



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



Consultation Regulatory Impact Statement 4

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

June 2021



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GLOSSARY

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

Key Terms	Definition
AC Act	<i>Aged Care Act 1997</i> (Cth)
ACL	Australian Consumer Law
CCLSWA	Consumer Credit Legal Service of Western Australia
Consumer Protection	The Department of Mines, Industry Regulation and Safety – Consumer Protection Division
CRIS	Consultation Regulatory Impact Statement (this document is CRIS 4)
Final Report	Statutory Review of Retirement Villages Legislation Final Report, November 2010
Operator	Operator/owner/manager of a retirement village
RACF	Residential Aged Care Facility
RV Act	<i>Retirement Villages Act 1992</i> (WA)
RV Code	Fair Trading (Retirement Villages Interim Code) Regulations 2021 (WA)
RV Legislation/ RV Laws	<i>Retirement Villages Act 1992</i> (WA), Retirement Villages Regulations 1992 (WA), and Fair Trading (Retirement Villages Interim Code) Regulations 2021 (WA)
RV product	Retirement village product
RV Regulations	Retirement Villages Regulations 1992 (WA)
RVS	Retirement village scheme
RV Unit	Includes a retirement village unit, villa, apartment
SAT	State Administrative Tribunal
SL Act	<i>Sale of Land Act 1970</i> (WA)
ST Act	<i>Strata Titles Act 1985</i> (WA)
TL Act	<i>Transfer of Land Act 1893</i> (WA)
WASAT	Western Australian State Administrative Tribunal
WASC/Supreme Court	Supreme Court of Western Australia

ABOUT THE CONSULTATION PROCESS

CRIS 4 is part of a broader consultation

This Consultation Regulatory Impact Statement four (CRIS 4) is the last in a series of four consultation papers between August 2019 and June 2021.¹ Together these CRISs are an important part of a broader consultation process on implementing recommendations made in the *Statutory Review of Retirement Villages Legislation Final Report (2010)* (Final Report) and considering other issues that have arisen since that time. The CRIS parts have been numbered consecutively from 1 to 22. CRIS 1 contains parts 1–5, CRIS 2 contains parts 6–11, CRIS 3 contains parts 12–17 and CRIS 4 contains parts 18–22.

What do the CRIS papers deal with?

The CRIS 1–4 papers cover a wide range of issues. A summary of the reform proposals and issues considered in CRIS 1–4 is provided at pages 3–8. Some issues have been 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. The content of each CRIS is summarised below.

CRIS 1: IMPROVING CONSUMER UNDERSTANDING OF THE RV PRODUCT AND PRICE

CRIS 1 took a ‘back to basics’ approach to improving understanding of the complex issues in contracts, prices, fees and costs of retirement villages. It looked at why many consumers do not fully understand what they are buying and what the cost will be despite disclosure requirements. The paper identified that relevant information is disclosed late in the purchasing decision, and this lessens its effectiveness for consumers. CRIS 1 proposed reforms to assist consumers to better understand what the retirement village product (RV product) includes and how much it will cost them. CRIS 1 proposed that this information be provided earlier through advertising and that more information be provided about the price structure before purchasing decisions are made. It also proposed certain changes to definitions in the *Retirement Villages Act 1992 (WA)* (RV Act) to capture each element of the RV product.

¹ The release and closing dates of CRIS 1-4 are as follows:

- CRIS 1 - 1 August 2019 - 27 September 2019.
- CRIS 2 - 12 December 2019 - 30 June 2020.
- CRIS 3 - 16 June 2020 - 30 September 2020.
- CRIS 4 - 9 June 2021 - 21 July 2021

CRIS 2: OPERATOR OBLIGATIONS IN THE VILLAGE

CRIS 2 was the longest paper and dealt with day-to-day issues faced by residents and operators in retirement villages, as well as departing residents. Its theme was operator obligations, both to the village community and to individual residents. A significant reform proposed in this CRIS was that former residents' exit entitlements be paid by an operator within a set time after departure from the village, as well as early payments for those residents moving to aged care. The paper also proposed changes to the budget process to improve the financial accountability of operators by requiring that operators obtain resident consent to village budgets.

Proposals were also made to implement the Final Report recommendation that reserve funds be mandatory in retirement villages, as well as providing some clarification around categories of capital works and the funding of those works in villages. The paper also dealt with issues around refurbishment obligations and proposed distinctions between reinstatement and improvement works in the legislation to give greater clarity to residents in the refurbishment works that can be included in an exit fee. The final parts of CRIS 2 proposed reforms to clarify who bears responsibilities under the RV Legislation and reforms to insert more specific conduct obligations for operators and residents of retirement villages.

CRIS 3: WHEN, WHY AND HOW THE RV ACT APPLIES

CRIS 3 provided some background on when, why and how the RV Act applies. It explained that the RV Act only applies when a particular financial model is used to provide accommodation for older consumers. The paper proposed the establishment of a public database of retirement villages as recommended in the Final Report and a better distinction in the legislation between the terms 'retirement village scheme' and 'residence contract'. It also asked questions about the need for better clarity around village community arrangements for residents of a village. CRIS 3 also proposed amendments to expressly recognise multisite retirement villages as well as considering a number of emerging issues dealing with rent-paying residents and sub-letting in retirement villages.

CRIS 4: MANAGING CHANGES TO A RETIREMENT VILLAGE

PART 18: IDENTIFYING RV LAND AND PROVIDING FOR ITS ADDITIONAL USE

Part 18 explains that the RV Act is not sufficiently clear as to the land that a retirement village comprises.

18.1: Capturing land used for amenities and services

Part 18.1 proposes that the RV Act's definition of a retirement village more clearly includes the land on which the amenities and services promised in a residence contract are provided. It also proposes clarifying that amenities and services shared with non-residents are part of a village when they are promised in residence contracts.

18.2: Retirement village comprises a whole parcel/s of land

Part 18.2 proposes that the RV Act clearly state that a retirement village is the whole of any parcel/s of land on which any of the RV product (residences, amenities or services) are situated. It also proposes that the RV Act recognises that putting some of that land to a second use does not impact its status as part of the village.

18.3: RV Act memorial to describe land used for one village only and only one RV Act memorial per village

Part 18.3 proposes clarifying RV Act requirements for memorials to prevent instances of a single memorial describing multiple villages and multiple memorials for the same village. It also proposes that the RV Act provide for new village land to be added to an existing memorial (as this is one reason multiple village memorials are being lodged).

PART 19: RETIREMENT VILLAGE CHANGE PROCESS

Part 19 explains that:

- in order to protect residents' interests in receiving the RV product throughout their residence, the RV Act restricts certain changes being made to a village; but
- these restrictions can lock operators and residents into a built environment or product that becomes outdated over time.

It also explains that there are different processes for dealing with approvals for, and the various disputes that can arise from, a change that can currently occur.

19.1: Single process for significant village changes

Part 19.1 proposes that the RV Act provide a single process for all significant changes to a village or the RV product. The process involves three proposed change categories (winding down an retirement village scheme (RVS), RV Act memorial correction and village redevelopment) and the State Administrative Tribunal (SAT) making all decisions and resolving all disputes that arise regarding the proposed change.

19.2: Retirement village change categories

Part 19.2 makes proposals in more detail for two of the proposed change categories – winding down a RVS and village redevelopment. It proposes the following criteria for distinguishing between the proposed significant village changes in the village redevelopment category that require SAT oversight from those that do not on the basis of:

- complexity; and/or
- residents' ability to meaningfully protect their interests.

This part also looks at resident relocation due to a significant change.

19.3: Minimum consultation requirements

Part 19.3 explains how minimum resident consultation requirements, flexible enough to deal with the full range of significant village changes that may be proposed, could benefit operators and residents in considering those changes. This part proposes measures to assist stakeholders to identify matters that will need to be agreed and clearly identify those that cannot. This part explains six proposed minimum requirements for resident consultation in the village change process:

- notification to residents that a significant change is proposed;
- provision of a draft implementation plan to residents;
- consultation with the residents committee;
- draft individual resident impact statements (where relevant);
- at least one residents meeting; and
- written responses to requests for information or suggestions from residents.

PART 20: PRE-RESIDENCE ISSUES

20.1: Multiple sales contracts – pre-contract disclosure and cooling off

Part 20.1 makes proposals to implement Final Report Recommendation 23 that the RV Legislation clarify which residence contract/s its pre-contract disclosure and cooling-off requirements apply to when residents sign more than one contract at different times.

Part 20.1 also recognises that recent amendments to both the *Strata Titles Act 1985 (WA)* (ST Act) and *Sale of Land Act 1970 (WA)* (SL Act) could create confusion when a RV premium (deposit) may be released and the circumstances in which a residence contract can be rescinded.

This part makes proposals to clarify that:

- pre-contract disclosure applies only to the first residence contract signed;
- rescission rights apply to all contracts signed; and
- the RV Act premium release obligations and rescission rights are in addition to any obligations under the ST Act or SL Act.

PART 21: APPLICATION OF RV ACT TO RESIDENTIAL AGED CARE FACILITIES

21.1: RV Act and residential aged care residents

Part 21.1 explains that the RV Act does not apply to a village operator or certain residents in village residential aged care facilities (RACF) when the operator is an approved provider under the *Aged Care Act 1997* (Cth) (AC Act) and is receiving funding under the AC Act for the residential care that a particular resident receives.² The wording for this exclusion may mean that the RV Act applies to an operator and residents receiving care under the AC Act when the approved provider is a different entity to the village operator for RV Act purposes. This part seeks feedback on whether this exclusion requires updating to reflect current village operating arrangements and recent changes to the AC Act.

PART 22: ISSUES FOR FEEDBACK ONLY

22.1: Dispute resolution

Part 22.1 summarises the current processes that exist under the Fair Trading (Retirement Villages Interim Code) Regulations 2021 (WA) (RV Code) for resolving disputes between operators and residents of retirement villages. The processes include the village dispute resolution process, conciliation and investigation of village disputes by the Department of Mines, Industry Regulation and Safety – Consumer Protection Division (Consumer Protection), and consideration of certain types of disputes by SAT and current powers to make orders.

This part seeks feedback from stakeholders about ways to improve current retirement village dispute resolution processes, such as widening the jurisdiction of SAT to hear and resolve all retirement village disputes and make orders in relation to all disputes; the introduction of compulsory conciliation and/or mediation; a ‘good faith’ requirement relating to dispute resolution to be introduced into RV Legislation; and to establish a free or low-cost advocacy service dedicated to assisting seniors.³

² RV Act (WA) section 5(2).

³ The CCLSWA study commissioned by Consumer Protection in 2019 recommended the above ways to improve the current dispute resolution processes available to residents.

22.2: Building defects

Part 22.2 seeks information to assess the extent of issues around building defects and whether a regulatory response may be required. Residents have raised concerns that some operators are passing building rectification costs on to residents through recurrent charges, the imposition of additional levies, or deductions from reserve funds rather than pursuing the builder for rectification. Issues may also exist with a lack of transparency by operators in providing relevant information to prospective and existing residents about known building issues, associated rectification planning and any relationships, if they exist, between operators and retirement village developers and builders.

22.3: Insurance

Part 22.3 reports that residents have reported that they have difficulty obtaining information from operators about insurance arrangements in the village. This can cause problems for residents who may find it difficult to determine what is included or excluded from their village's insurance coverage, what insurance costs, including excess payable that they may be liable for, what changes may have been made to insurance and how and when to make an insurance claim themselves. This part assesses the need for improved information disclosure and transparency for residents about village building insurance.

22.4: Strata title retirement villages

Part 22.4 deals with the overlap between the ST Act and RV Act regulation in strata villages. Strata title retirement villages are regulated under both the ST Act and the RV Act. As some of this regulation overlaps, there is confusion in the community about which rules apply. This part commences the process of clarifying obligations and rights by looking at three main areas where overlaps exist. These include pre-contractual disclosure time periods, financial reporting requirements and village rules. The possibilities for streamlining regulatory requirements are also discussed. This part seeks feedback about the current overlaps, obligations, rights and problems.

22.5: Provision of private home care services in retirement villages

Part 22.5 explains that home care services enable older people to continue living at home rather than entering an aged care facility or nursing home. These services are now also available in retirement villages to residents who require assistance with personal needs. This part seeks stakeholder feedback on whether any issues exist in the provision of home care services in retirement villages. This part also canvasses views on the future direction of the retirement village sector.

SUMMARY OF REFORM PROPOSALS/ISSUES IN CRIS 1–4

CRIS 1		Improving consumer understanding of the RV product and price		
Part	Issue	Objective	FR Rec.	Proposals / Options
4.1 (p.26)	Amending core definitions to improve understanding of RV product and price.	To enable a better understanding of the RV product in the community and ensure that the individual components of the RV product (accommodation, amenities, services and managed community) are reflected in key definitions.	18, 84, 100(3)	<p>Option A</p> <p>Definition of <i>retirement village</i></p> <p>Amend the definition of retirement village to:</p> <ul style="list-style-type: none"> • insert the additional components of a managed community and the provision of amenities and services; • retain the reference to complex(s) of residential premises occupied or intended for occupation under a RVS; and • retain the reference to land used or intended to be used for or in connection with a RVS. <p>Definition of <i>residence contract</i></p> <p>Amend the definition of residence contract to:</p> <ul style="list-style-type: none"> • insert a reference to agreements for communal and personal amenities and communal and personal services; and • delete the words “and may take the form of a lease or licence” because the variety of tenure models means they are no longer appropriate <p>Option B</p> <p>Definition of <i>retirement village scheme</i></p> <p>Amend the definition of “retirement village scheme” to incorporate all of the components of the RV product.</p> <p>Definition of <i>residence contract</i></p> <p>Amend the definition of residence contract to:</p> <ul style="list-style-type: none"> • include a reference to the right to use or receive communal or personal amenities and services; and • delete the words “and may take the form of a lease or licence” which are no longer appropriate.

CRIS 1		Improving consumer understanding of the RV product and price		
Part	Issue	Objective	FR Rec.	Proposals / Options
4.2 (p.39)	Requirements for advertising to improve understanding of the RV product.	To enable a better understanding of the RV product, including understanding of how the RV product is different to a residential property purchase.	1, 2	<p>Option A</p> <p>That guidelines be developed to guide industry on existing provisions in the RV Code and ACL.</p> <p>Option B</p> <p>That RV Legislation be amended to require advertisements or marketing material for retirement villages to include the following information:</p> <ul style="list-style-type: none"> • the specific type of tenure offered (lease for life, licence, occupation by shares, strata title etc.); • that accommodation is provided in a managed community with non-elective amenities and services; and • any other prescribed information. <p>Option C</p> <p>That RV Legislation be amended to prohibit the following kinds of statements in advertisements and marketing material about retirement villages:</p> <ul style="list-style-type: none"> • statements which represent that accommodation which is for a type of tenure that is not freehold (such as a lease or licence) is the same as or equivalent to freehold tenure (e.g. units for long term lease are 'for sale'), and • that RV Legislation require advertising and marketing materials for a type of tenure that is freehold to specify whether or not the tenure is subject to terms and conditions that restrict that tenure e.g. strata title units that are purchased subject to restrictions imposed on the resident about disposal.

CRIS 1 Improving consumer understanding of the RV product and price				
Part	Issue	Objective	FR Rec.	Proposals / Options
5.1 (p.61)	Improving upfront pricing information.	To enable consumers to better understand the RV product price.	1, 10, 26	<p>Option A</p> <p>That guidelines be developed by Consumer Protection to assist industry to develop more accurate advertising and marketing practices including compliance with section 48 of the ACL (Final Report Recommendation 1).</p> <p>Option B</p> <p>Advertisements which display only part of the price of retirement villages be required to also display the following information about the other fees and charges:</p> <p>That RV Legislation be amended to require advertising and marketing of retirement villages which states an amount which is only part of the price, to provide the following information about other fees and charges that are payable :</p> <ul style="list-style-type: none"> • the amount of recurrent fees and charges which are payable in the village' • the minimum or maximum deferred management fee (DMF) payable; • the minimum of any other fees payable; and • other prescribed information.
5.2 (p.64)	Improving upfront pricing information by means of an Average Resident Comparison Figure (ARCF).	To enable consumers to obtain more complete upfront price information.	1 10 26	<p>Option A</p> <p>Require operators to provide an ARCF and the ARCF Table for any units advertised available for occupation.</p> <p>Option B</p> <p>Require operators to provide an extended ARCF (with additional information) and the extended ARCF Table for any units advertised available for occupation.</p> <p>Option C</p> <p>Require operators to advertise the upfront payment with and without the DMF.</p>

CRIS 2		Operator obligations in the village		
Part	Issue	Objective	FR Rec.	Proposals / Options
6.1 (p.9)	Time limit for exit entitlements,	To ensure former residents receive their exit entitlements within a reasonable, fair and certain timeframe.	71	<p>That the RV Act specify the time limit time for exit entitlement payment to be:</p> <p>Option A – 6 months;</p> <p>Option B – 12 months; or</p> <p>Option C – 18 months after a resident leaves the village.</p> <p>Contracts will still be permitted to stipulate an earlier time for payment.</p> <p><i>Funding Residential RACF accommodation.</i></p> <p>Option D</p> <p>No special provision for residents moving to an RACF.</p> <p>Option E</p> <p>If requested by a former resident, an operator must pay a daily accommodation deposit (DAP) of up to 85 per cent of the estimated exit entitlement.</p> <p>Option F</p> <p>If requested by a former resident, an operator must pay either the refundable accommodation deposit (RAD) or DAP of up to 85 per cent of the estimated exit entitlement. The RAD to be paid within 6 months of the resident's departure from the village.</p> <p>Option G:</p> <p>That the RV Legislation require that a residence contract provide how an exit entitlement will be calculated if a unit is not reoccupied when it falls due.</p> <p>Option H</p> <p>That the RV Legislation provide that if a residence contract makes an exit entitlement amount dependent the amount of a new resident's upfront payment or a stipulated time, the unit is not reoccupied when an exit entitlement becomes payable and the former resident and operator cannot agree the upfront payment amount:</p> <ul style="list-style-type: none"> • the operator must obtain an independent valuation of the current market value (price); and • the upfront payment component of that value.

CRIS 2		Operator obligations in the village		
Part	Issue	Objective	FR Rec.	Proposals / Options
				<p>Option I</p> <p>Option H with the additional requirement that the price structure applying to the former resident must be used.</p>
6.2 (p.37)	Clarifying the term exit entitlement.	To clarify that RV Act exit entitlement protections apply to all exit entitlement payments regardless of the way contracts describe them.	87	<p>That RV Legislation be amended to:</p> <ul style="list-style-type: none"> • insert a new term “exit entitlement” for all the payments an operator may make to a former resident, however they are calculated and however they arise; and • use that term in relevant provisions, including sections 19–21 of the RV Act. <p>Option J</p> <p>That the RV Legislation prohibit terms in residence contracts that purport to confer an obligation to make a payment on a person who is not a party to the contract.</p> <p>Option K</p> <p>That the RV Legislation provide that residence contracts must provide that exit entitlements are payable by an operator.</p>
6.3 (p.42)	Extending the cap on recurrent charges to strata and purple title villages.	To ensure RV Act consumer protections apply appropriately to all residents.	71 73	That the current caps on paying recurrent charges after leaving a village (3 months for new contracts and 6 months for existing contracts) apply to all former residents regardless of property ownership model.
7 (p.48)	Resident consent to budget.	To ensure that residents can meaningfully participate in the village budget setting process and receive sufficient information about operating budgets.	35-43	That an operator be required to seek residents consent to the proposed budget and provide such information as is reasonably requested by the residents (or the residents’ committee) for the purpose of deciding whether consent should be given.
8.1 (p.71)	Mandatory reserve funds.	To ensure that operators plan appropriately, for long-term capital works in the village and that adequate funds are available.	44-50	That operators be required to introduce mandatory reserve funds in retirement villages in WA.

CRIS 2 Operator obligations in the village				
Part	Issue	Objective	FR Rec.	Proposals / Options
8.2 (p.83)	Capital works definitions and funding rules.	To provide greater clarity to residents about the funding arrangements for capital works in their retirement village.		<ul style="list-style-type: none"> - Insert definitions for the categories of capital works (capital maintenance, capital replacement) - Regulate the funding sources for categories of capital works: <p>Option A</p> <p>Recurrent charges can only be used for capital maintenance expenses.</p> <p>Option B</p> <p>The operator is responsible for funding all capital works in the village</p>
8.3 (p.101)	Obligation to maintain capital items.	To ensure retirement villages are maintained in a reasonable condition.		Require operators to maintain the capital items owned by the operator in a retirement village in a reasonable condition.
9.1 (p.108)	Refurbishment.	To ensure resident's refurbishment obligations are easily identifiable and understood.	76 77	<p>That the RV Legislation distinguishes between reinstatement works and improvement works by:</p> <ul style="list-style-type: none"> • replacing the term refurbishment works with terms that distinguish between reinstatement and improvement; • providing that reinstatement means (words to the effect) the works reasonably necessary to restore vacated premises to the condition they were in when first occupied (the precise meaning will be settled in drafting); • expressly excluding: <ul style="list-style-type: none"> ○ fair wear and tear; and ○ alterations made with the operator's consent without a requirement for premises to be restored to their original condition on departure from the works required to reinstate the vacated unit to its previous condition; • providing that improvement means (words to the effect) works that improve the vacated unit's value or marketability as part of the RV product or that extends the life of a unit or changes the function of part of it or a fixture (ATO approach – the precise meaning will be settled in drafting); and • expressly providing that reinstatement includes a minor, incidental level of improvement but

CRIS 2		Operator obligations in the village		
Part	Issue	Objective	FR Rec.	Proposals / Options
				not work that alters the function or character of a fixture or the property or that significantly enhances the marketability or sale value of a RV product relating to the vacated unit (ATO approach).
9.2 (p.121)	Refurbishment.	To ensure resident's refurbishment obligations with respect to the unit they vacate are fair.		<p>Option A</p> <p>No change to current requirements.</p> <p>Option B</p> <p>Require all residents to pay for reinstatement by way of a refurbishment fee; and allow contracts to require former residents to fund improvements but only in proportion to their share in any upfront payment increase (Qld model).</p> <p>Option C</p> <p>Require all residents to fund reinstatement but prohibit requiring residents to fund improvement. (NSW/ACT model)</p>
9.3 (p.128)	Property condition report.	To minimise the scope for disputes about works.	71	<p>Require:</p> <ul style="list-style-type: none"> • operators to provide prospective residents with a property condition report for the unit they will occupy within a prescribed period prior to signing a residence contract; • that the inspection for the report occur in the presence of the resident or their representative, unless the resident agrees in writing that it will occur in their absence; • a prospective resident is to either sign the report as accurate or return a copy to the operator with areas of disagreement marked within a prescribed period; and • the property condition report to contain the detail and be in the form prescribed in the RV Legislation.

CRIS 2		Operator obligations in the village		
Part	Issue	Objective	FR Rec.	Proposals / Options
10.1 (p.141)	Operator responsibilities.	To clarify the entity that has responsibility for obligations under the RV Act. To ensure persons who control the village have appropriate responsibilities.	87	Amend the RV Legislation to: <ul style="list-style-type: none"> replace the term “administering body” with “operator”; provide that “operator” means the entity (or entities or persons) that control the RV product (the precise wording will depend on the outcome of consultation on the part 4, Issue 4.1 reform proposals); insert a new term “manager” for an entity (or entities or person) who has some control over day-to-day village operations (and allocating appropriate RV Legislation obligations to that entity/person); insert a new term “village landowner” for the owner of land used for a retirement village (other than a resident) and allocating responsibilities appropriate to village land ownership.
10.2 (p.156)	Joint responsibilities of entities.	Ensure that all entities in multiple owner models are responsible under the RV Legislation.		Amend the RV Legislation to expressly state that: <ul style="list-style-type: none"> unless otherwise indicated, all responsibilities are joint and several; and when an obligation requires a particular act or actions, compliance by one responsible entity is sufficient.
11.1 (p.160)	Conduct obligations of operators.	Provide a clear statement of the standards of conduct expected from operators in a retirement village.		Require an operator of a retirement village to: <ol style="list-style-type: none"> Have knowledge and understanding of all relevant laws. Have regard to best interests of residents. Exercise skill, care and diligence. Act with honesty, fairness and professionalism. Act in good faith. Protect information – keep it confidential and not use it improperly. Not use their position improperly. Manage conflicts of interest.

CRIS 2		Operator obligations in the village		
Part	Issue	Objective	FR Rec.	Proposals / Options
11.2 (p.176)	Conduct obligations of residents.	Provide a clear statement of the standards of conduct expected from residents in a retirement village.		Require residents to: <ol style="list-style-type: none"> 1. Respect the peace, comfort and privacy of other residents and persons in the retirement village. 2. Not harass or intimidate other residents and persons in the retirement village. 3. Not act in a manner that may place the safety of other residents and persons in the retirement village at risk of harm; and 4. Comply with the residence rules.

CRIS 3 When, why and how the RV Act applies				
Part	Issue	Part	FR Rec.	Part
13.2 (p.10)	Public database of retirement villages.	To provide a public database to assist consumers to compare villages.	93	Require operators to provide information for a public database with: Option 1 Basic information about retirement villages; or Option 2 More comprehensive information about retirement villages.
14.1 (p.15)	Amendments to clarify definition of: <ul style="list-style-type: none"> • “scheme’ • multi-site villages • one village per scheme • premium. 	To address misunderstanding of the term ‘scheme’ in the RV Act.	85	Clarify the RV Act definitions for RVS and residence contract in the RV Act so that it no longer provides that the word scheme (when used alone) has the same meaning as RVS.
15.1 (p.31)	Multi-site villages.	To ensure the RV Act provides for multi-site villages.	84	That: <ul style="list-style-type: none"> • 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 pre-contract disclosure) will indicate that the retirement village is multisite.
15.2 (p.37)	One village per scheme.	To clarify that the RV Act permits only one retirement village for each RVS.		Amend the RV Act to expressly provide that a RVS applies to one retirement village only.
16.1 (p.41)	Definition of premium.	To ensure all premiums paid by residents are required to be held in trust under s. 18 regardless of the entity to which they are paid.		Amending the RV Act to define a premium as a payment to any legal entity in connection with admission into a village.
16.2 (p.44)	Definition of premium.	To clarify the definition of premium under the RV Act.		Amend the RV Act definition of premium 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.

CRIS 4 Managing changes to a retirement village				
Part	Issue	Objective	FR Rec.	Proposals / Options
18.1 (p.32)	Capturing land use for amenities and services.	To ensure the RV Act memorial serves its intended role in the RV Act consumer protection to: notify consumers of the land that is subject to the RV Act. To also notify and give priority to satisfying residents' exit entitlement payment secured by the RV Act statutory charge over other creditors.		Amend the RV Legislation to provide that <ul style="list-style-type: none"> ○ any amenity or service that is promoted as being part of the village, or for which a resident must pay because they are a village resident, is part of the RV product regardless of that amenity or service: ○ not being exclusively provided for residents; or ○ being provided by the operator through arrangements with a third party; ○ a residence contract includes any contract for provision of amenities or services that are part of the RV product; ○ a retirement village includes the land used to provide the amenities and services set out in a residence contract; ○ an operator must indicate areas of the village used for amenities and services accessed by non-residents on a village map; and ○ an operator is not to require a resident to enter into a contract for provision of an amenity or service on the basis that it is not part of the residence contract. A resident can voluntarily enter into such contracts provided they are terminable on reasonable notice.
18.2 (p.46)	Retirement village comprises a whole parcel/s of land	To ensure that villages are described in RV Act memorials as comprising the whole of any parcel of land on which the RV product residential premises, amenities or services are provided.		Amend the RV Act: <ul style="list-style-type: none"> ○ to clarify that a retirement village must comprise the whole of any parcel of land on which RV product accommodation, amenities or services are provided; and ○ to recognise that portions of the land used for a RVS may also be used for an additional purpose without compromising that land being secured by the RV Act statutory charge.
18.3 (p.49)	RV Act memorial	To ensure the RV Act memorial only describes one village and that there is only one memorial per village.		Amend the RV Act to provide that: <ul style="list-style-type: none"> ○ each village is to have its own memorial; and ○ there is to be only one memorial for each village.

CRIS 4 Managing changes to a retirement village				
Part	Issue	Objective	FR Rec.	Proposals / Options
19.1 (p.56)	Single process for significant village changes	<p>To provide a process for operators to make a wider range of changes to a village than the RV Act currently contemplates, that:</p> <ul style="list-style-type: none"> • protects residents' interests; and • is able to efficiently deal with the wide range of changes that operators may wish to make and the full range of disputes that may arise. 		<p>That:</p> <ul style="list-style-type: none"> ○ the RV Act provide a single process for all significant changes to a village or the RV product; ○ the process involve: <ul style="list-style-type: none"> ○ minimum requirements for resident consultation about the proposed change; and ○ SAT making all decisions and resolving all disputes that arise regarding the proposed change; ○ the RV Act distinguish the significant changes that will require resident consultation only and those that will require SAT oversight on the basis of the potential for impact on residents' financial and tenure security; and ○ the possibility of a simplified application for uncontested changes be explored with SAT.
19.2 (p.69)	Retirement village change categories	<p>To appropriately categorise the range of changes that can occur in a village and whether SAT approval is required for them to proceed.</p>		<p>That the RV Act provide:</p> <ul style="list-style-type: none"> ○ the following criteria for distinguishing between the proposed significant village changes in the village redevelopment category that require SAT oversight from those that do not, it: <ul style="list-style-type: none"> ○ is complex; ○ has potential to impact residents financial or tenure security; and/or ○ have potential for impact on resident rights and obligations that requires technical legal or financial skill to assess; and ○ specific examples of these kind of changes that include: <ul style="list-style-type: none"> ○ excising land from a village; ○ changing the way part of a village is used; and ○ making RV product amenities and services open to the public, ○ as well as power for regulation to provide further guidance about the criteria; and ○ that SAT resolve any dispute about application of the criteria to any proposed change.

CRIS 4 Managing changes to a retirement village				
Part	Issue	Objective	FR Rec.	Proposals / Options
19.3 (p.77)	Minimum consultation requirements	To encourage informed resident consultation and decisions on significant village changes, and the process for implementing them, and reduce disputes as to the adequacy of operator consultation processes.		This part explains how minimum resident consultation requirements, flexible enough to deal with the full range of significant village changes that may be proposed, could benefit operators and residents in considering those changes. This part proposes measures to assist stakeholders to identify matters that will need to be agreed and clearly identify those that cannot.
20.1 (p.82)	Multiple residence contracts – pre-contract disclosure and cooling off	To clarify RV Act pre contract and cooling off requirements when a residence contract comprises contracts that are signed at different times.	23	<p>Pre-contract disclosure</p> <p>That the RV Legislation provide that:</p> <ul style="list-style-type: none"> ○ its pre-contract disclosure requirements only apply to the first residence contract that a prospective resident is asked to sign; and ○ prospective residents must be given at least 10 working days to consider any additional residence contracts that are not to be signed at the same time as the first residence contract. <p>Cooling off</p> <p>That the RV Legislation provide that its consumer cooling-off rights:</p> <ul style="list-style-type: none"> ○ apply to each residence contract that a prospective resident must sign; ○ have effect even though the contract may be subject to the SL Act; and ○ do not derogate from the SL Act rights.
21 (p.89)	Application of RV Act to residential aged care facilities	To avoid unnecessary RV Act application to village RACF residents when their accommodation and services are regulated under the AC Act.		It is not necessary for two Acts to regulate accommodation and services provided in an RACF. This results in overlapping requirements and there is potential for inconsistency in what each Act requires. also confuses consumers. It is more difficult for them to identify and enforce their rights.

CRIS 4 Emerging issues (for feedback only)				
Part	Issue	Objective	FR Rec.	Proposals / Options
22.1 (p.92)	Dispute resolution	To assess current levels of satisfaction with existing village dispute resolution processes and obtain views on possible improvements.		<p>Part 21.1 summarises the current processes under the RV Code for resolving disputes within retirement villages and asks what changes might be needed to improve them.</p> <p>It also seeks feedback about recommendations made in the CCLSWA Report relating to retirement village dispute resolution. The CCLSWA study commissioned by Consumer Protection in 2019 recommended that the SAT's authority to hear and make orders on retirement village disputes be broadened, a 'good faith' requirement relating to dispute resolution be introduced into RV Legislation, compulsory mediation be mandated as a part of the dispute resolution process and a free or low-cost advocacy service dedicated to assisting seniors be established.</p>
22.2 (p.98)	Building defects	To assess whether there is a need for regulation to require greater transparency and accountability in identifying and rectifying building defects within retirement villages.		This part seeks feedback about the extent of issues around building defects and whether a regulatory response may be required.
22.3 (p.102)	Insurance	To assess the need for improved information disclosure and transparency for residents relating to village building insurance.		This part seeks feedback about the need for improved information disclosure and transparency for residents about RV building insurance.
22.4 (p.107)	Strata title retirement villages	To ensure that the regulatory requirements which apply to strata RVs are clear.		This part seeks feedback about any consumer difficulties regarding regulatory overlap between the strata titles and RV Laws.

CRIS 4 Emerging issues (for feedback only)				
Part	Issue	Objective	FR Rec.	Proposals / Options
22.5 (p.114)	Provision of private home care services in retirement villages.	To seek stakeholder feedback on whether there are any problems being experienced in relation to the delivery of private home care services in retirement villages and the future direction of retirement village living.		Part 21.5 seeks stakeholder feedback on whether any issues exist in the provision of home care services in RVs. This part also canvasses views on the future direction of the RV sector.

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

The consultation papers form part of 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. They seek your comment to ensure government decisions on whether reforms are required, policy should change and/or particular proposals are likely to be effective.

How else is feedback on these proposals being obtained?

Feedback from the community is also being obtained in other ways, including surveys, discussions and roundtables with peak bodies in the sector, engagement with other government agencies and discussions with interested organisations.

What matters can you raise?

The CRIS 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 CRIS and advise that you do not agree that reform is required. This is the case whether or not these are specific questions in the CRIS. 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 has been released with a due date for submissions. This helps us consider your responses as we develop the CRISs. If the due date is a problem for you please seek an extension of time and we will consider your request. 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 other CRIS proposals 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 is next?

Consumer Protection will analyse all submissions it has received during the consultation process. This includes any additional matters and any alternate ways for dealing with an issue raised by stakeholders. Before the end of this year Consumer Protection will assess the likely regulatory impact of the proposals and make recommendations in a Decision Regulatory Impact Statement to Government for what reforms should proceed. The Government will then decide whether to accept those recommendations.

Many of the recommendations are for changes to be made to the RV Act. If the Government decides to approve these, a draft Bill for introduction into Parliament will need to be prepared. Further consultation with stakeholders may be required during this process.

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 the CRIS; or
- request (via email to consultations@dmirs.wa.gov.au) a copy of a separate word document containing all of the questions to assist you in providing a response.

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



Attention: Retirement Villages Consultation

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

You can also have your say by telephoning Consumer Protection on 1300 304 054.

Closing date

The closing date for providing comments on this CRIS is **21 July 2021**.

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 18: IDENTIFYING RV LAND AND PROVIDING FOR ITS ADDITIONAL USE

The RV Act is not sufficiently clear that:

- a village includes the land on which amenities and services promised in a residence contract are provided;⁴
- when the RV product is provided on a parcel of land that is also used for non RVS purposes – for example, a school, church or ‘rent only’ block of units – the whole parcel of land is the village;⁵
- the RV Act memorial is to describe the land used for one village only; and
- there is to be only one RV Act memorial for each village.

Some operators therefore do not understand that the RV Act obligations apply to this land and so do not correctly identify their village in RV Act memorials. Landgate records, for example, reveal instances of the same memorial describing land that is used for more than one village and of several memorials describing land used for the same village.

RV Act memorials do not determine what land comprises a village. That is determined by whether land is in fact used for a RVS. The memorial’s description of the land that is a village does however serve a public notification purpose. It represents that a village is the described land. Incorrect memorials therefore create a number of problems.

These problems include uncertainty about whether and how the RV Act statutory charges securing village land for resident exit entitlement payments apply to any incorrectly omitted or included land. Residents may find that the charge does not have priority over other secured interests for omitted land (because priority dates from the memorial being lodged)⁶ or, alternatively, persons dealing in the omitted land may later discover that the statutory charge has priority over their secured interests, for example, a mortgage.⁷ A memorial that describes land that is in fact used for two or more villages also misrepresents that land securing the statutory charge.

⁴ Issues in the RV legislation not providing a united description of the RV product were discussed in CRIS 1, Part 4.

⁵ In *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013] WASC 219 (*Hollywood case*), the court observed that it is not possible to say that land secured by the RV Act statutory charge is not being used for or in connection with a RVS. Consistent with this, the RVS use that applies to a designated portion of a parcel of land may the RV Act statutory charge alone (this is, its security for exit entitlement payment is use for or in connection with a RVS).

⁶ The statutory charge has priority over other charges against land for which a memorial is required to be lodged from the date the memorial is lodged (RV Act, section 20(3) and (4)). How this will be interpreted by a court is not clear.

⁷ The RV Act provides that a resident’s right to premium repayment under section 19 of the RV Act is a charge on the land in a retirement village and that the charge has effect whether or not it is registered (section 20(1) and (2)). Omitting village land from the land that a memorial identifies as the village is therefore not likely to mean that the land is not secured. It does however create priority problems that undermine the usefulness of that land being security.

The RV Act's restriction on removing a memorial while any part of the land continues to be used for a RVS is intended to ensure that residents continue to receive the RV product promised to them in their residence contracts. This intent is undermined when:⁸

- land is omitted from a memorial – because the way an operator uses it can be changed without need to remove the RV Act memorial; and
- if there are several memorials for the same village – it may be possible to remove one memorial without removing the others.

Memorials incorrectly identifying only a portion of a parcel of land as the village are also problematic because for the RV Act statutory charge to be effective, a village must comprise a whole parcel/s of land.⁹

This part proposes RV Act amendments to ensure that all land that comprises a village is included in a RV Act memorial, and to recognise that a parcel of land may be used for both a RVS and some other purpose while remaining secured by the statutory charge. In summary:

- *Issue 18.1: Capturing land used for amenities and services* proposes that the RV Act's definition of a retirement village more clearly includes the land on which the amenities and services promised in a residence contract are provided. It also proposes clarifying that amenities and services shared with non-residents are part of a village when they are promised in residence contracts.
- *Issue 18.2: Retirement village comprises a whole parcel/s of land* proposes that the RV Act clearly state that a retirement village is the whole of any parcel/s of land on which any of the RV product (residences, amenities or services) are situated. It also proposes that the RV Act recognise that putting some of that land to a second use does not impact its status as part of the village.
- *Issue 18.3: Memorial to describe land used for one village only and only one memorial per village*: proposes clarifying RV Act requirements for memorials to rectify issues of a single memorial describing multiple villages and multiple memorials for the same village. It also proposes that the RV Act provide for new village land to be added to an existing memorial (as this is one reason multiple village memorials are being lodged).

⁸ RV Act, section 15(8).

⁹ A designated portion of a parcel of land cannot be sold: the whole parcel must be sold. This is explained further below.

This part implements Final Report Recommendations 29 (to amend the RV Act to ensure the memorial applies to all village land) (Recommendation 29) and 84 (to update the term retirement village to reflect new village models).¹⁰ Correctly identifying the land that is a village provides the basis for implementing Recommendation 30 (that the RV Act provide a process for partial removal of a RV Act memorial – that is, to excise land from a village). Issue 18.3 addresses memorial issues that became apparent subsequent to the Final Report.¹¹

Background: RV Legislation

A retirement village is a complex comprising the residential premises and ‘appurtenant’ (related) land use or intended to be used for or in connection with a RVS.¹² A memorial identifying the land that is the retirement village must be lodged by an operator with the Registrar of Titles prior to offering any contract to reside in the village.¹³ Entry of this memorial in the Register of Titles is intended to notify consumers, persons dealing in the land and regulators that the land the memorial identifies is a particular village and that the RV Act applies to it.

Lodging the memorial is also significant because the lodgement date is the date from which village statutory charges have priority over other secured interests in the land it identifies.¹⁴ Statutory charges may not arise until many decades later. The memorial lodgement date is therefore a very important consumer protection for residents’ exit entitlements.

A RV Act memorial does not determine the land that is a village. Any land that is (or will in the future be) used for or in connection with a RVS is the village regardless of whether a RV Act memorial is lodged or that land is included in a lodged memorial. The memorial is largely an operator representation only as to the land that is a village.

¹⁰ See *Statutory Review of Retirement Village Legislation, Final Report, 2010* (Final Report), Chapters 15 and 34 for the precise recommendations and reasons for them.

¹¹ These issues were identified in the Supreme Court cases discussed in CRIS 3, Appendix 14 now Appendix 1 to this CRIS.

¹² RV Act, section 3(1): RVS means “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 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”.

¹³ RV Act, sections 15(3) and 16. Technically, RV Act, section 15(3) requires the operator to identify the land that is or is proposed to be used for a RV but a RV is defined as a complex of residential premises and appurtenant land used, or intended to be used for or in connection with a RVS (RV Act, section 3(1)), so the general effect is that the memorial identifies land that is or will be used for a RVS.

¹⁴ A statutory charge does not arise until an exit entitlement has not been paid. This does not become due until after a resident has left a village, so statutory charges do not generally arise until some years after the RV Act memorial has been lodged (RV Act, sections 19 and 20). The priority that lodging the memorial confers can therefore be very important.

As outlined above, an incorrect RV Act memorial undermines its notification and statutory charge priority functions. In addition to the matters previously noted, it means that prospective residents may be misinformed as to the land available to satisfy that village's statutory charges.

A memorial is more than a representation for the RV Act protections against changes to the way a village is used. For a memorial to be removed, the RVS needs to be terminated. This requires Supreme Court of Western Australia (Supreme Court) approval, which is an oversight protection for residents' interests.¹⁵ If a memorial omits some village land, there is no need to remove the memorial to change the use of the omitted land, nor is there any need to seek Supreme Court approval to terminate the RVS.¹⁶

Background: Scenarios in which RV land can be difficult to identify

Example 18.1 sets out scenarios commonly presented to Consumer Protection in which operators find it difficult to correctly identify the land that is a retirement village.

EXAMPLE 18.1: DIFFICULTY IN IDENTIFYING LAND THAT IS A RETIREMENT VILLAGE

Scenario A

Retirement village services and amenities are shared with the users of another business (or charitable) enterprise owned by the RV operator (or a related entity). This enterprise is on the same undivided land as the village residences, amenities or services or is adjacent to them. For example, a carpark is shared between a village and a church or a village administration office is used by administration staff for a school.¹⁷

Scenario B

Retirement village services and amenities are also open to the general public. For example, an operator subcontracts a third party to provide an amenity or service that the operator has promised to residents in their residence contracts (for example, a café, medical service or gym). The subcontractor leases premises in the village but runs the village amenity as its own business, including making it available to the general public. If the contractor ceases to provide the service, the operator must find a replacement.¹⁸

Scenario C

The development in which the village is located comprises several other uses – for example, a café, hairdresser, supermarket, library or medical centre – that are not promised in the residence contract and that are located on different parcels of land (generally strata title lots). The operator may negotiate discount resident rates to access these amenities or services but there is no contractual obligation to replace them if the businesses cease trading. Recent provision in WA for community title arrangements may increase the incidence of this scenario.

¹⁵ Unless the village is vacated (RV Act, section 22)

¹⁶ RV Act, section 15(8).

¹⁷ These examples are from the Report by the Hon. Minister for Fair Trading on the operation and effectiveness of the Retirement Villages Act 1992, 1995 (1995 Statutory Review Report), 66.

¹⁸ This can also be the case for operator owned amenities/services, particularly where the operator is a corporate group structure.

Scenario D

Residential aged care and independent living are provided in the same complex. Provided at least one resident in the complex pays a premium, land on which a RACF is situated is or is part of a retirement village.¹⁹ The operator however regards the RACF as a different use to the independent living units and wants to sell it. Some services and amenities are available to both RACF and independent living residents. Selling the RACF will mean that its nursing staff are no longer available to respond to emergencies.

ISSUE 18.1: Capturing land used for amenities and services

Recommendation 29 — to amend the RV Act to ensure the memorial includes all land used for a RVS — was directed at a small number of operators who were not including land on which village amenities and services were provided in the RV Act memorial. In addition to making Recommendation 29, the Final Report supported the previous statutory review report’s recommendation to ensure land used for amenities and services such as “delicatessens, banking agencies and health care clinics” was included.²⁰ Subsequent stakeholder contact with Consumer Protection has confirmed this continues to be a problem.

There appear to be two main reasons that land used for village amenities and services is being omitted from RV Act memorials. First, some stakeholders do not understand that the term ‘appurtenant land’ in the RV Act meaning for retirement village includes the land on which RV product amenities and services are provided. This is because neither of the RV Act meanings for retirement village or RVS expressly identify amenities and services as part of the RV product.²¹

Second, there is some misunderstanding and/or uncertainty as to whether, or when, land used to provide an amenity or service that can be accessed by people who are not village residents is part of a village. This arises in example 18.1 scenarios A, B and D. Operators providing an amenity or service that requires third-party cooperation can also be confusing. For example, a bank agency in a village. If the bank decides to close its agency, the operator may not be able to replace it. In this circumstance, the operator may not regard the agency as part of the village.

¹⁹ The RV Act excludes certain RACF residents and operators but the facility itself, and the land on which it is situated, remain part of the village (section 5(2) and *Hollywood case*, paragraphs 58 and 59). See discussion in part 21.

²⁰ The *Review of the Regulation of the Western Australian Retirement Village Industry*, 2002 (2002 Statutory Review Report) found that the RV Act needed amending to ensure the land on which village amenities and services were situated was recognised as part of the village and described in the memorial. The relevant recommendation was Recommendation 3 - to amend the meaning for retirement village to include “communal, community service and support facilities within the village which are available to village residents” (p 20) such as those described in the quote. The Final Report supported this recommendation (p 172).

²¹ See discussion of this issue in CRIS 1, p4.

Villages being built as part of broader, multiple use developments — example, 18.1 scenario C — challenge the traditional view of a retirement village as a ‘stand-alone’ complex, which is embedded in the RV Act. Emerging village models include greater reliance on residents using local amenity hubs outside the RV product itself and villages in vertical constructions which use artificial concepts of land. What comprises a village is becoming more flexible and therefore more complex in these contexts.

The high-level consumer protection issues in incorrect memorials were noted above. On a day-to-day basis, error or uncertainty in whether land used for an amenity or service is part of a village leads to misunderstandings regarding what residents can be asked to fund through village fees and charges. It also leads to disputes and disgruntlement regarding changes to the way land is used. Example 18.2 sets out two instances of this type of misunderstanding:

EXAMPLE 18.1.1: IDENTIFYING WHETHER LAND USED FOR AN AMENITY OR SERVICE IS PART OF A VILLAGE

Village 1

Village infrastructure was located next to a large open space that was partially covered by grass. The operator included the cost of watering and mowing this space as if it was a village amenity. Residents did not consider this land part of the village. It was not an attractive area. They did not use it and it was not the village garden/lawn areas. After a number of years, residents brought an action objecting to the village budget. One of the objections was to paying for the maintenance of this area. The tribunal found that the land was not part of the village and that the operator was not entitled to include the costs for maintaining it in the budget.

Village 2

Village infrastructure was located next to a large pond, surrounded by a wetland area. Some residents at least decided to enter the village because it had this amenity. Many more enjoyed it. The operator decided to sell the land on which the pond was situated. The new owner’s redevelopment would either fill in the pond or reduce it and replace the wetland with infrastructure. Some residents objected to the sale but the operator maintained that the land was never part of the village.

These problems can be minimised by the RV Act more clearly identifying that: land used for village amenities and services are part of the village; and the village amenities and services are those set out in the residence contract, regardless of whether any person who is not a resident also has access to them or they are provided by an arrangement between the operator and a third party.

OBJECTIVE

To ensure the RV Act memorial serves its intended role in the RV Act consumer protection framework, to:

- notify consumers, persons dealing in land and regulators of the land that is subject to the RV Act and what land comprises a particular retirement village; and
- give priority to satisfying residents' exit entitlement payment secured by the RV Act statutory charge over other creditors with a secured interest in the land that is a retirement village.

DISCUSSION

What issues need to be addressed?

Indirect obligation

The RV Act obligation for a memorial to include land used for village amenities and services is indirect. The relevant provision refers to land used (or intended to be used) for a retirement village, which means a complex that includes residential premises and appurtenant land used for or in connection with a RVS. A RVS is also defined by reference to occupation of residential premises. The effect of the RV Legislation is that the term 'appurtenant land' captures the amenities and services promised in a residence contract but this is not always understood.

Making the current effect of the RV Act clearer (that land used to provide the amenities and services promised in a residence contract is part of a village) will minimise incorrect memorials arising from RV product fragmentation in the RV Legislation.²²

Village amenities and services not limited to residents and/or provided by arrangement with third parties

Some operators appear to believe that land used to provide amenities and services is not part of a village if the amenity or service is not exclusively provided to residents.²³ This may flow from the traditional view that a village is a 'resident-only' complex separate from the general community. Other operators appear to consider that the degree of resident versus other use is relevant. Some registered charities use amenities such as an administration office, gardens, meeting rooms or parking areas for the purposes of both a village and a school or church. There can be different views on whether the land on which these are situated is part of the village.

²² This proposal builds on the CRIS 1, part 4 proposals to make the RV product clearer by making it express that the village is the land used to provide the RV product described in a residence contract.

²³ Both the Final Report and the 1995 Statutory Review Report mention this. The 1995 Statutory Review Report expressed concern at potential for unscrupulous operators not to include land used for village amenities and services in the RV Act memorial through making them available to other users (1995 Statutory Review Report, 66-7).

These views can combine with the difficulties operators face if a sub-contractor is effectively able to control continued service provision like the bank agency example above. If the agency is located in the middle of the village, there is less likely to be a question as to land on which it is situated being part of the village. If the agency is on the edge of a parcel of land or on a different parcel of land, this can be less clear. Similarly, if a gym is run by the operator on a separate lot to residences and other amenities or services, what makes it part of the village rather than a separate business?

Memorials may continue to be incorrect if the basis on which shared and subcontracted amenities and services are part of a village is not clarified. This can be addressed by more clearly identifying that land used in providing the amenities and services promised in a residence contract is part of the village.

Villages as resident-only environments

The RV Legislation does not prohibit village amenities and services also being accessed by persons who are not residents. It simply makes no provision for that to occur.

One of the many attractions residence in a village offers is the security of living in an environment that is separated from the broader community. There may therefore be some stakeholders who consider that retirement villages should be resident only environments. Multiple users for village amenities and services however predates the RV Act and has continued since it was made. Unwinding these practices would cause considerable disruption to the sector, including to residents in the relevant villages and it may not be welcomed by them.

Academic research suggests that people now entering the age group for the RV product want a more multigenerational living environment and some integration with the broader community.

Well managed, multiple user models offer potential for more affordable villages through residents sharing amenity and service costs with other users. Diversifying and increasing operator profit streams is likely to offer village residents improved security of tenure through reduced risk of operator insolvency and better ability to attract institutional funding.

Consumer Protection does not consider it feasible or desirable to prohibit mixed use of village land or village amenities and services with non-residents. Instead, consumers can decide which type of village suits them. To be able to do this, they need to be able to identify whether a village has areas that will be accessed by non-residents on a regular basis. Queensland (Qld) requires an operator to identify village facilities or land that are also open to other users when registering the RVS.²⁴ These details are available to a prospective resident inspecting the village register.²⁵ Requiring this information to be provided to prospective WA residents, for example, through indicating non-exclusive use on a village site plan, would allow prospective residents to consider publicly accessed village areas when deciding whether to reside in a village or a particular unit in a village.

RV Act restriction on changes to village land use

Some operators may prefer to omit land used for shared purposes from the memorial's description of a village due to the RV Act restrictions on changes to the way village land is used.

The Part 19 process for changes to village land, or the way it is used while remaining part of the village should remove this incentive for operators to narrowly describe villages in memorials. The circumstances in which this may be appropriate are discussed in Issue 18.2 below.

Options to resolve problem

CRIS 1, part 4, proposes that the meaning for:

- either retirement village (or RVS); and
- residence contract

be amended to include amenities and services.²⁶

²⁴ RV Act (Qld), section 27(2)(a)(iv) and *Retirement Villages Regulation 2018* (Qld) regulation 4, Schedule 1, items 7 and 9.

The application for RVS registration must include: "details of any facilities or retirement village land that will not be for the exclusive use or enjoyment of residents of the village" and "if retirement village land is used, or is to be used for any other purpose in addition to its use as a retirement village", that document must describe the other use and provide details of the commercial arrangements regarding that use.

²⁵ RV Act (Qld), section 35(2) and (4).

²⁶ CRIS 1, 32-5

For shared amenities and services and those provided to residents under operator sub-contract arrangements — the RV Act currently operates so that the RV product described in a residence contract is the basis for distinguishing between those that are part of the village and those that are not:

- if an amenity or service is promised in the residence contract — it is part of the RV product promised ‘for life’. The land on which it is provided is part of the village. The RV Act can be amended to clarify that whether an amenity or service is also accessed by non-residents is not relevant; and
- if an amenity or service is not promised in the residence contract and residents have access to it in the same way as the general public — it is not part of the RV product. The land on which these amenities and services are provided is not part of the village. Operators may arrange discounts or resident only access times but they incur no costs in providing these amenities or services and residents pay the providers directly for use.

For sub-contracted service provision, as is currently the case, an operator needs to decide whether they want to promote the village on the basis that it offers that service. If so, it is part of the RV product and must be in the residence contract.

Ensuring all amenities and services that residents fund because they reside in a village are in the residence contract

Amending the RV Act to expressly describe a village as including land used to provide the amenities and services promised in a residence contract appears uncontroversial. During stage one reforms however there was some concern that unscrupulous operators would try to avoid the new restrictions on changes to communal amenities and services by leaving them out of a residence contract and that they might require residents to enter into additional contracts.

From a technical perspective, it is not clear that operators can require residents to enter into contracts that are not residence contracts. This is because, as CRIS 3, part 14 explains, a residence contract is not a single document. It is any contract that sets out the broad arrangements under which the right to reside arises. All contracts that residents are required to enter into because they are a village resident are therefore likely to be residence contracts because they form part of the broad arrangements regarding the right to reside. Until a court rules on this there is a risk of a finding that the policy intent has not been achieved. Ensuring RV Act memorials correctly describe a village requires certainty that a residence contract is any contract:

- that a resident is required to enter into; or
- under which they are required to make a payment — whether on a use basis, for infrastructure maintenance, repair and replacement, through village recurrent charges, levy or other fee or charge,

because they are a village resident.

Alternatively, an operator could be prohibited from requiring a resident to enter into a contract with it or a third party for amenities or services additional to the RV product described in the residence contract. This would not prevent these contracts from being entered into voluntarily if a resident is able to terminate them on reasonable notice.

This provides clarity for what is in fact currently required.

18.1: PROPOSAL FOR CONSULTATION

The following proposal is being considered to ensure that a RV Act memorial does not omit village land:

That the RV Legislation provide that:

- **any amenity or service that is promoted as being part of the village, or for which a resident must pay because they are a village resident, is part of the RV product regardless of that amenity or service:**
 - **not being exclusively provided for residents; or**
 - **being provided by the operator through arrangements with a third party;**
- **a residence contract includes any contract for provision of amenities or services that are part of the RV product;²⁷**
- **a retirement village includes the land used to provide the amenities and services set out in a residence contract;²⁸**
- **an operator must indicate areas of the village used for amenities and services accessed by non-residents on a village map; and**
- **an operator is not to require a resident to enter into a contract for provision of an amenity or service on the basis that it is not part of the residence contract. A resident can voluntarily enter into such contracts provided they are terminable on reasonable notice.²⁹**

²⁷ This proposal is consistent with the CRIS 1, part 4 proposals and also completes implementation of Final Report Recommendation 18, that a residence contract include contracts for services and amenities (Final Report, 30).

²⁸ This is consistent with the CRIS 1, part 4 proposals.

²⁹ This proposed amendment is consistent with Final Report Recommendations 18 and 19 to distinguish between optional or elective services, which should not be in the residence contract, and those that form part of the RV product (Final Report, 30).

IMPACT ANALYSIS

The proposed amendments are largely to make the current effect or intent of the RV Act clearer, so that the consumer protection framework is not undermined by misunderstandings and confusion about the land that comprises a village. They do not introduce new policy about what is part of a village but recognise what is now occurring in the sector. Village amenities and services are currently being accessed by non-residents (including residents of other villages) and residents are accessing local amenities and services such as cafes and medical centres that are not part of the village.

This environment is more complex than stand-alone village complexes and there are risks that they undermine consumers' ability to identify what the village and RV product comprise. The proposed amendments will however reduce these risks.

Example 18.1.2 scenario A illustrates how the proposal would work if implemented:

EXAMPLE 18.1.2: IDENTIFYING WHAT THE VILLAGE AND RV PRODUCT COMPRISE.

Scenario A

An operator promotes a village as offering a pool, gym, café, hairdresser and parkland and specifies those amenities and services in the residence contract. Under the proposed amendments to the RV Act, the pool, gym, café, hairdresser and parkland are part of the RV product and the land used in providing them is part of the retirement village. The land on which all of these amenities and services are located must be described in the memorial.

Even if the operator enters into an agreement with ABC Fitness to provide the gym, the land on which the gym is situated must be described in the RV memorial. If ABC Fitness decides not to continue its business, the operator must find another entity to provide residents with a gym service as promised in the contract.

Villages currently promote easy resident access to local amenities and services that are not part of a village. For example, cafes, shops, libraries, bowling clubs and parks that are nearby. The RV Legislation and Australian Consumer Law (ACL) misrepresentation provisions mean that this promotion should be accurate.

The proposal that operators cannot require residents to enter into contract for provision of amenities and services outside a residence contract but that residents can voluntarily enter into short term contracts (terminable on reasonable notice) implements Final Report Recommendations 18 and 19. These were collectively that the RV Legislation distinguish between optional or elective services — which should not be in a residence contracts — and the services which form part of the RV product.

Varying an amenity or service so that it becomes accessible by non-residents should fall within the ambit of variations that require resident consent by special resolution.³⁰

³⁰ RV Regulations, regulations 7C, item 4 and 7E, item 3.

IMPACT ANALYSIS

Potential benefits and disadvantages of the proposal are:

Potential benefits	Potential disadvantages
<p>Clarity as to the land that comprises a village will support the statutory charge protecting consumers' financial investment.</p> <p>Clarity in the amenities and services to which the RV Act applies.</p> <p>Reflects existing practices and updates the RV Act to reflect emerging village models that involve:</p> <ul style="list-style-type: none"> village amenities and services being open to non-residents; and villages in multiple use developments taking advantage of amenities and services shared with all or some other uses in the development. 	<p>There may be some stakeholders who prefer that their village is a resident only environment.</p> <p>It may be difficult for residents to know whether they are disproportionately subsidising amenities or services also available to non-residents.</p> <p>The reforms may encourage operators to provide amenities and services on a user pays basis separate to the RV product to include a profit element.</p>

Questions:

- 18.1.1 *Will expressly providing that a retirement village includes land used for the amenities and services set out in a residence contract make the land that must be described in a memorial clearer?
If not, please explain why.*
- 18.1.2 *Will defining a residence contract as including any contract for the amenities and services promised as part of the RV product have any unintended effect? (Noting that the regulations already require amenities and services to be in the residence contract.)
If so, what problem do you think this will cause?*
- 18.1.3 *Will the proposal for identifying an amenity or service that is part of the RV product address the problem in stakeholders misunderstanding whether amenities and services shared with others are part of the village?
If not, why not? What more is required? Will this proposal have any unintended adverse consequence?*
- 18.1.4 *Will the proposal that operators cannot require a resident to enter into a contract for provision of an amenity or service that is not part of the residence contract restrict the potential for operators to bind residents to services that are not subject to RV Act protections? (Noting that voluntary, terminable user pays contracts are excepted.)
If not, what more is required?*
- 18.1.5 *Should operators be required to indicate on village maps the areas in which amenities and services that are open to non-residents are situated?*

IMPLEMENTATION ISSUES

Do financial reporting obligations need to be updated for shared amenities and services?

Non-residents accessing village amenities and services has, on occasion, been contentious. Residents have become concerned that that they are disproportionately subsidising them. They can also become concerned that they do not know whether they are disproportionately subsidising services because they do not have the information necessary to assess this.

This raises the question: are the current RV Legislation financial requirements sufficient to provide transparency that residents are not bearing a disproportionate share of the cost of providing amenities and services shared with non-residents?³¹

Question:

18.1.6 *Do you think that the RV Legislation financial reporting obligations need to be updated to give transparency around the proportion of the costs for shared amenities and services that residents bear?*

If so, why? What problems are not addressed by the current provisions? What do you think is required?

Distinguishing between an amenity and a service

The RV Act definition for the term service contract identifies amenities as a type of service.³² The Retirement Villages Regulations 1992 (WA) (RV Regulations) provision for what must (or must not) be in a residence contract impose different requirements for amenities than for services. Some stakeholders have asked what differentiates a village amenity from a village service. Uncertainty in what each means risks the wrong set of RV Regulation requirements being applied to an amenity or service.

The terms amenity and service are not defined in the RV Legislation. Stakeholders have indicated a need to separate the village as a built environment from the services provided in it and that an amenity could be the built structure or land in which a service is provided. In its ordinary meaning however the word amenity includes a desirable, useful or attractive feature of a building or place: something that helps to provide comfort or enjoyment. This ordinary meaning is more consistent with the RV product than a village amenity as a built structure only. The ordinary meaning for amenity also has practical ramifications. For example, stakeholders have raised these intangible features as relevant to identifying what constitutes a change to a village.

³¹ See footnote 21, which summarises the information that Queensland operators must provide about these matters.

³² A service contract is a contract for provision of services that include “recreation services or *amenities* and entertainment services or *amenities*” (Consumer Protection emphasis). (RV Act, section 3(1)).

An option may be to use and define three words: ‘facility’ for the infrastructure in or on which services are provided in; ‘amenity’ defined as the intangible qualities associated with the village; and ‘services’. To identify what may be needed, however, additional information is required as to the nature and extent of the issues.

Question:

18.1.7 *Do you think that the RV Legislation needs to better distinguish between amenities and services?*

If so, why? What problems do the current provisions cause? What do you think is required?

ISSUE 18.2: Retirement village comprises a whole parcel/s of land

As noted above, some operators use different areas in an undivided parcel of land for both a retirement village and other purposes. For example, a school or RACF (example 18.1, scenarios A and D above). Part of a parcel of land can also be left vacant for later subdivision. This has resulted in some memorials identifying only the portion of the land on which RV residences are located, or these residences and some amenities and services, as the village. There has also been some advocacy for a process for partial release of land from a RV Act memorial (Recommendation 30) to ‘correct’ errors in memorials identifying the whole parcel of land as the retirement village in these circumstances.³³

The RV Act does not expressly state that a retirement village must be a whole parcel/s of land but it likely requires that to be the case.³⁴ This is because the RV Act statutory charge can secure a portion only of a parcel of land but WA land law does not allow a portion of a parcel of land to be sold (unless it is to be subdivided). Allowing villages that are a portion only of a parcel of land therefore has potential to undermine the statutory charge.

It is nonetheless apparent from the long history of dual RVS and other use for different areas of the same parcel of land that this practice can benefit, or not adversely affect, residents. Benefits include operators not being restricted to land that can be subdivided in deciding where to build a village. This may be particularly important in rural areas. It may also be important for villages on land that is or was Crown land, as the conditions regarding uses for this land can be complex. The RV Act therefore needs to recognise this practice in a way that does not undermine its statutory charge.

³³ For example, 1995 Statutory Review Report, 66 and Final Report, 44.

³⁴ This is consistent with the approach the court took to the statutory charge in the *Hollywood* case (Appendix 1): the need to ensure the statutory charge provides the contemplated consumer protection suggests that a RVS continues until all charges are satisfied [paragraphs 153 to 159]. The court did not however decide this or consider the entire parcel of land question.

OBJECTIVE

To ensure that villages are described in RV Act memorials as comprising the whole of any parcel of land on which the RV product residential premises, amenities or services are provided.

DISCUSSION

Background: Portions of land parcels cannot be sold

Under WA law, it is not possible to sell a designated portion of undivided land. Put simply, WA land law is based on land being divided into parcels that are in themselves undivided land. Each Certificate of Title (CT) for land describes a separate parcel of land.³⁵ When land that is not contiguous is described in a CT, it is a single parcel of land for land law purposes. A strata lot is described in its own CT and is therefore a parcel of land.

Parcels of land can be subdivided. When this occurs, new CTs are issued. This means that each subdivided part of the original land parcel becomes a new parcel of land in its own right.

Land can be held in single or multiple ownership. When there are two or more owners, each owns a share in all the land that the CT describes.³⁶ An ownership share may include a right for a particular owner to use a designated portion of the parcel of land and to exclude the other owners from that portion. This does not however affect the others' ownership of that portion of the land.

A share in a parcel of land can be sold but it is not possible to sell a designated portion of the parcel only. A designated portion of a parcel of land can only be sold if the original parcel is subdivided into two (or more) new parcels for that purpose.

Retirement village comprises a whole parcel of land

The legal character of land that is a village is important. In the event an operator cannot or does not pay exit entitlements when due, the Supreme Court can order that the land secured by the statutory charge is sold to pay them.³⁷ If a village comprises a designated portion of a parcel of land only, the Supreme Court may not be able to order that the secured land be sold. If it can, the difficulty the purchaser would face in registering their ownership without subdivision will deter purchasers.

³⁵ By reference to survey plans deposited with the relevant agency. Crown land is described in various forms of Crown land Certificates of Title. There may be some Crown land that is not yet registered under the *Transfer of Land Act 1893 (WA)* but the RV Act does not permit RVs on this land.

³⁶ Joint ownership may be more than two people and occurs by the joint owners holding one or several 'shares' in the whole parcel of land, usually through holding that share in a company or trust that owns the land. This type of ownership is generally called 'purple title' (from the colour of the ink traditionally used in the certificate of title describing the share in the whole land). Purple title certificates of title each describe the same parcel of land. Strata certificates of title however describe different individual lots as the parcel of undivided land.

³⁷ RV Act, section 21. The conditions for the charge to arise under sections 19 and 20 must first be met.

Other practical issues in relying on ability to subdivide the parcel of land on which the village is situated include that an insolvent operator may not have the funds to subdivide and a liquidator may not be prepared to cooperate with subdivision. Any other joint landowners will also have to cooperate with subdivision. Also, an operator may lease the land used for the RVS, so not be a landowner. Landowners who are not the village operator in the sense of having a stake in the village business may not be willing to agree to land subdivision to satisfy an operator debt. Subdividing land also involves additional expense and delay that compromises the security the land offers. Finally, the land may not be subdivisible.

If subdivision does not or cannot occur, the RV Act statutory charge would offer no effective protection for residents. Therefore, for the RV Act statutory charge to be effective, a retirement village must comprise the whole parcel/s of land on which any of its residences, amenities or services are provided.

The RV Act statutory charge is the ‘last resort’ consumer protection against the financial risks inherent in residents making substantial upfront payments (investments in the village operator) on promise of an exit entitlement after they leave.³⁸ Amending the RV Act to make it clear that a RV comprises the whole of any land parcel on which the RV product residences, amenities or services are situated will ensure this protection is effective.

It also ensures that the benefit that industry derives from consumer confidence that land is secured to pay their exit entitlements is not undermined.

Making this amendment would not prevent portions of a land parcel from being put to an additional, as well as RVS, use. That this can occur can also be made clearer in the RV Act.

Parcel of land being put to joint RVS and other use

The RV Act does not acknowledge that land used for or in connection with a RVS is currently being put to joint RVS and other use — the RV and church or school scenario discussed above. Apart from identifying village amenities and services and resident concern about subsidisation, these circumstances have not resulted in any particular resident issues being raised with Consumer Protection.

If villages are established with areas of dual land use, and prospective residents are aware of this, they enter the village knowing the environment.

³⁸ Residents invest substantial upfront sums in retirement village operators – without the right or necessarily the skills and knowledge to perform the due diligence that institutional investors undertake when loaning equivalent sums. Using average figures from the Property Council of Australia’s funded One Fell Swoop, *The critical need for retirement village living in Western Australia*, October 2015 as to average village size and upfront payments that year, the average total resident investment in provision of the RV product for life is \$28,035,000 per village.

Operators have expressed concern that enforcing the statutory charge could result in detriment to non-residents who rely on the amenity or service — for example, who attend the school or church. There also appears to be some concern that ability to attract independent business use is compromised when the land on which business premises are situated is subject to the RV Act charge. It is not however apparent that these risks differ in character from those faced by any consumer of services or any business lessee. If a service provider or landlord becomes insolvent, there are generally secured interests that can force a land sale.

Residents on the other hand make a substantial upfront investment in an operator on promise of an exit entitlement and on the understanding that the accommodation, amenities and services described in the residence contract will be provided throughout their long term residence. For these and other reasons, their interests have priority.

What other use should be permitted on land used for a RVS, and when dual use is required, are more problematic. This is discussed as an implementation issue below.

‘Off the plan’ residence contracts

Requiring memorials to identify a whole parcel of land as the RV may create problems when new villages are part of broader, multiple use developments and the RV product is being sold before the land is subdivided for its individual uses.

A developer (who may or may not be the eventual village operator) generally needs to demonstrate interest to financiers through RV product sales ‘off the plan’ prior to the development commencing. Subdivision may not occur until after finance has been secured. A RV Act memorial must however be lodged before any invitation to enter into a residence contract.³⁹ This means that it may be lodged before subdivision occurs. If the RV Act memorial describes the whole parcel of land as the village, the land will continue to be recorded as comprising the village after subdivision. Issue of new CTs will not alter this, the RV Act memorial will be recorded on the CT as identifying the new parcel of land as part of the village.

In this circumstance, requiring the memorial to identify a whole parcel of land as the village will result in memorials that do not correctly describe the land that the operator intends to use for a RVS after subdivision. This is discussed as an implementation issue below.

³⁹ RV Act, section 16.

18.2: PROPOSAL FOR CONSULTATION

The following proposal is being considered:

That the RV Act be amended:

- to clarify that a retirement village must comprise the whole of any parcel of land on which RV product accommodation, amenities or services are provided; and
- to recognise that portions of the land used for a RVS may also be used for an additional purpose without compromising that land being secured by the RV Act statutory charge.

IMPACT ANALYSIS

This proposal makes express the likely current effect of the RV Act. It ensures that the RV Act statutory charge is an effective consumer protection while providing for current practices regarding dual land use to be recognised. This is preferable to the disruption that prohibiting those practices would entail.

To minimise impact on the sector, this clarification will not affect current arrangements. Operators who currently use a portion of a parcel of land for a different purpose may however use the provision for land to be excised from a village on subdivision or SAT approval for dual use (the Part 19 retirement village change process) if they see some benefit in doing so.

Recognising dual land use does however raise some implementation questions. These are considered below.

Questions:

- 18.2.1 *Is there any reason the RV Act should allow villages that are a portion only of a parcel of land?*
- If so, why should that be permitted?*
- If a village is allowed to be a portion of a parcel of land only, how can the issues in enforcing the statutory charge be addressed??*
- 18.2.2 *If the RV Legislation does not provide a process for permitting additional uses for village land in conjunction with use for a RVS, what problems would arise in your village?*

IMPLEMENTATION ISSUES

RVS land put to dual use

Part 19 proposes implementing Recommendation 30 — providing a process to excise land from a village. This raises the question of whether ability to put land used in connection with a RVS to an additional purpose should be limited to circumstances in which excision cannot occur. For example, the land cannot be subdivided.

It is not clear that this restriction is necessary. Operators may prefer not to subdivide land to save costs but having a larger, undivided parcel of land available to satisfy their exit entitlement may also be to residents' benefit.

Another question that arises is whether there should be any restrictions or oversight of the additional use to which RV land can be put. Introducing dual use to existing villages is a change to the village. If the change is significant, it will trigger the village change process discussed in Part 19. Is this sufficient to address the issues that are likely to arise?

Provision for dual use also raises questions about the RV Act applying to those other uses. The RV Act currently excludes certain RACF residents from the RV Act.⁴⁰ Social housing and rent only arrangements within a village in which at least one resident has paid a premium are not a different use to a RVS.⁴¹

On the information currently available, most additional uses to which the land will be put do not involve persons who are not village residents residing on the land. Issues in RV Act application are not being referred to Consumer Protection beyond the RACF and rent only residents that are already being addressed.

Further information is required regarding these questions.

Questions:

- | | |
|--------|--|
| 18.2.3 | <i>Is there any reason that part of a parcel of RV land should only be able to be put to an additional use if the parcel cannot be subdivided?</i> |
| 18.2.4 | <i>For new villages, should there be any criteria for operators to be able to use a parcel of land that is a village for an additional purpose?
If so, what do you think these should be?</i> |
| 18.2.5 | <i>If you operate or reside in a village that currently puts land to dual use, are any problems arising regarding RV Act application to that additional use?
If so, please explain these problems.</i> |

⁴⁰ Issues in this exclusion are discussed in part 21.

⁴¹ RV Act, section 3(1) meaning for RVS. CRIS 3, part 17 discusses whether any special provision is required for rental arrangements.

Off the plan residence contracts — memorial issue

The discussion above noted that off the plan residence contracts can result in memorials identifying land that operators do not intend to use for the RVS after subdivision. Current land law and practices however mean that the RV Act memorial must be recorded on all the new CTs that issue on subdivision, regardless of a developer's original intent not to use that land for the RVS.

Operators who currently lodge memorials describing the whole parcel of land prior to subdivision report issues in financiers not wanting to fund development and in persons not wanting to purchase or lease it due to the RV Act memorial. The *Transfer of Land Act 1893* (WA) (TL Act) currently has a process for correcting incorrect memorials but this is complex and therefore costly, as it involves a Supreme Court application to determine that the land was never part of the village. Amending the RV Act to expressly state that a retirement village comprises a whole parcel of land may make this determination more difficult.

An exception to a village comprising the whole land parcel for new villages that are being developed on land that will later be subdivided for other uses would avoid this problem. There would however need to be some protection for the risk that subdivision does not proceed, only proceeds after statutory charges have arisen or that after subdivision the village does not comprise a whole parcel of land.

An option is to allow a village to temporarily be a portion only of a land parcel when that portion will be a whole parcel/s of land after subdivision.⁴² The risks this poses can be minimised, though not eradicated, with the following limitations:

- a. the subdivision/strata title is already approved;
- b. it is not practicable for a developer to implement the subdivision/strata title prior to lodging the RV Act memorial;
- c. advertising and residence contracts clearly identify the land to be used for the retirement village;
- d. subdivision will occur prior to a resident entering the retirement village; and
- e. a resident is able to rescind a residence contract if the subdivision does not occur.

Another option is to provide that the village only comprises the whole parcel of land until the subdivision is made. When the subdivision occurs, the village comprises a previously designated portion of land only. This option may not address the problems that operators have identified with financing and occupation of the parts of the development that will not be the village.

⁴² There are currently procedures under the *Transfer of Land Act 1893* (WA) that would allow this to occur. Memorials generally (not RV Act memorials specifically) can be lodged with an 'Interest Only Deposited Plan' that describes a designated portion of a parcel of land. If necessary, the RV Act could provide that in this circumstance only the new certificates of title that issue in relation to the designated portion of land would record the RV Act memorial. Once the policy position is settled, further discussion with Landgate will determine whether this is necessary.

Questions:

- 18.2.6 *If you were building a village on land that is going to be subdivided for different uses after you have begun to promote the village, would allowing a village to temporarily be a portion of a parcel of land address the issues in a village being the whole of a parcel of land?*
If not, why not? What problems would this cause?
- 18.2.7 *If you are a village resident, do you see any problems with this proposal?*
- 18..2.8 *Do you agree with the proposal generally but not the conditions outlined in paragraphs a-e above?*
If so, which conditions do you disagree with? What other conditions do you think are necessary?
- 18..2.9 *Would it be better to provide that the village is the whole parcel until subdivision, following which it is only the new parcels that issue for a designated portion of the original parcel?*
If so, what benefits does this confer? What problems does this avoid?

ISSUE 18.3: RV Act memorial

ISSUE

The RV Act requires that there be a different memorial for each village and only one memorial for each village.⁴³ There are however a number of instances of a single RV Act memorial describing land used for multiple villages and multiple memorials describing land used for the same village. This undermines the memorial's notification and statutory charge functions.

These circumstances complicate, and so make more expensive and time consuming, identifying the land that comprises a particular village. Both the *Swancare* and *Amana* cases discussed in CRIS 3, Appendix 14 (attached as Appendix 1 to this CRIS for ease of reference) illustrate the complex series of matters that need to be considered in determining whether there are one or more villages and how finely balanced the decision can be. Both operators and residents may unexpectedly find that their village is part of a larger multisite village or is a separate village within a larger complex that includes two or more villages. The same problems in identifying what land is the village will arise in enforcing a statutory charge.

⁴³ [2014] WASC 80 paragraphs 131-138 (Swancare case).

The *Swancare* case may have addressed one reason for this problem — operators misunderstanding the unstated effect of various RV Act provisions when considered together. Other causes however are current. One is that the RV Act makes no provision for the addition of land to, or excision of land from, an existing village. This may be contributing to multiple memorials being lodged for the same village. Another is the current restriction on releasing part only of village land from a RVS. An operator wanting to put some village land to another use in the future may be lodging separate memorials for different parts of the village in the belief that this will allow them to later remove the memorial for the relevant part without having to terminate the RVS.

This discussion is confined to eliminating the reasons for the errors occurring. Part 18 deals with issues in the TL Act process for correcting incorrect memorials and proposes that when a memorial is lodged under the RV Act, the RV Act provide a process for its correction. To the extent that multiple memorials are being lodged over the same village as a hedge against inability to release part of village land from the RVS at a later date, the Part 19 proposal for a process to excise land from a village should remove the incentive for that to occur.

OBJECTIVE

To ensure the RV Act memorial only describes one village and that there is only one memorial per village.

DISCUSSION

Making current RV Act memorial requirements express

As referred to above, the RV Act requirements that:

- each village have its own memorial; and
- there be only one memorial per village,

are not express. They can only be understood on a reading of several RV Act provisions together. This means operators do not always understand what is required.

If the RV Act made the current requirements express, the risk of memorials incorrectly describing more than one village and several memorials for the same village would be reduced.

It is not however clear that this would completely address these problems for strata or purple title villages. These villages seem to be particularly prone to multiple memorials being lodged. For strata villages, this may be because a memorial cannot be lodged against the strata scheme but why the same memorial is not describing all the lots is not clear. There are also instances of a single lot being subject to several RV Act memorials.

The RV Act currently has the following exceptions to the obligation to lodge a memorial for landowners who are residents. They are not required to lodge a memorial when:

- the resident's interest in the land is only in relation to the residential premises they occupy; and
- that interest is not used as security and the resident has not entered into a contract for sale of the premises.

These exceptions may be too limited.

Provision for land to be added to a village

At present there is no process for an existing RV Act memorial to record land added to a village after it was lodged. A memorial must record all land that is intended to be used in future for a retirement village. There should therefore be a single memorial for staged developments. There are however circumstances in which the decision to use additional land for the village is made after the memorial is lodged. For example, an operator may want to acquire neighbouring properties when they come on the market but there is no certainty that this will occur or that the operator will be able to purchase them if they are put up for sale.

From a technical perspective, the RV Act can be amended to provide for land to be added to an existing memorial. Some other jurisdictions provide in their land legislation for an original memorial to be removed and a new memorial to be lodged.⁴⁴ The effect of this on the existing statutory charge priority is not however clear. Consumer Protection's preference is to adapt the TL Act process for adding land to an existing mortgage to adding land to an existing RV Act memorial. This would involve:

- an operator lodging a village expansion document with the Registrar of Titles advising that the village described in the original memorial (identified by Landgate's memorial number) now also comprises the additional land described in the expansion document; and
- the village statutory charges applying to the additional land with priority from the time the expansion document is lodged.

The more complex question is whether there should be a process involving resident consultation and independent oversight for adding land to an existing village.

Adding land does not raise the same issues as excising land from a village as the land securing the statutory charge is being increased rather than reduced.

⁴⁴ NSW and VIC take this approach.

Nonetheless, adding land may be part of a broader series of changes that could adversely affect residents' interests. Residents may be concerned that a village is becoming larger than they expected, affecting the RV product amenity. They may object to additional land if it is to be used for new amenities and services that increase their recurrent charges beyond what they can afford.

Staged developments

Landgate records suggest that there are some instances of operators lodging a new memorial each time a further stage for a development is released. The RV Act is clear that a memorial is to describe all the land that will in the future be used for the RV as well as land that is currently being used. It is therefore not clear why this is occurring.

18.3: PROPOSAL FOR CONSULTATION

The following proposal is being considered:

That the RV Act expressly provide that:

- **each village is to have its own memorial; and**
- **there is to be only one memorial for each village.**

(Incorrect historical memorials to be corrected by using the single process for changes to a retirement village that Part 19 proposes.)

IMPACT ANALYSIS

As explained above, this proposal does not alter any existing memorial obligations. It makes the current effect of the RV Act clearer. The expected impact is that the land comprising a particular village, and so subject to particular statutory charges, will be clearer. This will make RV Act rights and obligations such as enforcing charges and terminating a RVS less complex and therefore quicker and less expensive for all involved, including the public purse. Operators must currently correct memorial using a TL Act process that includes a Supreme Court application. The Part 19 retirement village change process offers a SAT process for this to occur. The benefits of this process are discussed in that part.

Questions:

- 18.3.1 *Do you agree that the RV Act should expressly provide that each village is to have its own, separate memorial?
If not, why not?*
- 18.3.2 *Do you agree that the RV Act should expressly provide that each village is to have only one RV Act memorial?
If not, why not?*
- 18.3.3 *Will this process impact your village?
If so, what will that impact be?*
- 18.3.4 *Regarding a process for adding land to a village:*
- *do you think residents should be consulted prior to an operator being able to add land to a village?*
 - *do you think that some independent assessment of the impact on residents is required before land can be added to a village?*
- Why do you have this view?*
- 18.3.5 *Does the RV Act exception to the obligation to lodge a memorial for landowners who are residents need to be expanded?
If so why and what other circumstances should be excluded?*
- 18.3.6 *Will provision for adding land to an existing memorial address the problem in separate memorials being lodged for each stage of a retirement village development?
If not, why not?*

PART 19: VILLAGE CHANGE PROCESS

The RV Act restricts certain changes being made to a village. This is to protect residents' interests in receiving the RV product over a long term of residence. In doing so, the RV Act contemplates that a village, will essentially remain the same until the RVS is terminated.⁴⁵

The restrictions in the RV Act on changes to village land and its use are however posing problems for operators and residents by locking a village into a built environment or product that becomes outdated over time. Certain changes might be necessary and even essential for the continued operation and viability of the village and these can be prevented by the RV Act.

The RV Act provides for a RVS to be terminated by applying to the Supreme Court for approval to terminate. However, there is no process for approving the sale of part of village land or other significant changes that may be required or simply beneficial to residents. This issue gave rise to the Recommendation 30 that there be a process for operators to excise land from a village.⁴⁶

This part proposes a new change process to enable and manage significant changes to a village and the RV product. It is contemplated that this change process will apply to the full range of changes that impact the village community and delivery of the RV product but only if the change is significant. Changes that are not significant would continue to be dealt with in the normal course of business and be subject to the general consultation and dispute resolution requirements in the RV Legislation.

The proposed new village change process is consistent with the process recently introduced under the ST Act to manage proposals to terminate strata title schemes. In particular, in that it suggests the SAT have a supervisory role over the approval and management of changes as well as dispute resolution. SAT has indicated preliminary support for this oversight role.

As only significant changes will be required to go through the change process, one of the most important issues to be determined is what changes are significant. Three categories are proposed for these changes:

- *Winding down a RVS*: this category replaces RVS termination, which is currently supervised by the Supreme Court.
- *Memorial correction*: this category creates a RV Act pathway for correcting memorials, which is currently supervised by the Supreme Court under the TL Act.

⁴⁵ Communal amenities and services can be varied if 75% of residents agree to that occurring.

⁴⁶ *Statutory Review of Retirement Villages Legislation, Final Report, 2010* (Final Report), 49. The full text is: "that the legislation be amended to provide that the procedures required for the partial removal of a memorial on title be prescribed by regulation and the relevant dispute resolution body should be SAT". To partially remove a memorial, it is necessary that the first be a process to terminate application of the RVS to the relevant land – in effect, to excise land from a village.

- *Village redevelopment*: this is the broadest change category and includes physical changes such as proposed land excision, but also other changes which may not involve physical changes such as changes to the village community arrangements.⁴⁷

A key focus for this consultation is considering what changes should be included in the village redevelopment category.

This part considers:

- *Issue 19.1: single process for significant village changes*: proposes a new, single process for allowing a wider range of significant changes to a village or RV product than can currently occur. The main features for the proposed process are minimum requirements for resident consultation, SAT dealing with all disputes that arise and for some matters, SAT oversight or approval. This includes SAT replacing current Supreme Court oversight of some changes. Some implementation issues such as how to determine resident support for a change, are raised;
- *Issue 19.2: village change categories*: looks at two of the proposed village change categories — winding down a RVS and village redevelopment — in more detail. It proposes that the process for RVS termination be two stage, winding down followed by a clear event and date for RVS termination. Some criteria for determining whether a proposed change is significant are discussed. This issue also asks some implementation questions such as how the RV change process should align with any planning or subdivision processes and how resident relocation should be dealt with; and
- *Issue 19.3: minimum consultation requirements*: discusses six proposed minimum requirements for resident consultation about a significant change and the role providing residents with a draft change implementation plan can play in minimising disputes and simplifying SAT oversight. It asks questions to assess the merits of these requirements.

This part implements Recommendation 30 and responds to stakeholder advocacy for the RV Act to provide a process for a wider range of changes.

Some common village change scenarios

Example 18.1 in Part 18, set out four common village change scenarios. The Supreme Court cases summarised in Appendix 1 provide additional information about the types of changes an operator may wish to make and the issues that may arise. These cases illustrate the complex matters that must be considered in deciding whether a change should occur. They also illustrate the wide range of disputes that can arise.

⁴⁷ See CRIS 3, part 17, which identifies village community arrangements as the broad scheme that applies to a village as distinct from the three features that make up a RVS for RV Act purposes.

ISSUE 19.1: Single process for significant village changes

ISSUE

The RV Act does not allow some village changes to be made. For the changes that it does allow, it requires different processes. Complicating matters further, the disputes that can arise from the same change need to be referred to different decision makers. For example:

- RVS termination — the Supreme Court approves termination and can impose conditions for it to occur;
- residence contract termination, resident relocation, service withdrawal or variation, budget and relocation disputes⁴⁸ — SAT hears these matters;
- residence contract disputes — go to the civil courts (Magistrates, District or Supreme Courts) unless they are amenities or services disputes, in which case SAT resolves. The boundaries between residence contract matters and matters that SAT can approve — for example, it approves residence contract termination but the civil courts hear residence contract disputes — are not clear cut;
- ACL⁴⁹ matters, such as misrepresentation or unfair contract term claims — go to the civil courts. The RV Code however provides that some specific representations are not to be made.⁵⁰ Disputes about these representations go to SAT but only if the Commissioner for Consumer Protection (Commissioner) refers it; and
- disputes about whether the RV Code consultation requirements have been met — go to SAT but again only the Commissioner can refer these disputes.

The *Hollywood* case (see Appendix 1) illustrates that all these matters can arise from a village redevelopment and that village redevelopment is often a part of a proposed RVS termination or land excision.⁵¹ These overlaps and gaps in both the nature of changes that may be proposed and the disputes that can arise lead to unnecessary costs incurred in multiple actions in different jurisdictions.

⁴⁸ That involve transfer to a different type of accommodation in the village (RV Act, section 57).

⁴⁹ The *Fair Trading Act 2010* (WA), section 19, makes the Australian Consumer Law (which is Schedule to the *Competition and Consumer Act 2010* (Cth) and regulations made under section 139G of that Act) a Western Australian (WA) law.

⁵⁰ RV Code, clause 6.

⁵¹ *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013] WASC 219 (*Hollywood* case). This is made even clearer when the related SAT cases are considered. Amongst other things, in *Winter and Salvation Army (WA) Property Trust and Retirement Care Australia (Hollywood) Pty Ltd* [2012] WASAT 17, as part of their breach of services claim, residents argued that the operators had an obligation to continue operating the village; and *Retirement Care Australia (Hollywood) Pty Ltd and Turpin* [2012] WASAT 125 in which two residents sought an order to strike out the operators application for their residence contracts to be terminated on the basis that the Supreme Court should deal with all matters arising from the proposed RVS termination.

The new process for allowing a wider range of significant village changes needs to be flexible enough to deal with both the wide range of:

- changes that may be proposed — allocating them to consultation only or SAT oversight as appropriate to the potential impact on residents' interests; and
- disputes that may arise.

OBJECTIVE

To provide a process for operators to make a wider range of changes to a village than the RV Act currently contemplates, that:

- protects residents' interests; and
- is able to efficiently deal with the wide range of changes that operators may wish to make and the full range of disputes that may arise.

DISCUSSION

Single process — flowchart

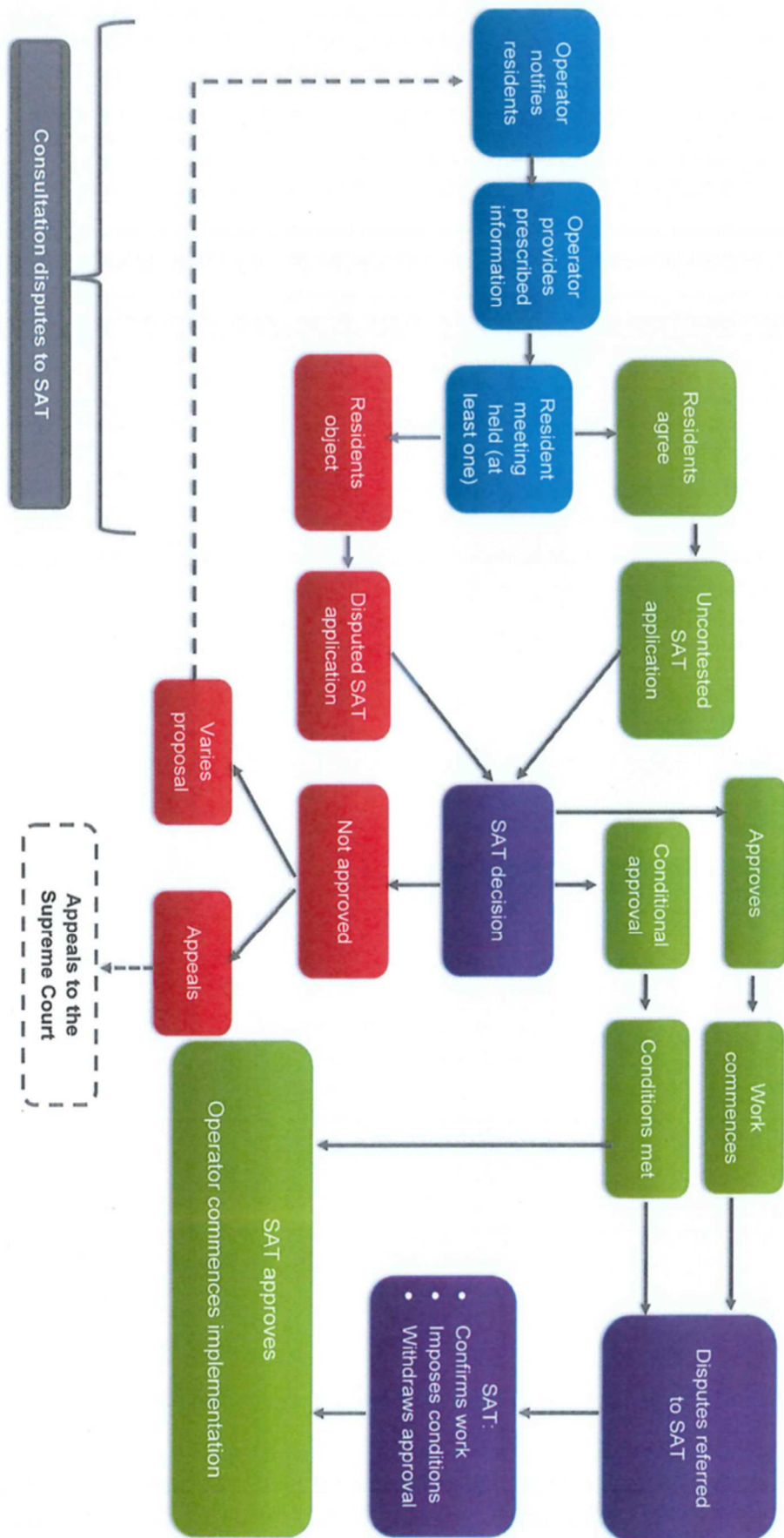
The proposal discussed in this part is that the current fragmented approach to allowing changes and resolving disputes, is replaced with a single process that involves the one decision maker, SAT, for approval and any disputes that arise. This process would involve:

- mandatory resident consultation with minimum requirements for all changes that have potential to impact residents;
- SAT oversight or approval for changes that are complex, have potential for adverse financial or tenure security or are otherwise more significant; and
- SAT oversight of implementation.

Flowchart 19.1 below outlines how this process could work. It anticipates two streams for SAT applications — controversial and uncontroversial. These applications will be different in nature, with the latter being a review to ensure residents' interests have been properly reflected in the arrangements for the change to occur.

The main features of the proposed single process: the significant change categories which would be required to go through this change process, resident consultation requirements, and the requirement for SAT approval of certain changes are outlined below.

FIGURE 19.1: PROCESS FOR SIGNIFICANT VILLAGE CHANGES — FLOWCHART



Three significant change categories

Three categories of significant changes will together capture the range of changes to which the new process will apply.

Winding down a RVS

This category involves terminating a RVS. It includes changes made in the winding down period leading to a village being closed or its conversion to another type of housing scheme. It can also include temporary village closure for longer than a prescribed period. For example, if a village is to be vacated for major redevelopment. To enable a single process for all significant changes, RVS termination will need to be transferred from the Supreme Court to SAT.

Memorial correction

This category involves correcting memorials that incorrectly describe village land, rather than a change to village land. This is the problem discussed in Part 18, Issue 18.3 — some RV Act memorials incorrectly describe land used for more than one village and some villages have several memorials. To enable a single process for all significant changes, RV Act memorial correction will need to be transferred from the Supreme Court to SAT.

Village redevelopment

This is the broadest change category, capturing all the significant changes that do not fall into the winding down a RVS or memorial correction category. It includes land excision (Recommendation 30) and the significant changes discussed in Part 18 — using village land for dual purposes and opening village amenities and services to non-residents. It is intended to include village redevelopment that broadly impacts the retirement village community. These are likely to result in significant changes to the RV product and village community arrangements.

It will not include individual resident matters — for example, alteration to an individual unit or personal amenity.

Winding down a RVS, memorial correction and some village redevelopment changes, such as land excision, will involve SAT oversight. The rest of the changes falling into the village redevelopment category will be subject to the proposed mandatory consultation requirements. SAT will resolve any disputes that may arise during this process.

The village development category and the first category of winding down a RVS are discussed in more detail in Issue 19.2. The boundaries of each category will be determined through consultation. This part asks questions to assist in this.

Changes that are not significant will not be subject to mandatory consultation or SAT approval. SAT will resolve any disputes that arise regarding village redevelopment, including whether the RV change process applies.

Resident consultation — six minimum requirements

Significant changes in a village can be highly stressful for residents, particularly when they feel they have not been given the full picture or are uncertain about the impact, including for their contracts or village budget. Regardless of who owns the village land and infrastructure, a retirement village is the residents' home and they fund its operating costs. Residents generally expect to have say in village changes that may impact them and many operators agree. At a recent industry conference, for example, one operator explained that the first step it took in deciding to redevelop a village was to consult residents on what changes they wanted to see. It reported a very positive experience in the redevelopment proceeding as joint vision about the village future.

The RV Legislation already requires operators to have “an appropriate procedure” for consulting with residents and a residents committee about the future planning, budgeting and financial operating arrangements for a village, as well as the day-to-day running of the village. This includes any plans for expansion, substantial alterations and when residents are funding them, upgrades.⁵²

This obligation has however proved insufficiently clear to be fully effective. Disputes arise as to whether an operator's procedure is appropriate because there are no clear standards for determining this. Consumer Protection also receives enquires from operators because they are uncertain what an appropriate procedure involves. Further problems include that residents are not currently able to make a complaint to SAT that an operator's consultation procedure is not appropriate.

To ensure resident consultation is effective, it is proposed that the RV change process include some minimum requirements for consultation about significant changes. It will also provide for an operator or residents to refer a dispute about the adequacy of consultation, including the information provided about a change, its impact on residents and how it will be implemented, to SAT. Six minimum requirements are proposed, that the operator:

- notifies residents that a significant change is proposed;
- provides residents with a draft implementation plan for that change;
- consults with the residents committee (if the village has one) prior to preparing these documents;
- if relevant, provides residents/some residents with a draft individual resident impact statement — for example, the specific date they must have left the village or amount of their exit entitlement;

⁵² RV Code, clauses 16(1)(b), (c), (d) and (e) and (2)(e).

- holds at least one residents meeting to discuss the proposed change and draft implementation plan; and
- provides a written response to a written request for information or suggestion from a resident.

These minimum requirements — in particular, requiring a draft implementation plan — have been developed from the minimum consultation requirements in the ST Act and other jurisdictions' RV Legislation.⁵³ The intent is that the draft plan and individual impact statements provide a tool for minimising disputes through identifying the matters that need to be agreed or resolved.

Feedback is sought on these proposed requirements in Issue 19.3.

SAT approval for certain changes

The RV change process is designed to encourage operators and residents to reach agreement between themselves about a change and the way it will be implemented. For changes that have resident tenure or financial security ramifications however, it is proposed that SAT oversight will be required. As well as having long-term ramifications, these changes can be complex. For example, excising land from a village will involve releasing it from the statutory charge as well as any redevelopment, change of use, other amenity or budget considerations that may arise. It may require residents to relocate, which can raise complex contractual issues around deferred management fees (DMF) and exit entitlement payment, including compensation issues if a resident must leave the village.

Residents may lack the confidence, skills or resources to be able to obtain necessary advice, to agree changes with an operator or to meaningfully negotiate conditions (such as compensation) for their agreement. A problem for operators is that some residents may not raise concerns or objections due to worry, rightly or wrongly, about how an operator or other residents will react. This can make it difficult for an operator to gauge the extent of support for a proposed change and risks disputes arising during implementation, by which time substantial costs may have been incurred in implementing the change.

The complex issues that can arise in village changes and the problems in relying solely on resident consent are among the reasons that the RV Act requires Supreme Court approval to terminate a RVS and that the Commissioner is a party to that application. Making provision for SAT to approve complex changes, including changes that have potential to impact the protection offered by the statutory charge, ensures that residents' views and interests are considered in making the change.⁵⁴ It gives both

⁵³ For example, the *Retirement Villages Act 1999* (Qld), Part 2, Divisions 4, 5 and Part 5, Division 10, *Retirement Villages Act 1999* (NSW), sections 136 and 136A, *Retirement Villages Act 2016* (SA), section 37 and *Retirement Villages Act 1986* (Vic), section 39.

⁵⁴ The Supreme Court explains this in the *Hollywood* case: "clearly the view of residents and their interests, will be relevant to the question whether the Court should exercise its discretion to approve the termination" and "it is not difficult to envisage that some of the residents of a retirement village for reasons of advanced age, poor health or infirmity, or limited resources may not

residents and operators confidence that the change is appropriate and residents' interests are protected.

The proposed approach maintains the existing process for these types of changes in that external approval is required before the change can take place. The main difference is that SAT, not the Supreme Court, will decide whether they proceed and, if so, whether any conditions for approval may be required. SAT has indicated that it sees this oversight role (even when the stakeholders have reached agreement about significant change and the way it will be implemented) as consistent with SAT's role under the ST Act.

Two streams — uncontested and contested — for applications are proposed with a view to providing for a simplified uncontested application process. SAT is open to this and further discussion will occur once the general policy approach is settled.

Transfer of matters from the Supreme Court to SAT

The proposed single change process would transfer approval to terminate a RVS from the Supreme Court to SAT. It would also transfer RV Act memorial correction to SAT.

RV Act memorials can currently be corrected under the TL Act. An operator must first apply to the Supreme Court for a declaration that the memorial incorrectly describes village land, and what the correct description should be. This declaration supports an application to the Registrar of Titles to correct the record of the memorial in the Register.⁵⁵

This process is only concerned with land record matters — whether an error was made. It does not involve RV Act considerations. There is no obligation to notify residents or right for them to be heard.⁵⁶ Given that the memorial is a representation as to the land comprising a village, there is potential for residents to be adversely affected by a correction.⁵⁷ The *Swancare* and *Amana* cases⁵⁸ (see Appendix 1) were both memorial correction applications on the basis that each memorial incorrectly described more than one village. In each, there were a complex series of inconsistent indicators as to whether the relevant sites were separate villages or the same village. Decisions on this has resident implications — for example, amenity or service may be found to relate to two sites rather than one, with recurrent charge consequences. Also,

be in a position to put before the Court all relevant matters concerning the interests of existing residents, or other considerations relevant to whether a scheme should be terminated. Although the Commissioner does not act for the residents, the role of the Commissioner as a party will be important in ensuring that all relevant considerations are drawn to the attention of the Court". (*Hollywood case*, paragraphs 136 and 127.)

⁵⁵ *Transfer of Land Act 1893* (WA), section 188(3).

⁵⁶ The Supreme Court did hear evidence as to residents' views in *Swancare Group Inc v Commissioner for Consumer Protection* [2014] WASC 80 but this was due to the operator seeing this as appropriate and necessary, not as a right.

⁵⁷ This issue is expressly dealt with in the *Report by the Hon. Minister for Fair Trading on the operation and effectiveness of the Retirement Villages Act 1992, 1995*. Its recommendation for a process for partial memorial removal was that this can only occur when the land involved was "not represented as intended to be used" as a retirement village. (Recommendation 5.7, 70).

⁵⁸ *Swancare case* – see footnote 11 - and *Amana Living Incorporated v Commissioner for Titles* [2019] WASC 203 (*Amana case*).

both these cases involved terminating the RVS over one of the sites said to be a separate village.

It is expected that giving SAT jurisdiction over RVS termination and memorial correction would mean a less technical and so a less expensive process.

Commissioner's role

The Commissioner's current conciliation role in retirement village dispute resolution would continue under the RV Act change process.

The Commissioner's role as an independent party ensuring all issues are presented on a RVS termination application will also continue and be extended to memorial correction.⁵⁹ That this role is useful from an operator perspective is illustrated by the *Swancare* and *Amana* cases, both of which joined the Commissioner as an independent party.

The Commissioner would be notified of proposed changes that require a SAT application at the same time as residents and be able to appear as an independent party on these applications.

19.1: PROPOSAL FOR CONSULTATION

The following proposal is being considered:

That the RV Act provide:

- **a single process for all significant changes to a village or the RV product;**
- **the process involve:**
 - **minimum requirements for resident consultation about the proposed change; and**
 - **SAT making all decisions and resolving all disputes that arise regarding the proposed change;**
- **there be three categories of significant change:**
 - **winding down a RVS;**
 - **memorial correction; and**
 - **village redevelopment; and**
- **the RV Act distinguish the significant changes that will require resident consultation only and those that will require SAT approval on the basis of the potential for impact on residents' financial and tenure security.**

The possibility of a simplified application for uncontested changes will be explored with SAT in the event the proposal proceeds.

⁵⁹ See footnote 9.

IMPACT ANALYSIS

It is expected that this proposed process will bring benefits to both industry and residents in broadening the range of village changes that an operator can make with appropriate protection for residents' interests. It offers a less technical and therefore less expensive process for RVS termination and memorial correction. It also offers savings in time and cost in SAT being able to resolve all the issues that may be in dispute regarding any particular change.

The proposed RV change process allows operators to apply to SAT for approval to implement a change that residents do not support. It offers both operators and residents confidence that change is needed and/or that implementation proposals appropriately protect residents' interests. It does not require operators to refer less significant changes to SAT but allows residents to refer to SAT a dispute about whether a change is significant. It involves SAT having power to resolve all the issues that may arise, reducing complexity, cost and delay.

There may be some initial costs on operators associated with the time and activity in complying with the requirements of the process for change. It is anticipated however that clarifying current RV Legislation consultation requirements will reduce disputes and therefore costs.

At this point, the proposal is in principle only. There are a number of implementation issues some of which are discussed below. Feedback on expected impacts of the proposed process is sought in the questions below.

Questions:

- 19.1.1 *Do you agree that the RV Act should provide a process for a wider range of significant changes to a village and/or the RV product than can currently occur?*
If not, why not? What problems will this cause that are not addressed by the RV change process outlined above?
- 19.1.2 *If you agree there should be a process, do you agree that it should include minimum requirements for resident consultation about the change?*
If not, why not?
- 19.1.3 *Do you agree that SAT should have an oversight role for agreements that operators and residents reach about changes that are complex or have potential for adverse impact on residents?*
If not, how do you propose the issues in residents' ability to meaningfully negotiate with operators be addressed?
- 19.1.4 *Is there any reason that the Supreme Court not SAT should approve RVS termination (winding down a RVS category)?*
If so, how do you propose the issues in two decision makers dealing with overlapping matters be addressed?

19.1.5	<p><i>Is there any reason that the Supreme Court not SAT should approve RV Act memorial correction? (memorial correction category)</i></p> <p><i>If so, how do you propose the issues in two decision makers dealing with overlapping matters be addressed?</i></p>
19.1.6	<p><i>What significant village redevelopments should the RV change process apply to?</i></p> <p><i>Do you agree that the RV Act change process should apply to changes that significantly alter the village or RV product? Do you think whether a change is reversible is relevant?</i></p> <p><i>Are there any changes that you would like to make, or see made in your village that cannot currently occur? What are these changes?</i></p>
19.1.7	<p><i>Do you think that the following changes are significant changes to which the RV change process should apply (and so fall into this category):</i></p> <ul style="list-style-type: none"> • <i>excising land from a village (Recommendation 30)?</i> • <i>changing village land use so that part of a village is also used for a purpose additional to the RVS?</i> • <i>opening village amenities and services to non-residents?</i> • <i>village redevelopment that broadly impacts the community?</i> • <i>significant changes to the RV product?</i> • <i>significant changes to village community arrangements?</i> <p><i>For each, if not why not?</i></p> <p><i>Are there any other specific changes that you think should be included in this category?</i></p>
19.1.8	<p><i>If you are an operator, what impact would introducing a single process for all significant village changes have on your ability to make the change you want to a village?</i></p> <p><i>If you are a resident, what impact would introducing a single process for all significant village changes have on your ability to have a say on significant village changes?</i></p>
19.1.9	<p><i>Do you think a different process should be used for significant village changes? If so, what process do you suggest?</i></p>

IMPLEMENTATION ISSUES

Determining that a change is not controversial

The proposed change process includes providing for a simplified SAT application stream where the change is one that requires SAT oversight (for example, winding down a RVS) but is supported by residents (see Flowchart 19.1). If the change is uncontested then it can be considered uncontroversial. It is envisaged that the simplified SAT application would largely involve SAT considering the agreed change implementation plan to confirm residents' interests are appropriately addressed.

If a change is contested, then it is controversial and the usual SAT process regarding evidence and hearings would apply.

It would not be appropriate for a single resident's opposition to move the application from the simplified stream to usual SAT processes but what degree of opposition would mean this should occur? The discussion above also identifies some issues in determining whether residents, or some of them, agree to a change or the implementation proposals for it.

Should there be some process for determining the degree of resident support for a significant village change?

Question:

19.1.10 How do you think that whether a significant change is controversial should be determined?

Should it be whether a change implementation plan can be agreed? Or whether a certain percentage of residents agreed to the implementation plan? Or some other criteria?

Timing in relation to planning, subdivision and building approvals

Many applications for approval to terminate a RVS, excise village land, put land to an additional use, or for redevelopment will also involve planning, subdivision and/or building approvals. These approvals are given by various entities such as local governments, Development Assessment Panels and the Western Australian Planning Commission. It is therefore necessary to consider how the RV Act change approval process will align with these related approval processes.

Planning, subdivision and building applications are generally made by or on behalf of landowners. Strata or purple title residents who own village land must generally be consulted but lease residents generally have no consultation rights. When these rights do exist, the decision maker cannot take RV matters into account — its focus is on the technical planning, subdivision or building issues. The decision makers have no expertise or background in retirement village matters.

The question is whether the RV Act change process or the consultation stage of it, occur before, contemporaneous with or after the other approval processes?⁶⁰

Prior consultation allows greater scope for resident input, for improvements and for changes to be made. This is because significant time and money has not been invested in a particular course of action. At a recent industry conference, one operator explained how the first step they took in deciding to redevelop a village was to consult residents on what changes they wanted to see. The redevelopment proceeded as a joint vision about the village future.

On the other hand, many residents just want certainty in what will occur and may regard being actively engaged in the technical aspects of a village change as a burden. If consultation occurs too early, residents may be disconcerted when redevelopment, change of land use and/or building applications are altered in the planning or other approval processes. Operator plans may also evolve and change over time independent of planning and other approval processes — for example, as financing becomes available or is withdrawn or new ideas arise.

Which comes first — approval for a change under the RV Act or the related planning, subdivision or building approvals — may need to vary depending on the extent and nature of the proposed change and a village community's preference for the stage at which they become involved in the change. This suggests that the timing of each approval in relation to other approvals may be better left to operators than prescribed.

In practice, the various approval processes will likely operate in tandem, with ongoing consultation as each approval progresses.

To ensure that the RV significant change process is meaningful however, it is proposed an operator will not be able to act on any planning, subdivision or building approval until the RV Act process has been completed (whether this is resident consultation only or SAT approval). An operator will be able to apply to SAT for permission to take action to implement these approvals prior to the RV Act process being completed.

⁶⁰ The Department of Planning, Lands and Heritage has confirmed that it is not appropriate to merge these other approvals with RV matters.

Questions:

- 19.1.11 *If you are a resident, what is more important to you — ability to provide input into a proposed change or certainty in what has been approved?*
- If you are an operator, are there business reasons that the RV change process should always occur prior to/after the other approvals?*
- If so, please explain what these are.*
- 19.1.12 *Will allowing operators to determine which approval goes first and whether they operate in tandem with each other pose any issues?*
- If so, please explain what you see as the problem/s.*
- Will this problem be addressed if residents can ask SAT to require operators to commence the RV Act change process consultation prior to these approvals being sought or finalised?*
- 19.1.13 *Will requiring an operator to obtain any RV Act approval required to implement a change before acting on any other related approval (eg planning, subdivision or building) pose any practical issues?*
- If so, what are these? Does provision for SAT to permit steps to be taken address these? If not, why not?*

ISSUE 19.2: Retirement village change categories

ISSUE

Only significant changes would be required to go through the retirement village change process. The three categories of village changes to which it is proposed the retirement village significant change process will apply are:

- winding down a RVS;
- memorial correction; and
- village redevelopment.

The first two categories involve transferring Supreme Court approval for the relevant changes to occur to SAT. Out of the three categories, the third, village redevelopment, is the most diverse. It includes the new changes that will be permitted — excising land from a continuing village, putting a portion of RVS land to additional use and adding land to a village. All of these are significant by their nature. They involve consideration of the impact on RV Act statutory charges and altering the village or RV product. This category also includes other changes that may or may not be significant depending on what is proposed rather than their nature. For example, this category includes changes to the village community arrangements or village upgrades, which can either involve building demolition, new amenities or services and resident relocation or be minor in extent.

The memorial correction category will not require any policy change beyond the jurisdiction transfer to SAT discussed above. The other two categories require some additional matters to be addressed. Village redevelopment in particular raises the question of how to distinguish the changes that require resident consultation only from those that require a SAT application.

OBJECTIVE

To ensure that the RV change process for:

- winding down an RVS — applies sufficiently early for effective SAT oversight; and
- village redevelopment — does not require automatic SAT oversight when it is not required.

DISCUSSION

Winding down a RVS

This category would replace the current provision for Supreme Court approval to terminate a RVS. It does not include ceasing to operate the RVS over part only of a village (excising land from a village).

Problems in current provision for RVS termination

Some problems with the current provision would need to be addressed in transferring the question of whether to approve RVS termination to SAT. Winding down a RVS generally takes some time after a decision has been made to cease implementing the RVS.⁶¹ The RV Act intends that approval will be sought to take the steps necessary to terminate the RVS⁶² but does not specify:

- the stage of the winding down process at which approval is to be sought; or
- what action subsequent to approval to terminate means that the RVS is in fact terminated.

Despite the intent that approval be prospective, the RV Act also provides that Supreme Court approval to terminate a RVS is not required when a village is vacant.⁶³ The RV Act does not however explain how a village can be vacated without beginning to wind down the RVS, which requires Supreme Court approval.

⁶¹ In the *Hollywood case*, the Supreme Court found that the RV Act contemplates that an action will be taken by the village owner to terminate a RVS and that the termination will “likely be brought about because the owner of the land in question stops implementing [a RVS]” with it being “likely that bringing about the termination of a RVS would, in practical terms, ordinarily take some time”. [Paragraphs 134 -136 and 143]

⁶² The Supreme Court confirmed this proactive intent In the *Hollywood case*: “It appears likely that bringing about the termination of a RVS would, in practical terms, ordinarily take some time. The requirement for the Court’s approval to terminate a RVS appears intended to enable the owner of the retirement village to take the steps required to bring about the termination of the scheme, so that at some future point in time there will no longer be a RVS (and thus a retirement village) on the land” [paragraph 143].

⁶³ This is the practical effect of RV Act, section 22(1).

A further problem is that the RV Act contemplates that a RVS is terminated by the person/s who own the village (which is the land and infrastructure on it) — who may be residents — but the Supreme Court found that residents' intent could not bring about RVS termination.⁶⁴ The village under consideration in that case was a lessee village, which likely limits this observation but it raises the question of whether strata or purple title residents can terminate a RVS without the retirement village business owner's (operator's) agreement.

Approval to be sought prior to beginning to wind down the RVS

Ambiguity in how the current RVS termination provisions operate together means that some operators are either vacating a village prior to seeking Supreme Court approval to terminate a RVS or vacating the village then terminating the RVS without Supreme Court approval. This practice limits or avoids the Supreme Court's ability to ensure residents' views and interests are considered in terminating a RVS.

Expressly requiring that an application for approval to wind down a RVS be made after resident consultation and before any steps are taken to begin winding down will ensure that the intent of the current RV Act provisions is achieved. It will ensure that SAT can consider a range of issues, including proposals and dates for residents having to relocate, timing of an exit entitlement payment in relation to securing other accommodation, staged withdrawal of services, redevelopment prior to the village being vacated and resident transition to non-RVS arrangements. SAT can then make any direction necessary for protecting residents' interests prior to irreversible changes occurring.

There may be some uncontroversial or reversible changes that can occur regardless of whether the RVS will be terminated. SAT will therefore be able to give permission for certain steps to be taken before it makes its final decision.

SAT to terminate the RVS

At present, there is no clear basis for former residents, persons dealing in village land or the Registrar of Titles to determine whether or when a RVS is terminated. This creates uncertainty in whether and when land has ceased to be used for a RVS. There is also no clear basis to determine whether statutory charges, which may survive RVS termination, have been extinguished. These circumstances make it difficult for the Registrar of Titles to know whether to remove the RV Act memorial from land that is a village. It also makes it difficult for operators to deal in the land.

⁶⁴ *Hollywood* case, paragraph 136.

To address these issues, winding down a RVS can be a two-step process. The first step is that SAT approves an operator beginning to wind down the RVS. The second step is that SAT terminates the RVS on confirming that the implementation plan has been completed, statutory charges have either been extinguished (exit entitlements have been paid) or appropriate alternate protections for exit entitlement payment has been made and any conditions for termination (such as the operator locating alternate accommodation for residents) have been met.

The RV Act can provide that the statutory charges are extinguished on RVS termination unless an appeal is lodged. This creates a short period of uncertainty for operators but the scope for this is limited to circumstances in which exit entitlements have not been paid as payment extinguishes any statutory charge.

Ceasing to implement a RVS on a temporary basis

Qld makes specific provision for temporary village closure.⁶⁵ The main reason for this is that temporarily closing down a village raises many of the issues that arise with permanent vacation but that may not arise with less extensive redevelopment in a village. This raises the question of whether this provision would be useful in WA.

It would be confined to circumstances in which the whole village is vacated for a minimum period — for example, 12 months — to enable redevelopment.

Temporary closure for less than the minimum period due to an emergency (such as a weather event or pandemic) will not automatically require SAT approval.

Questions:

- | | |
|--------|---|
| 19.2.1 | <i>How will changing the application from one to approve RVS termination to approval to wind down a RVS affect you?</i> |
| 19.2.2 | <i>Should SAT be able to approve an operator taking some steps to implement RVS termination before it makes its final decision? For example, if the only outstanding issues are condition details or residents support the particular measures?</i> |
| 19.2.3 | <i>Would provision for an operator to apply to SAT for approval to temporarily close a village be useful?

If so, should this only be required if the cessation exceeds a prescribed period (for example, 12 months)?</i> |
| 19.2.4 | <i>Will a two-step process — SAT approval to begin winding down a RVS followed by SAT formally terminating the RVS — address the current lack of clarity in when a RVS is terminated?

If not, how should this be addressed?</i> |

⁶⁵ RV Act (Qld), section 40A(3)(b).

Village redevelopment

This third category includes the balance of the significant changes to which the RV change process will apply. Some changes will, like winding down a RVS and memorial correction, always require SAT oversight. This is because they also have potential to impact the security offered by the statutory charge and/or residents existing rights and obligations in ways that it may be difficult for residents to assess.

The village redevelopment category is for significant changes that are not winding down a RVS or memorial correction. Issue 19.1 suggested that land excision (recommendation 30) and the significant changes discussed in Part 18 — using village land for dual purposes and opening village amenities and services to non-residents — would fall into this category. This category could also include village redevelopment that broadly impacts the retirement village community. These are likely to result in significant changes to the RV product and village community arrangements.

Some of the changes that will fall into this category will also have potential to impact the statutory charge and/or residents existing rights and obligations in ways that it will be difficult for them to assess. For example, the changes discussed in Part 18.2: to allow dual use of RV land and allow amenities and services previously restricted to resident only to be made available to non-residents. These changes may also require automatic SAT oversight.

Other significant changes in this category will not be so complex or otherwise raise the issues requiring automatic SAT oversight. These village redevelopment changes would undergo the mandatory consultation process only, if residents support the change, and the implementation plans for them, they will proceed. If residents do not support the change, or aspects of it or the implementation plan, they can refer these disputes to SAT. SAT will decide whether the change can proceed and whether any changes need to be made to the implementation plan, including any proposals for resident compensation. An operator can decide not to proceed with the change or (as with all SAT decisions) appeal this decision.

Splitting significant changes into those that are inherently likely to be complex and so require SAT oversight and those that are likely to be less complex and so require consultation only raises the issues in an operator proceeding on resident consent. The RV Act currently provides that some changes can occur provided residents consent by special resolution — communal amenities and services, for example, can currently be varied if 75 per cent of residents consent. One issue in relying on resident consent for a change that was not mentioned above is that the change may be opposed by residents but be necessary for long-term village viability. That is, there may be circumstances in which the longer term village interests should prevail over current residents' opposition. An operator can therefore apply to SAT for approval to proceed with a change if residents do not support it.

Providing for SAT oversight on the basis of the potential impact of a change on residents, and their likely ability to meaningfully negotiate outcomes that appropriately protect their interests, means that there will be changes that meet these criteria that are not listed amongst the specific examples. Disputes about whether these criteria are met can be referred to SAT.

19.2: PROPOSAL FOR CONSULTATION

The following proposal is being considered:

That the RV Act provide:

- **the following criteria for distinguishing between the proposed significant village changes in the village redevelopment category that require SAT oversight from those that do not. The change:**
 - **is complex;**
 - **has potential to impact residents financial or tenure security; and/or**
 - **has potential for impact on resident rights and obligations that requires technical legal or financial skill to assess; and**
- **specific examples of these kind of changes that include:**
 - **excising land from a village;**
 - **changing the way part of a village is used; and**
 - **making RV product amenities and services open to the public,**
- **as well as power for regulation to provide further guidance about the criteria; and**
- **that SAT resolve any dispute about application of the criteria to any proposed change.**

Questions:

19.2.5 *Do you agree that the village redevelopment changes that require SAT oversight should be distinguished from those that do not on the basis of:*

- *complexity; and*
- *residents' ability to meaningfully protect their interests?*

If not, why not? How should the two sets of changes be distinguished?

19.2.6 *What significant village changes should be able to occur without mandatory SAT oversight?*

19.2.7 *What factors do you take into account:*

- *If you are an operator — in deciding that you do not need to inform or consult residents about a proposed change?*
- *If you are a resident — in deciding that you want to be informed or consulted about a change?*

Resident relocation obligations

Some significant changes such as RVS termination, village redevelopment or land excision may require resident relocation. This can be relocation outside or inside the village. Relocation outside a village appears the more difficult event for residents but relocation within a village can involve complex considerations. For example, whether the resident can afford increased recurrent charges following redevelopment and whether a DMF must be paid for the previous unit rather than transferred to the new unit. Issues can also arise around allocation of new units under operator relocation policies.

The RV Act currently prevents involuntary resident relocation. Some residence contracts however have terms that provide that residents agree to relocate in the event an operator requires it as a consequence of a future village change. Enforcing these terms would likely be a civil court matter. A dispute about transfer to another kind of accommodation is however heard by SAT.⁶⁶

New South Wales (NSW) and South Australian (SA) retirement villages legislation impose some specific operator obligations regarding resident relocation, RVS termination or village redevelopment.⁶⁷ These include to:

- provide a minimum amount of notice of the relocation date;
- either make alternate accommodation available or assist a resident to obtain alternate accommodation;
- pay the resident's reasonable relocation costs, including any utility connection or disconnection fees; and
- pay a resident's exit entitlement prior to vacation or within 10 working days of the resident leaving.

Alternate accommodation:

- is approximately the same standard as the unit the resident is leaving or, if not the same standard, that is agreeable to the resident;
- requires no greater financial outlay on the part of the resident; and
- is accommodation that is, or ought reasonably to be, acceptable to the resident.

Statutory relocation obligations will not prevent the resident and operator reaching agreement regarding relocating to a higher standard of accommodation in the redeveloped village.

⁶⁶ RV Act (WA), section 57.

⁶⁷ RV Act (NSW), section 136(2)(c) and (3)(c) and (d) and RV Act (SA), section 37(3). Queensland's RV legislation operates so that the relocation proposals an operator makes are considered in whether a redevelopment plan is a "clear, orderly and fair" process: RV Act (Qld), sections 40D(5) and 113F(5) and *Retirement Villages Regulations 2018* (Qld), regulations 4A and 8A, Schedule 1A, item 24 and Schedule 4A, item 39.

These provisions recognise that a resident may require assistance in locating alternate accommodation and will likely need their exit entitlement to fund it. They also recognise that suitable alternate accommodation may be determined by factors such as locality or nearness to transport, not simply the standard of the new unit itself.

Qld requires that operators include their resident relocation policy in the draft implementation plan provided as part of the mandatory resident consultation and how it will affect individual residents in the individual resident impact statement. This allows these matters to be developed with resident input.

Giving residents statutory relocation rights means that some jurisdictions can also provide that a resident is not to unreasonably refuse to relocate.

Questions:

- 19.2.8 *Should the RV Act impose minimum operator obligations for resident relocation required by village change?*
If not, how should resident relocation be managed?
- 19.2.9 *What do you think of the other jurisdictions' requirements for an operator to:*
- provide a minimum amount of notice of the relocation date?*
 - make alternate accommodation available. Alternatively, assist the resident to obtain alternate accommodation?*
 - pay the resident's reasonable relocation costs, including any utility connection or disconnection fees?*
 - pay a resident's exit entitlement prior to vacation or within 10 working days of the resident leaving?*
 - have a policy for relocation, including within the village?*
- 19.2.10 *Do you agree that alternate accommodation operators provide or find for residents should be accommodation that is:*
- approximately the same standard as the current unit or, if not the same standard, that is agreeable to the resident;*
 - requires no greater financial outlay on the part of the resident; and*
 - is, or ought reasonably to be, acceptable to the resident?*
- If not, what features do you think the alternate accommodation should have?*
- 19.2.11 *If operators are to have these types of obligations, should the RV Legislation also require residents not to unreasonably refuse to relocate?*
- 19.2.12 *If you are an operator or resident, what would the impact of legislated minimum relocation requirements be? For example, what provision do your contracts currently make for relocation?*

ISSUE 19.3: Minimum consultation requirements

ISSUE

Issue 19.1 explains that residents expect to be consulted about significant changes to the village and why this is the case. It also outlines the importance of adequate information and why stakeholders would benefit from more concrete minimum requirements that are nonetheless flexible enough to deal with the full range of significant village changes that may be proposed. It proposed six minimum requirements.

This issue discusses those requirements in more detail. It proposes some measures to assist stakeholders to identify matters that will need to be agreed and clearly identify those that cannot. It asks some questions to determine what consultation should be required for significant village changes.

OBJECTIVE

To encourage informed resident consultation and decisions on significant village changes, and the process for implementing them, and reduce disputes as to the adequacy of operator consultation processes.

DISCUSSION

Formal notice of the change

The RV Legislation can provide for operators to give residents notice of a proposed change and include details such as:

- the change that is proposed;
- why the operator wants to make the change;
- the likely timeframe over which the change will be made;
- the likely impact on residents;
- that at least one residents' meeting will be held to discuss the change;
- that a draft implementation plan and (if relevant) an individual resident impact statement will be provided prior to the first resident meeting; and
- contact details for resident inquiries and/or suggestions.⁶⁸

For certain proposed changes, there may need to be a prescribed minimum notice period. Some other jurisdictions, for example, require that residents be given at least 12 months' notice of village closure.

⁶⁸ An approved form could be developed to standardise this document.

Draft change implementation plan

A draft implementation plan will (if necessary) provide more detail about the matters outlined in the formal notice. It will include information on additional matters (to the extent necessary having regard to the proposed change). For example:

- what other approvals are required for the change to proceed and when these will be sought;
- whether the change requires SAT approval to proceed;
- the anticipated sequence of events for implementing the change;
- detail about resident impact issues such as access restrictions, noise and dust issues or temporary withdrawal of services;
- whether any temporary or permanent resident relocation will be required, the units affected and any allocation process for new units;
- whether any amenities or services will be varied or interrupted and, if this is the case, what alternate arrangements or compensation the operator proposes; or
- whether the change will result in any changes to village rules, fees or charges or to contracts and, if so, what these will be.⁶⁹

The draft implementation plan is intended as a tool that will encourage discussion and identify any missed impacts/opportunities.⁷⁰

The length and complexity of this document would depend on the scale and complexity of the change that is proposed. The intent is that it will over time be developed into an agreed final implementation plan. While this will not always be achievable, the process will clarify and reduce the matters that remain in dispute and so the issues that SAT will need to resolve.

The potential for a final implementation plan to simplify SAT applications is discussed further below.

Prior residents' committee consultation

If a village has a residents committee, it is proposed the operator will consult it about the content of the formal notice and draft change implementation plan prior to providing them to residents.

This will assist operators to develop a village change proposal, formal notice and draft change implementation plan. It will alert operators to resident concerns early, enabling the operator to address them in the draft implementation plan prior to disputes developing. Resident concerns will also be reduced as the residents committee will be able to explain the change and process to residents.

⁶⁹ Again, an approved form could be developed to standardise this document.

⁷⁰ An approved form with prescribed information offers support to less sophisticated operators, and residents, through alerting them to matters that they need to consider and resolve.

Draft individual resident impact statement

Some proposed changes will have different impacts for different residents. For example, all residents may need to be aware of a proposal to redevelop a community centre but only some residents will need to temporarily relocate to allow this to occur. This document would deal with matters that are individual resident specific. For example:

- if the resident must relocate, the alternate accommodation options the operator has identified and when any exit entitlement will be paid; and
- if access to a driveway will be blocked, the likely dates or length of time this will occur.⁷¹

Again, the length and complexity of this document will vary depending on the change and the extent to which matters are not dealt with on a village wide basis in the draft change implementation plan. This document is also intended to form the basis for negotiation and developing an agreed final impact statement.

At least one residents meeting

It is proposed that operators hold at least one residents' meeting to discuss the proposed village change and matters in the draft change implementation plan. This will not limit the number of meetings that can be held. Operators, residents and the residents committee will be able to convene additional meetings under the RV Code, as they are required.

Operators and residents will also be able to agree different communication options such as email or posting information on a website.

Written operator response to written inquiry, request for information or proposal for variation to the proposed change or draft change implementation plan

The RV Code currently requires an operator to provide a response to a reasonable resident request for information on various matters within 10 working days and to give reasons for refusing or inability to comply in writing. Despite this, Consumer Protection's experience is that disputes referred to it often arise from an operator not responding or not responding adequately to resident requests for further information. This can be due to a very narrow view as to what it is reasonable for residents to request.

The proposal therefore requires a response to all written resident requests. An operator will be able to respond by advising why they consider a request or suggestion is unreasonable or unworkable. The need to put the request in writing will deter unreasonable requests. There could also be a limit on the number of requests a resident can make within a time period.

⁷¹ Similarly, an approved form could be developed to standardise this document.

The obligation to respond to residents' suggestions is part of the design of the proposed consultation process as a joint operator and resident endeavour. Not all resident suggestions will be able to be accommodated but they will know why that is the case. Residents may be aware of matters or strategies that do not occur to the operator. Encouraging operators to respond to resident suggestions ensures that these matters are considered, as well as having potential to reduce dissatisfaction and disputes.

Final change implementation plan is enforceable

The potential for an agreed final change implementation plan is an important feature of the proposed consultation process.

Requiring a draft implementation plan early in the process ensures all stakeholders turn their minds to relevant matters, minimising the risk of significant questions being raised towards the end of the process. The intent is that after a residents' meeting or other step in developing the change, the operator will update the draft plan to reflect any agreements reached or changes that are required. This may occur over the course of several meetings and/or over the course of meetings with a residents' committee or individual residents. Having a written implementation plan offers potential to reduce the confusion, uncertainty and different understandings that can arise when the stakeholders rely on verbal communications. It ensures that everyone has a clear understanding of what will occur, when it will occur, and how they will be affected by it.

If a final change implementation plan is agreed, and if necessary approved by SAT, it will be enforceable under the RV Act.

There may however be good reasons to change an agreed final plan. For example, planning or other approval conditions may require that the plan (including the detail of the village change) be altered. Unforeseen events or opportunities for improvement may arise after it is finalised. Minor changes will not require variation (a good plan will build in some flexibility around non-essential matters) but agreed plans will be able to be materially varied by consent or by SAT, as appropriate. An operator will then comply with the varied plan.

As previously noted, to the extent matters cannot be agreed, the draft implementation plan provides a basis to identify what the differences are. This has potential to reduce any eventual SAT application.

Questions:

- 19.3.1 *Do you think that the six minimum requirements that are proposed are appropriate consultation requirements?*
If not, which do you think are unnecessary? Why?
What other/alternative requirements do you suggest? Why?
- 19.3.2 *Formal notice:*
Do you agree with the suggested matters the formal notice must address?
If not, why not? Are there any other matters that should be in the notice?
Should there be a prescribed minimum length of notice for winding down a RVS? If so, what do you think it should be?
- 19.3.3 *Draft change implementation plan:*
Do you think that a draft change implementation plan has potential to give greater clarity to a proposed change and the implementation process?
In your view, will it encourage both operators and residents to focus on the practical aspects of change implementation and reach agreement about whether a change is desirable and how it may occur?
Put another way, does it have potential to reduce uncertainty and the number of matters in dispute?
- 19.3.4 *Do you think that an implementation plan agreed with residents (when a change does not require SAT approval) or approved by SAT should be enforceable (subject to provision for variation when required)?*
If not, why not? What problems might arise?
- 19.3.5 *Proposed draft individual resident impact statement:*
Does this statement have potential to give greater clarity to the impact of the change on individual residents?
In your view, will it encourage both operators and residents to focus on reaching agreement about resident specific matters?
Should this statement also be enforceable?
What matters do you think this statement should address (you can suggest different matters for different kinds of changes)?

PART 20: PRE-RESIDENCE ISSUES

ISSUE 20.1: Multiple residence contracts — pre-contract disclosure and cooling off.

ISSUE

There is some uncertainty and/or duplication in the way RV Act pre-contract disclosure and cooling-off requirements apply to multiple residence contract documents that are signed at different times.

A residence contract often involves more than one contract that is itself a residence contract.⁷² An agreement to lease and a lease are, for example, both part of a residence contract and residence contracts in their own right.⁷³ The RV Act uses the term residence contract to describe the scheme or arrangements under which a right to residence in a village arises, as well as a contract that is part of the scheme or arrangement.⁷⁴

Residence contracts are complex and involve financial arrangements and rights and obligations that are different from property transactions. Both these factors mean that they can be difficult for consumers to understand. To address this, the RV Act requires operators to provide residents with a copy of a residence contract, and a range of other materials that include the Form 1 summary of that contract and other village matters, at least 10 working days prior to them signing a residence contract (pre-contract disclosure).⁷⁵ It also allows a person to withdraw from the purchase (rescind the contract) within:

- seven days of signing a residence contract, provided the person has not moved into the village; or
- 17 working days of receiving the pre-contract disclosure, if this has not been provided prior to the contract being signed (cooling off).⁷⁶

The Final Report found that there was some ambiguity in how these requirements applied to a residence contract that comprised contracts signed at different times. For example, when an agreement to lease and lease are not signed at the same time. If the RV product is bought off the plan, there can be several years between the documents that are each a residence contract.

⁷² As ATO TR 2002/14 observes, “[i]t is usually necessary for a prospective resident to enter into a number of agreements which are essential or integral to one another”. ([TR 2002/14 | Legal database \(ato.gov.au\)](#) 7 March 2018, paragraph 111.) CRIS 3, part 14 discussed the unusual way the RV Act defines residence contract as more than just the contract itself.

⁷³ An agreement to lease creates, immediately gives rise to, or confers a right to occupy that is contingent on the event specified in the agreement occurring. Generally, this is completion of the premises that will be leased. A contingent right to occupy can be exercised prior to the contingency occurring. For example, a prospective resident can restrain an operator from offering the right to reside in the future unit to another person (which they may want to do if the market has risen) even though the prospective resident cannot move in because the unit is still under construction.

⁷⁴ See CRIS 3, part 14 for discussion of the overlap between the word scheme and the term residence contract and the proposal to separate these concepts.

⁷⁵ RV Act, section 13. The Form 1 summarises important features of the residence contract, price and village. It is prescribed in the RV Regulations.

⁷⁶ RV Act, section 14.

Recommendation 23 was, in effect, that the RV Act specify how pre-contract disclosure and cooling-off requirements apply to residence contracts signed at different times.

The proposals below are that:

- pre-contract disclosure requirements only apply to the first residence contract that a prospective resident is required to sign; and
- cooling-off periods apply to all residence contracts that a prospective residents signs.

OBJECTIVE

To clarify RV Act pre contract and cooling-off requirements when a residence contract comprises contracts that are signed at different times.

DISCUSSION

Ambiguity has consequences for consumers

Example 20.1.1 describes consumer reports to Consumer Protection that illustrate some of the issues that can arise from ambiguity in pre-contract disclosure obligations and cooling-off rights:

EXAMPLE 20.1.1: AMBIGUITY IN PRE-CONTRACT DISCLOSURE OBLIGATIONS AND COOLING-OFF RIGHTS

Case study 1

Jane is 76 years old. She made what she called an 'offer to purchase' a lease for life over a retirement village unit under construction. She paid a deposit. The operator then made changes to the village plans and sought an extra \$12,000. Jane agreed to pay this. The unit was to be completed by September 2016. Jane sold her home. Two months after the promised completion date, she was couch surfing with no sign of the unit being ready for occupation. Jane wanted to know if she could cancel her contract with the village operator and if she was liable for the \$12,000.

No pre-contract disclosure documents were provided to Jane.

Case study 2

Ahmed paid a deposit to occupy a retirement village unit off the plan. At the time, the sales representative said that the only extra expense would be electricity. No contract was received at the time the deposit was paid. On receipt of the contract, Ahmed saw that 'extra' costs included: recurrent charges; land rates; land tax; water rates; and insurance.

Case study 3

Lee Lin put in what she described as an "offer to purchase" (in the particular village, this was more likely an offer to lease) and paid a deposit of \$20,000. Seven months later, she was still waiting for the lease. The operator encouraged her to move into the village before receiving the lease.

On receiving the lease, she was concerned that her exit entitlement would be calculated on the basis of a lower "purchase price" than she paid. The operator said that the difference was \$7,000 paid to the real estate agent and that this lowered the upfront payment she made. This was not explained to her at the time she entered into the first residence contract.

Case study 4

Tom and Barry entered into a residence contract prior to selling their home. The operator agreed to fix some issues with the village unit and insisted on full payment of the upfront payment — just under \$700,000. The operator “invited” Tom and Barry to have new white goods and furniture delivered directly to the village unit. When they queried progress of work on the unit, the operator said that delivery of the whitegoods meant that they had moved in under the residence contract so it was no longer obliged to fix the unit. Tom and Barry decided that they no longer wished to move to the village.

By the time they contacted Consumer Protection, the cooling-off period had expired regardless of whether they had technically moved in. Consumer Protection assisted in negotiating rescission of the residence contract without payment of the DMF or refurbishment fees.

Pre-contract disclosure for first residence contract only

The RV Act pre-contract disclosure requirements are directed at the decision to purchase. They are intended to inform residents as to unusual nature and price structures for the RV product, as well as details about a village and contractual requirements. They are also intended to allow consumers to compare different RV products and villages prior to deciding on their purchase. It is therefore important that pre-contract disclosure occur before the earliest residence contract is signed. Using the examples above, this is before an agreement to lease is entered into.

Duplicating pre-contract disclosure involves some additional cost for operators. In large developments with several hundred new units, this can be a significant sum. Consumers may require some time to consider whether the further residence contract is the same as the one provided in the pre-contract disclosure for the first contract, but there does not appear to be any consumer need for repeated pre-contract disclosure. The RV Act could provide that a consumer must be given at least 10 working days to consider any residence contract but pre-contract disclosure requirements apply to the first contract. This is consistent with the position in NSW.⁷⁷

Contract variation

Lease or sales off the plan are problematic in the RV context due to potential for the development to change over its construction. Changes may occur due to conditions for planning or other approvals. They may also be due to financial and other developer considerations. To address this, the RV Legislation requires that all necessary consents to develop a village are obtained prior to any village promotion. It permits operators to seek expressions of interest from prospective residents but these are non-binding indications of intent only.

⁷⁷ RV Act (NSW), section 18(4). It also appears to be the position in Qld, which provides that when there is more than one residence contract, pre contract disclosure must occur before any resident contract is entered into (RV Act (Qld), section 84(6)).

This provision does not contemplate operators entering into residence contracts.⁷⁸ The RV Legislation also does not contemplate that a proposed village will change once pre-contract disclosure has occurred. All residence contracts include a statutory warranty that pre-contract disclosure information is correct. This warranty prevails over any inconsistent contract term.⁷⁹

The SL Act and ST Act however allow a developer to make some changes to a development without a consumer being able to rescind the sale. Example 19.1 reveals that developers are making changes to a village, and even the upfront payment, between residence contracts. This suggests that the relationship between the RV Act restrictions on change and these other Acts' permission for change needs to be clarified. Qld makes provision for some off the plan village changes. It requires an operator to distinguish the facilities it undertakes to provide from those that depend on sales activities, finance availability or market conditions.⁸⁰

All contracts must be included in pre-contract disclosure

The RV Regulations require that copies of all the contracts that a consumer must agree in order to reside in a village are included in pre-contract disclosure.⁸¹ The case studies in Example 20.1.1 case study 1 however, suggest that some operators are not doing this. This raises the question of whether transferring this obligation to the RV Act is required, to give it more prominence.

Cooling off — first, all or each residence contract?

Cooling-off periods are an important consumer protection. The decision to enter a RV has significant long term financial and housing security implications for consumers. For many consumers the RV price structure — upfront payment, DMF and exit entitlement payment only after long delay — means that they will be unable or find it difficult to leave a village. Decisions to enter a village can be highly emotional and impulsive rather than a sober assessment of the long term financial and other implications. They may be made on immediate considerations such as nearness to relatives, village appearance and friendliness of the staff. Consumers also may not be able to access the financial and legal advice they need within the 10 working days they are given to consider the pre-contract disclosure. While this is intended as a minimum, consumers have reported that some operators have treated this as a deadline for commitment.

The RV Act cooling-off periods allow consumers to take a second look at their purchasing decision once the emotion has cooled off. When there are lengthy periods of time between each residence contract, a cooling-off period for each may be important.

⁷⁸ RV Code, clause 7.

⁷⁹ RV Act, section 13(4).

⁸⁰ This information is included in the application for registration of the RVS and this application is part of the pre contract disclosure (RV Act (Qld), sections 27(2)(a)(iii) and 74(3)).

⁸¹ RV Regulations, regulation 6(1)(a).

For example, a prospective resident may develop need for residential aged care that is not provided in the village or relatives may move, meaning the village is no longer suitably located. Other jurisdictions require operators to bear these risks. NSW, the Northern Territory and Qld, for example, provide cooling-off periods for all contracts.⁸²

The proposal is that this important consumer protection applies to all residence contracts.

Other jurisdictions make or are considering further provision for consumers' unfamiliarity with the RV product. NSW and SA have both cooling-off and settling-in periods.⁸³ A settling in period is a time after entering a village within which the resident can change their mind. The settling in period is 90 days in each jurisdiction.⁸⁴ Residents who move out during the settling in period pay market value rent for their stay in the village and reimburse any costs incurred in making the unit suitable for them. In NSW, they do not pay any exit fees and upfront payments must be refunded within 14 days of the contract being terminated.⁸⁵ Victoria (VIC) has just released an options paper that seeks feedback on whether a settling in period is preferable to an extended cooling-off period.

From a consumer perspective, a settling in period has the advantage of allowing a resident to experience retirement village living prior to making a binding commitment to purchase. From an operator perspective, a settling in period has some disadvantages. It creates uncertainty and risk of additional costs in remarketing the RV product for a unit vacated under a settling in provision. It could however have some operator benefits. It may give consumers more confidence to try RV living, expanding the pool of prospective residents. Giving residents who find they are not suited to RV living the chance to leave will also reduce the time operators need to devote to their problems.

Consumers misunderstanding what entering into occupation of a unit means

Example 20.1.1, case study 4 illustrates a problem reported also by other prospective residents, misunderstanding that entering into occupation means actually residing in the unit. Contracts generally define what entering into occupation means. That the resident has begun moving their goods into the unit is not an unreasonable meaning.

The prescribed form notifying residents of their cooling-off rights may however need to include advice about what acts will mean a person has entered into occupation of the unit (Form 2).⁸⁶ Alternatively, the RV Act cooling-off provision could define what entering into occupation of a unit means.

⁸² RV Act (NSW), section 32, *Retirement Villages Regulations 1995* (NT), Schedule 2, clause 21 and RV Act (Qld), section 45(1)(a) and 48.

⁸³ RV Act (NSW), sections 32 and 44A and RV Act (SA), sections 24(3) and 44(4) read with section 4(2)(b).

⁸⁴ *Ibid.*

⁸⁵ RV Act (NSW), section 44D(1).

⁸⁶ RV Act section 13(2)(b) and RV Regulations, Form 2.

RV Act rescission rights in addition to rights under other legislation

Both the SL Act and the strata titles legislation provide circumstances in which a property transaction can be terminated. These contracts may be part of a residence contract. The RV Act currently states that its rights to rescind have effect even though the contract may be subject to the ST Act and that the RV Act rights do not derogate from the ST Act rights.⁸⁷ For clarity, it is proposed that the RV Act makes an equivalent statement regarding the SL Act.

20.1.1: PROPOSAL FOR CONSULTATION — PRE CONTRACT DISCLOSURE

The following proposal is being considered to clarify RV Act pre contract disclosure requirements when a consumer signs residence contracts at different times:

That the RV Legislation provide that:

- **its pre-contract disclosure requirements only apply to the first residence contract that a prospective resident is asked to sign; and**
- **prospective residents must be given at least 10 working days to consider any additional residence contracts that are not to be signed at the same time as the first residence contract.**

IMPACT ANALYSIS

The proposed amendment clarifies that pre-contract disclosure must occur prior to the first residence contract that a prospective resident must sign. It also clarifies that duplicated pre-contract disclosure is not required, reducing operator compliance costs. The proposal will require prospective residents to retain the disclosure documents for reference when a later contract is provided but this should occur in any event.

Questions:

- 20.1.1 *Do you agree that only one round of pre-contract disclosure is required?
If not, why should pre-contract disclosure occur when a later each residence contract is to be signed?*
- 20.1.2 *Do prospective residents require 10 working days to consider residence contracts that are to be signed after a first contract?
Should this be limited to when there is a lengthy delay between contracts?
Say 6 months?*
- 20.1.3 *Is the statutory warranty that pre contract disclosure overrides residence contracts appropriate for RV product sales off the plan?
If not, why not? What is required?*

⁸⁷ RV Act, section 75(7).

20.1.4 Do you think that putting the requirement for pre-contract disclosure to include all contracts that a resident will be asked to sign in the RV Act make this clearer to operators?

20.1.2: PROPOSAL FOR CONSULTATION – COOLING OFF

The following proposal is being considered to clarify RV Act cooling-off rights when a consumer signs residence contracts at different times:

That the RV Legislation provide that its consumer cooling-off rights:

- **apply to each residence contract that a prospective resident must sign;**
- **have effect even though the contract may be subject to the *Sale of Land Act 1970 (WA)*; and**
- **do not derogate from the SL Act rights.**

IMPACT ANALYSIS

The proposed amendment clarifies residents' cooling-off rights. Residents are able to rescind a contract within the current deadlines (provided they have not entered occupation of the unit). The amendment would allow residents to reconsider having regard to circumstances that may arise in the intervening time between contracts, which can be years if the RV product is purchased off the plan. There will be no change for operators.

Questions:

20.1.5 Do you think that cooling-off rights should apply to only the first or last contract a resident signs? If so, specify which and explain why cooling-off rights should not apply to the other contracts.

20.1.6 Is there any reason that the relationship between Retirement Villages Act 1992 (WA) and Sale of Land Act 1979 (WA) rescission rights should be different from that between the Retirement Villages Act and the equivalent Strata Titles Act 1985 (WA) rights?

20.1.7 Do you think WA retirement village residents should have a settling in period to decide whether to proceed with the RV product purchase? Please explain why this is or is not a good idea.

20.1.8 To address the problem in consumers not understanding when they have entered into occupation of a unit, which approach do you prefer?:

- residence contracts continue to identify what entering into occupation means in a particular village; or
- the RV Act define what entering into occupation of a unit means?

Please explain why you consider the option you choose is preferable. If you think that the RV Act should define what entering into occupation means, what acts do you think it should include?

PART 21: APPLICATION OF RV ACT TO RESIDENTIAL AGED CARE FACILITIES

ISSUE 21.1: RV Act and residential aged care residents

ISSUE

Some retirement village residents live in a RACF.⁸⁸ The RV Act applies to the whole village, including the RACF. When a village RACF is operated under the AC Act, that Act also regulates provision of accommodation and services to village residents. It is not necessary for two Acts to regulate accommodation and services provided in an RACF. This results in overlapping requirements and there is potential for inconsistency in what each Act requires.⁸⁹ Overlapping and/or inconsistent requirements increase the regulatory burden for operators. This means the cost of providing the RV product and/or aged care services is higher, which increases the cost for residents. Overlapping and/or inconsistent regulation also confuses consumers. It is more difficult for them to identify and enforce their rights.

The RV Act was amended so that it did not apply when the AC Act applied. The exclusion is very specific because the AC Act does not apply to all RACFs or to all of the residents in the RACFs to which it does apply. The RV Act does not apply to village residents, or an operator regarding those residents, when the operator is:

- approved under the AC Act as the service provider for the village premises in which a resident resides;
- providing residential care as defined in the AC Act to that resident; and
- eligible for a subsidy under the AC Act for providing that care to the resident.⁹⁰

RV Act aged care exclusion

Changes to the way residential aged care is delivered, funded and regulated raise the question of whether this exclusion needs updating.

OBJECTIVE

To avoid unnecessary RV Act application to village RACF residents when their accommodation and services are regulated under the AC Act.

⁸⁸ A retirement village is a complex that includes residential premises and appurtenant land that is used, or will be used, for or in connection with a RVS. A RVS is a scheme for persons who are predominantly over 55 to occupy residential premises under one or more specified arrangements and under which at least one person will pay a premium for admission to the village. (RV Act, section 3(1)). There is no requirement that the residential premises be for independent living.

⁸⁹ The RV Act applies to retirement villages. It regulates what occurs regarding the land and infrastructure that is the village, the people who live in villages and operate them and the product provided in them. The AC Act does not regulate RACFs or the land on which they are situated. It regulates provision of the aged care services that the Commonwealth funds. These different approaches to regulation mean that there is overlap rather than exact duplication and differing requirements for the same matter.

⁹⁰ RV Act, section 5(2).

DISCUSSION

Circumstances in which the RV Act applies to RACF residents

The AC Act not the RV Act usually applies to the accommodation and services provided to village RACF residents. The RV Act does however apply to the following RACF residents when the village administering body:

- *is not* the AC Act approved provider for the RACF — to all the RACF residents; and
- *is* the AC Act approved provider for the RACF — to any RACF resident:
 - receiving services that are not AC Act residential aged care services. For example, a partner of the ACAT assessed resident; and
 - for whom the administering body is not receiving a subsidy under the AC Act.⁹¹ For example, a person who is not an Australian citizen or who is occupying a bed that is not Commonwealth subsidised.

The intent is that the RV Act applies when the AC Act does not provide residents with consumer protections — because there is no AC Act approved provider for the RACF;⁹² or the individual resident's services are not those regulated under the AC Act. This may be because they are not residential aged care services or because a resident's accommodation and services are not subsidised by the Commonwealth (fully funded privately).

AC Act approved provider who is not the RV administering body

In some WA villages, the AC Act approved provider for a village RACF is not the village administering body. This circumstance arose in a 2013 Supreme Court case. In the decision, the judge observed that the AC Act approved provider not being the village administering body raised the question of whether the RV Act aged care exclusion applied. The judge did not answer that question.⁹³

The historical reasons for limiting the RV Act aged care exclusion to residents of RACFs run directly by village administering bodies may no longer be relevant. The AC Act has been significantly amended since it was introduced. This raises the question: if there is an approved provider under the AC Act for the village RACF, does that person also need to be the RV operator? Does this make any difference to the consumer protections that the AC Act offers village RACF residents?

The indications are that it does not but further information is required on how the AC Act regulatory requirements work in practice in a village RACF.

⁹¹ RV Act section 5(2).

⁹² The AC Act does not require that residential aged care facilities be operated by providers approved under it. This is only required to receive Commonwealth subsidies under that Act. There are some RACFs in the eastern states that are not operated under the AC Act. In WA, such facilities are required to register under the *Private Hospital and Health Services Act 1927* (WA). WA has had fully privately funded facilities in the past but as at 2019, none were registered.

⁹³ Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection [2013] WASC 219 [paragraphs 58 and 59].

RV Act applying when residents' care is not Commonwealth subsidised

Some operators have queried whether RV Act consumer protections are still required for unsubsidised RACF residents (when an operator is an AC Act approved provider). Their view is that AC Act requirements for accommodation and services are imposed on an approved provider, often in relation to a particular RACF, so the practical effect is that there is no AC Act gap for unsubsidised residents.

Consistent with this view, village RACF residents do not appear to be referring RV Act matters to Consumer Protection. It is not known whether this is because the RV Act effectively prevents issues arising, residents are not aware of or not in a position to pursue RV Act remedies or any issues that do arise are resolved under the AC Act. Further information is required on whether any, and if so what issues are arising, and how they are currently resolved.

2017 AC Act amendments — subsidies now paid to the consumer

The AC Act was amended in 2017 to provide for consumer directed care. Under this new funding model, Commonwealth subsidies are paid directly to a care recipient who then pays the service provider. These changes primarily affected care provision in the home rather than RACF arrangements.

It is however possible that these changes have impacted the RV Act aged care exclusion based on an AC Act subsidy being paid directly to an operator.

Questions:

- 21.1.1 *Is there any reason that the RV Act consumer protections regarding accommodation and services provided in a RV need to apply to RACF residents when the person who is the approved provider under the AC Act is not the village operator?*
If you think that it does, please explain why.
- 21.1.2 *If you are an operator with privately funded residents in a RACF, do you find any RV Act provisions useful?*
If so, which provisions and what gap in the AC Act do they fill?
- 21.1.3 *If you are a privately funded RACF resident in a RV, do you find any RV Act provisions useful?*
If so, which provisions and why are they useful to you?
- 21.1.4 *Have the 2017 AC Act amendments regarding consumer directed care meant that any RACF residents in your village now receive the Commonwealth subsidy rather than the village operator?*
If so, please explain how this has affected RV Act application regarding those residents.

PART 22: ISSUES FOR FEEDBACK ONLY

ISSUE 22.1: Dispute resolution

ISSUE

The effectiveness of the dispute resolution processes in the RV Legislation was considered in the Final Report. Several recommendations for change were implemented in Stage 1 reforms. A Seniors Housing Advisory Service was established by Consumer Protection to improve accessibility to and awareness of the village dispute resolution process (Recommendation 67). The dispute resolution process in the RV Code was also amended to require that the person nominated by an administering body to deal with a dispute be suitable to both parties in the dispute (Recommendation 68). This addressed concerns that the existing process may not be sufficiently impartial. Amendments were also made to the RV Act enabling SAT to deal with disputes relating to specific resident contract issues, increases to recurrent charges and the imposition of village levies.

As with most communal living arrangements disputes within retirement villages can and do occur. How disputes are dealt with can have a major impact on the ongoing wellbeing of individual residents and the wider retirement village community.

Concerns about dispute resolution in retirement villages continue to be raised with Consumer Protection. In addition, in September 2019 the Consumer Credit Legal Services of Western Australia (CCLSWA) published the findings and recommendations of a 12 month law reform project funded by Consumer Protection (the CCLSWA Report). The CCLSWA Report considered four key areas of consumer law and policy affecting Western Australians, including matters relating to retirement village dispute resolution.⁹⁴

This part seeks feedback on whether the existing dispute resolution processes are effective and whether any of the recommendations made in the CCLSWA Report are supported.

OBJECTIVE

To assess current levels of satisfaction with existing village dispute resolution processes and obtain views on possible improvements to them.

DISCUSSION

The main causes of dispute within a retirement village are generally related to village fees, refurbishment requirements, village maintenance and management and communication issues between operators and residents.

⁹⁴ Consumer Credit Legal Service (WA) Inc, *Report to Consumer Protection, Department of Mines, Industry Regulation and Safety* (CCLSWA Report) September 2019.

When a dispute arises, the dispute resolution process to be followed is set out in the RV Code. The steps outlined in the RV Code are designed to provide easy access to a process that is not expensive or overly formal.

As part of the process:

- Residents who wish to make a complaint must provide a notice in writing to all the different parties in dispute, seeking the matter be rectified or otherwise settled.
- A suitable person that is acceptable to all parties in dispute needs to be appointed to assist in attempting to resolve the dispute.
- The parties to the dispute who are provided written notice of the dispute must respond to the notice within 10 working days and provide reasons in writing if any of the dispute matters are rejected.
- The parties in dispute are to meet to attempt to resolve the matter.
- If the matter remains unresolved the matter can be referred to the Commissioner for Consumer Protection for referral to mediation or alternatively, depending on the matter, referral to the SAT.
- Consumer Protection can also provide a conciliation service to the parties to attempt to resolve the matter.

Conciliation and investigation of village disputes is undertaken by Consumer Protection. The majority of disputes referred to Consumer Protection which do not involve a breach of the legislation are managed by conciliation.

In 2015-16 and 2016-17 Consumer Protection investigated and conciliated 64 and 44 retirement village related complaints respectively. In 2018-19 Consumer Protection undertook the conciliation of 27 retirement village matters and in 2019-20 that number was 34.

Entering into the conciliation process provided by Consumer Protection is a voluntary and free service. Although mediation is an option, it appears to be rarely used. One of the reasons may be that it can be expensive and under the current mediation process set out in the RV Code, unless the Commissioner decides otherwise, the costs of the mediation are shared equally between the parties to the dispute.

Questions:

22.1.1 *How well have the changes introduced in the Stage 1 reforms worked to help resolve village disputes?*

22.1.2 *If you think further changes are needed, what should they be? Please give your reasons.*

22.1.3 *Have you experienced issues in regard to dispute resolution in a retirement village? If so what were they?*

Consumer Credit Legal Service WA Recommendations

The CCLSWA Report suggested that the current dispute resolution processes within retirement villages are not sensitive to the vulnerabilities of residents, particularly in relation to their age and financial resources and that village residents felt dispute resolution processes are not easily accessible because they are too lengthy, costly and complex.

The CCLSWA Report made the following recommendations to improve dispute resolution within retirement villages:

- Extend the SAT's authority to hear and make orders on retirement village disputes.
- Introduce a 'good faith' requirement in the RV Legislation.
- Mandate compulsory mediation within the dispute resolution process.
- Establish a low-cost or free advocacy service dedicated to assisting seniors, including retirement village residents.

SAT jurisdiction

Specific consideration of SAT's powers in relation to significant changes within a village has been undertaken in *Part 19: Village Change Process* of this paper. Part 19 considers whether the SAT should have jurisdiction over RVS termination and memorial correction as well as the ability to deal with disputes relating to some other significant village change proposals or implementation.

This section considers the CCLSWA Report recommendation to extend SAT's ambit to allow it to hear and determine retirement village disputes more broadly.

The CCLSWA Report argues that the jurisdiction of SAT in relation to retirement village disputes is unduly narrow.

Current SAT jurisdiction over RV disputes

Under the RV Act, SAT is able to consider and make orders in relation to the following five main dispute types:

- specific matters relating to residence contracts;
- service contracts;
- increases to village recurrent charges and levies;
- transferring residents from one kind of accommodation in a village to another; and
- the termination of a resident's occupation of a village under various grounds, including such things as medical grounds or breach of residence contract.

The RV Code also allows a former village resident to apply to the SAT to challenge the need for refurbishment work undertaken, or the cost of the work, if they consider the refurbishment work to be unwarranted, or the cost excessive.

The orders that SAT can make in relation to the above dispute types includes varying or cancelling terms of the contract in question (residence or service), directing either party to the contract comply with contract requirements, ordering refurbishment be ceased, completed or commenced, varying required refurbishment payment amounts, ordering a payment or refund of money, allowing or disallowing a resident's transfer or terminating or enforcing a resident's village occupancy rights.

The CCLSWA report recommends broadening SAT's ambit to hear and resolve retirement village disputes. It suggests that by broadening SAT's jurisdiction to allow it to consider disputes without limiting what type of disputes can be heard, parties will have more freedom to bring matters to SAT without needing to determine if the matter falls within a specific dispute type. The CCLSWA Report suggests this will improve access to a cost effective and binding dispute resolution process.

Along with broadening SAT's retirement village dispute type jurisdiction, the CCLSWA Report suggests that the RV Legislation could also be amended to allow SAT to make a wider variety of orders that are not necessarily specific to the type of dispute being heard. The CCLSWA Report suggests this will provide more flexibility in responding to dispute matters and allow for orders to be made that better suit the matter in dispute.

In support of its argument for SAT to have a wider jurisdiction to hear disputes, the CCLSWA Report cites the respective relevant tribunal arrangements for NSW, SA, the ACT and Qld. All of those jurisdictions allow an application regarding a village dispute be to made to their respective tribunals, simply if a dispute between parties is occurring, thus providing easier access to their respective jurisdictions' tribunals.

The CCLSWA Report states that the other state and territories' tribunals' broader jurisdictions are complemented by their powers to make a variety of orders allowing them to respond more flexibly to matters. Examples of orders that the respective state and territory tribunals can make in relation to village disputes include: directing compliance with the relevant legislation; modifying or setting aside provisions of a contract; restraining or requiring performance of specific actions; ordering payment of money; and determining exit entitlements.

Questions:

- | | |
|--------|--|
| 22.1.4 | <i>Should SAT be given a general broader jurisdiction to hear and resolve all retirement village disputes?</i> |
| 22.1.5 | <i>Should SAT be able to make a wider variety of orders when determining a matter, than those listed?</i> |

Introduction of good faith requirement

Under the dispute resolution process set out in the RV Code, parties to a dispute, having agreed to meet within a set timeframe, are required to attempt to resolve the matters in dispute.⁹⁵

The CCLSWA Report submits that including a good faith requirement into this section of the RV Laws would place an obligation, which is otherwise missing, on all parties to take the resolution of disputes seriously. The CCLSWA Report also suggests that a new good faith requirement would oblige parties to be brought back to dispute negotiations should they fail to act in good faith.

CRIS 2 considered whether RV Laws in WA could introduce additional operator conduct obligations. The adoption of a principle that requires operators to act in good faith when exercising contractual rights with residents was an option raised. A good faith principle requires that parties who have contractual rights exercise them reasonably and do not abuse them, and that a party must have regard to the legitimate interests of the other party. The CCLSWA Report recommendation is that such a principle of good faith should also be applied to dispute resolution processes.

Question:

22.1.6 *Do you see any benefit in introducing a requirement that operators act in good faith in dispute resolution processes?*

Compulsory conciliation / mediation

If a dispute remains unresolved using the existing dispute resolution process, the matter can be referred to the Commissioner for conciliation or mediation. Mediation, like the conciliation service offered by Consumer Protection, is not compulsory.⁹⁶

An issue with voluntary dispute resolution is that parties to a dispute cannot be compelled to attend these services, and, if a conciliation or mediation does occur, any of the parties can withdraw from the process at any time.⁹⁷ It has been proposed that making such services compulsory for parties to attend may improve the effectiveness of the dispute resolution process.

The CCLSWA Report recommended that consideration be given to the introducing “compulsory free or low-cost mediation...into the WA dispute resolution process...” arguing that by doing so a more efficient and cost effective mediation model would be facilitated.⁹⁸ As part of its recommendation, the CCLSWA Report suggested that any compulsory mediation model introduced be administered by the SAT.

⁹⁵ RV Code, clause 30(3)(b).

⁹⁶ RV Code, clause 31.

⁹⁷ RV Code, clause 31.

⁹⁸ CCLSWA Report, 22.

Consumer Protection has recently provided a mandatory conciliation service under the *Residential Tenancies (COVID-19 Response) Act 2020 (WA)* to deal with tenancy disputes relating to the coronavirus (COVID-19) pandemic moratorium period. This service has been successful in providing an efficient and cost effective dispute resolution model. A similar model could be considered for retirement village disputes.

Questions:

22.1.7 *Have you had a village dispute that has been referred to Consumer Protection's conciliation service? If so, were you satisfied with the service provided? If not can you please provide details as to why?*

22.1.8 *Do you think that compulsory conciliation and/or mediation of retirement village disputes would assist in dispute resolution?*

Advocacy service

The CCLSWA Report recommends that the Government consider funding a low-cost or free specialised, dedicated advocacy service for seniors. The CCLSWA Report suggests that providing such a service would assist residents to access and use existing dispute resolution processes more effectively. To illustrate its argument the CCLSWA Report provides information about three advocacy agencies in, respectively, Qld (Seniors Legal and Support Service), SA (Aged Rights Advocacy Service), and NSW (Seniors Rights Service).

These bodies provide advocacy services including: the provision of information and advice about residents' contractual and legal rights and obligations; advocacy and negotiation on behalf of residents; representation and support in disputes; and assistance to residents to interact with operators to raise and address concerns

The CCLSWA Report suggested that WA should consider establishing an advocacy service that provides services that are similar to the services provided in Qld, SA and NSW. Although the creation of a dedicated seniors' advocacy service goes beyond the review of the RV Legislation, feedback on this issue is welcome. If it was to occur, this would need to be considered more broadly by several government agencies.

Questions:

22.1.9 *Should a dedicated advocacy service for seniors, that includes services relating to dispute resolution, be introduced into WA?*

22.1.10 *What would the benefits be for such a service?*

ISSUE 22.2: Building defects

ISSUE

Concern has been raised by residents of retirement villages that some operators are not rectifying building defects when they arise and are passing building rectification costs on to residents through recurrent charges, the imposition of additional levies, or deductions from reserve funds.

Issues may also exist with a lack of transparency by operators in providing relevant information to prospective and existing residents about known building issues, associated rectification planning and any relationships, if they exist, between operators and retirement village developers and builders.

This may be more prevalent where a resident has acquired a unit in a new or staged development or via an off the plan sale, as defects may often only becoming apparent some years after construction is completed.

The most common forms of building defects include water ingress, internal and external wall cracking, roofing and guttering problems and tiling faults.⁹⁹

Building defects that are not properly fixed can have a substantial impact on residents financially, on their health and safety and on the overall amenity of their village. Lack of information about how building defects are being addressed can also lead to disputes and mistrust on the part of residents.

OBJECTIVE

To assess whether there is a need for regulation to require greater transparency and accountability in identifying and rectifying building defects within retirement villages.

Question:

22.2.1 *Have you experienced issues relating to building defects in your retirement village? If so what were they?*

DISCUSSION

There are three main issues that arise in retirement villages regarding building defects — who should be responsible for addressing building defects when they occur, what related information should be disclosed to residents and who should be responsible for the cost of rectification.

⁹⁹ Nicole Johnston with Sacha Reid, *An Examination of Building Defects in Residential Multi-owned properties*, Deakin University, June 2019, 10.

Responsibility for addressing defects

Retirement village legislation requires residence contracts to provide a warranty to the resident that premises in existing villages will be in a reasonable condition when a resident takes possession.¹⁰⁰ There is, however, no specific requirement about the responsibility for rectifying building defects, if they occur.

Building defects are usually dealt with under the building contract and building legislation, where the owner and, to a lesser extent the occupier, may seek remedies for rectifying defects from the builder or developer during a set defect liability time period, (sometimes referred to as a statutory warranty period). The liability period in this context refers to the period of time in which a complaint can be made under the *Building Services (Complaint Resolution and Administration) Act 2011*. Under this Act, a complaint cannot be considered more than six years after completion of the related works. In a retirement village, the responsible party for taking such action is usually the village owner and/or operator. Where the remedies during the set defect liability period are not pursued by the owner or operator of the village, this can mean that defects are not addressed by the appropriate party.

Other issues may also arise that impact the rectification of building defects in a retirement village:

- A change in village ownership may mean that operators who are not the original owners have less recourse against the builder/developer.
- Where an operator is a related entity to a village builder and/or developer there may be a conflict in the operator pursuing the builder to rectify defects. This might increase the chance that costs are shifted on to village residents.

These issues raise the question whether operators should be required under the RV Legislation to rectify any building defects within a reasonable period of time.

Questions:

22.2.2 *Who should be responsible for rectifying building defects within a retirement village, for example village owners/operators, residents or a combination of both?*

22.2.3 *In your view, under what circumstances should an operator be held responsible for rectification work?*

¹⁰⁰ RV Regulation, Regulation 7A, Item 14.

Disclosure

When a resident takes up occupation in a new development, they may not learn of any building defects until after they have signed the contract and moved in. Where building defects are disclosed and steps are taken to remedy defects, residents can be confident that issues are being properly managed. If information about building defects is not disclosed to residents, residents may miss the opportunity to pursue a potential remedy during a statutory defect liability period. This can mean that residents are required to pay for rectifying defects, when they potentially should be more properly addressed by another party.

Information which would be useful to residents to determine whether building defects are adequately being dealt with may include:

- the type and nature of building defects;
- defect rectification planning;
- any applicable statutory defect liability periods; and
- any disputes that the operator may have with the builder and or developer that have an impact on defect rectification.

Questions:

- 22.2.4 *In your experience how is information concerning building defects currently provided to prospective and current residents?*
- 22.2.5 *Should operators be required to disclose known building defects or other related information to residents/prospective residents? If so, what type of information should be required to be disclosed? For example should operators be required under RV Legislation to disclose any relationship they may have with the developer and/or builder of a village?*
- 22.2.6 *Should operators be required under RV Legislation to have a formal transparent building defect identification and rectification process identifying how defects are to be dealt with as they arise?*

Costs of rectification

Residents have raised concerns about operators recovering the cost of fixing building defects directly from residents. This can occur through recurrent charges for maintenance, charging additional levies and/or use of funds from a reserve or sinking fund.

Concerns have also been raised that residents are being required to pay for latent defects that are identified when a residence is being refurbished upon a resident's departure.

If this is occurring, this raises the question of whether operators should be restricted from passing on the cost of rectifying latent building defects to residents.

Other jurisdictions

Most other jurisdictions do not specifically address building defects in their RV Legislation. NSW and the ACT, however, prohibit RV operators passing on or recovering building rectification costs via recurrent charges or capital works funds, if the work arises from a breach of a statutory warranty. The effect of this restriction is that any defect rectification work that falls within the statutory warranty period remains the responsibility of the original operator, or if village ownership has changed, the subsequent village operator.

Questions:

- 22.2.7 *In your experience how is building defect rectification work within retirement villages currently paid for?*
- 22.2.8 *Should operators be permitted to recover building defect rectification costs from residents through recurrent charges or reserve funds?*
- 22.2.9 *If a building defect occurs inside an applicable set defect liability time period should retirement village legislation in WA prohibit an operator from recovering building defect expenses from residents through recurrent charges, levies or a reserve fund?*

ISSUE 22.3: Insurance

ISSUE

Retirement village operators generally take out building insurance that provides coverage for village buildings and infrastructure, including residential premises. Insurance premiums and other associated costs can be recovered from residents as part of the village's recurrent charges.

Residents have reported that they have difficulty obtaining information about insurance arrangements in the village from operators, such as insurance coverage, costs, changes and also the processes involved when an insurance claim is made.

This can cause problems for residents who may find it difficult to determine what is included or excluded from the village's insurance coverage, what insurance costs, including excess payable, that they may be liable for, what changes may have been made to insurance and how and when to make an insurance claim themselves.

OBJECTIVE

To assess the need for improved information disclosure and transparency for residents relating to village building insurance.

Question:

22.3.1 *Have you experienced issues concerning insurance related matters in your retirement village? If so what were they?*

DISCUSSION

Disclosure of insurance arrangements *before entering a village*

Prior to entering into a residence contract to reside in a retirement village, prospective residents are given a disclosure statement with a range of information about the village that assists them in determining if the village is right for them.¹⁰¹

The information provided includes some detail relating to the insurance arrangements of the village, including: whether insurance costs are passed on to residents by the operator, what insurance coverage residents are responsible for arranging themselves, what the village is insured for, the amount of insurance cover, the period of coverage, and the excess payable in the event of a claim being made.

¹⁰¹ RV Act, section 13(2).

Some residents have indicated however that the insurance information provided by operators can be sometimes limited, and may not provide all the specific information they would like or need. Prospective residents can find it difficult to obtain certain information, such as what the insurance taken out by an operator specifically includes and excludes, what the ongoing insurance cost might be and also how the insurance claims process within the village actually works.

It is important for prospective residents to have relevant information about village arrangements prior to signing a contract and moving in to the village. This enables prospective residents to make financial decisions. The level of insurance cover, the costs of that cover and what insurance a resident might be required to take out is information that prospective residents require.

If adequate information is not being provided to incoming residents, the law may need to be changed to require operators to provide more detailed and comprehensive information about village insurance at the time of contracting. This information could be provided for example by requiring further insurance detail be in the disclosure statements provided to prospective residents. Operators could also be required to provide insurance Product Disclosure Statements, an insurance key fact sheet that provides simple, clear explanations of the critical terms and conditions of the insurance, or a combination of all of the above.

Increasing the information operators are required to provide to new residents about insurance arrangements may however make disclosure information too detailed. Details may also need regular updating which increases the compliance burden on industry.

Other jurisdictions

The requirements for disclosure of insurance information to prospective retirement village residents in NSW, VIC and SA is similar to that of WA. In those jurisdictions, the law requires prospective residents to be provided with insurance information generally as part of a disclosure statement, prior to entry into a village. Like the WA requirements, however, the insurance information required to be provided is limited in nature.

Questions:

- 22.3.2 *As a resident or prospective resident, have you encountered problems in obtaining all the insurance information you would like prior to entering a village? If so what were they?*
- 22.3.3 *If more information about insurance is required, what additional information do you think should be provided?*
- 22.3.4 *As an operator, what information about insurance do you provide to new residents? Would increasing the information to be provided cause any problems?*
- 22.3.5 *What in your view would be the best way to provide the additional information, for example increased information within the villages prospective resident disclosure statement?*

Disclosure of insurance arrangements to residents living in a village

Details in residence contracts

Retirement village laws do not say what details about insurance must be included in a residence contract. The content and clarity of the information in contracts can vary widely. Residents have found that the residence contract does not always include a clear statement of rights and obligations relating to insurance.

This means that current residents can find it difficult to understand important aspects of the insurance policies in their village. For example, they may not know about the insurance costs and applicable excesses, coverage and exclusions and the claims process which applies.

A lack of information can lead to an increase in disputes between residents and operators about insurance responsibility and liability, unexpected and unexplained increases in insurance cost or potential delays in the claims process if a claim needs to be lodged.

Requiring certain details about insurance arrangements in residence contracts might assist residents to better understand arrangements. Having all residence contracts specify the same details might also assist. However, as with pre-contractual disclosure, increasing the information required to be in a residence contract could increase the complexity of contracts making them more difficult to understand. If the information needs to be regularly updated this also increases the compliance burden on industry.

Other jurisdictions

Laws in Qld and VIC require details about insurance to be in the residence contract. Laws in VIC require that the residence contract provide information on the insurance policies of the retirement village that the *owner* has taken out. The laws in Qld require that the resident contract include details about the insurance for the retirement village that the owner has taken out *and* the insurance for which the resident is responsible.¹⁰²

In NSW, VIC and the ACT the operator cannot put a provision in the residence contract requiring a resident to take out their own insurance policy. The only exception to this is if a resident needs coverage for a motorised wheelchair.¹⁰³

Questions:

- 22.3.6 *Do you think there should be a requirement that residence contracts include specific information regarding village insurance?*
- 22.3.7 *If so, what information should or should not be required to be provided?*
- 22.3.8 *Should RV Legislation in WA contain a provision that prohibits residence contracts requiring residents, or having them agree to, take out their own insurance policy, except in certain circumstances?*

Ongoing communication and consultation with residents about insurance

Ongoing communication and consultation between operators and residents about village arrangements is important for a successful village community. Insurance arrangements are an area that residents have indicated they have an interest in being kept informed. Changes may occur to insurance arrangements, the level of cover might change, premiums may increase, or claims might need to be made.

These questions ask whether the current communication and consultation between residents and operators about insurance related matters is adequate and whether there is a need for improvements in this area.

¹⁰² Retirement Villages (Contractual Arrangements) Regulations 2017 (VIC), Regulation 11(2)(o); *Retirement Villages Act 1999* (Qld) section 45 (1)(i).

¹⁰³ Retirement Villages Regulation 2017 (NSW), Schedule 3 (3); Retirement Villages (Contractual Arrangements) Regulations 2017, Regulation 10 (b); Retirement Villages Regulations 2013 (ACT), Schedule 2 (2.3).

Questions:

- 22.3.9 *As a current resident have you encountered difficulties in obtaining insurance information in your village? If so what were they?*
- 22.3.10 *As a current resident what information would you like to receive about insurance in your village?*
- 22.3.11 *How are changes to insurance (eg. coverage, claims process, excess, cost) in your village currently communicated? How should changes be communicated?*
- 22.3.12 *Should consultation between operators and residents occur prior to changes to village insurance being made?*
- 22.3.13 *Should resident agreement on insurance changes be sought prior to changes being made?*
- 22.3.14 *Do you have any other feedback in regard to retirement village insurance related matters that you would like to provide?*

ISSUE 22.4: Strata title retirement villages

ISSUE

Approximately eight per cent of the retirement villages in WA are strata title properties (18).¹⁰⁴ In these villages, both the Strata Title Legislation (ST Legislation) and RV Legislation apply. Where there is overlap in what the laws cover, there may be confusion and misunderstanding for both residents and operators.

This part identifies where overlap may exist between the RV and ST Legislation in the areas of pre-contractual disclosure time periods, financial reporting requirements and village rules. It asks whether any issues are arising in these areas and whether there are other areas overlapping between ST and RV Legislation which are posing problems.

OBJECTIVE

To ensure that the regulatory requirements which apply to strata title villages are clear.

ISSUE 22.4.1: Pre-contractual disclosure

DISCUSSION

Disclosure of information

The RV and ST Legislation both require the disclosure of information to prospective residents. The pre-disclosure of information is important to ensure that residents are provided with an opportunity to gain an understanding of the contractual arrangements surrounding their proposed investment. If the requirements are not clear, it makes it difficult for operators to know how to comply with the law. Further, if pre-contractual disclosure is not clear, it may make it more difficult for consumers to make an informed decision about the contracts to purchase a retirement village strata property.

The information required to be provided to the resident is:

- the prescribed disclosure statement (prescribed in Form 1 of the RV Regulations);
- a prescribed notice of rights under sections 13 and 14 of the RV Act;
- a copy of the residence rules;
- a copy of any applicable code; and
- any other documents prescribed under the regulations.¹⁰⁵

¹⁰⁴ Department of Mines, Industry Regulation and Safety (WA), Property Industries Directorate Data, 2021.

¹⁰⁵ RV Act, section 15(2).

The RV Regulations require that copies of all the contracts that a consumer must agree in order to reside in the village are included in pre-contract disclosure.¹⁰⁶ The RV Legislation requires operators to provide residents with at least 10 days to consider these contracts.¹⁰⁷ Form 1 requires the disclosure of information for prospective residents and includes whether an aged care facility is adjacent to the village, the amount of premium to be paid, amount of recurrent charges and exit fees.

Where the residence contract relates to a strata title retirement village, Form 1 requires the operator to disclose additional information about the residents' obligations under the ST Act to the prospective resident. This information includes whether there is a body corporate strata levy fee for the strata property and if so, how much that fee is and whether communal amenities form part of the common property in the village.

The ST Legislation also provides that the seller must disclose all relevant information to a resident prior to entering into a contract to purchase a strata unit in a retirement village. Section 156 of the ST Act sets out that the seller of a strata lot must give the buyer certain information before the buyer signs the contract of sale. The information is required to be disclosed in a pre-contractual disclosure statement¹⁰⁸ and includes minutes of the most recent annual general meeting,¹⁰⁹ strata by-laws¹¹⁰ and statements of estimated income for the strata company.¹¹¹

Unlike the RV Act however, the ST Legislation does not stipulate a time period for disclosure of this information to prospective residents.

TABLE 22.4.1: PRE-CONTRACTUAL DISCLOSURE UNDER RETIREMENT VILLAGE AND STRATA LAWS

	RV LEGISLATION	ST ACT
Disclosure to be made prior to person entering into a residence contract	✓	✓
Minimum time period of disclosure prior to a person entering into a residence contract	✓ (At least 10 days prior)	✗ (No time period specified)

¹⁰⁶ RV Regulations, regulation 6(1)(a).

¹⁰⁷ RV Act, RV Regulations, section 13 and schedule 1, Form 1A and Form 1AA.

¹⁰⁸ Landgate Pre-contractual Disclosure Statement to the Buyer, Approved Form 2020-44221.

¹⁰⁹ ST Act, section 156(1)(b)(v).

¹¹⁰ ST Act, section 156(1)(b)(ii).

¹¹¹ ST Act, section 156(4)(a).

Although the RV Legislation¹¹² requires that copies of all contracts that the prospective resident must agree in order to reside at the village are included in pre-contract disclosure, it is not clear whether operators understand that this requirement applies to strata sales contracts. The different disclosure time periods under the RV Legislation and ST Act potentially causes confusion as to how the disclosure process should occur. This is problematic because a resident may not be able to review all relevant information about the contract at the same time making it difficult for the resident to understand the contracts and how they both interact.

Two lots of separate disclosure information may also be confusing to a prospective resident. While Form 1 required under the RV Act provides some specific information about the strata requirements in the context of the RV Act, it refers only to corporate strata levy fees and whether communal amenities form part of the common property. It may be that additional information about the strata title retirement village would be of use to consumers in the retirement village disclosure statement.

Questions:

22.4.1.1 *(For residents) In your experience, did you have sufficient information about the strata sales contract at the time of entering into the residence contract?*

(For operators) In your experience, are the requirements for pre-contractual disclosure for strata retirement villages easy to comply with?

22.4.1.2 *How could pre-disclosure information for strata title RV units be improved? Would a single disclosure statement assist?*

Cooling-off period after signing contracts

A cooling-off period is a safeguard designed to give consumers the opportunity to change their minds about a purchase or agreement they have made.¹¹³ The RV Legislation provides for a seven day cooling-off period after the contract is entered into, allowing the resident to rescind the residence contract during that time if they change their mind.¹¹⁴ The ST Act does not have a cooling-off period. However, if a notifiable variation occurs prior to settlement the purchaser can rescind the contract.¹¹⁵

¹¹² RV Regulations, regulation 6(1)(a).

¹¹³ <https://www.accc.gov.au/consumers/contracts-agreements/entering-into-a-contract>.

¹¹⁴ RV Act, section 14.

¹¹⁵ ST Act, section 157. ST Act, section 160(b) provides that the buyer may avoid a contract for sale if the materially prejudiced by the information or document disclosed.

TABLE 22.4.2: COOLING-OFF PERIODS UNDER THE RETIREMENT VILLAGE AND STRATA LAWS

	RV LEGISLATION	ST ACT
Cooling-off period after signing the contract	✓ (7 days)	✗
Strata company to notify prospective purchaser of if a 'notifiable variation' occurs prior to settlement	✗	✓

In light of the different provisions for rescinding contracts under the RV and ST Acts, two problems may occur. Firstly, a purchaser may rescind a retirement village residence contract within seven days after signing, but then have no opportunity to exit the strata sales contract unless there is a clause in that contract which enables this to occur.

Secondly, a purchaser may need to void the sales contract due to a 'notifiable variation',¹¹⁶ but be unable to rescind the retirement village residence contract unless there is equally a clause in the contract. This situation would only occur in an off the plan sale.

Relying on contractual provisions to address this issue may not be sufficient. If not, it may be that the RV and ST Legislation need to be amended to clarify a consumer's rights around the cooling-off period for strata title retirement villages.

Part 20 of this paper proposes that a cooling-off period occur for each additional residence contract that is not signed at the same time as the first residence contract. This part asks further questions about the strata contract.

Questions:

- 22.4.1.3 *Have you experienced any problems with the cooling-off period or notifiable variation period relating to the purchase / sale of a RV strata unit? If so, please provide details.*
- 22.4.1.4 *If you have been involved in a sale or purchase of a strata retirement village, how has the retirement village cooling-off period been managed in your contracts?*

¹¹⁶ ST Act, section 157(3) provides that seller must inform buyer of notifiable variation as soon as possible if seller becomes aware of variation less than 15 working days before settlement, and in other cases, not later than 10 working days after seller becomes aware. A buyer may subsequently 'avoid a contract' as outlined in section 161 of the ST Act.

ISSUE 22.4.2: Financial reporting

ISSUE

The RV and ST Legislation require operators and strata companies to separately report information to residents about the financial management of their strata title village. However, the financial information required by each Act (RV or ST) relates to different aspects of the village. The RV budget and financial statements relate to expenses for the operation of the retirement village. The ST budget and financial statements relate only to expenses for strata title common property. The strata title common property will differ for each village depending on the strata title plan.

Three issues arise with the financial reporting requirements under the RV and ST Acts:

- a) As noted above, ST and RV financial statements and budgets cover different aspects of the retirement village. The RV statement will cover the operating costs for the whole village and the ST statements will cover common property which will also be part of the village. Depending on how the statements are prepared, it may be difficult for residents to cross-reference and understand exactly what the expenses relate to.
- b) There are different levels of detail required in the ST and RV financial reports. The RV Legislation requires operators to ensure that they provide residents with a proposed operating budget for the next financial year of the retirement village,¹¹⁷ which must include separate line items for matters such as rental income, finance costs, income from recurrent charges and insurance expenses.¹¹⁸ The ST legislation also requires the strata company to prepare a budget for each financial year, however, there is no requirement for the ST budget to contain line items.¹¹⁹

The RV Legislation also requires the operator to prepare quarterly and annual financial statements including a statement of income for each line item included in the proposed budget.¹²⁰ Similarly, the ST Legislation requires the strata company to prepare a statement of accounts for each financial year showing the assets and liabilities and the income and expenditure of the strata company for the financial year.¹²¹ The ST Legislation does not contain any provision requiring the financial statements to contain line items.

¹¹⁷ RV Code, clause 17(1)(a).

¹¹⁸ RV Code, clause 17(3).

¹¹⁹ ST Act, section 102.

¹²⁰ RV Code, clauses 18(3) and 19(4).

¹²¹ ST Act, section 101.

For reserve fund budgets, the RV Legislation requires the budget to contain detailed line items including the opening balance, interest earned, other income sources and income from recurrent charges.¹²² The ST Legislation requires that the strata company must have a 10 year plan for a reserve fund,¹²³ setting out the estimated costs for the maintenance, repairs, renewal or replacement.¹²⁴ The ST Legislation does not require the reserve fund budget to contain line items.

The lack of line item detail in the ST financial statements and budgets raises questions as to whether residents in a strata title retirement village who are receiving two sets of financial information about the village are getting sufficient detail about the financial information to understand the expenses being charged to residents. For instance, the residents may not be able to check if costs are duplicated between the ST expenditure and the RV expenditure.

- c) RV and ST meetings around budgets and financial statements are not held at the same time.¹²⁵ RV Legislation requires the administering body of a retirement village to hold an annual general meeting of the residents within five months after the end of each financial year to deal with financial statements.¹²⁶ A strata company is required to hold an annual general meeting once every 12 months at which there is consideration of accounts.¹²⁷ Separate meetings may make it difficult for a resident to understand the interaction between the accounts and business of the retirement village and that of the strata. It may also be difficult for the resident to understand what rights they have under each of the laws. Conversely, a single meeting may also confuse residents if an explanation is not about how the information is connected.

Questions:

22.4.2.1 *Are you aware of any difficulties with budgets or financial statements in a strata RV? In your experience are these easy to understand?*

22.4.2.2 *In your experience, have you experienced any difficulties with the RV meetings and strata meetings being held separately?*

¹²² RV Code, clause 17(4).

¹²³ ST Act, section 100(2) provides that reserve fund only required for a 'designated company'.

¹²⁴ ST Act, section 100(2A)(ii).

¹²⁵ RV Code, clause 26(13) provides that a meeting of residents under the RV Code must not be held simultaneously with a meeting held under the ST Act if the retirement village is comprised in a strata plan or survey-strata plan registered under the ST Act.

¹²⁶ RV Code, clause 26(1).

¹²⁷ ST Act, section 127(3)(b).

ISSUE 22.4.3: Rules governing occupation

ISSUE

A strata title retirement village will have two sets of rules; by-laws and residence rules. By-laws are administered by the strata company¹²⁸ and residence rules by the RV operator.¹²⁹ Problems may arise when the by-laws and residence rules are inconsistent. This makes it difficult for residents and operators to determine which rules apply.

EXAMPLE 22.4.3.1: INCONSISTENCY IN ST ACT BY-LAWS AND RV ACT RESIDENCE RULES

Case study

A resident in a retirement village strata title property owned two dogs which she kept at her property. Neighbours complained to the strata company about the dogs barking late at night. The strata company made enquiries and was satisfied that the resident's barking dogs were causing 'adverse consequences' for the neighbouring strata residents. The strata company advised the resident that by-laws prohibited residents from having pets at the property. The resident disagreed and said that she was permitted to have pets under the residence rules. The strata company gave the resident further breach notices about the pets, which she failed to comply with. The strata company applied to the SAT who issued an order requiring the removal of the resident's pets from the property.

Penalties for non-compliance also differ for the by-laws and residence rules. The ST Legislation allows a strata company to apply to the SAT seeking an order to enforce a by-law against a resident.¹³⁰ The RV Legislation does not contain any provisions allowing the operator to seek enforcement of the residence rules, having to rely solely on the contractual arrangements between the resident and operator. The inconsistencies mean that retirement village strata residents may find themselves in a situation where their behaviour is compliant with one set of rules but exposed to a penalty for non-compliance under the other set of rules.

The RV Legislation in NSW have addressed this issue and provide that where a RV unit is part of a strata or community land scheme, the by-laws will apply over the residence rules.¹³¹

Questions:

- 22.4.3.1 *Have you experienced a situation where there was a conflict between the residence rules and by-laws in your retirement village? Please explain how the conflict was managed.*
- 22.4.3.2 *In your view, should residents who own a RV unit which is part of a strata scheme be exempted from complying with the residence rules, only being required to comply with the strata by-laws? Please explain your reasons.*

¹²⁸ ST Act, section 44 provides the strata company with the authority to make governance or conduct by-laws.

¹²⁹ RV Regulations, Regulation 23 provides that the administering body must establish a set of residence rules covering the rights and obligations of the residents of the RV which must be 'clear and consistent' with the laws and in consultation with residents.

¹³⁰ ST Act, section 47(1)(b).

¹³¹ RV Act (NSW), section 45.

ISSUE 22.5: Provision of private home care services in retirement villages

ISSUE

Retirement villages are designed for independent living in the same way that a person lives in their own home. Persons who are no longer able to live independently would usually transition to an aged care facility or another residence where they can be better cared for. However, research indicates that many older Australians prefer to stay in their own home as they age.¹³² Home care services enable the older people to continue living at home rather than entering an aged care facility or nursing home.

These services are now also available in retirement villages to residents who require assistance with personal needs.

This part considers issues which may be arising with the provision of private home care services in retirement villages. A question is also asked more broadly about the retirement village sector and what changes may be expected in the future to inform future policy direction.

OBJECTIVE

To seek stakeholder feedback on whether there are any problems being experienced in the delivery of private home care services in retirement villages and the future direction of retirement village living.

DISCUSSION

Home care services can include nursing care, disability support, domestic help, meal preparation, cleaning, gardening and home maintenance. There is now considerable choice of services provided at competitive prices.

Residents of retirement villages may access home care services either through Commonwealth Government funded home care packages¹³³ or by privately engaging and paying for the services of home care providers. Privately provided home care services are not regulated under the AC Act in terms of the level and standard of care and services provided to recipients.

¹³² The proportion of older Australian in the total population is growing. In 2017, 15 percent of Australians (3.8 million) were aged 65 and over and this proportion is projected to grow steadily over the coming decades. The Property Council of Australia in its paper *National overview of the retirement village sector* October 2014 forecast high growth for the population of seniors in Australia and that this will drive growth in demand for age appropriate accommodation options, including retirement villages. ABS 4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015; data from a 2015 survey revealed that most older Australians (94.8% of those aged 65 years and over) were living in household (this includes self-care retirement units in retirement villages, that one in twenty (5.2%) lived in cared accommodation such as nursing homes and aged care hostels, and over one-quarter (26.8%) of all older people lived alone.

¹³³ Victoria State Government Justice and Community Safety, *Options for reforming the Retirement Villages Act 1986*, April 2021. This paper defines the term 'home care package' as aged care assistance for older persons (or younger persons with special needs) who need help with everyday tasks or who have complex or intensive care needs requiring the delivery of coordinated services, under which service providers are paid subsidies for the provision of care services according to four levels of assessed need: Basic care needs (approximately \$8,750 a year); Low care needs (approximately \$15,250 a year); Intermediate care needs (approximately \$33,500 a year); and High care needs (approximately \$50,750 a year).

Other laws however may apply. For example, there are various health laws that govern the practices of people who may be involved in the delivery of private home care services.¹³⁴ In addition, the Australian Consumer Law will apply to the delivery and standard of services.

More retirement villages are now offering home care services as part of their services for residents. There are indications that some retirement villages are moving to a model of continuum of care, which integrates low and high level care without a resident being required to move out of the village.

As retirement villages move more into the provision of home care services enabling residents to possibly stay longer in the village, a question arises as to whether existing laws are sufficient to protect residents receiving these services.

There may also be issues relating to access and choice of home care services in retirement villages. There are a considerable number of private service providers available in the market. Some retirement village operators have also formed their own companies to provide private home care services to residents.

Other jurisdictions

Other jurisdictions are also considering issues relating to aged care and home care services in retirement villages. The 2015 Productivity Commission Research Report on housing decisions of older Australians acknowledged the importance of the availability, cost and growing demand of home care services in retirement villages.¹³⁵

The 2017 Greiner report in NSW recognised developments in the industry where older models of service delivery may no longer fit developing models of care and accommodation that are growing in response to an ageing population and the broader policy environment of ageing in place. The report considered that the principles of consumer choice and competition in the regulation of the retirement village sector are required, particularly where operators offer to provide home care services as part of retirement village contractual arrangements.¹³⁶

The 2019 review of retirement villages' legislation in VIC considered that with the evolution of retirement villages providing care and support services to enable older residents to remain in their village homes longer, comes a greater responsibility for retirement village operators to ensure the safety and welfare of these residents.¹³⁷

¹³⁴ National health laws govern health care professions such as doctors, nurses, physiotherapists, massage therapists, and naturopaths.

¹³⁵ Productivity Commission Research Paper, *Housing Decisions of Older Australians*, December 2015, 6, 11, 16.

¹³⁶ New South Wales Government, *Inquiry into the NSW Retirement Village Sector* Greiner Report December 2017, 109

¹³⁷ Consumer Affairs Victoria *Review of the Retirement Villages Act 1986* (VIC), Issues Paper, Dec 2019, part 4.2.3, 43.

Questions:

- 22.5.1 *Have you experienced or are you aware of any problems in relation to the provision of private home care services in retirement villages?*
- 22.5.2 *Do you have any other feedback about the provision of private home care services in retirement villages in terms of matters such as access, choice, cost, fair business practices, or any other matters that you would like to raise?*
- 22.5.3 *How do you view the future direction of retirement village living. Is the assumption that retirement villages are for independent living still relevant? Please give reasons for your answer.*

APPENDIX 1: THE SUPREME COURT CASES

INTRODUCTION

In 2013 and 2014, the Supreme Court made two important decisions regarding the RV Act terms and its memorial, statutory charge and RVS 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 RVS.

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 a 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 RVS 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”.¹³⁸

Findings on key RV Act terms

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

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

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

¹³⁸ *Hollywood* case, paragraph 3.

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 RVS. It noted for example that there were statutory charges against the land that had not been satisfied. The operator argued that when the RVS 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 RVS for RV Act purposes. This meant that terminating the RVS 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 RVS.¹³⁹

Similarly, the court found that removing a RV Act memorial from land would not mean that the RVS 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 complex¹⁴⁰.

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;¹⁴¹ and
- outlining grounds on which the Supreme Court might approve RVS termination.¹⁴²

The court's discussion of the termination provisions highlighted some gaps in the RV Legislation. In particular, the intent to cease using land for a RVS 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.

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 RVS 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.

¹³⁹ *Hollywood* case, paragraphs 152 to 157.

¹⁴⁰ *Hollywood* case, paragraphs 98, 122, 148, 152 to 157 and 160 to 163.

¹⁴¹ *Hollywood* case, paragraph 59.

¹⁴² See *Hollywood* case, paragraphs 55, 127, 165 to 177 and 189 to 194.

The operator applied to the Supreme Court for approval to terminate the RVS 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.¹⁴³

As the same RV Act memorial was lodged against multiple sites, and the Bentley site was continuing to be used for a RVS, 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 RVS (in which case, the RVS 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 RVS at some time in the future. The Carlisle complex was emptied in 2008 in order to implement the RVS, not to terminate it. The 2012 premium payment at Carlisle meant that the Carlisle site was in fact used for a RVS.¹⁴⁴ Once a RVS 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 RVS could not be terminated without its approval.¹⁴⁵

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).

It decided on the facts and circumstances that they were and that they were used for the purposes of different RVSs.¹⁴⁶ 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 RVS. It approved termination subject to the operator taking steps to correct the Register of Titles with regard to the RV Act memorial.¹⁴⁷

¹⁴³ *Swancare* case, paragraphs 132 to 137.

¹⁴⁴ *Swancare* case, paragraphs 42 to 45, 59 to 63 and 90 to 109.

¹⁴⁵ *Swancare* case, paragraph 95.

¹⁴⁶ *Swancare* case, paragraphs 72 to 93.

¹³⁸ *Swancare* case, paragraphs 94 to 110 and 163 to 165

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.¹⁴⁸ 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 RVS 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.¹⁴⁹ 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 RVSs.¹⁵⁰ 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 RVS that had previously applied to the vacated site because this is not necessary when no person admitted under the RVS remains living on the complex.

Matters the Supreme Court considered in deciding whether there were two villages and whether they operated under the same RVS

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

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;

¹⁴⁸ [2019] WASC 2013 paragraph 15 (*Amana* case)

¹⁴⁹ *Amana* case, paragraph 52.

¹⁵⁰ *Amana* case, paragraph 48.

- (the *Amana* case only) State and Federal government funding was specific to an individual location; and
- each location had a different name.¹⁵¹

Although the *Hollywood* case found a RVS has three elements only, it can be seen that in the *Swan care* and *Amana* cases the court considered additional features in deciding that the villages were not used for the purposes of the same RVS. 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 RVS may overlap, depending on the question being asked.

¹⁵¹ 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 RVSs for each location.

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