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Mr Aaron Harper MP
Member for Thuringowa and Committee Chair
Health, Communities, Disability Services and
Domestic and Family Violence Committee
Parliament House
George Street
BRISBANE QLD 4000
via: Health@parliament.qld.gov.au

Dear Mr Harper

Health and Other Legislation Amendment Bill 2018

The Property Council of Australia welcomes the opportunity to provide feedback on the *Health and Other Legislation Amendment Bill 2018* (HOLA Bill). Our submission is focused on proposed amendments to the *Retirement Villages Act 1999* (RV Act).

The proposed amendments to the RV Act in the HOLA Bill, if enacted, will place a significant financial burden on scheme operators (Operators) through a mandatory requirement to purchase a freehold unit after a period of 18 months, are therefore strongly opposed.

Our submission provides an overarching view and comment on the policy settings supporting the proposed amendments along with a detailed analysis and recommendations relating to individual clauses in a separate attachment.

A lack of explanation

We do not agree with the explanation provided in the supporting Explanatory Notes suggesting that this amendment seeks to clarify the policy intent of the 2017 amendment, which requires Operators to pay an exit entitlement to a resident no later than 18 months after the termination of their right to reside within the village.

The fact that this amendment contains 11 detailed clauses seeking to further amend the RV Act, in our view shows that this was never a policy intent. Indeed, this affirms the industry was correct in forming the view that the 2017 amendments would not apply to freehold villages.

Whatever the explanation is, it certainly does not justify the amendments in the HOLA BILL having retrospective application to existing units purchased under the current legislation or the 18 month period beginning in November 2017. This is completely unacceptable and will add to the significant financial liability that Operators are currently carrying for leasehold and licence villages as we approach the date in May 2019 when Exit Entitlements will start to be paid on units that have not sold.

The same rules should not apply to different tenure types

The tenure arrangements between freehold and leasehold or licence arrangements is fundamentally different and therefore the financial structure and arrangements for Operators are completely different in a freehold scenario.

In broad terms, an Operator of a freehold strata village is somewhat similar to a body corporate manager, as opposed to an Operator in a leasehold or license setting where the underlying ownership of the units and the land sits with the Operator and a contract is formed between the Operator and the resident to reside in the village.

Operators should have more control over the sales process

Operators of leasehold and licence villages have a level of control over the sales process that is not afforded to operators within freehold villages. In a freehold context, owners are at liberty to appoint external agents and determine a listing price for that appointment and the Operator has no oversight or control of this process.

If the price is set too high for the market, then it is likely that the Operator will be required to carry out a mandatory purchase. In this scenario the Operator will offer a mandatory purchase price at a point in time before the 18 month period expires, and at a more comparable price to the market value. The resident may not agree to this price and this will then trigger additional costs due to the Operator being required to obtain a valuation that will then be taken to be the agreed value.

To assist in mitigating the need for an Operator to carry out a mandatory purchase the HOLA Bill should be amended so that the Operator has the exclusive right to market and sell the unit from the date that notice is given (by the resident or the Operator) triggering the sale.

This is not a buyback it is a compulsory acquisition

The proposal is not a buyback as the Operator does not hold the underlying ownership of the unit as is the case for leasehold or licence villages. Also, in most cases the existing Operator was not the original developer of the property who sold the units.

In effect this amendment is similar to the compulsory acquisition powers that only Government has the power to operate under, however, it is being applied in the open market.

To draw a similar example to the broader residential market, it is like putting a requirement on a body corporate manager to purchase a dwelling in a Community Title Scheme that has not sold.

Where is the modelling and analysis to justify this amendment?

It is disappointing that the Health, Communities, Disability Services and Domestic and Family Violence Committee has not been provided with a Regulatory Impact Statement from the Department that fully investigates the ramifications of this amendment for both residents and operators. We are deeply concerned that this amendment will have unforeseen implications due to it being pushed through without broader analysis or simply understanding what issue the amendment is trying to resolve- and ultimately whether or not this amendment will serve that purpose.

The Property Council and its members are not the only ones concerned about the implications of the proposed amendments. The news articles referenced below raise a number of issues that warrant further investigation by the Committee and the Department prior to this amendment being passed by the Queensland Parliament:

- The Sydney Morning Herald, 25 November, 2018 (Rachel Lane) – *There's a buyback loop lurking in the north.*
- The Courier Mail, 9 December, 2018 (Noel Whittaker) – *Retirement village law change could hurt those least able to pay.*

Consistency with legislation of other jurisdictions

Another failure of the Explanatory Notes supporting this Bill is that no analysis has been undertaken to inform the Committee that this amendment is inconsistent with legislation governing retirement villages and any other private property transaction in other jurisdictions.

While other forms of buybacks exist in other jurisdictions, to our knowledge there is no other jurisdiction that mandates the compulsory purchase of freehold units in a retirement village by an operator, similary there is not other jurisdiction who mandate the compulsory acqicion. In fact, contracts that have 'freehold' like features are specifically separated from buyback legislation in some states (e.g. New South Wales). Therefore, this amendment is likely to have broader consequences for the Operators across Australia as other jurisdictions are likely to follow the lead of Queensland.

Thank you for the opportunity to provide feedback to the *Health and Other Legislation Amendment Bill 2018*. If you would like any further information, please do not hesitate to contact me on [redacted]

Yours sincerely

Chris Mountford
Queensland Executive Director

Enc - Attachment: Detailed analysis and recommendations on the HOLA Bill

Attachment: Detailed analysis and recommendations on the HOLA Bill

Health and Other Legislation Amendment Bill 2018			
Clause	**Heading**	**Proposed amendment**	**Comments**
37	Insertion of new s 11A		
		11A(2)(b) *What is freehold property of a resident or former resident*	In proposed section 11A(2)(b), a freehold interest in an accommodation unit is a former resident's 'freehold property' if the former resident had a right to reside in the accommodation unit that has been terminated under the Act. 1. The amendments do not clarify the timing for when a former resident's right to reside in a freehold accommodation is *terminated*, which then triggers the start of the 18 month period in a freehold context. The Act defines 'termination date' in section 56 as the date the resident's right to reside under a residence contract is terminated 'under this Act'. In a freehold context, the right to reside derives from a freehold interest and therefore ceases, at the latest, on the sale of the unit (as the resident has the right at law to live in the unit as its owner until they no longer own it). The residence contract between the former resident and the scheme operator (**Operator**) is usually in the form of a service or management agreement, as opposed to an agreement granting the resident exclusive possession of the freehold property (as for a lease). The Operator and resident's obligations in a freehold context end in 2 scenarios: a. if the resident elects to sell the freehold interest: the former resident's obligations end on settlement of the sale to the incoming buyer. Reinstatement work and sales and marketing efforts commence when the resident formally notifies the Operator of his/her intention to sell; or b. if the Operator elects to exercise an option to purchase the unit in certain circumstances (e.g. if the resident materially breaches the agreement): the former resident's obligations end on settlement of the sale to the Operator. Reinstatement work and sales and marketing efforts commence when the Operator exercises the option. In neither case is there a notice of termination given by either party. Proposed section 11A(2)(b) therefore creates uncertainty about the due date for the Operator to carry out the mandatory purchase of the unit.

			Submission: The amendments should clarify when the right to reside has been terminated in the freehold context. For example, when the Operator or the resident gives a notice under the residence contract which triggers the sale of the unit. 2. The proposed amendments to the RV Act are silent on when the former resident must vacate the freehold property after a notice which triggers a sale is served. Without statutory intervention on this matter, the resident could remain in the unit, which could delay the sales process, and especially undertaking agreed reinstatement works. It necessarily follows that the unit will take longer to sell, which increases the likelihood that the Operator will have to carry out the mandatory purchase of the unit. **Submission: The amendments should require the resident to vacate the unit within a specific time frame after a notice which triggers a sale is served.**
38	*Insertion of new ss 63A-63I*		
		63A *Scheme Operator must enter into and complete contract to purchase freehold property*	1. Under proposed section 63A, the Operator must enter into a contract to purchase the former resident's freehold property. Proposed section 63B(3) states that the Operator must complete the purchase under the contract by the date that is 18 months after the termination date. However, a fundamental concern is that there is no obligation on the former resident or the personal representative to enter into a contract with the Operator. It is noted that in other jurisdictions, the resident can opt out of the mandatory buyback (for example, if the resident is of the view that he/she will wait out the market to try to achieve a better price). It is unclear from the amendments if the omission of an obligation for the resident to enter into the contract is intended to give the resident an indirect ability to 'opt out'. In light of proposed section 63A(6)(a), it could have this effect. As a consequence of the above, if the former resident does not cooperate then the Operator is left in doubt about the implications if the contract has not been entered into or settled at the 18 month mandatory purchase date. **Submission: To provide legal certainty, the amendments should require the resident to enter into the contract with the Operator or alternatively, should state that the resident may opt out of the mandatory purchase.** 2. In proposed section 63A(2), reference is made to the freehold property being 'sold'. It is unclear whether this means: a. that the sale of the property has settled; or b. that a contract of sale has been entered into. It would seem that the intent is that the sale of the property has settled, as proposed section 63A(2)(b) then refers to the Operator having a reasonable excuse not to sign or complete, which

			includes if the former resident has entered into a private contract under proposed section 63A(6)(b). **Submission: If 'sold' means 'settled' then this should be amended for certainty.** 3. Proposed section 63A(6) provides that the Operator has a reasonable excuse for not entering into a contract or completing the purchase during (a) *a period during which the Operator cannot take the required action, despite taking all reasonable steps, because of an act or omission of the former resident.* In practice, this creates uncertainty about the exact period for which the Operator will be deemed to have a reasonable excuse. This uncertainty is addressed in subparagraphs (b) and (c), but not in (a). The implication of paragraph (a) is that the Operator must enter into the contract or complete the contract immediately once the former resident rectifies or remedies the act or omission preventing the required action. In practice, both parties will then need time to prepare for and attend settlement. **Submission: The wording in subparagraph (c) should be replicated in subparagraph (a) e.g. the period runs until the earliest day, after the former resident has remedied the act or omission, by which it would be reasonable for the Operator to take the required action.** 4. Industry is yet to see the approved form contract. If the amendments commence without an approved form contract being released, there could be significant delays in a contract being signed by the Operator and former resident, as a bespoke contract will need to be prepared and individually negotiated with each former resident or his/her representative. This adds to both party's costs. Unless there is an approved form contract, a former resident who considers that the form of contract offered is unfair (for example because it includes warranties or obligations that the resident thinks are unreasonable) may allege that the Operator is attempting to circumvent the buyback obligations. While proposed section 63A(7) provides that a dispute relating to a contract is a retirement village dispute, it is submitted that this will impose additional costs for the Operator and resident, place unnecessary burden on the tribunal and result in consequential delays for operators and residents during the phase-in of the mandatory buyback provisions. **Submission: The approved form contract should be issued (following appropriate industry consultation) at the same time as the mandatory purchase provisions commence.**
		63B *Timing of purchase*	Proposed section 63B(3) requires the Operator to complete the purchase of the former resident's unit by the latest of: (a) the day that is 18 months after the termination date; and

			(b) if the former resident has died – the day that is 14 days after the Operator is shown the probate of the former resident's will, or letters of administration of the former resident's estate. This omits the fact that the transmission application may not yet have registered and therefore title cannot be transferred to the Operator. **Submission: Proposed section 63B(3)(b) should be amended to include registration of the transmission application at the Land Titles Office.**
		63D *Purchase price of freehold property*	1. Proposed section 63D(2)(b) provides that in the 'valuation and resale provisions' (sections 60, 64, 65, 67 and 68 to 70AD) a reference to paying an exit entitlement to the former resident is to be read as a reference to entering into a contract under proposed section 63A. This simplistic method of amending the relevant provisions creates uncertainty. That uncertainty is demonstrated when applying proposed section 63D(2)(b) to section 64. Section 64 applies to units not sold within 6 months and relates to the appointment of a real estate agent by the resident. Application of proposed section 63D(2)(b) to that section means that it would read along the lines of: '*(1) This section applies if –* *(a) a former resident's right to reside in a particular accommodation unit is not sold within 6 months after the termination date; and* *(b) the operator has not entered into a contract under section 63A.* *(2) The former resident may engage a real estate agent to effect the sale of the right to reside in the accommodation unit*.' In the context of this section, it is irrelevant whether the Operator has entered into a contract with the former resident. It would seem that subparagraph (b) should actually read '*(b) the Operator has not completed the purchase of the former resident's freehold property under section 63A.*' However, that is not the technical outcome of applying proposed section 63D(2)(b). The same issue exists when applying proposed section 63D(2)(b) to section 65(1). **Submission**: **Both former residents and Operators need certainty in the legislation regarding the mandatory purchase of freehold units and for that reason, it is submitted that proposed section 63D should be removed from the Bill and instead, each valuation and resale provision amended to make it clear how those provisions apply to freehold property.** 2. As the Land Titles Office distributes property sale prices (as declared in the Form 1 Transfer) to other Government departments (e.g. Office of State Revenue) and information service providers (e.g. RP Data, Pricefinder), the consideration (or resale price) stated on the Form 1 Transfer is public information relied upon by Government, property valuers and banks.

			Submission: Proposed section 63D should make it clear that the resale value to be determined by a valuer must exclude amounts that the Operator may set off or deduct against the resale price (including the exit fee). 3. The Bill gives the legislature an opportunity to clarify the decision in *Sentinel Citilink Pty Ltd v PS Citilink Pty Ltd* [2018] QSC 239. That decision has created legal uncertainty in relation to the consideration to be stated in a Form 1 Transfer. The facts are analogous to a freehold mandatory purchase. In *Sentinel*, a rent incentive was expressed to be a deduction from the balance purchase price, was quantifiable and was more than a mere possibility of occurring. In the context of a freehold mandatory purchase, the deduction of the exit fee from the balance purchase price is certain (as it is calculated on a specific formula) and more than a mere adjustment for outgoings under the contract. Applying *Sentinel,* the consideration (resale price) to be recorded in the Form 1 Transfer would arguably be the resale price less the exit fee (and potentially other amounts to be deducted from the resale price under the contract). As a consequence, the application of that decision without further guidance from Government (e.g. an additional option in the Form 24 Property Information to specify any exit fee included in the consideration) could have an adverse outcome on freehold unit values. **Submission: Legislative guidance on the decision in *Sentinel* is required, and these amendments give the Government an opportunity to clarify the preferred practice for consistency across industry.**
		63E *Contract may require reimbursement of scheme operator's legal costs*	Proposed section 63E provides that a contract may include a term requiring the former resident to pay certain legal expenses on or after completion of the purchase. If a contract comes to an end because the former resident settles the sale of the unit to an incoming purchaser before the due date for settlement of the mandatory purchase obligation, the Operator will have incurred legal expenses in entering into, and in some cases preparing for settlement of, that contract. **Submission: Proposed section 63E should be expanded to provide that the former resident may also be required to pay the Operator's legal expenses if the contract entered into under section 63A is terminated for any reason other than the Operator's breach.**
		63F *No sales commission payable on a mandatory buyback*	Proposed section 63F states "*Despite anything in a residence contract, no sales commission is payable on the sale of the resident's freehold property to the scheme operator under section 63A*." The former resident may contractually appoint an independent real estate agent on an exclusive basis, in which case that agent is entitled to commission no matter who is the cause of the sale (*Property Occupations Act 2014* (Qld) - Form 6 'Appointment and reappointment of property agent, resident letting agent or property auctioneer). Proposed section 63F creates doubt as to who is liable for that commission.

			Submission: It should be clarified in this section that the Operator must not charge any sales commission, but if the former resident has entered into a contractual agreement to pay commission to a 3rd party, then that commission must be paid from the balance purchase price.
		63G *Exit fee*	Paragraph 7 of the Exit Entitlement Summary provides: *'7. Any fees and charges owing to the Operator would be deducted from the mandatory purchase price paid by the Operator at settlement (i.e. deducted from the proceeds of sale).'* However, proposed section 63G only provides that the former resident is not liable to pay an exit fee to the Operator until completion of the purchase. The amendments are silent on an adjustment to the purchase price, in favour of the Operator, for other payments that the former resident is required to make to the Operator on sale of the right to reside, for example: • transfer registration fees; • reinstatement costs; • refurbishment costs (if applicable); • outstanding general services charges; and • the Operator's share of any capital gain. Without clear direction in relation to these adjustments, the former resident may argue that there is no obligation to pay those costs in circumstances where the residence contract did not contemplate a buyback scenario. **Submission: Proposed section 63G should be amended to provide that any amounts payable to the Operator under the residence contract, but unpaid at settlement of the mandatory purchase, must be deducted from, or set off against, the resale price. Alternatively, the approved form contract should be issued (after appropriate industry consultation) when the mandatory purchase provisions commence and should include an obligation for the resident to pay these amounts at settlement.**
		63I *Non-application of particular legislation to contract*	While certain disclosure requirements under the *Body Corporate and Community Management Act 1997 (Qld)* and the cooling-off period under the *Property Occupations Act* are excluded by proposed section 63I, there are other statutory disclosure obligations that will apply to the sale. For example, disclosure regarding any pool safety certificate, the existence of smoke alarms and any tree disputes. **Submission: The approved contract should make provision for those disclosure obligations (as the standard REIQ Contract for House and Land currently does).**
Clause 46	Insertion of new pt 15, div 4		

		237Q *Timing of mandatory buyback*	1. It has been well reported by the industry and in the media that the short implementation timeframe is going to cause significant detriment to freehold Operators and residents, particularly Operators with a relatively small number of villages who do not have the capital reserves to "buy back" freehold units. While proposed section 171A allows the Operator to apply for an extension of time if the Operator is likely to suffer undue financial hardship, in some circumstances this extension of time does not resolve the issue and only delays the inevitable. For example, in circumstances where an Operator does not collect an exit fee but instead receives income only for management services, it is unlikely that the Operator will ever have sufficient funds in reserve to carry out the mandatory purchase of units, which will cause a significant level of discontent and adversely affect the resale value of units in those villages. 2. The proposed amendments also do not address the potential financial hardship suffered by other residents in the retirement village due to the mandatory purchase provisions. **Submission: Operators should be given the same 18 month notice period as leasehold Operators. This will enable affected Operators and residents to prepare for the commercial impact of the mandatory buyback requirements.**

Other comments The amendments are silent on, or do not provide relief from, the following issues:	
1.	As outlined above, a resident in a freehold retirement village scheme owns the freehold title to the unit and the Operator's engagement is usually under a management or service type agreement. In a leasehold retirement village scheme, the Operator owns the freehold, so once the residence contract is terminated and the former resident has delivered vacant possession, the Operator can commence the sales and marketing process, including by engaging an agent to market the unit. As the Operator and the agent are in the retirement village industry, have invested in brand and village marketing and know the requirements under the residence contract and the RV Act, they are in the best position to find a buyer of the right to reside. In the case of a freehold unit however, the resident as the owner of the unit can engage any agent (including a residential property sales agent) to list and market the unit from the outset. Due to licensing restrictions under the *Property Occupations Act,* the Operator and the Operator's agent are unable in those circumstances to lawfully engage in the relevant activities required to sell the unit. In these circumstances, sale of the unit can be frustrated because the appointed residential property sales agent is unlikely to have the required level of expertise in retirement village sales to successfully sell the unit. As a result, the former resident becomes frustrated with the process and the likelihood of the Operator having to buyback the unit under proposed section 63A is increased. **Submission**: **The Operator should have the exclusive right to market and sell the unit from the date that notice is given (by the resident or the Operator) triggering the sale. To the extent that this right would contravene the licensing requirements in the *Property Occupations Act,* it is submitted that those provisions should not apply to the sale of units in a freehold retirement village scheme.**
2.	The requirement for some Operators to obtain FIRB approval for each mandatory purchase if the Operator has the requisite degree of foreign ownership, whether this is on a transaction-by-transaction basis or on an annual 'rolling' basis. **Submission: While it is acknowledged the Queensland Government cannot change this statutory requirement, the amendments should permit an extension to the 18 month mandatory purchase deadline to allow the Operator sufficient time to comply.** In relation to proposed section 63E, the term 'legal costs' is vague and may not include FIRB fees.

	Submission: 'Legal costs' should be defined to expressly include FIRB application fees required to be paid by the Operator to obtain FIRB approval for the purchase of the unit.
3.	Following settlement of the mandatory purchase contract, the Operator will be liable for holding costs until the unit is sold (for example, council rates and body corporate levies). However, the Operator is not permitted in the *Retirement Villages Act* to recover those costs in the general services charges. **Submission: Appropriate industry consultation should be undertaken in relation to an amendment of the definition of 'general services' in the Schedule to the Act to include holding costs for units bought back by the Operator under proposed section 63A.**
4.	Some Operators, residents, real estate agents, bodies corporate and relevant trustees could potentially be in breach of residence contracts, trust deeds, community management statements, development consents, financing arrangements or similar structural arrangements at freehold villages where those arrangements limit who can buy and own property in the retirement village scheme, for example by limiting the ownership of units in the village to 'residents' under the Act. **Submission: Operators, residents, real estate agents, bodies corporate, relevant trustees and their related parties should be excluded from all liability for breach of the above (and related) arrangements caused by their compliance with the mandatory buyback requirements, and cannot be sued, prosecuted or held liable for any such breach.**