



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



Decision Regulatory Impact Statement

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

January 2022

Decision Regulatory Impact Statement

This Decision Regulatory Impact Statement (DRIS) has been prepared in compliance with the Western Australian Government's requirement for Regulatory Impact Assessment.

The purpose of this DRIS is to recommend the preferred options for regulating the retirement villages industry in WA.

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GLOSSARY

The following is a summary of key terms frequently used in this document.

Key Terms	Definition
AC Act	<i>Aged Care Act 1997</i> (Cth)
ACL	Australian Consumer Law as applied in Western Australia by the <i>Fair Trading Act 2010</i> (WA)
ARCF	Average Resident Comparison Figure
CCLSWA	Consumer Credit Legal Service of Western Australia
Consumer Protection	The Department of Mines, Industry Regulation and Safety – Consumer Protection Division
COTA	The Council on the Ageing Western Australia (COTA (WA))
CRIS	Consultation Regulatory Impact Statement
DAP	Daily Accommodation Payment
DMF	Deferred Management Fee
DRIS	Decision Regulatory Impact Statement
Final Report	Statutory Review of Retirement Villages Legislation Final Report, November 2010
2002 Statutory Review	Review of the Regulation of the Western Australian Retirement Village Industry Final Report February 2002
MEEP	Mandatory exit entitlement payment
MRF	Mandatory reserve fund
Operator	Operator/owner/manager of a retirement village
Industry peak bodies	Property Council of Australia, Retirement Living Council, Leading Age Services Australia (LASA) and Aged and Community Services Australia (ACSA)
RACF	Residential Aged Care Facility
RAD	Refundable Accommodation Deposit
RIA	Regulatory Impact Assessment
RT Act	<i>Residential Tenancies Act 1987</i> (WA)
RV	Retirement village
RV Act	<i>Retirement Villages Act 1992</i> (WA)
RV Code	Fair Trading (Retirement Villages Interim Code) Regulations (No.2) 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
ST Act	<i>Strata Titles Act 1985</i> (WA)
WARVRA	Western Australian Retirement Villages Residents Association
WATC	Western Australian Treasury Corporation

EXECUTIVE SUMMARY

The *Retirement Villages Act 1992* (WA) (RV Act) is the law that regulates a form of long term accommodation for older persons under a particular financial model. Under this model, an upfront payment is made to an operator for the ongoing provision of accommodation, amenities, services and management in a retirement village. The RV Act is supported by the *Retirement Villages Regulations 1992* (WA) (RV Regulations) and the Fair Trading (Retirement Villages Interim Code) Regulations (RV Code) made under the *Fair Trading Act 2010* (WA).

The RV Act aims to protect residents' financial investment through a statutory charge over the retirement village (RV) land, and to provide certain protections to consumers who enter into long term residence contracts with an operator.

The Final Report¹ of the statutory review of the RV Act was published in November 2010 containing over 100 recommendations and incorporating an additional 50 recommendations of an earlier review.² Stage 1 of the implementation of the recommendations occurred between 2012 and 2016.

This Decision Regulatory Impact Statement (DRIS) contains the recommendations for the implementation of the remaining Final Report recommendations (Stage 2 reforms). It also contains recommendations for additional issues which have arisen since the Final Report. The DRIS recommendations are presented in five categories, which represent the key areas of concern for residents and operators of RVs:

1. information disclosure;
2. exit entitlements;
3. life in the village;
4. village land; and
5. village changes.

1. Information disclosure

A residence contract for a RV involves complex financial arrangements. The retirement village product (RV product) is purchased under a price structure that represents different payments over time, both before, during, and at the end of, the residency. RV tenure ranges from long term leasehold to freeholds, such as restricted strata and purple title. Consumers can be unfamiliar with the financial arrangements in RV living, as well as the tenure restrictions. The recommendations in this section aim to improve the information provided to consumers about the RV product so they better understand the nature of what they are purchasing and the cost structure and can make better decisions for themselves.

¹ Statutory Review of Retirement Villages Legislation Final Report, November 2010.

² Review of the Regulation of the Western Australian Retirement Village Industry Final Report February 2002.

2. Exit Entitlements

Exit entitlements are funds that are required to be paid to a resident at the end of their residency. These are generally the balance of the upfront payment made by the resident less exit fees charged by the operator, such as a deferred management fee (DMF) and refurbishment fees. Many residence contracts provide that a resident's exit entitlement is not payable until a new resident has paid their upfront payment. If a new resident is not found quickly, this can mean that residents departing a RV may wait for many years for payment of their exit entitlement. The average time for exit entitlement payment in Western Australia (WA) is 14 months. Some residents can wait up to three to four years. This is causing hardship to former residents and their families. The recommendations in this part aim to provide a fairer balance between residents and operators in respect of the timing of the payment of exit entitlements and to reduce the hardship being experienced by former RV residents.

3. Life in the Village

RV living is a form of communal living, with the operation and maintenance of the village managed by the operator. Residents pay for the expenses of the RV operation by way of recurrent charges and other fees. The RV Act imposes certain requirements on the operator for the management and maintenance of the village. The recommendations in this part aim to improve consumer protections around the management of the RV by the operator, the financial arrangements for the operation of the village and the maintenance of capital items in the village.

4. Village land

One of the primary consumer protections under the RV Act is the statutory charge over the land used for a RV that secures the residents' exit entitlements. A memorial is required to be placed over RV land by the owner of the land as public notification of this security. The recommendations in this part aim to clarify the memorial requirements in the RV Act to ensure that a resident's contractual interest in the village is sufficiently protected, whilst being sufficiently flexible to support changes that an operator may wish to make to the village land. The recommendations also address issues raised with the RV Act in two Supreme Court cases (Hollywood case (2013) and Swancare case (2014)).³

³ *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* [2013] WASC 219 (Hollywood case).
Swancare Group Inc v Commissioner for Consumer Protection [2014] WASC 80 (Swancare case).

5. Village changes

Residents of RVs enter into long term agreements with an operator for accommodation, amenities and services and management of the RV. The average stay in villages for a resident in WA varies from between 8.3 to 11.3 years.⁴ Residents are entitled to expect that the accommodation, amenities and services and management that they purchased will be provided for the length of their stay. However, RVs are businesses that must remain viable in the market if they are to survive. Operators need to respond to consumer expectations and ensure village viability in changing market conditions. RVs also need to be upgraded from time to time to ensure they remain suitable for residents. An operator may need to make significant changes to a village to enable these things to occur. The recommendations in this part set out a new process for operators to make significant changes to a RV allowing operators to make a wider range of changes than can currently occur, subject to safeguards for residents' interests. The process involves resident consultation, State Administrative Tribunal (SAT) approval for changes that have potential to impact residents' security of tenure or financial security or that are otherwise complex and depend on the ability of the SAT to resolve disputes that may arise.

⁴ WATC survey results.

SUMMARY OF RECOMMENDATIONS

Consumer Protection recommends the following:

Information disclosure

1. Describing the product in the RV Act

- 1.1 Amend the *Retirement Villages Act 1992* (WA) (RV Act) to ensure that the definitions of ‘retirement village’ and ‘residence contract’ include all the elements of the retirement village product (RV product) – residential premises, amenities and services and managed community.
- 1.2 Include the following additional features:
 - a) definition for retirement village (RV) – identify the residential premises, amenities and services and management of the community elements of the RV product as those set out in the residence contract; and
 - b) definition for residence contract – expressly identify that a residence contract includes arrangements pertaining to the managed community.
- 1.3 Conduct further consultation during drafting on the term to be used to capture operator management of communal matters beyond land and infrastructure.
- 1.4 Depending on Parliamentary Counsel’s advice, recommendations 1.1.1 and 1.1.2 may be best achieved through introducing a new term ‘retirement village product’ to use in these amendments.

2. Improving consumer understanding of RV product and price

- 2.1 Amend the *Retirement Villages Act 1992* (WA) (RV Act) to require that:
 - a) advertisements or marketing material for a retirement village (RV) include the specific type of tenure offered, and that accommodation falls under the RV Act and is provided in a managed community with non-elective amenities and services in accordance with prescribed requirements;
 - b) advertising and marketing of the retirement village product (RV product) price provide additional and clearer information regarding the total cost structure of the RV product in accordance with prescribed requirements; and
 - c) operators make a key summary of the fees and charges associated with the RV product publically available in accordance with prescribed requirements to assist consumers to better understand and compare the total cost of the RV product.
- 2.2 Engage with operator and resident stakeholders about the prescribed requirements for recommendations 2.1 a), b) and c) and develop options to simplify the information that is required as part of the Retirement Village Regulation 1992 (WA) (RV Regulations), Form 1, in the pre-contract disclosure phase.

- 2.3 Include a transition period of 12 months in the RV Act for recommendations 2.1 a), b) and c) to take effect.
- 2.4 Subject to resourcing, Consumer Protection, develop an information campaign on the RV product contract types and costs (including the differences between this and other residential accommodation).

3. Community arrangements

- 3.1 Insert into the *Retirement Villages Act 1992* (WA) (RV Act) a new term 'community arrangements' for the features of the scheme or arrangements under which a retirement village (RV) operates that are the same or consistent for all residents.
- 3.2 Conduct further consultation during drafting:
 - a) about what matters are considered community arrangements, particularly about what financial arrangements may be community arrangements; and
 - b) as to how community arrangements will be disclosed (including in a way that permits prescribed contracts terms to be reduced).

4. Multiple contracts

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to provide that:

- a) pre-contract disclosure requirements only apply to the first residence contract that a prospective resident is asked to sign;
- b) prospective residents must be given at least 10 working days to consider any additional residence contracts that are not signed at the same time as the first residence contract;
- c) prior to signing a second contract, an operator disclose any variation to the pre-contract disclosure information previously provided; and
- d) consumer cooling-off rights:
 - i) apply to each residence contract that a prospective resident must sign;
 - ii) have effect even though the contract may be subject to the *Sale of Land Act 1970* (WA) (SL Act); and
 - iii) do not derogate from the SL Act rights.

5. Meaning of RV 'scheme' in definition of residence contract

Amend the *Retirement Villages Act 1992* (WA) (RV Act), section 3(1), to clarify the definitions for 'retirement village scheme' and 'residence contract' so that it no longer provides that the word 'scheme', when used alone, has the same meaning as 'retirement village scheme'.

6. Premium payments to legal entities

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to ensure that RV Act protections apply to all premiums regardless of the entity to whom they are paid.

7. Definition of premium

Do not implement CRIS 3, proposal 16.2, which proposed that the *Retirement Villages Act 1992* (WA) (RV Act) definition of premium be amended to specifically include all payments made by a person in consideration of, or in contemplation of, admission to a retirement village (RV), regardless of when the payment is made.

8. Public database of retirement villages

8.1 Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) require operators to provide the Commissioner for Consumer Protection (Commissioner) with information and updates to support a database of the following basic information:
 - i) the name of the retirement village (RV) and street address;
 - ii) the name and contact details of the operator;
 - iii) the total number of premises in the RV;
 - iv) tenure details, including the number of freehold (strata and purple title), lease, licence, and rental premises; and
 - v) the memorial number of the RV.
- b) ensure that the requirement for operators to provide and update information is enforceable and that penalties will apply for non-compliance.

8.2 Do not implement CRIS 3 proposal 13.1 (Final Report recommendation 86) which proposed to restrict the use of the term 'retirement village' in the name of a village.

Exit entitlements

9. Statutory time limit for payment of exit entitlement

9.1 Amend the *Retirement Villages Act 1992* (WA) (RV Act) to introduce a 12 month statutory time limit for exit entitlement payments and to provide that:

For residents who are residing at the retirement village (RV) at the time of the commencement of the new provision (12 months after commencement of the legislation):

- a) the 12 month time period starts when the resident permanently departs the RV.

For residents who departed after the legislation commences but before the MEEP provision commences:

- a) the 12 month time period starts when the provision commences (not when the resident departed).

For residents who have already departed (former residents) the RV at the time of the commencement of the legislation:

- a) the 12 month time period starts when the provision commences (not the date when the resident departed).

For both former and current residents, the amendments to include provisions to ensure:

- a) the Mandatory Exit Entitlement Payment (MEEP) time limit applies to current and former residents from the date of the commencement of the provision (12 months after commencement of the legislation);
- b) the MEEP applies to all residents, regardless of tenure type;
- c) a method for calculating an exit entitlement where an agreement between the operator and resident cannot be reached, with further prescription in regulations;
- d) strata and purple title contracts to specify that the operator must pay the exit entitlement; and
- e) operators have the ability to apply to the State Administrative Tribunal (SAT) for a time extension in the case of financial hardship.

10. Aged care rule

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to provide for payment of daily accommodation fees (DAP) for residents entering aged care (aged care rule) and to provide that:

- a) the aged care rule apply to all residents, regardless of tenure type;
- b) the aged care rule apply if the resident is entitled to an exit entitlement and requests that the DAP be paid by the operator;
- c) any DAP paid to a resident will be deducted from any Mandatory Exit Entitlement Payment (MEEP) due;
- d) transition arrangements will apply to the aged care rule for both current and former residents so that the requirements will apply from the date of the commencement of the provision (12 months after commencement of legislation);
- e) there be capacity for operators to apply to the State Administrative Tribunal (SAT) for a time extension in the case of financial hardship; and
- f) a transitional period of 12 months be applied from the passing of legislation.

11. Cap on recurrent charges

11.1 If the proposed Maximum Exit Entitlement Payment (MEEP) reform is implemented:

- a) amend the *Retirement Villages Act 1992* (WA) (RV Act) to provide that any resident liability for recurrent charges for strata and purple title retirement village (RV) properties cease after the time limit for the MEEP has been reached; and
- b) do not implement CRIS 2, proposal 6.3 to expand the current caps on paying recurrent charges after leaving a RV to apply to all former residents regardless of property ownership model.

11.2 If the proposed MEEP reform is not implemented, amend the RV Act to provide that the current caps on paying recurrent charges after leaving a RV apply to all former residents regardless of property ownership model.

12. Definition of term 'exit entitlement'

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) 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;
- b) use the term 'exit entitlement' in relevant provisions in the RV Act, including sections 19 to 21; and
- c) prohibit terms in residence contracts that purport to confer a right to payment from a person who is not a party to a contract.

Life in the village

13. Operator and resident conduct provisions

13.1 Amend the *Retirement Villages Act 1992* (WA) (RV Act) to insert the following new conduct obligations for operators and residents:

An operator of a retirement village (RV) must:

- a) have knowledge and understanding of all relevant laws;
- b) have regard to best interests of residents;
- c) exercise skill, care and diligence;
- d) act with honesty, fairness and professionalism;
- e) act in good faith;
- f) protect information – keep it confidential and not use it improperly;
- g) not use their position improperly; and
- h) manage conflicts of interest.

A resident of a RV must:

- a) respect the peace, comfort and privacy of other residents and persons in the RV;

- b) not harass or intimidate other residents and persons in the RV (including the operator and any person employed in the retirement village scheme (RVS));
- c) not act in a manner that may place the safety of other residents and persons in the RV at risk of harm; and
- d) comply with the residence rules.

13.2 Amend the RV Act to provide:

- a) the State Administrative Tribunal (SAT) with jurisdiction to make orders for conduct improvement and impose penalties where conduct provisions have been breached; and
- b) appropriate penalties for non-compliance with the prescribed rules of conduct.

14. Budget obligations

Amend the *Retirement Villages Act 1992 (WA)* (RV Act) to:

- a) require operators to meet with residents' committees, or sub-committees (such as finance sub-committees) if they exist, to consult with such committees and negotiate annual budgets, prior to and in addition to the required wider retirement village (RV) annual budget meeting;
- b) move the budget and financial requirements from the Fair Trading (Retirement Villages Interim Code) Regulations 2021 (WA) (RV Code) to the Retirement Villages Regulations 1992 (WA) (RV Regulations) as offence provisions; and
- c) introduce into the RV Act a power by which the Commissioner for Consumer Protection (Commissioner) could order an operator that has not met its budget process obligations to do so.

15. Rent and sub-letting

Amend the *Retirement Villages Act 1992 (WA)* (RV Act) to include a provision that gives a retirement village (RV) operator an express power to terminate a fixed term lease and seek recovery of the RV unit.

16. Mandatory reserve funds

16.1.1 Amend the *Retirement Villages Act 1992 (WA)* (RV Act) to:

- a) require operators to establish a mandatory reserve fund (MRF) within two years of the commencement of the legislation;
- b) require operators to determine the amounts to be raised for payment into the reserve fund, ensuring that they are sufficient to maintain the retirement village (RV) in a reasonable condition, having regard to the age and prospective life of the capital items;

- c) prescribe regulations to stipulate that reserve funds are to be held in an Authorised Deposit Institute (ADI) account, along with the purposes for which a reserve fund may or may not be used;
- d) enable residents to make an application to the State Administrative Tribunal (SAT) for a matter to be reviewed and determined where they believe that the application of a levy or a proposed increase in their contribution to a reserve fund is excessive, unwarranted or inconsistent with existing contractual arrangement; and
- e) allow a majority of residents, who believe that the MRF fund is inadequate to maintain the RV in a reasonable condition, to make an application to the SAT to determine the matter.

16.1.2 Undertake further consultation regarding the right of residents to appeal to the SAT when regulations are developed.

16.2 Capital works plans

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) require operators to prepare five year capital works plans for their retirement village (RV). The five year plan would not be required if an RV already had a 10 year plan under the *Strata Titles Act 1985* (WA) (ST Act); and
- b) allow further prescription of the capital works plans in regulations detailing the items to be included in the plan.

17. Capital works defined terms and regulation of funding sources

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) insert definitions for capital maintenance and capital replacement;
- b) define capital maintenance and capital replacement by reference to the Australian Taxation Office rulings; and
- c) require that the only capital works expenses that can be funded through recurrent charges are capital maintenance expenses.(Option A).

18. Condition of capital items

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) include an express provision imposing an obligation on operators to maintain the capital items owned by the operator in a retirement village (RV) in a reasonable condition; and
- b) insert an additional requirement that residents must notify the operator as soon as practicable if a capital item in the RV needs to be repaired or replaced.

19. Refurbishment definitions

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) replace the term 'refurbishment works' with terms that distinguish between reinstatement and improvement;
- b) define 'reinstatement' as works to restore the vacated unit to the condition they were upon occupation, excluding fair wear and tear and alterations made with operators' consent;
- c) permit 'reinstatement' to include a minor, incidental level of improvement but not work that alters the function or character of a fixture or the property or that significantly enhances the marketability or sale value of a retirement village product (RV product) relating to the vacated unit; and
- d) define 'improvement' as works that improve the vacated unit's value and marketability, in line with the approach taken by the Australian Taxation Office (ATO) in defining improvement.

20. Refurbishment obligations of residents

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) require all residents to pay for reinstatement through a reinstatement fee; and
- b) allow contracts to require former residents to fund improvements but only in proportion to their share in any upfront payment increase.

21. Property condition reports

Amend the RV Act to require the:

- a) property condition report to be provided to prospective residents prior to their signing of the residence contract;
- b) prospective resident (or their representative) be present during the inspection for that report unless they provide authorisation not to be present;
- c) prospective resident to provide their acceptance or disagreement with the report within a prescribed period; and
- d) property condition report to be in a prescribed form.

22. Building defects

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) improve information provision to residents about the existence of building defects and how building defects are to be rectified; and
- b) prohibit operators from passing on or recovering building rectification costs from residents during the six year period following the completion of a related building service.

23. Insurance arrangements

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to require operators to provide residents with an annual insurance statement that provides simple and clear explanations of the critical details of the retirement village (RV) insurance as part of their wider annual reporting obligations.

24. Dispute resolution

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) provide the Commissioner for Consumer Protection (Commissioner) with a discretion to compel parties to a retirement village (RV) dispute to attend mediation; and
- b) require parties to act in good faith during the RV dispute resolution process.

25. Strata titles

25.1 Amend the *Retirement Villages Act 1992* (WA) (RV Act) to provide:

- a) that the RV Act have primacy over the *Strata Titles Act 1985* (WA) (ST Act); and
- b) a head of power to allow for regulations to be made prescribing areas where it is not appropriate for the RV Act to have primacy over the ST Act.

25.2 Consumer Protection continue consultation with relevant stakeholders regarding:

- a) progressing a single joint disclosure statement for retirement village strata products (which could be progressed by way of an amendment to the *Retirement Villages Regulations 1992* (WA) (RV Regulations)); and
- b) the areas of overlap between the ST Act and RV Act where the RV Act should not have primacy over the ST Act.

26. Aged care exclusion

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to extend section 5(2) exclusion to operators and Commonwealth subsidised residents of a Residential Aged Care Facility (RACF) when the RACF is operated by a provider approved under the *Aged Care Act 1997* (Cth) that is not the retirement village (RV) operator.

27. Redefining administering body and joint and several liability

27.1 Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) replace the term ‘administering body’ with the term ‘operator’, meaning the person (including an entity) or persons who control the retirement village product (RV product) - essentially the business owner/s;
- b) insert the term ‘village landowner’, for any non-resident owner of land used for a RV;
- c) ensure existing administering body obligations be appropriately allocated to each; and
- d) expressly state that:
 - i) unless otherwise indicated, all responsibilities are joint and several; and
 - ii) when an obligation requires a specific act or action, compliance by one responsible entity is sufficient.

27.2 Do not insert a new term ‘manager’ into the RV Act.

Village land

28. Capturing land used for amenities and services

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to provide that:

- a) the RV Act expressly provide that:
 - i) a retirement village (RV) includes the land used to provide the amenities and services set out in a residence contract; and
 - ii) a residence contract includes any contract for provision of amenities or services that are part of the retirement village product (RV product);
- b) amenities or services are part of the RV product if a resident must pay for them because they are a RV resident whether or not they are accessed by non-residents or provided through operator arrangements with a third party;
- c) an operator is not to require a resident to enter into a contract for provision of an amenity or service that is not part of the residence contract;
- d) a resident can voluntarily enter into contracts for services or amenities that are not part of the RV product provided the resident can terminate the contract on reasonable notice;
- e) an operator must indicate on a RV map the areas of the RV used for amenities and services accessed by non-residents;
- f) a head of power exists in the RV Act for regulations to provide for appropriate financial transparency and protections against residents disproportionately funding shared use amenities and services (if necessary); and
- g) there are definitions for amenity, service and/or any new term to deal with the need to distinguish between a building, services and amenity in its ordinary meaning.

29. RV whole parcel of land

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to:

- a) clarify that a retirement village (RV) must comprise the whole of any parcel of land on which the retirement village product (RV product) accommodation, amenities or services are provided;
- b) recognise that portions of the land used for a Retirement Village Scheme (RVS) may also be used for an additional purpose without compromising that land being secured by the RV Act statutory charge;
- c) provide for an exception to the requirement that a RV must be the whole of any parcel of land when a memorial is lodged before land is subdivided with the following limitations:
 - i) the subdivision/strata title is already approved;
 - ii) it is not practicable for a developer to implement the subdivision/strata title prior to lodging the RV Act memorial;
 - iii) advertising and residence contracts clearly identify the land to be used for the RV;
 - iv) subdivision will occur prior to a resident entering the RV; and
 - v) a resident is able to rescind a residence contract if the subdivision does not occur;
- d) enable operators to correct incorrect 'portion only' memorials through the proposed new RV change process (Recommendation 34); and
- e) require that where amenities and services, which are part of a RV (including in strata scenarios) are shared by others, this is identified in pre-contractual disclosure.

30. Multisite villages

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to provide that:

- a) regulations set out any specific requirements for multisite retirement villages (RVs) dealing with matters such as the RV budget, the use of amenities and services and any minimum distances between sites; and
- b) the memorial contains specific information about the RV being a multisite village.

31. Single RV scheme per village

Amend the *Retirement Villages Act 1992* (WA) (RV Act) to expressly provide that a retirement village scheme (RVS) applies to one retirement village (RV) only.

32. One memorial per RV and one RV per memorial

Amend the *Retirement Villages Act 1992 (WA)* (RV Act) to expressly provide that:

- a) each retirement village (RV) is to have its own memorial;
- b) there is to be only one memorial for each RV; and
- c) land may be added to an existing RV memorial.

Village changes

33. Single process for significant village changes

Amend the *Retirement Villages Act 1992 (WA)* (RV Act) to introduce a process that can deal with a range of significant retirement village (RV) changes, including land excision, resolve all matters and disputes that these changes may involve, and include the following features:

- a) minimum standards for resident consultation;
- b) the State Administrative Tribunal (SAT) approval for all significant changes;
- c) three significant change categories – winding down a Retirement Village Scheme (RVS), memorial correction and RV redevelopment;
- d) the SAT approval for winding down a RVS;
- e) memorial correction made by a judicial SAT member;
- f) further consultation occur during drafting on appeal rights;
- g) the criteria for significant village redevelopment to be those recommended for CRIS 4, part 19.2, namely:
 - i) the Commissioner for Consumer Protection (Commissioner) to be empowered to determine disputes about whether a change is significant and requires the SAT approval;
 - ii) whether the consultation process with residents has been followed;
 - iii) appeal of the Commissioner's determination to be made to the SAT; and
 - iv) the RV Act provide that planning and other approvals required for a significant change to which the village change process applies, cannot be acted on prior to completion of the RV Act process unless the SAT approves certain steps being taken.

34. Significant village change categories

34.1 In providing for winding down a Retirement Village Scheme (RVS), the *Retirement Villages Act 1992 (WA)* (RV Act) provide that:

- a) an application for State Administrative Tribunal (SAT) approval to wind down a RVS is to be made before an operator takes any steps to implement the decision to cease implementing the RVS;
- b) the SAT can approve an operator taking some steps to wind down a RVS prior to final approval, when the only outstanding matters are minor and it will not be detrimental to residents;
- c) a RVS is terminated by SAT order and an operator can apply for that order on completion of the winding down process; and
- d) the SAT can approve an operator temporarily winding down the RVS without terminating it.

34.2 Further consultation occur during drafting on:

- a) criteria for SAT approval to wind down and making an order terminating a RVS;
- b) conditions that the SAT may impose; and
- c) whether there should be minimum or maximum time periods for temporary winding down applications.

34.3 In providing for significant retirement village (RV) redevelopments, the RV Act provide:

- a) that the criteria for requiring SAT approval for change include complexity, potential for impact on residents tenure or financial security and residents' ability to assess the impact without technical, legal or financial advice;
- b) that an operator must obtain SAT approval to excise land from a RV;
- c) for regulations to provide guidance on the features of a change that mean it meets the criteria for requiring SAT approval; and
- d) for the Commissioner for Consumer Protection (Commissioner) to issue a determination on a dispute about whether the RV change process applies to a proposed change and for regulations to specify the process for this to occur and ability to refer a matter to the SAT.

34.4 In providing for resident relocation obligations, amend the RV Act to provide that:

- a) operators have the minimum resident relocation obligations to:
 - i) provide minimum notice of the relocation date;
 - ii) make alternate accommodation available or assist the resident to obtain alternate accommodation;
 - iii) pay the resident's reasonable relocation costs, including any utility connection or disconnection fees;

- iv) pay a resident's exit entitlement prior to vacation or within 10 working days of the resident leaving; and
- v) have a policy for relocation, including relocation within the RV.
- b) alternate accommodation means:
 - i) being of approximately the same standard as a resident's current unit or if not to that standards, agreeable to the resident;
 - ii) requiring no greater financial outlay on the part of the resident; and
 - iii) is or ought reasonably to be acceptable to the resident.
- c) residents must not unreasonably refuse to relocate.

35. Resident consultation

Amend the *Retirement Villages Act 1992 (WA)* (RV Act) to provide for a significant retirement village (RV) change process which includes the following minimum consultation requirements, subject to further consultation on consolidating them during drafting:

- a) residents be given formal notice of the change;
- b) residents be given a draft change implementation plan (if necessary);
- c) when a RV has a residents committee, consultation occur with the residents committee prior to formal notice and a draft implementation plan being given;
- d) residents be given individual resident impact statements (if necessary);
- e) at least one residents' meeting be held;
- f) operators provide written responses to written inquiry, request for information or proposal for variation to the proposed change or draft change implementation plan; and
- g) make provision for:
 - i) prescribing minimum notice for types of significant RV change; and
 - ii) regulations to prescribe minimum content for approved forms.

BACKGROUND

Regulatory framework

Retirement villages (RVs) in Western Australia (WA) are regulated by the following specific legislation:

- the *Retirement Villages Act 1992* (WA) (RV Act);
- Retirement Villages Regulations 1992 (RV Regulations);
- Fair Trading (Retirement Villages Interim Code) Regulations (No.2) 2021 (RV Code); and
- *Residential Tenancies Act 1987* (WA) (RT Act).

The proposed reforms discussed in this paper relate primarily to the RV Act. This paper proposes reform to subsidiary legislation (RV Regulations and RV Code) where necessary to provide a clear explanation of a proposed reform. Further reform to subsidiary legislation will be considered following the outcome of this consultation.

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

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

RV sector

As explained in CRIS 1, reliable statistical information about RVs in WA is limited. In 2021, a survey (WATC survey) was issued to 296 sites for which RV Act memorials have been lodged to gather information for the Western Australian Treasury Corporation (WATC) financial modelling discussed in part 9 of this paper. Thirty eight operators provided information about 129 villages.

The sector has grown since the 2016/17 estimates reported in CRIS 1. Some 290 to 310 RVs currently operate or are in development. Seventy five per cent of these are in the greater Perth metropolitan region (which includes Mandurah) and 25 per cent in regional locations. An estimated 25,500 persons currently live in a RV. This means the Retirement Village product (RV product) is a niche market for approximately 6.5 per cent of the WA population who are 65 years and over.⁵ However, most RV residents are older, with a surveyed average between 80 and 86 years of age.⁶

⁵ Based on the WA population of 65 and over as at 30 June 2019. [Media statements - Updated toolkit supporting WA seniors to live their best lives](#) (dated 17 November 2021).

⁶ For its purposes, WATC averaged the survey data on village location, tenure type and operator type (commercial or registered charity) rather than at a village or operator level.

Residents live in villages for significant periods of time, with the WATC survey finding that this varied between 8.3 and 11.3 years. The WATC survey also found that current average upfront payments varied significantly, between \$143,000 and \$426,000, depending on location, tenure type, whether the operator is commercial or a registered charity, village age and village size. RVs commencing after 2001, require an average of \$50,000 to \$85,000 more upfront payments than older villages. RVs with more than 150 units also require higher average upfront payments but this may reflect that older villages tend to be smaller.

In WA, there are a range of alternatives to RV living, such as lifestyle villages, over 55's strata villages and rent only complexes. These arrangements fall outside the RV Act because residents do not pay a premium to live in the village. Other regulation such as the *Residential Parks (Long-Stay Tenants) Act 2006* (WA), the ST Act or the *Residential Tenancies Act 1987* (WA) may apply. They also however often involve residents who have limited income and other vulnerabilities due to their age. Consumer Protection is aware that there is a need for further consideration of the way housing alternatives designed for older people are regulated to ensure adequate protection for older consumers.

RV reform process

Between 2012 and 2016 significant changes were made to RV Act in WA following the *Statutory Review of Retirement Villages Legislation Final Report, November 2010* (Final Report) (stage 1 reforms). Many of these changes were focused on providing the consumer with more information when deciding whether to enter into a RV agreement, as well as making changes to residence contracts and budget and financial reporting requirements.

Four consultation regulatory impact statements (CRIS) have been released in the period from August 2019 to July 2021 to facilitate stage 2 reforms. The reforms proposed in the CRIS papers included proposals to:

- address consumer misunderstanding of the RV product and price structure by way of advertising requirements, clarifying definitions in the RV Act, and improving pricing information;
- improve the financial situation of departing residents, including a proposed time limit for the payment of exit entitlements;
- address refurbishment obligations;
- introduce mandatory reserve funds (MRF) in RVs to ensure provision is made for long-term capital works;
- improve clarity and transparency around village operating budgets and the use of resident funds for capital works;
- impose certain standards for the conduct of operators and residents in RVs;

- establish a database of RVs to assist in the identification of villages covered by the RV Act; and
- increase the flexibility of the regulatory requirements to enable significant changes to be made to a RV which might be required for the continued operation and viability of the village whilst retaining the necessary protection for residents.

In June 2020, Consumer Protection formed a working group of members from industry and resident peak bodies to consider reforms that might be expedited to stimulate investment in the RV sector in WA. The working group was initiated as part of the State Recovery Advisory Group appointed to support recovery of industry due to the effects of the COVID-19 pandemic. The working group comprised representatives from the Western Australian Retirement Villages Residents Association (WARVRA), Property Council of Australia, Retirement Living Council, Leading Age Services Australia (LASA) and Aged and Community Services Australia (ACSA).

Four roundtables were held with the working group from August to October 2020 to obtain input into two key reform areas: a process for RV changes and issues in new developments; and time limits for paying resident exit entitlements. Although useful discussion occurred on two key reforms during the fast track process, the working group did not reach consensus on policy positions. However, the consultation identified the areas of concern for reform of exit entitlements payments and the RV change process.

In addition to the round table discussions, further meetings were held in 2021 between Consumer Protection and key stakeholder groups including:

- five roundtable workshops with industry peak bodies⁷ and WARVRA in 2020;
- seven meetings with industry peak bodies in 2021;
- five meetings with WARVRA in 2021; and
- several individual meetings with operators.

A total of 156 submissions were received to the CRIS 1 - 4 papers. (**see Appendix 1**).

An RV survey seeking feedback on the options in CRIS 2 opened in February 2020 and closed on 30 June 2020 (RV survey (2020)), with 240 people responding to the RV survey (2020).

A second survey was held in 2021 asking questions specifically about budget consent, with 43 people responding.

⁷ Property Council of Australia, Retirement Living Council, Leading Age Services Australia (LASA), and Aged and Community Services Australia (ACSA).

The DRIS reforms are considered in the following thematic categories:

1. information disclosures;
2. exit entitlements;
3. life in the village;
4. village land; and
5. village changes.

It should be noted that some problems may be dealt with in more than one category, with different aspects considered in each. The interrelationships between individual issues across the consultation papers have been taken into account in developing the DRIS reform proposals.

Information disclosure

CRIS 1 identified that, despite extensive reforms in stage 1 of the RV reform process, consumers can still have difficulty in understanding the RV product and its price structure of the product. CRIS 1 explained that consumer complaints and feedback indicate that information failure continues to cause problems in the RV market and that information *disclosure* alone is only partially successful. CRIS 1 proposed that additional measures are required so consumers can better understand and use information about the RV product, its pricing structure and contracts.

The feedback received during the consultation has confirmed that:

- the advertising and marketing of RVs can be misleading for consumers;
- consumers continue to have difficulty understanding the contract they are entering into and the information provided can be overwhelming;
- early public information about the RV product and its price structure is limited, making it difficult to compare villages; and
- there are features of the contractual arrangements about which residents want further information.

To address these issues, recommendations have been made to amend the RV Act to:

- describe the RV product in the RV Act;
- improve consumer understanding of the RV product and price;
- clarify price in advertising and marketing;
- provide options for displaying fees and charges as a single price;
- improve disclosure of community arrangements;
- clarify when information must be disclosed for multiple residence contracts; and
- introduce a public online database of RVs.

Feedback has also, however, been received from industry that a significant amount of information is already required to be provided to prospective residents under the RV Act. The regulatory burden of providing this information has been raised as an issue by industry. Resident bodies have also identified that information overload is an issue for consumers in the sector and that the information provided in contracts and pre-contractual disclosure can be overwhelming and require legal advice to understand. Such advice is often difficult and expensive to obtain.

It is clear from the feedback received by Consumer Protection that what is required is more effective disclosure rather than simply more information to consumers. This requires further consideration to be given as to how the existing requirements around disclosure and residents contracts could be improved in conjunction with the recommendations in this section.

1. Describing the RV product in the RV Act

Issue

CRIS 1, part 4.1

The RV product is a mixed housing services product. It has three elements: (1) accommodation, (2) amenities and services and (3) both being provided in a community managed by, or on behalf of, an operator. The RV Act does not expressly describe the RV product. It generally identifies each element separately and relies on the operation of multiple provisions to capture the whole product. In particular, the important RV Act terms, 'retirement village', 'retirement village scheme' and 'residence contract' expressly mention only the residential premises element.⁸ The prominence this gives to residential premises over the other RV product components contributes to two problems:

- consumers do not understand that the RV product has different rights, obligations and risks to those associated with property ownership or tenancy; and
- operators do not understand that land used for providing amenities and services is part of the RV and so subject to RV Act protections, such as restrictions on change to its use.

The Final Report recommended, in effect, that: the RV Act be amended to ensure land used for amenities and services is recognised as part of a RV; the definition of RV be updated; and residence contracts expressly include agreements for amenities and services (recommendations 29, 84 and 18). It also supported an earlier statutory review recommendation to amend the definition of RV to include communal, community service and support facilities.⁹ CRIS 1 dealt with the first problem only. Its options for the RV Act to provide a description of the whole RV product, however, provides the basis to address the wider issues inherent in the Final Report recommendations.

Objective

To reduce misunderstandings arising from the absence of an express description of the RV product in the RV Act through implementing Final Report recommendations 18, 29, 84 and 100(3).

⁸ A retirement village is 'a complex of residential premises ... and appurtenant land, occupied or intended for occupation under a retirement village scheme ...'. A retirement village scheme is defined to be a scheme for retired persons to occupy residential premises under a particular financial model. A residence contract is the scheme, arrangement or contract which creates or gives rise to a right to occupy residential premises in a village. (RV Act, section 3(1)).

⁹ Final Report recommendation 100 was to implement various 2002 Statutory Review recommendations. The relevant recommendation is recommendation 3 of the earlier review (Recommendation 100(3)).

Policy proposal

CRIS 1, proposal 4.1 is that:

- Option A (preferred option) – amend the definitions of **retirement village** and **residence contract** to include all the elements of the RV product - residential premises, amenities and services and managed community; or
- Option B – amend the definitions of **retirement village scheme** and **residence contract** to include all the elements of the RV product outlined in Option A above.

Stakeholder feedback

Fourteen stakeholders responded to the CRIS questions by written submission. A further three stakeholders provided verbal feedback in meetings with Consumer Protection. Verbal feedback was also provided during Consumer Protection presentations about CRIS 1 and by the peak bodies during 2020 working group meetings. Many submissions to later CRISs also contained information about this issue. Respondents included individual residents, WARVRA, operators and RV managers, industry peak bodies and the Council of the Ageing WA (COTA), an association advocating for the rights of older people.

Respondents strongly supported clarifying in the RV Act that the RV product is not just a property transaction. One operator explained, ‘Fragmentation of the legislative provisions causes significant confusion to the retirees and their families and the retirement village owners and operators’, and that clarifying definitions are ‘required so that all stakeholders then use the same language and all understand what that language means’.¹⁰ WARVRA said that a unified concept of the RV product is ‘a fundamental breakthrough concept that could be the foundation of new understandings and approaches to the whole sector’. WARVRA captures the general stakeholder view in its statement that: ‘providing a unified and consistently applied concept is a goal that can almost be taken for granted’.

Subject to some reservations about the term ‘managed community’, there was general support for the way the options described the RV product. One village manager said: ‘This definition captures, without excluding, RV operations across the many varied models’.¹¹ The industry peak bodies qualified their support with the need to ensure that the definition does not blur the distinction between the RV product and rent only seniors’ accommodation products. WARVRA expressed concern that the definition could pose difficulties for small operators or villages with very limited amenities or services.

WARVRA advised that some of its members were concerned that the term ‘managed community’ had a connotation that operators will ‘impose their will, their style and their goals on residents’. It suggested alternate terms such as ‘supported community’.

¹⁰ Submission 18.

¹¹ Submission 12.

A resident said the term ‘managed community’ had ‘negative implication as people do not like to feel their behaviour is being managed’ and that it is the RV environment and property that is being managed ‘with village rules being sensible guidance for ensuring that social interaction and the behaviour of other residents is not disruptive’.¹²

Three operators said that it needs to be made clearer to consumers that ‘a retirement village is a managed community that is subject to controls and rules that are designed to enhance the attributes and functioning of that retirement residential community. Many of these controls do not have to exist in the standard residential environment but are essential in the context of a retirement village product’.¹³ Another operator suggested managed complex, saying a RV was not a managed community.¹⁴

Impact assessment

The feedback on this issue confirms that the RV Act’s fragmentation of the RV product contributes to consumers’ misunderstanding what they have purchased and the rights and obligations that the RV product involves.¹⁵ It is also clear from the response to this issue and the consultation more generally, that this misunderstanding results in disputes and consumer dissatisfaction that is problematic for industry as well as residents. Respondents agreed, almost unanimously, that clarifying the RV product in the RV Act will help reduce this problem.¹⁶

Option A is preferred by respondents. Consumer Protection agrees express inclusion of amenities and services in the meaning of RV, rather than retirement village scheme (RVS), also simplifies and supports other reforms. For example, advertising requirements, RV Act provision for RVs in mixed use developments (identifying when amenities and services shared with other users are part of a village), introducing a process for significant changes to a village and making it clearer that provision of a managed community entails operator obligations.¹⁷

No operator identified any cost impact. The impacts are largely expected to be indirect. Better consumer understanding about the RV product will mean more informed purchasing decisions, so there will be cost savings in less disputes arising.

The recommendations deal with WARVRA’s concern about the impact of the reform on villages with very limited amenities or services. Linking the amenities and services that form part of the village to those set out in a residence contract shifts the focus from identifying a RV by what consumers may expect it to involve to identifying it by what it

¹² Submission 5. These concerns were also raised by residents at WARVRA meetings that Consumer Protection attended.

¹³ Submissions 23, 24 and 27. There were slight variations in the wording.

¹⁴ Submission 18.

¹⁵ For example, a resident submitted: ‘The way in which Retirement Village operators advertise and promote RV ILU accommodation leads many consumers (residents) to believe that they have ‘purchased’ a unit, much like a property purchase, when in reality they are paying for accommodation and services through a combination of an upfront fee, ongoing recurrent charges and a DMF’ (submission 5).

¹⁶ One operator who supported the reform queried whether consumers read the legislation (submission 22).

¹⁷ For example, to resolve resident to resident disputes.

does involve. All RVs provide at least minimal management services, such as organising some maintenance work.

Resident objection to a connotation in the term ‘managed community’ is understood and will be subject to further discussion with the key stakeholders to develop an acceptable term that describes an operator’s role in managing the functioning of a village.

Regarding the industry peak bodies’ concern that the amendment does not capture rent only villages, it is noted that the RV Act only applies to complexes that operate under a RVS, which is defined so as to exclude rent only villages. There is no intent to change this definition.¹⁸

Recommendation 1

Implement CRIS 1, proposal 4.1, Option A, which proposed to amend the RV Act to ensure that the definitions of ‘retirement village’ and ‘residence contract’ include:

- a) all the elements of the retirement village product (RV product) – residential premises, amenities and services and managed community.**

Also amend the RV Act to include additional features:

- b) definition for retirement village (RV) – identify the residential premises, amenities and services and management of the community elements of the RV product as those set out in the residence contract; and**
- c) definition for residence contract – expressly identify that a residence contract includes arrangements pertaining to the community.**

Conduct further consultation during drafting on the term to be used to capture operator management of communal matters beyond land and infrastructure.

Depending on Parliamentary Counsel’s advice, this may be best achieved through introducing a new term ‘retirement village product’ to use in these amendments.

¹⁸ WARVRA’s issues with the RV scheme definition are dealt with in CRIS 3, Issue 14.2 – community arrangements.

2. Improving consumer understanding of the RV product and price

Issue

CRIS 1, parts 4.2, 5.1 and 5.2

Complaints to Consumer Protection, and feedback by consumers in response to CRIS 1, indicate that consumers often misunderstand the RV product, as well as the RV price and price structure, resulting in consumer decisions that are based on incorrect assumptions. As a result, consumers can enter a contract without fully understanding what they are purchasing, the investment being made, and the financial consequences, particularly at the point of exit.

The RV product and price structure are unique, however, the way they are advertised and presented publicly can often appear similar to traditional property offerings. In particular, there is little attention drawn to the fact that the RV product is covered by the RV Act and usually a lease for life contract and not a purchase of title. Exacerbating this is the fact that information about pricing structure and costs is not provided early enough in the decision-making process. The lack of consistent publicly available price and product information makes it difficult for consumers, especially those new to the RV product, to understand the total costs and compare those against other products.

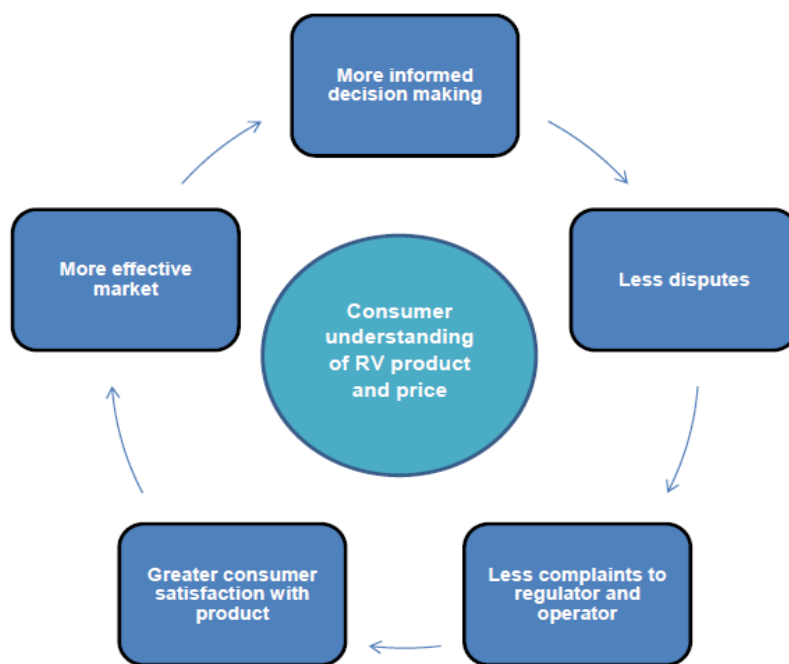
While operators argue that they already recommend that prospective residents seek independent legal and financial advice before deciding to enter a RV, the consultation process has shown that this is not necessarily effective. Due to the unique and complex nature of the contracts, professionals with the required experience to provide objective and informed advice are limited in WA. In addition, because many operators do not consistently provide publicly available pricing information, it is often not possible for even qualified financial or legal experts to properly advise on the products being presented.

In order that consumers be better informed at an earlier stage in the purchase process and are better able to understand the RV product, it is important that information about the RV product, including tenure and cost structure of the product is advertised clearly, and that clear, early pricing information is available to consumers. Figure 1 illustrates the advantages of consumers having a good understanding of the RV product.

Objective

The objective is to improve consumer understanding of the RV product and price structure and to provide clear, enforceable direction on advertising practices that are not acceptable under the Australian Consumer Law (ACL). Further, the intention is to provide increased transparency and understanding of costs for consumers without unnecessarily increasing the compliance burden for industry.

Figure 1: The Retirement Village Product



Policy proposal

CRIS 1, proposal 4.2: Accurate advertising and promotion of the RV product

Three options were provided to ensure accurate marketing of the RV product and to increase the community's understanding of how the RV product is different to a residential property purchase.

Option 4.2A: that guidelines be developed to guide industry on existing provisions in the RV Code and the ACL (Final Report, recommendation 1).

Option 4.2B: that the RV Act be amended to require that advertisements or marketing material for retirement villages include the specific type of tenure offered and that accommodation is provided in a managed community with non-elective amenities and services.

Option 4.2C: that the RV Act be amended to 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, and to prohibit statements that represent that accommodation, which is for a type of tenure that is not freehold, is the same as or equivalent to freehold tenure.

CRIS 1 proposal 5.1: Advertising and marketing of the RV product price

Two options were provided for the clearer advertising of costs and price structure.

Option 5.1A: that guidelines be developed to assist industry to develop more accurate advertising and marketing.

Option 5.1B: that the RV Act be amended to require advertising and marketing to provide the following information about the fees and charges:

- the amount of recurrent fees and charges;
- the amount or calculation of Deferred Management Fee (DMF) payable;
- the minimum of other fees payable; and
- any other prescribed information.

CRIS 1 proposal 5.2: Early provision of more complete, publicly available price information

Three options were provided for the earlier and publicly available presentation of fees associated with a RV product.

Option 5.2A proposed the development of an Average Resident Comparison Figure (ARCF) (a concept used in New South Wales).

Option 5.2B proposed the development of an extended ARCF with additional information.

Option 5.2C would require operators to advertise the upfront payment with and without the Deferred Management Fee (DMF) (Victorian approach).

Stakeholder feedback

There was general support by both operators and residents for more accurate presentation of the RV product and price in the sector, however, there were differences in which option was preferred. Residents and WARVRA strongly supported introducing legislative requirements around advertising, however, there was strong resistance from some operators and industry peak bodies to any legislative requirements for the up-front presentation of the complete cost of the RV product.

CRIS 1 proposals 4.2 and 5.1: Requirements for advertising of the RV product and price

All resident responses, and some individual operator responses, supported requiring marketing materials for RVs to contain specified information about the product, such as tenure, noting that consumers can misunderstand the nature of the RV product they are purchasing, including that it is different to a standard residential purchase. One operator noted that their advertisements already specify the lease for life tenure in the village.

However, another operator considered that the information failure in the market was not due to information asymmetry, citing the amount of information already required to be

provided as pre-contractual disclosure, but rather the fact that consumers are reluctant to read and consider the material provided. For that operator, the issue in part is information overload. Support was expressed for a key terms summary ‘...to assist with providing consumers with an early basic understanding of the product’.¹⁹

Some individual operators were resistant to any requirements that were too prescriptive, noting that non-binding guidelines would be the preferable option.²⁰ A specific area of concern identified with the legislative proposals under 4.2 and 5.1, was that regulating the way a RV product was advertised may cause properties to be moved from the ‘For Sale’ to ‘For Rent’ category on real estate sites. It was also submitted that mandating specific information in marketing material may increase confusion for consumers, especially if details were required that were not relevant to the particular village. Further it was suggested that requiring this information may affect the saleability of the retirement village product.

It was also recognised from both operators and resident feedback, that advertising controls require accuracy, but also need to allow reasonable brevity due to the cost of some advertising and marketing publications.

CRIS 1 proposal 5.2: Early provision of complete, publicly available price information

Feedback on the CRIS proposals, showed overall support for the provision of additional and earlier price information with all eight of the responses received to this issue in favour.²¹

Feedback on CRIS 1, 5.2 options, however, indicated that none of the options proposed for the early provision of pricing information were considered entirely suitable. Both operators and residents (including WARVRA) believed that an ARCF was too complex, and not necessarily accurate.

Residents and WARVRA preferred Option 5.2C of the three that were provided but were open to other options, noting that providing the DMF does not necessarily provide a full understanding of the total price. Specific feedback about what might be suitable included ‘an abridged version of Form 1’ and a ‘standardised obligations summary’. WARVRA strongly supported the early disclosure of price, and that it should be included in legislation and applicable to all publishers of information (i.e. including salespeople).

Apart from concern about the complexity and accuracy of the amount estimated for future fees in Options 5.2A and 5.2B - the Average Resident Comparison Figure (ARCF), there was a clear gap between the positions of the resident and industry peak bodies in responses to the CRIS regarding the provision of clearer upfront pricing information to prospective residents.

¹⁹ Independent operator in WA.

²⁰ The responses comprised four owners, four residents, one family member of a former resident and one Other/Operator employee. Industry peak bodies made no formal submission on the advertising of product.

²¹ Responses comprised three residents, four owners and a family of a resident.

The industry peak bodies considered that endorsing existing industry tools, such as the Property Council and Leading Aged Services Australia's voluntary industry code (the Retirement Living Code of Conduct) should be preferred to avoid a prescriptive approach. Key concerns of industry with a requirement to provide upfront pricing information were:

- that, with tailored offerings, 'there could be as many contracts as there were units' and that providing a simple figure or the entry and exit price could be misleading as there are many variables that can impact the cost and conditions;
- providing up front information would allow operators increased visibility of their competitors' models and potentially decrease their competitive advantage; and
- that operators preferred to work with potential residents to provide them with an understanding of all of the (non-financial) benefits of RV living before a breakdown of costs was provided.

Joint feedback from the industry peak bodies also noted that industry is already required to provide substantial information around upfront, ongoing and future costs through the pre-contractual disclosure process in existing regulations. The joint submission, dated 20 September 2021, raised concerns that existing disclosure requirements in legislation already add significant complexity to the contracting process for consumers. Adding to existing requirements could result in further confusion and complexity to transactions. Their position is that disclosure processes around price and costs must be as simple and understandable as possible.²²

Due to the issues raised with Options 5.2A and 5.2B - the ARCF - in the response to the CRIS and the concern that Option 5.2C - requiring the provision of the DMF - could still provide a misleading comparison of costs, further work was undertaken to look at existing models that, without being onerous, help consumers understand:

- what they will pay upfront;
- what they will pay in total across their stay in a RV village; and
- costs and conditions at the time of exiting a village.

During this process, it was identified that some RVs already provide consumers with a useful one-to-two-page key terms summary of contract options, including the major fees and charges, the methods for calculation and the differences between the contracts (see examples at **Appendix 3**). WARVRA feedback was that this approach was useful and enables comparison (both between and within villages) and assisted decision making.

²² Interim Joint Industry Submission On Retirement Villages Act Review, July 2021

Industry peak bodies were generally resistant to being compelled to provide complete pricing information publicly or on demand as it could become too prescriptive and limiting, although the possible benefits of a key terms summary were raised.²³

Impact assessment

CRIS 1 proposals 4.2 and 5.1: Accurate advertising and promotion of the RV product and price

Based on the feedback received in the consultation, it is considered that implementing Recommendation 1 of the Final Report with administrative guidelines as to better advertising and marketing practices, is insufficient to address advertising and marketing issues around the RV product and price.

It is clear that problems remain despite Consumer Protection providing regular education. The Australian Competition and Consumer Commission (ACCC) already publishes many general guides as to the requirements which apply to advertising and selling practices under the ACL. Specific industry requirements can offer a more efficient and effective process because the information an operator is required to provide to comply with advertising rules can be clearly set out in regulations.²⁴

This may also result in more effective compliance activity by the regulator, with specific obligations tailored to the practices of the sector. In this respect, provision in RV Act offers benefits to operators as well as consumers and regulators. Remedies can also be more tailored to any established breach.

The consultation feedback showed overall support for option 4.2B, that the RV Act be amended to require that advertisements or marketing material for retirement villages include the specific type of tenure offered and that accommodation is provided in a managed community with non-elective amenities and services.

In regards to information about price, option 5.1B had the greatest support, being the amendment to the RV Act to include specific details about all of the costs of the RV product, and not just the upfront price in advertising and marketing material. However, there was an acknowledgement that requiring what and how specific costs must be presented would be cumbersome and difficult to comply with, given the variety of different contract options available.

The key concerns raised by industry with proposed requirements for advertising relate to cost impacts of including additional information, the possibility that the information is confusing for consumers and the possible impact on saleability of residences.

The need for brevity in some forms of advertising to reduce costs can be managed by targeting regulatory requirements to different types of advertising used in the sector.

²³ Feedback from an operator.

²⁴ In addition to specific advertising rules for retirement villages, the *Retirement Villages Act 1999* (NSW) section 17 contains a note referring to the application of the ACL to any advertising and promotional and sales material.

For example, New South Wales (NSW) imposes different requirements depending on the number of words in the advertisement.²⁵ Another approach might be for an advertisement to direct consumers to more complete publicly available information, such as the proposed key terms summary, rather than to provide it all within the advertisement. Measures such as these can address concerns about the impacts raised by stakeholders.

Industry was also concerned that regulating the way a RV product was advertised may cause properties to be moved from the 'For Sale' to 'For Rent' category on real estate sites. It is not clear that this would occur. For example, it is noted that a predominant real estate website already has a separate category for retirement living accommodation under the 'For Sale' category. RV units may therefore remain under the 'For Sale' category, but be required to make clear in the descriptive text that it is the RV product (as opposed to the property) that is for sale, the tenure type, the applicability of the RV Act and that the advertised cost is part of a cost structure.

It is recommended that the insertion of a specific requirement in the RV Act to set out clear expectations as to the advertising and marketing of the price of the RV product and compliance with the intent of section 48 of the ACL be implemented.

Further consultation will be required to understand how information can be presented most effectively for consumers without overcomplicating the advertising. This will include seeking feedback on other jurisdictions' experience. It is recommended that specific requirements also be supported by way of regulations to ensure that the legislative requirements can be easily adapted to changes in advertising and marketing.

5.2: Early provision of complete, publicly available price information

The responses received to the consultation showed that although there was support for earlier and more complete price information being available to consumers, the options proposed in the CRIS did not receive strong support. Both operator and WARVRA feedback expressed concern about the complexity and reliability of the information in an ARCF. Of the three options, WARVRA supported Option 5.2C as a starting point, but noted, along with other respondents, that providing the DMF still does not necessarily provide an accurate representation of the total costs of a contract as it does not reflect the variety of contract options and value propositions that are offered by operators. An alternative option was identified, being that operators be required to provide up front pricing information through the form of a key terms pricing summary that outlines the key ingoing, ongoing and outgoing costs (either as a value or range, or by their method of calculation). This had support amongst submissions from operators and residents.

An intended advantage of a key terms summary is that is that it would use information that operators already have (as opposed to a tool like the ACRF) and allows for the variability of contracts to be captured in a simple way.

²⁵ Retirement Villages Regulation 2017 (NSW), Schedule 3A, 14 and 15.

While this does not currently diminish the amount of disclosure required at the pre-contract stage, up front publicly available product and pricing information is intended to be provided much earlier in the decision-making process to allow a more accurate understanding of, and comparison between products prior to making a decision about a purchase.

The key concern raised by industry regarding providing clear upfront pricing information on the total costs of entering a RV relate to possible negative impacts on an operator's competitive advantage as a result of making their pricing model public.

Consumer Protection notes that the industry peak bodies' argument around protection of pricing information for competition reasons is not in the interests of the consumer and is contrary to the ACL. Exit fees and conditions are a significant component of the overall cost of a RV and a significant point of difference from purchasing general residential property and should be referenced or included in any presentation of price. The ACL has a clear position around drip or component pricing and requires making costs that are included in the total price transparent. In particular, consumers have the right to:

- a) understand the product that is being advertised and what the advertised price refers to; and
- b) access pricing information that is easily available (either publicly accessible or on demand) to be able to compare the product.

Despite feedback from industry around the ability to capture the complexity of contracts and offerings, there is evidence that some operators are already working to provide clearer pricing information. The examples at Appendix 3 provide an example of this. One of these examples is available on an operator's website, and one is available at the point of enquiry. The examples show that, while there are differences in pricing structures between operators and contracts, it is still possible to provide a clear summary of the major pricing components.

Given this information already exists (rather than needing to convert existing information into a uniform measure), the comparative compliance burden on the operator of a RV is expected to be far less than requiring a single comparative figure. Providing the capacity to use a formula or a range in the summary, the number of summaries that would need to be developed or the frequency of them being changed should also be reduced.

A key summary that is readily available also supports the information that needs to be provided in an advertisement, for instance by enabling consumers to easily look up details of a relevant price structure. Consumer Protection considers that this may be a viable option and that further consultation with stakeholders will assist in determining the appropriate level of information to provide consumers with clear and concise information, without significantly increasing the regulatory burden for the industry. This consultation will occur during the drafting process.

In response to feedback on the amount and complexity of information already required to be provided by operators to consumers, and given the proposed changes to the up-front information that will be available, Consumer Protection proposes to also work with resident and operator stakeholders to review the current Form 1 pre-contract disclosure form to identify areas where information provision can be simplified.

Educational material

The CRIS consultation process highlighted the lack of understanding in the community of the RV product and pricing structures, and the significant impact this had in terms of consumer decisions and complaints. The lack of understanding is acknowledged to be widespread among the community and includes legal and financial advisors as well as families of residents.

To help address this it is proposed that, in addition to the proposed regulatory changes, Consumer Protection, through its Seniors Housing Advisory Centre service (SHAC), develop an educational campaign to increase awareness of the RV product and pricing structures. The educational materials would provide information on the differences between purchasing a RV product and general residential housing products and the rights of consumers to up front pricing information.

In combination with the proposed legislation to require more complete information about the fees and charges in advertising, the education package should result in an improvement in the transparency and understanding of the RV product and price structures and the rights and obligations of both the consumer and operators.

The development of an education campaign and accompanying materials to support the new requirements will help both the retirement community and the broader community understand the RV price structures and the product being advertised. If done effectively, increasing the publicly available information on the RV product will increase community literacy and help ensure that the proposed legislation around advertising and promotion of the RV product has the greatest impact.

The wider education element is particularly important in the case of RVs, as often a resident's family is involved at either the upfront decision to purchase a RV product or at the point of departure.²⁶ An education campaign, along with supporting materials, will help both consumers and their families understand both what information they should expect to receive as well as how to interpret that pricing information, which should have a positive impact on both consumers and operators.

Interaction with other recommendations – 6.1 MEEP time limit

The proposed policy reform has also been considered in parallel with the proposed introduction of a mandatory exit entitlement payment (MEEP) time limit. The reason for this is, that many of the complaints relating to the delayed payment of exit entitlements

²⁶ The WATC Survey of Retirement Village Operators commissioned by DMIRS showed that 54% of departures from a RV leading to a vacated unit were due to moving into aged care, and 34% because the resident had passed away.

were around the lack of awareness of the process at the time of entering the contract. Should the introduction of a MEEP not be supported, then information requirements that include up front information around the expected time for an exit entitlement payment is recommended.

Implementation

A transition time will be necessary to allow time for operators to update websites and advertising materials.

Recommendation 2

Implement CRIS 1, proposal 4.2, Option B, to amend the RV Act to require that:

- a) advertisements or marketing material for a retirement village (RV) includes the specific type of tenure offered and that accommodation falls under the RV Act and is provided in a managed community with non-elective amenities and services in accordance with prescribed requirements.**

Do not implement CRIS 1, proposal 5.1, Option A or B, but amend the RV Act to require that:

- b) advertising and marketing of the retirement village product (RV product) price provide additional and clearer information about the total cost structure of the RV product in accordance with prescribed requirements.**

Do not implement CRIS 1, proposal 5.2 options but instead amend the RV Act to:

- c) require operators to make publically available a key summary of the fees and charges associated with the RV product in accordance with prescribed requirements to assist consumers to better understand and compare the total cost of the RV product.**

Further, to:

- d) engage with operator and resident stakeholders about the prescribed requirements for recommendations a, b and c and develop options to simplify the information that is required as part of the Retirement Villages Regulations 1992 (WA) (Form 1) in the pre-contract disclosure phase;**
- e) include a transition period of 12 months for recommendations a, b and c; and**
- f) subject to resourcing, Consumer Protection, develop an information campaign on the RV product contract types and costs (including the differences between this and other residential accommodation).**

3. Community arrangements

Issue

CRIS 3, part 14.2

Residents say the RV Act needs to distinguish between community arrangements that are common to all residents within a village and the contract terms that can vary from resident to resident, and also that it should require operators to provide a more complete description of a village's community arrangements.

Problems that they raise include: difficulty identifying community arrangements to compare villages; difficulty understanding what the administrative, operational and financial arrangements are in a village and how they interact with individual contracts; inequity in rights and obligations within a village; that operators can make changes to community arrangements without their knowledge or consent; and that the RV Act prevents, or has no process for, some changes to community wide arrangements that may be desirable.

The RV Act uses the same term – residence contract – for the scheme or arrangement that gives rise to a right to live in a village and the contracts that residents sign. This conflates matters that may be community wide and not necessarily in a contract with contract terms specific to a particular individual resident.²⁷

Objective

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

CRIS questions

CRIS 3, issue 14.2 makes no proposals. It notes that the need to better separate community from personal matters is reflected in Final Report recommendations 19, 24 and 37, that stage one reforms began this process and asked six questions to determine what more may be needed. These questions are summarised in the stakeholder feedback headings below.

²⁷. See discussion in Part 5 about the unusual way the RV Act defines the terms retirement village scheme and residence contract, with issues in the meaning for both terms using the word scheme. In summary, a retirement village scheme means a scheme with the three elements that mean the RV Act applies. The word scheme as used in the term residence contract includes detail for the way a village is operated beyond the three requirements for the RV Act to apply.

Stakeholder feedback

Seven submissions responded directly to the CRIS questions. Stakeholder feedback included industry peak bodies, WARVRA, residents' committees and operators. Additional relevant feedback was provided in general submissions, responses to other CRIS issues and in meetings with stakeholders, including working group meetings with industry peak body during 2020 and with COTA in 2021.

Better delineation between community wide arrangements and individual specific terms

Stakeholder feedback generally supported better delineation between community arrangements and individual contract terms. A residents' committee said 'For residents living within the same village and conducting their everyday lives, there should be a 'sameness' in their experience. Their ability to enjoy the facilities of the village and to receive service from the management and owners should be equal and not be affected by the version of the contract that they hold, or whether they are long-term or new residents'.²⁸

Industry lawyers suggested the RV Act provide a process for 'identifying and clearly differentiating between a retirement village scheme, the contract and the services' that includes the important elements of a retirement village scheme being lodged with the RV Act memorial.²⁹

WARVRA strongly supported any proposal that would 'make it clear' that the residence contract comprises two separate and distinct parts:

- a) the financial arrangements between the [operator] and the resident(s); and
- b) 'community arrangements' which states the rules and obligations to be complied with by **all** residents' (original emphasis).

WARVRA submitted that financial obligations should only be varied by amendment to legislation or mutual consent. WARVRA's submission to CRIS 1, and later meetings with Consumer Protection, identified a wider range of matters and purposes for a community arrangements concept.³⁰

An operator advised that consistency in non-financial matters made sense operationally, because they would be easier to administer and differences cause dispute and confusion amongst residents.³¹ The industry peak bodies agreed that 'Even where villages offer different contract models within the same village, it is also important to ensure consistency of terms and items that may impact individual residents the same way, despite benefitting from different contract models'.

²⁸ Submission 104. This committee suggested that prospective residents be provided with a record of amendments to residence contracts over the years, to 'provide them with some idea of the progress of village administration' and compare offered terms with those of other residents.

²⁹ Submission 111.

³⁰ Submissions 14 and 121.

³¹ Submission 141 and subsequent meeting.

In meetings with Consumer Protection, they agreed that it could be useful to provide some clarity about what these matters are. They also saw potential for the community arrangements concept to reduce residence contract length by creating a separate document that describes the community arrangements.³²

They did not, however, support disclosure of ‘detailed operational information’ to residents (see questions 14.2.1 and 2 below) and said that the RV Act already requires that ‘contractual provisions must adequately provide protections for consumers’. In particular, operators are concerned that their ability to offer different financial models (which is what they mean by different contract models) in a village is not restricted. They say it is necessary to adapt financial models to current economic conditions over time and to meet consumers’ preferred payment options.

Questions 14.2.1 and 2 – should operators be required to disclose additional information? If so, what information? Should it include information about:

- *14.2.1 - staffing arrangements, administration arrangements, operator operational policies, insurance details, details about capital works management (example, contractor selection policies)’ and*
- *14.2.2 – the operator’s financial status, use operator makes of upfront payments, whether the operator is part of a group and whether the village finances are treated as independent or used for group purposes.*

WARVRA supported disclosure of the listed matters, apart from operator operational policies which it said were too broad. WARVRA also sought disclosure of any association between a contractor and the operator and identified capital works management and funding sources, and levels of consultation about them, as requiring further attention. WARVRA identified a range of additional matters for early disclosure, such as noise rules and pet policy. WARVRA also sought a declaration that an operator is financially viable and able to meet business operating costs, information about an operator’s arrangements to meet exit entitlement payments and whether an operator has other villages or aged care facilities.

Two residents’ committees supported disclosing more information about insurance.³³ Resident views on operator financial disclosure were limited and mixed.³⁴ As noted above, the industry peak bodies did not support disclosure of detailed operational matters.

³²Such as a key feature summary provided through earlier disclosure (proposed by Final Report recommendation 10) or information voluntarily provided on websites. Implementing recommendation 10 has also been supported in operator submissions about making consumers better aware of the RV product’s difference from a general property transaction (see CRIS 1, Issue 4.2).

³³ One reported a number of issues with insurance coverage to support better disclosure of resident inability to obtain insurance for their contractual responsibilities not covered by the operator’s insurance and operator insurance payment processes (submissions 104 and 107).

³⁴One view was information about an operator’s financial position was not needed. Another advised that an operator’s refusal to explain why the upfront payment was being made to a different company or provide a financial statement for their \$1m loan was why they did not enter that village (submission 116).

Individual operator views on disclosing the question 14.2.1 matters were mixed. One supported disclosure of these matters provided it did not occur 'in any manner that allows residents to think they can be part of the decision making'.³⁵ Another supported better disclosure of insurance policy excesses, capital works management and details on selection of contractors.³⁶ A third opposed mandated disclosure.³⁷

Individual operator views on financial disclosure were also mixed. One operator said financial arrangements to mitigate risk should remain commercial in confidence.³⁸ Another supported disclosure of the 14.2.2 financial matters, adding 'finances should be described for the purposes that they are used. Residents expect to know the use of the monies they have paid'.³⁹

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

Views on this were mixed. WARVRA did not support disclosure through the public database, which it says should be a quick introduction to the village only. An industry law firm suggested a written scheme to be lodged with a RV Act memorial. COTA advised that for a range of reasons, including reduced ability to adjust to new software as they age, transparency for seniors meant printed documents. One operator suggested an expanded version of the current disclosure form⁴⁰ and another an early key terms summary.⁴¹

Question 14.2.4 - whether residents should be notified of, consulted on or give consent for changes to community arrangements and whether there are any matters that the operator should be able to change without these processes.

WARVRA, and a residents committee, supported residents being notified and consulted on changes. WARVRA submitted that resident consent should be required for 'any changes that remove or diminish residents' rights or access to amenities and services' and it submitted that the State Administrative Tribunal (SAT) should resolve disputes about community arrangement changes.

During consultation in 2020, the industry peak bodies supported changes to some community arrangements being subject to resident notification and consultation. Obtaining resident consent was more contentious.

³⁵ Submission 106.

³⁶ Submission 110.

³⁷ Submission 141.

³⁸ Submission 106.

³⁹ Submission 110.

⁴⁰ Submission 104.

⁴¹ Meeting with Lendlease.

Individual operator submissions supported residents being notified of changes to community arrangements, but their views on consultation and consent were mixed. One supported consultation and consent if existing contracts would be affected.⁴² Another supported the requirements for resident consent in the current RV legislation.⁴³ Operator concerns were that providing for community arrangement changes on majority resident vote is unfair, impacting existing contracts regardless of individual resident consent, that requiring resident consent would result in residents feeling overwhelmed and potential for discord to develop between residents with different views.⁴⁴ An operator, however, also advised that it was crucial to have a conversation with residents about changes to community arrangements that allowed for their input and ideas.⁴⁵

Questions 14.2.5 and 14.2 6 - Do you have concerns about different contracts in your village? If so, what are these concerns? Do you think that there should be consistency in some matters between contracts in a village? If so, what matters should be treated consistently?

Residents were in general concerned at the degree of contract variation within a village. WARVRA said the variety was causing confusion in many villages. A residents' committee responded to question 14.2.5 with 'Perhaps the most pertinent response to this question is to ask why they shouldn't be the same?' (original emphasis), explaining: 'Sometimes minor changes in the wording can result in significant differences between residents during the life of the village. This ultimately leads to a 'multi-tier' system of residents' entitlements and difficult administration, as village management has to be aware of the version of lease that each resident holds. This can lead to confusion by the village management'.⁴⁶

WARVRA sought consistency in allocation of maintenance costs between operating and reserve funds, the matters requiring resident consultation or approval and a range of other matters such as village rules. It said residents were particularly concerned about variety in financial arrangements and exit charges, including DMFs being calculated differently. It submitted that recurrent charges should be the same for all residents.⁴⁷ Supporting this, a resident complained there were at least five contracts in their village, differing on who pays – the resident, village budget or capital funds – 'for even the smallest things' such as smoke alarms.⁴⁸

Operators supported contract variety in a village, primarily regarding financial models. The industry peak bodies advised that there can be 30 or 40 different contractual provisions about what falls within recurrent charges, exit fees or the way a DMF is calculated within a village.

⁴² Submission 110.

⁴³ Submission 141.

⁴⁴ Submission 106.

⁴⁵ Meeting between Consumer Protection and not-for profit operator..

⁴⁶ Submission 104.

⁴⁷ With exceptions for variations based on floor space, number of residents and some other matters (submission to CRIS 1).

⁴⁸ P Burton.

Impact assessment

There is general consensus that some arrangements within a village affect all residents and should be consistent for all residents. What these arrangements are can then be more clearly identified to prospective residents and existing residents can be notified of any changes. Stakeholders generally support using the community arrangement concept to consolidate village features that apply to all residents and that are (or should be) consistent in all village contracts, as the first step in addressing the policy problems.

Stakeholders also broadly agree that community arrangements include many of the matters set out in questions 14.2.1 and 14.2.2, and the various matters that different pieces of the RV Act currently identify as community, rather than individual resident matters, such as village rules, dispute resolution procedures and communal amenities and services. A village urgent repairs policy is also likely to apply to all village residents. These matters provide a foundation for the community arrangement concept. Whether other matters are community arrangements is likely to vary from village to village. For example, the matters included in recurrent charges – some operators advised these are the same for all village residents, meaning this is a community arrangement for those villages, but others advised that what is included varies from resident to resident, meaning this is not a community arrangement for those villages.

The main areas of disagreement are the extent to which:

- a) contractual financial models should be consistent within a village;
- b) operators should be required to consult residents, or obtain their consent, to make changes to community arrangements; and
- c) prospective residents should be given the 14.2.1 matters that provide financial information for their upfront investment in an operator.⁴⁹

Consumer Protection does not consider it necessary for financial models to be the same within a village. Operators need to be able to vary financial models within a village to provide prospective residents with price structure options that meet their different tolerances for risk over certainty in fees based on length of residence and market movements, their different capacities to pay and, over time, adjust to changing market conditions.⁵⁰

Resident concerns about inequality in recurrent charges, capital works funding and different DMF calculations are complex. Aspects of these concerns are addressed in CRIS 2, parts 7 and 8 recommendations about village budget and capital works and by

⁴⁹ CRIS 3, pp25-6 discussed that at present some residents make their decision to invest in the RV product: with little understanding that their upfront payment is an investment in the operator; without information as to operator's financial status or use to which their funds will be put; and this aspect of community arrangements may be an important consideration in deciding to enter a retirement village or a particular retirement village.

⁵⁰ As discussed in CRIS 1, some price structures ask for a higher upfront payment and an uncertain DMF together with a share in any upfront payment increase or loss. Others involve a lower upfront payment and certainty in the DMF amount but offer no share in any upfront payment increase. Different consumers value certainty and risk differently and some will choose based on the amount they have available to pay upfront.

the recommendations for better disclosure of RV price structures. The latter will make it clearer to residents that what they pay for in one fee is paid by other residents through different fees.

The current degree of variety does, however, pose issues for ensuring there is no double dipping, including through cost shifting between fees and charges, for existing residents without their consent.

Residents are not seeking to make management decisions or that their consent be obtained for all village changes. Like operators, they are concerned about making decisions on matters when they do not have the full picture, being overwhelmed by the matters that they must make decisions on, and discord arising from different views and decisions affecting existing contracts. They are seeking consultation about changes to community arrangements and for their views to be influential. Their position that a change to community arrangements that affects their rights, amenities or services (or access to them), should require their communal consent is reasonable and is already required for changes to communal amenities and services.

Individually residents may invest substantial sums in a village operator. Cumulatively, their investment can be in the hundreds of millions of dollars. At present, in relation to the security of their investment, prospective residents can be given limited or no information to assess or compare different villages across the sector. For example, residents are given little or no information about the operator's financial status, the uses to which their upfront investment will be put by the operator, whether the operator is part of a group, how the operator funds exit entitlements and the adequacy of the land secured by the statutory charge to fund these.⁵¹ Residents may need to be notified when some of these matters change.

Further consultation can occur during drafting on:

- a) what the community arrangement concept will comprise (including whether any financial arrangements should be consistent);
- b) which changes should be subject to notification only, or resident consultation or consent; and
- c) how community arrangements will be disclosed – for example, in a prescribed, early key term summary or voluntary information on websites,

Relevant to early, prescribed disclosure, an operator who provides early key term summaries in other jurisdictions advised this had no cost implications because it was a pro forma document and it was tailoring information to a particular RV product unit and price structure that incurred costs.

⁵¹ For example, upfront payments can be used to support other operator businesses or not for profit activities and so not be available for village purposes (CRIS 3, p26-6). In other types of investment, financial disclosure of matters relevant to this investment is prescribed. The RV Act disclosure requirements do not provide the usual disclosure that would be required for investments of the size residents make and this information may not be available from other sources. See, for example: [Regulatory Guide RG 168 Disclosure: Product Disclosure Statements \(and other disclosure obligations\) \(asic.gov.au\)](#).

Otherwise, stakeholders have not yet engaged with the details of the reform, beyond all industry peak bodies seeing benefits in providing clear information about community arrangements and the potential for this to reduce final disclosure and contract size.

Introducing the concept of community arrangements to the RV Act has potential to reduce consumer confusion, concern, dissatisfaction and disputes. Consistency and clarity in these matters therefore offers a reduction in business costs and potential to attract a wider pool of consumers.

Depending on what is included in prescribed community arrangements, operators may need to make some changes to their current standard form terms and conditions. This will fall within the general costs to update contracts following the reforms.

Consumer Protection will incur costs in education about the reform. In particular, Departmental guides will be useful.⁵² If operators do not comply, some compliance actions may be generated but not expected to be significant.

Recommendation 3

- 3.1 Amend the RV Act to insert a new term ‘community arrangements’, for the features of the scheme or arrangements under which a retirement village (RV) operates that are the same or consistent for all residents.**
- 3.2 Conduct further consultation during drafting:**
- a) about what matters are considered community arrangements, particularly about what financial arrangements may be community arrangements; and**
 - b) as to how community arrangements will be disclosed (including in a way that permits prescribed contracts terms to be reduced).**

⁵² COTA advised that seniors find guides with questions for them to consider helpful.

4. Multiple contracts

Issue

CRIS 4, part 20.1.2

It is not uncommon for prospective residents to be required to sign multiple contracts before they take up residency in a village, particularly when buying a unit off-the-plan. Sometimes the contracts are signed years apart, causing confusion around whether the RV Act disclosure requirements and cooling off periods apply only to the first contract or to all contracts forming part of the lease of the unit. The RV Act does not address how the disclosure requirements should be managed when prospective residents are required to sign more than one contract. This has resulted in some operators not providing full pre-contractual disclosure until the signing of the last contract. There is also confusion as to whether the minimum cooling-off periods apply to each contract or whether it is limited to either the first or last contract only.

To deal with these issues, the Final Report made a recommendation to amend the RV Act to specify how pre-contractual disclosure and cooling-off requirements apply to residence contracts signed at different times.⁵³

Objective

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

Policy proposals

CRIS 4, proposal 20.1.1, was that the RV Act be amended to provide that:

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

CRIS 4 also noted that other jurisdictions had introduced a settling in period as an alternative to an extended cooling off period. It asked for stakeholders' views on settling in periods.

⁵³ Final Report recommendation 23.

Stakeholder feedback

Pre- contractual disclosure for multiple contracts

There were limited responses received on this issue, however, they generally supported the proposal to limit disclosure requirements to the first residence contract. A large operator agreed that operators should only be required to disclose the prescribed information once, prior to entering into the first residence contract. The operator noted that the RV Act already requires an operator to disclose copies of *all* residence contracts the resident will be required to enter into in order to reside in the retirement village at least 10 days before entering into a residence contract.⁵⁴ This means that there is limited need for further pre-contractual disclosure of information when the resident signs any additional residence contracts.

The industry peak bodies agreed that the RV Act needed to clarify the ‘timing of information disclosure and how cooling off periods may apply in off-the-plan circumstances’.⁵⁵ It was also submitted that operators should only be required to make one pre-contractual disclosure of information, with this being ‘when a residence contract is signed conferring a right to the resident to occupy the RV unit’.

Similar to the response received from the operator, WARVRA noted that the RV Act currently requires *all* the contracts the prospective resident will be asked to sign must be disclosed to a prospective resident at least 10 working days before a person enters into a residence contract. WARVRA said that this meant that further contract disclosure should only be required if there are any changes to the ‘way in which the village is to be operated or communal amenities and services are to be provided’ or if the lease is off-the-plan and a period of time, such as 6-12 months, has elapsed since the first residence contract was signed.

Cooling off periods for multiple contracts

Responses to this issue were divided. The operator who responded stated that a cooling-off period of seven working days should apply to all residence contracts, such that if residents enter residence contracts at different times, they have the benefit of the cooling off period commencing from the date of the last residence contract to rescind all contracts.

The operator also supported a 90 day settling in period, however, stated that this should not be available if the resident has re-located from another retirement living unit operated by the same operator.

WARVRA was also of the view that residents should be provided with a cooling-off period for all contracts they are required to sign after the first contract.

⁵⁴ RV Regulations (WA), regulation 6.

⁵⁵ Property Council of Australia, Retirement Living Council, Leading Age Services Australia (LASA) and Aged and Community Services Australia (ACSA).

They did not support a settling in period for residents stating that it would most likely result in additional costs being covered by the operator or resident.

The industry peak bodies submitted that ‘cooling-off’ periods should only apply once ‘where a residence contract that contains the right to occupy or own a retirement village unit is entered into’.

Impact assessment

Pre-contractual disclosure for multiple contracts

Overall, there was support from industry peak bodies, WARVRA and operators to CRIS proposal 20.1.1 that pre-contractual disclosure should only apply to the first contract that a resident is required to sign. However, WARVRA considered that an exception should be in circumstances where there has been a variation in terms of any of the unsigned contracts impacting the provision of amenities and services to the resident. WARVRA also noted that additional disclosure may be warranted if a period of more than 6 to 12 months had elapsed since the signing of the first contract.

The RV Act does not contemplate that changes to a RV contract will be necessary after the first pre-contractual disclosure has occurred. However, it is evident that changes to contracts do arise, especially with off-the-plan sales and where there has been a considerable time lapse between signing off the first and any subsequent contracts. It is considered that providing consumers with an opportunity to consider any variation to the documents provided as pre-contractual disclosure ensures that prospective residents are fully informed as to any changes. This also reduces the likelihood that they will become aggrieved when a variation later comes to their attention. The minimal delay involved with a further consideration period involves is also preferable to potential residents disputing whether a consideration period does or should have applied.

The ST Act requires the notification of notifiable variations after the buyer signs a contract for the purchase of a lot.⁵⁶ Further consideration will be required in the RV context as to what types of changes to disclosure documents should be disclosed to a prospective resident.

Cooling-off period for multiple contracts

The responses to CRIS 4 were mixed. WARVRA and a large operator supported having a cooling-off period for each contract. The industry peak bodies did not support a cooling-off period for each contract, maintaining that the cooling-off period should only apply to the contract that ‘contains the right to occupy or own a retirement village unit’.

The view that cooling off rights should only apply to the contracts entered into for retirement village living which relate to the right to occupy or own a unit is at odds with the notion that retirement village living involves more than simply accommodation.

⁵⁶ ST Act (WA), section 157. ST Act, section 160(b) provides that the buyer may avoid a contract for sale if materially prejudiced by the information or document disclosed.

As discussed in recommendation 4.1, the RV product involves the provision of amenities and services in a managed community. Residents are required to pay for these additional components as part of their residency. Restricting cooling off to a contract for accommodation would not address problems identified in other contracts which are also an essential part of residence in the village. No adverse impacts of requiring a cooling-off period for each contract that forms part of the residence contract were identified in the responses. It is also noted that the right of residents to a 'cooling-off' period ceases at the point when the resident enters into occupation of residential premises at the village.⁵⁷

RV legislation in NSW, the Northern Territory (NT) and Queensland (Qld) require cooling-off periods for *all* RV contracts entered into.⁵⁸ Some village operators also now provide extended cooling off periods as well as settling in periods under their contracts.⁵⁹

The ST Act does not have a cooling-off period for contracts, however, if a notifiable variation occurs after a buyer signs a contract for sale and purchase of a lot, the seller must inform the buyer in writing of the variation to enable the buyer to make an informed assessment as to whether they are materially prejudiced by the variation.⁶⁰ If the buyer is materially prejudiced by the variation, they are allowed to avoid the contract for sale.⁶¹ Cooling-off periods provide prospective residents with a right to exit the contract at the election of the resident. Residents are, however, able to negotiate issues that arise with the operator if they prefer to do this during the cooling-off period.

Cooling-off periods provide consumers with the opportunity to ensure they are fully satisfied with their decision before committing to a major investment. It also provides time for persons to identify any important changes, ask questions, obtain advice and exit the contract if issues are unable to be resolved. It provides a safeguard to residents to ensure that they fully understand their contractual rights and obligations.⁶²

In these circumstances, it is considered that having cooling-off periods for each RV contract entered into provides prospective RV residents with an appropriate consumer protection when entering into important contractual arrangements about their future living arrangements.

Settling in period

The only stakeholder support for a settling in period was from one operator who supported a 90 day settling in period provided that it was not available to residents moving from one village to another which was owned by the same operator. WARVRA, as well as a not-for-profit operator and the industry peak bodies opposed the settling in period stating that it would result in unnecessary costs being borne by the operator and residents and may also delay the payment of exit entitlements to departing residents.

⁵⁷ RV Act (WA), section 14(2).

⁵⁸ R Act (NSW), section 32, Retirement Villages Regulations 1995 (NT), Schedule 2, clause 21 and RV Act (Qld), section 45(1)(a) and 48.

⁵⁹ Retire Australia states that a 21 day cooling off period and 90 day settling in period is available under their contracts: retireaustralia.com.au; Aveo have a 21 day cooling off period and 90 day settling in period.

⁶⁰ ST Act (WA), section 157

⁶¹ ST Act (WA), section 160(b).

⁶² If a prospective resident rescinds a contract, all residence, service and collateral contracts are rescinded: s 75, RV Act.

The RV legislation in NSW and SA includes provisions allowing residents to have a settling in period of 90 days during which the resident can change their mind as to whether the village suits their needs.⁶³ At this stage, there has been no research on the use and effectiveness of settling in periods in retirement villages.

Feedback from both industry peak bodies and WARVRA expressed considerable concern about allowing settling in periods, highlighting additional costs that would be borne by operators and residents. Although settling in periods for retirement villages are required in other Australian jurisdictions, at this stage, it is considered that there is insufficient support and need to require this in WA. This also leaves operators free to introduce a settling in period as part of their own contractual arrangements.

Recommendation 4

Implement CRIS 4, proposal 20.1.1, to provide that:

- a) pre-contract disclosure requirements only apply to the first residence contract that a prospective resident is asked to sign;**
- b) prospective residents must be given at least 10 working days to consider any additional residence contracts that are not signed at the same time as the first residence contract; and**
- c) prior to signing a second contract, an operator disclose any variation to the pre contract disclosure information previously provided.**

Also implement CRIS 4, proposal 20.1.2, to provide that:

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

⁶³ RV Act (NSW), sections 32 and 44A and RV Act (SA), sections 24(3) and 44(4) read with section 4(2)(b).

5. Meaning of ‘scheme’ in definition of residence contract

Issue

CRIS 3, part 14.1

To be a retirement village, residential premises and land must be used or intended to be used for a ‘retirement village scheme’. Under the RV Act a retirement village scheme has three elements. It is a programme of action or a plan or policy for:

- a) retired persons or predominantly retired persons (element 1);
- b) to occupy residential premises under specified arrangements (element 2); and
- c) at least one resident or prospective resident to pay a premium (element 3).

Stakeholders appear to be confusing the terms ‘retirement village scheme’ and ‘residence contract’ as used in the RV Act. One reason for this confusion is that the RV Act inconsistently defines and uses the term ‘scheme’, a word that is used in the meanings for both a RVS and residence contract. This confusion can result in misunderstandings about RV Act obligations which apply to a retirement village scheme and residence contracts.

Objective

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

Policy proposal

CRIS 3, part 14.1 proposed that the RV Act definitions for retirement village scheme and residence contract be clarified by amending the RV Act so that it no longer provides that the word ‘scheme’, when used alone, has the same meaning as ‘retirement village scheme’.

Stakeholder feedback

Seven written responses to the proposal were received.⁶⁴ Respondents included a residents’ association, village owners and operators, WARVRA, a law firm and industry peak bodies. Most respondents supported the proposal. The residents association did not support the proposal but did not provide any reason as to why. WARVRA supported the proposal stating that the definitions used to describe ‘retirement village scheme’ and ‘residence contract’ and the way that they are interpreted are not clear. It further suggested that more work be undertaken to clearly define both terms.

There was general support for the proposal from individual operator respondents. A law firm thought that the definitions for ‘retirement village scheme’ and ‘residence contract’ should be refined and the term ‘scheme’ be separately defined.

⁶⁴ Written responses were contained in submissions 107, 110, 111, 121 and 153 (representing three separate respondents).

The industry peak bodies, while suggesting they understood the intent behind the proposal, did not support it, stating that they had difficulty seeing how a safe or adequate definition could be drafted or included in legislation. Their concern is that, if an amended definition was too narrow in scope, emerging forms of retirement living may not be captured by it.

Impact assessment

It is clear from the responses received on this issue that there is a lack of clarity around the terms 'retirement village scheme', 'residence contract' and 'scheme'.

CRIS 1, part 4.1 deals with proposed changes to the definition of a retirement village, RVS and residence contract; and some of the issues raised by the respondents, including the industry peak bodies concerns about unduly excluding some arrangements, are dealt with in that section. This proposal relates solely to the problem caused by section 3(1) of the RV Act defining 'retirement village scheme' and 'scheme' as having the same meaning. No substantive change to the terms is proposed, as the meanings for 'retirement village scheme' and 'residence contract' will not be changed.

No significant cost impacts of the proposal were identified during consultation. Clarifying that 'scheme' when used alone does not have the same meaning as 'retirement village scheme' will reduce instances of noncompliance with RV legislation and minimise disputes arising from misunderstandings that apply to a RVS or residence contract. Separating the term 'scheme' when used alone from 'retirement village scheme' is a technical amendment which will make the differences between a RVS and a resident contract clearer and more easily understood.

The proposal is unlikely to have any impact on contractual rights and obligations or other rights and obligations under RV legislation. There may be some compliance costs associated with amending standard form contracts for new residence contracts that use the terms 'retirement village scheme', 'residence contract' or 'scheme', interchangeably.

Recommendation 5

To amend the RV Act section 3(1) to clarify the definitions for 'retirement village scheme' and 'residence contract' so that it no longer provides that the word 'scheme', when used alone, has the same meaning as 'retirement village scheme'.

6. Premium payments to legal entities

Issue

CRIS 3, part 16.1

Section 18 of the RV Act protects a prospective resident's financial interest by requiring that a premium paid to the administering body be held in trust and not be released to the administering body until the prospective resident takes up occupation of the unit or it becomes apparent that they will not take up occupation.⁶⁵ However, retirement village financial models can involve a premium being paid to other legal entities rather than an administering body. Where this occurs, the protection provided by section 18 of the RV Act may not apply.⁶⁶

The intention of section 18 of the RV Act is to protect all premiums paid by prospective residents regardless of the entity to which they are paid. This issue is an unintentional loophole created by the drafting of section 18 and also the definition of a premium in section 3 of the RV Act.

Objective

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

Policy proposal

CRIS 3, proposal 16.1 was that the RV Act be amended to define a premium as a payment to any legal entity in connection with admission into a village. The CRIS also asked whether the proposal should apply to premiums paid prior to the amendment coming into effect.

Stakeholder feedback

WARVRA supported CRIS 3, proposal 16.1 stating that it would close 'this loophole for the future'. A large operator in WA also supported the proposal, commenting that it 'presents no issues to the operators who are already implementing it as a matter of practice'.⁶⁷

The industry peak bodies did not, however, support the proposed amendment on the basis that they were not aware of 'any existing issues where section 18 of the RV Act currently applies'. The industry peak bodies also noted that 'even in scenarios where contracts include the payment of a premium to entities other than the administering body, the settlement is typically arranged by the administering body, and it is the administering body who complies with trust accounting requirements'. There were no adverse impacts identified with this proposal in any of the submissions.

⁶⁵ RV Act, section 18(1).

⁶⁶ RV Act, section 20 secures a resident's right to repayment of all or part of a 'premium' paid against the land in the retirement village by a statutory charge. .

⁶⁷ Submission 141

Other jurisdictions

In Qld, SA and Vic, an ingoing contribution is defined as the amount payable by a person to secure a right to reside. There is no reference as to the entity to which the contribution must be paid.⁶⁸

The ingoing contribution is protected with a requirement that it be held in trust until the person on whose behalf it was made enters into occupation of the residence.⁶⁹

In contrast, the Australian Capital Territory (ACT), NSW, Tasmania (Tas) and WA specify that the premium or ingoing contribution payments are made to the operator or administering body. On making such payments, the legislation offers protection by requiring that the monies be held in trust.⁷⁰ However, this means that any payments made to an entity other than the operator or administering body will not be afforded the protection of the requirement that the monies be held in trust.

Impact assessment

Consumer Protection considers it advisable to close the potential loophole in RV Act section 18 due to the significant consequences for prospective residents if it is held not to apply to a premium paid to an entity other than an administering body. There was no feedback from any stakeholders demonstrating adverse impact of the proposed amendment to section 18.

Recommendation 6

Implement CRIS 3, proposal 16.1 to ensure that RV Act protections apply to all premiums regardless of the entity to whom they are paid.

⁶⁸ *Retirement Villages Act 1999* (Qld) sections 14(1), 46(1), *Retirement Villages Act 2016* (SA) section 4.

⁶⁹ *Retirement Villages Act 2016* (SA) sections 4 and 26, *Retirement Villages Act 1999* (Qld) sections 14 and 46, *Retirement Villages Act 1986* (VIC) sections 3 and 25.

⁷⁰ *Retirement Villages Act 2012* (ACT) sections 11 and 39(1), *Retirement Villages Act 1999* (NSW) sections 6 and 23, *Retirement Villages Act 2004* (Tas) sections 4 and 9 and RV Act, sections 3 and 18.

7. Definition of premium

Issue

CRIS 3, part 16.2

The RV Act currently defines premium as payments made for, or in contemplation of, admission to the village as a resident.⁷¹ Recommendation 87 of the Final Report was that the RV Act be amended to better define premiums. In particular, it recommended that the definition of premium be expanded to 'include the payment of consideration on a deferred basis to the administering body and to exclude nominal sums'.⁷² This was to address concerns that the definition may not include deferred fees, such as DMFs.

Objective

To clarify the definition of premium under the RV Act.

Policy proposal

CRIS 3, proposal 16.2 was that the RV Act definition of premium be amended to specifically include all payments made by a person in consideration of, or in contemplation of, admission to a RV regardless of when the payment is made.

Stakeholder feedback

WARVRA did not support proposal 16.2. WARVRA raised the concern that 'there are other considerations related to premium that might be confused if this proposal proceeds'.

A large operator in WA also expressed concern about the proposal stating that 'the definitions of premium to include all payments made in connection with admission to a village has real potential to restrict contract options within the industry'. The operator explained that:

'In the case of alternative contract models where there is an additional amount paid upfront on entry (instead of a DMF payable on exit), those operators should be allowed to determine how they treat the additional prepaid amount and not be required to treat it as part of premium regardless of what it actually represents. This will allow operators to continue to offer alternative contract options and provide more choice to consumers to suit their financial circumstances'.⁷³

The industry peak bodies also did not support the proposed amendment commenting that 'it risks confusing different financial components, obligations, payments and benefits at different stages of a resident's tenure'.⁷⁴

⁷¹ RV Act (WA), section 3.

⁷² Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report*, November 2010, 149.

⁷³ Submission 141

⁷⁴ Submission 153 .

The submission also noted that ‘the final DMF or premium amount cannot be certain or guaranteed upon entry, which provides challenges if the definitions are changed’.

Other jurisdictions

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

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

Impact assessment

The proposed amendment to clarify the definition of premium did not have support from the industry peak bodies, WARVRA or independent operators. The stakeholders all expressed concern regarding unintended consequences of the proposed amendment.

As CRIS 3 noted, it is arguable that premium as currently defined already extends to deferred payments as there is no reference to when the payment made for or in contemplation of admission to a village must be made. Further, since this issue was discussed in the 2010 Final Report, Consumer Protection has not been alerted to any issues regarding the definition of premium not including deferred payments. The consultation did not identify any problems with this issue.

Recommendation 7

Do not implement CRIS 3, proposal 16.2, which proposed that the RV Act definition of premium be amended to specifically include all payments made by a person in consideration of, or in contemplation of, admission to a retirement village (RV), regardless of when the payment is made.

This recommendation is based on the feedback received and concerns identified in regards to unintended consequences of the proposal.

8. Public online database of retirement villages

Issue

CRIS 3, parts 13.1 and 13.2

RVs are one of a number of different retirement living options for older consumers and it is not always clear what retirement accommodation is covered by the RV Act. One reason is that the RV Act only applies when premises are used for, or in connection with, a RVS.⁷⁵ The existence of a RVS depends on the financial contractual arrangements with residents and these arrangements are not generally made public. There is also no restriction under the RV Act on the use of the term 'retirement village'.⁷⁶

Consumer Protection does not have a comprehensive list of RVs and operators in WA. This can hamper regulatory functions under the RV Act, such as the provision of educational information to operators, compliance functions and providing advice to the Government on the sector. The Final Report recommended that operators be required to provide information about their villages to the Commissioner for Consumer Protection (Commissioner) and that the Commissioner publish this information to enable prospective residents to easily identify RVs which are regulated by the RV Act. The Final Report also recommended restricting the use of the term 'retirement village' to premises to which the RV Act applies (recommendation 86).⁷⁷

Objective

To enable consumers to readily identify premises regulated by the RV Act and make easier comparisons between seniors' accommodation options, and to provide government with an accurate list of premises covered by the RV Act to assist in regulatory functions.

Policy proposal

CRIS 3, part 13.1 proposed not implementing Final Report recommendation 86 to restrict the use of the term 'retirement village' in the name of a village.

CRIS 3, part 13.2 proposed establishing a public online database containing prescribed information to enable consumers to identify premises regulated by the RV Act. It further proposed that this information be provided and updated by operators of RVs and that this obligation be enforceable under the RV Act with penalties applying for non-compliance.⁷⁸ The proposal also identified issues such as database infrastructure options and the cost of implementing the database.

⁷⁵ The term 'retirement village scheme' is defined in the RV Act section 3. A key part of this definition is that a resident normally .pays an upfront premium 'in consideration for, or in contemplation of, admission as a resident under the scheme'. Section 5(1) of the RV Act explains the application of the RV Act.

⁷⁶ The RV Act does not require villages to use the term 'retirement village' for accommodation covered by the RV Act. .Remedies, may exist under the Australian Consumer Law where a village uses the term 'retirement village' where it is not covered by the RV Act, however the situation is less clear where accommodation labels itself as 'retirement living' or other similar terms. .

⁷⁷ The 2010 Final Report recommended restricting the use of the term 'retirement village' as one option to assist consumers identify which villages are regulated by the RV Act.

⁷⁸ CRIS 3 proposal 13.2 implements Final Report recommendation 93.

Stakeholder feedback

Restricting the use of the term 'retirement village' in the name of a village

Four written submissions were received in response to the question as to whether restrictions should be placed on the use of the term 'retirement village'. Opinion was divided.⁷⁹ One respondent stated that the term 'retirement village' should only refer to villages that are covered by the RV legislation. Another generally supported standardising the definitions and terminology used in RV contracts and disclosure documents. Two respondents agreed that there should be no restriction in the use of the term 'retirement village'. One of these respondents, in support of the proposal, stated that the term 'retirement village' has become 'such a common descriptor by many potential clients and establishments that restricting the term would not alter perceptions'.

Introduction of a public database

Six written submissions were received in response to the proposal to establish a database.⁸⁰ The CRIS proposal was supported by a majority of stakeholders. There was support from the majority of residents and operators that responded and also from WARVRA. COTA also supported the establishment of an online database but noted that some seniors prefer information in hard copy and that some still do not have access to the internet.⁸¹ A joint submission from industry peak bodies supported the introduction of a basic database on a number of conditions, one being that Consumer Protection should maintain and update the database rather than requiring operators to formally notify Consumer Protection of any changes.

Feedback was also sought on the type of information which should be contained in the public database. Both residents and operators supported including the name and street address of the RV and the name and contact details of the operator. Residents largely supported the inclusion of the following additional basic information in the database:

- a) the total number of premises in the village;
- b) tenure details, including the number of freehold (strata and purple title), lease, license and rental premises; and
- c) the memorial number of the village.

Industry peak bodies, however, considered that only the name and street address of the RV and the name and the contact details of the operator should be required. Industry peak bodies considered that the information should be restricted to protect commercially sensitive and competitive information, and to minimise the compliance burden, including cost, on operators.

⁷⁹ Submissions 107, 108, 121 and 110.

⁸⁰ Submissions 106, 107, 108, 110, 121 and a previous submission from WARVRA on 4 February 2016.

⁸¹ COTA has advised that only about 60 percent of older people have access to the internet and suggested that print copies should also be made available, eg in *Have A Go News*. The Pew Research Centre in the US found that 67 percent of adults aged 50–64 are currently Internet users.

WARVRA considered that the content should be basic, as in SA and Vic, and that further information can be obtained from the internet, noting that ‘.... any further investigation should be left to the enquirer who in this digital age can usually obtain substantial amounts of information easily’.

There was no support from stakeholders for including more extensive information about the RV in the database, such as detailed information about village facilities, amenities and services, and financial information about the village, although one submission supported the possibility of including additional information at a later time.

Other jurisdictions

Qld, NSW, SA and Vic provide a simple database on their respective websites. Other jurisdictions also require operators to provide database information.⁸² The size of the database and type of information provided varies slightly but the purpose of the information provided is the same as that proposed for WA.

Table 1 provides a summary of the statutory requirements relating to RV databases in the jurisdictions that provide public databases on departmental websites. Table 2 lists the type of information that is provided in these databases.

Table 1: Statutory requirements relating to retirement village databases in other jurisdictions

Database legislative provisions	NSW	Qld	SA	Vic
Legislation enables establishment of an online database.	✓	✓	✓	✓
Legislation requires operators to notify the regulator of retirement village information.	x	✓	✓	✓
It is an offence for operators to fail to provide the prescribed information.	x	✓ ⁸³	✓	✓
It is an offence to fail to update information.	x	✓ ⁸⁴	✓	✓
Legislation provides for a registration scheme.	x	✓	✓	x

⁸² There are statutory requirements for operators to provide and update information in Queensland, South Australia and Victoria and penalties for breaching these requirements. In addition, Queensland and South Australia operate registration schemes which require operators to provide a considerable amount of information. NSW does not have legislative backing to require operators to provide and update information for their online database. However the Better Regulation Division of the Department of Customer Service Division in NSW requests and receives information from operators through administrative arrangements. A notice is on the Department's Fair Trading website requesting operators to provide information by email. There are no enforcement provisions or penalties for non-compliance in the *Retirement Villages Act 1999* (NSW).

⁸³ *Retirement Villages Act 1999* (Qld) section 34 makes it an offence to operate an unregistered retirement village but no offences are specifically listed in relation to the provision of database information or the updating of that information.

⁸⁴ Although there are no specific offences, Queensland legislation requires registration and accurate details.

Table 2 – Database information in other jurisdictions

	Database details	Number of RVs
Qld	Village name, address, date of registration, number of living units currently available, number of serviced apartments, tenure (freehold, lease, licence), scheme operator, State electorate, and local government area. ⁸⁵	329
NSW	Village trading name, address, telephone number, link to the operator's webpage, and local government area. ⁸⁶	678
SA	Village name, address, and number of residences. ⁸⁷	534
Vic	Village name, address, and any exemptions that have been granted under the <i>Retirement Villages Act 1986</i> (Vic) section 38L. ⁸⁸	467 ⁸⁹

Impact assessment

CRIS 3, proposal 13.1 that recommended not restricting the use of the term 'retirement village' was generally supported by stakeholders who responded to the consultation on the basis that adopting such a restriction would not assist consumers. CRIS 3, proposal 13.2 to establish a public online database in WA was strongly supported by the majority of respondents, including WARVRA and COTA. Conditional support was also received from industry peak bodies.

Requirement for operators to provide and update information

The consultation did not identify any significant economic impacts for residents. The industry peak bodies raised concerns about requiring operators to provide database information as imposing an additional compliance and cost burden on operators. This relates to proposal 13.2, which places the onus on operators to provide and update information and also requires a slightly larger amount of information than is supported by industry peak bodies.

Although proposal 13.2 will impose some compliance costs on operators, the requirement to provide the information online is not considered onerous in terms of time and cost. The proposed information required is minimal, readily available to operators, and not likely to change often. In addition, the information to be provided is not commercially sensitive.

Although consumers can obtain information about RVs by conducting their own research and engaging with an operator, there is no public information available about which housing complexes are regulated under the RV Act. As noted above, the existence of a RV scheme depends on the financial contractual arrangement with residents. Unless an operator advertises that the village is regulated by the RV Act it is difficult for consumers to have this information when they are making purchasing decisions.

The web links to the public online RV data bases in other jurisdictions are as follows:

⁸⁵Qld <https://www.data.qld.gov.au/dataset/be1c76a4-e448-43f5-b36b-4baa0fd28df8/resource/b679faad-ff54-48dd-b0cb-972a88a8346e/download/retirementvillages31may2021lgas.csv>

⁸⁶NSW <https://www.fairtrading.nsw.gov.au/help-centre/online-tools/fair-trading-public-register-data>

⁸⁷SA <https://data.sa.gov.au/data/dataset/retirement-villages-register/resource/4d1c7ad5-5665-4036-a141-bd1d29a49fe6>

⁸⁸VIC <https://registers.consumer.vic.gov.au/rvsearch>

⁸⁹ Consumer Affairs Victoria, *Review of the Retirement Villages Act 1986* (VIC) Issues Paper 2019.

Improving consumers' access to information about RVs at an early stage increases market competition and supports consumers making better informed decisions. This is a key focus of the current reform process. The database would also support the Commissioner's regulatory functions under the RV Act, such as advice and information, community education and policy development. Other jurisdictions have a public database of RVs available from the regulator.

Other options proposed

One submission suggested that the provision of information by operators could be linked to the registration of the RV memorial at Landgate in order to minimise duplication for industry. This option is not considered feasible as the obligation to lodge a memorial is a once-off requirement imposed on the land owner. The information required by the database would need to be lodged by operators and would be an ongoing requirement.

A residents' group provided conditional support to the proposal by stating that the RV Act already requires that a disclosure statement must be given to prospective residents and that this may provide sufficient information. The disclosure statement is required to be provided 10 days prior to the entry into a residence contract. It is not generally given until a consumer is well advanced into contractual negotiations with an operator and so this process does not address the policy problem for early and easy access to useful information about RVs regulated by the RV Act.⁹⁰

Overall, Consumer Protection considers that the benefits that database will bring outweigh any negative impacts in that the database will assist consumers to identify whether a village is regulated by the RV Act which provides consumers with certain protections, in particular considerable financial protections. The database will increase the amount of publically available information about RV options⁹¹ and support the Commissioner's regulatory functions.

Type of information to be provided by operators

There was some division between industry and residents about the type of information which should be included on the database. The operator peak bodies were opposed to including information beyond the name and address of the village and operator details while residents supported some additional details.

The majority of databases used in other jurisdictions provide only RV and operator name and contact details. Qld registers RVs and operators and are required to provide a considerable amount of additional information in the registration process. The Qld database includes the date of registration, number of living units currently available, number of serviced apartments, tenure (freehold, lease, licence), scheme operator, the State electorate, and local government area (see Table 2).

⁹⁰ The need to improve access to useful information to support earlier and more informed housing choices is a priority of the State Government's *Ageing with Choice* initiative.

⁹¹ The need to improve access to useful information to support earlier and more informed housing choices is a priority of the State Government Ageing with Choice initiative.

Although including information about the number of premises, tenure and the memorial number would go further than the majority of other jurisdictions, a major problem for prospective residents is confusion about tenure. Requiring tenure information in the database will help to address this problem. The number of units also assists consumers to compare the size of villages and the number of residents in the RV.

The memorial number provides information for a consumer to make relevant enquiries at Landgate. For example, the memorial contains records of land ownership and details of the land comprising a particular RV. It also contains the date of the commencement of the statutory charge on the land which protects residents' rights to the repayment of their premium.

It is recommended, therefore, that the database include the following information:

- the RV name and street address;
- the operator name and contact details;
- the total number of premises in the RV;
- tenure details, including the number of freehold (strata and purple title), lease, licence and rental premises; and
- the RV memorial number.

Costs for government

The establishment of a public database will incur a cost for government in establishing and operating the database. This is estimated to be between \$26,000 and \$52,000 for the first year, depending on the type of database infrastructure adopted. Ongoing annual operating costs are estimated to be approximately between \$14,000 and \$17,000 per annum, depending on the infrastructure used. Some of these costs will be offset by savings in officer time in obtaining up to date information on the sector.⁹²

⁹² Legislation and Policy Directorate regularly spend time collecting information about the retirement village sector to inform advice and reform work. Details of retirement villages in various electorates are also required for Community Cabinet briefings.

Recommendation 8

8.1 Implement CRIS 3, proposal 13.2, and the Final Report recommendation 93 for the RV Act to:

- a) require operators to provide the Commissioner for Consumer Protection (Commissioner) with information and updates to support a database of the following basic information:**
 - i) the name of the retirement village (RV) and street address;**
 - ii) the name and contact details of the operator;**
 - iii) the total number of premises in the RV;**
 - iv) tenure details, including the number of freehold (strata and purple title), lease, licence, and rental premises; and**
 - v) the memorial number of the RV.**
- b) ensure that the requirement for operators to provide and update information is enforceable and that penalties will apply for non-compliance.**

8.2 Do not implement CRIS 3, proposal 13.1 (Final Report recommendation 86), which proposed to restrict the use of the term 'retirement village' in the name of a village.

Exit Entitlements

An exit entitlement is the payment a resident is entitled to after they leave a village. Usually this is paid when a new upfront payment is made by a resident who will occupy the vacated unit. The exit entitlement amount is generally calculated on formulae that use length of time in a village and the upfront payment made by either the departed resident or the new resident. This payment may have a number of names but, for the purpose of Consumer Protections reform process, it has been called an 'exit entitlement'.

9. Statutory time limit for payment of exit entitlements

Issue

CRIS 2, part 6.1

The RV Act requires an exit entitlement to be paid within a prescribed time of it becoming payable under a residence contract.⁹³ The RV Act does not, however, regulate when an exit entitlement may become payable. Because contracts often provide that this will be on the re-occupation of the vacated residence by a new resident (through the taking up of a new retirement village contract for the property), former residents can wait up to three to four years for payment.⁹⁴

Waiting for an exit entitlement to become payable can cause former residents (and their families trying to manage transition into aged care or to wind up a deceased estate) significant financial hardship, health issues and distress. For many residents, their upfront payment ties up the bulk of their funds.⁹⁵ Therefore, they often need their exit entitlement to pay for accommodation outside the RV when they leave. Uncertainty in when an exit entitlement will be paid, sometimes in combination with experience of long-standing current village vacancies, means some residents either cannot afford to leave the RV or face a precarious financial situation if they do.

Objective

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

⁹³ Former residents have debt recovery rights under the RV Act if that does not occur - RV Act (WA), sections 19 - 20.

⁹⁴ 2019 PwC/Property Council Retirement Census, Buyback Period in Months of most common contract, WA average of 36 months (n=400 villages nationally) and Retirement Village Legislative Reform Workshop 2 – Summary and Outcomes (8 September 2020)

⁹⁵ McCrindle Baynes Villages Census Report 2013, Executive Summary, 6. As explained in CRIS 1 Part 3, retirement village residents generally pay a sum roughly equivalent to housing purchase to enter a retirement village. For most residents, this means that their funds are tied up until their exit entitlement is paid. National research shows that consumers generally fund their retirement village upfront payment through the sale of their family home. The Census report put the figure at 90%. This means that many (likely most) residents 'invest' the bulk of their funds in the upfront payment and rely on the exit entitlement to fund alternate accommodation on leaving a village.

Policy proposal

CRIS 2, proposal 6.1 proposed that the RV Act:

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

The following options were proposed for the time limit:

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

Stakeholder feedback

Significant consultation has occurred on proposal 6.1 since it was released in CRIS 2 in December 2019. WARVRA, residents and also some individual operators expressed strong support in their written submissions for the introduction of a statutory time limit for the payment of exit entitlements. CRIS 2, proposal 6.1 received the most number of submissions during the consultation process with 90 written submissions (Appendix 1: Summary of written submissions). There were 189 responses to a RV survey (2020) question on the options.

WARVRA and individual residents have consistently and strongly supported the introduction of a mandatory exit entitlement payment (MEEP) with a strong preference for a 6-month limit, arguing that the current delay in exit entitlements (sometimes up to three to four years) is unreasonable and can place undue hardship on residents and/or their families.

Reasons provided by WARVRA and individual residents arguing for the shorter time limits focus on the need to move to and finance aged care; financial hardship for former residents needing to fund new accommodation; stress; finalising an estate; and the fact that the contract was 'only a lease agreement'.

'This issue causes significant anxiety to most residents at (village). At my time of life, it is reasonable to assume that I will be able to manage my transition to aged care or bequeath to my beneficiaries monies from the sale of the lease of my unit in reasonable time. Instead, I find that there will be no pay-out until the lease is sold, regardless of how long my villa remains empty. In the current economic climate this can be years and places me and my beneficiaries in a precarious position, particularly regarding a planned and well facilitated end of life experience'.⁹⁶

'...my wife's health deteriorated rapidly where high care was the only option. She went to permanent full care in another aged care facility back in October 2018. As a result I have had to deal with undue stress. It has continued to be physically

⁹⁶ Resident submission 38.

and emotionally draining to be living a substantial distance away from my wife for well over a year. I wish to rectify this situation ASAP. My GP has also recently instructed me to urgently start preparation for aged residential care. I have asked many times for some commitment of assurance so I can plan for the next phase of our lives but get none of that from either the owner or lessor of (the village), nor the management company. Until such time as there is a clear process and duration on when we can get monies owed, we are in limbo. I need these monies to finance the Refundable Accommodation Deposit (RAD) but am currently faced with a 2 plus year wait upon exiting...'.⁹⁷

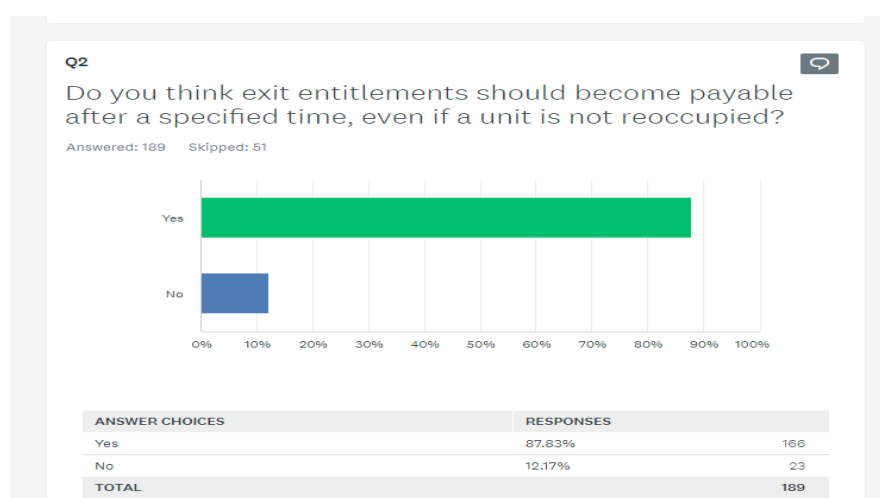
Submissions in support of the proposal were also received from residents' families noting the significant costs incurred in funding parents' moving to aged care, or lengthy waits in finalising estates.

'This caused me financial distress in 2016 when my father was accepted into residential care. Because of me not having the proceeds of sale of the property, I paid a significant portion of the facility's residential accommodation deposit (RAD) as my father did not have the available cash to afford the full payment.'⁹⁸

'Mum's home (the villa in the retirement village) has been on the market for 2 years along with 7 other Villas and all are still not showing any signs of selling'.⁹⁹

Residents overwhelmingly supported shorter MEEP time frames of 6 months (Option A) and in some cases 3 months, with no resident written responses supporting the 12 or 18 month options.

In the RV survey (2020), 88 per cent (166 responses) supported the introduction of a MEEP. In response to how long the time period for a MEEP should be, 71 per cent (or 122) respondents who answered supported a time limit of 6-months or less, and 15 per cent supported a 12-month limit.



⁹⁷ Resident submission 87, 12 March 2020.

⁹⁸ Resident family submission 35.

⁹⁹ Resident family submission 36.1, January 2020. The same person wrote again in September 2020 advising: 'There are now a total of 15 villas for sale in the village. It is now two and a half years since Mum's villa was put on the market.'

Individual operators, however, strongly rejected the MEEP proposal:

*‘We totally reject the proposal that operators be required to pay out exit fees at any fixed or predetermined period. Operators are already incentivised to achieve a sale in the earliest time possible. We cannot create purchasers, and we are at the mercy of the RV market with all its peculiarities and the lease for life product that differentiates it from the freehold market. Nor can we make a purchaser choose one residence in preference to another when there is a choice of similar units. Our responsibility starts and finishes with ensuring a resident’s opportunity to collect its exit fee is dispensed in a fair, equal and professional manner’.*¹⁰⁰

Individual operator submissions also expressed the view that residents of a RV are no different to other persons in residential property and should not be treated any differently:

*‘In making an arm’s length decision to buy accommodation, there should be no enduring obligation by the seller to buy that property/occupancy right back because the resident / purchaser decides to vacate the accommodation. To do so is unfair and can have the same effect of distorting the open working of the market and could well then distort the transactions through a requirement to increase costs, fees and charges to the detriment of the customers’.*¹⁰¹

The industry peak bodies also strongly opposed the proposed options for implementing a statutory time limit for the payment of exit entitlements. In a joint submission from the industry peak bodies, the following key concerns and feedback were provided:

- cash flow was identified as an issue and the risk of insolvency for businesses who have difficulty in paying;
- the need for operators to have transition time to adapt their business model to have sufficient funds to pay;
- the drawdown impact of exit entitlement payment timeframes on RV unit prices due to pressure to sell;
- that the MEEP and any associated payment of aged care charges should not apply to all former residents, with exceptions identified; and
- the depressed property market in WA in recent years compared to other jurisdictions which delayed reoccupation times.

During stakeholder meetings, industry peak bodies have proposed that any MEEP introduced should be subject to certain carve outs such as excluding deceased estates and existing residents. It was also submitted by industry that residents of strata titled and purple title RVs have equivalent rights to property ownership and as such should not be entitled to the payment of exit entitlements prior to the unit being sold.

¹⁰⁰ Operator submission 97, March 2020.

¹⁰¹ Operator submission 53.

The proposal was the subject of discussions by a working group of industry peak bodies in the sector during the fast track process in late 2020 at which the financial impact on the sector was raised as a key concern by industry. No consensus was able to be reached at these discussions, however, a key issue which was identified was the lack of publicly available information about exit entitlement payments making it difficult to quantify the financial and economic impact of any MEEP on the RV sector.

Other jurisdictions

All other jurisdictions in Australia have introduced statutory time limits for exit entitlement payment with several jurisdictions also introducing a special provision for residents moving to aged care.

An outline of these requirements, including exclusions, is provided below.

Table 3: Exit Entitlements – Overview of other jurisdictions

Legislative requirements The RV legislation :	NSW and ACT	Qld	SA	Tas and NT	Vic
• requires exit entitlement payment within specified time frames (months):	6 (Sydney) 12 (Rural)	18	18	6	6
• applies to all residents:	✗	✓	✓	✓	✗
• makes special provision for residents moving to a RACF:	✓	✗	✓	✗	✓
• allows an operator to apply for an extension of time:	✓	✓	✓	✓	✓
• applies to existing as well as new contracts	✓	✓	✓	N/A	✗

Table 4: Exit Entitlements – Exclusions

Jurisdiction	Time limit
New South Wales	<p>Not a registered interest holder (leasehold resident): premium refund is to be paid within 6 months of departure. Any other departure payment that is dependent on the amount of the upfront payment paid by a new resident is to be paid on reletting.</p> <p>Registered interest holder: can apply for an order for exit entitlement payment after 6 months (metro) or 12 months (rural) if the operator is not properly marketing the unit.</p> <p>Exclusions: estates, strata and purple title and residents whose DAP is being paid by the operator. The latter can apply after 24 months.</p>
Victoria	<p>In effect - premium refund is to be paid within 6 months.</p> <p>(Provision is indirect, through regulation of residence contracts: any condition imposed on premium repayment is void unless the condition is in effect that the date of repayment will not be more than 6 months after delivery up of vacant possession.</p> <p>Exclusions: residents' whose contracts give them specific marketing rights.</p>
Queensland	<p>Any exit entitlement (which includes refunds) is to be paid within 18 months of departure.</p> <p>If a unit has not been sold within 6 months of departure, and the exit entitlement has not been paid, a former resident may engage their own real estate agent.</p> <p>The operator and resident are to agree 'resale' value. If they do not, the operator is to appoint an independent valuer.</p> <p>Operator can apply for an extension in the event of serious financial hardship.</p>
South Australia	<p>Unless the resident continues to reside while the right to reside is being sold, an exit entitlement (which includes refund of a premium) is to be repaid within 18 months of departure.</p> <p>Operator can apply for an extension in the event of serious financial hardship</p>
Tasmania	<p>Premium refund to be paid within 6 months of departure.</p> <p>Operator can apply for an extension not exceeding 18 months in the event of serious financial hardship.</p>
Northern Territory	<p>Exit entitlements to be paid if a unit is not reoccupied within 6 months.</p>

Impact assessment

Cost to the resident of lengthy delays in receiving exit entitlements

The evidence indicates that there is significant concern from residents and their families about the length of time some former residents are required to wait for exit entitlement payments. This issue was the one most responded to during the consultation and there was overwhelming support from residents for the options proposed in CRIS 2.

Over the last few years, Consumer Protection has also received a considerable volume of queries from residents waiting on their exit entitlement. Between 2015 and 2020, 10 per cent of all consumer calls received by Consumer Protection regarding RVs related solely to exit entitlements. In addition, over 10 per cent of formal RV complaints related to exit entitlements.

A significant amount of ministerial correspondence has also been received in relation to this issue from the families of former residents who are experiencing lengthy delays.¹⁰² Correspondence is also regularly received from members of Parliament contacted by constituents about this issue.

Submissions and correspondence on this issue also provided examples of the financial problems faced by former residents and their families as a result of not being able to receive their exit entitlements for a long time after they leave the RV.

Former residents can wait up to three to four years for the payment of their exit entitlements. What is often missed in looking at the financial impact on operators, is that the money which has been paid in advance for the lease of a villa or unit and not repaid has a cost to the consumer. This cost may be because the consumer needs to withdraw money from an interest earning investment or take out an equivalent mortgage to secure their next accommodation or, alternatively, the money that is tied up with the vacated RV could otherwise be invested in a different way and be earning interest (the opportunity cost).¹⁰³ An example calculation based on an outstanding exit entitlement of \$250,000¹⁰⁴ and an example interest rate of 3.5 per cent¹⁰⁵, show a cost to the consumer of approximately \$9,000 per year that the exit entitlement is not paid.

It is clear from the feedback received during the consultation that there is significant operator concern over the proposed introduction of a MEEP. This concern is largely based on the anticipated financial impact on individual operators and the sector. Operators, argue that the introduction of a MEEP would have an adverse impact on the competitiveness and viability of the industry.

Likely cost of MEEP proposals - WATC survey and analysis

Following the conclusion of the working group discussions in 2020, Consumer Protection commissioned the Western Australian Treasury Corporation (WATC) in March 2021 to undertake financial modelling to better understand the impact of introducing a MEEP on operators. The Department of Treasury also assisted on the project.

The key issues investigated by WATC were the financial impact of introducing a MEEP and the potential cash flow impact of the proposed introduction of mandatory Daily Accommodation Payments (DAP) on behalf of residents who exit RV units and move to Residential Aged Care (RAC) before their unit has been reoccupied. CRIS 2 also proposed special provision for paying residents' DAP when they move to a RACF. This is discussed in part 10.

¹⁰² One argument advanced by industry in the past relates to the lack of complaint numbers in relation to this issue. Complaint numbers are not indicative of the extent of the consumer issue, as the legislation currently permits contracts to provide for exit entitlement payment times.

¹⁰³ The predominant tenure model for retirement villages in lease for life. Strata and purple title ownership is estimated as comprising only about 10% of the overall market.

¹⁰⁴ This is based calculations from the WATC survey responses regarding exit entitlement payments.

¹⁰⁵ 3.5% was chosen as an example, acknowledging rates could be both higher and lower depending on the type of loan or investment that is chosen.

To obtain information to model this impact, in July 2021 operators were asked to complete a confidential survey (the WATC survey) on the basis that the data would be de-identified before being provided to Consumer Protection.

The financial modelling undertaken by WATC shows that the financial impact of both the proposed MEEP and the DAP provision will be a temporary cash flow issue for impacted operators rather than a cost. WATC have advised that once sufficient reserves have been accumulated, a steady state should be achieved by operators where there is no cash flow issue. This is because, if the operator does pay the MEEP, once the unit is reoccupied the up-front payment from the new resident will cover the cost paid out to the original resident and so the money will eventually be recovered by the operator.

The WATC modelling has shown that the cash flow impact to industry of the MEEP is the amount of the reserve needed to be able to temporarily fund the exit entitlements for their RVs. This amount will depend on variables such as the:

- vacancy rate and standard time to reoccupy an Independent Living Unit (ILU) in a RV;
- size of the RV; and
- size of the exit entitlements.

The quantum estimated by the WATC model is indicated below, as a total figure, and as an amount 'per unit', to provide context to the amount. Table 5 below shows, the total reserve required across the RV industry should a 6-month MEEP be introduced is \$252.2 million, which equates to an average of \$12,600 per RV unit in WA. For a 12-month MEEP, it is \$140.2 million or an average of \$7,000 per RV unit.

The WATC model showed that the size of the MEEP liability changes according to the time limits imposed for repayment, due to changes in the number of ILUs that would be impacted. For example, with an average reoccupation time of 14 months across all RVs, if a six-month time limit was introduced, a greater proportion of ILUs would not have been reoccupied compared to after 12 or 18 months. This means the financial reserves required for MEEPs to be paid by the operator to the resident with a six-month time limit are greater than if a longer time limit is introduced.

Table 5: MEEP Cash Flow Impact – by Operator Type (WA Industry) – Future Departures

MEEP Cash Flow Impact \$ Millions		For Profit	Registered Charity	Total
MEEP Period	6 Months	157.4	95.0	252.5
	12 Months	96.0	44.2	140.2
	18 Months	53.3	23.8	77.1
	24 Months	11.3	4.7	15.9
	36 Months	-	-	-

Table 6: MEEP Cash Flow Impact – by Operator Type – per RV Unit (WA Industry) – Future Departures

MEEP Cash Flow Impact \$ Thousands/Unit		For Profit	Registered Charity	Industry Average
MEEP Period	6 Months	18.1	8.4	12.6
	12 Months	11.0	3.9	7.0
	18 Months	6.1	2.1	3.9
	24 Months	1.3	0.4	0.8
	36 Months	-	-	-

Transition time for industry to build sufficient reserves to accommodate MEEP

One of the questions considered in the modelling was the required transition time for an operator to build sufficient reserves to meet the MEEP. There is little transparency around the capacity of operators to fund the reserve required. Industry has, however, provided feedback that banks are not willing to finance this cost.¹⁰⁶

As the financial modelling did not have access to the current financial position of operators, a conservative option for funding the cash flow was selected – that the operator must build a reserve from a zero base to pay exit entitlements. To explore timing issues, WATC modelled one option which would be available to operators, being reducing the average exit entitlement payment on new contracts to grow cash reserves.

Table 7 provides an overview of the estimated time to establish MEEP cash reserves if operators were to reduce the average exit entitlement payment on new contracts by 10 per cent. On this basis, the results show that (from a zero base) it will take an average of 5.1 years to accumulate cash reserves for a 6-month MEEP and 2.8 years for a 12-month MEEP. This is determined by a number of factors, including the number of anticipated new contracts, the size of the exit entitlement and the amount of the reserve needed by each operator.

¹⁰⁶ During discussions with industry representatives, a financier indicated to Consumer Protection that larger operators, those with five villages or more, are likely to be able to obtain finance for these liabilities. Not for profits, however, are less likely to be able to obtain finance in these circumstances.

Table 7: Estimated times for operators to establish MEEP cash reserves by Operator Type (WA Industry)

Time to Establish MEEP Cash Reserve (Years)		For Profit	Registered Charity	Average
MEEP Period	6 Months	7.8	3.2	5.1
	12 Months	4.7	1.5	2.8
	18 Months	2.6	0.8	1.5
	24 Months	0.6	0.2	0.3
	36 Months	-	-	-

It is important to note that the accumulation of funds by reducing exit entitlements (which could be done by increasing fees that residents pay such as the DMF) is just one scenario identified by WATC in the draft report, purely as an example for advice to Consumer Protection on the proposed reform and options that might be pursued by industry.

As the cost impact is a timing of cash flow issue, other scenarios exist for operators to accumulate the funds for a MEEP reserve. These include looking at the cost as an additional business cost per RV unit over different periods of implementation that could be partially or totally funded from existing revenues, rather than directly passing on the cost to incoming residents. How to fund the reserves, however, would be a decision for each operator and it is not proposed that advice be provided to industry on possible ways to fund temporary cash flow issues. It is also noted that if average vacancy rates or time to reoccupy can be reduced the quantum required would also decrease.

Financial Risk and Barriers

CRIS 2 explained that the predominant RV business model largely transfers the risk of reoccupying the premises from the operator to residents.

The current imbalance of financial risk between the consumer and operator at the time of departure is a significant issue. In the majority of current RV contracts, the resident appears to bear most of the risk of the property market at the time of departure, but with limited power to make decisions that could influence the sale (such as reducing the price or the upfront component of it, changing marketing or residence contract conditions or choosing to provide the RV product as a rental arrangement instead of a long-term lease).

This significantly distinguishes the position of a RV resident from that of a residential home owner. In addition, the average time of 14 months to reoccupy an RV unit is far longer than the average length of time for the sale of a residential property which has ranged from 60 to 20 days since 2017.¹⁰⁷

¹⁰⁷ REIWA Perth listings and median selling days Sept 2021.

While the operator ultimately takes on the recurrent costs of a unit that is vacant, the individual impact on the resident from the withholding of the exit entitlement, together with the limited ability of the resident to vary residence contract terms is more significant and presents significant unfairness.¹⁰⁸

The delay in paying exit entitlements means that there are significant financial barriers to leaving RVs, which effectively creates a 'stickiness' for consumers who would otherwise wish to move¹⁰⁹. That is, once they are in, they are stuck. This in turn reduces the incentive for operators to improve the competitiveness of their product or financial models, either compared to other RV operations or against alternative accommodation offerings.¹¹⁰ There is also little incentive for operators to prioritise reoccupation of existing units over development of new units, which may be more profitable. The potential for new developments to detrimentally impact the value and reoccupation of existing units was raised as an issue in the consultation:

'Shortly after I purchased my villa lease, 27 new villas came on the market. A choice of patio, construction or air conditioning was offered as a 'sweetener' for sales, and eventually sale prices were dropped. By flooding the market, my equity is less, an aspect I am powerless over.

I have real concerns that when or if I need to vacate my villa to go into a higher level of care, and because [operator] keeps building villas and cottages here, there will be little opportunity for me to gain a sale, or alternatively my family will be left with many months of not being able to finalise my affairs and receive their inheritance or pay my bills'.¹¹¹

Ensuring residents are able to change providers with as few barriers as possible is important. In addition to being an issue of fairness, increasing choice by improving ease of movement for residents increases the market incentive for providers to improve their competitiveness, including to be more transparent about the costs and services provided.

12-month MEEP

Consumer Protection considers that the introduction of a MEEP is important to rectify current issues in the RV financial model which is causing significant consumer detriment to older consumers who can have particular vulnerabilities not present for other consumers.

¹⁰⁸ Operators have made claims that operators have an equal interest in selling the property due to recurrent costs that they must bear. These costs however, are incremental and should be less on a vacant property compared to one that is occupied. The operator also has levers to manage these costs, such as building an assumed vacancy rate into the financial model's fees and charges. The burden on the operator compares to an average exit entitlement of over \$200,000 for lease loan units (based on the WATC survey results) for a resident of a unit.

¹⁰⁹ Banning exit fees for bank mortgages is a high-profile example of government action to remove market barriers for consumers. In 2011, the federal government banned exit fees outright for new home loans. Under these rules, ASIC was given the power to take action against any bank if they charge an early exit fee which is considered unfair or unconscionable to a consumer. The aim of these reforms was to increase competition in the home loan market over time, by giving customers greater freedom to change providers if their current bank isn't offering the most competitive interest rate.

¹¹⁰ Reforms to transparency of the RV product and pricing structures to provide clearer information and assist with the ability to compare products are also being developed for consideration.

¹¹¹ Resident submission 30.2.

It is also recognised that sufficient transition time for operators is required to provide industry with the time to build reserves and adjust their business model as needed. While the consumer argument for the introduction of a MEEP is strong, the challenge for any change is for it to occur in a way that does not threaten the viability of the RV market. Industry remain significantly opposed to the introduction of any MEEP.

While six months was the time limit most strongly supported by consumers and in line with many other jurisdictions, the modelling shows that the cash flow impact and time to accumulate reserves by operators meant that a 6-month MEEP may be difficult for industry to achieve. Further, the proposal incorporated feedback that units can take between 6-8 months to prepare for reoccupation, and that the WA property market can have prolonged stagnant periods which can delay RV product selling times.

As a result of the feedback and the WATC modelling of the financial impact, Consumer Protection considers that a 12 month initial transitional provision plus a 12 month MEEP balances the needs of consumers and the ability of the operators to build and manage the reserves required without adversely impacting the RV market.

Deceased estates

According to the WATC survey, approximately 34 per cent of RV units are vacated as a result of the resident being deceased. Although excluding estates would reduce the cash flow impact on the sector this makes an implied value judgement about the finances of the estate (beneficiaries may have had to fund end of life care in the absence of a MEEP) and does not consider the opportunity cost of that money for the estate. If estates are required to wait a significant time for the finalisation of assets this delays the settlement of the estate. Deceased estates are also not excluded in any other jurisdiction, apart from NSW, where there is a provision for registered interest holders.

Existing residents

Excluding existing residents from the statutory time limit would mean that the MEEP would effectively not come into effect until residents entering the village, after the introduction of a MEEP, leave the village. Given the average length of occupation in a retirement village in WA is 9.4 years, this would be a significant delay.

While the difficulty of changing existing contracts has been raised by industry, it is noted that MEEPs have been introduced and applied to existing contracts in NSW, Qld, SA and the ACT. Many other reforms have also applied to existing contracts. As discussed below, appropriate transition periods and options in the case of financial hardship can assist industry in managing the impact of changes to contracts.

Strata and purple title properties

Based on the results of the WATC survey, purple and strata title units make up approximately 9 per cent of RV units and have a current average vacancy rate of 7 per cent, which is below the sector average of 11 per cent.

Industry submitted that purple and strata title resident owners should not be entitled to the MEEP. Industry consider that a different approach should be taken to residents with titled contracts because the operators do not have the same level of control over the sales process as operators of freehold villages.¹¹² The Property Council's submission also noted that in leasehold arrangements, RV residents generally have an exit entitlement paid by the operator, whereas strata and purple title residents typically have a legal entitlement to receive payment directly from an incoming purchase and an obligation to make a settlement payment to the operator.¹¹³ The contractual arrangement is typically that the resident pays the operator an agreed proportion of the unit sale price out of settlement proceeds, received from an incoming resident.

While Consumer Protection recognises the differences that can occur between the different models, the RV Act only applies when the owners' rights to dispose of freehold tenure, such as strata and purple title are restricted. RV residence contracts often contain significant restriction on strata or purple title ownership rights. For example, persons considering purchasing the strata lot must be prepared to also enter into the operator's contract for services. The policy intent in making the RV Act was that RV residents have the same protections regardless of the variety in arrangements.¹¹⁴

Qld has dealt with strata and purple title RV product property arrangements through requiring operators to 'buy back' the unit from the resident. A similar approach is proposed to address this issue in WA, with a provision to be included that the operator must pay the exit entitlement and consideration given to how it can best be implemented around the particular requirements of these contracts.

Time period for operators to accumulate reserves and transitional arrangements

As noted in the WATC report, the requirement for operators to pay a MEEP will have a 'temporary cash flow' impact on their business operations. The results of the WATC modelling also showed that it would take an average of 2.8 years for operators to accumulate sufficient cash reserves to manage their payment obligations if they were to decrease payments to new residents on exit by 10 per cent. This conservative approach assumed that an operator had no existing ability to access funds.

Consumer Protection has recommended that the 12-month MEEP period will apply to both current and former residents who have not received their MEEP. To minimise the impact on operators, it is recommended that the MEEP provision does not commence until 12 months after the commencement of the legislation. This means that there will be a minimum period of 24 months after commencement of the legislation until operators are required to pay a MEEP, providing operators with sufficient time to build up cash reserves. This also ensures that operators will not face an immediate need to fund a backlog of MEEPs for former residents as there is a 24-month period after the new

¹¹² Large operator submission to CRIS paper, 30 November 2020.

¹¹³ Property Council of Australia Submission, 30 November 2020.

¹¹⁴ Hon Y Henderson MLA, Minister for Consumer Affairs, 'The Retirement Villages Bill aims to provide the same levels of protection for all types of resident funded schemes'. Legislative Assembly of Western Australia, Retirement Village Bill - Second Reading Speech, Hansard, 16.05.91, p 2050).

legislation comes into effect before any payments will fall due. It is also expected that providing a full 24-month time period from commencement of the legislation will mean that the number of former residents who will require payment under the MEEP will be limited, as many will have received their exit entitlement before the MEEP payment falls due.

Residents departing before legislation commences

For residents who have departed the RV at the time when the legislation commences and have not received their exit entitlement, the 12-month MEEP period will commence at the date of **commencement** of the provision (12 months after the commencement of the amendment Act). This means that these residents will largely not benefit from the new laws, as most are expected to have already received their exit entitlements. However any residents still waiting on exit entitlement payments will receive these 24 months after the commencement of the legislation.

Residents departing after legislation commences but before MEEP provisions commence

Residents who are residing at the RV at the time when the amendment legislation commences, but who leave the village before the commencement of the new MEEP provision, must wait a further 12 months after the provision commences until they receive their exit payment. This means that for these residents, their MEEP will be paid 24 months after the commencement of the legislation.

Residents departing after the MEEP provision commences

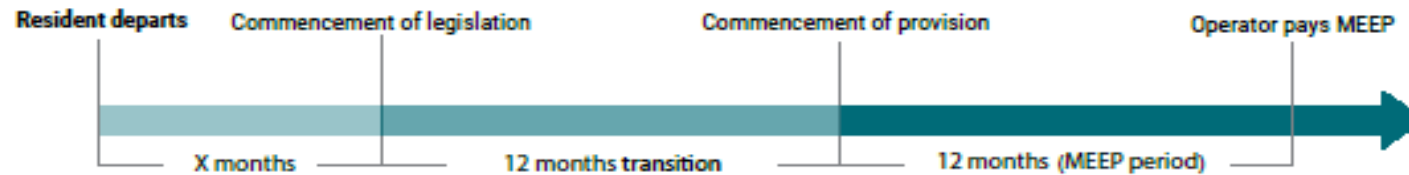
Residents who leave after the MEEP provision commences, will become eligible for payment 12 months after their departure date.

This means that operators will not incur MEEP obligations all at one time, but gradually as there will be residents departing at different points along the departure timeline after the MEEP provision commences. This staggered departure will again provide operators with additional time to build up the required cash reserves to fund the MEEP.

Consumer Protection also notes that it will take time to draft the new laws and take them through the Parliament. This will provide operators with additional time to prepare for the introduction of the MEEP requirement. The timeline bellows illustrates the different scenarios for the MEEP:

Figure 2: Timelines for introduction of Mandatory Exit Entitlement Payment (MEEP)

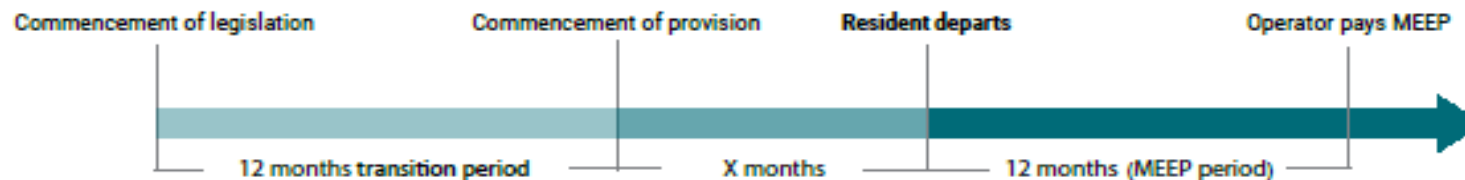
Residents departing before legislation commences



Residents departing after legislation commences but before the MEEP provision commences



Residents departing after the MEEP provision commences



Consumer Protection notes that the 2.8 years calculated by the WATC modelling represents an average across the sector and recognises that different RVs will face different circumstances and so, in some cases provision for an application for extension of time due to hardship or other grounds may be needed.

Ability to extend MEEP on the basis of undue hardship

CRIS 2 proposed that the RV Act allow an operator to apply to the SAT for an extension of time (and/or payment by instalment) on the basis of undue hardship.

This provision is intended to address concerns that an operator may not be able to make an exit entitlement payment within the statutory time limit despite taking reasonable steps to make provision for payment. This could be due to a range of factors outside the operator's control, such as: an unusually high turnover of residents; unexpectedly high exit entitlement amounts; or unreasonable behaviour on the part of the former resident or their family frustrating unit reoccupation.

There were minimal written responses to this proposal from residents (One resident and WARVRA). WARVRA supported this ability for operators, noting that residents or their representatives should have the right to be heard. In addition, WARVRA noted that the SAT should consider all relevant parties including 'communal interests' of the RV.

There was strong support (60 per cent, 3 responses) from operators for the ability to apply to the SAT for extension of time in the case of undue hardship. In the CRIS 2 written submissions, operators proposed specific reasons to be taken into account by the SAT including market conditions, availability of trades, delay in exiting by a departing resident, time taken to make unit a ready for reoccupation, and unforeseen high turnover of residents.

Industry peak bodies supported the proposed ability to apply to the SAT for an extension of time, but are opposed to models that might risk reputational impact for operators who apply for an extension, or where the impact on the resident is the key consideration.¹¹⁵

Industry peak bodies' feedback suggested that reasons for an extension of time could include market and socio-economic considerations, including those relevant to COVID disruption, example being closed borders and economic stimulus impacting trade workers' availability, which are currently creating significant delays in works.

This type of provision has also been inserted into MEEP legislation in other jurisdictions, including NSW, Qld, Vic, SA and Tas.

¹¹⁵ Property Council Submission to Fastrack Process, 30 November 2020, including a reference to the Queensland model which 'requires 'the impact of the former resident' to be a key consideration'.

Determining the exit entitlement

The use of different price structures can cause issues with determining the amount that is due if the entitlement is required to be repaid prior to reoccupation and a new contract being signed. It is important for both the operator and departing resident that there is a method for determining the payment in these cases.

CRIS 2 proposed the following options for the calculation of the exit entitlement in cases where the amount owed cannot be agreed by the operator and the former resident:

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

Option H - that the RV Act provide that if a residence contract makes an exit entitlement amount dependent on 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, then the operator must obtain an independent valuation of:

- the current market value (price); and
- the upfront payment component of that value; or

Option I - as per Option H but with the additional requirement that the price structure applying to the former resident must be used.

Submissions on this issue indicated mixed views on the preferred option, but both residents and operators indicated support for Option I. This approach was also supported by the industry peak bodies in the 2020 working group discussions.

In its CRIS 2 submission, WARVRA noted it preferred that the resident contract provide how the exit entitlement would be calculated as it is simple and would allow other options to be added as needed (Option G), however, they also supported Option I.

Operator feedback noted concern with using the former resident price structure (Option I). This related to potential losses if the estimated exit entitlement provided to the former resident is more than the unit is reoccupied for.

During the working group discussions, the issue of payment for the independent valuation was discussed. The working group supported residents and operators paying an equal share.

Feedback received during the consultation has shown the need for a provision for the calculation of an exit entitlement in circumstances where the contract does not adequately provide for the calculation in the event of a MEEP.

The consultation also indicated general support for Option I being:

- the RV Act provide that if:
 - a residence contract makes an exit entitlement amount dependent on 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; then
- use must be made of:
 - the upfront component of an independent valuation of the current market value (price) obtained by the operator; and
 - the valuation must use the price structure applying to the former resident.

While there is overall support for Option I, the concern raised by operators about using the former resident's price structure needs to be considered further. Further consultation with the sector regarding prescription in regulations of the method of calculation of the exit entitlements will be undertaken to resolve these outstanding concerns.

Recommendation 9

Implement CRIS 2, proposal 6.1, to provide that the RV Act be amended to introduce a 12-month statutory time limit for exit entitlement payments.

In addition, amend the RV Act to ensure that:

- 1. For residents who are residing at the retirement village (RV) at the time of the commencement of the new provision (12 months after commencement of the legislation):**
 - a) the 12 month time period starts when the resident permanently departs the RV.**
- 2. For residents who departed after the legislation commences but before the MEEP provision commences:**
 - a) the 12 month time period starts when the provision commences (not when the resident departed).**
- 3. For residents who have already departed (former residents) the RV at the time of the commencement of the new provision:**
 - a) the 12 month time period starts when the provision commences (not the date when the resident departed).**
- 4. For both former and current residents, the RV Act be amended to include provisions to ensure:**
 - a) the Mandatory Exit Entitlement Payment (MEEP) time limit applies to current and former residents from the date of the commencement of the provision (12 months after commencement of the legislation);**
 - b) the MEEP applies to all residents, regardless of tenure type;**
 - c) a method for calculating an exit entitlement where an agreement between the operator and resident cannot be reached, with further prescription in regulations;**
 - d) strata and purple title contracts to specify that the operator must pay the exit entitlement; and**
 - e) operators have the ability to apply to the State Administrative Tribunal (SAT) for a time extension in the case of financial hardship.**

10. Aged care rule

Issue

CRIS 2, part 6.1

A former retirement village resident may be unable to enter a RACF if they are dependent on their exit entitlement to fund the Refundable Accommodation Deposit (RAD) or a DAP¹¹⁶ required to enter the facility. Not being able to access required funds to transition to a RACF can result in significant financial and emotional stress, as well as financial costs for former residents and their families. While some operators already pay exit entitlements early when a resident is moving to a RACF, particularly when the operator (or a related entity) operates a RACF, this is dependent on operator good will, not a contractual right.

Objective

The purpose of the proposed aged care rule is to provide departing residents with immediate access to exit entitlement funds to pay costs of residential aged care.

The aged care rule aims to provide a safety net for people who need to move to residential aged care and ensures that former residents who need to move into aged care are able to use funds owing from their exit entitlement to do so.

Policy proposal

CRIS 2, proposal 6.1, proposed the following options for funding former residents' aged care prior to exit entitlement payment:

- Option D** no special provision for residents moving to a RACF;
- Option E** if requested by a former resident, an operator must pay DAP of up to 85 per cent of the estimated exit entitlement; and
- Option F** if requested by a former resident, an operator must pay either the 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.

Stakeholder feedback

Responses to CRIS 2 and the RV survey (2020) indicate that significant concern about this issue exists in the community.¹¹⁷ Residents consistently expressed concern about their ability to fund and move to aged care if needed. Families of residents noted they had to pay their parent's aged care fees as their exit entitlement had not been paid.

There was very strong resident support for an aged care rule both in the RV survey (2020) and written submissions. In the written submissions, residents who responded to the question relating to an aged care rule favoured immediate DAP payment and RAD

¹¹⁶ A DAP is a RAD equivalent that is paid periodically instead of as a lump sum.

¹¹⁷ See also stakeholder feedback to issue 6.1 (Recommendation 9 of this DRIS).

payment within 6 months, particularly if the time limit for payment of exit entitlements is 12 months or more. One resident noted:

*‘When new people decide to move to Aged Care Facility there are significant costs involved, usually the only asset they have is the lease having to wait indefinitely for these funds is unacceptable. They or their family need to take out a loan or pay an exorbitant interest rate which puts financial & emotional stress on all concerned, which has the Hallmark of ‘Elder Abuse’. Also when a Resident Passes On, the Executor of the Estate requires settlement to obtain Probate. Payment of exit entitlement should be within 45-60 days from termination of the lease’.*¹¹⁸

In the RV survey (2020), there was also very strong resident support for an aged care rule (70 per cent). Operator feedback also recognised the importance of being able to move to a RACF when it was needed, but the industry peak bodies raised concerns about the financial impact of the proposed requirements. The Property Council noted that, while they have supported the introduction of an aged care rule in other jurisdictions, the introduction of an aged care rule in addition to the proposed MEEP would be unaffordable.¹¹⁹

More recent joint feedback from the industry peak bodies, received in November 2021, maintained that an aged care rule should only apply to residents in financial hardship - to reflect the needs of a departing resident and to ensure operators are not used as a temporary line of credit for departing residents who otherwise have the ability to fund their entry into aged care. Industry also noted that any aged care rule or similar obligations should consider the possibility that existing aged care funding models may no longer exist at the time new legislation comes into effect.¹²⁰

Other jurisdictions

Aged care provisions for residents of RVs have been introduced in SA and Vic and have recently been implemented in NSW.

Table 8: Aged care provisions for residents of retirement villages

RV Act Features	South Australia ¹²¹	Victoria ¹²²	Victoria	NSW ¹²³
Must an operator pay a former resident’s DAP when the resident is entitled to an exit entitlement and requests that the DAP be paid by the operator? (NB: Qld, Tas, ACT and NT have no aged care rule)	YES ¹²⁴	YES ¹²⁵ (if residence contract signed on or after 30/7/17)	YES (if residence contract signed before 30/7/17)	YES

¹¹⁸ Resident submission 39.

¹¹⁹ Property Council of Australia Submission on Retirement Village Act Reforms, 30 November 2020.

¹²⁰ Joint letter from Property Council of Australia, LASA and ACSA to the Commissioner of Consumer Protection, 25 October 2021.

¹²¹ RV Act (SA); section 30.

¹²² RV Act (Vic), section 43(1)(ac) and *Retirement Villages (Contractual Arrangements) Regulations 2017* (Vic) regulation 7.

¹²³ [Changes to retirement village laws | NSW Fair Trading](#)

¹²⁴ RV Act (SA); section 30 (4).

¹²⁵ *Retirement Villages (Contractual Arrangements) Regulations 2017* (Vic), regulation 7.

Impact assessment

WATC Analysis - assessing the cash flow impact of funding DAP

WATC assessed the potential cash flow impact of the proposed introduction of the mandatory DAP funding requirement (Option E). This option was modelled instead of other possible options, such as the payment of the RAD of up to 85 per cent of the exit entitlement, based on feedback to the CRIS. Given a RAD payment would be due as a lump sum within six months of departure, a provision for the payment of a resident's RAD for approximately 50 per cent of departures would place a much more significant cash flow burden on operators.

The combination of the 12-month MEEP and the DAP was considered a more reasonable proposal to model, providing a safety net for residents (who often do not have a choice when the time comes to move into aged care), while limiting the financial impact for operators.

Table 9 shows the results of the WATC modelling for the cash flow impacts of the payment of a DAP by operators for residents moving to a RACF:

Table 9: DAP cash flow impact – by Operator Type (WA Industry) – Future Departures

DAP Cash Flow Impact \$ Millions		For Profit	Registered Charity	Total
MEEP Period	6 Months	1.0	1.2	2.2
	12 Months	3.3	2.8	6.1
	18 Months	5.7	3.8	9.5
	24 Months	8.4	4.8	13.2
	36 Months	9.1	5.1	14.2

This cash flow impact of a mandatory DAP will vary over time dependent on the introduction of a MEEP. That is:

- a shorter MEEP has the effect of shortening the period over which DAP is payable; and
- shorter MEEPs therefore reduce the quantum of DAP funding required to be met by an operator.

The cash flow impact of introducing a DAP requirement is significantly smaller than the introduction of the MEEP, however, if the DAP was introduced together with the MEEP, the total impact would be additive. For example, for a 12-month MEEP, the total cash flow impact on industry would be \$143.8 million (\$138.3 million MEEP provision plus \$5.5 million DAP provision). It is also noted that the operator will recoup funds on the reoccupation of the RV unit and that any DAP payments will be deducted from the MEEP paid to the resident.

As with the MEEP, it is intended that the operator will also be able to apply to the SAT for an extension of time to make the first payment or exemption from making the payment on the basis of financial hardship.¹²⁶

There is strong support in the community for the introduction of an aged care rule for residents leaving a RV to enter an RACF. Responses to the consultation indicate significant concern by residents and their families about the impact of not being able to access these funds to pay for a move to a RACF.

Introducing the aged care rule would provide an important safety net for people who need to move to a RACF. The WATC survey indicated that approximately 54 per cent of RV residents leave a RV to move into a RACF. This decision is usually made for health reasons, when it is no longer possible to easily live independently. For this cohort, waiting 12-months or more for an exit entitlement is likely to have the greatest impact and could impact end of life living and care options. An aged care rule ensures that those needing to move to a RACF are not restricted from doing so for financial reasons and alleviates the financial burden on families having to fund residential aged care until the exit entitlement is paid. Those who wish and are able to pay a RAD upfront instead of receiving the DAP are not restricted from doing so.

It is considered that Option E provides an appropriate balance between assisting former residents needing to move to aged care and minimising the financial impact on operators. The WATC financial modelling shows that the aged care rule increases the cash flow impact on operators if introduced in conjunction with a MEEP. However, because the payments are incremental and taken out of the final exit entitlement payment, it has a far smaller cash flow impact (even when combined with the 12-month MEEP) than if the 6-month MEEP was introduced.

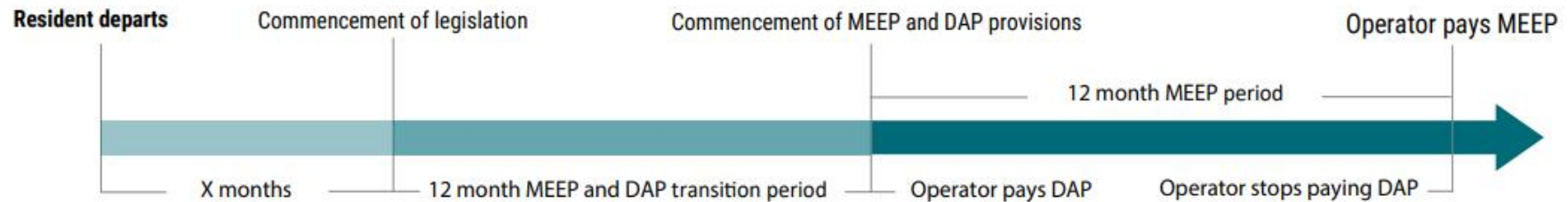
Transitional arrangements

The proposed introduction of the aged care rule will have a 12-month transition period before the provision commences. This means that operators will have a period of 12 months after the commencement of the new legislation before they are required to fund the DAP for those residents moving to a RACF and unable to sell their lease. It should be noted that those residents who departed prior to the commencement of the legislation or on commencement date will not be eligible for the MEEP until 24 months after commencement of the legislation. These residents will receive DAP at the end of the 12 month transition period (after commencement of the legislation) until their MEEP becomes payable 24 months after commencement of the legislation.

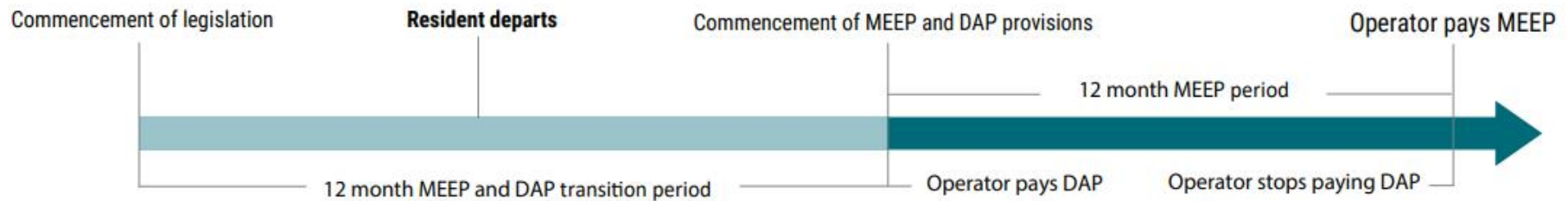
¹²⁶ Operators have noted that hardship provisions could have unintended consequences, potentially signalling insolvency concerns of an operator to the market. Operators provided feedback during the fast track workshops on how the provision could be applied effectively, and that WA should ensure that learnings from other jurisdictions in any implementation of this provision is taken into consideration.

Figure 3: Timeline for introduction of aged care rule

Example A: Residents departing before legislation commences



Example B: Residents departing after legislation commences



Reform of the aged care sector

Reform of the aged care sector is underway, with the federal Government releasing its response to the *Final Report of the Royal Commission into Aged Care Quality and Safety in May 2021*.¹²⁷

Although this issue was raised by industry as a reason for not proceeding with the aged care rule at this time, Consumer Protection does not consider that possible reforms to aged care should be an argument against implementing a DAP provision, as there is no certainty about whether the funding model will be significantly impacted or the timing of reform. This issue will be considered during drafting and should any substantive changes be introduced, any DAP provision can be reviewed at that time.

Recommendation 10

Implement CRIS 2, proposal 6.1, Option E to amend the RV Act to provide for payment of daily accommodation fees (DAP) for residents entering aged care (aged care rule) and to provide that:

- a) the aged care rule apply to all residents, regardless of tenure type;**
- b) the aged care rule apply if the resident is entitled to an exit entitlement and requests that the DAP be paid by the operator;**
- c) any DAP paid to a resident will be deducted from any MEEP due;**
- d) the aged care rule apply to current and former residents from the date of the commencement of the provision (12 months after commencement of legislation);**
- e) there be capacity for operators to apply to the State Administrative Tribunal (SAT) for a time extension in the case of financial hardship; and**
- f) a transitional period of 12 months be applied from the passing of legislation.**

¹²⁷ <https://www.health.gov.au/sites/default/files/documents/2021/05/australian-government-response-to-the-final-report-of-the-royal-commission-into-aged-care-quality-and-safety.pdf>.

11. Cap on recurrent charges

Issue

CRIS 2, part 6.3

The RV Act currently caps the time for which former lease for life residents can be required to continue paying recurrent charges after they permanently vacate a RV.¹²⁸

The cap is six or three months, depending on whether their residence contract was signed before or after the cap came into effect (on 1 April 2014). This cap does not apply to residents who own strata lots or a share in a purple title ownership scheme. Strata and purple title residents say their exclusion from this consumer protection is unfair.

Objective

The objective of the policy is to extend the current policy for lease for life residents to residents under strata and purple title contracts.

Policy proposal

CRIS 2, proposal 6.3 was that the current cap on paying recurrent charges after leaving a RV (three months for new contracts and six months for existing contracts) apply to all former residents regardless of property ownership model.

Stakeholder feedback

WARVRA supported the proposal in CRIS 2 for capping recurrent charges for strata and purple title residents after they have permanently vacated. More generally, 86 per cent of respondents to the RV survey (2020) (made up predominantly of resident-linked respondents) were in favour of a cap on recurrent charges for strata and purple title residents. The resident feedback is based on the view that they experience no significant extra benefit to their ownership of RV property as distinct from lessee residents. Industry peak bodies have generally not supported the proposal to extend the cap. Notwithstanding this general position held by representatives of the industry, a large operator submitted that the proposal to cease strata and purple title residents' liability for recurrent charges for general services after six months was a more fair and balanced approach than a shorter cap.¹²⁹ A smaller operator also supported the proposal in their submission to the CRIS. These views are in contrast to industry peak bodies' feedback.

The argument put forward against the extension of the cap, is that operators of leasehold and licence villages have a level of control over the sales process that is not the same as operators within freehold villages.

¹²⁸ RV Act, section 23.

¹²⁹ The large operator actually referenced 42 days rather than 3 months as the shorter proposed option (which was not supported because of the financial burden it would impose). It is understood, however, that this may have been referenced in error as NSW was consulting about this option at a similar time.

The industry peak bodies noted that in a freehold context (such as strata and purple title arrangements), resident owners can appoint an external agent and determine a sale price for that appointment and that recurrent charges contribute to the upkeep of the RV which positively benefits the departing resident who is trying to reoccupy their property. Strata residents also have the additional protections under the ST Act which give them power over decisions relating to their lot and the common property.

Residents argue that this control is limited as the operator still determines the RV product price structure and village eligibility requirements for the new resident. In addition, there are other limitations placed on strata and purple title residents due to the nature of the RV contract. For example, strata owners in a RV cannot offset costs by renting out their property after they have vacated as would be possible in a traditional strata or purple title property.¹³⁰

Other jurisdictions

Inter-jurisdictionally, there is not a consistent approach. Victoria excludes former strata and purple title residents from their cap, while NT, SA and Vic do not have a cap on paying recurrent charges once a resident has vacated a village. NSW, Qld and the ACT all have some form of cap for strata and purple title residents.

Impact assessment

Including a recurrent charge cap for strata and purple title RV residents would bring these residences in line with lease for life RV residences, which make up the majority of RV arrangements in WA. There is also strong support by residents for a consistent cap. According to the WATC survey undertaken in 2021, purple and strata titled properties make up 9 per cent of the RV market, with 88 per cent being lease for life and the remainder being rental.

Consistency across the sector is an argument for change. The policy intent in making the RV Act was that RV residents have the same protections regardless of the variety in arrangements.¹³¹ This recognises that although there may be different tenure arrangements all residents face similar restrictions when they leave the village. Although strata and purple title residents do have ownership of the freehold in their residence, the type of ownership is a restricted freehold with residents having little of the controls which exist for standard freehold.

The issues raised by operators over strata and purple title residents having greater control of sale of the RV product are, however relevant and do require some consideration.

¹³⁰ The summary of stakeholder feedback to proposal 6.2 is based on responses provided in submissions 32, 83, 95, 97, and 100.

¹³¹ Hon Y Henderson MLA, Minister for Consumer Affairs 'The Retirement Villages Bill aims to provide the same levels of protection for all types of resident funded schemes'. Legislative Assembly of Western Australia, Retirement Village Bill, Second Reading Speech, Hansard, 16.05.91, p 2050 .

Ultimately, the financial impact of the introduction of a cap for strata and purple title that is consistent with lease holders has been the key consideration in the development of a policy position by Consumer Protection. In the context of the broader and more substantive financial reforms being pursued through the introduction of the MEEP, it is thought that also capping recurrent charges for strata and purple title residents may place too much of a burden on some operators. Consumer Protection notes, however, that in the event that a MEEP is introduced, it would not be reasonable or practical for residents to continue to pay recurrent charges after the MEEP time limit has been reached and the exit entitlement has been paid.

For this reason, and despite support by residents, Consumer Protection is recommending that the proposed cap not be pursued at this time. Instead, it is proposed that the RV Act be amended to make clear that, assuming MEEP is introduced, recurrent charges for strata and purple title residents no longer apply once the time period for a MEEP has been reached. Should the proposed MEEP be supported, this would create an effective cap of 12 months for these residents, which would provide a degree of financial benefit and certainty for consumers.

Recommendation 11

11.1 If the proposed Mandatory Exit Entitlement Payment (MEEP) reform is implemented:

- a) amend the RV Act to provide that any resident liability for recurrent charges for strata and purple title retirement village (RV) properties cease after the time limit for the MEEP has been reached; and**
- b) do not implement CRIS 2, proposal 6.3, to expand the current caps on paying recurrent charges after leaving a RV to apply to all former residents regardless of property ownership model.**

11.2 If the proposed MEEP reform is NOT implemented, amend the RV Act to provide that the current caps on paying recurrent charges after leaving a RV apply to all former residents regardless of property ownership model

12. Definition of the term ‘exit entitlement’

Issue

CRIS 2, part 6.2

The RV Act refers to exit entitlements as the repayment of a premium but not all RV contracts describe them in this way. Some contracts, for example, refer to exit entitlements as being paid from the new resident’s upfront payment. The variety in contract descriptions means that consumers can be confused by the differing terminology and that there is a risk of an unintended, technical gap in the RV Act protections for exit entitlements.¹³²

Some residence contracts involving leases also give a resident a right to a payment from the next resident for the vacated unit. The next resident is not, however, a party to the residence contract. Persons who are not a party to a contract are not bound by it. This means that the resident has no legal right to a payment from the next resident. This also means that a former resident will not have an operator debt under this contractual term to prove in the event of operator insolvency and so bears an increased financial risk in these situations.

Objective

To clarify that the RV Act exit entitlement protections apply to all exit entitlement payments regardless of the way contracts describe them and ensure that RV contracts do not contain terms for payments to a resident which are unenforceable by the resident. The proposed options also respond to Recommendation 87 of the Final Report that any RV Act terms identified as requiring redefinition should be redefined.

Policy proposal

CRIS 2, proposal 6.2, was that the RV Act be amended to:

- a) 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
- b) use that term in relevant provisions, including sections 19 to 21 of the RV Act.

CRIS 2, 6.2.1, proposed two options to address a problem in residence contracts purporting to confer a right to be paid an exit entitlement by a person who was not a party to the contract:

- a) Option J - prohibit that practice; or
- b) Option K - require contracts to provide that all exit entitlements are payable by the operator.

¹³² For example, if a resident has a contingent contractual right to their ‘premium’ being ‘repaid’ (including part repayment), it must be repaid within a specified time of the contingency occurring (section 19(3)) and the section 19(3) right to repayment (statutory charge) is protected by a charge against RV land (section 20).

Stakeholder feedback

New term 'Exit Entitlement'

Stakeholders generally supported the CRIS 2, 6.2 proposal.¹³³ There is no concern that it represents a new obligation or policy change. The industry peak bodies observed that the proposal is a simpler way to capture all exit entitlements.¹³⁴

The industry peak bodies advised that any definition would be subject to their consideration of the final mandatory exit entitlement payment reforms and suggested that the new term be exit *payment*, because this: 'will better assist prospective residents to understand how the different components of the RV product relate to each other'; is 'more reflective of the benefit that residents receive when they leave a village'; and 'avoids a further complication in the use of the word *fee*'.¹³⁵

The RV survey (2020) conducted by Consumer Protection asked whether operators should be required to use the same language to describe all exit entitlements. Responses strongly supported this (96 per cent), indicating that clearer and more consistent language is strongly supported by the community.

6.2.1 Contracts purporting to confer a right to be paid an exit entitlement by a person not a party to the contract

There was a limited response to this issue. Some individual operators supported Option K as it was their current practice or they saw it as more prescriptive. A large operator, which is the major WA strata and purple title village operator, supported Option J (prohibiting the practice). WARVRA supported Option J but said Option K (requiring contracts to provide that all exit entitlements are payable by the operator) may be necessary. The industry peak bodies did not support either option. Regarding Option J, the industry peak bodies said that they understood the option as referring to strata and purple title villages and that as residents owned the units, residents are liable for outgoing fees and charges. They say this complicates exit entitlement payment because outgoing residents transfer obligations to new residents.

¹³³ The summary of stakeholder feedback to proposal 6.2 is based on responses provided in submissions 32, 67, 88, 95, 97 and 100.

¹³⁴ A large operator queried the need for the reform on this basis but advised they had no objection to it proceeding.

¹³⁵ Dependent on this outcome, operator peak bodies may want to split exit entitlements into two categories: upfront payment refund and 'capital gains' share, for mandatory payment purposes (as occurs in some other jurisdictions). This has not been put forward to date.

Impact assessment

New term 'Exit Entitlement'

No cost impacts were identified with proposal 6.2 to insert a new term 'exit entitlement' into the RV Act. All exit entitlements, regardless of how they are defined are already intended to be protected by the RV Act.

The industry peak bodies' submission suggests that industry does not regard the protections as applying to premium repayments only, so this would be bringing the RV Act into line with current practices, rather than requiring operators to change them.

The industry proposal to change the terminology from 'exit entitlements' to 'exit payments' is not recommended. Considerations against describing 'exit entitlements' as 'exit payments' include:

- 'exit entitlement' is the term used in other jurisdictions' RV legislation for operator payments¹³⁶ and provides consistency for consumer understanding and for operators across jurisdictions. In 2018, WA undertook (together with the other jurisdictions) to aim for more harmonised RV legislation;
- based on submissions and correspondence received by Consumer Protection, the term 'exit entitlement' already appears well understood by stakeholders; and
- residents make exit payments to operators. Using the term 'exit payment' for the payments operators make to residents is potentially confusing for consumers.

As there are no significant impacts and stakeholders support the proposal, it is recommended that proposal 6.2 be implemented. In regards to the question as to whether operators should be also required to use the term 'exit entitlements' in contracts, although the RV survey (2020) indicated strong support for this requirement, it is not considered necessary to introduce a legislative requirement at this stage. This language is already commonly used in the sector and it is expected that operators will use language consistent with the legislation and supporting education material. It is also noted that the term 'exit entitlement' is used in the majority of other jurisdictions.

6.2.1 Contracts purporting to confer a right to be paid an exit entitlement by a person not a party to the contract

No submission relating to 6.2.1 identified any cost impacts for options J or K. It is unlikely that there would be significant costs for the sector as a result of introducing either of these options as payments of exit entitlements will still effectively be made by an operator. Both options would require some operators to amend contracts, either to

¹³⁶ RV Act (Qld), section 16 and RV Act (SA), section 4.

RV Act (NSW), section 182AA: NSW also uses the term 'exit entitlement' to describe payments an operator is to make to a registered interest holder resident after departure. Victoria does not use the term 'exit entitlement' in its legislation, but its 2021 options paper uses and defines it. Entitlement also more clearly denotes a resident right and therefore benefit and in ordinary usage has less overlap than payment with the word fee.

remove terms which purport to confer a right to be paid an exit entitlement by a person who was not a party to the contract (Option J) or to provide in the contract that exit entitlements are payable by the operator (Option K). They may also require some change in accounting arrangements. However, the number of contracts which would be impacted is not known.

Option J was identified as raising an issue for strata or purple title contracts, which involve resident ownership, as existing schemes may involve a payment being made by an incoming resident rather than the operator. Implementing Option J does not preclude payments being made by a purchaser of a strata lot to an outgoing resident, as this payment will be made under a contract for the sale of the lot. However, Option J precludes a term for this payment in any contract to which the purchaser (incoming resident) is not a party. It is noted that a large strata village operator supported Option J.

Provisions to address strata title and purple title contractual arrangements in the context of a MEEP are dealt with separately in Recommendation 6.1.

Recommendation 12

Implement CRIS 1, 6.2 proposal, to amend the RV Act to:

- a) 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**
- b) use that term in relevant provisions in the RV Act, including sections 19 to 21.**

It is also recommended that CRIS 1, proposal 6.2.1, Option J, be implemented to amend the RV Act to:

- c) prohibit terms in residence contracts that purport to confer a right to payment from a person who is not a party to a contract.**

Life in the village

13. Operator and resident conduct obligations

Issue

CRIS 2, part 11.1

Operators of retirement villages on the whole carry out their obligations professionally and with respect for residents. However, CRIS 2 identified that Consumer Protection receives reports of poor conduct by some operators in the management of their villages.¹³⁷

These concerns include inappropriate behaviour, lack of communication and consultation, breaches of duty of care, and problems experienced in dispute resolution. CRIS 2 provided examples of issues raised with Consumer Protection. These issues can create distrust and significant friction in a village.

The RV Code requires operators to observe a number of principles in the management and operation of a RV. However, these obligations may not sufficiently capture all the duties and responsibilities that operators should follow in managing and operating a complex entity such as a RV.¹³⁸

The current operator obligations in the RV Code also have limited enforcement options. CRIS 2, part 11 proposed that clear and enforceable conduct obligations be introduced into the RV Act to address these problems.

Consumer Protection also receives complaints about the inappropriate behaviour and conduct of some residents. Residents who engage in problem behaviour can be difficult to live with in a shared community and also cause issues of distrust and adversely impact on the lives of other residents.

The RV Code requires operators to establish a set of residence rules covering the rights and obligations of the residents of the retirement village.¹³⁹ Such rules are specific to a particular RV and do not apply to residents in other RVs throughout the RV industry. Residence rules are only enforceable by an operator under a residence contract.

Objective

To improve operator and resident conduct in RVs and provide additional enforcement options where operators or residents engage in inappropriate behaviour.

¹³⁷ In the previous 5 years (2015 – 2020) Consumer Protection received almost 2000 enquiries and 242 complaints relating to retirement villages.

¹³⁸ Conduct obligations of operators currently in the RV Code are explicitly stated or implied in clauses 3, 4, 5, 16; and 23 (see Appendix 2).

¹³⁹ RV Code clause 23.

Policy proposal

CRIS 2, part 11.1 proposed the following new conduct obligations for operators in the RV legislation:

That an operator of a RV must:

- a) have knowledge and understanding of all relevant laws;
- b) have regard to best interests of residents;
- c) exercise skill, care and diligence;
- d) act with honesty, fairness and professionalism;
- e) act in good faith;
- f) protect information – keep it confidential and not use it improperly;
- g) not use their position improperly; and
- h) manage conflicts of interest.

CRIS 2, part 11.2 proposed the following new conduct obligations for residents in the RV legislation:

That residents of RVs must:

- a) respect the peace, comfort and privacy of other residents and persons in the RV;
- b) not harass or intimidate other residents and persons in the RV (including the operator and any person employed in the RV);
- c) not act in a manner that may place the safety of other residents and persons in the RV at risk of harm; and
- d) comply with the residence rules.¹⁴⁰

To improve the enforceability of operator and resident conduct obligations, it was also proposed that:

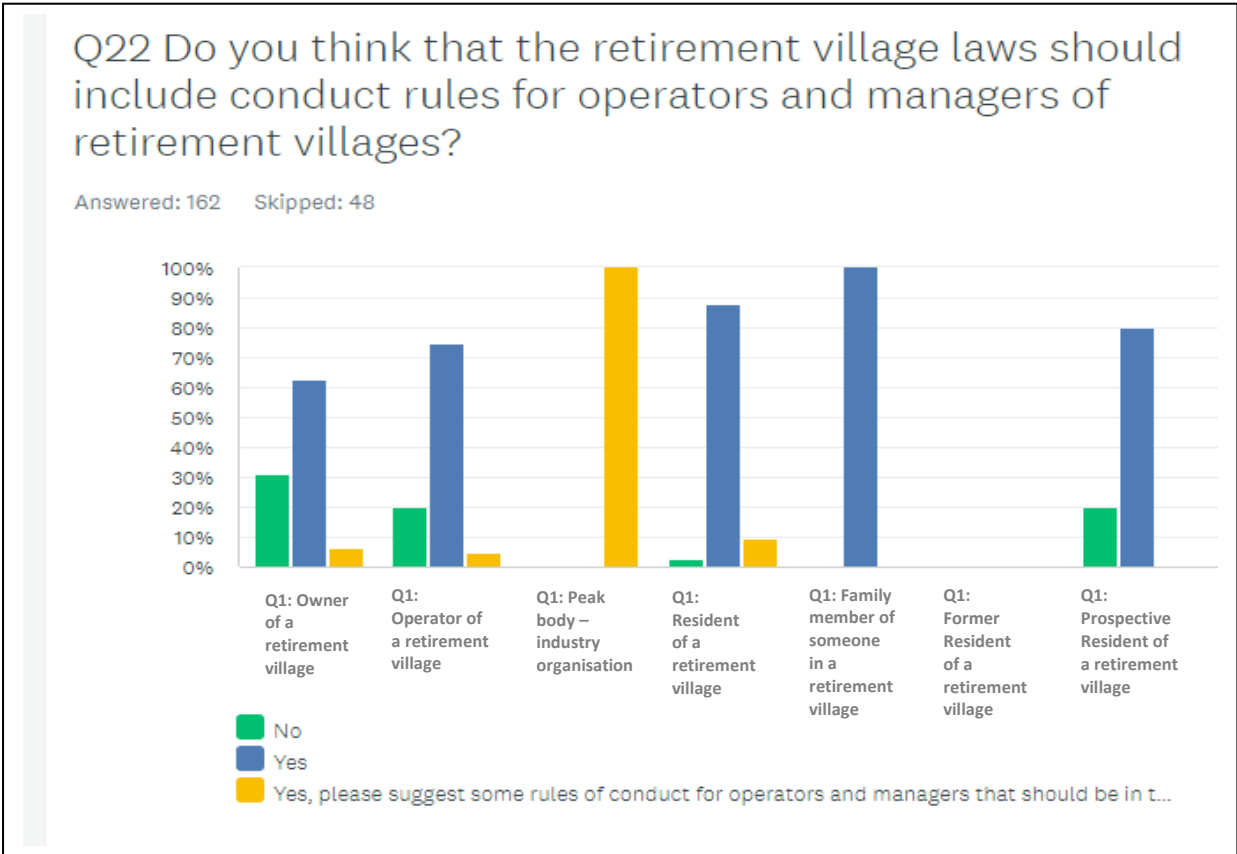
- the new obligations would be inserted into the RV Act;
- the SAT would be provided with jurisdiction to make orders for conduct improvement and impose penalties where conduct provisions have been breached; and
- appropriate penalties would be included in the RV Act as offence provisions for non-compliance with identified rules of conduct.

¹⁴⁰ The proposed conduct obligations for residents are similar to those in the *Retirement Villages Act 1999* (NSW) and the *Retirement Villages Regulations 2017* (SA).

Stakeholder feedback

In response to the RV survey (2020), there was very strong support from residents for new conduct obligations for operators and some support from owners of RVs and operators. (See Table 10).

Table 10: Graph of responses from industry and resident respondents to a question regarding operator and manager conduct rules in RV Legislation.



Written responses to CRIS 2 were from a total of 67 respondents (84 per cent were from respondents representing residents and 16 per cent were from industry respondents).¹⁴¹ A strong majority of written submissions supported the proposals to insert new conduct expectations for both operators and residents and the proposed enforcement mechanisms. All residents who responded as well as WARVRA and a village owner supported the proposals. The industry peak bodies gave qualified support for the proposals.

¹⁴¹ There were 62 resident responses to the CRIS and these came from fifteen individual residents, a former resident, a residents committee, one village submission (supported by 44 residents), and WARVRA (peak resident body). Industry responses to CRIS 2 came from a village owner and a joint industry peak body submission from three peak industry bodies, namely the Property Council of Australia, Leading Age Services of Australia, and Aged and Community Services Australia.

Key reasons advanced in support of the proposals were the subsequent improvement in operator knowledge of their legislative obligations, improvements in operator skill, care and diligence, improved clarity in overall conduct requirements, and operators being required to have regard for the best interests of RV residents.

Industry peak bodies requested that proposed item 8 'Manage conflicts of interest' be amended to 'Manage conflicts of interest subject to the terms of the residence contract'. Specific issues such as these will be addressed during the drafting process.

The industry peak bodies also noted the existence of similar obligations in the voluntary industry code, the *Retirement Living Code of Conduct 2020*. The voluntary code covers operator obligations which are focused on the wellbeing of residents, fairness in marketing and sales practices; maintaining good relationships with residents and stakeholders; and transparent processes when residents move out. The industry code also requires operators to improve their handling of complaints and reaching resolution in disputes.

The industry peak bodies submitted that '*industry has taken its own steps to ensure the elements considered by the proposal are standard practice, where they do not already exist in legislative or regulatory requirements*'.¹⁴²

In response to a question as to whether there were any additional operator obligations that should be considered, three operator obligations were raised:

- be appropriately trained and skilled;
- ensure that the disclosure statement (Form 1) is completed clearly; and
- treating residents with respect as valued customers by recognising their skills and talents and adopting effective consultation.

WARVRA supported significant penalties for non-compliance with the new obligations.

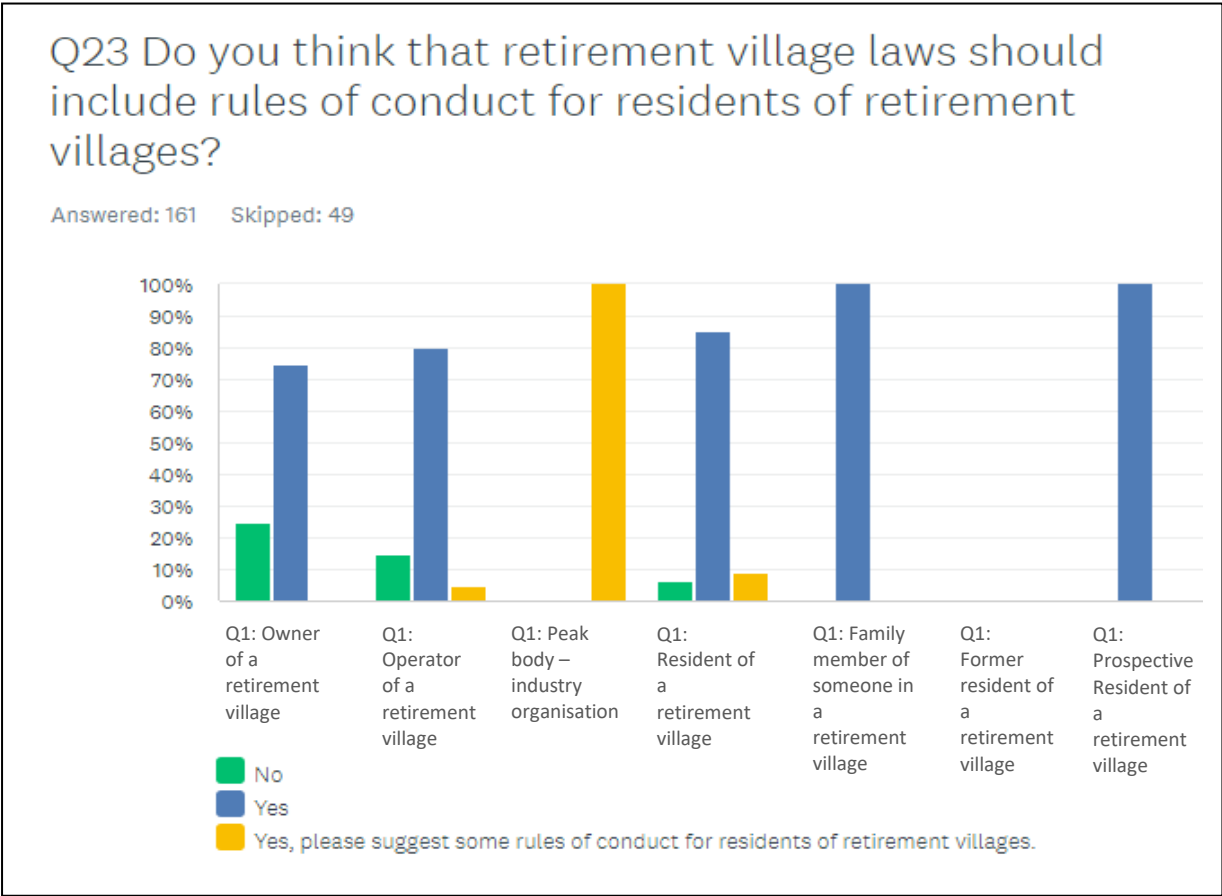
There was strong support from all stakeholders for the proposal that RV laws should include conduct rules for residents (see Table 11).

Reasons advanced by respondents in support of new conduct obligations for residents included:

- residents being more aware of their obligations and responsibilities;
- more clearly defined consequences and penalties if residents did not meet these obligations;
- support for operators and staff who have little protection against residents engaging in misconduct; and
- additional avenues for operators and employees to deal with resident misconduct.

¹⁴² Submission 152

Table 11: Graph of responses from industry and resident respondents to a question regarding conduct rules for residents in RV legislation.



- Other areas identified by respondents requiring resident conduct obligations were:
- honesty, compassion, fairness, communication and exemplary standards of care and consideration;
 - noise, pets, bullying, verbal abuse, and the conduct of residents’ visitors;
 - the need for residents to comply with residence rules; and
 - dealing with vexatious complaints and dispute resolution.

Other jurisdictions

CRIS 2 compared various conduct provisions found in other legislation

Table 12: Comparison of various conduct obligations in legislation

Conduct obligation	RV Code (WA)	Strata Titles Act (WA)	Associations Act (WA)	Cooperatives Act (WA)	RV Amendment Regs (NSW)	RV Regs (SA)	Franchising Code (Cth)	Corporations Act (Cth)	Insurance Act (Cth)
Knowledge and understanding of all relevant laws		✓			✓			✓	
Act in best interests of members			✓	✓	✓	✓		✓	
Skill, care and diligence		✓	✓	✓	✓			✓	
Honesty, fairness and professionalism	✓	✓			✓	✓		✓	
Good faith		✓	✓	✓			✓	✓	✓
Use of information		✓	✓	✓	✓			✓	
Use of position		✓	✓	✓	✓			✓	
Conflicts of interest		✓	✓	✓	✓			✓	
Right to autonomy	✓					✓			
Right to privacy	✓				✓	✓			

Impact assessment

There is clear support for inserting new conduct obligations for operators and residents of RVs into the RV Act. Stakeholders agreed that clear conduct obligations in the RV Act would better assist operators and residents in understanding their obligations towards each other, and would provide options to ensure that these obligations could be better enforced.

Responses to the consultation did not identify any significant economic impacts from the proposal to insert new conduct obligations for operators and residents. There will be some compliance costs as some operators will need to change their management practices and also train their staff in exercising appropriate conduct. Residents will also need to understand their obligations in residing in a RV. Educational initiatives would be required to clarify the conduct standards expected of both operators and residents.

The RV Act already contains a number of obligations for operators of RVs (Appendix 3). The new conduct obligations will capture many of these existing obligations in a separate provision to set out clearly the principles for expected standards of both operators and residents. This would also bring WA into line with other Australian jurisdictions, such as NSW and SA.

The following specific issues raised during the consultation have been taken into consideration.

Standards in voluntary industry code

The existence of an industry code is a positive step in improving standards of RV management. A voluntary code alone is not, however, considered sufficient to address the problems identified in the CRIS as it only applies to industry operators who voluntarily sign up to the code. There are also limited enforcement options under such a code, with reliance primarily on dispute resolution processes. Breaches of the code can be investigated by the Code Administrator, however sanctions are limited and at the most result in a RV being removed from the code register.

Additional obligations proposed for operators and residents

Some stakeholders identified additional obligations which could be introduced. It is considered that these obligations are already sufficiently captured under the proposed reforms. However, further consideration will be given to this during the drafting process. The industry peak bodies' submission suggested that operators be given the flexibility to include village rules specific to their village. It is noted that clause 23 in the RV Code requires operators to establish residence rules for a RV. Such rules would be in addition to conduct obligations.¹⁴³ The current requirements in the Code for operator and resident conduct have limited enforcement options. The insertion of specific conduct provisions in the RV Act, will provide better enforcement options where breaches of the requirements can be established.

Other jurisdictions provide for orders to be made and penalties to be imposed for breaches of some conduct provisions. In NSW, for example, recent amendments enable section 83B of the RV Act in NSW to identify specific rules of conduct as offence provisions with penalty infringement notices of up to \$11,000 for breaches of the rules. Breach of other rules may be taken to the NSW Civil and Administrative Tribunal (NCAT) which imposes mediation and orders for offenders to comply with the law. It is proposed that a similar approach be taken in WA.¹⁴⁴

¹⁴³ The NSW case *Tarragal Glen Retirement Village II Pty Ltd and Errol Investments Pty Ltd v De Carli* [2021] NSWCATCD 58, 22 July 2021, is an example of the power of the NCAT in NSW to make orders. In this case the NCAT decision resulted in a resident's contract not being terminated. Instead the Tribunal made an order that the resident should cease certain disruptive conduct.

¹⁴⁴ Enforcement provisions were introduced in the NSW RV legislation in 2019 (*Retirement Villages Act 1999* (NSW) sections 83B and 203 (the general regulation-making power) and Retirement Villages Amendment (Rules of Conduct for Operators) Regulations 2019). The enforcement provisions in the NSW Retirement Villages Amendment (Rules of Conduct for Operators) Regulations rely on NCAT to issue orders for behaviour improvement. Obligations for operator and resident conduct also exist in legislation in South Australia (*Retirement Villages Act 2016* (SA) section 60 and Retirement Villages Regulations 2017 (SA) Schedule 1 Regulations 1 and 2). A further example is the Corporations Act (Cth) which provides for civil penalties for the breach of the obligations of directors or other officers of a corporation. These include care and diligence; good faith; use of position; and use of information.

Recommendation 13

13.1 Implement CRIS 2, proposals 11.1 and 11.2, to amend the RV Act to insert the new conduct obligations for operators and residents:

An operator of a retirement village (RV) must:

- a) have knowledge and understanding of all relevant laws;**
- b) have regard to best interests of residents;**
- c) exercise skill, care and diligence;**
- d) act with honesty, fairness and professionalism;**
- e) act in good faith;**
- f) protect information – keep it confidential and not use it improperly;**
- g) not use their position improperly; and**
- h) manage conflicts of interest.**

A resident of a RV must:

- a) respect the peace, comfort and privacy of other residents and persons in the RV;**
- b) not harass or intimidate other residents and persons in the RV (including the operator and any person employed in the retirement village (RV));**
- c) not act in a manner that may place the safety of other residents and persons in the RV at risk of harm; and**
- d) comply with the residence rules.**

13.2 Amend the RV Act to provide:

- a) the State Administrative Tribunal (SAT) with jurisdiction to make orders for conduct improvement and impose penalties where conduct provisions have been breached; and**
- b) appropriate penalties for non-compliance with the prescribed rules of conduct.**

14. Budget obligations

Issue

CRIS 2, part 7.1

Operators are required under existing RV Act to be open and accountable to residents in regard to budget setting and RV operating expenditure. The RV Code (clauses 16 – 20 and 26) sets out the financial transparency and accountability requirements of operators setting out obligations for:

- consultation;
- provision of information on request;
- notice and display of budget information;
- time periods to allow for budget and financial information consideration;
- meetings to be held;
- explanations of fees and charges calculations; and
- dispute resolution (see **Appendix 4** for summary of existing RV Code requirements).

Despite these requirements, feedback from residents and WARVRA suggests that there is a lack of meaningful consultation and transparency regarding RV financial operations by some operators. Further, the feedback suggests that requests for the provision of financial information can be poorly dealt with by some operators and residents can feel that they do not have enough say in budgeting decisions.

Some residents have also expressed concern regarding the difficulty in progressing matters through the SAT when there are budget/recurrent charge related disputes.

Objective

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

Policy proposal

CRIS 2, Proposal 7.1 was that operators be required to seek residents' consent to proposed budgets and provide such information as is reasonably requested by residents (or residents committee) to assist in deciding whether to give consent.

Stakeholder feedback

Written submissions, RV surveys and targeted discussions with key stakeholders provided information on the proposal.

Eighteen submissions were received in response to the proposal. Respondents included operators, village residents, WARVRA and industry peak bodies.

Two online surveys were issued to stakeholders – one covering a broad range of RV reform issues, – RV survey (2020), and one seeking further information about stakeholders' reasons for supporting providing residents with a right to consent to budgets (Survey Two).

There were 188 responses to the RV survey question '*Should the retirement village laws require operators to get the consent of residents to the village operating budget?*' Survey Two was issued to 72 stakeholders with 47 responding.

Stakeholder feedback

Residents

Eleven submissions, (nine residents, WARVRA and one operator) supported the proposal on the basis that it would:

- assist in creating trust and ownership of financial decision making;
- provide for greater transparency and information provision relating to financial information; and
- in the case of the operator, the proposal mirrored its existing practices.

There was also support for the proposal from the majority of resident respondents, to both online surveys, with the key reasons being the belief that:

- it would improve clarity and transparency in village finances;
- it would introduce a requirement for operators to provide more information to residents about expenses; and
- would allow residents to have a say in village expenditure.

WARVRA expressed a general reservation about the proposal, stating that while it supported additional resident rights and opportunities to be involved in the preparation and final approval of village budgets, not all residents wish to be involved or are able to 'to understand and make a meaningful contribution to consideration of the village budget'. It expressed concern that if the proposal is introduced it can envisage that operators may be faced with 'questions and comments that will seem uninformed, irrelevant, inconsequential and trivial' and ultimately may lead to delays in the budget process and potential increase in disputes.

WARVRA also noted, that when effective systems are in place that allow for resident participation in budget and financial matters, for example via residents' committees or finance sub-committees, and where information is provided effectively to these bodies, discussion and negotiation on financial matters occurs well and acceptance of annual budgets is quite straightforward.

WARVRA has suggested that a means to improve effective discussion and negotiation on budget and financial matters would be to introduce a mandatory requirement for operators to first present and consult on the proposed annual budget with the residents' committee or finance sub-committee, if these bodies are in existence, before presenting the budget to the wider RV.

Overall, written responses indicated that residents' key budget related concerns centred around a lack of operator consultation, transparency and explanation of what certain fees or fee increases were related to and failure to provide financial statements and related information when requested.

Operators

The industry peak bodies opposed the proposal, arguing that current requirements found in the RV Code relating to the budget consultation process and financial information provision are adequate. The industry peak bodies considered that having to obtain consent from residents would be impractical and there would be disagreement regardless of the budget presented (ie. in relation to staffing costs, marketing costs etc); and the introduction of a consent requirement would lead to an increase in disputes.

One operator also noted that it would be impossible to obtain complete resident consensus, as many residents can think in individual and present terms and not for the future communal needs of the RV. Residents' self-interest in terms of keeping fees as low as possible would lead to little flexibility in budget negotiations.

The view was also advanced that as there are currently clear village budget and financial information requirements in the RV Code, resident concerns around budget and financial matters are linked to the level of operator compliance with existing requirements.

Impact assessment

Residents

Although there may be improvements to the budget process for residents from the proposal if introduced, such as increasing RV budget and financial information transparency and accountability, and, enabling greater resident input into budget and financial expenditure decisions, the feedback from the consultation also identified that some residents may not wish to be involved in, or have the capacity, to make budget decisions.

The feedback also identified a risk that in considering budget expenditure residents may focus primarily on short term or individual preferences without giving proper consideration to the long term communal needs of the RV. This may delay or prevent longer term expenditure on the RV and impede maintenance of village facilities over time.

Industry

The proposal would represent a significant change in the current operational processes for some villages in WA. Operators may find it difficult to obtain consent from residents for reasonable budgets because residents object to certain spending items. Operators may be hindered from planning for or making expenditure decisions that are in the best interest for the business and the village more widely.

There may also be a potential increase in disputes if operators are unable to obtain consent to budget from residents. If consent to the budget is not obtained, operators may then have to apply to the SAT to have the proposed budget approved, with the associated time, cost and effort involved.

The proposal to introduce a consent requirement was put forward as an option to improve operators' consultation and negotiation with residents in relation to the budget process, however, stakeholder views in regard to the more widespread unintended consequences are accepted.

While introducing a budget consent requirement would go some way to addressing concerns village residents have in regard to the existing RV budget process, and the provision of financial information more widely, there is a risk that introducing such a requirement, and the subsequent impact it would have on operator processes may not be commensurate with the actual detriment that the proposal is seeking to address.

It has been argued by industry that the current budget process as required by the RV Code is already comprehensive, that the introduction of a consent to budget requirement is unnecessary and that the proposed changes are impractical and may lead to an increase in disputes. Further, it has been stated by both WARVRA and industry that some residents, given their demographic, do not wish, or would find it difficult, to be involved in budget setting decisions.

Analysis of the written submissions suggests that resident concern is primarily related to consultation and information provision and not necessarily in regard to wanting to actively participate in the budget setting. RV complaints data relating to village budget and financial matters from 2015 to 2020 (approximately 45, averaging 9 a year) indicates that approximately 50 per cent of complaints are related to lack of information provision relating to financial disclosure, lack of transparency and information in regard to budget line items, approximately 30 per cent are related to fee increases while the remainder are general complaints about the villages financial management amongst broader village management issues.

The budget process, financial transparency and accountability requirements currently found in the RV Code were significantly amended in the first round of reforms. These requirements are quite prescriptive and if adhered to generally result in greater resident satisfaction with the budget process and other financial matters and less disputes.

If more consistent and widespread operator compliance with the existing requirements can be obtained, and consultation on budget and financial matters improved, it may be that residents' concerns will be addressed. It is considered that there are several measures that can be taken to improve compliance with existing requirements.

The RV Code has limited compliance options for breaches of the Code. Transferring the RV Code requirements to the RV Regulations would enhance the enforceability of the village financial requirements, because failure to adhere to budget and financial obligations could be more easily linked to penalty provisions.

Operator compliance with the budget process requirements would be further enhanced by introducing into the RV Act a power for the Commissioner to order an operator that has not met its budget process obligations, to do so. Failure to comply with the order could then be met with stronger enforcement options such as infringement notices or in certain cases, penalties. Budget process requirements that could be the subject of a Commissioner's order would be prescribed in RV regulation.

Additionally, in acknowledging the advantages of improved consultation between residents and operators as outlined above, it is considered that, as suggested, during the consultation, a requirement should be introduced for operators to meet with and appropriately consult on the annual budget with a villages residents' committee or finance sub-committee (if they exist) prior to the mandated annual budget meeting and to be required to provide budget and other financial information to these bodies on request.

This would enable any residents who wished to become more involved in the budget process to become a part of these committees and participate more in the budget process.

Recommendation 14

Do not adopt CRIS 2, proposal 7.1. Instead, amend the RV Act to:

- a) require operators to meet with residents' committees, or sub-committees (such as finance sub-committees) if they exist, to consult with such committees and negotiate annual budgets, prior to and in addition to the required wider retirement village (RV) annual budget meeting;**
- b) move the budget and financial requirements from the Fair Trading (Retirement Villages Interim Code) Regulations 2021 (WA) (RV Code) to the Retirement Villages Regulations 1992 (WA) (RV Regulations) as offence provisions; and**
- c) introduce into the RV Act a power by which the Commissioner for Consumer Protection (Commissioner) could order an operator that has not met its budget process obligations to do so.**

15. Rent and sub-letting

Issue

CRIS 3, parts 17.1 and 17.2

Consumer Protection is aware of an increase in the number of rent paying residents at RVs in WA, many having contracts exceeding 12 months. Although residents in rent only seniors accommodation are covered by the *Residential Tenancies Act 1987* (WA) (RT Act), residents who rent in retirement villages are covered by the RV Act and not the RTA. Apart from a shorter disclosure form for short-term residence contracts,¹⁴⁵ the RV Act does not distinguish between residents who pay a premium and rent paying residents, treating both equally.¹⁴⁶ This means that residents who rent in a retirement village do not have the protections afforded by the RTA. Conversely, it also means that residents who pay rent generally have the same rights as residents who have paid a premium to enter into the retirement village.

A question arises as to whether the RV Act should distinguish between the rights of premium and rent paying residents given the more significant financial investment the former make when entering the RV. For example, one additional right which has been sought by premium paying residents is the right to sub-let their unit during times when they may be absent from the village. A further question arises as to whether the RV Act provides rent paying village residents with adequate rights and protections.

Objective

To ensure that the RV Act provisions apply appropriately to different categories of residents of RVs, providing them with adequate rights and protections.

Policy proposal

CRIS 3, parts 17.1 and 17.2 asked for feedback in relation to these issues, making no specific proposals.

Stakeholder feedback

There was limited response as to whether there should be any distinction between the rights of rent and premium paying residents. The feedback received was divided as to whether such residents should be distinguished or treated the same. WARVRA strongly maintained that the RV Act should treat both categories of residents the same and this was vital to maintaining the 'community' of the village. WARVRA also submitted that the RV Act should contain provisions similar to the RT Act, ensuring the provision of adequate rights and protections for long and short term rent paying residents.

¹⁴⁵ Form 1A of the *Retirement Villages Regulations 1992* (WA) is a shorter disclosure form for residence contracts less than 12 months. The Form 1 disclosure form is used for all other residents being premium paying residents and rent paying residents with contracts exceeding 12 months.

¹⁴⁶ The only exception to this is that the RV Regulations provide a modified disclosure information form for a short-term residence contract, being Form 1A.

WARVRA considered that where RVs take on residents who pay rent, operators should be required to provide more disclosure about the rent received from residents, particularly amounts paid towards recurrent charges.

WARVRA also maintained the residents should be able to sub-let their units in special circumstances and subject to the approval of the operator.

One operator considered that the RV Act should treat premium and rent paying residents differently, reflecting the significant financial investment made by residents who pay a premium. The industry peak bodies did not comment on the rights of residents who rent in a RV but did not support providing residents with the right to sub-let their units noting that:

‘Residents should not have the right to sub-let as residence contracts frequently contain several provisions and rules that apply to the resident (i.e. the party to the contract) and it would become challenging for operators to regulate within villages if terms applied to the resident and could not be extended by contract or legislation to a subtenant of the resident. There are additional circumstances where residents subletting will create significant challenges, for example where a residence contract may cease where a sub-tenant continues to live in the unit’.

Termination of fixed term rental contracts under the RV Act

Problems were identified with the RV Act in dealing with fixed term rent paying residents. Section 17 of the RV Act lists various methods that validly terminate a residence contract, but is silent about termination of fixed term agreements. This is in contrast to the RT Act which expressly provides for the Magistrates Court to terminate fixed term agreements and for the lessor to seek recovery of the premises.¹⁴⁷ The following case study shows the confusion about whether the SAT or the Magistrates Court has the authority to terminate a fixed term RV agreement for rent paying residents.¹⁴⁸

Case study

A resident at a Perth metropolitan retirement village first entered the village on a 12 month tenancy agreement which was subsequently renewed for two further 12 month terms. Approximately five months prior to the expiration of the second term, the operator advised the resident that the lease would not be renewed. Despite the notice, the resident failed to deliver vacant possession of the RV unit. The matter of vacant possession was then heard in the Magistrates Court, with an order requiring the resident to vacate the unit.

The resident continued to refuse to vacate and the matter was considered by the State Administrative Tribunal (SAT) with a determination that the SAT had no power to overturn the magistrate’s order. The SAT also noted that section 65 of the *Retirement Villages Act 1992* has a prohibition on an administering body undertaking proceedings to obtain recovery of possession of residential premises occupied by a resident of a retirement village. A Magistrates Court order for seizure and delivery was finally sought, resulting in the eviction of the resident.

¹⁴⁷ *Residential Tenancies Act 1987* (WA), section 72.

¹⁴⁸ Consumer Protection, Commissioner’s Memorandum, 22 July 2021, A36748365.

Other jurisdictions

There is no consistent approach to this issue in other jurisdictions. The RV legislation in the NT, Qld and Vic is similar to WA in that it does not distinguish between residents who pay a premium and those paying rent. On the other hand, the RV legislation in the ACT, NSW, SA and Tas applies the relevant residential tenancies legislation to rent paying residents.

Impact assessment

Consumer Protection notes the concerns of WARVRA that the sense of community in a RV may be adversely impacted if there are different rights for premium paying residents over and above those for rent paying residents. There are valid reasons to be concerned about creating divisions between village residents. Disputes in the RV can significantly impact the quality of resident occupation. At this stage there also appears to be insufficient support for amending how the RV Act currently applies to premium and rent paying residents.

Based on the feedback received in the consultation, Consumer Protection does not recommend any changes at the current time to the RV Act to distinguish between the rights of rent and premium paying residents. In regards to WARVRA's desire that operators provide more disclosure about the rent received from residents, it is noted that the RV Code requires operators to disclose rental income used to meet village operating costs in the proposed budget and quarterly and annual financial statements.¹⁴⁹ If disclosure is not occurring this is a breach of the Code and the issue should be raised with the operator.

Termination of fixed term rental contracts under the RV Act

The recent example in the case study above indicates that there is confusion about whether the SAT or the Magistrates Court has the authority to terminate a fixed term RV agreement. This can be attributed to the absence of a provision similar to section 72 of the RT Act, providing a clear right to terminate and seek recovery of premises combined with the operation of section 65 of the RV Act which prohibits the operator from taking proceedings to recover possession. Residents under shorter fixed term tenancies are required under their contracts to vacate the premises upon the end of the fixed term unless it has been extended. This situation differs from premium paying residents in long term leases. It is important that operators are able to take proceedings to recover their premises in the event that a tenant does not vacate in accordance with the contract. Further consultation will be undertaken to ascertain whether such proceedings are best progressed in the Magistrates Court or the SAT.

Recommendation 15

Amend the RV Act to include a provision that gives an operator an express power to terminate a fixed term lease and seek recovery of the RV premises.

¹⁴⁹ RV Code, sections 17(3)(c), 18(4) and 19(4).

16. Mandatory reserve funds and capital works plans

Issue

CRIS 2, part 8.1

The issue of the adequacy of funding and planning for long-term capital works in a RV, as well as the security of funds being collected from residents for that purpose, has been a long standing issue for RV residents. To deal with these issues, the Final Report recommended that RVs be required to establish mandatory reserve funds (MRFs) and that the legislation prescribe where reserve funds collected from residents are to be held and how they can be used.¹⁵⁰

Following the Final Report, the stage one reforms increased transparency around reserve funds held in RVs, however, no measures were taken to introduce MRFs. Despite increasing transparency, Consumer Protection continues to receive contact from residents concerned about adequacy, planning and security of reserve funds related to both improper use and insufficiency of funds to maintain their village.

Currently, the RV Act does not require operators to have a reserve fund. This means that the establishment of a fund for the long-term capital works expenses is at the discretion of an operator. If an operator elects not to have a reserve fund, this often causes concern for the residents about the capacity of the operator to meet long-term capital works expenses in their village.

If an operator does have a reserve fund, the RV Code requires the operator to provide residents with the reserve fund budget, which must include a separate line item that presents expenditure in the areas of repairs, replacements, maintenance and renovations of a capital nature.¹⁵¹ The RV Code also requires operators to provide residents with quarterly and annual financial statements for the reserve fund.¹⁵²

Despite these requirements for reserve fund budgets and financial statements, some residents maintain that operators do not provide sufficient information about the long-term capital works plans for their village. There is no requirement that operators prepare long term plans for capital works to be undertaken in the village or provide these to residents.

The RV Act also do not require funds for long-term capital works in a RV to be held in a separate account.¹⁵³ This means that funds relating to all capital works may be held in the same fund. This can lead to resident concern about the security of reserve funds, along with confusion about what arrangements are in place in the village for the various categories of capital works.

¹⁵⁰ Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report*, November 2010, 71.

¹⁵¹ RV Code, clause 17(4)(h).

¹⁵² RV Code, clause 18(4) and 19(5).

¹⁵³ RV Code, clause 14(1).

In addition, the RV Act does not include a specific provision stating that the funds paid into a reserve fund must be used for a specific purpose, causing concern for residents about how the funds will be used.

Objective

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

Policy proposal

CRIS 2, part 8.1 proposed that MRFs must be introduced in each RV within two years of the commencement of the relevant amendment. It was also proposed that:

- the amount held in a MRF and/or the ongoing contributions to the fund are sufficient to ensure that the village can be maintained in a reasonable condition;
- the relevant amount and/or ongoing contributions to be in place for all reserve funds within five years of the commencement of the relevant amendment;
- the Commissioner for Consumer Protection (Commissioner) be able to extend the five year period and provide for a decision by the Commissioner to be reviewable on application to the SAT;
- where residents believe that the application of a levy or a proposed increase in their contribution to a reserve fund is excessive, unwarranted or inconsistent with existing contractual arrangements, they may make an application to the SAT for the matter to be reviewed; and
- the RV Regulations prescribe where reserve funds are to be held and purposes for which a reserve fund may or may not be used.

No proposals were made in relation to capital works plans but feedback was sought on whether capital works plans should be:

- prepared by operators for RVs;
- prepared by an independent person such as a quantity surveyor; and
- for a period of five or 10 years.

Stakeholder feedback

Mandatory Reserve Funds

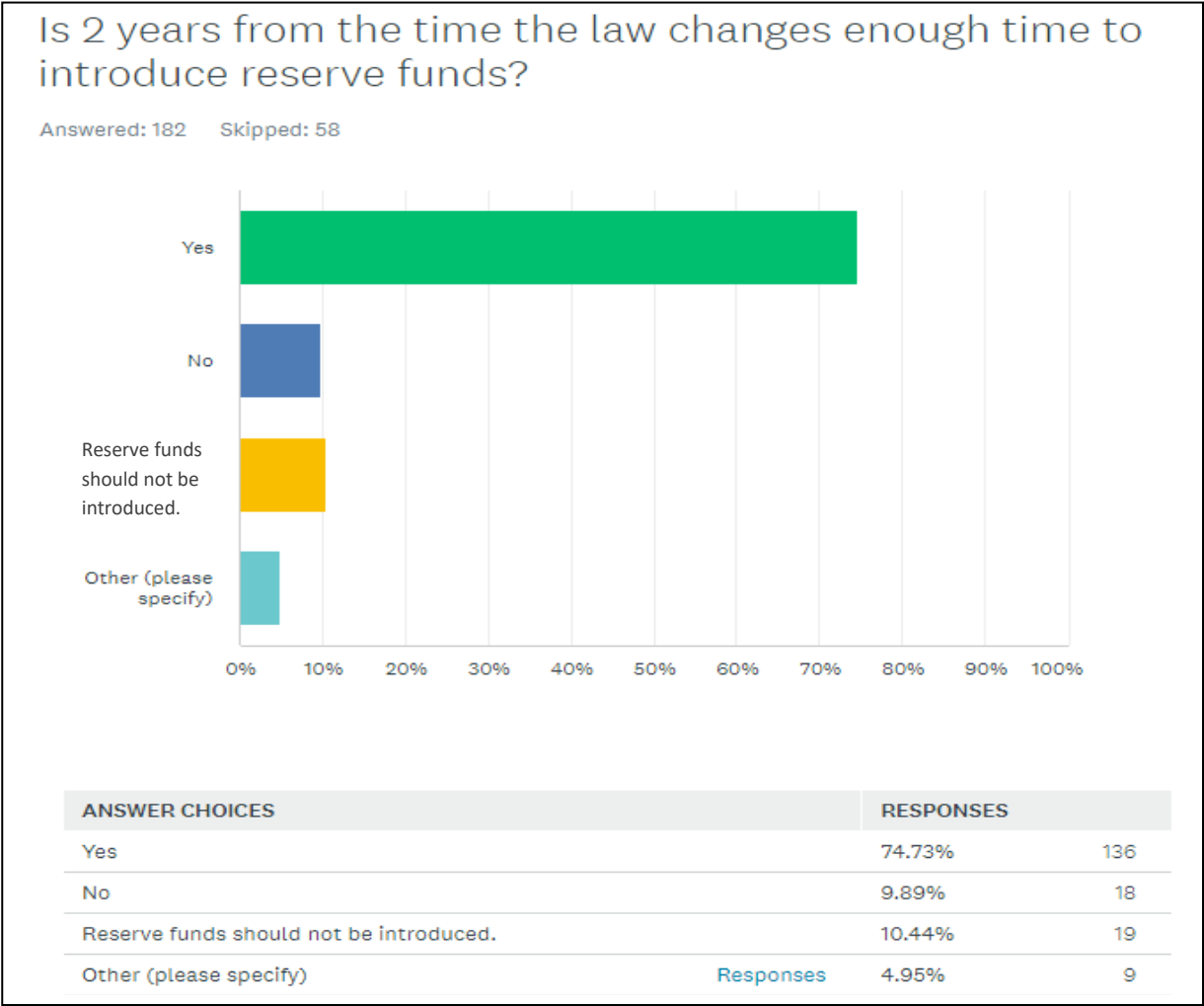
There were limited submissions received to the proposals to implement MRFs. However, responses from WARVRA and a number of operators supported the introduction of MRFs. The industry peak bodies' response did not support the MRF proposals on the basis that they considered 'standard current industry practices include the establishment and maintenance of reserve funds above and beyond current requirements'.

In later meetings with the industry peak bodies and WARVRA, feedback was sought on whether WA’s new strata laws about reserve funds would be an appropriate model for strata RVs in that they:

- allowed strata companies to determine the amount to be raised for the fund;¹⁵⁴ and
- provided owners of a strata property the right to appeal to the SAT if the property is not adequately maintained.¹⁵⁵

WARVRA and the industry peak bodies both supported progressing RV reform with similar provisions to the ST Act which allow the operator the discretion to determine the appropriate reserve amount. Similar feedback was also received from a not-for-profit operator and a large operator. The feedback from CRIS 2 and the RV survey (2020) showed overwhelming support for a two year period for operators to introduce MRFs, with 75 per cent (136/182) of respondents considering that two years from the time the law changes was sufficient time to introduce reserve funds.

Table 13: Timeframe for introducing MRFs



¹⁵⁴ *Strata Titles Act 1985* (WA), section 100(2)(b).
¹⁵⁵ *Strata Titles Act 1985* (WA), section 91(c), and section 197(10(a)(ii).

CRIS 2 responses also supported a requirement that funds paid by residents towards a MRF should be held in a separate account. The RV survey (2020) indicated that 97 per cent (176/182) of respondents considered that MRFs should be held in a separate account such as an ADI account, trust account or an account secured by a charge.

Data gathered from the WATC survey indicates that the majority of RVs already have reserve funds.¹⁵⁶ It is likely therefore that the financial impact of this reform on the sector will be limited.

Capital Works Plans

The submission from industry peak bodies did not support a requirement for capital works plans, on the basis that the RV Act currently requires operators to provide residents with information about future maintenance of a village as part of the budget and financial statements.

New WA strata laws require the strata company to prepare 10 year capital works plans setting out the long-term maintenance, repair and renewal of the premises.¹⁵⁷ The question of whether this would be an appropriate model to use for the RV sector was raised during further consultation with industry peak bodies.

The industry peak bodies expressed concern about the detail of information required under the new strata laws for capital works plans and advised that if similar plans were required for RVs, the costs would be significant and ultimately borne by residents. Further, the industry peak bodies thought that a 10 year capital works plan was an excessive timeframe, given that the average resident resided at a RV for a period of around eight years. They noted that discussions with residents generally used a one-three year timeframe, even though the operator often had longer term plans.

The submissions from WARVRA and two operators supported capital works plans on the basis that they would increase transparency around the long-term capital works planning in a village. WARVRA however emphasised that the capital works plans should not be overly onerous on operators, to avoid excessive costs being paid by residents.

WATC data indicated that approximately 95 per cent of the surveyed units in metropolitan WA had been constructed prior to 2011.¹⁵⁸

¹⁵⁶ The WATC survey covered 296 villages in WA. Extrapolating from these responses it was calculated that approximately 87 per cent of villages already have reserve funds.

¹⁵⁷ Strata Titles (General) Regulations 2019, regulation 77(1) details what the ten year plan must include.

¹⁵⁸ WATC data indicated that 7600 of the 8000 units surveyed were constructed prior to 2011.

Other jurisdictions

Mandatory reserve funds

Compulsory capital works planning for RVs by way of a MRF is already required in Qld. In Qld, operators are required to:

- maintain a capital replacement fund for replacement of a village's capital items;¹⁵⁹
- maintain a maintenance reserve fund for maintaining and repairing capital items;¹⁶⁰
- only use the reserve fund monies for a specific purpose;¹⁶¹
- keep interest from reserve funds in the fund;¹⁶²
- hold the reserve fund monies in a separate account; and¹⁶³
- a statutory charge is also created over the reserve fund for the benefit of the residents of the village.¹⁶⁴

Other jurisdictions, such as ACT, NSW, NT and SA, do not make reserve funds compulsory but do make it mandatory for operators to establish a separate reserve fund when residents are contractually required to contribute to such costs.¹⁶⁵ These jurisdictions also limit the purposes for which these funds may be used.

Capital works plans

One jurisdiction, Qld, requires retirement villages to have a capital works plan. The plans must be assessed by a quantity surveyor and a written report provided about the expected capital replacement and maintenance costs for the village for the next 10 years.¹⁶⁶ The report must be revised every three years or if there is a substantial change to the RV.¹⁶⁷

The RV legislation in Qld also requires operators to prepare a budget for both the capital replacement fund¹⁶⁸ and the maintenance reserve fund for each financial year.¹⁶⁹ Separate accounts must also be kept for the capital replacement and maintenance reserve fund.¹⁷⁰

¹⁵⁹ *Retirement Villages Act 1999* (Qld), section 91(1)(a).

¹⁶⁰ *ibid*, section 97(1)(a).

¹⁶¹ *ibid*, sections 91(1)(b) and 97(1)(b).

¹⁶² *ibid*, section 94(1)(b) and 100(1)(b).

¹⁶³ *ibid*, section 91(1)(b).

¹⁶⁴ *ibid*, section 91(6).

¹⁶⁵ *Retirement Villages Act 2012* (ACT), section 143(1), *Retirement Villages Act 1999* (NSW), section 99(1), *Retirement Villages Act 2016* (SA), section 28, and *Retirement Villages Act 1995* (NT), section 38(1).

¹⁶⁶ *Retirement Villages Act 1999* (Qld), section 92(1) and section 98(1).

¹⁶⁷ *ibid*, section 92(2)(a) and section 98(2)(a).

¹⁶⁸ *ibid*, section 93(1).

¹⁶⁹ *ibid*, section 99(1).

¹⁷⁰ *ibid*, section 111.

Similar to Qld, the ST Act in WA also requires a strata title company to have a capital works plan (10 year plan), to be revised once every five years. It is not a requirement that the plan be prepared by a quantity surveyor.¹⁷¹ Capital works plans for RVs are also being proposed in Vic.¹⁷²

Impact assessment

During consultation, stakeholders identified the following concerns with the CRIS 2, 8.1 proposals.

- *The relevant reserve amount and/or ongoing contributions to be in place for all reserve funds within five years of the commencement of the relevant amendment.* Feedback from both residents and operators expressed concern that this requirement would unduly restrict flexibility and impose an unnecessary financial burden on both residents and operators.
- *Prescribing where funds are to be held, along with designating the purpose for which the funds must be used.* This proposed amendment may mean that operators will not be permitted to hold long-term capital works funds in the RVs general operating account. As a result, operators may have reduced overall flexibility in managing the village's finances, possibly impacting cash flow.
- *All RVs to have MRFs in place within two years.* Feedback from one of the smaller RVs was that 80 per cent of their leases do not have provision for payment into a reserve fund, with DMF payments being used to cover refurbishment only. The operator submitted that time must be given 'for those leases to expire and new leases to be put in place with specific terms and deductions for a reserve fund'.

The following is noted in regards to these concerns.

- *Proposed five year period to build up fund:* It is likely that requiring a reserve fund to be built up to a required amount in a five year time period could place a considerable financial burden on operators. A more feasible approach would be to provide a discretion for operators to determine the reserve amount. This would mitigate such financial risks, however, it may result in insufficient funds being available for the long-term maintenance of the village. This could be addressed with placing a statutory obligation on operators to maintain RV capital items, along with a right for residents to appeal to the SAT if the operator fails to adequately maintain the RV.
- *Requirement that reserve funds be held in a separate account:* It is considered that concerns about reduced financial flexibility will be mitigated by providing operators two years to implement MRFs, allowing operators sufficient time to implement necessary financial management structures. The introduction of MRFs

¹⁷¹ *Strata Titles Amendment Act 2018* (WA), section 49(2), Division 2, amending section 36 of the *Strata Titles Act 1985* (WA) and to be renumbered as section 100 of the *Strata Titles Act 1985* (WA) - assented to on 19 November 2018 but not as yet proclaimed and operating as law.

¹⁷² *Review of the Retirement Villages Act 1986* (Vic) Issues Paper, 2019, Consumer Affairs, Victoria.

would also only apply to new residence contracts from or after the date of amendment.¹⁷³

- *Proposed two year period from introduction of the legislation for operators to implement MRFs:* It is considered that this would allow sufficient time for operators to ensure that financial arrangements are in place for MRFs. It is also noted that it will be approximately two years until the new laws progress through Parliament. This means that operators will have until early 2025 to make arrangements for MRFs.

Mandatory reserve funds

Overall, there was strong support from the industry peak bodies, WARVRA, residents and operators to have MRFs to ensure the ongoing maintenance of RVs. However, concern was expressed by a number of the stakeholders about requiring operators to achieve a fixed reserve amount no later than five years after the introduction of the MRFs. It was argued that this requirement would limit the flexibility of operators in managing the village and place an unreasonable financial burden on both operators and residents.

Consumer Protection recognises that the current CRIS proposal requiring operators to achieve a reserve amount within a specified period could place a significant financial burden on RVs, especially villages that do not currently have reserve funds. However, Consumer Protection also recognises the importance of reserve funds in ensuring the ongoing long term maintenance of the village. To this extent, it is considered that adopting the approach in the new strata laws to allow an operator to determine the amount to be placed in the fund while providing residents a right to appeal to the SAT, if they believe the reserve insufficient, will provide a suitable balance, while at the same time ensuring the ongoing maintenance of the village.

¹⁷³ *Strata Titles Act 1985* (WA), section 29 provides that amendments requiring reserve funds only apply to contracts entered into after the amending Act has been enacted.

Recommendation 16.1

16.1.1 Amend the RV Act to:

- a) require that operators must establish a mandatory reserve fund (MRF) within two years of the commencement of the legislation or such longer term as is prescribed;**
- b) require operators to determine the amounts to be raised for payment into the reserve fund, ensuring that they are sufficient to maintain the retirement village (RV) in a reasonable condition, having regard to the age and prospective life of the capital items;**
- c) prescribe regulations to stipulate that reserve funds are to be held in an Authorised Deposit Institute (ADI) account, along with the purposes for which a reserve fund may or may not be used;**
- d) enable residents to make an application to the SAT for a matter to be reviewed and determined where they believe that the application of a levy or a proposed increase in their contribution to a reserve fund is excessive, unwarranted or inconsistent with existing contractual arrangement; and**
- e) allow a majority of residents, who believe that the MRF is inadequate to maintain the RV in a reasonable condition, to make an application to the SAT to determine the matter.**

16.1.2 Undertake further consultation regarding the right of residents to appeal to the SAT when regulations are developed.

Capital works plans

The RV Act requires operators to provide residents with budget and financial statements for reserve funds, with specific line items for maintenance and repair to be included in these statements. From the feedback provided, it would appear that residents and some operators consider that this information could be improved by providing residents with capital works plans. However, there was also strong feedback from the industry peak bodies stating that capital works plans were an unnecessary cost burden, with other stakeholders stating that such plans should not be onerous or costly.

Capital works plans assist residents in understanding how operators will fund future maintenance in their village. They also provide assurance to residents that the operator is planning for the long term upkeep of the village.

The WATC data indicated that the vast majority of RV units in greater metropolitan Perth were constructed prior to 2011 and are over 10 years old. Given the large number of ageing RV units, it is imperative that operators who may not be planning for long term maintenance be required to do so.

The key concern identified with the requirement for capital works plans was the additional cost. Capital works plans are, however, a standard method to assist with the ongoing management of the capital items in the village. As noted, capital works plans are also now required under the new WA strata laws.

Recommendation 16.2

It is recommended that the RV Act be amended to:

- a) require operators to prepare five year capital works plans for their retirement village (RV). The five year plan would not be required if an RV already had a 10 year plan under the *Strata Titles Act 1985 (WA)* (ST Act); and**
- b) allow further prescription of the capital works plans in regulations detailing the items to be included in the plan.**

17. Capital works defined terms and regulation of funding sources

Issue

CRIS 2, part 8.2.1

Operators collect funds from residents for capital works expenses. However, contractual variations and discretions mean that arrangements for how these funds are spent in a village can be unclear to residents. Disputes occur about what works fall into different capital works categories, along with how funds should be allocated. A particular concern of residents is the use of recurrent charges for the replacement and improvement of capital items in the village.

Objective

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

Policy proposal

CRIS 2, proposal 8.2.1 was that the RV Act be amended to:

- a) insert definitions for the categories of capital works;
- b) define capital maintenance and capital replacement;
- c) regulate the funding sources which can be used for certain capital works by providing that:
 - recurrent charges can only be used for capital maintenance expenses (Option A); or
 - operators to be responsible for the cost of both capital maintenance works and capital replacement (Option B).

Stakeholder feedback

Defining capital works categories

The RV survey (2020) indicated strong support for the proposal to define capital works categories. This survey indicated that 92 per cent (170/185) of respondents supported inserting definitions in the RV Act to define categories of capital works. WARVRA supported inserting definitions for capital works categories on the basis that it would 'improve clarity and consistency within RVs in regards to capital works'.

The industry peak bodies did not support inserting statutory definitions for the capital works categories, maintaining that it was best practice for capital works terms to continue to be defined in the residence contracts.

Preferred definitions

CRIS 2 also consulted on what definitions were preferred by stakeholders, suggesting two options. The first option was to define the capital works categories in the RV Act and allow further prescription in regulations or guidelines. This approach is taken in NSW and the ACT. The second option was to define the capital works categories by linking them to Australian Taxation Office (ATO) rulings. This approach is taken in Qld.

WARVRA supported linking capital works definitions to ATO rulings. One large operator supported capital works definitions to ensure consistency across contracts, with a preference for defining the capital works categories in a similar way to RV legislation in NSW and the ACT. The operator considered that linking capital works definitions to ATO rulings 'appears quite complex and overly detailed, which may lead to great confusion and disputes between residents'.

Regulating funding sources

Thirty four per cent (62/184) of respondents to the RV survey (2020) supported Option A, that the only capital works expenses that can be funded through recurrent charges are capital maintenance expenses. Option B, the operator being responsible for both capital maintenance and capital replacement expenses, was preferred by 53 per cent (97/184) of respondents. The response from 13 per cent of respondents was that they did not support either Option A or Option B.

WARVRA supported Option B, with operators being responsible for both capital maintenance works and capital replacement, commenting that it had a 'closer alignment with the RT Act'.

The industry peak bodies did not support either of the options, maintaining that regulation of funding sources should continue to be dealt with in the residence contracts. It was argued by industry that regulating sources of funding for capital works 'risks compromising innovation relating to financial and contract models, especially where different models operate within a village to cater for changing resident needs or preferences'.

Responses from individual operators on the whole supported Option A, on the basis that limited regulation was preferred by requiring recurrent charges to be used for capital maintenance expenses only, allowing operators contractual flexibility around capital replacement expenses. The responses from operators also indicated that standard industry practice is for residents to be responsible for capital maintenance expenses through recurrent charges. Operators generally take responsibility for the funding of capital replacement expenses.

There was no stakeholder feedback on any cost impact of making these changes. However, Consumer Protection recognises that operators will need to ensure residence contracts align with any new requirements to the definitions of capital works and the funding of capital maintenance and replacement. These changes will involve some compliance costs for operators.

Other jurisdictions

Three Australian jurisdictions, the ACT, NSW and Qld, currently define capital works terms.¹⁷⁴ Two of these jurisdictions, NSW and the ACT, have provisions allowing for the further prescription of capital works items and capital maintenance.

In the ACT, the RV legislation allows the Minister to make guidelines about the distinction between capital maintenance and capital replacement.¹⁷⁵ The ACT's *Retirement Villages (Capital Maintenance and Replacement) Guidelines 2019* provide examples of commonly encountered capital maintenance and capital replacement issues to assist residents and operators.¹⁷⁶

In NSW, the RV legislation allows regulations to prescribe works that are not capital maintenance.¹⁷⁷ The works are prescribed as not including work done to substantially improve an item of capital beyond its original condition and work done to maintain or repair an item of capital in circumstances where it would have been more cost effective to replace the item of capital.¹⁷⁸

In Qld, the RV legislation links the definition of capital replacement to ATO Rulings made under the *Taxation Administration Act 1953* (Cth).¹⁷⁹

Impact assessment

Capital works definitions

The insertion of statutory definitions for capital works categories had support from stakeholders, with the exception of the industry peak bodies. Industry peak bodies considered that statutory definitions for capital works categories and regulating funding sources would restrict the contract options that could be offered, meaning residents are not provided with the best retirement living option.

Consumer Protection recognises that contractual flexibility is important in ensuring that the RV sector can operate flexibly and meet the needs of consumers. However, many of the RV disputes dealt with by Consumer Protection relate to a lack of clarity as to how capital works categories are defined and who pays for the expense. It is considered that statutory definitions for capital works categories will assist to provide consistency and clarity around key terms, reducing disputes between residents and operators.

¹⁷⁴ *Retirement Villages Act 2012* (ACT) section 135, *Retirement Villages Act 1999* (NSW) section 4 and *Retirement Villages Act 1999* (Qld), section 4.

¹⁷⁵ *Retirement Villages Act 2012* (ACT) section 136A.

¹⁷⁶ <https://www.legislation.act.gov.au/View/nl/2019-405/current/PDF/2019-405.PDF>

¹⁷⁷ *Retirement Villages Act 1999* (Qld), section 4.

¹⁷⁸ *Retirement Villages Regulations 2017* (NSW), regulation 4.

¹⁷⁹ <https://www.ato.gov.au/law/view/document?docid=TXR/TR9723/nat/ato/00001>

On balance, it is considered that these advantages of legislative definitions for capital works terms outweigh industry desire for contractual flexibility in this area.

The feedback on what definitions should be used for the categories of capital works was also divided between residents and operators. WARVRA supported linking the definitions to ATO rulings, while some operators preferred specific definitions of capital maintenance and capital replacement in the RV Act.

There may be some difficulty in residents understanding ATO Rulings and how they link to the capital works categories. To this extent, Consumer Protection anticipates providing information and education to residents to assist them in accessing and understanding the ATO Rulings. Linking capital works definitions to ATO Rulings is the preferred approach as it ensures that such terms are consistent with the taxation law. This may also minimise the compliance burden for operators. A similar approach is used in the RV legislation in Qld.¹⁸⁰ In NSW, recent amendments to the RV laws require Asset Management Plans to define the 'effective life of items of capital' by reference to ATO Rulings.¹⁸¹

Regulation of funding sources

The feedback for the regulation of funding sources was divided. The submission from WARVRA supported operators being responsible for both capital maintenance and replacement expenses (Option B).

Submissions from some individual operators supported operators being responsible only for capital replacement expenses, with residents being responsible for maintenance expenses paid by recurrent charges (Option A). Option B had the most (53 per cent) support in responses to the RV survey (2020). The industry peak bodies did not support any regulation in this area on the grounds that it restricted contractual flexibility.

Introducing regulation requiring operators to be responsible for both capital maintenance and replacement (Option B) has support of WARVRA and the majority of respondents to the RV survey (2020). However, Consumer Protection considers there is a risk that introducing such requirements will have a considerable impact on how operators manage the finances of the village. In its feedback on the proposals, industry has noted that many different contractual arrangements are in place for funding capital works in a village and a more prescriptive approach may limit options provided to residents as to how they can best meet the overall cost structures associated with living in a RV.

Industry acknowledged that this may lead to an array of different contractual arrangements across a RV, but considered that this 'encouraged innovation' and was in the best interests of residents.

Analysis of the written submissions and RV survey (2020) responses also suggests that resident concern is primarily related to how capital works terms are defined, along with how operators spend funds acquired from recurrent charges.

¹⁸⁰ *Retirement Villages Act 1999 (Qld)*, Schedule Dictionary definitions for maintenance, repairs, replacement and capital improvement.

¹⁸¹ Retirement Villages Amendment (Asset Management Plans) Regulations 2021 (NSW), regulation 26G.

The RV Act requires operators to detail in budgets and financial statements how recurrent charges are calculated and applied to capital works expenses.¹⁸² However, it is not uncommon for residents to disagree on how an operator has defined a capital maintenance expense, arguing that it more accurately falls within the capital replacement category and is the responsibility of the operator.

If more clear and consistent definitions for the capital works categories are contained in the RV legislation, it could be argued that this will result in a considerable reduction of disputes around the funding of both short and long term capital maintenance in a village. In addition, requiring that recurrent charges can only be used for a defined capital maintenance category will provide residents with increased certainty and again likely to reduce disputes.

On balance, it is considered that requiring recurrent charges to be used for capital maintenance expenses only (Option A) will provide residents with more certainty around paying for day to day expenses while at the same time ensuring that there remains contractual flexibility about how best residents can fund the overall costs of life in the village.

Transitional provisions

Implementation of proposal 8.2.1 will mean that residence contracts entered into after the RV Act is amended will need to align with the new capital works terms and funding rules. Questions arise as to the application of new RV laws to residence contracts entered into prior to the amendment of the legislation.

Further consultation will be undertaken with the sector in regards to transitional arrangements for proposed amendments.

Recommendation 17

Amend the *Retirement Villages Act 1992 (WA)* (RV Act) to:

- a) insert definitions for capital maintenance and capital replacement;**
- b) define capital maintenance and capital replacement by reference to the Australian Taxation Office rulings; and**
- c) require that the only capital works expenses that can be funded through recurrent charges are capital maintenance expenses (Option A).**

¹⁸² RV Code (WA), clauses 17, 18 and 19.

18. Condition of capital items

Issue

CRIS 2, part 8.3

It is important to both residents and operators that the RV be kept in good condition. There is no legislative obligation requiring operators to maintain a RV in a reasonable condition. Operators will be required either expressly or impliedly under the residence contract to maintain the village in a reasonable condition. Residents who have concerns about the condition of the village must therefore pursue contractual remedies, which can be expensive and stressful.

Objective

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

Policy proposal

Proposal 8.3 proposed that the RV Act be amended to provide an express provision imposing an obligation on operators to maintain the capital items owned by the operator in a RV in a reasonable condition.

Stakeholder feedback

Overall, there was strong support from WARVRA, individual residents and independent operators for proposal 8.3. The industry peak bodies did not support the proposal stating that it was unnecessary regulation. No specific adverse impacts were identified by the industry peak bodies in opposing the proposal.

Some stakeholders suggested that the RV Act should also impose an obligation on residents to notify the operator as soon as practicable if a capital item needs to be repaired or replaced.

Other jurisdictions

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

In WA, a strata company has a duty to keep in good and serviceable repair, properly maintain and, where necessary, renew and replace the common property, including the fittings, fixtures and lifts used in connection with the common property.¹⁸³

¹⁸³ *Strata Titles Act 1985 (WA)*, section 35(1)(c).

Impact assessment

Consumer Protection considers that the benefits of amending the RV Act to provide a clear obligation for operators to maintain a RV in a reasonable condition far outweighs any concerns regarding unnecessary regulation in this area. The proposed amendment will make it clear that operators have an obligation to maintain the village. It would also provide residents with an accessible avenue for enforcement of the obligation to maintain the RV in a reasonable condition. No adverse impacts were identified by stakeholders during the consultation.

Consumer Protection notes that strata laws in WA provide that a strata company has a duty to keep in good and serviceable repair, properly maintain and, where necessary, renew and replace the common property, including the fittings, fixtures and lifts used in connection with the common property.¹⁸⁴ The RV legislation in other Australian jurisdictions imposes an obligation on operators to maintain capital works items in a reasonable condition.¹⁸⁵ The legislation in NSW and the ACT imposes an obligation on residents to notify the operator as soon as practicable if a capital item needs to be replaced.¹⁸⁶

Consumer Protection has considered the suggestion that the RV Act should impose an obligation on residents to notify the operator as soon as practicable if a capital item needs to be repaired or replaced. It is considered that such a provision is reasonable to allow the operator to rectify the issue. This approach is used in other similar legislation and is consistent with the overarching objective of maintaining RV capital items in a reasonable condition.

Recommendation 18

Implement CRIS 2, proposal 8.3, to amend the RV Act to:

- a) include an express provision imposing an obligation on operators to maintain the capital items owned by the operator in a retirement village (RV) in a reasonable condition; and**
- b) insert an additional requirement that residents must notify the operator as soon as practicable if a capital item in the RV needs to be repaired or replaced.**

¹⁸⁴ *Strata Titles Act 1985* (WA), section 35(1)(c).

¹⁸⁵ *Retirement Villages Act 2012* (ACT), section 137(1), *Retirement Villages Act 1999* (NSW), section 93(1).

¹⁸⁶ *Retirement Villages Act 2012* (ACT), section 138(1), *Retirement Villages Act 1999* (NSW), section 94(1).

19. Refurbishment definitions

Issue

CRIS 2, part 9.1

Many residence contracts require former residents to pay (in whole or in part) for refurbishment of the unit they vacate through a specific exit fee – a refurbishment fee. Disputes arise between RV residents and operators about what can and cannot be included in the refurbishment fee and also about what residents may sometimes regard as excessive refurbishment costs.

Residents and operators can find the RV Act ambiguous in setting out the standards and type of works required when a resident departs a village as the term ‘refurbishment’, as defined in the Retirement Village Code, potentially means different things to operators and residents. Further, legislation setting out refurbishment requirements can be difficult to navigate, being found in both the RV Regulations and the RV Code.

Often disputes relating to refurbishment arise when former residents are vulnerable, occurring when the resident is departing a village to move to aged care and being less likely to have the health or financial capacity to properly engage in dispute resolution.

Objective

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

Policy proposal

CRIS 2, part 9.1, proposed that:

- RV Act be amended to replace the term ‘refurbishment works’ with terms that distinguish between reinstatement and improvement;
- ‘reinstatement’ be defined as works to restore the vacated unit to the condition it was upon occupation, excluding fair wear and tear and alterations made with operators’ consent;
- ‘reinstatement’ be permitted to include a minor, incidental level of improvement but not work that alters the function or character of a fixture or the property or that significantly enhances the marketability or sale value of a RV product relating to the vacated unit; and
- ‘improvement’ be defined as works that improve the vacated unit’s value and marketability, in line with the approach taken by the ATO in defining improvement.

Stakeholder feedback

A total of 61 written submissions were received in response to the proposal, however, 44 of those responses were received from residents of one village. Respondents were made up of village owners and operators, village residents, WARVRA and industry peak bodies. This issue was also the subject of further targeted consultation with peak bodies in the RV sector.

There was a general consensus from individual operators, residents and WARVRA in support of the proposal that the RV Act distinguish between 'reinstatement' and 'improvement'. While there was limited specific feedback about the proposed definitions of 'reinstatement' and 'improvement', there was general support from those stakeholders who did comment on the definitions put forward in CRIS 2.

There was also general agreement that reinstatement requirements should exclude 'fair wear and tear' and any alterations to which the operator has agreed. WARVRA submitted that it should be clearly stated in RV Act that it is the operators' responsibility to rectify fair wear and tear. The industry peak bodies supported clarifying in the RV Act how reinstatement and refurbishment are treated, however, preferred that definitions be managed contractually rather than in legislation to allow for greater flexibility in negotiations and discussion between operators and residents. The industry submission also raised a concern with how 'fair wear and tear' might be defined in the RV Act.

Impact assessment

The key impact identified by industry relates to the loss of contractual freedom to negotiate refurbishment obligations between operators and residents. Analysis of the complaint and enquiry data relating to refurbishment disputes received by Consumer Protection suggests that in many cases residents do not fully understand, or are unaware of, their contractual refurbishment obligations. Refurbishment complaints and enquiries received by Consumer Protection are generally related to resident concerns about the types of works allowed for under contracts such as improvements, the costs involved and also having to pay for refurbishment in general, suggesting that resident ability to negotiate on contractual refurbishment obligations is, in practice, quite limited.

Different definitions used in contracts to describe refurbishment, reinstatement and improvement works can cause uncertainty and confusion for residents in attempting to understand their obligations on departure. Introducing defined terms into contracts will significantly reduce contract complexity and improve resident understanding of the works they will be required to fund. Clearly distinguishing the terms 'reinstatement' and 'improvement' in the RV Act and further clarifying related resident and operator obligations should also reduce the number of disputes concerning what works are included in residents' refurbishment fees.

No significant detrimental impacts of this proposal were identified during the consultation. As with other changes it is likely that there may be some compliance costs in altering standard form contracts. As with other problems facing RV residents, the ability for Consumer Protection to take enforcement action may create an effective deterrent to excessive operator refurbishment demands. Setting resident funded refurbishment

standards in the RV Act rather than leaving them to contracts would provide a basis for this. There was support for clarifying current RV Act refurbishment obligations from WARVRA, residents and industry.

WARVRA, residents and operators agreed that terms defining the works associated with 'reinstatement' and 'improvement' in legislation would assist in reducing confusion and provide clarity about resident and operator obligations for works to be undertaken on vacation of a residential unit.

While the industry peak bodies supported clarifying the meaning of the terms 'reinstatement' and 'refurbishment' they suggested that this should be done contractually to allow flexibility for residents and operators to better negotiate refurbishment obligations. Consumer Protection acknowledges that the proposal will restrict the ability of operators to use individual contractual definitions for these terms, however, it considers that those concerns are outweighed by the benefits of limiting differences in how such terms are defined across contracts and villages and providing additional clarity in the RV Act around the works to be undertaken and by whom they are funded.

If introduced, the new definitions will assist in clarifying resident and operator refurbishment obligations by clearly identifying the difference between reinstatement works and improvement works. This in turn should lead to a reduction in disputes between residents and operators concerning responsibility and associated costs. As such, Consumer Protection considers that the term 'refurbishment work' should be replaced in the RV Act with a less ambiguous descriptor and definition that clearly identifies for both residents and operators the standard of works a resident is required to fund.

Recommendation 19

Implement CRIS 2, proposal 9.1, to amend the RV Act to:

- a) replace the term 'refurbishment works' with terms that distinguish between reinstatement and improvement;**
- b) define reinstatement as works to restore the vacated unit to the condition it was upon occupation, excluding fair wear and tear and alterations made with operators' consent;**
- c) permit reinstatement to include a minor, incidental level of improvement but not work that alters the function or character of a fixture or the property or that significantly enhances the marketability or sale value of a retirement village product (RV product) relating to the vacated unit; and**
- d) define 'improvement' as works that improve the vacated unit's value and marketability, in line with the approach taken by the Australian Taxation Office (ATO) in defining improvement.**

20. Refurbishment obligations of residents

Issue

CRIS 2, part 9.2

The RV Act regulates how a resident can be required to pay for refurbishment costs by requiring transparency in contracts and limiting payment by residents for certain costs. Residents are only permitted to be charged for 'refurbishment work' as set out in the RV Code and cannot be charged more than the actual costs of the work.¹⁸⁷

As discussed in part 19, the definition of refurbishment work in the RV Code is very broad and there is a level of uncertainty in regards to works a contract can require a resident to fund. Disputes also arise between RV residents and operators in regard to what residents may sometimes regard as excessive refurbishment costs being charged under contracts.

CRIS 2, part 9.1 proposed options for improving clarity around the definitions of refurbishment, so that residents are clear about what works they are required to pay for. CRIS 2, part 9.2 considered the question of whether some contractual obligations for refurbishment costs are unfair for residents because they may require residents to pay for the improvement of a unit.

Objective

To ensure residents' refurbishment obligations with respect to the unit they vacate are fair.

Policy proposal

CRIS 2, part 9.2, proposed three options:

Option A – status quo: The RV Act continue to allow residence contracts to require residents to fund improvements.

Option B – The RV Act be amended to provide that:

- a) all residents are required to pay for reinstatement through a reinstatement fee; and
- b) contracts can require former residents to fund improvements but only in proportion to their share in any upfront payment increase (as in Qld).

Option C – The RV Act be amended to provide that all residents must fund reinstatement but cannot be required to fund improvement (as in the ACT and NSW).

¹⁸⁷ Retirement Village Regulations 1992 (WA) regulations 7G (items 2(a,b,c,d)); 7K(1); and 11(3)(i); RV Code cl 22.

Stakeholder feedback

Eight submissions were received in response to this issue. Respondents were made up of village owners and operators, a village resident, WARVRA and the industry peak bodies. The feedback was mixed. The resident respondent supported Option C, one operator supported option B stating that it was fair and offered flexibility, while the second supported Option C.

Feedback to the RV survey (2020) indicated a high level of support from residents for Option C, however support for this option from operator respondents was split almost 50-50 with slightly more support from operator respondents for Option B which would allow operators to require residents to fund improvements in the unit to bring it to current market standards if the resident shares proportionately in any increase in upfront payments.

In its submission, WARVRA supported regulatory change but proposed a different option ('Option D') to provide that all costs for refurbishment be paid by operators and recovered from residents by upfront payments or capital funds. WARVRA later advised, however, that residents should be able to contribute to upgrade/improvement costs at their discretion for a proportionate share of the increased return.

The industry peak bodies' submission acknowledged that improved clarity concerning refurbishment costs included in residents' exit fees is necessary for operators, residents and their estates. It however, supported Option A – the status quo and did not support either Option B or Option C. It argued that the existing arrangements enable flexibility between operators and residents to negotiate on refurbishment costs in situations where, to give a unit being sold a competitive advantage, a higher refurbishment cost can be agreed.

Impact assessment

Option A – status quo

Option A would mean no disruption to existing operator business models. The industry peak bodies support this option to allow for greater flexibility in refurbishment negotiations. Residents and individual operators, however, preferred other options. This option does not address the policy problem in regards to concerns about the fairness of a resident being required to pay for improvement costs when there may be no share in any increase in the RV product price (often referred to as 'capital gain' by industry).

Option B

Option B would allow residents to be required to fund improvement costs but only in proportion to their share in any upfront price increase. It also requires residents to pay for reinstatement costs by way of a separate fee to improve clarity for consumers about exit costs. This option provides for better equity in residents' refurbishment obligations across all RVs and is considered to represent a fairer allocation of risk than the status quo, by linking the expense of improvement to a potential higher return for the resident. It also allows for a degree of flexibility to occur in negotiation between operators and residents in agreeing upon improvement costs.

Submissions did not identify any specific financial impacts of this option, however, industry raised the concern that this would reduce contractual flexibility between operators and residents. There is also likely to be some disruption to operator price structures that do not currently involve a separate refurbishment fee. Additionally, there will be a reduced ability for operators to pass on costs for improvement work to residents. While there was limited response in submissions in regard to this option, it did receive a high level of support from individual operator respondents to the RV survey (2020) (approximately 81 per cent of operator respondents to the related question supported Option B).

Option C

Option C would prevent operators from requiring residents to directly fund improvement costs. This option follows the NSW approach. Feedback from residents strongly supported this option above Options A or B.

Similarly to Option B, there would be disruption to operators pricing structures and significantly reduced operator ability to negotiate refurbishment costs with residents. This option may be considered to be unfair to operators if they pay the total costs for any improvements where the vacating resident shares in any increase in value generated by those improvements.

Of the three options presented, Consumer Protection considers that Option B strikes the best balance between the interests of operators and residents. Consumer Protection considers that it will provide additional clarity and certainty for residents in regard to both their reinstatement and if applicable, their refurbishment/improvement obligations. It will prevent residents incurring refurbishment costs when they do not share an increase in the RV product price. It also provides for a legislative basis for the costs and benefits of any improvement works undertaken to be shared equally between residents and operators. While Option B has the potential to disrupt some operator pricing structures, it will still allow for flexibility for negotiation between operators and residents when agreeing upon improvement works and costs.

Determination of resident proportion of share in price increase

Option B provides that a resident can only be required to pay for improvements in proportion to their share in any upfront payment increase. The variety of pricing structures used by operators can affect the value of upfront payments. Options to manage this issue will be subject to further consultation during drafting.

Option B will be supported by the part 19 recommendation to clearly distinguish between 'reinstatement' and 'improvement' in the RV Act and also the part 21 recommendation that a property condition report be provided to prospective residents prior to their signing of the residence contract.

It is noted that the proposed MEEP and the shift in market risk between a resident and operator may have an impact on the way operators manage the refurbishment of a unit. It is considered that Option B will still allow sufficient flexibility to operators to make any required changes whilst still addressing the policy problem.

Recommendation 20

Implement CRIS 2, part 9.2 proposal Option B, to amend the RV Act to:

- a) require all residents to pay for reinstatement through a reinstatement fee; and**
- b) allow contracts to require former residents to fund improvements but only in proportion to their share in any upfront payment increase.**

21. Property condition reports

Issue

CRIS 2, part 9.3

Disputes can arise between RV residents and operators in regard to the refurbishment/reinstatement obligations upon the vacation of a RV unit.¹⁸⁸ Often, the disputes relating to refurbishment/reinstatement are caused by differing views between former residents and operators about the condition of the premises when it was originally occupied and subsequently what refurbishment/reinstatement, if any, needs to occur upon a resident's departure.

With no official record of a property's condition, and with occupation often lasting for a long period of time, recollection of the property condition upon entry is problematic to rely upon as it can potentially differ between resident and operator. Persons without personal knowledge of the condition of the premises on entry, such as a former resident's estate, may also be involved in refurbishment/reinstatement discussions and without a property condition report find it difficult to determine the original condition of the unit.

There is no current requirement for an operator to provide a resident with a property condition report on entry to or exit from a RV.

Objective

To provide residents and operators with an agreed record of the property condition which will guide refurbishment/reinstatement obligations, which in turn will assist in reducing the number of disputes regarding works to be performed prior to entry into occupation of a RV unit or that required for refurbishment/reinstatement of a vacated unit.

Policy proposal

CRIS 2, part 9.3 proposed that the RV Act require a property condition report be provided to prospective residents prior to their signing the residence contract.

It was also proposed that RV Act require prospective residents (or their representatives) be present during the inspection for that report; provide their acceptance to or disagreement with the report within a prescribed period; and the property condition report be in a prescribed form.

Stakeholder feedback

Written submissions and RV survey (2020) responses were received. A total of nine written submissions were received in response to the property condition reporting proposals outlined in CRIS 2. Respondents were made up of village owners and operators, village residents, WARVRA and industry peak bodies.

¹⁸⁸ Data for sample period January 2015 to November 2020 indicates receipt of approximately 100 enquiries and 16 complaints.

In addition, there were 177 responses to the question '*Should operators be required to provide prospective residents with a property condition report?*' asked in the RV survey (2020), with respondents made up mainly of current and prospective residents, operators, industry peak bodies, consumer advocates and advice providers.

Responses from both the written submissions and the RV survey (2020) strongly supported the proposal.

There was also general support in the written submissions that the property condition report be in a prescribed form, potentially adapted from the RT Act property condition report and that acceptance or disagreement of the report be provided within a prescribed period.

There was not complete consensus between residents and operators on the length of the prescribed period that should be provided to residents to return a signed copy of the report to an operator. Residents suggested 14 days while operators suggested seven and 14 days and also sign off prior to settlement. The industry peak bodies' submission did not provide comment on this aspect of the proposals.

Residents and operators disagreed on whether residents (or their representatives) should be present during the property condition inspection. Residents and WARVRA supported the presence of a resident during the inspection while operators considered that as a prospective resident would have a prescribed period to review the report and inspect the property after its provision, their presence at the initial inspection is unnecessary.

The industry peak bodies' submission requested further clarity be provided about the process by which a resident accepts the property condition report or not upon entry or departure.

Other jurisdictions

RV legislation in the ACT, NSW, SA and Qld makes provision for operators to provide residents with a property condition report on entry, on departure, or both. Vic is currently considering the option of introducing a requirement that a property condition report be provided upon village entry and exit, as part of its ongoing wider review of its RV legislation. Property condition reports are also standard as part of residential tenancy agreements.

Impact assessment

This proposal will impose some costs on those operators who do not already provide a property condition report and who will need to incorporate the new requirements into existing processes. A prescribed form may be inconsistent with some current forms, resulting in some transition and administration costs. There will also be costs to both the resident to attend the unit, and the operator, to facilitate the resident's attendance at the unit, if the proposal to have the resident or their representative present during the property inspection is introduced.

However, there may be less overall disputes relating to refurbishment and reinstatement as residents will have more confidence and certainty in the required works. Any increase in administrative and regulatory compliance costs incurred in relation to the new requirement is possibly offset by a reduction in dispute resolution costs.

Amendments to the RV Act requiring the provision of property condition reports will provide residents and operators with an agreed record of the condition of a premise upon entry, reducing the scope for disputes relating to the extent of refurbishment/reinstatement works required upon vacation. The property condition reports will assist in providing evidence for a speedier resolution of any disputes that do arise and also facilitate agreement between operators and residents as to works required when a resident takes up occupation.

Consultation has indicated that there is consensus amongst stakeholders for the introduction of a property condition reporting requirement, as a relatively low cost mechanism that will assist in reducing refurbishment and reinstatement disputes.

Recommendation 21

Amend the RV Act to require:

- a) a property condition report be provided to prospective residents prior to their signing of the residence contract;**
- b) the prospective resident (or their representative) to be present during the inspection for that report unless they provide authorisation not to be present;**
- c) the prospective resident to provide their acceptance or disagreement with the report within a prescribed period; and**
- d) the property condition report to be in a prescribed form.**

22. Building defects

Issue

CRIS 4, part 22.2

Concerns have been raised by residents of RVs that some operators are not rectifying building defects when they arise and are passing building rectification costs on to residents when it should be the operators who incur that cost.

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

Objective

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

Stakeholder feedback

CRIS 4 sought stakeholder feedback on the extent of issues around building defects and whether a regulatory response may be required to any issues identified.

The CRIS set out four main questions for consideration and feedback:

- what issues relating to building defects had residents of RVs encountered;
- who should be responsible for addressing building defects when they occur;
- who should be responsible for the costs of rectification; and
- what related building defect information should be disclosed to prospective and current residents.

There were 11 written submissions received in response to the building defects questions posed in CRIS 4. Respondents were made up of village residents, a residents' association, WARVRA, operators and the industry peak bodies.

Residents

There were seven written submissions from RV residents about building defects. Concerns were raised about building defects in individual accommodation in villages (such as cracking in walls or ceilings, faulty paintwork or uneven flooring) as well as more widespread issues within certain villages that had impacted multiple units. One village resident stated that with 'many of the defects residents have experienced, builders should have been held accountable but were not, so some of the matters have therefore been exacerbated'.

WARVRA submitted that it is receiving an increasing number of complaints concerning the cost of village maintenance resulting from defective original building work, use of inappropriate materials and fittings and work it suggests is noncompliant with appropriate regulations or guidelines.

WARVRA stated that RV Act should provide for building defects to be rectified by the builder within appropriate timeframes, and if not within those timeframes, by the operator of the RV. It also suggested that upon becoming aware of building defects, the operator should be required to provide that information to future residents via either the Form 1 or Form 1A.

WARVRA advised that costs for rectifying building defects are currently being met by operating funds and reserve funds, and in some cases it is individual residents that are directly paying.

WARVRA also submitted information about specific matters that residents had raised with it relating to defects within their respective villages. In many instances, these more widespread village issues generally related to plumbing and drainage problems that led to pipe blockages, and flooding in periods of heavy rain. Often these issues led to both remediation work to attempt to resolve the drainage and plumbing problems, and rectification work to repair damage caused by blockages and flooding. Commonly, in these matters, residents found it difficult to have the village operator accept responsibility for paying for these works, which often led to residents incurring the significant rectification costs themselves.

Residents universally suggested that it should be the operators' responsibility to rectify building defects and residents and WARVRA agreed that the costs for any rectification works should not, under any circumstances, be passed on to residents.

In the residents' and WARVRA's view, communication from operators to residents about building defects is lacking, with all residents and WARVRA stating that defect information is generally not provided and it is usually the residents who first notice building issues. They supported the idea that operators be required under RV Act to have a formal transparent building defect identification and rectification process identifying how defects are to be dealt with as they arise.

Industry

The industry peak bodies submitted that residence contracts, building contracts and other legislation already provide an adequate level of cover for building defect rectification issues and there is no need for additional regulation in this area. They supported this position by noting that the RV industry's voluntary *Retirement Living Code of Conduct* deals with issues relating to building defects and warranties by setting out a requirement that operators will '... ensure that new buildings comply with relevant building regulations and standards and that defects and warranties are handled under those regulations'. They also noted that there are significant building regulation reforms currently underway which will improve building standards in general.

A large operator suggested any legislative changes relating to building defects in RVs should set a time limit on the appearance of an issue that allows it to be deemed a building defect and that rectification of building defects should sit with the owner within the same statutory periods that a builder can be pursued for those defects.

It also suggested that after building defect periods expire, responsibility for building defects should depend on the ownership of the property. It suggested that if the property is freehold, responsibility should sit with the property owner (who may be a resident) and/or refurbishment fund and if it is leasehold it should sit with the operator and/or the refurbishment fund, depending on the extent of the works required.

In terms of building defect disclosure, the large operator suggested that if there is an identified issue of building defects, this should be disclosed to residents and prospective residents together with the plan to rectify those defects.

It further stated that what constitutes a building defect should be clearly defined and that if a defect disclosed as a defined building defect, operators should be permitted to recover building rectification costs from residents via a special levy approved at a resident meeting, however, an operator should not be able to recover defined defect rectification costs via the standard recurrent charges.

Other jurisdictions

NSW and the ACT prohibit operators passing on or recovering costs for building rectification work to residents via recurrent charges or capital works funds if the rectification work arises from a breach of a statutory warranty under their respective building legislation. Effectively this means that any rectification work that falls within the statutory warranty periods (six years for major structural defects and two years for minor non-structural defects) in either jurisdiction is the responsibility of the village owner or operator.

The remaining jurisdictions do not specifically address building defect rectification in their RV legislation.

Complaints and enquiry data

For the period, July 2015 to September 2021, Consumer Protection received six complaints and 20 enquiries relating to potential building defects. The matters raised with Consumer Protection generally relate to disagreements between residents and operators about responsibility for rectifying building defects after residents have become aware of them.

Impact assessment

The feedback to CRIS 4 shows that some RV residents are encountering issues with building defects within their villages, and, when they do, can experience difficulties in having those defects rectified.

Residents consider that there is a lack of transparency and inadequate information provision from operators about building issues, both about actual defects that might exist

and about who is responsible for rectifying those problems. There are also concerns that costs for rectification works are being borne for the most part by residents.

Residents and WARVRA were firmly of the view that either the builders, developers or operators should be responsible for rectification of any building defects.

There was also support from residents, WARVRA and one large operator for the idea that operators be required under the RV Act to have a formal, transparent building defect identification and rectification process identifying how defects are to be dealt with as they arise.

The industry peak bodies oppose the introduction of any additional regulatory requirements, on the basis that existing legislative and contractual mechanisms, in addition to the industry's voluntary code of conduct, provide sufficient protections for building defect matters.

Given the response to the consultation, Consumer Protection considers that it is clear that difficulties are being experienced with rectifying building defects in RVs. Part of the problem appears to be lack of clarity in the *identification* of building defects and the *responsibility* for rectification.

Improving information about building defects in the village

There is some support for improving information given to residents about how building defects are handled in the village. This could be done by amending the RV Regulations dealing with pre-contractual disclosure and content of residence contracts. It could also be done by requiring operators to have a policy for the identification and rectification of building defects. Further consultation about the most effective means to provide information will occur when regulations are developed.

Responsibility for building defects

There was also support for the idea that operators should be responsible for the cost and responsibility of building rectification work, particularly during the period of time in which a builder can be pursued under WA building legislation to remedy defective work.

Under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) a complaint can be made if a regulated building service is not carried out in a proper and proficient manner or is faulty or unsatisfactory, up to six years after the completion of that building service. If a complaint is successful, the builder can be ordered to:

- remedy the work;
- pay costs associated with having someone else remedy the work; or
- pay reasonable compensation.

Although complaints can be made by interested parties such as residents, the operator of the village is the party in the best position to pursue a complaint against the village builder.

It would appear reasonable that operators should be required to use the appropriate avenues to rectify building defects during this period and not pass the costs on to residents.

It is recommended that operators be prohibited from recovering or passing on the cost of rectification work in the six year period following the completion of the related building services during which a complaint can be made.

Prohibiting operators from recovering or passing on defect rectification costs during the six year period following completion of building work could be implemented by amendment to the RV Regulations, which currently prescribe a range of matters that operators must not demand or receive payment from residents or former residents.

Operators should also actively take steps to rectify building defects which are identified in the village. Part 18 of the DRIS proposes that the RV Act expressly require operators to maintain the capital items owned by the operator in a retirement village in a reasonable condition

This obligation will require operators to deal with any building defects that occur in the village. Residents will however be required to notify operators as soon as practicable if a capital item needs to be repaired or replaced due to a building defect. This will assist operators to identify building defects.

Further consultation will occur with stakeholders on supporting requirements for these obligations, such as the process for notification and timeframes for rectification, when regulations are being developed.

Recommendation 22

Amend the RV Act to:

- a) improve information provision to residents about the existence of building defects and how building defects are to be rectified; and**
- b) prohibit operators from passing on or recovering building rectification costs from residents during the six year period following the completion of a regulated building service.**

23. Insurance arrangements

Issue

CRIS 4, part 22.3

Residents have raised concerns about having difficulty obtaining information from operators about insurance arrangements in their village. This causes issues for residents who may find it difficult to determine what is included or excluded from their RVs insurance coverage, what insurance costs 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 extent of problems for residents relating to RV insurance.

Stakeholder feedback

CRIS 4, part 22.3 sought feedback on issues relating to insurance, such as whether enough information is provided to residents before and during their village occupancy, what information residents would like to be provided with and any issues residents have experienced in communication and consultation on insurance matters.

There were nine written submissions received in response to the insurance questions posed in CRIS 4. Respondents were made up of village residents, a residents association, WARVRA, owner/operators and industry peak bodies.

Industry

The industry peak bodies submitted that existing contract disclosure and annual budgeting processes are sufficient to ensure residents are adequately informed about insurance requirements. They noted that, as there is a difference between insurance products sought for the village as a whole and the insurance that residents obtain for their own personal needs, considerations concerning insurance can be complex.

A large operator indicated that it ensures residents have sufficient information about village building insurance by providing an insurance statement to its residents. It noted that residents with different tenure types within a village (freehold versus leasehold) often seek clarity about what is considered part of their property and what is considered external to it to determine which party is responsible for various issues.

Residents

WARVRA's response noted that residents from a number of villages have expressed concerns to it about insurance related matters. It stated that the most common issue for residents arises from operators that have multiple sites obtaining a single group policy for the RVs in their portfolio, which, while reducing the overall cost of insurance, creates difficulties in residents assessing the value of the insurance or evaluating the cover provided for their village.

It also suggested that some operators secure cheaper insurance by increasing the excess payable on claims, a cost that can be borne by residents.

WARVRA indicated that while it has not received significant feedback from residents with concerns about the insurance information provided to residents prior to their entry into a village, residents can find it difficult to obtain adequate information while they are residing in a village. It identified the most common issue being difficulties in obtaining and understanding information about what is covered by the RV insurance and what residents are responsible for covering themselves.

It suggested there be a requirement for operators to report on RV insurances, including information on coverage, costs and responsibilities, at the village financial statements meeting required to be held annually.

Feedback from resident respondents did not raise any significant issues relating to insurance information provision either prior to or during occupation of a village. It was suggested in the resident feedback however that residents would benefit if there was improved clarity concerning operator and resident insurance responsibilities.

There was general consensus amongst the resident respondents and WARVRA that any major changes to insurance coverage should be communicated to residents, however the need to obtain resident agreement on those changes was considered unnecessary.

Impact assessment

Feedback received in response to CRIS 4 from village residents and industry did not demonstrate significant concerns with existing insurance information provision arrangements. Between 2015 and 2021 Consumer Protection received five enquiries and three complaints concerning insurance related matters, mostly relating to disputes about insurance coverage and responsibility for the excess payable for claims that have been made.

Prospective village residents are given information about the insurance arrangements of a RV in the pre-contract disclosure information that is required to be provided to them prior to their entry to a village. This includes whether insurance costs are passed on to residents by the operator, what insurance coverage residents are responsible for arranging themselves, what the RV is insured for, the amount of insurance cover, the period of coverage, and the excess payable in the event of a claim being made.

The resident and WARVRA submissions indicated that, while insurance information provided to prospective residents as part of the pre-contractual disclosure requirements appears to be adequate, improvements could be made around ongoing information disclosure and transparency regarding RV insurance arrangements, particularly for current residents of the RV who would like clarity concerning insurance coverage and responsibilities.

For existing residents, the RV Code (Clauses 16 – 20) sets out the financial transparency and accountability requirements of operators to ensure residents receive sufficient detail about RV finances and budget information on an ongoing basis.

These requirements include the provision of insurance expense information as a line item in the RV budget and financial statements provided to residents regularly.

The RV Code also requires operators to provide access to management information about a RVs operating and financial arrangements and also any information that assists residents in their understanding of the budget and financial statements. These information requirements include information about a RVs insurance arrangements, including ongoing insurance charges, coverage, and costs. In practice however this type of information appears to be provided to village residents at the discretion of the village operator on an ad-hoc basis.

As noted at part 14 of this DRIS, which deals with budget obligations, a recommendation has been made to move the budget and financial requirements found in the RV Code to the RV Regulations as a way to improve compliance with the requirements for budget and financial information disclosure and transparency. This should also improve the provision of information relating to village insurance to residents who request this information.

However information to residents about insurance arrangements could be improved by the provision of an annual insurance statement to residents, setting out information, such as insurance coverage, any changes, ongoing costs and excess payable.

Improved insurance disclosure and transparency would benefit residents by providing a degree of certainty and reassurance about the insurance requirements that they are responsible for. Additionally, through improved awareness of the ongoing insurance costs and any applicable excesses that they may be responsible for, residents will be assisted in their financial and budget-making decisions. It is noted that at least one operator is already doing this.

Better communication and understanding between operators and residents would also help reduce any insurance related disputes that arise.

Recommendation 23

Amend the RV Act to require operators to provide residents with an annual insurance statement that provides simple, clear explanations of the critical details of the retirement village insurance as part of their wider annual reporting obligations.

24. Dispute resolution

Issue

CRIS 4, part 22.1

Disputes in RVs mainly relate to village fees, refurbishment requirements, village maintenance and management and communication issues between operators and residents. Concerns about how these disputes are resolved continue to be raised with Consumer Protection, with claims that the processes are not easily accessible because they are too lengthy, costly and complex. Concern has also been expressed that the current dispute resolution process is not sensitive to residents' age and financial resources.

As a result of recommendations from the Final Report,¹⁸⁹ the Seniors Housing Advisory Centre (SHAC) was established by Consumer Protection in September 2013, primarily to provide an independent source of information about seniors housing models, including improving to improve accessibility to and awareness of the RV dispute resolution process. In 2015, the dispute resolution process in the RV Code was also amended to require that the person nominated by an operator to deal with a dispute be suitable to both parties in the dispute.

Despite improvements made after the Final Report, concerns about the dispute resolution process have continued to be raised by residents and advocacy groups.

In 2019, the Consumer Credit Legal Services of WA (CCLSWA) Report¹⁹⁰ highlighted areas of concern for residents and recommended that the RV Act be amended to:

- make mediation of RV disputes mandatory;
- insert a requirement that the parties conduct the dispute resolution process in 'good faith'; and
- extend the SAT's jurisdiction regarding RV disputes.

The CCLSWA Report also recommended appointing a dedicated advocacy service for seniors to assist with the dispute resolution process.

Current RV provisions

When a dispute arises in a RV, residents must follow the dispute resolution process in Division 6 of the RV Code. As part of the process:

- residents who want to make a complaint must first 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 in dispute are to meet to attempt to resolve the matter;

¹⁸⁹ Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation Final Report*, November 2010, recommendation 26, 40.

¹⁹⁰ CCLSWA, Report to Department of Mines, Industry Regulation and Safety, Consumer Protection Division, September 2019.

- if the matter remains unresolved, a party to a RV dispute may apply to the Commissioner for Consumer Protection to have the dispute referred to mediation;
- if the matter is accepted for mediation, a party to a RV dispute cannot be compelled to attend mediation; and
- unless the Commissioner decides otherwise, the costs of the mediation of a dispute must be shared equally between each of the parties of the dispute.

Objective

To ensure that both residents and operators are provided with an efficient and appropriate dispute resolution process to assist with resolving disputes arising in RVs.

Policy proposal

CRIS 4, part 22.1 did not make any specific proposals but, in light of the recommendations of the CCLSWA report, sought feedback about the levels of satisfaction with the existing RV dispute resolution processes and possible improvements. Stakeholders were asked if:

- the SAT should be given a general broader jurisdiction to hear and resolve all RV disputes;
- there was any benefit in introducing a requirement that operators act in good faith in dispute resolution processes;
- compulsory mediation of RV disputes would assist in dispute resolution; and
- a dedicated advocacy service for seniors, that includes services relating to dispute resolution, should be introduced into WA.

Stakeholder feedback

The industry peak bodies' primarily supported expanding the SAT's jurisdiction to resolve complex matters involving RVs, where significant village changes or removal of memorials is required. The industry peak bodies did not support any other identified areas of reform, stating that Consumer Protection's data shows the number of RV disputes as minimal and not warranting any change to the RV laws. The industry peak bodies also argued that the *Retirement Living Code of Conduct*¹⁹¹ addressed dispute resolution, including accessing independent mediation, and it was not necessary to further regulate this area.

CRIS 4 submissions included a response from a large operator in WA, supporting mandatory mediation before escalation of the matter to the SAT, with any agreement reached being binding on the parties.

¹⁹¹ The Retirement Living Code of Conduct (2020) is an industry code developed and supported by Retirement Living Council and Leading Age Services Australia.

The operator considered that making mediation mandatory would ‘create greater opportunity for parties to resolve the matters amicably and at a lower cost’. The operator also indicated support for a low cost advocacy service such as an Industry Ombudsman as an ‘alternative for low cost, timely and binding resolution of disputes’. This concept has had national support.

A large not-for-profit operator supported expanding the SAT’s jurisdiction to hear and resolve all RV disputes. The operator also supported introducing a requirement that operators act in good faith in the dispute resolution process, along with a requirement for mediation to be mandatory.

WARVRA submitted that the dispute resolution reforms implemented in stage 1 of the reform process have not been as effective as expected. WARVRA supported extending the jurisdiction of the SAT to hear cases where resolution has not been achieved by conciliation or mediation. WARVRA also supported establishing a ‘referee’ or ‘ombudsman service’ to provide quick resolution for simple cases, with parties agreeing to be bound by the outcome. WARVRA considered that a requirement to act in ‘good faith’ in the dispute resolution process should be introduced, along with a requirement for mediation to be mandatory. Further, WARVRA specifically supported the CCLSWA recommendations relating to resolving RV disputes.

Other jurisdictions

There is a range of dispute resolution provisions in RV legislation in the other Australian jurisdictions. In NSW, the RV legislation allows regulations to be made about mediation of disputes, including providing for when mediation is mandatory.¹⁹² Although there are no regulations currently in force regarding mediation, the NSW Fair Trading Office provides onsite and free mediation for RV disputes.¹⁹³ SA requires a resident and operator to participate in mediation when the dispute relates to termination of the residents right to stay at the village.¹⁹⁴ In the NT, the RV legislation requires operators to establish a disputes committee to mediate disputes.¹⁹⁵ The legislation also provides the Commissioner of Consumer Affairs with the power to produce documents that contain model provisions for the dispute resolution process.¹⁹⁶ Vic and Qld provide for voluntary mediation in the RV dispute resolution process.¹⁹⁷

¹⁹² RV Act 1999 (NSW), section 203(2)(d).

¹⁹³ <https://www.fairtrading.nsw.gov.au/housing-and-property/retirement-villages/living-in-a-retirement-village/retirement-village-disputes>.

¹⁹⁴ RV Act 2016 (SA), section 44(3).

¹⁹⁵ Retirement Villages Regulations 2000 (NT), Schedule 2, Retirement Villages Code of Practice, clauses 38 – 40.

¹⁹⁶ RV Code (NT), clause 41.

¹⁹⁷ RV Act 1999 (Qld) section 161 and RV Act 1986 (Vic) section 38F.

Impact assessment

The feedback for making changes to the current RV dispute resolution process was divided. WARVRA, CCLSWA and some operators supported amendments to the RV dispute resolution process, whereas the industry peak bodies did not consider it necessary to make changes due to their view that there are only a low number of complaints made to Consumer Protection.

Requirement to act in good faith

CRIS 4 sought feedback as to whether parties should be required to ‘act in good faith’ during the RV dispute resolution process. Both WARVRA and the CCLSWA supported a requirement for both operators and residents to act in good faith during the RV dispute resolution process. The stakeholder feedback did not identify any adverse impact of introducing a ‘good faith requirement’ into the RV dispute resolution process. Parties who participate in the dispute resolution process are already expected to act in good faith during these negotiations. However given the support by stakeholders for this requirement to be made express in the legislation, Consumer Protection considers that a requirement for parties to act in good faith would assist in providing guidance to the parties about expectations around the conciliation/mediation process.

Extending the jurisdiction of the State Administrative Tribunal

There was strong support for extending the SAT’s jurisdiction to resolve RV disputes from WARVRA, operators and the industry peak bodies. The industry peak bodies considered that the extended jurisdiction should be limited to the SAT dealing with the more complex RV disputes. Several of the recommendations in this DRIS propose extending SAT’s jurisdiction, including extending the SAT’s powers to make orders which include changes to a village budget and amendments to residence contracts, and to disputes about proposals in a village change implementation plan. It is anticipated that the proposed extensions of the SAT’s jurisdiction over RV matters will improve the dispute resolution process within RVs.

Mandatory mediation

The current RV Act provides that the Commissioner for Consumer Protection may refer the matter to mediation if the resident and operator are unable to resolve their issues in the initial conciliation stage. Consumer Protection data shows that RV disputes are rarely referred to mediation and are managed at the more informal conciliation stage. However, under the RV Act when a RV dispute is referred to mediation by the Commissioner, the resident or operator are able to withdraw as the Commissioner does not have any power to require the parties to attend mediation and the conciliation has no enforceability.

If parties refuse to attend mediation this may mean that a dispute can progress to a court without the parties having exhausted all alternative dispute resolution avenues. Going to court will involve considerable expense and stress for both the resident and operator.

In circumstances where the dispute does not progress to court, it may be that the issues still remain unresolved causing ongoing problems in the village.

The stakeholder feedback did not identify any adverse impacts of introducing mandatory mediation. Consumer Protection considers that the current stepped approach of conciliation followed by the more formal mediation provides parties with a good opportunity to resolve RV disputes and prevent the further escalation of the issues.

In communal living such as RVs, it is important to have strong dispute resolution process which are aimed at both managing issues for the disputing parties and in the interest of the village as a whole community. To this extent, Consumer Protection considers that the process could be improved by providing the Commissioner with a discretionary power to compel residents and/or operators to participate in mediation.

Dedicated advocacy service

When a dispute is referred to Consumer Protection, it will first attempt to conciliate the dispute before referring to Commissioner approved mediation. Consumer Protection's data indicates that there were approximately 25 RV conciliations per year in the four year period up until October 2021. The majority of matters were resolved by education and advice being provided to the parties. The data shows that RV disputes rarely progress from conciliation to Commissioner approved mediation. The establishment of an advocacy service for seniors would, however, require significant resourcing. On the basis of the current data on the number of RV disputes, a new advocacy service would be difficult to support. However, one option that could be considered is for the existing Seniors Housing Advisory Centre service, which consists of just one FTE, to be expanded to incorporate a RV dispute resolution function.

Recommendation 24

Amend the RV Act to:

- a) provide the Commissioner for Consumer Protection with a discretion to compel parties to a retirement village (RV) dispute to attend mediation; and**
- b) require parties to act in good faith during the RV dispute resolution process.**

25. Strata titles

Issue

CRIS 4, part 22.4

Approximately eight per cent of the RVs in WA are strata title properties.¹⁹⁸ In these villages, both the ST Act and the RV Act apply. Which laws apply will depend upon the strata plan, areas delineated as common property under the ST Act and the ownership of strata lots. Some villages also have both lease for life residents and strata lot owner residents.

There is overlap between the ST Act and RV Act in certain areas, including pre-contractual disclosure, financial reporting requirements, and village rules. Due to this overlap, there is potential for both resident and operator confusion and misunderstanding when the provisions are not consistent. It can also be difficult for residents and operators to understand which laws apply in the village.

Objective

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

Policy proposal

CRIS 4 did not make proposals for regulatory change but sought feedback about any problems arising as a result of the overlap between the ST Act and the RV Act. In particular, it was asked whether:

- the pre-disclosure information for strata RV units could be improved, such as having a single pre-disclosure statement;
- there have been problems with the cooling-off period or notifiable variation period relating to the purchase /sale of a RV strata unit;
- there have been problems with budgets or financial statements in a strata RV;
- there have been problems with the RV meetings and strata meetings being held separately; and
- there has been a conflict between the residence rules and strata by-laws in a RV.

Stakeholder feedback

Improving pre-contractual disclosure for strata RV units

WARVRA considered that residents were given sufficient pre-contractual disclosure information when purchasing a RV product that includes a strata lot. However, they noted that the pre-contractual information is often complicated and it would assist to have a single joint disclosure statement for RV strata villages. Landgate submitted that 'there is a degree of overlap in information provided in the Form 1 and the pre-contractual buyer

¹⁹⁸ Department of Mines, Industry Regulation and Safety (WA), Property Industries Directorate data, 2021 and WATC 2021 survey.

disclosure statement for strata titles under the ST Act'. According to Landgate, 'a single source of truth, for example for financial matters is preferable'.

A large operator in WA responded that a single disclosure statement for strata RVs would reduce the burden for operators in complying with obligations under both the ST Act and RV Act. They also believed that a single disclosure statement would be less confusing for residents.

Overlap between ST Act and RV Act

There was little response from individual residents on this issue however one resident with a lease for life at a strata RV submitted that they had experienced difficulty in determining whether the ST Act or RV Act applies to certain fees. The resident also expressed concern with being unable to attend village meetings because attendance was limited to the RV strata lot owners.¹⁹⁹

WARVRA was not aware of any cases of conflict between residence and strata by-laws, nor were they aware of any problems with the cooling off periods when purchasing a strata RV product.

The large operator also submitted that the overlap of the ST Act and RV Act can create inconsistencies between matters such as reserve funds, annual general meetings, levies and rules. In this regard, the operator considered that this overlap could be addressed by excluding the application of the ST Act if the RV Act deals with the same matter.

The industry peak bodies submitted that 'industry is confident that it is capable of amending relevant residence contracts to satisfy the requirements of both Acts'. The industry peak bodies also commented that they were in the 'early stages of implementing and understanding the practical impact of the recent changes to the ST legislation, cautioning against additional changes to the RV Act as they relate to strata and purple title villages, until the full effects of strata title reform are known'.

Impact assessment

There were a limited amount of responses regarding the overlap between the ST Act and the RV legislation. However, the feedback did indicate support for a single joint disclosure statement for RV strata products which would form part of the prescribed pre-contractual disclosure statements contained in the RV Regulations.²⁰⁰ Despite this support, stakeholders emphasised the need for industry to have sufficient time to understand and implement the new changes to the ST Act. Industry cautioned against any further legislative changes until they had a comprehensive understanding of the new strata title laws.

¹⁹⁹ Confidential submission provided to DMIRS in July 2021.

²⁰⁰ RV Act (WA), section 13(2)(a) and RV Regulations (WA), regulation 6.

The feedback also suggested that the RV Act should apply to the exclusion of the ST Act if there is an overlap in regards to such matters as reserve funds, levies, annual general meetings and rules and by-laws. Again, stakeholders cautioned about any changes until there was a more comprehensive understanding of the new strata title laws.

It is clear that there is some overlap between the ST and RV Acts which can be confusing to operators and residents. With the introduction of new strata legislation this has the potential to increase. Consumers would be assisted by some additional clarity in how both the laws apply in strata RVs.

Recommendation 25

25.1 Amend the RV Act to provide:

- a) that the RV Act have primacy over the *Strata Titles Act (1985) (WA)* (ST Act); and
- b) a head of power to allow for regulations to be made prescribing areas where it is not appropriate for the RV Act to have primacy over the ST Act.

25.2 Consumer Protection continue consultation with relevant stakeholders regarding:

- a) progressing a single joint disclosure statement for retirement village (RV) strata products (which could be progressed by way of an amendment to the Retirement Village Regulations 1992 (WA) (RV Regulations)); and
- b) the areas of overlap between the ST Act and RV Act, where the RV Act should not have primacy over the ST Act.

26. Aged care exclusion

Issue

CRIS 4, part 21.1

Approximately 30 per cent of WA retirement villages have Residential Aged Care Facilities (RACF) on site. The RV Act applies to the whole village, including any RACF. To avoid duplicated and inconsistent requirements when residential aged care services are regulated under the *Aged Care Act 1997* (Cth) (AC Act)²⁰¹, section 5(2) of the RV Act provides that the RV Act does not apply to operators or residents if:

- the operator is the provider approved under the AC Act for the RACF;
- the resident's residential care is subsidised under the AC Act by the Commonwealth; and
- the AC Act care subsidy is paid to the operator.²⁰²

The section 5(2) exclusion was limited to ensure that the RV Act would still apply to RACF residents when the AC Act did not provide residents with consumer protections. CRIS 4 discussed how the historical reasons for this limitation may no longer be relevant.

Objective

To ensure the RV Act does not apply to RV residents, and operators in relation to those residents, when a resident's financial and contractual matters are regulated by the AC Act.

Policy proposal

CRIS 4, part 21.1 asked whether there should be any changes to the section 5(2) exclusion.

Stakeholder feedback

Six submissions responded to this issue. Consumer Protection also discussed the application of the RV Act to RACFs with stakeholders at meetings during targeted consultation on specific issues.²⁰³

²⁰¹ Aged care providers are not required to operate under the AC Act if they do not receive Commonwealth funding. Some RACFs operate on a private funding basis.

²⁰² RV Act (WA) section 5(2)

²⁰³ Meetings were held in late 2021 with lawyers for operators, Southern Cross Care and Amana Living. Consumer Protection also consulted with the Commonwealth and State Departments of Health (State - DoH) and with peak bodies during the 2020 fast track Working Group meetings.

Exclusion when RACF provider is approved under the AC Act

The section 5(2) exclusion does not apply to situations where the AC Act approved provider is not the operator. All of the submissions supported extending the section 5(2) exclusion to cover this circumstance.²⁰⁴ The industry peak bodies' submission stated that the AC Act is sufficient to regulate aged care requirements.

Privately funded residents in AC Act RACFs

The section 5(2) exclusion does not apply to privately funded RACF residents. This means that the RV Act applies to those residents. A question was asked as to whether the RV Act was still required to apply to privately funded RACF residents.

There were differences of opinion amongst stakeholders during the consultation about the extent to which the AC Act applies to privately funded residents in RACFs operated by providers approved under the AC Act.

Southern Cross Care confirmed that the Commonwealth does not fund care for all AC Act RACF residents.²⁰⁵ WARVRA said that it was not aware of any RACF residents making use of RV Act provisions. It supported extending the section 5(2) exclusion to privately funded RACF residents, saying it would clarify for all RV residents the legislation providing their consumer protections. Southern Cross Care, which operates RACFs in RVs, did not support the extension, on the basis that the AC Act may not sufficiently cover these residents.

Impact assessment

Exclusion when RACF provider is approved under the AC Act

No adverse impacts were identified during the consultation on extending the section 5(2) exclusion to circumstances in which the RACF provider is approved under the AC Act but is not the operator. All of the feedback supported extending the exclusion.

It is noted that the AC Act does not apply differently to RACF residents depending on whether the approved provider is the operator or some third party. There appears to be no consumer benefit to distinguishing between these circumstances. It is therefore recommended that the section 5(2) exclusion be amended to remove the requirement that the RACF provider must also be the operator.

Application of the RV Act to privately funded residents in RACFs

The feedback from the consultation did not identify any clear position on whether privately funded RACF residents in AC Act regulated RACFs still required the consumer protections under the RV Act. The number or proportion of privately funded residents in WA AC Act regulated RACFs is not known.

²⁰⁴ The joint industry submission did not support RV legislation regulating RACFs in retirement villages on the basis that the Commonwealth regulation was sufficient in this area.

²⁰⁵ In Southern Cross Care villages, Commonwealth funding is limited to respite care.

There is however evidence that these residents do exist and so may from time to time be in RACFs located in retirement villages. It is also possible that privately funded RACF residents may not receive the same protections under the AC Act regarding financial and contractual matters as other RACF residents.

One large operator with RACFs in RVs supported the retention of RV Act application to privately funded residents. The joint industry submission did not support the RV Act regulating RACFs in RVs on the basis that the Commonwealth regulation was sufficient in this area.

Based on the feedback received it is considered that there is insufficient basis to make any changes to the status quo. The position of industry peak bodies that Commonwealth regulation is sufficient in this area has been considered, however, there appears to be a lack of clarity around the regulation of privately funded RACF residents in AC Act regulated RACFs in WA.²⁰⁶ There may also be risks to vulnerable residents of withdrawing any protections which exist under the RV Act. Operators did not raise any concerns with the current application of the RV Act to privately funded RACF residents.

The recommendation is, therefore, to maintain the current RV Act application to these residents and operators.

Recommendation 26

Amend the RV Act to extend section 5(2) exclusion to operators and Commonwealth subsidised residents of Residential Aged Care Facility (RACF) when the RACF is operated by a provider approved under the *Aged Care Act 1997 (Cth)* that is not the operator.

²⁰⁶ Information about the existence of privately funded RACFs in WA is contradictory. The *Private Hospitals and Services Act 1927* (WA) (PHS Act) requires these facilities to have a licence and there are currently no PSH Act licensed RACFs, health.wa.gov.au (viewed 30 September 2021). It is also not clear whether the AC Act applies to these facilities.

27. Redefining administering body and joint and several liability

Issue

CRIS 2, parts 10.1 and 10.2

RV ownership and operating structures can involve multiple entities. The RV Act uses the term ‘administering body’ to identify the entity or entities on which it imposes operator obligations. The RV Act defines ‘administering body’ as ‘the person by whom, or on whose behalf, the RV is administered and includes a person (other than a resident) who is the owner of land within the RV’.²⁰⁷

It can be unclear to stakeholders as to which entity the term ‘administering body’ refers when:

- different persons or entities own the RV business, manage the retirement village and/or own village land; and/or
- more than one person or entity is involved in the RV business.

This lack of clarity can make it difficult to determine which entity is responsible for obligations under the RV legislation. RV stakeholders can also experience difficulties determining how overlapping legislative obligations operate in practice when more than one entity owns or operates the RV.

Objective

To provide clarity on responsibility for RV Act obligations and to ensure responsibilities under the RV Act are imposed on the appropriate persons.

Policy proposal

Redefining ‘administering body’

CRIS 2, part 10.1 proposed that the RV Act be amended to:

- replace ‘administering body’ with the term ‘operator’,
- provide that ‘operator’ means the person (including an entity or entities) that controls the RV product;
- insert a new term ‘manager’, for an entity (or entities) who has some control over day to day village operations (and allocating appropriate RV Act obligations to that entity/person); and
- insert a new term ‘village landowner’, for the owner of land used for a RV (other than a resident); and allocating responsibilities appropriate to village land ownership.

²⁰⁷ Section 3(1) of the RV Act.

Joint and several liability

CRIS 2, part 10.2 proposed that the RV Act be amended to expressly state that:

- unless otherwise indicated, all responsibilities are joint and several; and
- when an obligation requires a specific act or action, compliance by one responsible entity is sufficient.

Stakeholder feedback

Stakeholder feedback in relation to these proposals was obtained from written submissions provided in response to CRIS 2, discussions with key stakeholders and the RV survey (2020). Nine written responses were received in relation to the proposals in part 10.1 and six written responses were received in response to the proposal in part 10.2. Feedback was received from RV residents, village owners and operators, WARVRA and industry peak bodies.

Redefining ‘administering body’ – ‘operator’ and ‘village landowner’

The proposal to replace the term ‘administering body’ with the term ‘operator’ and to introduce the new term ‘village landowner’ for appropriate responsibilities received strong support in the written submissions and 97 per cent of the RV survey (2020) respondents also supported these proposals.

Resident respondents and WARVRA suggested that operating structures and definitions should be identified and simplified and submitted that the proposal would resolve confusion in regard to who the ‘administering body’ was when residents own the land used for an operator’s RVS. The term ‘operator’ was also seen as being more easily understood than the term ‘administering body’.

There was general support for the suggestion in the CRIS for the distribution of administering body obligations between operators and land owners. WARVRA observed that obligations which the RV Act places on landowners, such as to provide the Form 1 pre contract disclosure, were problematic when the landowner was not involved with village operation.

While the industry peak bodies supported the proposal to replace ‘administering body’ with ‘operator’ they expressed some concern about potential unintended consequences associated with changing definitions, particularly in regard to the obligations of landowners and operators, if they are not the same entity. A large operator advised that the proposal relating to replacing the term ‘administering body’ with ‘operator’ posed no issues for its current arrangements, and that the term ‘operator’ is commonly used throughout the RV industry and in other jurisdictions and better describes the entity responsible for legislative compliance. In relation to the proposal that village landowner specific obligations be separated from those imposed on an operator, its view was that current obligations imposed on an operator are sufficient. It also stated that further clarity and consultation is required when progressing the reforms proposed under 10.1.

One operator was concerned that separating landowner obligations from operator obligations raised the question of who a manager was reporting to in association run villages – the association board or the landowner.

New term ‘manager’

Views on the proposal to introduce the new term ‘manager’ with legislative responsibilities were mixed. WARVRA, some individual residents and an operator did not support the proposal. The main concern raised was that direct manager obligations would add a layer of complexity that would potentially distance an operator from its legislative obligations. WARVRA also noted that village managers are working on behalf of the operator and as such no independent obligations are required. It further stated that if the term manager is to be used, it should apply to individuals rather than entities and that the RV Act must set out related key performance indicators and training.

While not directly addressing the proposal regarding the introduction of the term ‘manager’, as stated above, the industry peak bodies expressed concern regarding the potential for unintended consequences of new definitions being introduced into the RV legislation. A large operator stated that it had no objection to a ‘manager’ having certain obligations under RV Act relating to the management of a village, however, suggested that further consultation and clarity was needed in relation to the proposed definition.

The RV survey (2020) respondents strongly supported village managers having express obligations in addition to operators with 73 per cent being in favour of the proposal.

Joint and several liability

The six written submissions received in response to the joint and several liability proposals generally supported them.

The industry peak bodies recognised that the joint and several liability proposal offered benefits to both operators and residents. A large operator supported the joint and several liability concept in principle subject to clarification of the new entities to be introduced under proposal 10.1 and the obligations that will be imposed on those entities.

There was support from four written submissions in response to the question as to whether the RV Act should expressly require an operator take practicable steps to ensure all persons involved in operating a RV comply with the RV legislation. However, a large operator indicated that it preferred the obligation be that operators ensure all relevant persons were familiar with the obligations relevant to their role.

Requiring operators to take reasonable steps to ensure all persons involved in operating the RV comply with the RV Act received strong support from the RV survey (2020) respondents with 98 per cent of respondents agreeing with this question.

Impact assessment

Redefining ‘administering body’ – ‘operator’ and ‘village landowner’

The consultation indicated that there is strong support for the proposals in 10.1, except for the proposal to insert a new layer of responsibility in the form of a village manager. Although the industry peak bodies raised some concern about potential unintended consequences no specific adverse impacts or additional costs on the sector were identified for the proposals.

An important anticipated benefit of the proposed changes in this area is greater clarity about who is responsible for ensuring RV Act obligations are met. A further desired outcome is to ensure regulatory obligations are appropriate to multiple layers of control often found in operator structures. Replacing the term ‘administrator’ with the term ‘operator’ aligns with the term used commonly in the RV industry and in other jurisdictions.

It is considered that introducing the term ‘village landowner’ for the owner of land used for a RV will also address the current ambiguity as to whether all landowners are responsible for all administering body obligations and addresses the issue of a landowner potentially having inappropriate responsibilities when they are not involved in operating the RV as a business. The concerns about possible unintended consequences and how obligations might be separated between operators and land owners can be addressed during drafting and further consultation with stakeholders.

New term ‘manager’

A new term ‘manager’ was proposed to recognise clearly in legislation the entity (or entities) that has control over day-to-day operations of the RV, as distinct from the entity (or entities) that ultimately controls provision of the RV product, and allocate appropriate RV Act obligations accordingly. It was considered that this might assist in the management of the village.

Although there was strong support from RV survey (2020) respondents for this proposal, the majority of written submissions did not support it, raising concerns about it increasing complexity in RV arrangements. Responses on the whole thought that the operator is the one who ultimately holds the regulatory responsibilities, that it was not necessary for an additional layer to be created and that the newly defined operator obligations would sufficiently capture management obligations. Given the concerns raised by stakeholders it is considered that the introduction of the new term ‘manager’ into the RV Act should not proceed at this stage and time should be given for the implementation of the other proposals in 10.1 and 10.2.

It is also noted that the introduction of a RV manager with clearly defined management responsibilities in the village does not require legislative backing to be effective. Operators are able to formulate their own management structure depending on the particular village environment.

Joint and several liability

Joint and several liability means that each person is accountable for obligations under the legislation. The written submissions received in response to the proposal that RV legislative responsibilities should be joint and several indicated general support for it, with no adverse impacts identified. One of the objectives of this proposal is to offer more flexibility to industry in meeting its obligations whilst ensuring the appropriate persons are accountable. Joint and several liability may also promote better governance measures for regulatory compliance by operators through each operating entity having a responsibility to ensure that the other is meeting their obligations. It also makes compliance and enforcement action more effective.

As noted, there was support from four respondents to CRIS 2 in response to the question that the RV Act expressly require an operator take practicable steps to ensure all persons involved in operating a RV comply with the RV Act, with the view that such a provision would lead to increased compliance with existing operator obligations.

Improved operator compliance with legislative requirements is also considered under part 3.1 of this DRIS, which recommends that new conduct obligations for operators be introduced into RV Act. As part of the proposed new conduct obligations operators will be required to have knowledge and understanding of all relevant laws and also exercise skill, care and diligence in their activities. It is considered that improved operator conduct obligations will sufficiently support an operator's role in ensuring all persons involved in operating a village comply with the RV Act without the need at this stage for an additional obligation.

Recommendation 27

27.1 Implement CRIS 2, proposals 10.1 and 10.2, to amend the RV Act to:

- a) replace the term 'administering body' with the term 'operator', meaning the person (including an entity) or persons who control the retirement village product (RV product) - essentially the business owner/s;**
- b) insert the term 'village landowner', for any non-resident owner of land used for a RV;**
- c) existing administering body obligations be appropriately allocated to each;**
- d) expressly state that:**
 - i) unless otherwise indicated, all responsibilities are joint and several; and**
 - ii) when an obligation requires a specific act or action, compliance by one responsible entity is sufficient.**

27.2 Do not implement CRIS 2, proposal 10.1, for a new term 'manager' being inserted into the RV Act.

Village land

28. Capturing land used for amenities and services

Issue

CRIS 4, part 18.1

The RV Act requires an operator to lodge a memorial that identifies the land used for a RV. Each RV is required to have a separate memorial and the memorial must apply to all of the land which is or will be used for the retirement village. The Final Report found that some of these memorials omitted land used for village amenities and services.²⁰⁸ Omitting this land from a memorial does not mean that it is not part of the village. The representation that this land is not part of the village, however, results from and creates misunderstanding about land used for village amenities and services being part of the village. This misunderstanding undermines RV Act consumer protections, such as its restriction on changes to the village land. The Final Report recommended that the RV Act be amended to ensure land used for amenities and services is included in the RV Act definition of a RV and identified in the memorial (recommendations 100(3) and 29).²⁰⁹

Land used for amenities and services can be omitted from the RV Act memorial's description of a village due to uncertainty about whether, and if so in what circumstances, amenities or services also open to non-residents are part of the RV. The RV Act does not clearly distinguish between amenities and services that are part of the RV product and those that are casual, additional services that are not part of the operator's RV business. For example, when a restaurant or gym is part of the RV and when it is not and whether it matters if an operator has subcontracted a third party to provide the service to residents or residents enter into contracts directly with a third party service provider.

The Final Report's recommendations that the RV Act distinguish between non-elective and optional services, and require non-elective services to be in residence contracts, were in part directed at providing some guidance (recommendations 18 and 19).²¹⁰ Stage one reforms distinguish between communal and personal amenities and services, both of which form part of the RV product, but they did not fully address that operators can arrange for residents to have access to optional third party amenities or services.

Finally, stakeholders can use the words amenities and services in different ways. Operators tend to use amenity to refer to the built environment in which services may be delivered. Residents tend to use amenity in its planning sense of pleasantness.

²⁰⁸ Final Report, 44.

²⁰⁹ The current definition for retirement village is "a complex of residential premises, whether or not including hostel units, and appurtenant land, occupied or intended for occupation under a retirement village scheme or used or intended to be used for or in connection with a retirement village scheme". This definition does not expressly mention amenities and services (RV Act, section 3(1)).

²¹⁰ Stage one reforms partially implemented these recommendations in the RV Regulations.

The RV Act does not define either term but defines a service contract as including amenities. This poses issues when identifying the land that comprises a RV because it is sometimes necessary to distinguish between the building in which a service is provided and the service itself.

Objective

To ensure the RV Act memorial:

- correctly notifies consumers, persons dealing in land and regulators what land is used for a particular RV and subject to RV Act consumer protections, such as restrictions on changing its use; and
- identifies all the land that comprises a RV in order to secure the statutory charge for resident exit entitlement payment.

To clarify how amenities and services shared by residents and non-residents are treated.

Policy proposal

The CRIS 4, proposal 18.1 builds on the CRIS 4, issue 4.1 options to provide a description of the RV product that includes amenities and services in the definitions for RV or RVS, as well as residence contract. Proposal 18.1 also links the definitions for RV and residence contract, and residence contract to the RV product in proposing that the RV Act provide that:

- a RV includes the land used to provide the amenities and services set out in a residence contract; and
- a residence contract includes any contract for provision of amenities or services that are part of the RV product.²¹¹

It then proposed the following criteria for shared or third party amenities or services to be part of the RV product:

- any amenity or service for which a resident must pay because they are a RV resident is part of the RV product whether or not it is accessed by non-residents or is provided through operator arrangements with a third party;
- an operator is not to require a resident to enter into a contract for provision of an amenity or service that is not part of the residence contract but a resident can voluntarily enter into such contracts, if they can terminate them on reasonable notice; and
- an operator must indicate areas of the RV used for amenities and services accessed by non-residents on a village map.

CRIS 4 questions included whether RV Act financial reporting obligations needed updating to give transparency about the proportion of costs that residents bear when amenities or services are shared with non-residents. A further question was whether the RV Act should distinguish between amenities and services.

²¹¹ Note: as a result of feedback on CRIS 1, Issue 4.1, this is now a recommendation for that issue.

Stakeholder feedback

Seven submissions responded directly to the CRIS 4, issue 18.1 proposal or some of the questions about it. These submissions were from the resident and industry peak bodies, individual operators, individual residents and Landgate. Responses to other CRIS proposals and questions, as well as general submissions, provided additional feedback on relevant matters. Industry lawyers for operators, also provided feedback at a meeting with Consumer Protection. The Department of Planning, Lands and Heritage (DPLH) considered the proposal from a planning perspective.

There was consensus for some flexibility in the RV Act around sharing RV amenities and services with other users, third party provision of services within a RV and resident ability to voluntarily access optional services and amenities outside the village. Residents as well as operators raised potential benefits for each other as well as themselves.

Other than the industry peak bodies, respondents generally supported the proposal. An operator agreed the proposal would:

- address the problem in stakeholders' misunderstandings about amenities and services shared with non-residents being part of a RV; and
- restrict potential for operators to bind residents to services that are not subject to RV Act protections,

The operator advised that defining a residence contract as proposed would not have any unintended consequences. This operator also supported a RV map indicating shared access areas, saying this would prevent misunderstanding and disputes between the operator and residents.²¹² This operator observed that RVs commonly have land that is not used for construction of units, residents access this land, this land includes facilities, and residents generally pay for this land's upkeep through service fees or reserve fund contributions.²¹³

Another operator advised that they supported the objective of unifying the RV product components but queried the benefit of the proposal. This operator submitted that what was included in the RV product was clear to consumers due to existing RV Act requirements such as to 'specify ... elective and non-elective communal amenities and services'. The operator sought further consultation during drafting.²¹⁴

WARVRA submitted land used for 'the common amenities and services must be included in the memorial over the RV land. Any other arrangement would seem to be bordering on deception'.²¹⁵ It agreed proposal 18.1 would help reduce misunderstanding about the status of amenities and services shared with non-residents.

²¹² Submission 137.

²¹³ Submission 137.

²¹⁴ Submission 141.

²¹⁵ It also expressed concern that operators excluding land used for amenities and services from RV Act memorials were doing so to reduce their obligations and enable the land to be later sold off.

It supported voluntary individual arrangements between a provider and residents for services and amenities not included in residence contracts. Regarding these, it accepted the need for greater flexibility to discontinue service provided by a third party, including when residents do not take them up.

Two residents agreed that expressly providing that a RV includes land used for the amenities and services set out in the residence contract ‘will help reduce confusion or ambiguity that could otherwise create issues’.²¹⁶ One resident observed that operators might find it difficult to identify third parties willing to provide promised services at all or at an acceptable cost and supported provision for voluntary, terminable user pays contracts outside residence contracts. The other said that ‘residents just want clear assurance that the village we enter will remain stable and all changes, if required, will be vetted through the residents’. This resident supported maps indicating the areas in which amenities and service open to the public were situated, saying ‘clarity in maps and plans are essential’.²¹⁷

Landgate and the DPLH advised that proposal 18.1 raises no planning issues.

Industry peak bodies concerns

The industry peak bodies did not support proposal 18.1. They submitted that it:

- limits operator ability ‘to innovate and adapt RV products to respond to changing resident needs ... [and] add services or amenities in a village that may also be used by the general public’; and
- ‘is impracticable where it risks retrospective application to residence contracts already in force’.

No further information was provided on these concerns during further consultation with the peak industry bodies.

Industry has previously expressed some concern about how to characterise third party services such as a hairdresser, bank agency or a gym. On the one hand, they want to represent these as part of the RV product offering, on the other, they say they need to be able to discontinue these services if a subcontractor withdraws. In some circumstances they may not be able to locate a replacement contractor. There are also issues in independent businesses, such as a gym, not wanting to be part of the RV and so have their business subject to the RV Act.²¹⁸

Some operators have worked out approaches to this problem. During the 2020 industry peak bodies’ meetings, an operator advised that it identifies the rooms that it makes available for third party service provision as part of the RV but not the services

²¹⁶ Submission 129 and 131.

²¹⁷ Submission 131.

²¹⁸ Discussion over 2012 to 2016 about implementing the Final Report recommendations to separate mandatory amenities and services from those that are elective, and during the 2020 working group meetings.

themselves. That is, the RV has an amenity – some rooms - that can be used by different services such as hairdressers, doctors or community groups over time.

Landgate and individual operators raised concerns about reconciling amenities or services in the same building or broader multiuse development with the RV, particularly those situated on common property and accessed by non-residents. Issues included the operator not having the lot entitlement necessary to either ensure continued provision of an amenity or capture common property in the RV Act memorial.²¹⁹

Industry lawyers for operators raised no objection to the proposition that if the RV Act memorial could not be lodged over land (including common property), any amenities and services provided on that land should not be offered to consumers as part of the RV product.

Updating financial transparency

Residents supported updating the RV Act financial requirements to give transparency around the proportion of costs that residents bear for shared amenities and services. The only operator who responded to this question did not support this but did not provide any explanation for this position.²²⁰

WARVRA said updating is necessary to give more explicit attention to apportioning costs and ensure new situations are included in current requirements. Residents were concerned that the current legislation does not address the extent to which residents may be subsidising shared facilities or co-located operator business enterprises such as an association club or its administration centre and/or associated residential aged care facility.²²¹

The industry peak bodies did not respond to these questions.

Amenity v service

Neither the word ‘amenity’ nor the word ‘service’ is defined in the RV Act. The RV Act definition for service contract includes contracts for recreation services or amenities but the RV Regulations split amenities and services into different categories.

WARVRA submitted that the lack of distinction between amenity and a service causes confusion when invoking RV Regulations provisions. Individual residents supported distinguishing between amenities and services, one saying a ‘better understanding

²¹⁹ Landgate observed that ‘there may be potential issues as to voting rights in relation to the management of the strata scheme as the ‘non village lots’ will have different ideas, responsibilities, and obligations to that of the RVS’.

²²⁰ Submission 137.

²²¹ Submissions 124, 129 and 154.

upfront would help prevent disputes'.²²² An operator opposed amendment to distinguish these terms without further comment. The industry peak bodies did not address this question in their submissions.

Impact assessment

Respondents generally agree that the CRIS 4, 18.1 proposal will address the problem in land used for amenities and services not being identified as part of a RV.

It is unlikely that the proposal will impact an operator's ability to innovate or offer new amenities or services that are also accessed by non-residents. This is because the proposal does not prescribe the amenities or services that an operator may offer, the third party arrangements under which this might occur or limit an operator's ability to add services that will also be open to the public. It simply requires transparency for consumers about which amenities and services are part of the RV product (and so part of the village) and which are not. Some operators may however need to adjust their marketing, pre contract disclosure or contracts to be clear which amenities and services are:

- part of the RV product and which are not; and
- accessed by other users and which are not.

This is in any event required to meet RV Act and ACL requirements about promotional materials.

The reform will apply to new contracts only, meaning it is unlikely to have retrospective impact on existing contracts. The industry peak bodies have not explained their concern and an individual operator has advised that there will be no unintended consequences. Relevant to the concern about practical impact on existing contracts, the industry peak bodies advise that operators currently manage RVs with 30 or 40 different contractual provisions about the matters included in different kinds of fees, which are introduced at different times over the life of a village. In this context, it is not apparent that managing different contracts in a village is impractical. Further consultation can occur on whether a transition period may be required.

The proposal provides a basis for identifying when amenities and services on common property within a multiuse or community title development are part of the RV. Greater certainty about this is likely to encourage investment in RVs in these context, aligning the RV Act with general State planning policy and emerging village development models.

Regarding these emerging village models, the RV Act may need to expressly provide that an amenity or services cannot be offered as part of the RV product:

- if strata or community title lot entitlements mean that an operator cannot guarantee an amenity or service throughout residence; or

²²² Submission 130. Another said this was required for the reasons set out in the CRIS and identified a problem in confusion over the requirements on operators and expectations of residents (submission 129). A third 'YES cause I don't understand the difference' (submission 131).

- in lease for life strata villages, an amenity or service is on common property that is not secured by an RV Act memorial.

Parliamentary Counsel will advise on this and further stakeholder consultation will occur in drafting.

A further benefit of the proposal is that clear demarcation as to what is or is not part of the RV product makes identifying what amounts to a change to RV land clearer. Less potential for uncertainty and dispute about the land that comprises an RV supports provision for the land changes anticipated by the part 19.1 recommendations.

The RV Act currently provides for personal amenities and services terminable on reasonable notice. These form part of the RV product. How the legislation will distinguish between personal services that form part of the RV product and temporary services that do not will be subject to further consultation during drafting. (For example, laundry services may not be taken up by all residents but an operator may promise that an option to use this service will be available throughout residence so this forms part of the RV product.)

Respondents did not raise any cost impacts for proposal 18.1. There will, however, likely be initial costs for some operators in changing marketing practices and consequential changes to pre contract disclosure and perhaps residence contract requirements. These will be in the context of an overall review following the reform package. The proposal may result in some operators becoming aware that their RV Act memorials are incorrect and so incur costs in correcting them, but it will not render any existing memorial incorrect.

Updating financial transparency

Disputes are arising about residents disproportionately subsidising amenities and services open to non-residents, including when these are independent operator businesses. Consumer Protection's experience is that the current financial provisions for transparency around these matters can be improved, including in providing guidance for appropriate apportionment. There may need to be additional protections such as requiring that residents' share of the costs be reasonably proportionate to their use.

Distinguishing between amenities and services

The question whether the RV Act needs to better distinguish between amenities and services arose from the 2020 industry peak bodies' and WARVRA meetings. These revealed significantly different views as to what each word meant, both between and within each stakeholder group. Operators tended to distinguish between a building and the service provided in it. However, all groups saw limiting amenity to buildings as problematic because it omitted open spaces, gardens and other important intangibles such as pleasantness. On balance, the different stakeholder group views on what

amenity and services mean, and resident support for distinguishing between them, suggest the RV Act needs to clarify these terms. Further consultation on how to capture village intangibles as well as buildings can occur during drafting.

Recommendation 28

Implement CRIS 4, part 18.1 proposal, so that:

- a) the RV Act expressly provide that:**
 - i) a retirement village (RV) includes the land used to provide the amenities and services set out in a residence contract; and**
 - ii) a residence contract includes any contract for provision of amenities or services that are part of the Retirement village product (RV product);**
- b) amenities or services are part of the RV product if a resident must pay for them because they are a RV resident whether or not they are accessed by non-residents or provided through operator arrangements with a third party;**
- c) an operator is not to require a resident to enter into a contract for provision of an amenity or service that is not part of the residence contract;**
- d) a resident can voluntarily enter into contracts for services or amenities that are not part of the RV product provided the resident can terminate the contract on reasonable notice; and**
- e) an operator must indicate on a RV map the areas of the RV used for amenities and services accessed by non-residents.**

In addition, the RV Act be amended to provide:

- f) a head of power exists in the RV Act for regulations to provide for appropriate financial transparency and protections against residents disproportionately funding shared use amenities and services (if necessary); and**
- g) there are definitions for amenity, service and/or any new term to deal with the need to distinguish between a building, services and amenity in its ordinary meaning.**

29. RV whole parcel of land

Issue

CRIS 4, part 18.2

The RV Act requires an owner of RV land to lodge a memorial over the land which is to be used for a retirement village.²²³ The RV Act does not expressly require a RV to comprise a whole parcel of land, however, this is the expected interpretation and policy of the Act.

Some memorials lodged under the RV Act identify only a portion of a parcel of land as RV land because operators say that parts of the land are being used for other purposes. Allowing a village to be only a portion of land causes an issue for the efficacy of the statutory charge, because a portion of land cannot be sold unless it is subdivided. Not all RV land can be subdivided. Some operators also want to use RV land for additional purposes to the RVS while it remains part of the RV.

Objective

To ensure that RVs 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.

Policy proposal

CRIS 4, proposal 18.2 was that the RV Act be amended:

- to clarify that a RV 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.

Proposal 18.2 also considered circumstances where the RV Act memorial is required to be lodged prior to subdivision of the land, in which case the RV might be a portion only of the undivided land on a temporary basis.

²²³ Section 15, *Retirement Villages Act 1992* (WA).

Stakeholder feedback

Residents, WARVRA, one individual operator and relevant government agencies all supported a RV being a whole parcel of land, with dual use permitted for a portion of the land. It was noted that security for the residents was an issue if a RV was only a portion of a parcel of land because of the issues in enforcing a statutory charge. Landgate also agreed that there were issues with enforcing the statutory charge if RVs were only a part of a parcel of land submitting that:

‘A retirement village memorial should be registered over an entire lot in keeping with the existing WA Government systems and processes for land administration..... If it is desired to only have the village over a portion of the land then the best approach is subdivision’.

DPLH did not identify any impacts with the proposal from a planning perspective.

One individual operator and the industry peak bodies opposed the proposal that a RV must be a whole parcel of land. Concerns were raised that this would limit flexibility for complementary or additional uses of land other than a RV on the same parcel of land. This was seen as a particular issue for newer multi-storey villages which may operate over multiple floors, and it was submitted that:

‘Protecting the ability for land to be mixed-use will be important in encouraging future retirement village development and reflect aspirations of government to deliver urban consolidation and infill development. The proposal would cause difficulties for newer multi-storey retirement village products, which may operate over multiple floors and also include other non-retirement village services or housing products within the same building’.

The industry peak bodies also saw the proposal as complicating the lodgement of memorials, and the ability to remove memorials. An individual operator submitted that a requirement to subdivide a parcel of land so that the RV was a resulting whole parcel would add to development costs.

On the issue of concerns about flexibility, Landgate noted:

‘However, it should also be highlighted that current WA Government systems and processes for land administration provide more flexibility and more options for development than previous regimes. Strata and Community Titles now provide for lots that were considered part lots prior to the introduction of these Acts. They also provide for lots over airspace in a building, which did not exist under earlier regimes. In addition, the new Community Titles Act provides for integration of interests in a considered scheme, to give participants, such as residents in retirement villages, a greater say with land associated with their residence than ever before.’

The Community Titles Act also provides for clearer cost allocation for commonly used land between lot proprietors and strata schemes within Community title schemes.

Assuming new provisions are made to vary a retirement village's memorial to apply to a different area as part of these reforms to the Retirement Villages Act, parties will have a new ability to negotiate and plan for a variation. In addition, it should be noted that under the Strata Titles Act as recently amended there are clearer and more extensive disclosure requirements relating to intended future development, using an interest only deposited plan, may be specified in contractual arrangements between the parties'.

Impact assessment

Although there was opposition by industry to this proposal, there are clear issues posed for a resident's security under the statutory charge if a RV is only over a portion of a parcel of land. These issues were raised by residents and also noted by Landgate. The statutory charge is a critical consumer protection under the RV Act and ensures that residents' rights to repayment of their premium are secured against the land.

The key concern raised by industry with the proposal was that requiring a RV to be the whole of a parcel of land would limit future flexibility for villages, particularly around the ability to have other uses on the land. However discussion with individual operators, industry lawyers and Landgate suggest that the proposals around dual use mixed developments will provide more flexibility than operators may understand.

There is no policy intent to prevent RV land to be used for other purposes, or for villages to be located in mixed use developments. As CRIS 4 indicated, proposal 18.2 makes express the likely current effect of the Act.

Proposal 18.2 also proposes that the RV Act expressly recognise that portions of RV land may also be used for an additional purpose without compromising that land being secured by the statutory charge.

It has been noted by industry previously that service providers do not want to operate on land subject to the RV Act memorial and that this limits the services that can be offered to RV residents. Although there may be some restrictions on operators, if this is the case these restrictions are considered justified due to the need to provide security to residents for the long term provision of amenities and services promised as part of the RV product they have purchased. These are the amenities and services included as part of the recurrent charges and that residents can expect to have provided to them for the duration of their residence in the RV. Operators are free to provide other services and amenities which are of a more temporary nature, however, these sit outside the RV product offering, are paid for separately and residents must be free to access or discontinue them at any time.

Multi-story retirement villages operating over multiple floors that also include other use within the same building

The industry peak bodies are particularly concerned that the proposal may pose problems where RVs operate over multiple floors of mixed use buildings. This may be due to some misunderstanding that the proposal will require the village land to comprise the whole of a building even though only part of a building is used for a RV. This proposal will not require that.

Landgate advises that different uses in the same building require that the land is strata or community titled. This means that a retirement village which occupies part of such a building will only exist on individual strata or community title lots. Each strata or community lot is a whole parcel of land. As each lot is a whole parcel, the statutory charge can be enforced. There is no need for the RV to be all of the lots within a strata or community title scheme. This means that, subject to planning laws, the other lots can be put to non-RFV uses.

The lots that comprise the RV can be described in an RV Act memorial separate from the other lots in the strata or community title scheme through an existing Landgate practice, lodging an Interest Only Deposited Plan identifying only the relevant lots with the RV Act memorial. There was some concern expressed during the consultation that this could not occur for lots on second or higher floors, but Landgate has confirmed that the recent strata titles and community titles reforms introduced lots over air space.

RV over only some lots in a strata plan – common property

Identifying only some of the lots in a strata plan as comprising a retirement village may cause issues when amenities or services are located on common property, which is owned by all the lot owners in common. There is no ability to divide the common property between the lots that are the RV and the lots which are not part of the RV. This will mean that any amenity or service on common property cannot be represented as part of the RV or RV product. Further, the common property is not secured by the RV Act statutory charge. For this reason, Landgate's preference is for a RV to comprise all the lots in a strata plan.

This is a practical issue for operators to consider in whether to use only some of the lots in the strata plan for a RV. Residents also need to accept that if they enter RVs in these environments, some amenities and services in the building are not part of the RV and the question of whether they will be continued and the costs charged for providing them will be up to the strata body, in which they or the operator may be a minority.

The RV Act does not require memorials to be lodged over resident owned land, so this issue only arises in lease or part lease strata/community title villages.

Memorials lodged before subdivision of the land

The CRIS described one issue which may cause problems with proposal 18.2 where a memorial is required to be lodged prior to subdivision (because of offers or off the plan sales) but the RV will not occupy all of the new parcels of land that will issue when the original parcel of land is subdivided. If the memorial is lodged over the whole parcel of land prior to subdivision, then it will be recorded against all the title of the new lots that result from the subdivision.

To address this it was proposed a RV be allowed to temporarily be a portion only of a parcel of land when a subdivision is proposed and the portion that is the RV will be a whole parcel/s of land after subdivision. This could be effected by lodging an Interest Only Deposited Plan identifying only the relevant portion with the RV Act memorial. On subdivision, only the new titles issued for the identified portion would have the RV Act memorial recorded. Certain conditions for this were also proposed to ensure the risks to consumers are limited.

Stakeholders were supportive of this proposal, with some reservations about the conditions and it is recommended that this proceed. Further engagement will occur with Landgate to determine the appropriate legislative amendments required for this to occur.

Costs incurred – example memorial correction and subdivision

The proposal will impose certain costs on some operators, such as costs for correcting a memorial that incorrectly describes a portion only of a parcel of land as the RV. It is proposed that any memorial correction will occur by the proposed new process for adding land to a RV. There could also be costs for subdividing a parcel of land to put a part of the land to a different use to a RVS and does not want to use the 18.1 provision for a part of the land that remains a RV to be put to a second use. These costs are, however, not considered to be new costs but costs incidental to the proper existing application of the RV memorial requirements.²²⁴

It is likely that the 18.1 and 18.2 proposals, together with the RV change process reforms will support industry to innovate in the sector by providing certainty around the regulatory requirements and clear processes around mixed land use and removing parts of village land by subdivision, an option not currently available.²²⁵

²²⁴ It is not clear that any additional planning costs will be incurred- different uses require planning approval in any event.

²²⁵ Hollywood case.

Recommendation 29

Implement CRIS 4, proposal 18.2, to amend the RV Act to:

- a) clarify that a retirement village (RV) must comprise the whole of any parcel of land on which the retirement village product (RV product) accommodation, amenities or services are provided; and**
- b) 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.**

In addition, the RV Act be amended to:

- c) provide for an exception to the requirement that a RV must be the whole of any parcel of land when a memorial is lodged before land is subdivided; with the following limitations:**
 - i) the subdivision/strata title is already approved;**
 - ii) it is not practicable for a developer to implement the subdivision/strata title prior to lodging the RV Act memorial;**
 - iii) advertising and residence contracts clearly identify the land to be used for the retirement village;**
 - iv) subdivision will occur prior to a resident entering the RV; and**
 - v) a resident is able to rescind a residence contract if the subdivision does not occur;**
- d) enable operators to correct incorrect 'portion only' memorials through the proposed new RV change process (Recommendation 34) ; and**
- e) require that where amenities and services, which are part of a RV (including in strata scenarios) are shared by others, this is identified in pre-contractual disclosure.**

30. Multisite villages

Issue

CRIS 3, part 15.1

Multisite villages are RVs that spread over two or more pieces of land that do not adjoin each other. Obligations under the RV Act currently apply to multisite villages as a single RV. For example, even though the villages may be on different sites of land, the RV Act only requires one memorial for a multisite village. Multisite villages can exist because of a number of factors, including difficulties in obtaining a large single site. The RV Act does not, however, expressly state that a RV may be multisite, and stakeholders have reported a lack of clarity in how requirements in the RV Act applies to these villages.

Final Report recommendation 84, to update the meaning of RV, was in part to ensure that the RV Act recognises multisite RVs.

Objective

To ensure the RV Act provides for multisite RVs.

Policy proposal

CRIS 3, proposal 15.1 proposed amending the RV Act to expressly provide that a RV can be multisite. It also proposed that the memorial and pre contractual disclosure contain information about a village being a multisite RV.

Stakeholder feedback

There was overall support from stakeholders for proposal 15.1. The industry peak bodies supported expressly providing for villages to be multisite, however, sought more clarity about how multisite would be defined a multisite village identified on the proposed public RV database. WARVRA proposed a maximum distance between sites and stressed the importance of prospective residents being informed at the outset that a village is multisite. A large operator supported the operator being allowed to choose whether they were operating one multisite village or several individual site specific villages.

Obligations under the RV Act currently apply to a single RV. If a village is multisite but still a single village, the obligations would apply to the RV as a whole and not individually to the separate sites. (For example, budgets and other financial statements relate to the RV. The RV Code also provides that each RV is to have only one residents committee. A residents committee can however have additional subcommittees). CRIS 4 asked whether any obligations under RV Act should apply differently to multisite RVs.

There was general consensus amongst respondents that rules, rights and obligations for multisite RVs should generally be the same across all sites, but there may need to be some allowance for smaller differences, or where there were clear site specific matters. WARVRA said that the budget and residents committee should be the same, however, noted that small variations such as different pet and parking rules should be allowed. An operator's response²²⁶ noted that rules should be fair and equitable and that different rules and rights within the same RV create discord. The industry peak bodies did not provide any comment on this issue.

Impact assessment

Stakeholders were generally in support of proposal 15.1 and did not raise any significant concerns. Given the importance of clarity on how requirements under the RV Act operate to a RV, it is recommended that the RV Act be amended to expressly provide for recognising multisite villages, and how the RV Act applies to them.

Several implementation issues were raised by stakeholders in their responses, especially if multisite villages were required to change current arrangements or rules across sites as a result of the proposal. An example was given of the possibility of different sites having one operating budget but different reserve funds. There was also some support for allowing different sites to have different rules for minor matters.

Depending on current practices, certain changes may be required to disclosure statements and contracts to ensure that clear information is provided by industry about multisite RVs. Further consideration is required as to what changes might be required to how the RV Act applies to multisite RVs. Additional consultation will occur on this issue during the drafting of the regulations.

Recommendation 30

Implement CRIS 3, proposal 15.1, to amend the RV Act to provide that:

- a) regulations set out any specific requirements for multisite retirement villages (RVs) dealing with matters such as the RV budget, the use of amenities and services and any minimum distances between sites; and**
- b) the memorial contain specific information about the RV being a multisite village**

²²⁶ Submission 108.

31. Single retirement village per retirement village scheme

Issue

CRIS 3, part 15.2

The RV Act defines a RVS, however, it does not state whether a RVS can apply to more than one RV. Section 22 of the RV Act requires Supreme Court approval for the termination of a RVS scheme. In considering an application for approval to terminate a RVS under this section, the Supreme Court in the Swancare case raised the question of whether the RV Act permits more than one RV to be used for the same RVS.²²⁷ The policy intent is that there be only one RV for each RVS.

Objective

To clarify that the RV Act permits only one RV for each RVS.

Policy proposal

CRIS 3, part 15.2 proposed that the RV Act be amended to expressly provide that a RVS applies to one RV only.

Stakeholder feedback

Limited submissions were received in relation to this issue. Resident submissions, including WARVRA, supported the proposal. WARVRA noted that implementing the proposal would avoid the issues which arose in the Swancare case. The industry peak bodies did not support the proposal, submitting that a risk existed in that an operator's capacity to offer innovative and different products would be reduced because they would not be able to share amenities and services across RVs.

Impact assessment

Although the feedback was divided on this issue, the only negative impact identified in the consultation on this proposal was industry concern that requiring a RVS to be limited to a single RV could risk limiting the ability of an operator to share funding across RVs. This concern may reflect a confusion between an operator's business arrangements to share certain costs across its operations, with the concept of the RVS under the RV Act.

As long as an operator complies with RV Act requirements for the RV, such as the budget and financial statements and residence rules being village specific, an operator is free to determine its business arrangements for various costs.

It is therefore not clear how the proposal would restrict operators in the way identified by the industry peak bodies. Further the proposal to expressly recognise multisite RVs under the RV Act may also address the industry concern.

²²⁷ Swancare case paragraph 73.

Based on the criteria applied by the court in the Swancare case, it is unlikely that a court would find that a single RVS could operate over two RVs. Consumer Protection, however, considers that it is preferable to avoid the issues that arose in the Swancare case and provide certainty on this issue. This will also ensure that the provisions for termination of an RVS can operate as intended.

Recommendation 31

Implement CRIS 3, proposal 15.2, to amend the RV Act to expressly provide that a retirement village scheme (RVS) applies to one retirement village RV) only.

32. One memorial per RV and one RV per memorial

Issue

CRIS 4, part 18.3

The RV Act requires that there be a separate memorial for each RV and only one memorial per RV.²²⁸ There are, however a number of instances of a single RV Act memorial describing land used for multiple RVs and multiple memorials describing land used for the same RV. This undermines the memorial's notification and statutory charge functions and can cause problems with termination of a RVS.²²⁹ The uncertainty may also cause disputes about lodgement dates for memorials and which memorial has priority in terms of the statutory charge.

One of the reasons that this has occurred is because there is some misunderstanding about what the RV Act requires. Another reason is that the RV Act has no provision for adding land to a RV or recording that land has been added in an existing RV Act memorial. Some operators who add land to a RV therefore also lodge another memorial resulting in multiple memorials for the same RV. The lack of clarity around multisite RVss discussed in part 30 30 has also contributed to this issue.²³⁰

Objective

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

Policy proposal

CRIS 4, part 18.3 proposed that the RV Act expressly provide that:

- a) each RV is to have its own memorial; and
- b) there is to be only one memorial for each RV.

Stakeholder feedback

There were limited submissions received to proposal 18.3. The main concern raised related to implementation and transition time. Industry peak bodies, a large operator and WARVRA supported the proposal, but said careful consideration should be given to allow sufficient time for operators to correct existing memorials which do not comply with the express requirements. Similar feedback was received from a WA legal firm specialising in retirement village law that also suggested that the reform should only apply to new memorials.

²²⁸ This is the effect of multiple RV Act provisions, not an express requirement. (Swancare case, paragraphs 132 to 137.

²²⁹ RV Act section 15(8) provides that a RV Act memorial cannot be removed while any part of the land it describes is being used for a RV.

²³⁰ As a multisite village is a single retirement village the RV Act only requires one memorial for a multisite village, even though it encompasses different sites of land.

Impact assessment

Express statement for memorial requirements

There was support from WARVRA, industry peak bodies and an operators for the CRIS proposal to amend the RV Act to expressly provide that one memorial should only describe one RV, and a whole RV should only be described in one memorial. The stakeholders considered that this would reduce confusion and unintentional non-compliance.

Consumer Protection recognises that a memorial is important in providing notification to the public of a statutory charge and the land that it secures. Information received by Consumer Protection has indicated that the memorial notification function has become confused and unclear as a result of multiple memorials being lodged for the same RV and more than one RV being described in the same memorial. It is considered that an express provision stating that only one memorial should be lodged will improve clarity in this area. It is therefore recommended that proposal 18.3 be implemented.

Memorial correction and transition period

The proposed implementation of 18.3 also requires addressing existing memorials which conflict with this requirement. There was a submissions that proposal 18.3 should only apply to memorials lodged after the date the RV Act is amended and that operators should be provided with sufficient time to transition to the express laws.

Consumer Protection recognises that memorials need to be corrected. Part 34 recommends that the process for memorial correction, which requires a Supreme Court application, be replaced with a SAT application. Further consultation will be undertaken with the sector in regards to transitional arrangements and the memorial correction process.

Adding land to a retirement village

As noted above, one of the reasons for the lodging of multiple memorials for the same RV is the lack of a process to add land to a RV memorial. CRIS 4 asked stakeholders whether the RV Act should include a process for adding land to an existing RV.

Stakeholder feedback indicated support for a process for adding land. WARVRA supported a process for adding land, however, not in cases where it was detrimental to residents. During meetings with Consumer Protection, the industry peak bodies indicated support for implementing a process to add land to a RV. No other stakeholders provided feedback about a process for adding land to an existing RV and no adverse impacts of implementing a process to add land to a RV were identified. Landgate queried how adding land to an existing RV would be recorded in the WA land register.

To ensure that a single memorial is able to apply to one RV in circumstances where operators seek to add land to a RV, it is clear that a process is required for adding land to an existing memorial. There are different ways that this may be able to occur.

Other jurisdictions provide a mechanism for an original memorial to be removed and a new memorial to be lodged. Alternatively the current *Transfer of Land Act 1894* (WA) (TL Act) process to add land to an existing mortgage could be adapted to add land to an existing RV Act memorial.

There are a number of issues to be considered, including the priority of interests under the statutory charge. Further consultation will be undertaken with Landgate and other relevant stakeholders to develop an appropriate process of adding land to a RV and the registration of all relevant interests.

As well as requiring a process for adding land to a single RV memorial, adding land to a RV will also involve more substantive consumer protection issues. Recommendation 34 proposes to implement a process to deal with significant changes made to RVs.²³¹ Provision for adding land to a RV is therefore considered in parts 34 and 35.

Recommendation 32

Implement CRIS 4, proposal 18.3, to amend the RV Act to expressly provide that:

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

In addition, the RV Act be amended to expressly make provision for:

- c) the addition of land to an existing village memorial.**

²³¹ Recommendation 34 will provide for a process that involves an operator lodging a memorial variation document with Landgate identifying the land to be added to an existing memorial. An operator will be required to attach prescribed information, which will include evidence of resident consultation, resident consent or SAT approval. The addition will have effect from the date the variation document is lodged and any existing or future RV Act statutory charges will apply to, and have priority over any other interests in, the new village land from that date.

Village changes

Operators have advocated for some years that the RV Act deters investment in the RV sector through restricting or precluding: new RV development, particularly in multiple use developments; multiple use of RV land, amenities or services; changes to a RVs land; and changes to the communal arrangements pertaining to a village. Operator advocacy for policy reform to assist economic recovery from the coronavirus (COVID-19) pandemic raised that restrictions in the RV Act pose difficulties for mixed developments of RVs. Residents support some of these concerns but also say that operators make too many changes unilaterally and without consideration of resident interests.

RV residents have a substantial financial and emotional investment in a village. Based on industry estimates, WA residents invest some \$6.45 billion in RVs. Residents have significant consumer rights to continued provision of the RV product that they purchased. Residents are also often limited in their ability to leave a village if they are unable to afford living in the village after a change (for example, an upgrade in accommodation or facilities can result in increased recurrent charges) or are unhappy with the change. Proposed RV changes can, therefore, have significant impacts on residents and need to be properly managed through adequate safeguards.

The recommendations in this part propose introducing a clear, transparent and accountable legislative framework for managing issues in new RV developments and changes to existing villages. In particular, the proposed reforms address operator concerns about inability to excise RV land for other use, or to add land to a RV, while the RVS continues.

As well as consulting with industry and resident stakeholders, Consumer Protection has consulted with government agencies including DPLH, Landgate and the SAT in developing this process. Consideration has also been given to the change process reforms recently made to WA's strata and community titles legislation as well as change processes in place in other jurisdictions' RV legislation.

These reforms will support development of modern and innovative RV communities, and effective management of existing villages' redevelopment, across the state. They also support broader state planning policy to encourage multiple use development, including integrated RV accommodation.

33. Single process for significant village changes

Issue

CRIS 4, part 19.1

The RV Act restrictions on changes to RV land and the way it is used can lock a village into a built environment or product that becomes outdated over time. Changes that may be necessary or desirable for a village's continued operation and viability, such as opening a village's amenities and services to the public or putting a portion of village land to an additional use, can be prevented. At the same time, the RV Act's assumption that some changes will not be made means that there is no clear process for them to occur. This creates uncertainty for business and leaves residents aggrieved when a change occurs without appropriate safeguards.

The changes that the RV Act does permit currently occur under different processes. Some involve no independent oversight or assessment regarding their impact on residents. Others must be approved by the Supreme Court but disputes about some of the matters they can involve go to the SAT or the Magistrates or District Court, depending on the particular issue. Also different persons – an operator, individual resident, residents as a group or the Commissioner – have the right to make applications regarding different aspects of a change or dispute. Complex RV changes can mean multiple applications to different bodies, resulting in duplication and gaps in assessing the change as a whole.

Finally, the RV Code's requirement for operators to have an appropriate process for consulting residents is not providing sufficient guidance for stakeholders and can only be enforced by the Commissioner.

Objective

To provide a process for operators to make a wider range of changes to a RV 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.

Policy proposal

Final Report recommendation 30 was for the RV Act to provide a process for the RV Act memorial to be partially removed from RV land. In effect, to allow land to be excised from a village. CRIS 4, proposal 19.1 is to introduce to the RV Act a process that can deal with a wider range of significant RV changes and resolve all matters and disputes that these changes may involve.

CRIS 4, proposal 19.1 includes the following features:

- a) minimum standards for resident consultation;²³²
- b) the SAT making all decisions and resolving all disputes that arise;
- c) three significant change categories – RVS winding down, memorial correction and village redevelopment – to enable the SAT considerations and powers to be tailored;²³³ and
- d) that the RV Act distinguish between significant changes requiring resident consultation only and those requiring the SAT approval on the basis of the potential for impact on residents' financial and tenure security. The CRIS discussion also referred to complexity as a criterion.

The RVS winding down and memorial correction categories were identified in Issue 19.1 as changes that required SAT approval to proceed. CRIS 4, issue 19.2 made a proposal about certain significant changes in the RV redevelopment category also requiring SAT approval.

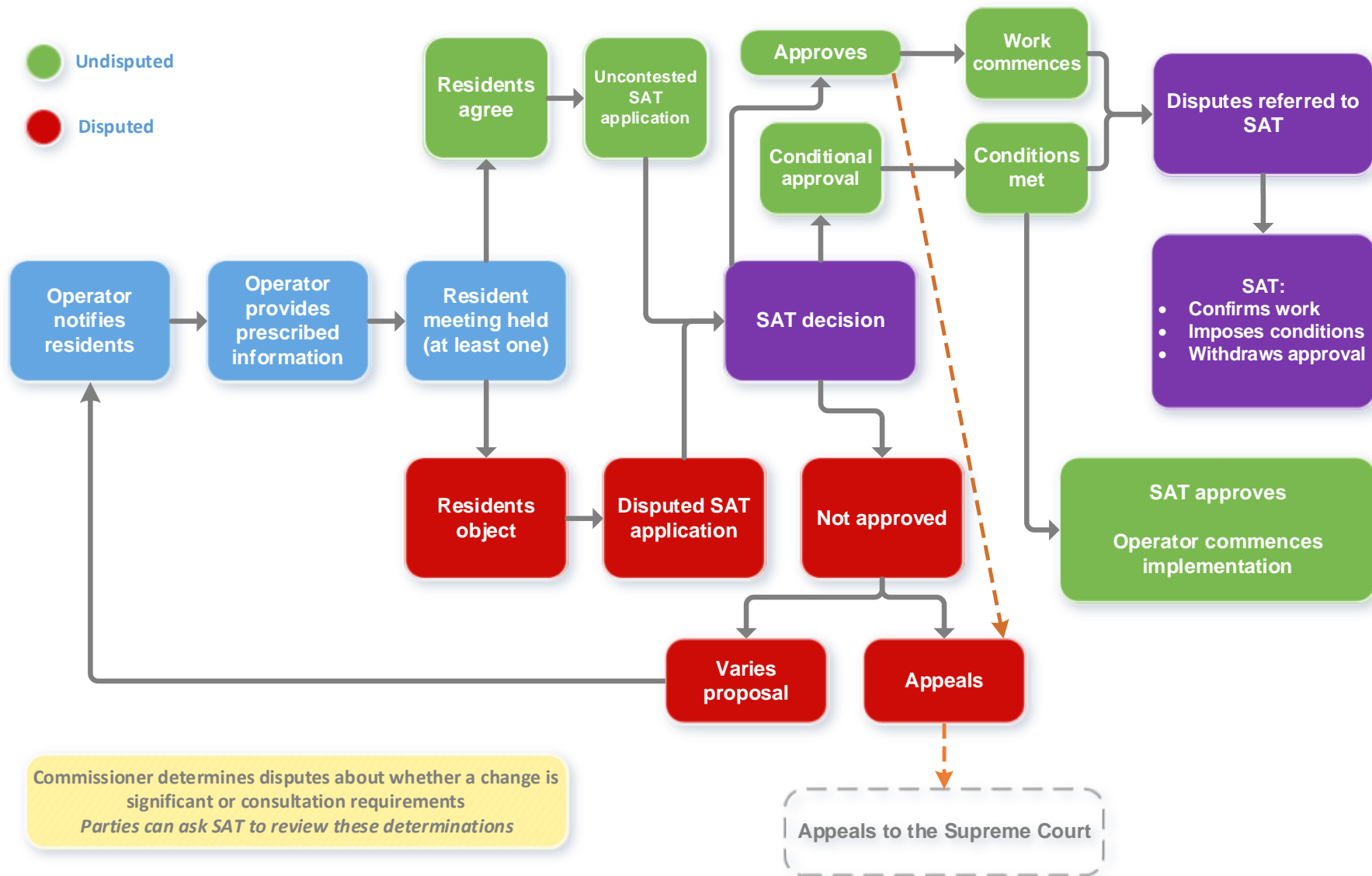
For significant changes that would proceed with resident consent or that only required resident consultation, the CRIS explained that an operator would be able to apply to SAT for approval to proceed if resident consent was not given and that residents would have a group right to apply to the SAT if they objected to a significant change an operator had proposed.

The attached flow chart at Figure 4 illustrates the proposed process.

²³² CRIS 4, part 19.3 proposed six minimum standards.

²³³ CRIS 4, part 19.2 made further proposals about these categories.

Figure 4: Process significant village changes



Stakeholder feedback

Ten submissions responded directly or indirectly to the CRIS proposals. Respondents included WARVRA, individual residents, the industry peak bodies, individual operators and law firms. Additional relevant feedback was provided in general submissions, responses to other CRIS issues, operator and resident Consumer Protection contact regarding proposed changes during the consultation period and in meetings with stakeholders, including industry peak bodies working group meetings during 2020.

Landgate, the DPLH and the SAT were consulted in developing the proposal.

Single process for all significant village changes, including the SAT making all decisions and resolving all disputes

There is general support for a single process for all significant RV changes with ability to resolve all matters and disputes.²³⁴

An operator advised that: 'a better and clearer process for a range of *significant changes* to a village or RV product ... will assist both residents and operators to understand what is required under each set of circumstances and to streamline the process'.²³⁵ (Original emphasis) This was echoed in a resident submission that 'a common known process is easier to manage'.²³⁶ The industry peak bodies' supported 'expanding the SAT's jurisdiction to resolve complex matters involving RVs, primarily where significant village changes or lifting of memorials is concerned'.²³⁷ An operator's support for the SAT as the decision maker was on the basis that the SAT was 'more costs effective and potentially less adversarial'.²³⁸

WARVRA qualified its support with some concern about the SAT deciding RVS termination.

Transferring Supreme Court decisions on RVS termination and memorial correction to the State Administrative Tribunal

Specific questions were asked about transferring approval to terminate a RVS and memorial correction - which impact state land records – to the SAT. Landgate supported this transfer, pointing to the SAT making equivalent decisions under strata titles legislation. It noted that these strata title decisions are made by a judicial SAT member. The SAT also suggested that if these decisions were transferred to the SAT, they be made by a judicial SAT member.

²³⁴ Only one respondent, an individual resident, opposed this saying 'Residents are always open to change if they are fully discussed and [agreed]' (submission 131).

²³⁵ Submission 141.

²³⁶ Submission 129.

²³⁷ This statement was made in the context of their feedback to discussion of generally expanding SAT's jurisdiction.

²³⁸ Submission 141.

As noted above, WARVRA's support for the SAT as the decision maker was qualified. Its concerns were that SAT decisions had a lesser status than decisions made by a Supreme Court judge, grounds for appeal from SAT decisions are more restricted than from a Supreme Court decision and SAT decisions were not as precedent based as Supreme Court decisions. However, WARVRA agreed these concerns would be addressed if the RV Act required these RV decisions to be made by a judicial SAT member and conferred appeal rights equivalent to those available from the Supreme Court.

Minimum standards for resident consultation

Respondents generally supported the process for significant RV changes setting minimum standards for resident consultation. CRIS 4, part 19.3 asked questions about what the minimum standards should be and the response to these is set out in the Part 35.

What significant change means and the three categories proposed

Meaning of significant change

Respondents either directly agreed that changes with potential to impact residents' financial or tenure security were significant changes for the purposes of the proposed process or supported the process applying to specific changes that, when analysed, met these criteria. The industry peak bodies' support for the SAT's expanded jurisdiction also proposed complexity as a criterion. WARVRA submitted that impact on resident wellbeing should also be a criterion.

There is, however, some stakeholder concern at how significant changes will be defined or identified. In particular, that minor matters and individual resident disputes are not captured.

Three significant change categories

There was support for the change process to be tailored to different types of changes and no objection to the three categories proposed – winding down a RVS, memorial correction and RV redevelopment.

All stakeholders thought RVS winding down and memorial correction were significant changes. Stakeholder concerns about the changes to which the RV change process would apply relate to the village redevelopment category.

Village redevelopment category – the changes it will include

CRIS 4, part 19.1 questions 19.1.6 and 19.1.7 asked what changes the RV redevelopment category should include and whether it should include the following matters:

- excising land from a RV – that is, implementing recommendation 30 (industry calls this partially lifting a memorial);
- changing the use for part of the village land, so part of a RV is used for an additional purpose while still being used for the RVS;²³⁹
- opening RV amenities and services to non-residents;
- RV redevelopment that broadly impacts the whole community;
- significant changes to the RV product; and
- significant changes to community arrangements.

Part 18.3, question 18.3.4 also effectively asked whether adding land to a RV should be included in this significant change category.²⁴⁰

There was general support for the RV redevelopment category to include excision of RV land, adding land to a RV, changes to land use and complex redevelopments. WARVRA expressly supported this and the industry peak bodies' general comment that the SAT should deal with complex matters, including significant village changes and memorial lifting encompasses these matters, although they did not directly respond to these questions.

Views on applying the RV change process to the other matters were more mixed. For instance, while residents thought opening amenities and services to non-residents was a significant change as it had the capacity to change the village environment or restrict their access to these amenities and services, some operators thought this was their decision alone.

WARVRA supported significant changes to the RV product being included in the RV redevelopment category but not changes to community arrangements.²⁴¹ WARVRA maintains that the latter changes are fundamentally different to the other changes, which are about the built environment, so should have an independent change process. Separating the built RV environment from the community aspects of RV living is important to WARVRA in its advocacy for more focus on improving village living experience, as distinct from property management.

²³⁹ See discussion in Part 18.2.

²⁴⁰ This question asked whether adding land (except for staged development additions disclosed prior to a resident entering into a residence contract) should occur after resident consultation or required some additional independent assessment.

²⁴¹ WARVRA supported the village change process applying to community arrangement changes in its submission but changed its position in later meetings and correspondence.

Amongst other things, WARVRA is concerned that applying the village change process to significant community arrangement changes will confuse residents. It is concerned that some residents will assume the process does not apply because they understand significant changes to mean changes to land or buildings. It is also concerned that other residents will expect the process to apply to minor community arrangement changes because they see these as significant. During meetings, the industry peak bodies have expressed similar concerns.

Stakeholders also distinguished between the degree and types of change, noting that some redevelopment is minor and should not be subject to the change process. Other concerns raised, largely by operators, related to appropriate decision levels – operator decision after resident consultation, resident consent being required or SAT approval.

WARVRA suggested the following additional RV redevelopment changes:

- changes to residential aged care;
- changes to tenure – such as changing from strata ownership to lease; and
- changes in the RV's lease for life to rental ratio or conditions.

No additional inclusions were proposed by operators.

Order of RV Act and planning, building or other approvals

The CRIS asked whether the RV Act should prescribe the order of RV Act and planning, building or other approvals for a change to occur or leave this to operators to determine. To assist in deciding this, it asked residents whether certainty in what was proposed or ability to have input prior to these approvals was more important. It also asked whether requiring an operator to obtain RV Act approval prior to implementing any related approval – planning, subdivision of building - posed any practical issues (questions 19.1.11 to 19.1.13).

The response to the first two questions was mixed, with residents generally reluctant to prioritise certainty or early input. Individual operators generally supported leaving the order of approvals to operators, one stated 'as long as the approvals that are required from the residents under the RV Act are made clear'.²⁴² Individual residents opposed this or had some concerns. WARVRA thought that ability to apply to the SAT for resident consultation to commence prior to planning or building approvals being sought would address their concerns.²⁴³ The industry peak bodies did not respond to these questions.

DPLH preferred RV Act applications to be made before any planning application but advised that a more flexible approach could be accommodated. It drew attention to the need to deal with some planning ramifications, such as planning approval allowing an operator to commence works before RV Act approval was obtained. It saw no issues in RV Act exceptions to some rights associated with planning approvals.

²⁴² For example, submission 141.

²⁴³ Submission 129.

No operator raised practical impact issues in requiring RV Act approval prior to implementing related planning, subdivision or building approvals.

Impact assessment

There is general support for a single process for significant RV changes, including its main features – the SAT making all decisions and resolving all disputes about significant village changes, the proposed criteria for a change to be significant, the three RV change categories and that SAT approval should be required for RVS winding down, RV Act memorial correction and some specific land and land use changes. Based on the consultation, Consumer Protection agrees that a judicial SAT member should approve winding down a RVS and for there to be appeal rights equivalent to those from a Supreme Court decision.

The lack of consensus about the significant change process applying to RV redevelopments that are not changes to village land or land use is addressed by the proposal 19.2 to define significant RV redevelopment as changes with the potential to affect residents' tenure and financial security, and those that are otherwise complex and require technical, legal or financial skills to assess their impact on rights and obligations. This is discussed further in part 34. All changes meeting these criteria would require SAT approval.

This acknowledges views that changes to community arrangements should be excluded from the significant change process and clarifies that minor redevelopments do not meet the criteria. These matters are better addressed through a different process.

It is proposed to introduce a process for the Commissioner to determine disputes about whether or not a change is significant rather than all these disputes be resolved by the SAT. This will reduce the burden on the SAT and be more suited to residents who are likely to be deterred by the formality of the SAT. It is also proposed to allow questions about the adequacy of consultation to be determined by the Commissioner for the same reasons. If disputes are not resolved at this level, the SAT would be the arbiter of whether the significant change process applies.

Which application should be made first, RV Act or planning, subdivision, building or other approval, will vary from significant change to significant change. To promote flexibility and ensure appropriate safeguards it is proposed the RV Act ensure that planning and other approvals are not acted on prior to the RV Act process occurring but do not specify the order of approvals.

The CRIS did not address SAT's powers or criteria for approval. Partial proposals have been developed and will be consulted on during drafting. For example, the SAT will need to consider the impact of land excision on the statutory charge securing RV land for residents' exit entitlement payment and will need power to extinguish that charge over land released from a RVS.

Landgate raised some technical questions about how changes to the land comprising a RV can be recorded in the Register of Titles under their processes for lodging and removing memorials.

The mechanism for this has been identified in consultation with Landgate. There will be further consultation with Landgate, DPLH and the SAT (as well as other stakeholders) during drafting.

Implementing recommendation 33 will allow operators to make a wider variety of significant changes to existing villages that can occur. Industry has identified provision for excision of land from a RV (recommendation 30) as particularly important to its ability to fund redevelopment for ageing villages. Also, while some significant changes may have been possible under the current legislation, uncertainty about this has restricted operators' willingness to undertake those changes and investors willingness to fund them.

Residents generally accept that a wider range of changes can benefit them or be necessary for long term RV viability, although some residents may experience changes they do not support and that would not previously have occurred. Residents will be reassured that significant village changes cannot occur without oversight and consideration of the impact on them. This may give consumers more confidence in the sector.

Requiring SAT's approval and associated processes for a wider range of changes have the potential for business costs to be incurred. Balanced against this, the wider range of changes that will be permitted have potential to generate business return. Certainty in whether a desired change is possible and the process for it to occur, and a process that can resolve all the matters that a complex change may involve offers business savings. Clarity about the process and the change will reduce disputes arising from confusion and uncertainty. The minimum consultation requirements recommended in part 35 are expected to support this reduction, as will the role of the Commissioner in determining confusion or disagreement about the nature of the change or consultation.

There is no comparative information available to assess the cost to government of the SAT, rather than the Supreme Court, dealing with RVS termination or memorial correction. SAT approval for some RV redevelopment matters will have SAT resource implications. The SAT has advised that it cannot identify these until after a DRIS is approved. This will be addressed when seeking approval to draft legislation.

There will also be costs for Consumer Protection in the Commissioner making determinations and these will also be addressed when seeking approval to draft.

Recommendation 33

Implement CRIS 4, proposal 19.1, to amend the RV Act to introduce a process that can deal with a range of significant retirement village (RV) changes, including land excision, and resolve all matters and disputes that these changes may involve and that includes the following features:

- a) minimum standards for resident consultation;**
- b) the SAT approving all significant changes; and**
- c) three significant change categories – winding down a RVS, memorial correction and village redevelopment.**

In addition, the RV Act be amended to also include:

- d) the SAT approval for winding down a RVS;**
- e) memorial correction made by a judicial SAT member;**
- f) further consultation occur during drafting on appeal rights;**
- g) the criteria for significant RV redevelopment be those recommended for CRIS 4, Part 19.2, namely;**
 - i) the Commissioner for Consumer Protection be empowered to determine disputes about whether a change is significant and requires the SAT approval;**
 - ii) whether the consultation process with residents has been followed;**
 - iii) appeal of the Commissioner's determination would be made to the SAT; and**
 - iv) the RV Act provide that that planning and other approvals required for a significant change to which the RV change process applies, cannot be acted on prior to completion of the RV Act process unless the State Administrative Tribunal (SAT) approves certain steps being taken.**

34. Significant village change categories

Issue

CRIS 4, part 19.2

Introducing a single process for significant RV changes involves addressing the problems of winding down a RVS and village redevelopment categories.

Winding down a RVS

The current RV Act provision for RVS termination has gaps in its consumer protections and creates uncertainty about whether and when a RVS has been legally terminated. The RV Act requires an operator to obtain Supreme Court approval to terminate a RVS unless no person admitted under that scheme remains in the RV. However, it also does not identify how a RVS is terminated (Supreme Court approval to terminate does not itself terminate a RVS) or whether a RVS is to be wound down before or after termination.

As a result, some operators are either vacating RVs without seeking Supreme Court approval to terminate the RVS or applying only after they have ceased implementing the RVS. This frustrates the court's ability to deny RVS termination or approve and supervise an appropriate winding down process. It also means that whether, and if so when, a RVS is legally terminated, as distinct from having ceased to be implemented, is difficult to identify.

Village redevelopment

Unlike the other two categories for significant changes to which the RV change process will apply, the RV redevelopment category includes a range of change types. Some types of change will always be significant and so require SAT's approval, such as a change to RV land. Other types of changes will be significant or minor on a case by case basis, depending on what is proposed, for example, redevelopment of a unit block as distinct from alterations to a single unit.

The RV Act therefore needs to address how stakeholders will identify when the RV change process will apply to a RV redevelopment.

Winding down a RVS and RV redevelopment – resident relocation

Provision for a greater range of RV changes to occur increases the prospect that residents will be required to relocate. The RV legislative protections in the event of forced relocation are more limited than those offered in other jurisdictions.

Objective

To ensure that the RV change process for:

- winding down a RVS — applies sufficiently early for effective SAT oversight and provides certainty in when a RVS is terminated; and
- RV redevelopment — does not unnecessarily require SAT's approval for a proposed change.

Policy proposal

CRIS 4 proposal 19.2 was that:

- SAT oversight be required for RV redevelopments that:
 - are complex;
 - may impact residents' financial or tenure security; and/or
 - require technical, legal or financial skills in order to assess its impact on rights and obligations;
- excising land from a RV, changing the way some land in a village is used and making RV product amenities and services open to the public meet these criteria; and
- the SAT resolve any disputes about whether a change meets the criteria for SAT's oversight.

Questions about winding down a RVS included the impact of changing the application from one to terminate a RVS to one to wind down a RVS, whether the SAT should be able to approve an operator taking some steps to wind down a RVS if the only outstanding issues are details about conditions, whether ability to temporarily wind down a RVS would be useful and whether a two-step SAT process – approval to wind down then SAT RVS termination – would clarify when a RVS is terminated.

Questions about resident relocation included whether the RV Act should impose minimum resident relocation obligations and whether stakeholders thought these should include certain requirements that other jurisdictions impose. These requirements are set out in the section below.

Stakeholder feedback

Eight submissions responded directly to CRIS proposal 19.2 and questions or some of them. Respondents included industry peak bodies, WARVRA, individual operators and individual residents. Further submissions provided feedback on matters relevant to the problems. The industry peak bodies and WARVRA also provided feedback on the issues during their 2020 working group meetings. Landgate, DPLH and the SAT were consulted in developing the policy approach.

Winding down a RVS

Respondents generally supported converting the application from one for approval for an operator to terminate a RVS to one to for approval to commence winding down a RVS. They also supported the SAT being able to allow an operator taking some steps to wind down the RVS prior to giving its final approval when the only outstanding matters are minor, provision for a temporary winding down and a two-step RVS termination process - SAT approval to wind down followed by the SAT terminating the RVS when the winding down was completed. The industry peak bodies agreed that provision for temporary winding down would be useful but made no further submission on this issue.

Reasons for support included that winding down would be more transparent and that the two-step process will address the lack of clarity in when a RVS is terminated.

WARVRA observed that the ability to temporarily wind down would be helpful when a RV was being redeveloped. It suggested that SAT's approval be required for any closure exceeding a month. An operator suggested a 12 month minimum closure for the application to be required. The industry peak bodies said no minimum period should be prescribed.

No respondent identified any adverse or cost impact.

Village redevelopment – proposal 19.2

Respondents generally supported the criteria for significant redevelopment, although they expressed some concerns about what SAT's oversight role would be.

WARVRA submitted that the criteria for a change requiring SAT's oversight should include that it affects village amenity, service to residents, 'more intangible interests' such as the desirable features of a village and residents' wellbeing and permanency.²⁴⁴ It submitted that any change that might possibly vary the ambience of a village or result in complaint by 5 per cent of residents should be referred to the SAT. It also considered that the SAT's oversight was required for all changes that are difficult for residents to properly assess.

On the particular matters that proposal 19.2 identifies (excising land from a village, changing the way some land in a village is used and making RV product amenities and services open to the public), WARVRA considered putting RVage land to an additional use required resident consultation only, with residents being able to refer any objection to the SAT.²⁴⁵

²⁴⁴ Submission 150.

²⁴⁵ Consumer Protection meeting with WARVRA on 8 September 2021.

Individual residents advised that opening amenities and service to the public had potential to impact their financial security and reduce their access to these amenities and services. WARVRA said these changes should only be permitted when they were not detrimental to residents.²⁴⁶

The industry peak bodies' support for the proposal was qualified. As noted in part 33, they supported expanding the SAT's jurisdiction to resolve 'complex matters such as significant RV changes and memorial matters', which includes partially lifting the memorial due to the land being excised. Their concerns are whether any changes to community arrangements will be subject to SAT's approval and more generally the range of RV redevelopments for which resident consent could be required.

An individual operator supported SAT's approval for RV land excision. Others submitted that the SAT should not approve RV amenities and services being opened to the public or adding land to a village.²⁴⁷

Resident relocation obligations

Residents and an operator supported the RV Act imposing minimum resident relocation obligations. The industry peak bodies made no submission on the relocation questions.

Question 19.2.9 asked whether operators should have obligations to:

- provide a minimum amount of notice of the relocation date;
- make alternate accommodation available or 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; and
- have a policy for relocation, including relocation within the village.

WARVRA said these requirements were 'excellent' and an operator that they 'appear reasonable'.²⁴⁸ WARVRA suggested residents be given a minimum 12 months' notice to relocate.

²⁴⁶ Consumer Protection meeting with WARVRA on 8 September 2021.

²⁴⁷ Submissions 143, 141 and 137 respectively.

²⁴⁸ Submission 141.

Question 19.2.10 asked whether alternate accommodation should be defined as:

- being of approximately the same standard as a resident's current unit or if not to that standards, agreeable to the resident;
- requiring no greater financial outlay on the part of the resident; and if not
- is or ought reasonably to be acceptable to the resident,
- what the features for alternate accommodation should be.

The respondents to this question agreed to the proposal without additional comment.²⁴⁹

Finally, question 19.2.11 asked if operators had these obligations, whether residents should be required not to unreasonably refuse to relocate. Respondents, including WARVRA and individual residents, supported this.

Impact assessment

Winding down a RVS

There is general support for clarifying the current uncertainties about RVS termination through requiring an application for SAT's approval to begin winding down a RVS and for the SAT to formally terminate the RVS when that is completed.

This process is expected to give confidence to residents that a RVS cannot be terminated by attrition²⁵⁰ and without their interests being taken into account. It has potential to reduce the risks for all stakeholders. For example, one operator invested a considerable sum in village redevelopment before applying to the Supreme Court for approval to terminate the RVS but the court did not give its approval.

Providing for the SAT to terminate the RVS on completion of RVS winding down and on being satisfied that any conditions for its approval to wind down have been met, will provide Landgate, any planning authorities dealing with applications regarding the former RV land and any persons looking to deal in that land, with certainty that the RV Act statutory charges have been extinguished and the RV Act no longer applies. This is likely to encourage investment in and development of former RV land.

This certainty avoids government costs incurred in Consumer Protection, Landgate and courts investigating whether a RVS has been terminated and if so when that occurred.

A RVS winding down process, in combination with the minimum resident consultation requirements recommended in part 35, is expected to offer savings in reduced resident concern and disputes.

Provision for the SAT to approve operators taking steps to commence winding down prior to formal approval means that disputes about minor matters will not unnecessarily delay RVS termination.

²⁴⁹ Submission 137 and WARVRA.

²⁵⁰ WARVRA raised RVS termination through 'sustained attrition' by stealth as a current resident concern.

The proposal may incur some additional costs but these are not expected to be substantial. There have been only two applications for approval to terminate a RVS since the RV Act was made in 1992. Even allowing for some informal terminations, applications to wind down a RVS are likely to be rare. Balanced against any additional resource costs, will be savings in the SAT dealing with all disputes in the same application rather than multiple applications going to different decision makers about different aspects of the same change.

Consultation on SAT's criteria for approval to wind down and terminate a RVS (for example, exit entitlements are paid and resident relocation obligations have been met) and ability to impose conditions will occur during drafting.

Village redevelopment

There is general support for the proposed criteria for what constitutes a significant RV redevelopment - the change has the potential to affect residents' financial or tenure security, is complex or requires technical, legal or financial skills to assess the impact on residents' rights and obligation.

There is general stakeholder agreement that SAT's approval should be required to excise land from a RV. Consumer Protection also agrees that SAT's approval is required and the recommendation for this implements the Final Report recommendation 30 - to provide a process to partially lift the RV Act memorial, as this first requires a process for land to be partially released from the RVS and so excised from a RV.

Views on requiring SAT's approval to put village land to an additional use, open RV amenities and services to the public and add land to a RV are more mixed.²⁵¹ WARVRA generally agrees with operators that residents should be consulted and have the ability, and therefore the responsibility, to refer disputes to the SAT but also wants some independent oversight that there is no detriment.

The recommendation in proposal 19.1 to give the Commissioner for Consumer Protection the power to determine whether a redevelopment is significant, and so requires SAT's approval, will allow parties to test views about putting land to an additional use or opening up RV amenities and services to the public in a quicker and less costly process than the SAT. This process is expected to address most disputes about whether a redevelopment is significant and appeals of the Commissioner's determination to the SAT are expected to be limited.

Further consultation on the criteria for requiring SAT's approval and regulations to support the new processes will occur during drafting.

Resident relocation obligations

There is general support for the RV Act to provide the minimum resident relocation rights and obligations set out in questions 19.2.9 to 11. No operator raised an impact. WARVRA observed that the provision will improve the rights some residents have under residence contracts. Some operators whose contractual rights do not meet the minimum standards will need to amend standard form contracts. This will occur as part of the general contract review the reforms will require.

Operators who do not develop formal relocation policies as part of their change processes when relocation is required will need to do this but formally recording a policy is not expected to be a significant cost. Operators who do not already assist residents to relocate will incur costs in fulfilling this new obligation. This is expected to be offset in part at least by a reduction in disputes. The new requirement for residents not to unreasonably refuse to relocate has potential to make relocation less protracted and reduce the need for operators to apply for a SAT order terminating a residence contract.

Recommendation 34

34.1 Amend the RV Act to provide that, for *winding down a Retirement Village Scheme (RVS)*:

- a) an application for the State Administrative Tribunal's (SAT) approval to wind down a RVS is to be made before an operator takes any steps to implement the decision to cease implementing the RVS;**
- b) the SAT can approve an operator taking some steps to wind down a RVS prior to final approval, when the only outstanding matters are minor and it will not be detrimental to residents;**
- c) a RVS is terminated by a SAT order and an operator can apply for that order on completion of the winding down process; and**
- d) the SAT can approve an operator temporarily winding down the RVS without terminating it.**

Further consultation occur during drafting on:

- a) criteria for SAT's approval to wind down and making an order terminating a RVS;**
- b) conditions that the SAT may impose; and**
- c) whether there should be minimum or maximum time periods for temporary winding down applications.**

34.3 Amend the RV Act to provide that, for significant retirement village (RV) redevelopments:

- a) that the criteria for requiring SAT's approval for change include complexity, potential for impact on residents' tenure or financial security and residents' ability to assess the impact without technical, legal or financial advice;**
- b) that an operator must obtain SAT's approval to excise land from a RV;**
- c) for regulations to provide guidance on the features of a change that mean it meets the criteria for requiring SAT's approval; and**
- d) for the Commissioner for Consumer Protection (Commissioner) to issue a determination on a dispute about whether the RV change process applies to a proposed change and for regulations to specify the process for this to occur and ability to refer a matter to the SAT.**

34.4 Amend the RV Act to provide that, for resident relocation obligations:

- a) operators have the following minimum resident relocation obligations, to:**
 - i) provide minimum notice of the relocation date;**
 - ii) make alternate accommodation available or assist the resident to obtain alternate accommodation;**
 - iii) pay the resident's reasonable relocation costs, including any utility connection or disconnection fees;**
 - iv) pay a resident's exit entitlement prior to vacation or within 10 working days of the resident leaving; and**
 - v) have a policy for relocation, including relocation within the RV.**
- b) alternate accommodation means:**
 - i) being of approximately the same standard as a resident's current unit or if not to that standards, agreeable to the resident;**
 - ii) requiring no greater financial outlay on the part of the resident; and**
 - iii) is or ought reasonably to be acceptable to the resident.**
- c) residents must not unreasonably refuse to relocate.**

35. Resident consultation

Issue

CRIS 4, part 19.3

The proposal for a single process for significant RV changes includes a proposal that the RV Act set minimum standards for operators' consultation with residents about a significant change. Experience with existing processes indicated that this guidance is needed. As reported in part 33, respondents supported this aspect of the proposal.

Objective

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

Policy proposal

CRIS 4, part 19.3 asked questions about the following six minimum consultation requirements, including whether stakeholders thought they were appropriate:

- ***residents be given formal notice of the change*** – which includes high level information, such as the proposed change, why it is proposed, the likely timeframe for implementing it, the likely impact on residents, that at least one residents' meeting be held to discuss the change and contact details for resident inquiries or suggestions;
- ***residents be given a draft change implementation plan (if necessary)*** – which provides more detail about the change and its impact on residents and is intended to be a tool that will encourage discussion, identify any missed impacts or opportunities and encourage agreement on the change or aspects of it and the way it will be implemented. For example: whether any building or SAT approvals are required to implement the change, details about the sequence of events and resident impact such as access restrictions, temporary withdrawal or variation of services, the need to relocate temporarily or permanently, any changes to fees and charges or village rules and any alternate arrangements or compensation that the operator proposes;
- ***when a village has a residents committee, prior residents committee consultation*** – about the change and information in the formal notice and draft implementation plan;
- ***draft individual resident impact statement (if necessary)*** – which deals with matters specific to an individual resident. For example, only some residents may need to relocate when a new community centre is proposed and the statement would provide the date by which the specific resident is to relocate, the alternate accommodation available to that resident or other arrangements specific to that resident;

- ***at least one residents' meeting*** – any additional meetings would be convened under current provision for residents' meetings to be held; and
- ***written operator response to written inquiry, request for information or proposal for variation to the proposed change or draft change implementation plan*** – requiring a written response ensures that questions are answered. There would also be a limit in the number of requests a resident can make within a prescribed time period.

Questions included whether minimum notice for a change should be prescribed and whether an agreed final implementation plan, a plan approved by the SAT and an agreed or SAT approved individual resident impact statement, should be enforceable, subject to provision for change by agreement or ability to apply to the SAT for variation.

Stakeholder feedback

Six submissions directly responded to the questions about the minimum consultation requirements. Respondents included industry peak bodies, WARVRA, operators and residents. A number of additional submissions provided information relevant to this issue. The industry peak bodies and WARVRA also provided feedback during the 2020 Working Group meetings.

Respondents generally supported the RV Act setting minimum standards for resident consultation but the industry peak bodies did not support the six proposed requirements.

Respondent support for the minimum requirements proposed in the CRIS

WARVRA and individual operators and residents supported the six CRIS minimum requirements for resident consultation. The operator, resident and WARVRA who responded to the impact questions agreed that the draft change implementation plan and individual resident impact statement had potential to give greater clarity to a proposed change and its implementation process, encourage both operators and residents to focus on impacts and reach agreement about a change and how it might occur and reduce uncertainty and dispute.

Most respondents also said that that final implementation plans and impact statements should be enforceable, subject to provision for variation when required.

Some feedback on the individual minimum requirements was:

- *formal notice* – some respondents suggested 12 months minimum notice for winding down a RVS;
- *draft change implementation plan* – WARVRA submitted this should address some additional matters such as that a development is funded and viable and impact on community matters such as 'activities, meetings, events, services, quality of life, benefits and amenity';
- *draft individual resident impact statement* – residents raised several matters they wanted this to address, confirming the importance they give to this requirement; and

- *written operator response to written inquiry etc* – WARVRA submitted this should include the words ‘with reasons why resident/s suggestions can or cannot be accommodated’.

The industry peak bodies agreed with ‘the need for rigorous consultation with residents prior to major village changes’ but submitted that the proposed approach is ‘onerous, lengthy and could be consolidated into a simpler approach that adequately caters for resident needs’. They previously expressed concern about the range of changes that would be considered significant. They also previously observed that prescribed or approved forms could assist less sophisticated operators to identify the matters and information that they needed to consult on.

Impact assessment

The RV Code currently requires operators to have an ‘appropriate procedure’ for consulting residents on a range of ‘substantial’ changes.²⁵² Significant village changes are a subset of these changes, being those that are particularly complex or that have potential to impact the financial or tenure security for residents as a group. The proposed minimum requirements stipulate the minimum steps that an appropriate procedure involves and provide a format for identifying and disclosing to residents the minimum information that meets the expectations of an appropriate procedure.

Other than the industry peak bodies, respondents support these minimum standards as appropriate and providing relevant information. The industry peak bodies concern that the requirements are onerous is more about potential for excessive application or prescription than the requirements themselves. Operators do not want burdensome obligations but residents also do not want to be overwhelmed with unnecessary detail or irrelevant information. The expectation is that for RVs that have residents committees, the information required and level of detail will largely be worked out with those committees.

The six minimum requirements are not expected to lengthen consultation for operators who already have an appropriate procedure. How lengthy a consultation is depends on the nature of the proposed change, how well it is explained to residents and operators’ ability or willingness to anticipate or respond to resident feedback and concerns. The minimum requirements do not impact the nature of the changes that may be proposed and respondents expect them to assist in explaining changes (give greater clarity to them, their implementation and impact), in reaching agreement and minimising disputes. The industry peak bodies’ submission that minimum response periods be prescribed, for residents as well as operators, will support shorter consultation periods.

Consumer Protection’s experience is that some operators spend a considerable amount of time and money in developing a specific consultation process for a particular significant change. This can involve legal advice and engaging consultation experts. Providing

²⁵² RV Code, clause 16.

guidance on what an appropriate process involves and the matters that need to be addressed through approved forms for notice, draft implementation plans and individual resident impact statements is likely to reduce these current compliance costs. Operators whose practices do not meet the current RV Code requirement for an appropriate consultation procedure will likely incur some costs in adjusting to express requirements for implementing significant changes. However, these operators are likely to benefit from less resident uncertainty and reduction in, or in the scope of, disputes.

Greater resident confidence in the consultation process carries potential for operators to introduce changes that may have been previously frustrated by resident uncertainty or suspicion.

Consumer Protection will likely experience some short term increase in requests for support in implementing the minimum requirements. It may also produce administrative guides for applying these to particular categories of significant RV change. Offsetting this, less resources will be expended in assisting operators to develop an appropriate consultation for a specific RV change and in responding to resident uncertainty, concerns and dispute. Minimum consultation requirements in the RV Act provide a clearer basis for Consumer Protection to assist when these issues do arise.

Further consultation during drafting the prescribed content for forms will ensure they are not unnecessarily onerous. Consideration will also be given to consolidating the minimum requirements and approving different forms for different categories of significant change.

Recommendation 35

Amend the RV Act to provide for a significant retirement village (RV) change process which includes the following minimum consultation requirements, subject to further consultation on consolidating them during drafting:

- a) residents be given formal notice of the change;**
- b) residents be given a draft change implementation plan (if necessary);**
- c) when a RV has a residents committee, consultation occur with the residents committee prior to formal notice and a draft implementation plan being given;**
- d) residents be given individual resident impact statements (if necessary);**
- e) at least one residents' meeting be held; and**
- f) operators provide written responses to written inquiry, request for information or proposal for variation to the proposed change or draft change implementation plan; and**
- g) make provision for:**
 - i) prescribing minimum notice for types of significant RV change; and**
 - ii) regulations to prescribe minimum content for approved forms.**

IMPLEMENTATION AND REVIEW

Many of the recommendations detailed in the Summary of Recommendations (pages viii to xx) will require implementation through amendments to the RV Act, which will require the approval of the Parliament. Other changes will be implemented through amendments to the RV Regulations and RV Code.

Subject to the Government's approval, Consumer Protection will progress the amendments to RV legislation in consultation with Parliamentary Counsel's Office.

Consultation

Consumer Protection will continue to consult with stakeholders on recommendations that require further input from both residents and the RV industry for the preparation of drafting instructions for amendments to the RV Act.

Other areas identified as requiring further consultation in this DRIS primarily relate to amendments to be made to the RV Code and RV Regulations. Consultation on these issues will occur at a later stage during the preparation of amendments to the RV Code and RV Regulations.

Transitional provisions

Many of the recommendations include transitional provisions to ensure that the RV industry has sufficient time to review and plan for the new laws. Consumer Protection will liaise with all stakeholders to keep them updated on the drafting progress and estimated timeframes for implementation of the new RV laws.

Community education campaign

A community education campaign targeting WARVRA, residents, RV industry peak bodies and independent operators will be implemented at the time when the new RV laws come into effect. The campaign will highlight the rights and responsibilities of both operators and residents under the new RV laws. It will also focus on educating the stakeholders about the need to plan for key transitional dates, such as when the new laws for payment of exit entitlements come into effect.

The campaign will use mediums such as regular email bulletins, social media, Consumer Protection's website, syndicated newspaper columns and direct contact with stakeholders to distribute information. Events will be organised for key stakeholder groups at which information will be presented along with an opportunity for questions to be asked about the new laws. Community telephone enquiries about implementation of the new laws will be taken by Consumer Protection's contact centre and referred to relevant staff members for assistance.

Evaluation

Consumer Protection will monitor compliance with the new laws following implementation of the new legislation. Information will be gathered to identify the number and nature of enquiries and complaint trends before and after implementation of the legislation. Consumer Protection will consult directly with the industry peak bodies, WARVRA and independent operators and residents seeking feedback about implementation of the new RV laws. The information gathered in these ways, will be used to identify any issues in the sector that may require addressing or further explanation and guidance.

Appendix 1: Summary of number of responses, category and respondents to CRIS written submissions

CRIS part	Issue	Number of responses	Category and number of respondents	
4.1	Amending core definitions to improve understanding of RV product and price	15	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Operator Employee	4 3 6 1 1
4.2	Requirements for advertising to improve understanding of the RV product	19	Consumer: Resident Consumer: Family Consumer: Consumer Advocate Industry: Owner Other: Operator Employee	8 1 3 6 1
5.1	Improving upfront pricing information	15	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Operator Employee	5 3 5 1 1
5.2	Improving upfront pricing information by means of an Average Resident Comparison Figure (ARCF)	18	Consumer: Resident Consumer: Family Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Operator Employee	6 2 3 5 1 1
6.1	Time limit for exit entitlements	90	Consumer: Resident Consumer: Family Consumer: Former Resident Consumer: Consumer Advocate Industry: Owner Other: Unknown	66 10 2 4 7 1
6.2	Clarifying the term exit entitlement	9	Consumer: Resident Consumer: Family Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	2 2 1 3 1
6.3	Extending the cap on recurrent charges to strata and purple title villages	9	Consumer: Resident Consumer: Family Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	4 1 1 2 1
7	Resident consent to budget	18	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	13 1 3 1
8.1	Mandatory reserve funds	49	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	43 2 3 1
8.2	Capital works definitions and funding rules	8	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	4 1 2 1

CRIS part	Issue	Number of responses	Category and number of respondents	
8.3	Obligation to maintain capital items	10	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	6 1 2 1
9.1	Refurbishment	61	Consumer: Resident Consumer: Family Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	55 1 1 3 1
9.2	Refurbishment	8	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	3 1 3 1
9.3	Property condition report	9	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	4 1 3 1
10.1	Operator responsibilities	9	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	4 1 3 1
10.2	Joint responsibilities of entities	6	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	1 1 3 1
11.1	Conduct obligations of operators	58	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	51 1 3 3
11.2	Conduct obligations of residents	9	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	3 1 2 3
13.2	Public database of retirement villages	7	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Other: Operator Employee Industry: Industry Body	1 1 3 1 1
14.1	Amendments to clarify definition of scheme, multi-site villages, one village per scheme and premium	8	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Industry: Advice Provider Other: Operator Employee	1 1 3 1 1 1
15.1	Multi-site villages	5	Consumer: Consumer Advocate Industry: Owner Other: Operator Employee Industry: Industry Body	1 2 1 1
15.2	One village per scheme	4	Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Operator Employee	1 1 1 1

CRIS part	Issue	Number of responses	Category and number of respondents	
16.1	Definition of premium	5	Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Operator Employee	1 2 1 1
16.2	Definition of premium	5	Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Operator Employee	1 2 1 1
18.1	Capturing land use for amenities and services	8	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Government	3 1 2 1 1
18.2	Retirement village comprises a whole parcel/s of land	6	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Government	1 1 2 1 1
18.3	RV Act memorial	7	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Government Other: Property Developer	1 1 2 1 1 1
19.1	Single process for significant village changes	9	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Other: Government	4 1 3 1
19.2	Retirement village change categories	6	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	1 1 3 1
19.3	Minimum consultation requirements	5	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	1 1 2 1
20.1	Multiple residence contracts – pre-contract disclosure and cooling off	8	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Government	3 1 2 1 1
21	Application of RV Act to residential aged care facilities	6	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	3 1 1 1
22.1	Dispute resolution	12	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Government	7 1 2 1 1
22.2	Building defects	11	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	7' 1 2 1

CRIS part	Issue	Number of responses	Category and number of respondents	
22.3	Insurance	9	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	5 1 2 1
22.4	Strata title retirement villages	8	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body Other: Government	4 1 1 1 1
22.5	Provision of private home care services in retirement villages	8	Consumer: Resident Consumer: Consumer Advocate Industry: Owner Industry: Industry Body	4 1 2 1
	Total number of responses	512		

Appendix 2: Obligations of operators currently in the RV Code:

Clause 3 outlines general principles that guide all those involved in the provision of retirement villages and related services and balance the rights of residents and operators in their relationship towards each other. Obligations of operators that are implied in these general principles include the requirement to:

- consider the well-being and interests of residents in relation to operators' rights;
- recognise the freedom of decision and action of each resident in the relationship between a resident and the operator and restrict this freedom as little as possible;
- recognise the relationship of residents with their families and past and present communities, and take into account the cultural, religious and linguistic background of each resident ; and
- treat residents fairly and not abuse or exploit them.

Clause 4 sets out the objectives of the RV Code. Operators' obligations that are implied in these objectives are to:

- trade fairly in the provision of services and in the promotion, sale or grant of rights in, and operation of the retirement village;
- disclose all relevant information to a person who is considering becoming a resident of a retirement village;
- ensure that contracts for the provision of amenities and services in a retirement village contain full details of the obligations and entitlements of the resident and the operator;
- facilitate an effective means of consultation between the operator and the residents on the management of a retirement village;²⁵³ and
- establish appropriate mechanisms for the resolution of any dispute in a retirement village between the residents and the operator or between residents.

Clause 5 outlines a number of overarching residents' rights that operators must observe, including the obligation to respect a resident's right to:

- privacy in the resident's residential premises, subject to the right of the operator to inspect the premises, as set out in the residence rules and the residence contract;
- quiet enjoyment of the resident's residential premises and any communal amenities, and
- complete autonomy over the resident's property and personal and financial affairs, subject to any legislative restriction or any other restriction provided for in the residence contract.

²⁵³An explanatory note below clause 4 contains examples of effective consultation. These examples were added as a result of the review of the RV Code in Stage 1 reforms conducted in 2014 to clarify the meaning of consultation that is genuine and effective following complaints from residents that they had not been consulted by operators on changes that directly affect them.

Clause 16 outlines operators' obligations to:

- provide prudent, efficient and economical management of the retirement village, having regard to the terms and conditions of the residence contract and any related contracts
- establish appropriate procedures for
 - consulting with residents on the future planning and budgeting of the retirement village and any other proposed change to the operating financial arrangements of the village;
 - providing the residents with access to management information relating to the operating financial arrangements of the retirement village; and
 - consulting with the residents on the day-to-day running of the retirement village and any issues or proposals raised by the residents; and consulting with residents' committees.

Clause 23 deals with residence rules and requires operators to establish a set of residence rules specific to their village covering the rights and obligations of the residents of the village.

- The rules must be consistent with the RV Code, RV Regulations and the RV Act (WA).
- The operator must consult with the residents before making, changing or revoking the rules, allow residents to change or revoke the rules by special resolution, and not unreasonably withhold agreement to the special resolution.

Appendix 3: Early disclosure agreements

Table 13: Early disclosure agreement: Example A²⁵⁴

Items for disclosure	Option 1 – Peace of Mind	Option 2 - Capital Share
Stamp duty	X (except for freehold-title homes)	X (except for freehold-title homes)
Deferred Management Fee	✓ 5% per annum over 5 years (max. 25%)	✓ 5% per annum over 7 years (max. 35%)
Reinstate/renovation costs (state by state dependant)	X (except beyond fair wear and tear)	✓ resident contribution dependant on works required
Capital gain/loss	X 0%	✓ 50%
Sales/admin costs (unless a 3rd party sales agent is appointed)	X Nil	X Nil
Repayment timing after departure guarantee[^]	6 months	18 months
Benefits	<ul style="list-style-type: none"> ✓ Provides a clear picture of expenses when selling the home ✓ Financial security - know exactly what costs you incur upon leaving the village; can plan for next steps accordingly whether it be aged care or children's inheritance. ✓ More attractive for the risk averse customer 	<ul style="list-style-type: none"> ✓ Share in capital gains ✓ Good option if purchasing in an area where you expect property prices to grow
Things to consider	If the value of the home increases over time, you will not receive any capital gains	Share in capital loss if property value drops Cannot forecast costs with certainty

²⁵⁴ The figures referred to in the table above apply to Independent Living Units (ILUs) and may indicate features which may differ or which are not available for all homes or may vary between homes. It is recommended you seek independent legal and financial advice before entering into a contract.

Table 14: Early disclosure agreement: Example B²⁵⁵

Items for disclosure	Option 1 Standard Capped DFF, ²⁵⁶ X% exit price	Option 2 Standard Capped DFF, X% exit price	Option 3 Prepaid Entry Price Plus X% Facilities Fee
Facilities Fee	Accumulation over 5 years, maximum X%	Accumulation over 6 years, maximum X%	Up front X% in addition to Entry Price
Facilities Fee Accumulation	10%, 10%, 5%, 5%, 5%	X%, X%, X%, X%, X%	X% Up front
Facilities Fee Basis	On exit, deduct % of entry price – Deferred Facilities Fee	On exit, deduct % of entry price – Deferred Facilities Fee	X% Up front
Capital gain/loss	100% to Operator	Shared	100% to resident
Maintenance Reserve Fund	Operator	Resident pays on exit (X% per annum for 10 years)	Resident pays on exit (X% per annum for 10 years)
Refurbishment	Operator	Operator Pays, Resident reimburses operator	Operator Pays, Resident reimburses operator
Sales and Marketing Fee	Operator pays	Resident pays	Resident pays
Administration	\$ X on entry	\$ X on entry	\$ X on entry
Additional Costs	Resident Pays	Resident Pays	Resident Pays
‘Buyback’ Period	45 Days	3 years	3 years

²⁵⁵ Everyone's situation is unique so Consumer Protection advises seeking independent legal and financial advice before deciding.

²⁵⁶ DFF – Deferred Facilities Fee

Appendix 4: Budget and other financial obligations

RV Code clauses 16 - 20 and 26

Operators must establish appropriate procedures for:

- consulting with residents on future planning and budgeting;
- proposed changes to the operating financial arrangements of the village; and
- access to management information about the operating financial arrangements of the village.

Operators must give notice of proposed operational and reserve fund annual budgets by displaying separate budgets in the village no later than one month before the end of each financial year and include:

- proposed income and expenses;
- annual accounts of actual expenditure;
- proposed changes in fees, amenities and services;
- consistent and prescribed separate line items; and
- any additional line items headings subtotals relevant to understanding a villages financial performance.

Operators must provide:

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

Statements must show actual and budget amounts for each line item.

Operators must respond to reasonable requests for additional financial information within 10 working days of the request.

Operators must explain:

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

Operators must give residents a minimum of 10 working days to consider the budgets.

Operators must hold an annual budget meeting of residents before the end of each financial year.

Operators must hold a financial statements residents' meeting within 5 months of the end of each financial year.

The State Administrative Tribunal (SAT) may hear disputes in relation to increases in recurrent charges in the proposed budgets.

Government of Western Australia

Department of Mines, Industry Regulation and Safety

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