

Review of retirement villages legislation

Issues paper

June 2007



Department of Consumer
and Employment Protection
Government of Western Australia
Consumer Protection Division

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How to participate in the review

Members of the public and interested organisations are encouraged to write to Consumer Protection about the issues raised in this paper or any other matters relating to retirement villages legislation. To make an effective submission, it is suggested that you:

- quote the number of the question to which you are responding;
- provide a clear and concise response to each issue by outlining your opinions, the reasons for them, and your suggestions on ways to improve the situation. Your submission does not need to be long or complex and you do not need to respond to every issue; and
- ensure that your submission only addresses issues that relate to retirement villages.

A summary of the questions raised is available in electronic format at www.docep.wa.gov.au and may be down loaded by following the links to the *Retirement Villages Legislation Review*. This summary will assist you in making a submission.

Please address your submission to:

Review of Retirement Villages Legislation
Department of Consumer and Employment Protection
Locked Bag 14 Cloisters Square
PERTH WA 6850
Fax: (08) 9282 0727
Email: retirementreview@docep.wa.gov.au

Where do I get copies of the current laws?

Copies can be purchased or downloaded from:
State Law Publisher
Ground Floor, 10 William Street (river end)
PERTH WA 6000
Telephone: (08) 9321 7688
Website: www.slp.wa.gov.au

Closing dates for submissions: 5pm Friday 31 August 2007

Executive Summary

The accommodation needs of Western Australia's ageing population are of growing significance to the Government. Retirement village living is becoming a desirable housing option for many retirees and it is essential that Western Australia has legislation in place to protect the interests of senior consumers and to ensure the viability of the retirement village industry.

Consumer Protection is currently carrying out a review of the operation and effectiveness of legislation regulating the retirement village industry in Western Australia. This legislation comprises the *Retirement Villages Act 1992*, *Retirement Villages Regulations 1992*, and the *Code of Fair Practice for Retirement Villages*, which is prescribed under the *Fair Trading Act 1987*.

In July 2006 Consumer Protection commenced Stage 1 of the review. This involved a series of 18 public consultation meetings that were held in metropolitan and regional areas over a three-month period. Over 900 people attended and almost 200 written submissions were received.

This Issues Paper marks the commencement of Stage 2 of the review. Consumer Protection is seeking feedback from all members of the community, particularly those in retirement villages and those thinking about moving to a retirement village. Feedback from industry is also important to ensure that any changes proposed are practical, feasible and viable.

Following a two-month long consultation period, Consumer Protection will analyse submissions and prepare a report making recommendations to Government regarding the future regulation of the retirement village industry.

This paper attempts to deal with issues in a chronological fashion to reflect the different stages experienced by residents and prospective residents. These issues are divided into the following parts:

- ***before moving into a retirement village*** (includes issues which impact on making a decision about whether to move to a retirement village and choosing a suitable retirement village in which to live);
- ***while living in a retirement village*** (includes issues which impact on factors such as on-going costs, dispute resolution, and quiet enjoyment);

- ***on leaving a retirement village*** (includes issues which impact on selling a unit or interest in a retirement village, exit fees, and inheritance issues); and
- ***miscellaneous issues*** (includes issues such as whether the legislation should be retrospective, enforcing the law, title matters and the structure of future legislation).

The key issues explored in this paper are:

- claims by residents that developers are not fulfilling promises made in promotional material;
- residents' and prospective residents' access to independent advice both before and after entering into contracts;
- ongoing fees and charges (many residents are on fixed incomes and do not have the financial resources to absorb large increases in recurrent charges);
- ongoing repairs and maintenance (concerns about the absence of reserve funds for repairs and maintenance, unexpected additional costs to fund the replacement of capital items, lack of transparency with reserve fund accounting and proposed use of those monies, and delays in repairs);
- dispute resolution (awareness of the right to complain, fear of victimisation, ineffectiveness of existing dispute resolution mechanisms, and perceived bias of such mechanisms against residents);
- refurbishment costs on vacation of premises (particularly where residents reside for a relatively short period of time and must bear the cost of substantial refurbishment as a condition of their contract);
- fees payable on termination of residence contracts; and
- problems associated with villages that are on a "purple-title", (particularly where unanimous agreement from residents on specific title matters is required);

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SECTION 1

INTRODUCTION

1 Introduction

1.1 Terms of reference

To review the operation and effectiveness of retirement villages legislation in Western Australia.

1.2 Reasons for the review

The Retirement Villages Act was introduced in Western Australian in 1992 and has not been altered significantly since coming into effect. The retirement village industry has experienced considerable change since the Act was introduced and, in view of the State's ageing population, significant growth is projected for the future.

The accommodation needs of Western Australia's ageing population are of growing significance to the Government. Retirement village living is becoming a desirable housing option for many retirees, and it is essential that Western Australia has legislation in place to protect the interests of senior consumers, and to ensure the continued viability of the retirement village industry.

The review fulfils a requirement under section 83 of the *Retirement Villages Act 1992* to conduct a review of the operation and effectiveness of the Act every five years. Section 43 (4) of the Fair Trading Act 1987 requires that the Code is reviewed every three years, otherwise it lapses.

As the obligation to conduct both reviews coincided in 2006, The Department of Consumer and Employment Protection (Consumer Protection), with the approval of the Minister and the support of key stakeholders, decided to undertake a concurrent review of the Act and the Code.

The provisions contained in the 2003 Code were reinstated in the 2006 Code in order to provide Consumer Protection with the necessary time to conduct a comprehensive review of the legislative package.

1.3 Purpose of this Issues Paper

The purpose of this Issues Paper is to invite feedback from the public, industry and consumer groups on the various issues raised in relation to retirement villages legislation. The Issues Paper provides information about the legislation, highlights the key issues being considered by the review, and proposes options for change.

1.4 The review process

The review of retirement villages legislation incorporates four important phases. These phases are outlined below:

1. Consumer Protection conducted 18 public meetings in both metropolitan and regional Western Australia between July and September 2006. Over 900 people attended these meetings and a large number of issues relating to retirement villages were raised.
2. Consumer Protection called for written submissions on issues relating to retirement villages in early August 2006, with submissions closing at the end of September 2006. Almost 200 written submissions were received.
3. Consumer Protection has distributed this Issues Paper to all stakeholders, as well as to members of the public who participated in the first consultation phase.
4. Consumer Protection will prepare a Statutory Review Report, incorporating feedback obtained from public consultation. The report will comment on the current operation of retirement village legislation and its effectiveness in regulating the retirement village industry. Submissions by stakeholders and the broader public will assist in formulating recommendations for changes to the legislation. Once this report is complete, the Minister will table the Report before Parliament.

1.5 Confidentiality

Please note that when you lodge a submission it becomes a public document which can be viewed by others or quoted for the purpose of this project. If you do not want your submission to be made public or quoted, please advise Consumer Protection of your wishes in writing when making your submission. You should be aware, however, that the right of third parties to access documents in the possession of Consumer Protection under the *Freedom of Information Act 1992 (WA)* means that Consumer Protection cannot guarantee the confidentiality of your submission.

SECTION 2

RETIREMENT VILLAGES LEGISLATION

2 Retirement villages legislation

2.1 Overview of the current legislation

The main laws that regulate retirement villages in Western Australia are the:

- *Retirement Villages Act 1992* (the Act);
- *Retirement Villages Regulations 1992* (the Regulations); and
- *Code of Fair Practice for Retirement Villages* that is prescribed under the *Fair Trading Act 1987* (the Code).

The Act, the Regulations and the Code form a package for the regulation of the retirement village industry in Western Australia. The *Fair Trading Act 1987* also applies to retirement villages.

2.2 Objectives of the Act

The objective of the Act is stated as:

“An Act to regulate retirement villages and the rights of residents in such villages and for related purposes”.

2.3 Objectives of the Code

The objectives of the Code are stated as being to:

- a) promote fair trading practices in the provision of retirement villages and related services by setting out the rights and obligations of residents and administering bodies in retirement villages;
- b) encourage fairness in the promotion, sale or grant of rights in, and operation of, retirement villages;
- c) require the disclosure of all relevant information to a person who is considering entering a particular retirement village;
- d) require contracts for the occupation of residential premises and for the provision of amenities and services in a retirement village to contain full details of the obligations and entitlements of the resident and the administering body;
- e) facilitate consultation between the administering body and the residents on the management of a retirement village; and
- f) establish appropriate mechanisms for the resolution of any dispute in a retirement village between the residents and the administering body or between residents.

2.4 Legislation in other jurisdictions

All Australian jurisdictions make provision for the regulation of retirement villages as detailed below.

Jurisdiction	Primary Legislation
Australian Capital Territory	<i>Retirement Villages Industry Code of Practice 1999</i>
New South Wales	<i>Retirement Villages Act 1999</i>
Northern Territory	<i>Retirement Villages Act 1995</i>
Queensland	<i>Retirement Villages Act 1999</i>
South Australia	<i>Retirement Villages Act 1987</i>
Tasmania	<i>Retirement Villages Act 2004</i>
Victoria	<i>Retirement Villages Act 1986</i>
Western Australia	<i>Retirement Villages Act 1992</i>

A number of Australian jurisdictions have completed comprehensive reviews of their retirement villages legislation in recent years. An analysis of the outcomes of these reviews, and subsequent amendments made as a result of these reviews, is included in section 8.3 of this Issues Paper.

.....The Act, Regulations and Code form a package for the legislation of the retirement village industry in Western Australia.....

SECTION 3

THE RETIREMENT VILLAGE INDUSTRY

3 The retirement villages industry

3.1 Profile of the industry

The Australian population is ageing, with the proportion aged over 65 years increasing each year. This trend is predicted to continue throughout the 21st century. The Australian Bureau of Statistics (ABS) social trends data indicates that in 2005, WA had a total population of 2.029 million of which 11.8 per cent were aged 65 and over. This equates to a population of more than 239,000 aged 65 years and over.

The ABS forecasts that in 2051, 22.2 per cent of Western Australia's population will be aged over 65. This means that the proportion of the aged population in the State will effectively double in less than half a century. The retirement village industry is clearly a growth industry and, with the ageing population, it is likely to continue to expand in the future.

The WA retirement village industry is comprised of villages that are privately run and operated on a "for-profit" basis, as well as many "not-for-profit" villages that are owned and operated by churches, charities and local councils. It appears that Australia-wide, the sector is roughly split 60 per cent for-profit and 40 per cent not-for-profit.

Aged and Community Services WA, the peak industry body representing the not-for-profit sector of the industry, currently has member retirement villages representing about 7,512 independent living units. The Retirement Village Association represents the for-profit sector of the industry and lists over 90 member villages in Western Australia.

.....The retirement village industry is clearly a growth industry and, with the ageing population, it is likely to continue to expand in the future.....

3.2 What is a retirement village?

The term “retirement village” covers various types of accommodation that is specifically designed or geared for people who no longer work, and restricted to those over 55 years of age. A retirement village is defined in the Act¹ as:

“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.”

A retirement village scheme is defined as:

“a scheme established for retired persons or predominantly for retired persons, under which -

- a) residential premises are occupied in pursuance of a residential tenancy agreement or any other lease or licence;
- b) a right to occupation of residential premises is conferred by ownership of shares;
- c) residential premises are purchased from the administering body subject to a right or option of repurchase;
- d) residential premises are purchased subject to conditions restricting the subsequent disposal of the premises; or
- e) residential premises are occupied under any other scheme or arrangement prescribed for the purposes of this definition,

but does not include any such scheme under which no resident or prospective resident of residential premises pays a premium in consideration for, or in contemplation of, admission as a resident under the scheme.”

In view of the fact that there is no licensing or registration regime for retirement villages, the only way to determine whether a complex of residential premises can be considered a bona fide retirement village, is through reference to this relatively cumbersome definition.

Historically many retirement villages were established by, and operated on a not-for-profit basis by, church groups, charitable organisations and government agencies. In recent years, many retirement villages have been established by developers on a for-profit basis.

There is considerable diversity in the types of retirement villages that exist within Western Australia. Retirement villages provide accommodation ranging from independent living units and serviced apartments to hostel accommodation and full-care nursing home facilities.

¹ *Retirement Villages Act 1992* Part 1

The range of facilities and services provided by the various retirement villages is also varied and continually expanding. Some villages provide accommodation with no onsite support or facilities, whereas others may provide facilities such as swimming pools, clubrooms and bowling greens, as well as the services of caretakers.

A number of different types of ownership and occupancy rights exist in retirement villages in Western Australia. In some villages residents own property either through a “strata title” or “purple title”, whereas in others the right to reside may be obtained through a lease or licence arrangement. Further information about ownership and occupancy rights is provided at section 8.4 (Appendix 4) of this Issues Paper.

There appears to be some confusion as to the difference between a “retirement village” and a “lifestyle village”. The term lifestyle village can be a source of confusion because retirement villages and “residential parks” (or caravan parks) are sometimes also referred to as lifestyle villages for marketing purposes.

Some retirement village operators prefer to use the term lifestyle village rather than retirement village in order to promote the positive aspects of residing in such villages. The term lifestyle village avoids the sometimes negative associations with residences which accommodate older people who need a high level of care.

Residential parks differ from retirement villages in that they provide land for lease to residents who own mobile homes or caravans. These residents do not pay an up-front premium, do not have permanent “for-life” tenure, and are not protected by a memorial on the title of the land. The legislation which applies to residential park tenants is the *Residential Parks (Long-stay Tenants) Act 2006*.

.....Some retirement village operators prefer to use the term “lifestyle village” rather than “retirement village” in order to promote the positive aspects of residing in such villages.....

SECTION 4

BEFORE MOVING INTO A RETIREMENT VILLAGE

4 Before moving into a retirement village

4.1 Marketing procedures

What the current legislation provides²

All promotional or sales material provided by the administering body must be truthful, accurate, unambiguous and consistent with the legislation. Village owners must obtain all necessary consents from the relevant authorities to develop a retirement village before any sales promotion of the village can be undertaken. In any promotional material, developers must specify the latest date (or specify an event that must occur) for the provision of particular facilities and services. For example, for those retirement villages that are constructed in stages, the provision of facilities such as a community hall may be contingent upon the completion of a particular stage.

Where promotional or sales material refers to the availability of residential care services under the *Aged Care Act 1997*, a statement must be included on the promotional or sales material stating that “it is not possible for an organisation providing services for older people to guarantee admission to Commonwealth funded residential aged care facilities”. Admission to these facilities is allocated on a “needs basis”.

Provisions contained within the *Fair Trading Act 1987* (the FTA) also regulate the conduct of operators of retirement villages. Division 1 of the FTA deals with such matters as misleading or deceptive conduct, unconscionable conduct and false representations.

Under the Regulations, all operators of residential premises in retirement villages must provide an information statement to prospective residents at least five working days before that person enters into a residence contract. This statement covers a wide range of matters that prospective residents should be aware of when making a decision about a particular village. This statement is discussed in more detail in section 4.3 of this paper.

There are cooling-off provisions within the Act which provide some degree of protection for residents and prospective residents. In general, a prospective resident is entitled to a cooling-off period of five working days after the date of the contract. These provisions are discussed in more detail in section 4.5 of this paper.

² Division 2 of the Code

Identified issues

Promised facilities

A number of residents complained that facilities, such as a clubhouse, pool, spa, security, and parking, were promised in marketing brochures but never built, or not provided in accordance with the stated date. Some residents commented that they had made decisions based on the facilities that were promised in promotional material. When these facilities were not provided, they felt that they had been let down or lied to.

The provision of facilities being contingent upon a specific event (such as the completion and sale of the first stage of building), can create problems for developers, as sales could be slower than predicted, resulting in delayed construction of facilities. Disclosure provisions currently allow developers to specify an event that must occur in order for facilities to be provided. As this may create uncertainty for residents, a possible solution could be to remove this provision. This could, however, result in difficulties for developers, who may be relying on profits provided by the sale of a specific number of units to finance the provision of facilities.

Aged care facilities

Some residents commented that they had been led to believe that they could automatically access on-site Commonwealth funded aged care facilities if available, and were very disappointed to discover after moving into a retirement village, that this is not necessarily the case. Residential aged care is financed by the Commonwealth Government. Funding for placements is determined using a need-based classification model and cannot be guaranteed by village operators.

Industry compliance with legislation

Several residents criticised Consumer Protection for not acting on complaints about developers not fulfilling promises made in promotional or marketing material. Consumer Protection has a responsibility to investigate any complaints that are brought to its attention. Consumer Protection has recently investigated a retirement village owner for breaching provisions of the Fair Trading Act, in relation to not providing facilities that were promised.

While there are existing protections under the Code for the residents concerns outlined above, it may be that there is a problem with industry complying with the Code. For this reason it may be useful to consider ways in which Consumer Protection could ensure that industry complies with the Code as well as raise greater awareness amongst residents and prospective residents as to their right of redress under the legislation.

The most recent review of the *Fair Trading Act 1987* recommends that the Commissioner should have the power to require a person to substantiate claims made regarding supply of goods or services. The adoption of this recommendation would provide greater protection for residents and prospective residents in terms of their ability to rely on information contained in promotional material.

Marketing information

While it is understood that there is a strong interest in marketing a village in the most effective manner possible, industry (both profit and not-for-profit) has a general responsibility to communicate with prospective residents in a way that is clear and easy to understand. It is important that information provided in marketing or promotional material is accurate and of substance.

Although the information contained in the prescribed information statement³ is comprehensive, this statement would usually be provided after a person has made a decision to enter into a residence contract with a particular village. There is no obligation on the part of the operator to provide such information in any marketing or promotional material. Therefore the usefulness of this statement is somewhat limited in the early stages of choosing a retirement village. This problem would not necessarily be addressed by increasing disclosure requirements as many participants felt that the amount of information already provided is excessive and difficult to understand. (Disclosure requirements are discussed in more detail in section 4.3 of this paper.)

The cooling-off provisions contained in the Act have a relatively limited life span and as such are useful only prior to moving into a retirement village (see also section 4.5). It is often the case that problems related to unmet expectations arise long after a resident has moved into the village.

³ Schedule 1, Form 1 of the Regulations

Possible options to consider

- Maintain the status quo.
- Redraft the statement relating to aged-care facilities, as it is apparent that a number of residents are unclear about the implications of the current statement.
- Remove the disclosure provision that allows developers to specify an event that must occur in order for facilities to be provided, as this results in uncertainty for residents.
- Ensure that prospective residents are able to obtain an information statement from a particular village upon request, not necessarily immediately prior to entering into a contract.
- Consumer Protection allocate additional resources to undertake more monitoring and compliance work, and also develop educational initiatives to raise community awareness of both industry and consumer rights and responsibilities in relation to the marketing of retirement villages.
- Establish an independent advisory service to provide impartial advice on retirement villages so that prospective residents don't receive information solely from a marketing perspective.

QUESTION 1:

In reference to the options outlined above, which, if any, do you think would be most effective in addressing some of the problems associated with the marketing of retirement villages and why?

QUESTION 2:

Are there any other options that you believe should be considered?

4.2 Pre-entry fees

What the current legislation provides

The legislation does not currently regulate pre-entry fees such as waiting list fees, holding fees, or contract preparation fees.

Identified issues

Waiting list fees

The issue of having to pay a fee to register on a waiting list was raised during the consultation phase of the review. Many participants commented that such fees are excessive and beyond what could be considered to be an administrative cost. In a separate review of the *Residential Tenancies Act 1987*, the issue of option fees is being closely considered. An “option fee” is essentially a fee charged by a real estate agent while they consider an application for tenancy for a rental property. As with option fees, there are some questions as to the fairness of imposing a fee to register on a waiting list and whether it is warranted. It is in the interest of the operator to have a waiting list of potential residents to fill vacancies as they arise and so it is unlikely that the abolition of such fees would adversely impact upon operators. It is recognised that prohibiting such fees may result in some loss of revenue, however it is important that any fees charged are justifiable on a cost recovery basis.

In NSW the maximum waiting list fee that can be charged is \$200. If a fee is to be charged, the operator must have a written waiting list policy. A copy of the waiting list policy and a receipt must be given to the prospective resident or their representative, who pays the required fee. A waiting list fee is fully refundable to the prospective resident or their estate, if he or she is unable to, or no longer wishes to, be a resident of the village. A refund must be made within 14 days of a written request.

Holding and contract preparation fees

Reviews of retirement village legislation in other Australian states have highlighted concerns regarding the cost of holding fees and contract preparation fees. In some states, operators allow prospective residents to pay a holding deposit on particular premises. This prevents the operator from offering the premises to any other person pending the resident’s entry into a residence contract with the operator. In NSW, a holding deposit can only be charged on vacant or new premises or if the existing resident has given notice to vacate. As with waiting list fees, a holding deposit is fully refundable within 14 days of a written notification that the prospective resident does not intend to enter into the contract or has died.

There are usually legal and other costs associated with the preparation of village contracts. In NSW, the legislation provides that these costs must be split equally between the incoming resident and the operator. The operator must provide the resident with a copy of any account in respect of these expenses. The incoming resident is not required to pay his or her share of the costs until the operator has provided this information.

Possible options to consider

- Maintain the status quo.
- Regulate holding fees and contract preparation fees using the provisions contained in NSW legislation as a guide.
- Impose monetary limits on pre-entry fees such as waiting list fees, holding fees, and contract preparation fees.
- Prohibit fee charges for registering on a waiting list.

QUESTION 3:

Should the fees charged by village operators for registering on a waiting list, be regulated or prohibited by government?

QUESTION 4:

Is there a need for holding fees or contract preparation fees to be regulated by government?

4.3 Disclosure to prospective residents

What the current legislation provides⁴

Currently all retirement villages operators must provide a package of information to prospective residents at least five working days before that person enters into a residence contract. This package includes a comprehensive information statement (Form 1), a copy of the residence rules and a copy of the Code. Form 1 is a checklist which contains a number of questions which the operator must address in writing. These questions relate to matters such as the payment of premiums and refund entitlements; charges for village operating costs; amenities and services; village management; resident consultation; and other matters. A sample of this form is provided at Appendix 5.

Identified issues

Effective disclosure

Current disclosure requirements appear to be adequate in terms of the comprehensiveness of information provided. While it is important that disclosure information is comprehensive, it is also important that it serves its purpose. Effective disclosure is integral to informed decision making. A number of participants to the review commented that the amount of disclosure information provided is excessive and difficult to understand. If too much information is provided, it is unlikely that prospective residents will read all of the material provided and as a result may not necessarily understand the implications of the contract that they are entering into. Further, many residents are making decisions at a time when they are relatively vulnerable; as is the case with those experiencing poor health or the loss of a spouse, and as such are not always in the best position to make an informed judgement.

It is important to note that the adoption of more stringent disclosure requirements can lead to greater compliance costs for industry. These costs would invariably be passed on to residents.

Legal advice

While many prospective residents understand the prudence of obtaining independent legal advice prior to entering into a contract, the fees charged by solicitors may be beyond the means of some individuals. Some participants spoke of encountering difficulties in accessing expert legal advice before signing a contract. It was claimed that there are few legal practitioners in Western Australia with sufficient relevant experience and that those that do have such experience are already engaged by one or more village operators.

⁴Section 13 and 14 of the Act; Schedule 1 of the Regulations (Form 1); Division 3 of the Code

Consumer Protection is somewhat limited in the advice that it is able to offer to prospective residents. Being able to provide advice on contracts and disclosure requirements requires specialised knowledge and at this point, Consumer Protection does not have sufficient resources to provide such a service.

Different levels of disclosure

If a potential resident is seriously considering a number of villages, each village would be required to provide an information package in keeping with disclosure requirements. This could result in unnecessary duplication of information provided to prospective residents. For this reason it may be useful to consider different levels of disclosure for the various stages of the decision making process.

Possible options to consider

- Maintain the existing disclosure provisions.
- Reduce or simplify the information that is required on Form 1.
- Implement two levels of disclosure, one for initial enquiries from prospective residents, and a second level for the provision of more detailed information to be provided prior to entering into a contract.
- Provide additional information, perhaps in the form of a Government produced information booklet (as required by legislation in NSW and similar to that required under the *Residential Parks (Long Stay Tenants) Act 2006*.
- Establish an independent advisory service that would provide education and advice on disclosure information and other matters relating to retirement villages.

QUESTION 5:

Are the current disclosure provisions adequate?

QUESTION 6:

If not, which of the above options, if any, do you consider would be most effective in improving disclosure to prospective residents?

QUESTION 7:

Are there any other options to consider?

4.4 Contract review period

What the current legislation provides⁵

A prospective resident must be provided with the required disclosure information at least five working days before entering into a residence contract or service contract.

Identified issues

Five-day timeframe

Comments provided at the consultation meetings, as well as in a number of written submissions, indicated that the five-day timeframe is too short. It was noted that five days does not allow adequate time to obtain legal advice or have a friend or family member look over the contract or any other information provided.

Contract documents can be difficult to understand and may use technical or industry-specific terms with which most people may not be familiar. Legal advice may be required to assist prospective residents understand the terms of their contract and their implications. The cost of obtaining legal advice is likely to be prohibitive for those individuals who are of limited financial means. It may also be the case that many prospective residents are reluctant to obtain legal advice believing it to be more costly than may be the case. Some participants spoke of encountering difficulties in accessing expert legal advice before signing a contract. Some residents voiced a concern that there are few legal practitioners in Western Australia with the knowledge and expertise required to adequately explain a retirement village residence contract to prospective residents.

There are very few other avenues whereby an individual can obtain specific advice in relation to retirement villages. There is at least one identified consultant in the Perth metropolitan area who provides an information and advice service on matters related to retirement villages.

In NSW, the legislation requires disclosure statements to be provided at least 14 days prior to entering into a contract, whereas a 21-day period applies in Victoria.

A difficulty that may arise if the disclosure time frame is increased, is that, where a prospective resident is in urgent need of accommodation, the length of time taken to finalise the contract would also be increased. This difficulty could be alleviated by the use of a waiver in situations whereby an individual required accommodation urgently.

⁵ Clause 3.1 of the Code

Possible options to consider

- Maintain the status quo.
- Increase the time that is required to be given to review disclosure information prior to entering into a contract.
- Allow for a longer time period for the review of disclosure information but provide for circumstances where this may be reduced, for example where legal advice has been obtained.
- Allow different time periods for the review of disclosure information according to the type of legal arrangement in place (eg. lease for life, strata title, purple title).
- Establish an independent advisory service that would provide advice on contracts and other matters relating to retirement villages.

QUESTION 8:

Which, if any, of the above options, if any, do you support?

QUESTION 9:

If you support increasing the contract review period, what do you consider to be a reasonable timeframe?

QUESTION 10:

Are there any other options to consider?

.....Legal advice may be required to assist prospective residents understand the terms of their contract and the implications.....

4.5 Cooling-off period

What the current legislation provides⁶

A prospective resident is entitled to a cooling-off period of five working days after the date of the contract, and can rescind the contract at any time within those five days by giving written notice to all other parties to the contract. If the retirement village has not provided all of the required disclosure information at least five working days before the contract is signed, the cooling-off period is extended to 10 working days.

It is very important to note that the cooling-off provision does not apply if a prospective resident moves into the village before the five-day period has expired.

Identified issues

Length of cooling-off period

The purpose of the cooling-off period is to give residents the opportunity to change their minds and legally withdraw from the contract without incurring a penalty.

A number of residents and prospective residents believe that the current cooling-off period is too short. It is useful to consider the cooling-off period in relation to the disclosure review period. If residents are given sufficient time to consider their contract and associated disclosure documentation before signing, the incidence of residents drawing upon their cooling-off rights may be reduced.

In NSW, prospective residents have 14 days to review disclosure information with a seven-day cooling-off period. In Victoria, where prospective residents have 21 days in which to review disclosure documents, the cooling-off period is three business days.

“Trying out” the community-living lifestyle

A number of residents indicated that they wished there was some means of “trying out” the community-living lifestyle offered by retirement villages, before committing to a long-term residency. Many residents and prospective residents commented that the lifestyle changes associated with moving from a suburban family home to a retirement village were significant, and once committed it was not financially viable to leave. A number of residents talked about “feeling trapped” and being in a position where they had no choice but to stay. This reinforces the need for any marketing or promotional material to be realistic and accurate so that residents’ expectations are in keeping with the actuality of life in a retirement village.

⁶ Section 14 of the Act

It is recognised that prospective residents “trying out” a retirement village would involve some costs and disruption on the part of village operators. This could be addressed to a degree through the imposition of cost-recovery charges for short term stays in a village.

NSW has taken moves to address this issue following a recent review of their legislation. A proposal to introduce a 90-day “settling-in” or “cooling-off” period was announced as part of a wide-ranging package of reforms to the *Retirement Villages Act 1999* (“the NSW Act”) announced on 14 August 2006. The consultation draft Bill makes provision for a settling-in period. This reform would mean that if a new resident leaves a village during the prescribed 90-day period, they would only have to pay a “fair and reasonable service fee” for the time that they were there.

Possible options to consider

- Maintain the status quo.
- Increase the cooling-off time period.
- Introduce some form of “cooling-off” or “settling-in” arrangement such as that proposed in NSW, which allows residents to change their minds after taking up residency without suffering a significant financial loss.

QUESTION 11:

Should the current cooling-off period be increased and if so, what would be an appropriate time period?

QUESTION 12:

Should provision be made to allow for a ‘settling-in’ period to apply after a resident has taken up residency, and if so, what would be an effective time period?

.....The purpose of the cooling-off period is to give residents the opportunity to change their minds and legally withdraw from the contract without incurring a penalty.....

4.6 Village contracts

What the current legislation provides⁷

The Act distinguishes between two different types of contracts, residence contracts and service contracts.

A residence contract generally deals with a resident's right to occupy premises within a village, while a service contract outlines the specific services to be provided to the resident while residing in the village, as agreed to by the parties to the contract. A residence contract is defined as a "contract, agreement, scheme or arrangement which creates or give rise to a right to occupy residential premises in a retirement village, and may take the form of a lease or a licence."

A service contract is defined in the Act as a "contract between an administering body or former administering body of a retirement village and a resident for the provision to the resident of –

- a) hostel care;
- b) infirmary care;
- c) medical or nursing services;
- d) meals;
- e) administrative and management services;
- f) maintenance and repair services;
- g) recreation services; or
- h) any other services,
- i) and any collateral agreement or document relating to the provision of any such services."

The Code specifies that the residence and service contract must be written in clear, concise, plain language and printed in a size of not less than 12-point type.

The Code also specifies a number of items that must be disclosed or specified. For example, the title and tenure must be disclosed in the residence contract, as must the amenities that are to be provided or made available to the resident. The basis for the future determination of the cost of providing amenities or services must also be included in both residence and service contracts.

The residence contract must also state the premium or rent payable by the resident and how refund entitlements are calculated. Any component of village operating costs that residents are required to pay must be stipulated and the basis for future determination of these costs must also be specified.

⁷ Section 13 and 19 of the Act and Division 4 of the Code

The legislation currently prescribes certain matters that must be included in a contract, but does not prescribe those matters that cannot be included. By contrast, in NSW the legislation states that certain matters, such as requiring a resident to have a will or contents insurance, cannot be included in a contract. Section 56 of the NSW Act provides that where a party to a service contract proposes to vary or cancel any of the terms of a service contract, or where there is a dispute between the parties to a service contract, either party can apply to the Tribunal for an order to settle the matter. Section 19 specifies that the Tribunal can vary or cancel any provisions of a service contract. For this reason, it is essential to identify which parts of a deed relate to the provision of services and which do not.

Identified issues

Format, wording and content of village contracts

Contracts were an issue that was raised repeatedly at all of the public meetings and also in a significant number of written submissions. The format, wording and content of village contracts is an issue of major concern to residents and prospective residents. At present, retirement village operators and their legal advisors determine these details.

Many residents and prospective residents expressed criticism of the length and complexity of retirement village contracts. One particular criticism was that these contracts contain legalistic language and for this reason the terms and conditions are difficult to understand. Another criticism was that, owing to the different forms of title and tenure, and the differences between contracts, it is very difficult to compare the terms and conditions of different retirement villages' contracts.

Access to legal advice

Submissions to the review also highlighted some of the difficulties experienced in accessing expert legal advice before signing a contract. Some residents were of the belief that there are few legal practitioners in Western Australia with the knowledge and expertise required to explain the details of a retirement village residence contract. Although many prospective residents understand the prudence of obtaining legal advice before signing a contract, the fees charged by solicitors, quoted by some residents as being around \$4,000, are not affordable for many prospective retirement village residents.

It may also be the case that many prospective residents are reluctant to obtain legal advice believing it to be more costly than is actually the case. Apart from financial considerations, some prospective residents may be unsure as to how to access legal advice and, not being familiar with such matters, may find the process somewhat daunting.

Standard contracts and clauses

A number of submissions supported the standardisation of contracts. It was argued that standard contracts would allow for greater uniformity and ensure that contracts were written in plain English. This would enable prospective residents to better understand and compare contracts, resulting in better-informed choices.

The standardisation of contracts may not be practical given the broad array of arrangements existing within the industry. Standardisation may also inadvertently inhibit competition and result in reduced innovation in the products and services offered.

Another suggestion as to how contracts could be simplified was to introduce prescribed standard clauses into contracts. Standard clauses could cover such things as the basic rights and obligations of residents and operators that are common to all types of retirement village arrangements. This would help to make contracts more uniform and also more transparent. The use of standard clauses would still allow village operators commercial independence, and would not inhibit innovation and diversity within the industry. In NSW, the power to prescribe standard clauses exists but has not been exercised to date. The *Western Australian Residential Parks (Long Stay Tenants) Act 2006* also prescribes standard clauses to be used in the various agreements made under that Act. The clauses prescribed under that Act relate to matters such as rent, fees and charges; general terms; fees and charges for services and utilities; condition reports; park rules; and the provision of information.

Model contracts

The implementation of a model or prototype contract was another proposal that was put forward during consultation. Consumer Protection could, in collaboration with industry, develop a model contract for the various types of contractual arrangements that currently exist. Although its use would not be mandatory, industry could be encouraged and supported to use such a model. Some villages already use model contracts that have been developed by key industry bodies.

A benefit of utilising model contracts is that it can reduce the legal costs of smaller retirement villages operators who may find the costs associated with engaging legal practitioners to draft contracts overly burdensome. However, the task of developing and maintaining suitable model contracts would be significant.

Appraisal of contracts

Residents and prospective residents also suggested establishing some form of contract appraisal system. This system would require retirement village operators to provide Consumer Protection (or another relevant body) with a draft of any contracts they propose to use. These contracts would then be assessed to ensure that they are fully compliant with the legislation.

Residence and service contracts

The distinction between residence contracts and service contracts was another issue of concern that was raised in the review. A decision made by the former Retirement Village Disputes Tribunal, in relation to the “Mrs Norma Parker case”⁸, and upheld in an appeal to the District Court, confirmed that a residence contract could also be a service contract. This can lead to confusion, particularly in relation to the termination and variations of contracts, as the Act contains provisions that treat the two contract types differently.

In many cases, residence and service contracts are combined into one document known to residents as a “deed” or a “lease”. The Retirement Villages Association suggested that the breadth of definition of service contracts contained in the Act is problematic because some matters that fall within the definition are also inherently the subject matter of residence contracts.

The Retirement Villages Association suggested that the definition of a service contract be limited to the provision of optional services already defined in the Act without the catch-all “any other services”. It was further proposed that such contracts should be able to be terminated by the resident and varied pursuant to its terms, and that the parties should be able to amend such contracts without making an application to the State Administrative Tribunal. WARCRA submitted that there is considerable overlap between a residence contract and a service contract and as such there was a need to revise the definitions contained in the Act.

The NSW Act explicitly provides that a residence contract, a service contract and any other village contract may be contained in a single document. South Australian legislation provides for one contract, namely a residence contract which must include details of additional services and facilities available to residents of the retirement village and the costs of those services and facilities. In Queensland the legislation makes reference to a residence contract and a service contract but notes that a service agreement may be contained in a residence contract.

⁸ Norma Parker v. Timberside Villas Management Pty Ltd

Leases

For certain types of occupancy arrangements, prospective residents enter into an “agreement to lease” and are then granted a “lease” pursuant to that agreement. Both the agreement and the lease amount to a “residence contract.” The Retirement Villages Association submitted that, at present, the Act presumes that a resident enters into a single “residence contract” as defined in the Act. The Act does not recognise the two-stage process whereby an agreement to lease or an agreement to licence is entered into before the lease, licence or deed by which rights to occupy are conferred.

This two-stage process also has ramifications for the application of a cooling-off period. It was suggested that the Act be amended to take into account the process that occurs in practice.

Assistance and advice

Another proposal which was raised by numerous participants in the consultation process, was to establish an advisory centre that would be able to provide both general and legal advice, at a low cost, to residents and prospective residents of retirement villages.

It appears that retirement village contracts present considerable problems for many residents and prospective residents in terms of comprehensibility. Further, the availability of, and access to, education, assistance and advice is also an issue for those who may have difficulties understanding what can sometimes be complex contracts. Many residents emphasised that they didn't really understand the implications of certain aspects of their contract until after they had moved into a village.

Unfair contract terms

There is currently a move towards introducing nationally consistent legislation prohibiting the use of unfair terms in consumer contracts. This legislation has already been implemented in Victoria and Western Australia has agreed in principal to the adoption of such legislation. An unfair contract can be described as one where there is a significant imbalance in the party's rights and obligations under the contract, to the detriment of the consumer. Typically a supplier will use a standard form contract for the provision of goods and services and the consumer does not have an opportunity to negotiate the terms of the contract. It can be the case that terms are included in the contract which are biased in favour of the supplier and which are not reasonably necessary for the protection of the suppliers' legitimate interests. The introduction of unfair contract terms legislation would significantly increase the protections available to retirement village residents and prospective residents.

Possible options to consider

- Maintain the status quo.
- Prescribe standard clauses that must be contained in all residence and service contracts (similar to the requirements of the *Residential Parks (Long Stay Tenants) Act 2006*).
- Amend the prescribed matters that must currently be disclosed in a residence or service contract, and/or also prescribe matters that may not be included.
- Abolish the distinction between a residence contract and a service contract, to provide for a single contract which contains details of the residence agreement, as well as details of additional services and facilities available to residents of the retirement village, and the costs of those services and facilities.
- Amend the Act to recognise the common industry practice of using a “two-stage” residence contract which comprises an “agreement to lease” as well as a “lease”.
- Develop a non-mandatory model contract for each type of legal arrangement (eg. lease for life, strata title or purple title).
- Prescribe a standard contract for each type of legal arrangement (eg. lease for life, strata title or purple title).
- Implement some form of contract approval process with respect to all contracts used within the industry.
- Introduce unfair contract terms legislation.
- Establish an independent advisory service that would provide education, assistance and advice on contracts and other matters relating to retirement villages.

QUESTION 13:

Of the options canvassed above, which, if any, do you consider would be most effective in addressing the problems associated with village contracts?

QUESTION 14:

Are there any other options to consider?

4.7 Consumer and industry education

What the current legislation provides⁹

Consumer and industry education is usually undertaken by industry, advocacy services or government agencies, such as Consumer Protection. While the legislation contains provisions regarding disclosure or a party's right to information, it does not make specific provisions in regard to consumer or industry education.

Identified issues

Consumer education

It is apparent that many residents are unaware or unsure of their rights and responsibilities under their specific residence and service contracts. Prospective residents who are informed about such matters are more likely to make appropriate enquiries and seek advice as to how to protect their interests before entering into a contract. There is also an emerging imperative to inform consumers of the difference between a retirement village and other forms of residential arrangements such as an over-45's residential park. This is discussed in more detail at section 7.2 of this paper.

Raising consumer awareness of issues relating to retirement villages can be considered a complement to regulation. Consumer education serves as a means of informing consumers of their rights and responsibilities under the legislation. This education may take the form of public seminars, dissemination of information via publications, consumer expositions and websites designed to raise awareness and educate persons about various issues related to retirement villages.

In terms of consumer information, Consumer Protection produces a publication for prospective residents entitled "*So you're thinking about moving into a retirement village.*" General information and advice on matters related to retirement villages is also available through Consumer Protection's call centre. The Building and Tenancy Industries Branch of Consumer Protection deals with complaints from consumers and also provides a conciliation service for matters related to retirement villages. Providing information and advice on many of the issues around retirement villages requires specialised knowledge and, at present, Consumer Protection does not have sufficient resources to provide a level of service to match the perceived need.

⁹ Division 3 of the Code

Industry education

Industry specific education and training is also be an effective way of improving business practices and ensuring that industry is aware of its responsibilities to consumers. The Retirement Villages Association offers educational services to its members by way of specific industry related courses. Consumer Protection does not offer any industry specific education or training.

Possible options to consider

- Maintain the status quo.
- Introduce a comprehensive education program to ensure that prospective residents are aware of the financial and other implications of entering a retirement village.
- Establish an independent advisory service for the provision of information, advice and the development of educational programs for residents and prospective residents.
- Establish an independent advisory service to assist operators, especially those not members of the RVA, to understand their rights and responsibilities.

QUESTION 15:

In what form do you prefer to access information (for example, brochures, seminars, websites or seniors' publications)?

QUESTION 16:

Where would you prefer to obtain this information (for example, from Consumer Protection, local libraries, seniors' associations)?

QUESTION 17:

Is there a need for an independent service to provide information, advice and educational programs to residents and operators of retirement villages?

SECTION 5

WHILE LIVING IN A RETIREMENT VILLAGE

5 While living in a retirement village

5.1 Protection of a resident's financial interest

*What the current legislation provides*¹⁰

Memorials on title

The Act currently requires that where land is used, or proposed to be used, for the purposes of a retirement village, a memorial must be lodged with the Registrar of Titles¹¹. This has the effect of giving notice to potential purchasers or lenders that the land is to be used as a retirement village and is subject to the operation of the Act. It means that the land can only be used as a retirement village while any resident remains in occupation.

Premiums

Before entering a village, prospective residents are required to make a payment known as a "premium." This may be a one-off or up-front payment, or the cost of buying the premises. In the Act, a premium is defined as a payment made to the administering body of a retirement village, in consideration for, or in contemplation of, admission of the person, by or on whose behalf the payment was made as a resident in a retirement village. The Act requires that a premium paid to the administering body must be held in trust and must not be released to the administering body until the prospective resident takes occupation of the unit, or until it becomes apparent that the prospective resident will not take up occupation.

Statutory charges on land

Under the Act, a resident's right to repayment of a premium, or part of a premium, is protected by way of a statutory charge on land in the retirement village, other than where the residential premises are owned by the resident. A statutory charge is a legal term that creates a right over the title of the land, and gives priority to the interests of residents ahead of the interests of other parties such as registered mortgagees. This charge is only of benefit for certain legal arrangements (this is discussed in more detail below).

¹⁰ Sections 15, 17, 18, 20 and 22 of the Act.

¹¹ The Registrar of Titles is located within Landgate. Landgate (formerly the Department of Land Information) is the agency responsible for Western Australia's land and property information.

Successors in title

The Act also makes residence contracts binding on successors in title of the owners. This means that any successor in title to the village is bound to recognise and perform the obligations of the (former) village owner who entered into a contract with the residents of the village. A further protection afforded by the Act is that a retirement village scheme cannot be terminated while any resident remains in occupation, without the approval of the Supreme Court.

Identified issues

Security of tenure and financial risks

Security of tenure and the potential financial risks to residents in the event that a retirement village operator becomes insolvent, were two overwhelming concerns raised at the public meetings. The fact that many residents pay considerable amounts of money to enter a retirement village but do not necessarily become owners of the premises in which they reside, is of particular concern. Residents in retirement villages can be financially vulnerable and for this reason, having their investment protected as well as security of tenure is particularly important.

Statutory charges on land

The statutory charge on land is of limited benefit. In the case of strata titled villages where all the residential units have been sold, and where the communal facilities form part of the common property, there is no land remaining over which the statutory charge can take effect. Similarly, in the case of purple-titled villages, the residents effectively own the whole of the village, meaning that there is no land remaining over which a statutory charge can take effect.

It is alleged that the statutory charge causes confusion for financiers who may not be willing to lend monies on land already subject to a charge. This can discourage investors from investing in the retirement village industry and may also have implications for residents trying to access equity in their property through products such as reverse mortgages.

Queensland and Victoria use a statutory charge to safeguard premium refund entitlements of retirement village residents. NSW legislation does not currently provide for a statutory charge on land, however, this provision is included in a package of proposed reforms announced in August 2006.

Recommendations of the 2002 Statutory Report

Issues relating to the protection of residents' financial interests, the memorial requirement, and the statutory charge on land were dealt with comprehensively in Recommendations 10 - 20 of the 2002 Statutory Report. These recommendations have not been implemented to date, and will be reconsidered as part of this review. These recommendations are outlined below.

Recommendation 10

That section 18 of the Act be amended to apply to the legal entity to which a premium is paid.

Recommendation 11

That section 18(1)(a) of the Act be amended to permit the release of a premium held in a trust account when the person who has paid the premium, or on whose behalf the premium was paid, is entitled to occupy the premises. That the existing subsection 18(1)(b) of the Act be retained.

Recommendation 12

That subject to the strengthening of the memorial regime under the Act, as recommended at part 4.3.4 (of the 2002 Statutory Report), the creation of a charge on land in a retirement village pursuant to section 20 of the Act, be repealed and as a consequence, section 21 of the Act that relates to the enforcement of the charge, also be repealed.

Recommendation 13

That provision be made in the Act for the Commissioner for Fair Trading¹² or the Registrar of the Retirement Villages Disputes Tribunal¹³, to approve the termination of a retirement village scheme upon the consent of all the residents of the village, the administering body and any person who holds a mortgage, charge or other interest in the land.

That the process for effecting the termination of a scheme by the Commissioner for Fair Trading or the Registrar of the Retirement Villages Disputes Tribunal, as the case may be, be simple and cost effective having regard to the need to ensure that all the parties have consented to the termination.

Recommendation 14

That a provision similar to section 31(7) of the Strata Titles Act 1985 be included in the Act to give the Supreme Court the discretion to make such orders for the payment of costs as it thinks fit for any application made to terminate a retirement village scheme under section 22 of the Act.

¹²This office is now known as Commissioner for Consumer Protection.

¹³This Tribunal is now defunct and its functions have been transferred to the State Administrative Tribunal.

Recommendation 15

That section 15 of the Act be amended to provide that land against which a memorial has been registered may only be used for the purposes of having a retirement village situated on that land, while the memorial remains registered, provided that the land may in part be used as a residential aged care facility under the *Aged Care Act 1997* (Clth).

Recommendation 16

That the Act be amended to provide that where land is used, or is proposed to be used, for the purposes of a retirement village, it shall not be necessary to remove or exclude the memorial, as the case may be, in respect of any part of the land that is to be used as a residential aged care facility under the *Aged Care Act 1997* (Clth). This is subject to the proviso that the remaining part of the land to which the memorial applies is used, or is proposed to be used, as a retirement village.

Recommendation 17

That the wording of the memorial be amended to read:

1. The land above described may only be used for the purposes of a retirement village scheme within the meaning of the *Retirement Villages Act 1992* and in part for the purposes of a residential aged care facility under the *Aged Care Act 1997* (Clth).
2. While any resident remains in occupation of residential premises under a retirement village scheme, the scheme cannot be terminated without the approval of the Supreme Court except where there is an agreement between all the village residents, the administering body and any person who holds a mortgage, charge or other interest in the land, to terminate the scheme.
3. If the Supreme Court approves the termination of a retirement village scheme, it may make such orders as it thinks necessary to protect the interests of the existing residents.
4. In addition to the circumstances detailed at point 2 above, this memorial may be cancelled as to a part or the whole of the land above described, where the Registrar of Titles is satisfied that the land to which the cancellation applies is no longer used, or proposed to be used, as a part or the whole of a retirement village.
5. The owner of the land above described and the successors in title to that land are bound to observe the terms and conditions of any existing residence contract which creates or gives rise to a right for a person to reside in a retirement village situated on that land.
6. The provisions of Part 3 of the *Retirement Villages Act 1992* apply generally to premises that are used, or are proposed to be used, for the purposes of a retirement village as defined in this Act.

Recommendation 18

That section 15(8) of the Act be amended to allow a memorial to be removed from a part of the land used as a retirement village upon the consent of all the residents of the village, the administering body and any person who holds a mortgage, charge or other interest in that part of the land.

Where total agreement on the removal of a memorial from a part of the land is not achieved, any aggrieved party may appeal against this outcome to the Retirement Villages Disputes Tribunal on the grounds that the objection to the removal of the memorial was vexatious, frivolous or without substance.

Recommendation 19

That where all parties consent to the removal of a memorial from a part of the land used as a retirement village, as provided for at Recommendation 18, the process for effecting the removal be simple and cost effective having regard to the need to ensure that the consent of all the parties has been obtained.

That the Department of Consumer and Employment Protection, in consultation with the Department of Land Administration (Landgate), develop a set of formal procedures, including appropriate documentation, to support an application for the removal of a memorial from the whole or a part of land used, or proposed to be used, as a retirement village. Where applicable, this should include:

- defining who is authorised to apply for the removal of a memorial from the whole or a part of the land (i.e. the owner, his or her legal representative or guardian);
- requiring a sworn statement by the owner's authorised officer regarding the circumstances necessitating the removal of a memorial (the 'owner' for the purposes of this recommendation is the current owner(s) of the land the subject of the memorial and can include a resident in a strata titled or purple titled scheme);
- requiring evidence that a retirement village scheme no longer operates on the land the subject of an application, or will not operate after the memorial is removed from that land. This could be confirmed by a certificate from the Commissioner for Fair Trading and should include the consent of any person who holds a mortgage, charge or any other interest in the land;
- requiring evidence of the approval of the Supreme Court to the termination of a retirement village scheme in accordance with section 22 of the Act;

- requiring evidence of the consent of all the residents, the administering body and any person who holds a mortgage, charge or other interest in the land the subject of an application, to the termination of a retirement village scheme in accordance with Recommendation 13 or the removal of a memorial from a part of the land in accordance with Recommendation 18; and
- in respect to the removal of a memorial from land subject to a licence, requiring a declaration of some sort to confirm the number of licence holders who would be required to provide consent.

Recommendation 20

That the recommended amendments to the memorial regime under the Act apply to existing retirement village schemes, wherever practicable; and

the Department of Consumer and Employment Protection liaise with the retirement village industry and the Department of Land Administration (Landgate) to consider the application of these amendments to memorials currently registered over land used, or proposed to be used, as a retirement village.

Possible options to consider

- Maintain the status quo.
- Implement Recommendations 10 - 20 from the 2002 Statutory Report.

QUESTION 18:

Do you agree that Recommendations 10–20 from the 2002 Statutory Report should be implemented to better protect residents' financial interests?

QUESTION 19:

Are there any other ways to better protect residents' financial interests which could be considered?

5.2 Village management

What the current legislation provides¹⁴

Currently the legislation does not provide for the licensing of managers, or set competency standards for the management of retirement villages.

The *Information Statement for Prospective Resident*, prescribed in the Regulations, requires a village operator to disclose the qualifications and experience of the retirement village's senior management. Village operators are also required to disclose whether the retirement village is accredited under any established accreditation scheme.

There is an established national system of accreditation which is run by the Retirement Villages Association. This system is known as the Australian Retirement Village Accreditation Scheme and is available to both member and non-member retirement villages. One of the purposes of accreditation is to set minimum standards for management practices within the industry. (Accreditation is discussed in more detail at section 7.6 of this Issues Paper).

Identified issues

Management standards

Good management is considered to be of fundamental importance to residents' enjoyment of village life. Many participants submitted that good management serves to eliminate or reduce the incidence of many of the problems that exist within retirement villages. In particular, people skills and a good understanding of the particular needs of residents were considered to be important traits for village management. At the public meetings it was found that in those villages where people were most satisfied with village life, good management was identified as one of the major contributing factors.

A number of residents expressed concern about the level of knowledge and expertise possessed by management in retirement villages. Residents felt that management should be required to have a certain level of administrative and financial management skills, as well as experience in working with seniors. Many residents felt that there was often poor communication between management and residents and also reported having experienced intimidation and being treated disrespectfully in interactions with management. Some residents felt that there should be minimum standards in terms of the training and qualifications possessed by management.

¹⁴ Schedule 1, Form 1 of the Regulations

Residents, particularly those residing in purple title villages, and to some extent, those residing in strata title villages, expressed frustration at not having an opportunity to be involved in the appointment of management or to determine the duration of management contracts. The comment was made that in a purple title arrangement the residents effectively own the village, therefore residents should have a right to participate in the appointment of management. By contrast, there may be some residents who would prefer to live a quiet life and not be required to take an active role in management of the village. The Code sets out minimum standards for management in terms of management procedures and resident consultation.

Legislation in other States

Various Australian jurisdictions have legislation which sets out who may not operate or manage a retirement village. Western Australian legislation does not impose any restrictions in this regard. In Victoria, the legislation provides that certain persons cannot be directly or indirectly involved in the management of a retirement village, including a person who is insolvent under administration, or a person who has been convicted of a recent offence involving fraud or dishonesty.

In NSW, the legislation prevents a person who is bankrupt, a director of a company that is insolvent, or a person who has been convicted of a serious offence involving violence or dishonesty, from working in the industry for five years.

Queensland's legislation contains provisions to the effect that a person who is insolvent under administration or who has a relevant conviction may not operate or manage, either directly or indirectly, a retirement village.

.....Good management is considered to be of fundamental importance to residents' enjoyment of village life.....

Possible options to consider

- Maintain the status quo.
- Encourage industry to further develop its own benchmarks and procedures for good management.
- Establish a requirement for continuous professional development for retirement village management.
- Mandate accreditation within industry as a means of assessing and setting standards for management.
- Establish a Government accreditation scheme to replace the existing Retirement Villages Association accreditation scheme.
- Include a provision in the legislation that restricts who may operate or manage a retirement village. This option would require the implementation of some system of registration.
- Provide for resident participation in the appointment of management under certain circumstances.

QUESTION 20:

Does the standard of village management in the industry need to be improved? If so, in what way would this be best achieved?

QUESTION 21:

Should the legislation impose restrictions on who may manage a retirement village?

QUESTION 22:

Should residents have a right to participate in the appointment of management, and if so, under what circumstances?

QUESTION 23:

Should a mandatory accreditation scheme be introduced?

5.3 Alterations to premises

What the current legislation provides¹⁵

The Code requires that the administering body of a retirement village must respect a resident's basic right to privacy in his or her residential premises, subject to the right of the administering body to inspect the premises as set out in the residence rules and the residence contract. The administering body must also respect a resident's basic right to quiet enjoyment of his or her residential premises and any communal amenities.

A resident's basic right to complete autonomy over his or her property and personal and financial affairs must also be respected by the administering body, subject to any statutory restriction or any other restriction provided for in the residence contract.

Issues identified

Residents' autonomy

A number of residents commented in the public meetings and in written submissions about feeling a lack of autonomy in regard to their residential premises. Residents reported instances of management entering their premises without prior notice and the imposition of unreasonable rules concerning what can be planted in gardens and whether pictures may be hung on walls.

One of the most significant challenges for incoming residents would be adjusting to community living and the compromises required in order to maintain harmony. It is likely that many residents would be entering a village after having lived in their own residences where they were "master of their domain".

Restrictions on alterations

Residents commented that in some villages there are restrictions on the type of alterations that can be made to the property at the resident's expense, such as the installation of an air-conditioning unit. Even if such alterations are permitted, the resident can be required to leave the fixtures or fittings behind when the contract is terminated, and often no compensation is provided. Residents in retirement villages, many of whom will reside in the same premises for the rest of their lives, feel that they should have the right to some control over their living conditions.

¹⁵ Clause 1.5 of the Code

Legislation in other States

The NSW draft consultation Bill 2006¹⁶ makes provision for renovations and alteration of fixtures or fittings. These provisions indicate that the consent of the operator is required but cannot be unreasonably withheld.

Possible options for to consider

- Maintain the status quo.
- Provide owner-residents with some discretion as to what may be planted in their gardens.
- Provide residents with the right to add or remove their own fixtures and fittings, provided that they obtain the consent of the operator (on the proviso that any such requests shall not be unreasonably refused).

QUESTION 24:

Should owner-residents' have some discretion with regard to what may be planted in their gardens or the appearance of their gardens?

QUESTION 25:

Should residents have a right to carry out minor renovations such as alterations to fittings and fixtures?

QUESTION 26:

Are there any other issues relating to alterations to premises which should be considered in the legislation?

¹⁶ NSW Retirement Villages Amendment Bill 2006 Consultation Draft

5.4 Resident input into budgets

What the current legislation provides¹⁷

The Code specifies that an administering body of a retirement village must provide prudential, efficient and economical management of the village, having regard to the terms and conditions of the residence contract and any related contracts.

The Code also requires the administering body to establish procedures for consulting with residents on planning and budgeting, and providing residents with access to management information relating to the administrative or operating financial arrangements of the retirement village.

Administering bodies are required to provide residents with a village operating budget, quarterly operating income and expenditure statements, and annual accounts. The budget statement must be available to residents no later than one month before the end of each financial year. The administering body must hold an annual budget meeting of the residents before the end of each financial year.

The Code provides model operating budget forms, quarterly income and expenditure statements, and a reserve fund statement. The use of these model statements is not compulsory.

Identified issues

Resident input

A number of residents commented in both the public meetings and in written submissions that, in spite of the provisions requiring budget information to be made available, and the requirement for a budget meeting, residents approval for the budget is not required and therefore residents have little say in respect to the proposed budget. Many residents expressed the view that they would like to have more control over village budgets and, in particular, the recurrent charges that they are required to pay.

Some residents also expressed an opinion that expenses that are not related to the operation of the village, such as membership of associations, should not be included in the operating budget.

Concerns of village operators

The administrative costs involved in providing residents with financial statements are an issue of concern to village operators, particularly in small not-for-profit villages. The practical implications of giving residents power of veto over budgets in a business environment must also be considered.

¹⁷ Clauses 5.2, 5.3, 5.4, and 5.5 of the Code

Legislation in other States

In NSW, the legislation requires retirement village operators to prepare and supply residents with a statement of proposed expenditure at least 60 days prior to the commencement of each financial year. The statement must be supported at a residents' meeting, by more than 50 per cent of those residents who vote. Resident approval for expenditure does not apply in other States.

Recent amendments to Queensland's legislation ensure that residents have a greater say in annual budget-setting. Under the new laws, operators are now required to provide a draft budget to residents before the end of the financial year, and then call a meeting of residents to discuss this draft before it is finalised. The draft budget covers maintenance, replacement of village facilities and ongoing general fees and charges. Residents may also ask for explanatory information to accompany quarterly financial statements, showing why expenses incurred are greater than what was budgeted for. Village operators are now required to consider more cost effective alternatives before increasing any general services charges. In addition, audited annual financial statements must be provided to the Queensland Office of Fair Trading.

Possible options to consider

- Retain the status quo
- Require the administering body to provide explanatory information to residents when quarterly financial statements indicate greater expenditure than was budgeted for.
- Increase the level of control residents have over budget-setting and recurrent charges. This could be done by adopting provisions similar to those contained in NSW's legislation.

QUESTION 27:

Should some degree of resident approval be required for proposed expenditure for the financial year? If so, what would be appropriate?

QUESTION 28:

Should the administering body be required to provide explanatory information in the event that expenditure exceeds the amount proposed in the budget?

5.5 Ongoing fees and charges

What the current legislation provides¹⁸

The *Information statement for prospective resident*¹⁹ prescribed in the Regulations, requires the operator to disclose operating costs that are payable by residents, the components of those costs, the method or calculation used to determine the amount payable by each resident, and any variations of those costs.

In relation to village operating costs, the Code specifies that the residence contract must state the following:

- the items of the village operating costs to which a resident must contribute;
- the actual or estimated operating costs for the current financial year;
- the basis for the future determination of those costs;
- any ongoing village operating costs or charges that the resident will be liable for if the resident permanently vacates the residential premises; and
- who is responsible for the costs of maintaining the residential premises in a reasonable state of repair, including the replacement and maintenance of fixtures and fittings.

Identified issues

Recurrent charges

Issues relating to recurrent charges were raised at all of the public meetings as well as in a large number of written submissions. Retirement villages require residents to pay recurrent charges to meet the costs associated with operating a village. This recurrent charge may also be known as an ongoing fee, maintenance fee or rental charge.

The recurrent charge is usually paid on a weekly, fortnightly or monthly basis and covers such things as management staff salaries, maintenance of facilities, and provision of additional services such as an emergency call service.

Residents may also be required to pay an additional cost for the provision of optional personal services such as meals, laundry and cleaning services.

¹⁸ Clause 4.7 of the Code

¹⁹ Schedule 1, Form 1 of the Regulations

Formulae for recurrent charges

There appear to be a number of different formulae specified in residence contracts for calculating the recurrent charges and any increases to this charge. For example, some villages charge a percentage of the Age Pension, whereas others may link increases to changes in the Consumer Price Index (CPI). It is sometimes the case that individual residents within a village pay different recurrent charges, depending on the formula specified in their contract.

The practice of specifying fixed formulae for calculating recurrent charges in contracts can be problematic for operators in the event that expenditure is in excess of the village's income.

Several residents also questioned the way in which single occupancy and double occupancy recurrent charges were determined. The way in which the charge is determined seems to vary from village to village. In some, the charge is per unit, regardless of whether there is a single or double occupancy. In others, the charge for double occupancy is approximately one and a half times the single rate and in some cases the charge is double. In strata titled villages, strata levies are linked to unit entitlement and some residents suggested that this would be a fairer way to determine recurrent charges in non-strata villages also.

Setting recurrent charges according to the number of occupants as opposed to a unit rate can lead to an inconsistent level of income for the village. This can result in uncertainty for residents as the recurrent charges may fluctuate from year to year, depending on the occupancy level.

Increases in recurrent charges

Increases in recurrent charges were one of the most significant issues for residents identified during consultations. Many residents reported that such increases were a cause of stress and anxiety. Many residents in retirement villages are on fixed incomes and may not have the financial resources to absorb large increases in recurrent charges, particularly when increases occur year after year. Some residents reported increases of up to 20 per cent in one year.

It is recognised that operators must be able to adequately cover the cost of operating a village and as such, recurrent charges will need to be increased from time-to-time in order to maintain a certain level of service. However, many residents indicated that they would prefer the consideration of alternative options for the provision of services rather than recurrent charges being automatically increased. Residents also expressed a desire to play a more active role in decision-making in relation to such matters. In particular, residents felt that they should have some say in deciding whether certain services should be discontinued or alternatively changed to a cheaper service provider.

A number of residents claimed that recurrent charges are sometimes subsidised by developers in the early stages of construction, prior to completion of the village and that the low charges are used as a marketing ploy to attract residents. The charges then rise considerably once the village is completed. Residents complained that this is unfair as a decision to enter a particular village may be largely informed by the recurrent charges in place at that time.

Consumer Protection has received a number of formal complaints about unreasonable increases in recurrent charges. Residents have complained that village operators do not comply with the specified basis for variations to charges stated in the contract.

Residents can be placed under considerable stress when they discover that they are unable to pay the increased recurrent charges, but cannot afford to leave the village due to the exit fees payable. The considerable cost of exit fees means that the resident's ability to buy into another village, or into the general housing market, is reduced.

Legislation in other States

In Victoria, the legislation limits increases to recurrent charges to increases in the Consumer Price Index (CPI), unless approved by a resolution of a majority of the residents or the residents' committee. The most recent review, conducted in 2004 showed that residents generally support this basis for adjusting recurrent charges as it provides a level of predictability.

Similarly in Queensland, recurrent charges cannot be increased beyond any increases in the CPI, unless the increase is approved by special resolution at a residents' meeting.

In NSW, the legislation specifies that if the contract provides for recurrent charges to be varied at set intervals, according to a fixed formula, then 14 days notice must be given to residents, however their approval is not required. Examples of fixed formulae used include variations in line with the Consumer Price Index (CPI), or setting recurrent charges as a percentage of the Australian Age Pension. Where variations are not based on a fixed formula specified in the contract, then an operator must follow the process set out in the NSW Act rather than the contract. Operators can only propose or suggest an increase if their contracts do not have a fixed formula. Residents must be given at least 60 days written notice and have a right to vote on the proposed increase. Should residents not give their consent, the operator may apply to the Residential Tribunal seeking to overturn the residents' decision.

The recent NSW review recommended that all operators should be able to vary recurrent charges in line with the CPI without residents' consent. Operators seeking to increase charges beyond the CPI must obtain the consent of residents and set out what steps have been taken to reduce costs. If operators seek to increase charges beyond the CPI more than once in a three-year period, then it is recommended that the owner must satisfy the relevant Tribunal of the need for the increase before putting the proposal to residents.

This procedure ensures that residents are protected against frequent and excessive increases in situations where they are unwilling, or reluctant, to oppose any proposal put forward by village management.

Possible options to consider

- Maintain the status quo.
- Introduce legislation (as exists in Victoria and Queensland, and proposed in NSW) to allow operators to increase recurrent charges, in line with the CPI increase for that financial year, without the consent of the residents. Residents' consent would be required where the increase being proposed is greater than the CPI increase.
- Limit the number of increases (to recurrent charges) in excess of the CPI that are allowed in a specific time period. Should the operator wish to increase such charges beyond the allowable number of increases, they must apply to the State Administrative Tribunal for approval.

QUESTION 29:
Should the way in which increases to recurrent charges are determined be standardised for retirement villages?

QUESTION 30:
If so, what would be the best method of determining such increases (eg. adjusted in accordance with increases to the CPI, as a percentage of the Age Pension, application of a fixed formula)?

QUESTION 31:
Should any increases to ongoing fees and charges which exceed an agreed limit, require the approval of residents?

5.6 Capital maintenance and replacement

What the current legislation provides²⁰

Reserve funds are monies set aside to pay for repairs, replacements, maintenance and renovations within the village. The legislation does not require villages to have a reserve fund, nor does it specify who is responsible for capital maintenance and replacement.

The *Prescribed Information Statement for Prospective Resident*, contained in the Regulations, requires that any reserve fund be disclosed. If there is no such reserve fund, then operators must disclose to prospective residents what arrangements are in place for funding any repairs, replacements, maintenance and renovations. Any contributions that residents must make, and the way in which these contributions are calculated, must also be disclosed.

The Code requires that the residence contract include details of any reserve fund as well as details of any contribution that a resident is required to make to this fund. The Code also specifies that the administering body must provide residents with operating income and expenditure statements that show payments made to and from, and the amounts standing to the credit of, any reserve funds for the village.

Identified Issues

Reserve funds

There were a number of issues relating to capital maintenance, repairs, replacements and renovations, raised at the public meetings and in written submissions.

The village operator, or in the case of a strata title village, the strata company, is generally responsible for ensuring that common facilities are adequately maintained. The manner in which this may be achieved varies considerably between villages.

Some villages provide for a separate reserve fund, as specified in the residence contract. Other villages do not have a separate reserve fund, but allocate money for capital maintenance works through their village budget. Reserve funds, also commonly known as sinking funds, are established to cover the costs of major maintenance works, such as capital replacement or refurbishment of common facilities. Contributions made by residents over time, enable the cost burden to be spread out over a number of years.

²⁰ Schedule 1, Form 1 of the Regulations

Residents may contribute to a reserve fund as a component of the in-going, on-going or recurrent fees, or alternatively a component of the exit fee may be allocated to the reserve fund.

Capital improvements

Capital improvements are generally the responsibility of village operators, however, in some circumstances residents may also fund capital improvements made to the village.

In the public meetings and written submissions, capital replacement and maintenance were identified as an area of significant contention between residents and village operators or management.

Residents expressed concerns about the absence of reserve funds in their particular villages and reported that they were worried about how capital replacement and maintenance would be funded in the future. Although wishing to reside in a well-maintained village, residents were anxious that unexpected additional costs may be imposed in the future, to fund capital replacement and maintenance as the village ages. It is clear that for people on fixed incomes such as the age pension, dealing with unexpected expenses can be very stressful.

Lack of transparency

Residents in villages with established reserve funds raised concerns about the lack of transparency associated with these funds. Some residents complained that they were not able to view the fund's financial statements and it was not clear to residents how much was held in the fund and what the funds were to be used for. This is contrary to the Code's requirement that the administering body must provide residents with operating income and expenditure statements that show payments made to and from, and the amounts standing to the credit of, any reserve funds for the retirement village.

Residents complained that there is often no clear distinction between capital maintenance and replacement, and that there is confusion as to who is liable to pay for the required works. For example, if a section of guttering is replaced, a dispute may arise as to whether the work should be classified as maintenance or capital replacement. This confusion often leads to delays in work being carried out. A number of residents also complained that even where there was no dispute, there were considerable delays in having necessary repairs or replacements carried out.

Legislation in other States

Victorian legislation does not require or regulate reserve funds or capital maintenance and replacement funds. A recent review of the legislation recommended maintaining these arrangements.

In NSW, the legislation currently provides for the voluntary establishment of capital replacement and long-term maintenance funds and sets out who should pay the repair or replacement of items of capital. NSW's consultation draft Bill²¹ released in November 2006 deals comprehensively with capital replacement and maintenance. This Bill details who is responsible for capital replacement and maintenance and specifies the circumstances where a capital works fund must be established and the way in which it must operate.

The Bill also sets out the circumstances where a resident may carry out urgent capital replacement or maintenance and seek reimbursement of costs from the operator.

Queensland's legislation is the most prescriptive with regard to capital maintenance and replacement. Under Queensland's Retirement Villages Act, operators are required to establish a capital replacement fund and a maintenance reserve fund. The way in which these funds are established, what the funds are to be used for, and how the amount of money to be kept in reserve for the current and future replacement of capital items is determined, is specified in this Act. An independent quantity surveyor is required to assess and report on each village's capital needs for the subsequent 10 years.

.....The NSW consultation draft Bill details who is responsible for capital replacement and maintenance and specifies the circumstances where a capital works fund must be established and the way in which it must operate.....

²¹ NSW Retirement Villages Amendment Bill 2006 Consultation Draft

Possible options to consider

- Maintain the status quo.
- Make the establishment of reserve funds mandatory.
- Increase disclosure requirements to clarify who is liable for the maintenance and replacement of capital items.
- Specify in the legislation who is liable for the maintenance and replacement of capital items
- Allow residents to carry out urgent repairs in certain circumstances.

QUESTION 32:

Should the legislation introduce provisions specifying who is responsible for capital maintenance and replacement, as well as the circumstances in which a reserve fund must be established, as per the NSW draft Bill?

QUESTION 33:

Should provisions to make reserve funds mandatory, similar to those contained in Queensland's legislation, be adopted in WA?

QUESTION 34:

Should residents be able to carry out urgent capital replacement or maintenance, without the consent of the operator, in certain circumstances?

5.7 Operating surpluses and deficits

What the current legislation provides²²

The *Information Statement for Prospective Residents* must disclose the purposes to which any village budget surplus may be applied. The process for resident involvement in any decisions about the use of any budget surplus must also be disclosed.

The Code states that the administering body must apply any surplus in the operating budget of a retirement village towards the future operating expenses of that village, except where the residence contract provides otherwise. The residents may, by special resolution, approve the application of all or part of a budget surplus, to other purposes that are of benefit to the residents of that village. Budget deficits are not specifically dealt with in the legislation, however, any liability residents may have for any additional or extraordinary charges must be disclosed, and the circumstances under which these charges apply.

Identified Issues

Budget surpluses

Issues relating to budget surpluses were raised on numerous occasions in the public meetings and written submissions. Residents, particularly in the not-for-profit sector of the industry, commented that a budget surplus in one village is sometimes used against a deficit in another village owned by the same organisation, or alternatively may be absorbed by the organisation.

Legislation in NSW

In the recent review of the NSW legislation, the issue of operating deficits was revealed to be a major concern of residents. Currently in NSW, in the event of a shortfall in operating expenditure at the end of the year, residents may vote by special resolution to approve the payment of a lump sum special levy to cover the deficit. Otherwise, the NSW Act requires any deficit in the annual accounts to be carried forward to the following year.

The issue of a surplus or deficit of accounts has been addressed in the recent package of reforms announced by the NSW Government. A draft consultation Bill provides that the operator of a retirement village is required to make good any deficit in the accounts of the retirement village and is not permitted to carry forward any such deficit, or to seek a special levy from the residents of the village except as provided by the regulations. Any surplus in the annual accounts of a village must be carried forward to the accounts for the next financial year, unless the residents approve a proposal for another use.

²² Schedule 1, Form 1 of the Regulations; Clause 5.6 of the Code

Possible options to consider

- Maintain the status quo.
- Adopt legislative provisions for the regulation of budget deficits and surpluses in operating expenses.

QUESTION 35:

Do you think that the legislation should prescribe how any surplus or deficit in the annual accounts of a retirement village is to be dealt with?

.....The Information Statement for Prospective Residents must disclose the purposes to which any village budget surplus may be applied.....

5.8 Residents' committees and meetings

What the current legislation provides²³

The function of a residents' committee, as stated in the Code, is to consult with the administering body on behalf of the residents about the day-to-day running of the retirement village and any issues or proposals raised by the residents.

The Code currently specifies that the residents of a retirement village may establish a residents' committee. It is not mandatory however, for a village to establish a residents' committee. The way in which a committee may be established is set out in the Code. A residents' committee may only be comprised of residents and a member of a residents' committee may not hold office for more than one year but may be re-elected.

The Code also specifies the circumstances under which an administering body must convene a residents' meeting and also the time frame within which certain meetings must be convened. The administering body must hold an annual general meeting of the residents within five months after the end of each financial year, and must hold an annual budget meeting of the residents before the end of each financial year. The administering body may also call a meeting of the residents at any other reasonable time and must call a meeting on the request of a residents' committee.

Identified Issues

Residents' committees

Residents' committees can play an important role in representing the interests of residents, and as a means of communication between village management and residents. Many villages have established residents' committees, however some villages, particularly those that are small or where residents are very elderly, may not see the need to establish a committee.

At the public meetings, and in a number of written submissions, residents expressed dissatisfaction with the manner in which residents' committees and residents' meetings are conducted. In some villages there appears to be a lack of understanding about the role of the residents' committee. Residents also reported that in some villages it was difficult to find residents to stand for election to the committee, and further, residents were inexperienced in the process of electing, establishing and running a committee. During the initial consultation phase, several residents approached Consumer Protection with requests for information on how to establish a residents' committee and conduct meetings.

²³ Clause 5.11 of the Code

In NSW, the *Retirement Villages Act 1999* has the power to regulate residents' committees via regulations however this power has not been exercised to date.

Advisory committees

In a number of villages it appears that an advisory committee or board replaces the role of the residents' committee. The role and composition of the advisory committee may be specified in the residence contract, and generally provides for both resident and management representation.

The existence of an advisory committee does not negate the right of residents to establish a residents' committee, however, this appears to cause confusion in some villages. Some residents reported that they had been advised by management that as the (existing) advisory committee fulfilled the role of the residents' committee, there was no need for a residents' committee.

A common complaint expressed by residents was that they felt their particular village committee did not represent the interests of the majority of residents. Some residents in villages in which advisory committees exist, indicated that they felt intimidated by having management on the committee and felt that they were unable to discuss their concerns freely.

Strata Council

The *Strata Titles Act 1985* also requires that strata title retirement villages have a strata council. This adds to the confusion experienced by some residents as to requirements relating to residents' representative bodies.

Park liaison committee

The *Residential Parks (Long Stay Tenants) Act 2006* requires the establishment of a park liaison committee to enable the park's residents to assist the park operator in the development of, and changes to, park rules and policies. The park liaison committee must consist of at least one tenant representative and one park management representative, but in the interests of negotiating fairness, there must be more tenant representatives than park management representatives on the committee. The stated objective of a park liaison committee is to improve the lifestyle and well-being of tenants who use the park as their principal place of residence.

Specifically the functions of a park liaison committee are as follows:

- to assist the park operator to develop, amend or enforce park rules and guidelines for behaviour;
- to assist in the resolution of disputes; and
- to develop policies for improving the environment and amenities of the park and any other prescribed matters.

Possible options to consider

- Prescribe a set of model rules via regulation, which outline the election process, functions and procedures of residents' committees.
- Provide additional advice on governance to help members of residents' committees to carry out their functions.
- Develop educational materials for use by residents, such as guidelines on how to establish residents' committees and conduct meetings.
- Make the establishment of residents' committees or liaison committees mandatory.
- Replace residents' committees with liaison committees, comprising representatives of both residents and management as outlined above.

QUESTION 36:

Should the establishment of a residents' committee or liaison committee be compulsory?

QUESTION 37:

What changes could be made to improve the effectiveness of residents' committees?

QUESTION 38:

Should residents' committees be replaced by liaison committees which allow for representation of management?

5.9 Relocating within a village

What the current legislation provides²⁴

The *Information statement for prospective resident* requires the disclosure of costs associated with moving to alternative accommodation in a village. The circumstances where this may occur must also be disclosed.

The Code specifies that information about transfer or relocation of a resident to other residential premises within the retirement village must be included in the residence contract.

Identified Issues

Costs of relocation

There are a number of reasons why a resident may wish to relocate within a village, for example a desire to occupy a smaller unit, a ground floor unit, or perhaps a quieter unit.

The manner in which relocation within a village is handled seems to vary between villages. In some situations however, particularly in the not-for-profit sector of the industry, relocation is a relatively inexpensive process with little or no cost involved. However, in some villages the costs involved can be substantial. In some situations the entire exit fee is payable and a completely new contract entered into. This can amount to a cost of tens of thousands of dollars to effect such a move. There is also some confusion about deferred management fees. These fees are usually payable upon leaving a village but are also sometimes charged for relocation within the village. It is not always clear to residents as to whether these fees should be calculated on the basis of the length of residency in the village or in a particular unit.

Residents claimed that the considerable costs associated with relocating within a village are unjust. Many residents see these costs as simply revenue raising on the part of the village operator. Where the unit is owned by the resident, as is the case with a strata titled village, the unit must be sold in order to transfer the title, and then a new residence purchased.

²⁴ Schedule 1, Form 1 of the Regulations; Clause 4.9 of the Code

Possible options to consider

- Maintain the status quo.
- Implement a cap for charges applicable to relocation within a village where the resident does not own the unit.
- Prohibit operators from charging owner residents deferred amenities fees for relocation within the village.

QUESTION 39:
Should the legislation regulate the costs involved in relocating within a retirement village?

QUESTION 40:
Should deferred amenities fees be charged upon termination of residency in a village or upon termination of residency in a particular unit?

.....Deferred management fees are usually payable upon leaving a village but are also sometimes charged for relocation within the village.....

5.10 Voting procedures

What the current legislation provides²⁵

Unless otherwise provided in the residence contract, if two or more residents occupy the same residential premises in the retirement village, each of them may vote at a meeting of the residents on any matter that requires, or provides for, a vote of the residents.

The Code also specifies that to pass a special resolution, the resolution must be carried by at least 75 per cent of the number of residents who are present and vote.

Identified Issues

Fairness of voting entitlements

A number of residents questioned the fairness of current voting entitlements. It was felt by some residents that voting should be based on a system such as unit entitlements, similar to that provided for under the *Strata Titles Act 1985*.

Amendments to Queensland's legislation passed in March 2006, provide for a "one vote per unit" rule to protect the rights of single occupants of units.

Anonymous voting

The voting procedure in place in some villages is also of concern to some residents. Some residents expressed a preference for an anonymous system of polling rather than the show of hands that is often used. This is particularly important in situations where residents feel pressure from management or from other residents to vote in a particular way.

Types of consent

In NSW, the legislation provides for two types of consent by residents, general consent and consent by special resolution. General consent requires more than 50 per cent of those residents who vote to support the measure or action. A special resolution requires a 75 per cent majority vote. Voting is by a show of hands at a meeting, unless 50 per cent of those present call for a written secret ballot.

²⁵ Clause 5.1, 5.11 of the Code

Possible options to consider

- Maintain the status quo.
- Prescribe a 'one vote per unit' rule to be applied to matters that require a vote of the residents.
- Encourage the use of anonymous voting methods for matters that require a vote of the residents.
- Prescribe the circumstances whereby a written secret ballot may be used for voting purposes.

QUESTION 41:

What do you consider to be a fair system for voting on matters at residents' meetings?

QUESTION 42:

Do you support a "vote per person" or "vote per unit" system?

.....Queensland legislation provides for a "one vote per unit" rule to protect the rights of single occupants of units.....

5.11 Dispute resolution

What the current legislation provides²⁶

The Code recognises that disputes may occur in a retirement village and outlines the processes that may be used to resolve them. The administering body within a village must nominate a suitable person or body to deal with the dispute according to processes outlined in the Code. If the dispute cannot be solved using the village dispute resolution process, the Commissioner for Consumer Protection can provide conciliation services to either party, or refer the matter to an independent external mediator. If the dispute remains unresolved, either party to the dispute may apply to the State Administrative Tribunal if the dispute is one in which the Tribunal has jurisdiction. The State Administrative Tribunal has a number of powers under the Act which were formerly vested in the Retirement Villages Disputes Tribunal.

Identified issues

Residents' dispute groups

It was evident from comments made by people at the community consultation meetings that many people do not know their rights in relation to making a complaint and if they do, they are reluctant to exercise their rights for fear of victimisation.

Although the legislation does not require it, some villages have established a residents' dispute group comprising residents, management and an independent person. It was suggested that similar committees could be established in all villages. The purpose of these committees would be to liaise with management to resolve problems arising in the village.

Advocates

Many participants also expressed a desire to have an advocate represent them in any dispute resolution processes. A number of residents felt that the existing dispute resolution process in their village was weighted against residents.

Enforcing orders

Some residents claimed that some of the current methods for onsite dispute resolution "had no teeth" as there was no mechanism to enforce a decision. Residents wanted to know how operators could be compelled to comply with their contractual obligations. It was suggested that there should be greater emphasis on enforcing orders made by the State Administrative Tribunal.

²⁶ Division 6 of the Code; Part 4, Division 5 of the Act details State Administrative Tribunal's powers in relation to the resolution of disputes in retirement villages

The implementation of recommendations arising from the review of the Consumer Affairs and Fair Trading Acts regarding the expansion of the powers of the Commissioner for Consumer Protection would go some way towards addressing these concerns. (These recommendations are discussed in more detail below.)

Regulatory body

It was generally felt that there is a need for better and fairer dispute resolution processes within the retirement village industry. A suggestion was made that there should be a separate regulatory body established to oversee the Act and deal with complaints. It was suggested that representatives from organisations such as Council on the Ageing (COTA), Western Australian Retirement Complexes Residents' Association (WARCRA) and the Retirement Villages Association (RVA) form part of this body. An alternative option, as proposed in review of the Consumer Affairs and Fair Trading Acts, is the establishment of a consumer disputes tribunal. (This proposal is discussed in more detail below.)

Cost of disputation

Another concern that was frequently expressed was the cost of disputation, particularly for cases that are referred to the State Administrative Tribunal. Many participants indicated a desire to return to the previous low cost system that existed under the Retirement Villages Disputes Tribunal in which lawyers were not present. Participants also suggested that there should be a dedicated Registrar responsible for dealing with retirement village disputes or that an independent arbitrator be appointed to deal with such disputes.

There were also numerous suggestions that Consumer Protection could resolve many of the disputes occurring within a retirement village. This would mean that parties in dispute would not have to seek assistance from the State Administrative Tribunal. State Administrative Tribunal processes tend to be seen as costly and lengthy. Some participants felt that Consumer Protection should be more proactive in protecting seniors and that it should provide an advocacy service in order to avoid the need for an application to the Tribunal to resolve a dispute.

Role of Consumer Protection

It was apparent from the feedback obtained during the initial consultation that many residents are unaware of the current level of assistance provided by Consumer Protection in the resolution of disputes. The Code states that if the dispute cannot be resolved within the retirement village, either party can seek the assistance of Consumer Protection. Consumer Protection can provide information and conciliation services to either party to assist in the resolution of the dispute or refer the matter to an independent external mediator.

Recommendations contained in the report of the review of the Consumer Affairs and Fair Trading Acts propose a stronger dispute resolution role for the Commissioner for Consumer Protection in Western Australia. This report recommends that the Commissioner be empowered to make binding orders and that the range of enforcement powers be expanded in line with similar provisions in the NSW and Victorian Fair Trading Acts. Implementation, however, would require a significant increase in resourcing for Consumer Protection.

In addition, the report proposes that a consumer disputes tribunal be established. For seniors, the creation of a new consumer disputes tribunal would mean easier and cheaper access to retirement village dispute resolution. Currently, disputes pertaining to retirement villages are dealt with by the State Administrative Tribunal. A consumer disputes tribunal would deal specifically with consumer matters (which encompasses tenancy matters such as retirement villages) and as such, would be more specialised than the State Administrative Tribunal. Under such a tribunal, legal representation and right of appeal would be limited so that disputes could be resolved more quickly. Interstate examples of such tribunals include the NSW Consumer, Trader and Tenancy Tribunal, which was established in 2001, and the Victorian Civil and Administrative Tribunal.

2002 Statutory Report recommendations

To address the problems of lack of awareness of available dispute resolution processes, and unwillingness to use such processes for fear of reprisal, the 2002 Statutory Report recommended the following²⁷.

Recommendation 39

That Consumer Protection carry out market research to determine:

- the extent to which the residents in retirement villages are aware of, and use, the available dispute resolution processes; and
- the reasons why the residents do not, or would not, use these dispute resolution processes.

Recommendation 40

That following the market research, the Consumer Protection develop education programs, in conjunction with the retirement village industry, resident representatives and relevant State and Commonwealth government agencies, to address perceived barriers to the residents of retirement villages making use of the dispute resolution processes.

Recommendation 41

That Consumer Protection include in any education package, details of:

- the processes involved in resolving disputes in a retirement village and information to assist the residents of the village with the presentation of any matter to the Village Disputes Resolution Committees and the Retirement Villages Disputes Tribunal; and
- other sources of external support and advocacy available to older persons in dispute situations.

Recommendation 42

As recommended in the 1995 report, that Consumer Protection, in consultation with relevant State and Commonwealth government agencies and appropriate community organisations including the Retirement Complexes Residents' Association, investigate other ways of ensuring that the needs of the residents of retirement villages for advice and counselling are addressed.

²⁷ 2002 Statutory Report Recommendations 39-42.

Possible options to consider

- Maintain the status quo.
- Encourage operators to develop dispute resolution systems in consultation with residents.
- Consumer Protection establish an education program that clarifies and promotes the dispute resolution processes currently available to residents, as recommended in the 2002 Statutory Report (Recommendations 39-42).
- The enforcement and dispute resolution powers of the Commissioner for Consumer Protection be expanded.
- An independent consumer disputes tribunal be established.

QUESTION 43:

How could existing dispute resolution processes be improved?

QUESTION 44:

Which, if any, of the above options would you support?

SECTION 6

ON LEAVING A RETIREMENT VILLAGE

6 On leaving a retirement village

6.1 Selling premises within a retirement village

*What the current legislation provides*²⁸

The Code requires that where an administering body is required by a residence contract to market residential premises, it must take all reasonable steps to enable the residential premises to be placed on the market as expeditiously as possible. The administering body must also provide the resident with a monthly marketing report that details the actions taken to market the premises.

Identified issues

Residents' input

Comments provided at the consultation meetings, as well as in a number of written submissions, raised concerns about selling when leaving a retirement village. The main issue that participants were concerned with related to having a say in matters such as the choice of an agent, selling fees, marketing strategies and the market value of a property.

Participants were concerned that village operators exerted undue control over the sale process by:

- selecting the real estate agent to sell the unit;
- determining the selling fees which are charged by agents and not providing residents with an opportunity to negotiate the fees;
- determining the marketing strategies to be used, such as the type of advertising and level of promotion; and
- determining the marketing price of the property.

Participants felt that it was unfair that they could not use their own real estate agent, that they had no choice in selecting an agent, and no opportunity to negotiate selling fees and marketing strategies. They also asserted that it was unfair that they had no say in determining the marketing price of their property.

Participants also suggested that residents should have the option of obtaining a private valuation prior to sale, or that there should be an independent body to determine the marketing price as opposed to the sale price being determined solely by the village owner.

²⁸ Division 2 and clause 5.7 of the Code; Schedule 1 Form 1 of the Regulations.

Unfair practices

Some participants reported that some developers/operators set a minimum sale price for a unit and that if the unit did not obtain this price at sale then the resident was required to make up the difference. There were some concerns that the sale of a property was often hampered by operators deliberating over the extent of refurbishments required following the departure of a resident, as well as the actual length of time required to carry out any refurbishments.

Participants also raised concerns as to the percentage of the sale price retained by village operators upon the sale of a property. WARCRA submitted that departing residents are generally required to pay developers or operators a minimum of 21 per cent of the re-sale or re-letting price of their residence. This charge may be referred to as an “exit fee”, “deferred facilities fee” or “deferred amenities fee”. Many participants felt that the amount retained by operators was unreasonable.

Costs of leaving

Departing residents were concerned that they may not recoup what they paid for the property, given the costs associated with exiting the residence such as selling fees, any exit charges or deferred fees which may apply and any refurbishment fund contribution that is required (these fees and charges are discussed in more detail in sections 6.2, 6.3, and 6.4 of this paper).

Some participants suggested that prospective residents may be deterred from buying into the village if the total costs of selling are disclosed prior to purchase. In disclosing such information, prospective residents may realise that, when their turn comes to sell, they may not have sufficient funds to enable them to move to a care facility or a nursing home.

Re-selling older units

The difficulties associated with re-selling older villas when newer villas are on the market was also an issue for residents. Residents commented that older properties can take some time to sell due to competition from newer properties on the market. They were concerned that developers and/or operators often promote the sale of their own newer properties rather than promoting the sale of the departing resident’s property.

Time frame for settlement

Another major concern was the length of time that it takes to settle the sale of a property after a resident has departed. It was claimed that the owner has no incentive to sell while the former resident is still paying fees.

Possible options to consider

- Maintain the status quo.
- Introduce a time limit on the maximum period between the sale of the property and settlement.
- Provide that, if major and lengthy refurbishments are proposed, the village owner is required to buy the unit back at market value rather than require the resident to wait for a sale.
- Provide that, in certain circumstances, for example, the transfer of a resident to a nursing home, or the death of a resident, village operators be required to buy the unit back at market value.
- Ensure that the legislation provides for a fair balance between the rights of the village owner and the rights of the departing resident in having a say in the choice of real estate agent, negotiating selling fees, and setting a sale price for the property.
- Regulate certain fees and charges (eg. exit fees, deferred fees taken as a percentage of sale price, refurbishment charges) to enable departing residents to recoup a fair price on the sale of their property when leaving a retirement village.

QUESTION 45:

What would be a reasonable time limit between the sale of a property and settlement?

QUESTION 46:

Should a village owner be required to buy back a unit at market price rather than wait for a sale to an incoming resident?

QUESTION 47:

Should the legislation provide that departing residents have some input into the sale of their unit? If so, to what extent?

QUESTION 48:

Do you support any Government regulation of exit fees charged by village operators upon sale of, and departure from, a unit?

6.2 Ongoing charges after a resident leaves

What the current legislation provides

Fees and charges are subject to agreements made between the parties to residence and service contracts. The legislation in Western Australia does not regulate the level of fees and charges, or any increases to fees and charges.

Identified issues

Liability for recurrent charges

A significant concern for many residents is that they continue to be liable for recurrent charges after they leave the village. Residents who move elsewhere, such as to a nursing home, must pay two lots of charges until their property is sold or another resident moves in. If a resident dies, liability for ongoing charges falls upon the estate of the deceased. Many participants believe that allowing ongoing charges to be imposed on exiting residents acts as a disincentive for operators to find new residents immediately. WARCRA submitted that, in some instances, ongoing charges are levied for facilities that are not yet available, or for specific services no longer received by the former resident.

Legislation in other States

The NSW Act distinguishes between residents who are owners and those who are non-owners when it comes to ongoing charges for departing residents. In NSW, non-owners cease to be liable for such charges six months after vacating, if a replacement resident is not found earlier. Residents can elect to defer payment but can then be charged interest. Owners, on the other hand, must keep paying recurrent charges until the premises are sold. The NSW review found that the practice of continuing to charge non-owner residents (or their estates) recurrent charges for an extended period after they have died or moved out is fundamentally unfair and inequitable. Former residents are no longer in any position to benefit from the services and facilities for which the recurrent charges are levied, nor do they have any control over the process of finding a resident to replace them. Village residents who have a lease or licence occupancy arrangement are similar in many respects to tenants of other residential premises. Landlords of such tenancies factor the cost of vacancies into the cost of operating a business and do not seek to hold an outgoing tenant liable for rent until a new tenant is found.

The NSW review found no valid reason why retirement village residents who do not own their premises should not be treated in the same way. The NSW reforms aim to encourage operators to take steps to ensure that vacancies are minimised. Examples of this would be the establishment of waiting lists and setting realistic market prices for the sale of premises.

Queensland's legislation provides that if a replacement resident is not found within 90 days, the former resident and the operator must then pay recurrent charges in the same proportion as they are to share in any capital gains.

South Australia's approach requires operators to pay recurrent charges for a maximum of six months after a unit is vacated and ongoing charges are deducted from refund entitlements with no interest payable.

Operators point of view

In justification of ongoing charges, operators argue that village operating costs are generally fixed and do not reduce when a unit is vacant. For example, local government rates and taxes, water rates, and grounds maintenance are still payable. Operators argue that it is necessary to continue to charge former residents to ensure a sufficient income level for the village. Other operators take into account potential vacancies when determining the recurrent charges from year to year.

.....A significant concern for many residents is that they continue to be liable for recurrent charges after they leave the village.....

Possible options to consider

- Maintain the status quo.
- That the recommendations arising from the NSW review be adopted in WA. This would mean that residents who have a lease or licence contract cease to be liable for recurrent charges after they vacate their unit, provided that they have given 30 days notice to the operator. In the event that 30 days notice is not given, the resident should remain liable for recurrent charges for up to 30 days after vacating, in lieu of notice.
- That provisions contained in Queensland's legislation be adopted in WA. This legislation provides that if a replacement resident is not found within 90 days, the former resident and the operator must then pay recurrent charges in the same proportion as they are to share in any capital gains.
- That South Australia's approach to ongoing charges be adopted. This requires operators to pay recurrent charges for a maximum of six months after a unit is vacated.
- That the financial burden on outgoing residents be reduced by requiring that ongoing charges be deducted from refund entitlements with no interest payable, as is the case in South Australia.
- That any liability for ongoing charges ceases upon death or upon permanent vacation of the property. Such a provision could be limited to those residents with a lease or licence occupancy arrangement. This option could mean that residents are required to pay more while they reside in the village, to cover for unit vacancies.
- Introduce a cap for ongoing charges payable by owner residents, but not for other payments such as strata levies.

QUESTION 49:

Do you think that former residents should be responsible for any ongoing charges once they have left the village?

QUESTION 50:

If so, should any conditions apply, for example, a time limit or monetary limit?

6.3 Refurbishment fees

What the current legislation provides²⁹

The Code outlines the requirements for repair and refurbishment of residential premises. In particular, the Code specifies that before the commencement of any such work, the administering body must provide the resident with a written notice of the claim against the resident for the work as well as an estimated cost of the work. This work must be completed and the resident must be given a fully itemised account for the final cost of the work before the administering body is able to accept or make a demand for payment for the work. The Code provides that a resident may challenge the need for work undertaken, or the cost of the work, by applying to the State Administrative Tribunal.

Identified issues

Challenges delay settlement

Industry claims that it is in the interests of residents to have premises refurbished when vacating so as to present them in the best possible light. It is claimed that in most villages, residents benefit the most from any increase in value, so it is in the residents' financial interest to have the premises refurbished. Although residents have the right to challenge the extent and cost of refurbishments, comments received at consultation meetings highlighted the fact that such challenges delay settlement. It is often the case that residents require funds as quickly as possible to enable them to move to more appropriate care facilities.

Unclear terms and responsibilities

Areas of considerable concern are issues relating to refurbishment, maintenance and repair, as well as contributions paid by residents to reserve funds, while residing in a retirement village and upon departure from a retirement village. Disputes frequently arise as a result of contracts containing unclear terms such as "operating costs", "operating budgets", "operating statements", "recurrent costs", "maintenance costs", "maintenance funds" and "sinking funds". Participants also spoke of lack of clarity in regard to what funds are available for refurbishment, and the responsibilities of the respective parties to the contract. Disputes often arise about whether a particular residence needs refurbishment at the point of sale. Participants cited examples of residents who, having lived in a unit for a relatively short period of time, were still liable for the total cost of substantial refurbishments. This may be a condition of the residence contract and, as such, must be carried out even though the residence is in perfectly good condition.

²⁹ Clause 5.8 (1) and (2) of the Code

Cost of refurbishment

Another issue that was raised at the public meetings and in written submissions relates to the cost of unit refurbishment. Village operators may require that before a unit is sold that it be upgraded to a “first class condition.” The cost of any such upgrade must be borne by the resident and is in addition to any contribution by the resident to the village’s refurbishment fund.

This practice is considered to be unfair in that the village operator generally receives 25 per cent of the enhanced value of the property upon sale, without having made any contribution to the improvements on the unit.

Refurbishment funds

A further concern for residents is that some developers and managers do not maintain separate banking accounts for refurbishment funds or reserve funds. Further, it is reported that the amount of money in these funds is not always fully disclosed. The over-riding concern on the part of residents is that by not being properly accounted for, these funds may be lost if the developer sells the village or becomes insolvent.

Possible options to consider

- Maintain the status quo.
- Ensure that contracts clearly specify the repair, maintenance and refurbishment obligations of each party to the contract.
- Require greater transparency in village budgets so that the funds set aside for refurbishment are clearly identifiable.
- Standardise terminology across industry, particularly in regard to the financial terms used in retirement village contracts.
- Amend the Act to require village schemes to hold reserve funds in trust.

QUESTION 51:

Are the current arrangements regarding refurbishment by departing residents adequate to balance the needs of residents and industry?

QUESTION 52:

If not, which of the above possible options for change , if any, would you support?

6.4 Exit fees

What the current legislation provides³⁰

It is common practice in the industry to impose fees which are payable upon a resident's departure from a village. These fees are known as exit fees but are also referred to as "deferred facilities fees," "deferred management fees" or "deferred payment". The current legislation does not regulate fees charged upon exit from a retirement village. Residence and service contracts specify the fees and thus residents are bound to pay the amounts outlined in such contracts. Schedule 1, Form 1 of the Regulations requires the owner to disclose refund entitlements to enable a prospective resident to compare the difference in costs between retirement villages. The Regulations require operators to clearly state what a resident's final return would be after 1, 2, 5 and 10 years.

Identified issues

Cost of leaving

It appears that at present the average minimum exit fees are about 30 per cent of the sale price of the residence (comprising 25 per cent deferred facilities fee, and 5 per cent refurbishment and improvement fund contribution).

Comments provided at the public meetings, as well as in a number of written submissions, revealed some concerns as to the substantial exit fees payable upon leaving a retirement village. Many participants were concerned that residents may be disadvantaged in that, after paying a considerable exit fee, it is difficult to re-establish themselves either in another village or alternatively in an aged-care facility. This is because the costs associated with purchasing or buying into a retirement village or aged-care facility are continually increasing. If the capital gains on any initial investment into a retirement village are absorbed by exit fees, this means that only the initial investment amount remains for the purchase of entry into an alternative residence. Some residents spoke of having realised, sometimes too late, that once they had sold their family home they had committed themselves to a "point of no return".

It was also pointed out that the exit fee is payable on a percentage basis every time a residence changes hands. As already mentioned, in general this is approximately 25 per cent of the sale price. It is claimed that this provides a source of perpetual income for the developer or owner.

³⁰ Schedule 1, Form 1 of the Regulations

Example of exit costs

The following example provided by WARCRA shows what an outgoing resident may receive upon settlement of a sale:

Purchase price: \$340,000 Sale price after 10 yrs: \$500,000		
Deductions	\$125,000	Deferred Facilities Fee equal to 25 per cent of the sale price
	\$12,500	GST equal to 10 per cent on the Deferred Facilities Fee
	\$25,000	Refurbishment Fund contribution equal to 5 per cent of sale price
Total deductions	\$162,000	
Balance	\$337,500	(\$500,000 less \$162,000)

This example illustrates that a resident leaving a retirement village may end up with less than the initial amount they paid 10 years before.

Method of calculating exit fees

Another issue raised in the written submissions is the way in which the settlement entitlement is calculated. Generally industry calculates the exit fee on the basis that a part of the year is deemed to be a whole year. It was submitted that a daily pro rata calculation should apply to any part of a 12 month period to avoid the outgoing resident and ingoing resident being charged for the same period.

Industry justification

Some of the reasons which industry representatives provide to justify the charging of exit fees (or equivalent term) are that charging the fee at the end of the residency:

- is fair to residents who only stay for a short period of time as the fee is determined by length of stay;
- lowers the cost of entry for residents;
- lowers ongoing costs for all residents because costs are factored into profit calculations;
- provides funding for long term expenses; and
- covers the cost of some of the services provided to residents.

If current arrangements were to be restructured, village operators may replace exit fees with higher entry and ongoing fees to maintain their profit levels.

Legislation in other States

The review notes the South Australian provision under which all residents who vacate within the statutory settling-in period of 90 days are only liable to pay market rent for their time of residence, plus any reasonable administration fee as set out in the contract. In NSW, a consultation draft of the *Retirement Villages Amendment Bill 2006* makes provision for a settling-in period during which a resident may terminate a village contract, and provisions to limit the period that a former occupant is required to pay recurrent charges after permanently vacating their unit within a retirement village.

These approaches remove the ability of unscrupulous operators to persuade vulnerable residents to move into unsuitable accommodation in the hope of making a quick profit. It also ensures that those residents who pass away or move to a higher level of care within a short space of time only pay a fair and reasonable amount for the time spent in the village.

.....In South Australia residents who vacate a retirement village within the statutory settling-in period of 90 days are only liable to pay market rent for their time of residence plus any reasonable administration fee as set out in the contract.....

Possible options to consider

- Maintain the status quo.
- Require that fees charged to departing residents benefit incoming residents by requiring that a specified percentage be placed in a fund used for refurbishments and improvements within the retirement village and/or for the provision of certain services provided to residents.
- Introduce a scheme, which places a cap on exit fees and the rate at which they may be increased.
- Require operators to accurately state the true cost of entry to a retirement village, either by disclosing all deferred fees, or requiring all fees to be charged up front, so that residents are not liable for unforeseen or undisclosed fees upon leaving a village.
- Introduce a reasonable “settling-in” period similar to the provisions in place in South Australia, and proposed in NSW, to ensure that people who live in a village for a relatively short period of time are not unreasonably penalised by high exit costs.

QUESTION 53:

Should operators be required to disclose the true cost of entry to a retirement village by requiring that all fees are charged up front?

QUESTION 54:

Should exit fees be retained but be fully disclosed in a village contract so that residents know the true cost of leaving a village?

QUESTION 55:

Do you support any of the other options for change proposed above?

6.5 Estate matters

What the current legislation provides

The existing legislation is silent on right of inheritance matters. Current industry contracts do not allow for an owner of a unit within a retirement village to bequeath the right to reside in the unit to a beneficiary. These contracts require that, on the death of a resident, the property must be sold. On settlement, exit fees are deducted and a percentage of the sale price goes to the owner/developer. In the event that a child or relative of the deceased former resident would like to acquire the property and would be eligible to do so (ie. over 55 years of age), they must purchase it at market price. Legislation in other Australian States is also silent on right of inheritance matters.

Identified issues

Bequeathing to children

Owner-residents commented that they would like to be able to bequeath their unit in a retirement village to their children or a relative so that they can become a resident in the village when of an eligible age. It was suggested that there should be a provision in the legislation to allow for the right of inheritance. It should be noted that as people are living longer, the probability of a beneficiary being over 55 at the time of a resident's death is increasing.

A possible disadvantage of allowing the right of inheritance is that a unit may remain unoccupied for a number of years until such times as an inheritor is of eligible age to enter the village. This issue could be resolved, however, by only allowing right of inheritance where the beneficiary is eligible for admission to the village (ie. over 55 years of age) at the time of the resident's death.

There is also the matter of recurrent charges and/or strata levies which must be paid by the owner, irrespective of whether a unit is occupied. These charges are often factored into village operating budgets and, as such, non-resident owners would be required to pay applicable fees or levies without receiving any of the associated benefits.

Operators point of view

As already discussed, operators generally charge an exit fee when a unit changes hands. This is usually taken as a percentage of the sale price of a unit. If right of inheritance were permitted, operators would not stand to receive revenue from exit fees as is currently the case. These fees are an important source of income for villages and the reduction in revenue associated with allowing right of inheritance would impact considerably upon village income.

Possible options to consider

- Maintain the status quo.
- Amend the legislation to allow for the right of inheritance of units or shares in a retirement village under certain circumstances (eg. If the beneficiary is over 55 years of age)
- That industry restructure its operating costs to enable beneficiaries to inherit freehold property within a retirement village under certain circumstances.

QUESTION 56:

Should owner-residents be permitted to bequeath freehold property, inclusive of the right to reside, under certain conditions (eg. if the beneficiary is over 55 years of age)?

.....Owner-residents expressed a desire to be able to bequeath their unit in a retirement village to their children or a relative so that they can become a resident in the village when of an eligible age.....

SECTION 7

MISCELLANEOUS ISSUES

7 Miscellaneous issues

7.1 Application of the legislation

What the current legislation provides³¹

The Act applies retrospectively to contracts that were entered into before the commencement of the Act to the extent that, if a contract is silent on a particular matter, then the provisions in the Act apply. However, if a contract states a particular provision, then that provision within the contract applies.

The 2006 Code applies to the administering body and a resident or prospective resident of a retirement village, whether or not the village was established before or after the commencement of the Code. Division 2 of the Code, however, does not apply to any contract, agreement or arrangement made, or entered into, prior to the commencement of the Code, except if the contract is silent on a matter with which Division 2 of the Code deals with.

Identified issues

Retrospectivity

Unless a good case can be made for retrospectivity, Government generally does not make laws to apply retrospectively to arrangements made prior to the commencement of the new legislation. The issue of retrospectivity, that is that any future changes to retirement villages legislation should apply to existing contracts, was supported at community consultation meetings and in a number of written submissions.

Some participants however reported that they were happy with their existing contractual arrangements and hoped that any new legislation would not be to the detriment of current residents.

In the previous review of the legislation which culminated in the 2002 Statutory Report entitled *Review of the Regulation of the Western Australian Retirement Village Industry* (2002 Statutory Report), Recommendation 50 recommended that any changes to the current legislation should, in general, apply to existing contractual arrangements, wherever practical.

It could be argued that any proposed changes should safeguard all residents, both current and future. It is widely accepted that older people are vulnerable in many respects and, for this reason, need the protection of the law.

³¹ Section 5 and 6 (1) and (2) of the Act: clause 1.2 of the Code

The 2002 Statutory Report pointed out that if any recommended changes to retirement village legislation did not apply to current contractual arrangements, then it would lead to a situation where some residents within a retirement village were governed by the provision of the older legislation while others were governed by the new legislation. Apart from potentially being unfair, this would create administrative difficulties for administering bodies, residents, the State Administrative Tribunal and the courts.

The impact on developers and operators would need to be considered in terms of fee structures and the likely costs in amending their existing contracts to comply with legislative changes. A reasonable transition period would need to be provided so that changes to existing contracts could be effected.

Possible options to consider

- Ensure that any changes made to the current Act, Regulations or Code are retrospective and apply to contracts made, or entered into, before and after the commencement of the new legislation.
- If legislative amendments are introduced, allow for a reasonable transition period for operators to amend existing contracts so that they comply with the new legislation.
- Provide that any changes to the legislation should only apply to new contracts and should not apply retrospectively to existing contracts.

QUESTION 57:

Should any changes to the legislation apply retrospectively to existing contracts (provided that these changes could be managed through transitional arrangements)?

QUESTION 58:

If so, is anyone likely to be unacceptably disadvantaged?

7.2 Definitions used in the Act

What the current legislation provides³²

The relevant terms defined in the legislation include terms such as:

- retirement village
- retirement village scheme
- retired person
- administering body
- owner
- premium
- recurrent charge
- residence contract
- residence rules
- resident
- residential premises
- residential tenancy agreement
- service contract

A “retirement village” is defined in the Act as “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.”

A “retirement village scheme” is defined as meaning “a scheme established for retired persons or predominantly for retired persons, under which –

- a) residential premises are occupied in pursuance of a residential tenancy agreement or any other lease or licence;
- b) a right to occupation of residential premises is conferred by ownership of shares;
- c) residential premises are purchased from the administering body subject to a right or option of repurchase;
- d) residential premises are purchased subject to conditions restricting the subsequent disposal of the premises; or
- e) residential premises are occupied under any other scheme or arrangement prescribed for the purposes of this definition,

but does not include any such scheme under which no resident or prospective resident of residential premises pays a premium in consideration for, or in contemplation of, admission as a resident under the scheme.”

³² Part 1, Section 3(1) of the Act

Identified issues

Difficulties in determining what is a retirement village

It appears that residential premises are being promoted and used as a retirement village without necessarily being a retirement village as defined under the Act. Some villages use short-term leases equivalent to those used in mainstream private rentals. Residents of such villages do not pay an upfront premium but rather pay ongoing rental and, as such, do not have a permanent “for life” tenure. The fact that this type of residential arrangement is promoted as a “retirement village” is misleading in that residents may enter into such an arrangement without being given the protections contained in legislation.

It is difficult for prospective residents to determine whether a village is a bona fide retirement village. The main difference between a prescribed retirement village and any other types of residential retirement accommodation is that residents, or prospective residents, must pay a premium in consideration for, or in contemplation of, admission as a resident under the scheme. This problem could be addressed by broadening the definition of a retirement village or by precluding the use of the term “retirement village” in promotional material other than for retirement villages registered under a proposed compulsory scheme.

The 2002 Statutory Report identified the growing trend towards the establishment of various services and facilities, such as delicatessens, banking agencies and health care clinics, operating from premises located within the villages. As such the report recommended that the definition of “retirement village” in the Act be expanded to include communal, community service and support facilities provided to the residents from within the village and that this definition be written in plain language.

The Retirement Villages Association also recommended the expansion of the definition of “retirement village” and suggested that the definition be amended to read:

“the land and improvements comprising a complex of residential premises together with any communal lifestyle facilities, services facilities, or management facilities used or intended to be used for, or in connection with, a retirement village scheme.”

Possible options to consider

- Broaden the definition of “retirement village” to capture all types of retirement village arrangements.
- Restrict the term “retirement village” to retirement villages that are registered under the proposed registration scheme (refer to section 7.3).
- Preclude the use of the term “retirement village” in promotional material other than for registered retirement villages registered under the proposed registration scheme.
- Review all definitions contained within the legislation to ensure that they are consistent and are written in plain language.

QUESTION 59:

Should the use of the term “retirement village” be expanded to encompass all types of retirement village arrangements?

QUESTION 60:

Should the term “retirement village” be restricted to those villages that are registered under the proposed registration scheme?

QUESTION 61:

Are there any terms relating to retirement villages, or those used in the legislation, which you would like to be better defined?

7.3 Registration of retirement villages

What the current legislation provides

There is currently no provision in the legislation for registration of retirement villages.

Identified issues

Register of retirement villages

There is no way of accurately determining the number of retirement villages in Western Australia, as there is no register of retirement villages. The definition of the term “retirement village” is complex and determining whether a particular residential complex can be considered to be a retirement village, as defined in the Act, is not a simple task. In addition, there is considerable confusion as to the difference between a “retirement village” and a “lifestyle village”, as discussed in section 3.2 of this Issues Paper.

A register of retirement villages would allow Consumer Protection to better monitor the industry, and allow for improved dissemination of information such as changes to the legislation, or educational initiatives undertaken by the Department.

In addition, a register of retirement villages would enable the public to ascertain whether a particular residential complex is covered by the protections of retirement villages legislation.

Legislation in other States

NSW does not currently have a register of retirement villages. However, recent reforms announced by the NSW Government include a provision for a recording on the Register kept under the *Real Property Act 1900* that specified land is used as a retirement village.

In Victoria, retirement villages are required to provide specific information to Consumer Affairs, including proprietors’ details, advice of any changes to those details and any exemption orders made under the Victorian *Retirement Villages Act 1986*.

In Queensland, all retirement village schemes must be registered with the Office of Fair Trading. An application for registration involves providing details of the land, accommodation and facilities, the terms of the contract and any disclosure documentation. The legislation imposes restrictions on who may operate a retirement village. The Chief Executive of the Office of Fair Trading must approve all applications for registration.

Possible options to consider

- Maintain the status quo.
- Establish a government register of retirement villages in Western Australia to enable the public to ascertain whether a particular residential complex is covered by the relevant retirement villages legislation.

QUESTION 62:
Should a Government retirement village register be introduced in Western Australia?

QUESTION 63:
If so, are there any particular matters that should be included on the register?

.....A register of retirement villages would enable the public to ascertain whether a particular residential complex is covered by the protections of retirement villages legislation.....

7.4 Monitoring and compliance

What the current legislation provides³³

The Act sets out the functions of Consumer Protection in investigating matters relating to retirement villages, resolving complaints, and the manner of dealing with an offence. The Commissioner for Consumer Protection may institute or defend proceedings on behalf of a resident in the State Administrative Tribunal or the relevant court. Under the *Fair Trading Act 1987*, where it appears that a person has carried on business in contravention of the Code, the Commissioner may request a deed of undertaking from this person to:

- discontinue the conduct,
- comply with the Code in future; and
- state what action will be taken to rectify the problem.

Where a person fails to comply with a request by the Commissioner for such an undertaking, the Commissioner may apply to the State Administrative Tribunal for a decision. A decision (or order) by the State Administrative Tribunal is enforceable by law. An administering body that fails to comply with an order made by the State Administrative Tribunal commits an offence that is punishable by a fine of up to \$10,000.

Identified issues

Consumer awareness

An issue of concern is that residents do not, in general, appear to be aware of the current powers of the Commissioner to order deeds of undertaking, or to take matters to the State Administrative Tribunal, on behalf of residents, if the matter is deemed to be in the public interest. There was a general perception expressed at a number of community consultation meetings, and in written submissions, that residents do not have much protection from the government. The legislation and Consumer Protection are perceived as “toothless tigers”. Some participants also expressed concern that the current legislation is not clear as to the rights and responsibilities of operators and residents. This gives rise to ambiguity and uncertainty in regard to rights and responsibilities in the event of a dispute.

³³ Section 8 and 9 of the *Retirement Village Act 1992*; section 44 and 46 of the *Fair Trading Act 1987*; Schedule 1 of the Code

State Administrative Tribunal

Participants to the review reported a general dissatisfaction with the process of applying to the State Administrative Tribunal to have a matter resolved. Residents may also be reluctant to make an application to the State Administrative Tribunal or the relevant court because of the costs involved in such an application. Many residents may not be able to afford legal representation or risk the possibility of legal costs being awarded against them if they lose a case. This can lead to a considerable imbalance of power between residents and village operators in Tribunal or Court proceedings in that village operators may be able to afford better legal representation than many residents. For this reason allowing legal representation in tribunal and court proceedings may be seen as being biased in favour of village operators. It was commented that there is some uncertainty as to the jurisdiction of the State Administrative Tribunal and that the Act needs to be more specific in delineating the role of the State Administrative Tribunal, particularly in jurisdictional matters relating to residence contracts. Issues related to the proposals to expand the powers of the Commissioner for Consumer Protection and to establish a consumer disputes tribunal, as discussed in section 5.11, are relevant here. Wider powers for the Commissioner and a tribunal structured more appropriately for the needs of seniors would more likely be able to address the issues raised in this section.

Possible options to consider

- Maintain the status quo.
- Establish an independent information and advice service specifically for residents and prospective residents.
- Establish an education program specifically for industry to raise awareness of its rights and responsibilities under the legislation and the processes available for dispute resolution.
- Introduce a pro-active compliance program within Consumer Protection to monitor industry compliance with retirement villages legislation on a regular basis.
- Expand the enforcement powers of Consumer Protection and allocate additional resources to enable the agency to effectively exercise its investigation, compliance, mediation and prosecution functions.

QUESTION 64:

How could compliance with retirement village legislation be better monitored and enforced?

7.5 Penalties

What the current legislation provides³⁴

The Act contains a number of offences with maximum penalties ranging from \$2, 000 to \$20, 000. A penalty for an offence against a Regulation may not exceed \$500. Compliance with the Code is mandatory and is enforceable by the Commissioner for Consumer Protection and the State Administrative Tribunal under the Fair Trading Act 1987. An administering body that fails to comply with an order made by the State Administrative Tribunal commits an offence which is punishable by a fine of up to \$10, 000.

Identified issues

Offence and penalty provisions

General dissatisfaction was voiced about offence and penalty provisions in the legislation. It was felt that there are no real incentives or disincentives to ensure compliance with the legislation. WARCRA specifically expressed dissatisfaction with the limited penalties applicable to the failure on the part of administering bodies to observe the terms of residence and service contracts.

Possible options to consider

- Maintain the status quo.
- Review the appropriateness and effectiveness of offences prescribed under the Act, Regulations and Code.
- Increase prescribed penalties to a level which would encourage compliance, particularly for serious offences such as:
 - false and misleading statements;
 - failure to disclose important information;
 - offences relating to village contracts;
 - serious disregard of residents' rights; and
 - unconscionable village rules.

QUESTION 65:

Is it necessary to amend any offences and/or penalties prescribed in the legislation? If so, what level of penalties would be appropriate for particular offences?

³⁴ Sections 6, 13, 15, 16, 18, 66, 75, 78 of the Act; Section 82 (3) of the Act states that a regulation may create an offence punishable by a penalty not exceeding \$500; Schedule 1 of the Code deals with compliance with the Code.

7.6 Accreditation of retirement villages

What the current legislation provides³⁵

At present the legislation does not provide for a mandatory accreditation system.

Identified issues

RVA accreditation system

The Retirement Villages Association (RVA) is a national body representing industry and its members are comprised of retirement village managers, owners, operators, developers, investors and other industry specialists. The RVA has an established national accreditation system in place. This is known as the Australian Retirement Village Accreditation Scheme. This industry-based scheme is voluntary in nature and sets out a number of criteria that must be met in order to achieve accreditation.

Purpose of accreditation

The purpose of accreditation is to set minimum standards for management practices, services and amenities in retirement villages. Accreditation is open to industry irrespective of whether the village is an Retirement Villages Association member. The Retirement Villages Association accreditation scheme is a self-regulatory approach with a focus on achieving best practice and encouraging improvement within the industry. It is of benefit to residents and prospective residents in that it provides a recognisable standard which allows for comparisons to be made between villages and also the identification of specific village strengths and weaknesses.

A number of residents commented in the public meetings that there is a need for a mandatory independent accreditation system. It was suggested that an industry-based system cannot be free from bias, and may not necessarily be in the best interests of residents. It was also suggested that Australian Retirement Village Accreditation Scheme did not necessarily cover all of the issues that are of importance to residents. It was suggested that minimum standards of safety and service in retirement villages should be prescribed.

³⁵ Schedule 1 of the Regulations

Possible options to consider

- Maintain the status quo.
- Establish an accreditation system that is independent and unbiased and sets minimum standards for matters such as safety, service provision and staff qualifications.
- Prescribe minimum standards in the legislation. This could be monitored via a broader registration system.
- Introduce minimum standards into the legislation. This would need to be done in conjunction with the registration of retirement villages. Compliance with these standards could be monitored through a broader registration system.

QUESTION 66:
Should accreditation be compulsory for the retirement village industry?

QUESTION 67:
Should an independent (non-industry based) accreditation system be established?

QUESTION 68:
Should the legislation prescribe minimum standards for matters such as safety, access, emergency monitoring, management practices, service provision and building design?

QUESTION 69:
If there is no Government accreditation, should there be minimum standards set under the Retirement Villages Act for accreditation schemes?

7.7 Title matters

What the current legislation provides

A title is a certificate that describes a piece of land, shows the name and address of the owner (registered proprietor) and provides other information about that piece of land. This includes details of mortgages and caveats affecting that piece of land. Title rights are discussed in more detail in section 8.4 (Appendix 4) of this paper.

The legislation does not prescribe any particular form of title in regard to retirement villages. There are, however, generally two types of types of title arrangements for retirement villages, namely strata title and purple title.

In a strata title arrangement a title-holder owns a defined portion of a piece of land or building. There will usually also be common property in which all owners have an interest, for example driveways, verges and gardens.

In a purple title arrangement, title-holders are referred to as “tenants in common” and are effectively co-owners, owning an undivided share of the whole property.

Identified issues

Levels of consent

Each type of title arrangement has different requirements in terms of the level of consent required for a resolution. This can have significant ramifications for retirement villages in terms of obtaining owners’ consent to proposed changes within a village. For example, purple title arrangements require unanimous consent for a resolution, whereas with strata titled properties, the *Strata Titles Act 1985* provides for four different types of resolutions, including unanimous resolution, resolution without dissent, special resolution, and ordinary resolution, which is determined by a simple majority.

The requirement for unanimous consent in purple title arrangements has been identified as a significant problem. For example, a recent issue has arisen whereby a village operator has proposed the conversion of part of the retirement village to a low-care aged facility. The proposal is supported by all but one (owner) tenant in the village. This tenant is withholding support for the proposal and this effectively means that the proposed conversion cannot proceed.

There are also some concerns as to the desirability of a developer being able to retain a share in a purple title village. Owing to the requirement for unanimous consent, developers are able to use their vote to exercise a certain control over the village.

Issues related to strata title

Issues related to strata title have also arisen since the commencement of the review. In a retirement village in which residents hold a strata title, they are bound by both the provisions of the Strata Titles Act, as well as the Retirement Villages Act. This can cause some confusion because there are some areas where the Acts overlap and this can lead to uncertainty about rights and responsibilities under the legislation.

A possible solution to some of the problems with the various title arrangements in retirement villages would be the creation of a completely separate form of title for retirement villages. This new form of title could be called a “grey title” or a “retirement village title”. Any new title arrangement would not be retrospective and would only apply to retirement villages formed subsequent to any legislative amendments. The creation of a new type of title would be a relatively complex process and would also be subject to approval from Landgate, the State Agency responsible for registering land ownership and issuing Certificates of Title.

An additional concern raised in submissions related to the term of office of management appointments. The “Norma Parker case” was cited whereby in a particular strata titled village, developers appointed themselves and a related management party for terms of up to 80 years, putting in place long term management which was effectively answerable to developers rather than to residents.

Possible options to consider

- Retain the status quo.
- Create a separate form of title for retirement villages, for example “grey title”.
- Limit the type of title that can be used in retirement villages to strata-title providing that resolutions may be passed by a simple majority. (This would only apply to retirement villages formed subsequent to any legislative amendments.)
- Amend the interpretation of “purple title” where retirement villages are concerned. For example, the requirement for unanimous consent could be changed to a minimum of 75 per cent consent.
- Amend the legislation to provide for a statutory body such as the State Administrative Tribunal to override lone or minority, dissenting tenants in common in order to pass a resolution where unanimous consent is required.
- Restrict the term of office of management and provide for residents to have a greater say in the appointment of a village manager.

QUESTION 70:

Should there be restrictions on the type of title that can be used for retirement villages?

QUESTION 71:

Should a new form of title be created, specifically for retirement villages?

QUESTION 72:

Should the legislation be amended to allow for a majority consensus as opposed to unanimous consensus for both purple title and strata title where a resolution is required?

QUESTION 73:

Should the legislation provide that the State Administrative Tribunal may override lone, or minority, dissentient tenants in order to pass a resolution where unanimous consent is required?

QUESTION 74:

Should the term of office of management be restricted by the legislation to prevent a situation similar to that created in the Norma Parker case cited above?

QUESTION 75:

If so, what would be a reasonable term of appointment for retirement village management (eg. 5 years, 10 years)?

7.8 Structure of the legislation

What the current legislation provides

The retirement village industry in Western Australia is currently regulated by the :

- *Retirement Villages Act 1992* (the Act);
- *Retirement Villages Regulations 1992* (the Regulations); and
- *Code of Fair Practice for Retirement Villages* that is prescribed under the Fair Trading Act 1987 (the Code).

The laws aim to ensure the maintenance of fair trading practices and consumer protection without impeding the efficient, economic and competitive operation of the retirement village industry.

Identified issues

Options for the structure of retirement village legislation

In the previous review of retirement villages legislation, the 2002 Statutory Report examined a number of regulatory options to address concerns identified since the inception of the legislation.

Possible options for the regulation of the retirement village industry considered in the 2002 Statutory Report³⁶ included:

Option 1: retain the current system (separate Act and Code);

Option 2: consolidate the Act and Code; and

Option 3: industry self-regulation.

An additional option identified in the course of this review is:

Option 4: create a Code under the Retirement Villages Act.

Discussion of Options

Each of the above options is discussed further below.

Option 1 - Retain the current system (separate Act and Code)

The 2002 Statutory Report highlighted that there was a high level of commitment to, and support for, the Code because:

- industry and residents were involved in the development of the Code;
- the Code reflects fair trading principles, such as the disclosure of important information;
- amendments to the Code cannot be made unless they have the support of industry and residents' associations.

³⁶ Review of the Regulation of the Western Australian Retirement Village Industry Final Report, February 2002, Department of Consumer and Employment Protection at 61- 64.

Possible advantages are that:

- there is a high level of input by industry and residents in the development of the Code; and
- the Code is flexible and can be easily amended without having to be passed by Parliament, which can be a time-consuming and complicated process.

It was agreed that the flexible approach of the current regulatory regime could be incorporated into a single Act by providing for appropriate subsidiary requirements such as the provision of disclosure information to be contained in, say, a form approved by the responsible Minister or the Commissioner. An approved form would be able to be amended at any time in response to innovations in the industry and changes in industry practices.

Any concerns about the level of input from residents and industry in using this approach, could be addressed by requiring the Minister or the Commissioner, as the case may be, to be satisfied that the requirements set out in subsidiary legislation, such as an approved form, have the broad support of both the residents and the industry. This is currently required of the Minister in approving the Code under the Fair Trading Act.

Regulation by way of an Act only would also overcome the problems caused by the duplication of regulatory control as well as the requirement for separate reviews of the Act and the Code. An Act supported by appropriate subsidiary legislation would ensure that the rights and obligations of residents the administering bodies are clear and easy to understand, and would retain the flexibility of the present system.

There was overwhelming support for this approach in the submissions to the Review of the Regulation of the Western Australian Retirement Village Industry which produced the 2002 Statutory Report. Consequently Recommendation 49 of this report stated that the Act and the Code be replaced by a single statutory scheme that retains, where appropriate, the flexibility of the present regulatory regime.

Indeed this could mean that the model which provides for an Act and a Code be retained but that the Code, as subsidiary legislation, would be made under the Retirement Villages Act and reviewed at the same time as the Act.

Possible disadvantages are that:

- there are separate statutory requirements for the review of the Act and the Code, with the Act required to be reviewed every five years and the Code every three years. These differing review periods make it difficult to effect fundamental change to the Act or the Code, as often change cannot be achieved by amending either in isolation;

- there is also some duplication of regulatory control between the Act and the Code which can cause uncertainty and compliance difficulties;
- the perception that compliance with the Code is voluntary may be enhanced by the absence of direct penalties for breaches of the Code; and
- the Code is made under the Fair Trading Act and not the Retirement Villages Act.

Option 2 – Consolidate the Act and the Code

The Act and the Code could be replaced by a single statutory scheme incorporating both pieces of legislation.

Possible advantages are:

- consistency with other states as Victoria, Queensland and New South Wales have adopted this model where the regulation of the industry relies solely on an Act and supporting subsidiary legislation.
- a consolidated Act and Code could provide more certainty by ensuring that the rights and obligations of the residents and the administering bodies are clearer and more easily understood. This in turn would facilitate greater compliance with the requirements of the legislation and the resolution of disputes.

Possible disadvantages are that:

- this form of regulation may be seen to be less flexible than the current system as the process to amend an Act can be time consuming and complicated, and may delay responses to changing dynamics and issues that may arise in the future;
- there is a concern that with this approach there may be less input from the residents and administering bodies in the regulation of the industry; and
- as there would still be a need for regulations to deal with issues that need to be flexible, this would result in having the Act and regulations with current control of the Code split between the Act and the regulations.

Option 3 – Industry self-regulation

Under a self-regulatory model, the primary responsibility for the conduct of an industry lies with the industry associations. The members of the associations would need to agree to operate within certain standards and develop a code of conduct. Associations would market themselves and their members as providing a high quality service. This could be achieved through the accreditation of members who achieve certain standards.

Possible advantages are that:

- the Retirement Village Association has already put in place an accreditation scheme and best practice guidelines for its members. Under this scheme, accreditation is normally awarded for a period of three years, but can be withdrawn if a village fails to maintain the required standards.
- an accreditation scheme would address the community need for information about the quality of service in the industry and enhance consumer confidence in dealing with the members of any association. An association would need to have the power under its constitution to require its members to maintain the agreed standards of service delivery and to enforce sanctions against any member who fails to comply with these standards;
- a system of self-regulation would remove statutory restrictions on the operation of the industry. This, in theory, could encourage competition and reduce administration and compliance costs, thereby benefiting consumers.

Possible disadvantages include the following:

- there was a clear lack of support for self-regulation in the submissions made to the 2002 review. There were consumer perceptions that self-regulation meant no regulation and that industry associations were unable to consider complaints against members in an objective and unbiased manner or enforce sanctions for breaches of the agreed standards;
- it was recognised that there is an obvious power imbalance between the residents of retirement villages and the administering bodies. Residents are older people who are usually on fixed incomes and have little experience of the retirement village industry before they move in. Whilst it is recognised that most administering bodies would not take advantage of this power imbalance, the absence of statutory regulation may lead to instances of exploitation of some residents.
- The 2002 Statutory Report expressed the view that the current regulatory scheme has generally been effective in protecting the rights of the residents without impeding the efficient, economic or competitive operation of the industry.
- However, there is some duplication of regulatory control between the Act and the Code and differing statutory review periods can make it difficult to effect fundamental change, as such change often cannot be achieved by amending either in isolation.

Option 4 – Create a Code under the *Retirement Villages Act*

This is an additional option which was not explicitly raised in the 2002 Statutory Report but alluded to in Option 2 of that report where it was suggested that the Act could be supported by subsidiary legislation, as is the case in other states as Victoria, Queensland and New South Wales. The Code would be made as a regulation under the Retirement Villages Act and not the Fair Trading Act as is currently the case. In addition, the review period would be aligned to the Retirement Villages Act with greater specific penalties under that Act.

Possible advantages are that:

- the Act and its supporting subsidiary legislation (the Code and Regulations) would be more easily understood as an integrated package;
- the current difficulty in reviewing the Act every five years and the Code every three years would be eliminated; and
- greater penalties for serious breaches having a major impact on the well-being of residents would most likely act as deterrents to retirement village owners exploiting residents.

Possible options to consider

- Retain the current legislative structure which provides for an Act, subsidiary regulations and a separate code made under the *Fair Trading Act 1987*.
- Adopt option 1, 2, or 3 of the 2002 Statutory Report as outlined above.
- Adopt option 4 as outlined above and restructure the legislation to comprise the Act, the Regulations and a Code made under the Retirement Villages Act so that all components regulating retirement villages are contained within a single legislative package.

QUESTION 76:

In reference to options 1–4 outlined above, which legislative arrangement would provide the best regulatory framework for the protection of residents of retirement villages, as well as the viability of the retirement village industry?

SECTION 8

APPENDICES

8 Appendices

8.1 Appendix One - 2002 Statutory Review of the Retirement Villages Act 1992

The *Retirement Villages Act 1992* requires a review of the operation and effectiveness of the legislation to be carried out every five years. A previous review was conducted in 2002 and produced a report entitled *Review of the Regulation of the Western Australian Retirement Village Industry (2002 Statutory Report)* which was published in February 2002. A copy of this report is available on www.docep.wa.gov.au by following the links to the Retirement Villages Legislation Review.

The 2002 Statutory Report contained 50 recommendations. The outstanding recommendations from the 2002 report are being reassessed as part of this review to determine whether they are still applicable. For example, since 2002, the Retirement Villages Disputes Tribunal has been replaced by the State Administrative Tribunal (State Administrative Tribunal) and consequently recommendations relating to disputes and the former tribunal are being reassessed in view of the new powers, functions, and procedures of the State Administrative Tribunal.

The majority of the recommendations in the 2002 Statutory Report relating to the Code were incorporated into the 2003 Code and subsequently the 2006 Code, which mirrors the 2003 Code provisions. These changes included:

- improvements in the management of retirement villages and resident consultation, including consulting with residents on the future planning and budgeting of retirement villages, changes to the administrative and financial arrangements of a village, and the upgrade of buildings, fixtures or fittings where residents are financing the costs of the work;³⁷
- increased disclosure requirements regarding any administrative and financial changes which require the consent of residents;³⁸
- the introduction of a requirement for each village in a group of retirement villages controlled by the same organisation to maintain separate financial arrangements;³⁹
- the introduction of a requirement to provide quarterly operating income and expenditure statements to residents;⁴⁰
- improvements in the disclosure of annual village operating budgets;⁴¹

³⁷ Recommendation 21 implemented in Clause 5.2 of the Code

³⁸ Recommendation 22 implemented in the Regulations (Schedule 1, Form 1)

³⁹ Recommendation 23 implemented in Clause 5.3 (5) of the Code

⁴⁰ Recommendation 24 implemented in Clause 5.4 of the Code

⁴¹ Recommendation 25 implemented in Clause 5.3 of the Code

- the requirement to apply any surplus in the operating budget of a retirement village towards the future operating expenses of that village;⁴²
- the addition of a further question in the Regulations relating to the extent of insurance cover available if the unit, or the village as a whole, is damaged or destroyed;⁴³
- the requirement to provide a resident with monthly marketing reports when selling their premises;⁴⁴
- the requirement to disclose a resident's settlement entitlement and how it is calculated when a residence contract is terminated and a resident is leaving the retirement village;⁴⁵
- that on leaving a retirement village, a resident is no longer charged fees for personal services, such as meals, laundry or cleaning services;⁴⁶ and
- the retention of existing processes for the resolution of disputes within a retirement village.⁴⁷

⁴² Recommendation 26 implemented in Clause 5.6 of the Code

⁴³ Recommendation 28 implemented in the Regulations (Form 1 of Schedule 1)

⁴⁴ Recommendation 30 implemented in Clause 5.7 (b) of the Code

⁴⁵ Recommendation 32 implemented in the Regulations (Form 1 of Schedule 1)

⁴⁶ Recommendation 35 and 36 implemented in Clause 4.5 (2) and (3) of the Code

⁴⁷ Recommendation 37 and 44 implemented in Division 6 (Clause 6.1 to 6.3) of the Code

8.2 Appendix Two - List of recommendations from the 2002 Statutory Report

Legislative Objectives

Recommendation 1

That there be an additional legislative objective to —
“Encourage investment in, and the development of, retirement villages”.

Application of the Act

Recommendation 2

That residential aged care facilities which achieve and maintain Commonwealth certification or accreditation under the provisions of the Aged Care Act 1997 (Cwlth), be exempted from the provisions of the Act. This would require an amendment to the definitions of “residential premises” and “retirement village” in the Act.

The Consumer Protection Legislation Amendment and Repeal Act 2006 was assented to on 13 December 2006. This Act amends the Retirement Villages Act 1992 to exempt residential aged care facilities that achieve and maintain Commonwealth certification or accreditation under the provisions of the Commonwealth Aged Care Act 1997, from the provisions of the Retirement Villages Act 1992.

Recommendation 3

That the definition of “retirement village” in the Act be written in plain language (in particular, replacing the word ‘appurtenant’) and expanded to include communal, community service and support facilities within the village which are available to the village residents.

Recommendation 4

That the definition of “service contract” in the Act be amended to make it clear that the legislation applies to service contracts between the administering body and the residents only, and not to service contracts arranged between the residents and private service providers.

Recommendation 5

That it be compulsory for strata titled schemes that restrict the occupation of a part, or the whole, of land to persons predominantly aged 55 years or over, to disclose in writing, when promoting the strata titled scheme, that the scheme is not a retirement village as defined in the Act; and an appropriate penalty be imposed where a strata titled scheme fails to comply with the above requirement.

Recommendation 6

That section 15(1) of the Act be amended to provide for Crown land to be used for the purposes of a retirement village.

Recommendation 7

That the Act be amended to prevent it being avoided by the payment of premiums to a legal entity that is separate from, but associated with, the administering body of a retirement village.

Entry to a Retirement Village

Recommendation 8

That the term 'retired person' in the Act be replaced with 'older person' meaning someone 55 years or over, with the references to 'retired from fulltime employment' and 'spouse' in the current definition of 'retired person' being deleted.

A consequential amendment be made to the definition of 'retirement village scheme' in the Act to replace the term 'retired person' with 'older person'.

A consequential amendment be made to section 6A of the Strata Titles Act 1985 to replace the term "retired person" with "older person". Any other section in that Act that refers to "retired person" should be similarly amended.

Recommendation 9

That the definition of "spouse" in the Act be amended to remove discriminatory terms by rewording it as follows —

"Spouse" means a person living with another person on a bona fide domestic basis, whether or not legally married to that person and a consequential amendment be made to section 6A of the Strata Titles Act 1985 to insert the new definition of "spouse".

Protection of a Resident's Financial Interest

Recommendation 10

That section 18 of the Act be amended to apply to the legal entity to which a premium is paid.

Recommendation 11

That section 18(1)(a) of the Act be amended to permit the release of a premium held in a trust account when the person who has paid the premium, or on whose behalf the premium was paid, is entitled to occupy the premises.

That the existing subsection 18(1)(b) of the Act be retained.

Recommendation 12

That subject to the strengthening of the memorial regime under the Act, as recommended at part 4.3.4, the creation of a charge on land in a retirement village pursuant to section 20 of the Act, be repealed and as a consequence, section 21 of the Act that relates to the enforcement of the charge, also be repealed.

Recommendation 13

That provision be made in the Act for the Commissioner for Fair Trading⁴⁸ or the Registrar of the Retirement Villages Disputes Tribunal⁴⁹, to approve the termination of a retirement village scheme upon the consent of all the residents of the village, the administering body and any person who holds a mortgage, charge or other interest in the land; and

the process for effecting the termination of a scheme by the Commissioner for Fair Trading or the Registrar of the Retirement Villages Disputes Tribunal, as the case may be, be simple and cost effective having regard to the need to ensure that all the parties have consented to the termination.

Recommendation 14

That a provision similar to section 31(7) of the Strata Titles Act 1985 be included in the Act to give the Supreme Court the discretion to make such orders for the payment of costs as it thinks fit for any application made to terminate a retirement village scheme under section 22 of the Act.

Recommendation 15

That section 15 of the Act be amended to provide that land against which a memorial has been registered may only be used for the purposes of having a retirement village situated on that land, while the memorial remains registered, provided that the land may in part be used as a residential aged care facility under the Aged Care Act 1997 (Clth).

Recommendation 16

That the Act be amended to provide that where land is used, or is proposed to be used, for the purposes of a retirement village, it shall not be necessary to remove or exclude the memorial, as the case may be, in respect of any part of the land that is to be used as a residential aged care facility under the Aged Care Act 1997 (Clth). This is subject to the proviso that the remaining part of the land to which the memorial applies is used, or is proposed to be used, as a retirement village.

⁴⁸ now the Commissioner for Consumer Protection

⁴⁹ position no longer exists

Recommendation 17

That the wording of the memorial be amended to read:

1. The land above described may only be used for the purposes of a retirement village scheme within the meaning of the Retirement Villages Act 1992 and in part for the purposes of a residential aged care facility under the *Aged Care Act 1997* (Clth).
2. While any resident remains in occupation of residential premises under a retirement village scheme, the scheme cannot be terminated without the approval of the Supreme Court except where there is an agreement between all the village residents, the administering body and any person who holds a mortgage, charge or other interest in the land, to terminate the scheme.
3. If the Supreme Court approves the termination of a retirement village scheme, it may make such orders as it thinks necessary to protect the interests of the existing residents.
4. In addition to the circumstances detailed at point 2 above, this memorial may be cancelled as to a part or the whole of the land above described, where the Registrar of Titles is satisfied that the land to which the cancellation applies is no longer used, or proposed to be used, as a part or the whole of a retirement village.
5. The owner of the land above described and the successors in title to that land are bound to observe the terms and conditions of any existing residence contract which creates or gives rise to a right for a person to reside in a retirement village situated on that land.
6. The provisions of Part 3 of the *Retirement Villages Act 1992* apply generally to premises that are used, or are proposed to be used, for the purposes of a retirement village as defined in this Act.

Recommendation 18

That section 15(8) of the Act be amended to allow a memorial to be removed from a part of the land used as a retirement village upon the consent of all the residents of the village, the administering body and any person who holds a mortgage, charge or other interest in that part of the land; and

where total agreement on the removal of a memorial from a part of the land is not achieved, any aggrieved party may appeal against this outcome to the Retirement Villages Disputes Tribunal on the grounds that the objection to the removal of the memorial was vexatious, frivolous or without substance.

Recommendation 19

That where all parties consent to the removal of a memorial from a part of the land used as a retirement village, as provided for at Recommendation 18, the process for effecting the removal be simple and cost effective having regard to the need to ensure that the consent of all the parties has been obtained.

That the Department of Consumer and Employment Protection, in consultation with the Department of Land Administration, develop a set of formal procedures, including appropriate documentation, to support an application for the removal of a memorial from the whole or a part of land used, or proposed to be used, as a retirement village. Where applicable, this should include:

- defining who is authorised to apply for the removal of a memorial from the whole or a part of the land (i.e. the owner, his or her legal representative or guardian);
- requiring a sworn statement by the owner's authorised officer regarding the circumstances necessitating the removal of a memorial (the "owner" for the purposes of this recommendation is the current owner(s) of the land the subject of the memorial and can include a resident in a strata titled or purple titled scheme);
- requiring evidence that a retirement village scheme no longer operates on the land the subject of an application, or will not operate after the memorial is removed from that land. This could be confirmed by a certificate from the Commissioner for Fair Trading and should include the consent of any person who holds a mortgage, charge or any other interest in the land;
- requiring evidence of the approval of the Supreme Court to the termination of a retirement village scheme in accordance with section 22 of the Act;
- requiring evidence of the consent of all the residents, the administering body and any person who holds a mortgage, charge or other interest in the land the subject of an application, to the termination of a retirement village scheme in accordance with Recommendation 13 or the removal of a memorial from a part of the land in accordance with Recommendation 18; and
- in respect to the removal of a memorial from land subject to a licence, requiring a declaration of some sort to confirm the number of licence holders who would be required to provide consent.

Recommendation 20

That the recommended amendments to the memorial regime under the Act apply to existing retirement village schemes, wherever practicable; and

- the Department of Consumer and Employment Protection liaise with the retirement village industry and the Department of Land Administration to consider the application of these amendments to memorials currently registered over land used, or proposed to be used, as a retirement village.

During Occupancy in a Retirement Village

Recommendation 21⁵⁰

That the Act (if it incorporates the Code), or otherwise the Code, be amended to delete the use of the term “input” and insert a definition of “resident consultation” to make clear the rights and the responsibilities of both the administering body and the residents with respect to the administration and the financial arrangements of a retirement village. This definition is to include the following principles.

- That the administering body has a responsibility to provide prudential, efficient and economical management of a retirement village, and any decision made by the administering body must be in accordance with the terms and conditions of the residence contracts.
- That an individual resident or a group of residents in a retirement village, shall be entitled, on request to the administering body, to a full disclosure of all relevant documents and information relating to any specified administration or financial matter.
- That the administering body is to provide a written response to a submission made by whatever means by an individual resident or a group of residents in a retirement village, relating to any specified administration or financial matter.
- That the written response is to give reasons for any decision made in relation to the matter or matters referred to in the submission and must be provided within a reasonable time, say 14 days.
- The identification of administration/management matters in a village (such as changes to services or facilities) and financial matters (such as the village budget) that require or do not require, as the case may be, the consent of the residents.

⁵⁰ Implemented in Clause 5.2 of the Code

Recommendation 22⁵¹

That Form 1 of Schedule 1 to the Retirement Villages Regulations be amended to include a requirement for the administering body of a retirement village to disclose to prospective residents what administration/management matters in the village (such as changes to services or facilities) and what financial matters (such as the village budget) require or do not require, as the case may be, the consent of the residents.

Recommendation 23⁵²

That the Act (if it incorporates the Code), or otherwise the Code, be amended to require each village in a group of retirement villages controlled by the same organisation to maintain separate financial arrangements.

Recommendation 24⁵³

That the Act (if it incorporates the Code), or otherwise the Code, be amended to require the administering body of a retirement village to provide quarterly operating financial statements relating to that village which show details of:

- the village's actual operating costs, income and expenditure against projections of the same;
- payments to and from, and the amounts standing to the credit of, any maintenance reserve funds for the village; and
- display the financial statements in a central location in the village and provide the same to each resident on request.

Recommendation 25⁵⁴

That the Act (if it incorporates the Code), or otherwise the Code, be amended to require the administering body of a retirement village to:

- make a genuine presentation to the residents of a retirement village of the financial information used each financial year in the preparation of the preliminary budget for that village;
- at least two months prior to the end of each financial year, display the financial information and the preliminary budget in a central location in the village and provide the same to each resident on request;
- allow a minimum of 10 working days for the residents to consider the preliminary budget; and
- hold a formal meeting where the administering body must address the residents on the final budget proposals for the next year.

⁵¹ Implemented in the Regulations (Form 1 of Schedule 1)

⁵² Implemented in Clause 5.3(5) of the Code

⁵³ Implemented in Clause 5.4 of the Code

⁵⁴ Implemented in Clause 5.3 of the Code

Recommendation 26⁵⁵

That the Act (if it incorporates the Code), or otherwise the Code, be amended to require any surplus operational funds of a retirement village to be applied towards future operating expenses of that village, except where at least 75 percent of the village residents approve the application of the whole or a part of the surplus to any other purpose or purposes that is, or are, generally of benefit to the village residents.

Recommendation 27

That the Act be amended to provide that where a mortgagee or chargee of a resident's estate or interest in residential premises enters into possession of the residential premises in pursuance of the rights conferred by the mortgage or charge, the residence contract shall —

- a) subject to paragraph (b), subsist, except that the resident's occupancy rights shall be suspended while the mortgagee or chargee remains in possession; and
- b) where the mortgagee or chargee exercises the mortgagee's or chargee's power of sale of the resident's estate or interest in the residential premises, be terminated in accordance with the terms and conditions of the village scheme that regulate the sale of residential premises.

Recommendation 28⁵⁶

That Form 1 of Schedule 1 to the Retirement Villages Regulations be amended to include a further question under question 4 as follows —

"What is the extent of insurance cover if the accommodation unit, or the village as a whole, is damaged or totally destroyed?"

Disposing of a Resident's Interest in a Retirement Village

Recommendation 29

That there be a provision in the Act to give a resident who owns a unit (e.g. under a strata or company title) or who resides under a lifetime lease or licence tenure, or the beneficiaries of the resident's estate, the non-exclusive right, together with the administering body, to nominate an agent of their choice to market the unit in a manner that complies with the terms of the retirement village scheme.

⁵⁵ Implemented in Clause 5.6 of the Code

⁵⁶ Implemented in the Regulations (Form 1 of Schedule 1)

This provision need not apply where a resident resides under a lifetime lease or licence tenure and under the residence contract:

- the administering body must pay the premium refund within a fixed time; and/or
- the amount to be refunded is not contingent on the premium paid by, or on behalf of, a replacement resident;
- the appointment of the agent for either party be made by the administering body;
- the administering body must appoint the agent so nominated by a resident but the administering body should retain the right to dismiss the agent for a breach of marketing conditions;
- subject to the implementation of the above, section 19(5)(b) of the Act be repealed; and
- subject to the implementation of the above, question 27 in Form 1 of Schedule 1 of the Retirement Villages Regulations be amended (where appropriate).

Recommendation 30⁵⁷

That the Act (if it incorporates the Code), or otherwise the Code, be amended to require the administering body of a retirement village, on the request of a resident, to provide monthly marketing reports (commencing one month after a unit is placed on the market) showing efforts taken by the administering body to dispose of the resident's interest in the unit.

Recommendation 31

That provision be made in the Act for a resident who owns a unit (e.g. under a strata or company title) or resides under a lifetime lease or licence tenure, to have input into the determination of the marketing price for the unit;

this provision need not apply where a resident resides under a lifetime lease or licence tenure and under the residence contract:

- the administering body must pay the premium refund within a fixed time; and/or
- the amount to be refunded is not contingent on the premium paid by, or on behalf of, a replacement resident;
- if, after four months on the market, the unit has not been sold, re-leased or re-licensed for the agreed price, the price to be sought for the unit may, at the request of the administering body or the resident, be reassessed;
- if at any time the administering body and the resident cannot agree on the price to be sought for the unit, either party may access the services of a licensed valuer;
- the cost of the licensed valuer be borne by the party requesting the services of the valuer, unless otherwise agreed; and

⁵⁷ Implemented in Clause 5.7(b) of the Code

- if the administering body and the resident continue to disagree on the marketing price for the unit based on the advice of the licensed valuer, both parties may appoint their own valuer, at their own expense. The price to be sought for the unit would then be the average of the two valuations.

Recommendation 32⁵⁸

That Form 1 of Schedule 1 to the Retirement Villages Regulations be amended to require the administering body of a retirement village to highlight the settlement entitlement of a resident in disclosure statements, including how the settlement entitlement is calculated.

Following termination of a residence contract

Recommendation 33

That section 19(3)(a) of the Act be amended to provide that where a person is entitled to occupy, or does subsequently occupy, the residential premises formerly occupied by the resident, the premium shall be repaid in whole or in part within seven days of that person taking, or being entitled to take, occupation.

Recommendation 34

That a new paragraph be included at the foot of section 19(3) of the Act defining the “happening of a contingency” in words to the effect that—

“For the purposes of this section, contingency means and includes, but is not limited to, the settlement or completion of a resale of a residence to a replacement resident, the grant or assignment of a lease of a residence to a replacement resident, or the grant of a licence to occupy a residence to a replacement resident”.

Recommendation 35⁵⁹

That the Act (if it incorporates the Code), or otherwise the Code, be amended to include a provision that from the date a resident in a retirement village has vacated a unit, fees shall not be charged for personal services that the resident no longer receives.

Recommendation 36⁶⁰

That the Act (if it incorporates the Code), or otherwise the Code, be amended to include a definition of “personal services”.

⁵⁸ Implement in the Regulations (Form 1 of Schedule 1)

⁵⁹ Implemented in Clause 4.5 (2) and (3) of the Code

⁶⁰ Implemented in Clause 4.5 (2) and (3) of the Code

Recommendation 37⁶¹

That the Act be amended to provide the Retirement Villages Disputes Tribunal with the power to make a determination where there is a dispute about the liability of a resident for the total cost of any repair or refurbishment to a unit in a retirement village.

Dispute resolution

Recommendation 38

That the existing processes for the resolution of disputes within a retirement village be retained.

Recommendation 39

That the Department of Consumer and Employment Protection carry out market research to determine:

- the extent to which the residents in retirement villages are aware of, and use, the available dispute resolution processes; and
- the reasons why the residents do not, or would not, use these dispute resolution processes.

Recommendation 40

That following the market research, the Department of Consumer and Employment Protection develop education programs, in conjunction with the retirement village industry, resident representatives and relevant State and Commonwealth government agencies, to address perceived barriers to the residents of retirement villages making use of the disputes resolution processes.

Recommendation 41

That the Department of Consumer and Employment Protection include in any education package, details of:

- the processes involved in resolving disputes in a retirement village and information to assist the residents of the village with the presentation of any matter to the Village Disputes Resolution Committee and the Retirement Villages Disputes Tribunal; and
- other sources of external support and advocacy available to older persons in dispute situations.

Recommendation 42

As recommended in the 1995 report, that the Department of Consumer and Employment Protection, in consultation with relevant State and Commonwealth government agencies and appropriate community organisations including the Retirement Complexes Residents' Association, investigate other ways of ensuring that the needs of the residents of retirement villages for advice and counselling are addressed.

⁶¹ Implemented in Division 6 (Clause 6.1 to 6.3) of the Code

Recommendation 43

That the Act (if it incorporates the Code), or otherwise the Code, be amended to require the administering body of a retirement village to:

- provide details of the members of the Village Disputes Resolution Committee to the Department of Consumer and Employment Protection for recording on a database to be held at the Department; and
- give notice to the Department of any change in the composition of the Committee within a reasonable time, say 14 days.

Recommendation 44⁶²

That the Act (if it incorporates the Code), or otherwise the Code, be amended to require any party to a dispute before the Village Disputes Resolution Committee to make a full disclosure of all relevant documents and information to the other party prior to the matter being heard by the Committee.

Recommendation 45⁶³

That the Retirement Villages Disputes Tribunal application form be revised to make it more “user-friendly” and encourage applicants to provide the appropriate information. The revised form should:

- update the address of the Tribunal (front and back of form) to “Level 2, May Holman Centre, 32 St George’s Terrace Perth”;
- provide for the name of the applicant to appear as a new item 1;
- amend page 2, item 6 to include the name of the resident against whom the application is being made (i.e., item 3 should be included at item 6);
- include a new item following item 7 as follows: “A resident involved in the dispute can ask to be accompanied by a friend or a family member. Would you like a friend or a member of your family to accompany you at the hearing?”;
- provide for the applicant to state in simple terms what order is being sought;
- provide more space at item 9 (“reasons for seeking the order”) and include a note to advise the applicant to “attach additional sheets if needed”;
- provide the parties to the dispute with the option to request the Registrar of the Tribunal to first mediate the dispute at a pre-hearing conference;
- include a new item as follows: “Would you like the dispute to be heard before a referee sitting alone or a panel consisting of a referee and two other members? Please refer to the attachment for details of who forms the Tribunal”;

⁶² Implemented in Division 6 (Clause 6.1 to 6.3) of the Code

⁶³ Note that this form is no longer in use

- include a request for the applicant to attach to the application form all documents such as a copy of the residence contract, photographs, correspondence relating to the issue etc;
- make the guidelines attached to the back of the form clearer;
- provide an option for the applicant as follows: “If you need advice on completing this application form, you may telephone the Registry on (08) 9425 2773. Staff at the Registry will not be able to give advice on the merits of your application, but can advise you on how to present your application”; and
- update the name, address and telephone number for the Ministry of Fair Trading to the Department of Consumer and Employment Protection, The Forrest Centre, 219 St George’s Terrace Perth. Telephone 1300 30 40 54”.

Recommendation 46

That the Act be amended to provide:

- the Registrar of the Retirement Villages Disputes Tribunal with the discretionary power to mediate disputes at a pre hearing conference;
- that any party to an application made to the Retirement Villages Disputes Tribunal may request mediation as a first step, which shall not be denied by the Registrar without good reason; and
- that if the matter cannot be resolved by mediation then it may be referred to the Retirement Villages Disputes Tribunal to be heard before the full Tribunal or the Referee sitting alone.

Recommendation 47

That subject to the agreement of the Attorney General, the Suitors’ Fund Act 1964 be amended so that the definition of “court” includes the Retirement Villages Disputes Tribunal.

Regulation of the WA Retirement Village Industry

Recommendation 48

That the Government continue to regulate the retirement village industry in order to provide basic safeguards for older persons living in, or contemplating moving into, a retirement village.

Recommendation 49

That the Act and the Code be replaced by a single statutory scheme that retains, where appropriate, the flexible approach of the present regulatory regime.

Implementation of the Recommendations

Recommendation 50

That any changes to the current legislation should, in general, apply to existing contractual arrangements, wherever practicable.

8.3 Appendix Three - Reviews in other States

NEW SOUTH WALES	
Document	Relevant dates
Issues Paper ⁶⁴	September 2004
Final Report ⁶⁵	March 2005
Consultation Draft Bill ⁶⁶	November 2006

Key reforms proposed⁶⁷:

- to require the operators of retirement villages to hold annual general meetings and to provide certain information at those general meetings;
- to make provision for capital maintenance and replacement in respect of property within the retirement village;
- to provide circumstances in which the operator of a retirement village may vary the recurrent charges that are payable under a village contract without the consent of the residents;
- to provide that the operator of a retirement village be required to make good any deficit in the accounts of the retirement village and not be permitted to carry forward any such deficit, or seek a special levy from the residents of the retirement village to make good any such deficit, except as provided by the regulations;
- to provide that the operator is required to ensure that the retirement village is generally safe and that emergency vehicles and home care services have vehicular access to residential premises within the village;
- to provide for the recording on the Register kept under the *Real Property Act 1900* that specified land is used as a retirement village;
- to limit the period that a former occupant is required to pay recurrent charges after permanently vacating the premises within a retirement village;
- to provide for a settling-in period during which a resident may terminate a village contract;
- to revise the investigation, compliance and enforcement powers under the principal Act; and
- to create a process by which the right to receive a refund of an ingoing contribution paid under a village contract may be enforced.

⁶⁴ Website address: www.fairtrading.nsw.gov.au/pdfs/corporate/retirementvillagesip.pdf

⁶⁵ Website address: www.fairtrading.nsw.gov.au/pdfs/corporate/retirementvillagesreviewreport.pdf

⁶⁶ Website address: www.fairtrading.nsw.gov.au/pdf/exposure/b06-077-25-p.02.pdf

⁶⁷ Taken from Retirement Villages Amendment Bill 2006 Consultation Draft

VICTORIA	
Document	Relevant dates
Discussion Paper	September 2003
Final Report ⁶⁸	March 2004
Retirement Villages (Amendment) Act 2005 ⁶⁹	Implemented: May 2005; January 2006; August 2006
Retirement Villages (Contractual Arrangements) Regulations ⁷⁰	Commenced August 2006

Key reforms implemented⁷¹:

- a mechanism for the statutory charge over retirement village land to be lifted for parts of the land now used for other purposes;
- removal of operators' ability to reserve rights to act as a resident's agent when a unit is resold;
- time limits on the charging of fees and the payment of entitlements after a resident has left a village;
- prohibitions on operators taking a power of attorney or proxy from a resident;
- making the form of future contracts subject to regulations
- a notification scheme for village operators so that Consumer Affairs Victoria and the public know who is currently operating retirement villages and how they can be contacted;
- a requirement that each retirement village has an internal mechanism for handling complaints about their own services and, where the affected residents agree, disputes between residents;
- repeal of the statutory references to arbitration, to make it clear that the services of Consumer Affairs and Victorian Civil and Administrative Tribunal are as much available for matters arising under retirement village contracts as for any other type of dispute over a consumer contract.

⁶⁸ Website address: www.consumer.vic.gov.au

⁶⁹ Website address: www.legislation.vic.gov.au

⁷⁰ Website address: www.legislation.vic.gov.au

⁷¹ Consumer Affairs Victoria Resource Centre

QUEENSLAND	
Document	Relevant dates
Retirement Villages Amendment Consultation Bill 2004	Submission closed April 2005
Retirement Villages Amendment Act 2006 ⁷²	Implemented: March 2006; January 2007

Key reforms implemented⁷³:

- more accurate public information documents;
- fairer meeting procedures;
- clearer management of finances;
- capped insurance excesses;
- streamlined dispute resolution;
- increased rights when leaving the village;
- exit fees payable to the operator-date for calculation clarified;
- exit entitlements payable to the resident- time frame specified;
- liability for general services charges;
- liability for personal services charges;
- voting rights; and
- recognition of rights of spouse or relatives.

⁷² Website address: www.legislation.qld.gov.au/LEGISLTN/ACTS/2006/06AC006.pdf

⁷³ Taken from Fair Trading Facts- New laws for Queensland Retirement Villages

8.4 **Appendix Four - Occupancy agreements and title rights**

This section aims to assist residents and prospective residents in understanding some of the issues relating to the differences between the types of occupancy agreements and title rights of residents in retirement villages and factors to be considered when looking at different types of retirement villages.

Types of retirement village occupancy agreements

There are different ways that residents can obtain the right to reside in a retirement village. Below is a summary of the most common types of occupancy agreements but it is important to note that under current legislation there are no standard agreements. Each retirement village has its own set of documents.

Leases

Under a lease, a resident's right to occupy premises is based on a document in which the owner of a property (sometimes referred to as the lessor or the landlord) grants the right to the exclusive use of part of the owner's property. The resident would usually be referred to as the lessee or tenant.

A lease may be for a specific period. This may be expressed as being for a specific number of years, until the death of the lessee, or until the lessee transfers or assigns the lease to someone else. If for a specific period, the lease may be for a long period, perhaps 99 years, or for a shorter period, perhaps 50 years together with an option to renew the lease for a further 50 years.

A lease does not amount to ownership of part of the property in the retirement village. To obtain a lease, a prospective resident will probably be required to pay an ingoing contribution. This may be referred to as a deposit and may include pre-paid rent. If the deposit includes pre-paid rent, there may be no further rental payments required under the lease, but there will still usually be regular fees payable for maintenance and services.

If the resident wishes to move out of the leased premises before the lease expires, the lease may be transferable or assignable to another person. This may occur during the resident's lifetime (when they leave the premises) or upon death. It may be assignable by executors under the resident's will. However, the lease may contain some restrictions as to whom it may be assigned to. For example, the lease may require that any new person taking over occupation of the premises is retired or over 55 years.

If a resident assigns their lease and receive money for that assignment, the lessor may be entitled to receive part of that money. The amount payable to the lessor on an assignment will depend on the terms of the lease. The lease may also be voluntarily surrendered by the resident. If that happens, the amount refundable will depend on the terms of the lease.

Strata schemes

A retirement village may be a strata titled scheme. If it is a strata scheme, an incoming resident purchases ownership of one of the lots in the scheme. Strata schemes are discussed in more detail later in this section.

Purple title schemes

These are schemes where an incoming resident acquires an undivided interest in the whole of the land comprising the retirement village. Purple titles are also discussed in more detail later in this section.

Loan schemes (licences to occupy)

Many non-profit organisations and some commercial developments offer retired persons the right to live in a village, subject to the resident making a loan to the organisation or developer. The right granted in such cases is a licence to occupy particular premises within the village, together with the right to share in the use of the village facilities and amenities.

A 'licence' is an interest in land but is less of an interest than a lease. The licence usually comes to an end on the death of the resident or when the resident leaves the village, for example, to go into an aged care facility. When a licence comes to an end, there is usually a refund to the resident but the amount repayable is usually substantially reduced by a retention of part of the loan amount and the resident will not be entitled to any interest on the loan. If a resident dies or leaves, the operator or developer can grant a licence to a new resident to take over the premises.

If the new resident makes a larger loan than a previous resident, the organisation or developer usually retains the amount of the increase. The previous occupier may still be charged with a number of expenses until the new resident moves in. A loan of this kind cannot be regarded as an investment that will grow in value.

Company title schemes

These are very rare. These are not to be confused with strata-titled schemes. They involve a small company owning all of the land in the scheme. Each company's constitution records that there are shares of different classes and that a person who has a share of a particular class is entitled to the right to occupy a particular residence on the land. Legal advice should be sought in relation to such schemes before agreeing to buy any shares.

Shared ownership of Land

Co-owners

A certificate of title may be in the name of one or any number of owners. When two or more people are registered as the proprietors of a title, each one of them is called a co-owner. Each co-owner is entitled to an 'undivided' share in the whole property. No one has any right to the exclusive use of any particular part of the land. However, co-owners can enter into an agreement allowing them to have separate rights to exclusive use of specified parts of the land. There are two ways that people can be registered as co-owners of the same piece of land.

Joint tenants

If the certificate of the title shows the registered proprietors as holding the land as 'joint tenants', they are each entitled to the same rights over and interest in the whole of the property. There is no limit on how many people may hold a piece of land as joint tenants but, however many there are, their rights and interests will always be equal. They will all be entitled to equal shares in any rental or other income from the property. If the property is sold, they will be entitled to share the proceeds equally.

Rates, taxes and other expenses and risks in respect of the property will usually be paid equally, although their liabilities for such expenses or in respect of claims against the co-owners may be 'joint and several'.

If one of the joint proprietors dies, the surviving joint proprietor(s) will automatically become entitled to ownership of the land, including all of the deceased proprietor's interest in the land. This is so even if the deceased proprietor tried to pass it to beneficiaries under his or her will. The last surviving joint tenant will become the sole proprietor of the property. Most residential properties owned by a husband and wife are held in joint tenancy.

Tenants in common

If the certificate of title shows the registered proprietors as holding the land as 'tenants in common', it will also show their respective proportions of ownership. These may be equal or unequal. For example, where a number of people have contributed different amounts towards the purchase of a piece of land, they may wish to record their shares of ownership to show those same proportions of contributions. Where this happens, a certificate of title might, for example, record that the land is owned by:

“Mary Smith, as to four undivided one-seventh shares; Mavis Smith, as to two undivided one-seventh shares; and George Brown, as to one undivided share.”

There is no limit on how many people may have an interest as tenants in common in the same piece of land.

Because each co-owner has an 'undivided' interest in the property, then unless they agree otherwise, they will all have the same rights to all parts of the land as each of the other co-owners, whether they have equal shares or not. However, each co-owner will be responsible for rates, taxes and other expenses in the same proportion as his or her interest as a tenant in common.

If the land is sold or if there is any rental or other income received from the property, a co-owner will be entitled to the same proportion of the sale proceeds or that income as his or her share as a tenant in common. A co-owner who is a tenant in common can sell or give that interest to any other person or to leave their interest to beneficiaries in their will, but co-owners sometimes enter into agreements with each other to restrict the use of or the transfer of a co-owned interest.

Co-owners sometimes enter agreements allowing one or more of them a right to occupy part of the property to the exclusion of the other or others. For example, a title to a property may be in the names of Mr and Mrs Smith and Mr and Mrs Jones as tenants in common in equal shares. They could enter into an agreement which allowed Mr and Mrs Smith the right to occupy one half of the property and Mr and Mrs Jones the right to occupy the other half.

Where two or more people own an undivided share in a property they may, as between themselves, decide to hold that interest as joint tenants. For example, in the example of Mr and Mrs Smith and Mr and Mrs Jones as set out above, Mr and Mrs Smith or Mr and Mrs Jones could choose to hold their undivided half share between them as joint tenants.

Title rights

A title is a certificate that describes a piece of land, shows the name and address of the owner (registered proprietor) and other information about that piece of land. This includes details of mortgages and caveats affecting that piece of land. All original certificates of title are held by Landgate. Landgate was once known as the Titles Office, then as the Department of Land Administration (DOLA), then as the Department of Land Information (DLI).

The owner of the land in a certificate of title is called a registered proprietor. A registered proprietor will only receive a duplicate of the original certificate of title. As the duplicate certificate of title may not record up-to-date details of matters affecting title to the land, interested persons can contact Landgate who will, for a fee, provide a copy of the original certificate of title. Copies of other documents recorded on the original certificate of title may also be obtained from Landgate.

Green titles

A Green Title means that the registered proprietor named in the certificate of title owns all of the land referred to in that certificate. The expression green title goes back to the days when every certificate of title included a green coloured sketch plan of the land. Landgate has computerised its certificates of title so that new certificates of title no longer show a sketch plan. However, these are still referred to as green titles. Some of the older types of green title certificates are still held by some owners.

Purple titles

Purple titles are issued for retirement village schemes in situations where incoming residents acquire an undivided interest in the whole of the land comprising the retirement village. When there are co-owners who own a property as tenants in common, each co-owner is entitled to apply to Landgate for a separate certificate of title (purple title) for their undivided share in the property.

In the past, instead of the sketch being green, the sketch would have been coloured purple. This is how the expression “purple title” arose. In the same way that green titles no longer show a sketch plan or colour, purple titles no longer show a sketch plan or colour. However, a separate certificate of title that is issued for an undivided share in a piece of land is still referred to as a “purple title”. The name of the proprietor of each purple title is shown on the new certificate of title in respect of that proprietor’s share. It shows, for example:

“Jane Smith as the proprietor of four undivided one seventh shares in the land.”

The proprietor of a purple title is entitled to sell his or her interest in that title but it is usually not readily marketable. If there is to be a sale or transfer of the whole property owned by the proprietors who each hold a purple title, all of the purple titles would have to be included in the transfer if the buyer is to acquire good title to the whole of the property. Some retirement village schemes provide for residents to acquire a ‘purple’ title to their lots. There may be two situations in which this may occur. There are:

- the whole scheme has been completed and the developer no longer has any share in the lot; or
- the scheme is incomplete, with a number of residences and other improvements still to be completed with the developer still retaining a share in the land.

In the case of a completed scheme, the purchaser's undivided interest in the whole scheme should be easy to identify. For example, if there are 100 residences, all of similar value, the property acquired by a purchaser will be one undivided one-hundredth share in the land comprised in the village.

Although every co-owner would have an interest in the ownership of every residence, the agreements signed by, or on behalf of all co-owners, will grant to each resident the right to exclusive use of one of those residences.

In this way, each can occupy a residence to the exclusion of the other co-owners of the land. They do not 'own' the residence but they have a share in the whole property, coupled with a right to exclusively occupy the residence.

However, where the development of the village is incomplete, the position may be different, although the starting point is still that every person who has an undivided share in a property has the same right to use all of the property as every other person who has such a share.

For example, if the developer had planned to develop and sell 100 similar residences but had not built all of them, the developer would sell to each intending resident an undivided one-hundredth share, together with the exclusive right to occupy one of the completed residences. This right would be granted in the first sale by the developer. At that time, the developer and the first purchaser would be the only co-owners of the land.

The developer would reserve the right to sell further undivided shares in the land, coupled with the grant of similar exclusive use rights to occupy a residence. The documents each purchaser would sign with the developer would usually include a grant by the purchaser to the developer of a right, on behalf of the purchaser and all previous purchasers, to grant exclusive use rights to each subsequent purchaser over one of the residences. This is to overcome the problems that would arise if every such agreement had to be signed by all previous purchasers.

The developer would need each purchaser's approval to retain exclusive use of any unsold balance of the land and the right to develop it. The approval could be included as a term of a contract to purchase a share in the land. However, if, in the example set out above, the developer built and sold, say, only 90 residences and decided not to build any more, the developer and those who had purchased undivided interests would own the undeveloped portion of the land as tenants in common. A resident's share may only be one one-hundredth and the other purchasers' shares, between them, may only total 89 one-hundredths and the developer's share of 10 undivided one-hundredth shares.

Despite those differences in undivided shares in the land, the developer would have no greater right to use or develop the undeveloped portion than any of the other co-owners, unless the relevant documents reserve the undeveloped portion. That wording of such rights, if any, may differ in different retirement villages' documents.

Strata titles

As an alternative to purple titles, it is possible, for land to be owned by a number of people, with each of them having a separate certificate of title showing their ownership of a defined portion of a piece of land or a building. This is called a strata plan. A strata plan is a type of land holding which is established under the Strata Titles Act 1985. A strata plan will show at least one building. There may be a number of parts of a strata-titled scheme that are external to the buildings in the scheme.

There is another form of strata titling a property which is called a survey-strata plan. It will not show any buildings. It is not used for multi-level developments where one lot is above or below another lot and is unlikely to be used for a retirement village. A person who is the owner of a lot is called a 'lot proprietor'. As with any other land ownership, a strata-titled property may be held in the name of one person or by more than one person as joint tenants or as tenants in common. It is important to understand some of the basic expressions used in relation to strata titled properties.

Issues related to strata titles

Parcel and lots

In a strata plan, all parts of the land are, together, called the parcel. Each portion that is the subject of a separate certificate of title is called a lot. Lots are frequently referred to as 'units'. However 'units', in that context, should not be confused with 'unit entitlements'. A residence may be identified within a village as, for example, 'Unit 10', but it may, in fact, be a lot which has a different number on the Strata Plan. It is important to check the strata plan to confirm the identity of the lots. Unit entitlements are referred to below.

Lot boundaries

It is important to identify lot boundaries because the resident will be liable for the repair and maintenance costs of his or her lot. In most cases, the strata company will be responsible for the repair and maintenance costs in relation to common property. A lot may be in more than one part. For example a lot may include a residence and a separate carport or storeroom. This will be apparent on the strata plan. A lot may include a part or parts within a building and a part or parts, such as a garden or courtyard area, external to a building.

The boundaries of the lots will be set out on the strata plan, usually in the form of a surveyor's notations. If they are not clear, it will be necessary to consider the terms of the Strata Titles Act. Assistance may be required in this regard.

Common property and strata scheme

Any part of land or building on a strata plan that is not comprised in one of the lots is called 'common property'. The lots and common property, together with the rights and obligations of the lot proprietors and others under the Strata Titles Act, are referred to as a strata scheme. Lot owners receive a certificate of title to that lot. The certificate confirms that a resident also owns a share in the common property. All lot owners will own the common property as tenants in common. A resident's interest in the common property will be in the same proportion that the unit entitlement of his or her lot bears in relation to the aggregate of the unit entitlements of all of the lots in the strata plan, but his or her rights to use, and have access to, some parts of the common property may be restricted by the by-laws of the strata company or by a lease or licence granted by the strata company.

Exclusive use and special privileges rights

A strata company has the power to grant to lot proprietors the exclusive use of or special privileges in respect of parts of the common property. This requires the strata company to adopt and register at Landgate a carefully worded by-law which must set out in clear terms the precise area covered by such rights and the conditions that must be observed by a proprietor who is granted those rights. In most cases a proprietor who has such rights will be responsible for the strata company's obligations to repair and maintain the relevant part of the common property but the particular by-law must be checked in that regard.

Unit entitlements

A strata plan will include a schedule of unit entitlements. This sets out, in respect of each lot, a figure referred to as the unit entitlement of that lot. On a strata plan, the unit entitlement of each lot is calculated by a licensed valuer who must certify the relative market values of the lots in the scheme. The valuer must then prepare the schedule of unit entitlement based on those values. For example, a six lot strata plan may include three one-bedroom lots, each valued at \$100 000, two medium-sized lots each valued at \$200 000 and one large lot valued at \$300 000. In such a case, because of those different values, the schedule of unit entitlement would look like:

Lot number	Unit entitlement
1	10
2	10
3	10
4	20
5	20
6	30
Aggregate unit entitlement	100

Strata company and ‘body corporate’

As soon as a strata plan is registered, all of the owners of lots are automatically formed into a body called a strata company. No other steps are required to create the strata company. Although it is referred to in the Strata Titles Act as a strata company, it is easier to understand if it is thought of as an owners’ association. Between 1966 and 1985, when the Strata Titles Act 1966 was in force, it was officially called the body corporate. When the Strata Titles Act 1985 replaced the 1966 Act, the name was changed to strata company, but the term body corporate is still often used. It is the same body. When a person sells or gives away his or her strata lot, that person will cease to be a member of the strata company. The new proprietor will automatically become a member of the strata company as soon as he or she is registered as the proprietor of the lot.

Depending on a particular village’s management arrangements, the management of many of the matters that would normally be controlled by the strata company are in fact exercised by the manager of the village. The costs involved in running a strata company must be kept separate from the manager’s costs.

Budgets and levies

The strata company will have regular administrative expenses relating to such things as insurance premiums and repair and maintenance costs in respect of the common property. The amount of these anticipated annual or regular expenses is normally the subject of an annual budget submitted to the lot proprietors for approval at an annual general meeting of the strata company. Following the approval of proposed annual expenditure, the strata company must recover a proportion of that amount from each proprietor. Those amounts are called ‘contributions’ or, more commonly, ‘strata company levies’.

For example, on the basis of the schedule of unit entitlement set out above, each of the proprietors of Lots 1 to 3 would have to pay 10 per cent, each of the proprietors of Lots 4 and 5 would have to pay 20 per cent and the proprietor of Lot 6 would have to pay 30 per cent of the total amount to be raised by the strata company to pay the annual expenses.

Further or contingent expenses

From time to time there will be some major expenses that are not of an annual or regular kind. For example, a building may need to be repainted, a common property driveway may need re-surfacing, or structural items may need to be replaced after a period of years. The Strata Titles Act authorises, but does not make it obligatory, for a strata company to set up a reserve fund.

A reserve fund enables a strata company to decide from year to year (at the same time as the administrative fund is dealt with and levies for annual or regular expenses are calculated), to add an additional levy for the reserve fund so that when a major expense item arises, there will be some funds available to meet that expense. Unless there is an adequate reserve fund, the strata company will have to raise special levies from the lot proprietors when the funds are required for such contingent items. This can create serious problems.

When considering acquiring a lot in a strata scheme, a purchaser is entitled to examine the books, records and accounts of the Strata Company (see section 43 of the Strata Titles Act 1985) if authorised by the seller. This should always be done before committing to a purchase of a strata lot.

Strata company by-laws

Every strata company operates under a set of internal rules known as by-laws. There are “standard” by-laws in Schedules 1 and 2 of the Strata Titles Act. These will apply to every strata scheme unless the strata company adopts different or additional by-laws. If the standard by-laws have been changed or replaced or added to, this should be recorded by way of a “Notification of Change of By-Laws” on the strata plan. It is useful to find out what by-laws apply to a scheme before proceeding with a purchase of a lot in the scheme.

The by-laws in Schedule 1 usually relate to meetings of the proprietors, as well as the appointment of members to a committee, generally referred to as the council or council of owners. They also deal with meeting procedures and voting rights. In strata-titled retirement villages, there is often a special by-law (or a special endorsement on the strata plan) restricting the occupation of a lot to retired people or people of a minimum age, although it may still be possible for someone under that age to be the proprietor.

For example, a member of a family may purchase ownership of a lot, but allow a parent to live in the lot, because a restriction or endorsement of this kind usually applies to occupation not ownership.

It is important that prospective owners consider the requirements of each scheme in this regard. The by-laws in Schedule 2 usually relate to the conduct and behaviour of proprietors, their tenants and guests, including restrictions on parking, the keeping of animals and noise and nuisance issues. The retirement village may have a set of 'residents' rules'. These should not be confused with a strata company's by-laws. In a strata-titled scheme, there may be both a set of by-laws and a set of residents' rules.

A strata company may want to grant a proprietor the right to exclusive use of or special privileges to a part of the common property. By-laws of that kind are often made for the use of areas such as gardens, courtyards or parking bays. This can be done by the proprietors voting at a strata company general meeting to adopt such a by-law. This has to be a Schedule 1 by-law (Section 42(8) Strata Titles Act 1985) and must be registered at Landgate within three months after it is adopted.

Council of owners

The by-laws of a strata company will contain provisions relating to the election of a 'council of owners', which is a committee, usually comprising between three and seven proprietors who are elected to the council at each annual general meeting of the strata company. The Strata Titles Act sets out a number of provisions relating to the powers and duties of the council. They are fairly wide powers, but a strata company or the strata company's by-laws may impose some restrictions, particularly in relation to spending powers.

8.5 Appendix Five – Checklist for prospective residents⁷⁴

It is important for you to carefully read and consider the following questions before deciding to enter any retirement village. If, after reading through the list, you are uncertain as to any aspects of the village, or its suitability for you, seek further advice.

1. Have I fully discussed my decision to enter a retirement village with my family, friends or adviser?
2. Can I afford to move into the village I have chosen and meet the current and future ongoing costs of living in this village? What are the financial consequences for me if I wish to move out of the village? Have I sought independent advice from a licensed financial adviser on these matters?
3. If I am considering moving to a retirement village because the housework, gardening and general maintenance has become too much, have I fully considered other options? For example, obtaining home help or handyperson help, or moving to a smaller unit in the same neighbourhood.
4. If I am considering moving to a retirement village because I have recently lost my partner, have I given myself enough time to grieve before I make a major lifestyle change?
5. Have I received adequate information about the retirement village I have chosen? Have I shown the documents to a solicitor? Am I satisfied that I fully understand the contract that I am signing?
6. Am I comfortable that the lifestyle of the village (including social activities and religion) will suit me? Have I spoken to any residents of the village?
7. Will the village and my unit be readily accessible if I become disabled and need a wheelchair or walking aid? What alternatives do I have if I am no longer able to live alone?
8. Does the village provide personal care or nursing care, an emergency call system and other amenities that are likely to meet my present or future needs?
9. Have I looked at a number of villages to compare the amenities (e.g. recreational, transport, gardens etc.) and financial arrangements?
10. Is the village I have chosen accessible to my friends and family?
11. Can I take my own furniture to the village and, if so, will it be suitable?
12. Before I sign the contract, have I received and considered all the information required to be given to me under the *Code of Fair Practice for Retirement Villages 2006* and the *Retirement Villages Act 1992*?

⁷⁴ Appendix 1 of the Code

8.6 Appendix Seven – Glossary of abbreviations

ABS	Australian Bureau of Statistics
Consumer Protection	The Consumer Protection Division of the Department of Consumer and Employment Protection
COTA	Council on the Aging
DOCEP	Department of Consumer and Employment Protection
FTA	<i>Fair Trading Act 1987</i>
NSW	New South Wales
NSW Act	<i>Retirement Villages Act 1999</i>
Qld	Queensland
RVA	Retirement Villages Association
SA	South Australia
SAT	State Administrative Tribunal
2002 Statutory Report	<i>Review of the Regulation of the Western Australian Retirement Village Industry</i>
The Act	<i>Retirement Villages Act 1992</i>
The Code	<i>The Code of Fair Practice for Retirement Villages</i> prescribed under the <i>Fair Trading Act 1987</i>
The Regulations	<i>Retirement Villages Regulations 1992</i>
Vic	Victoria
WARCRA	Western Australian Retirement Complexes Residents' Association, Inc.



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