single RV Act memorial over several sites. In this case, 12 sites.<sup>139</sup> The operator said the single memorial was lodged in error as each site was a separate retirement village. The trigger for the application was that one site had been vacated. The facts established that it was no longer used for a retirement village scheme and there was no intent to use it for one in the future. Complicating matters, in this case some sites had more than one RV Act memorial lodged regarding their land.

The Supreme Court found that that a single RV Act memorial was lodged over multiple parcels of land in error.<sup>140</sup> It found that each of the 12 sites subject to it were in fact a separate retirement village and that each was also used for the purposes of different retirement village schemes.<sup>141</sup> The court made an order for the Registrar of Titles to be corrected so that the sites were identified as different villages.

There was no application for Supreme Court to approve termination of the retirement village scheme that had previously applied to the vacated site because this is not necessary when no person admitted under the retirement village scheme remains living on the complex.

### **Matters the Supreme Court considered in deciding whether there were two villages and whether they operated under the same retirement village scheme**

In the *Swancare* and *Amana* cases, the court considered the same matters to determine whether there were two retirement villages operating under the same retirement village scheme as it did to decide whether the different locations were the retirement villages.

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<sup>137</sup> *Swancare* case, paragraphs 72 to 93.

<sup>138</sup> *Swancare* case, paragraphs 94 to 110 and 163 to 165.

<sup>139</sup> *Amana* case, paragraph 15.

<sup>140</sup> *Amana* case, paragraph 52.

<sup>141</sup> *Amana* case, paragraph 48.

These were that:

- the locations were geographically far apart;
- the different dates each location began operating as a retirement village;
- the amenities and services (such as a social club and outings) were different at each location. The occasional shared use of a clubroom and joint activity outings that occurred in the *Swancare* case was not sufficient to establish a multisite village having regard to the other factors;
- the operator's business records established that each location was managed as separate concerns. For example, budgets and accounts were based on the costs incurred at one location only and there was no cross subsidisation of operating costs;
- the residence contracts for each location were specific to the location and there were differences in them;
- (the *Amana* case only) State and Federal government funding was specific to an individual location; and
- each location had a different name.<sup>142</sup>

Although the *Hollywood* case found a retirement village scheme has three elements only, it can be seen that in the *Swancare* and *Amana* cases the court considered additional features in deciding that the villages were not used for the purposes of the same retirement village scheme. These were features such as the amenities and services and contractual terms and whether the operating, business and financial models were the same. This illustrates that the concepts of a village wide community scheme or arrangement and retirement village scheme may overlap, depending on the question being asked.

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<sup>142</sup> In each case, the matters that led to the finding that there were separate retirement villages also led to the conclusion that there were separate retirement village schemes for each location.

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