

Your Ref: Review of the Retirement Villages Act 1999
Quote in reply: 326 -1 - Elder Law Committee

21 September 2012

Transport, Housing and Local Government Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: thlhc@parliament.qld.gov.au

Dear Committee

REVIEW OF THE RETIREMENT VILLAGES ACT 1999

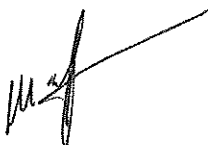
Thank you for inviting the Queensland Law Society to make submissions regarding the *Retirement Villages Act 1999* review.

The submission which follows has been prepared by the Elder Law Committee. I would particularly like to thank Michael Streeting for his assistance.

Thank you for the opportunity to provide these comments and observations. The Society would be pleased to respond to any questions from the Committee relating to legal practitioners, or to assist the Committee in any way it can.

Please contact our Policy Solicitor, Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au

Yours faithfully



Dr John de Groot
President

Submission

Inquiry into the Retirement Villages Act 1999 Review

Queensland Parliamentary Transport, Housing and Local Government Committee

*A Submission of the
Queensland Law Society*

21 September 2012

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1. Introduction

1.1 *Non-partisan*

The Society's submissions are non-partisan.

Our members advise and act independently for various stakeholders and participants in the retirement village industry (including residents, buyers and sellers of rights to reside in retirement village schemes, scheme operators, developers, local and other authorities, litigants and peak bodies).

The Society seeks to raise for consideration and review issues which it considers are causing difficulty, require clarification or are of general interest or concern in the industry.

1.2 *Desirable outcomes for review*

The Society's desirable outcomes for review, and for any proposed legislative amendments, are:

- clear, unambiguous and relevant legislative provisions, which properly recognise and allow for the different types of schemes, relationships, rights and obligations which arise, and so practitioners may confidently inform and advise clients about those issues;
- flexibility for schemes and contractual arrangements, to allow ongoing innovation and alternatives for needed accommodation, growth and competition in the retirement village industry;
- full and adequate disclosure of the terms and financial arrangements of schemes; and
- needed review in specific areas of concern.

1.3 *Macro issue – fee models and flexibility*

The Society wishes to emphasise the importance of reviewing the current fee model, with the view to facilitating and making provision under the *Retirement Villages Act 1999* ("RVA") for viable alternatives or variations to the current exit / "deferred" management fee model, for instance a:

- management fee model; and
- sinking fund (to be contributed to by residents on a pro rata basis), for replacement of property (including for example, communal facilities if agreed by residents with the scheme operator).

1.4 *Continuing concerns*

The Society has made submissions to government in previous reviews about the following issues of concern, which are still relevant:

- distinction between non-resident owners of rights to reside and others;
- distinction between freehold and non-freehold schemes;
- commencement of 14 day cooling-off period;
- prescribed proforma Public Information Document (PID); and
- provisions about village closure.

Further comments are made where relevant and appropriate about the above issues in this submission.

2. Terms of Reference

First Terms of Reference:

Consider whether the Act provides adequate fair trading practice protections for residents, including providing appropriate material to enable informed decisions to be made.

2.1 Does the RVA promote consumer protection and fair trade practices?

The Society considers that the drafting of the RVA generally provides protection to consumers and promotes fair practice.

The question is whether such strict requirements are required when most operators are already incentivized to achieve best practice and whether the degree of regulation prohibits flexibility for both operators and the RV industry to develop and move with the market and times moving forward into the future.

The Society considers there needs to be an appropriate balance between regulation, consumer protection and flexibility to ensure the industry can continue.

2.2 As a resident, did you have all information you needed to make informed decision?

The Society notes that this is directly relevant to the prescribed pro forma Public Information Document ("PID"). This will be addressed in the subsequent question.

2.3 Does the prescribed proforma PID provide adequate information?

Generally the PID provides relevant information, however it is repetitive and needs simplification. It also requires amendment to provide adequate information pertaining to:

- freehold schemes; and
- non-resident owners.

The Society supports the concept of a prescribed proforma PID (provided it gives accurate disclosure and allows flexibility), so prospective buyers and residents may more readily compare information about different villages and types of schemes.

2.4 As a resident, have you experienced deceptive conduct by the scheme operator?

The Society is unable to comment on this issue.

2.5 How does the RVA compare with other consumer protection legislation?

When compared with the retirement village acts in other states, the Queensland RVA is one of the most regulated together with NSW.

Furthermore when the Queensland RVA is compared the amount of regulation of other forms of residential accommodation (for example Manufactured Home Parks), again the RVA is extremely regulated.

Second Terms of Reference:

Consider whether the RVA does not include unnecessary restrictions and provisions which increase the affordability of living in a retirement village:

2.6 Is the exit fee model appropriate?

The history of the exit fee (deferred management fee) model must be understood to appreciate its benefit and future application.

The term "exit fee" is a statutory creation. The term commonly used before passing of the RVA, and is still used in residence contract for many schemes, is "deferred management fee."

In that model, rather than invoice a management fee to a resident or owner of the right to reside on a weekly or other periodic basis, the scheme operator defers payment for its management services until the right to reside is resold.

The deferred management fee is commonly calculated (by agreement) as a lump sum or as a percentage of the original purchase price or later resale price, capped after a number of years.

This leaves residents with more funds available for living expenses during their occupancy.

However, whether this model will be suitable or necessary for residents or scheme operators in the future is under question. The changing demographic of residents entering villages (ie baby boomers) and their financial position (eg. access to superannuation funds) reduces the need for that model - and delays in achieving resales in difficult economic times (when prospective buyers may experience delays in selling their existing homes) also adds pressure to use other financial models.

A primary concern now is that the RVA is restrictive and appears to be forcing scheme operators of retirement villages (large and small) to use the deferred management fee / exit fee model.

Accordingly the Society recommends that the provisions of the RVA and prescribed proforma PID be amended to encourage and allow flexibility and viable options for future financial models - for example a management fee or rent type model (with weekly, monthly or other periodic payment, and aligned to aged or DVA pension if applicable) based on an indexed and/or reviewable lump sum or formula (similar to a rent), with or without:

- an exit fee component, and/or sharing of capital gain by the scheme operator, upon resale; and/or
- a sinking fund (similar to the sinking fund for the common property under BCCM), to be contributed to by residents on a pro rata basis for replacement of property (including for example, communal facilities if agreed by residents with the scheme operator).

Such amendments may:

- provide flexibility and encourage growth and further development of accommodation units in the retirement village industry, within the objects of the RVA; and
- benefit both residents and scheme operators, depending on "trade off" in the level of exit fees and exit entitlements (and/or other fee arrangements or models) proposed and offered by the scheme operator, in comparison to those of competing schemes and villages; and
- provide further alternatives for residents and scheme operators.

In practice, the market place and economic conditions will determine whether the existing and any future financial structure of a retirement village is competitive, viable and acceptable to prospective buyers of rights to reside.

In that regard, we note the comments by Justice Applegarth of the Queensland Supreme Court of Appeal in *Jomal's Case*.¹

2.7 Does the current retirement village model lock residents into a village?

The Society generally notes that this question considers two circumstances:

- Proposed residents entering into a retirement village; and
- Residents leaving² a retirement village.

Entering a Retirement Village

The Society notes that procedurally, the requirements under the Act require proposed residents entering retirement villages to be given the PID and residence contract. In this circumstance

¹ *Jomal Pty Ltd v Commercial and Consumer Tribunal & Ors* [2009] QCA 326.

² For whatever reason.

there is an opportunity to consider and obtain independent legal advice before signing, as well as having a 14 day cooling off period.

Leaving a Retirement Village

Provisions about the exit fee are disclosed in the PID and residence contract, and it is made clear to residents in those documents that they may not receive their exit entitlement until the right to reside is resold.

The scheme operator is motivated to facilitate an early resale if possible, as its exit fee (deferred management fee) is not realized until then, and it may also have to bear or share general services charges for some period before resale.

It is in the best interests of both the resident and the scheme operator to effect a resale as soon as possible. Residents may also participate in the resale process, and agree to acceptance of a price less than valuation.

The scheme operator is disadvantaged if the unit owner or his / her representative delays marketing or sale of a unit in a freehold scheme (eg. while waiting for "a better market" or where there is contested estate litigation).

Economic consequences are the same as for any home sale. Resales are more easily realised if market conditions are favourable so prospective buyers may readily sell their existing home.

Although there is an ageing population and growing demand by retirees for retirement village accommodation, their ability to sell their existing home, discharge a mortgage and fund their purchase is dictated by economic and market conditions at the time.

2.8 *Is there appropriate balance of responsibility for vacated residences?*

The RVA and contractual documents determine the responsibility of parties in each case, and the Society does not express a view about whether they are appropriate.

A scheme operator may agree to negotiate with a unit owner / resident about the time and amount of payment, but is generally under no obligation to do so.

Generally, accommodation units presently remaining vacant for longer periods. The resident bears the ongoing general services charges for three months fully and then proportionately for the remaining six months. The scheme operator is then responsible.

If residents sold a normal home they would be responsible for outgoings apportioned to the settlement date.

2.9 *Affordability of village residency?*

The Society notes that affordability is a question of supply and demand, and demand is directly linked to the desirability of the product and economic circumstances at the time.

As noted in 2.6 above, the RVA supports the exit fee model which precludes the scheme operator from realising a profit for management services until resale. This is quite a restricted model. To enable additional retirement village products onto the market for the benefit of residents and scheme operators the RVA could look to encourage other models.

For example a "rental" type model, where the scheme operator receives a management fee ('profit') during the term of residency, may assist with cash flow of the scheme operator and help bring the cost of entering the village down for primary and resale buyers (ie. by having a lower ingoing contribution).

Assistance of government, local and other authorities to bring down the cost of development approvals, infrastructure, set up and construction costs should lower the ingoing contribution for residents and encourage development for the projected demand for retirement village accommodation.

2.10 Unnecessary restrictions in the RVA which affect affordability?

The Society is unable to comment on this issue at depth but considers if there was a simplification of the process around village management, and in particular the general services and budget process, this may save on the overall cost of village operation.

2.11 Is there appropriate governance of village funds?

The Society considers the cost, time and resources needed for compliance can be somewhat substantial, and may be prohibitive in some cases, particularly for smaller villages.

For example, a scheme operator must obtain quantity surveyor's reports and updates for the requirements of the maintenance reserve fund and capital replacement fund, and in the case of freehold schemes the Body Corporate and its committee must comply with BCCM and the applicable regulation module and obtain quantity surveyor's reports for the common property.

Third Terms of Reference:

Consider whether the Act provides adequate certainty, accountability and transparency for residents in relation to their financial obligations, including the interests of residents in the event of a village closing down

2.12 Request for exit fee estimate

Section 54, RVA requires that the scheme operator give a written estimate of the "exit entitlement" (not the "exit fee"), if the resident gives the scheme operator a written request including a notice that the resident is considering terminating the right to reside (but not if an estimate was given within 6 months immediately preceding the request).

Under s63(3), RVA at the same time an exit entitlement is paid the scheme operator must give the resident a written statement showing how the exit entitlement was worked out and particulars payable by the resident of any:

- *exit fee*
- *accrued general services charges*
- *outstanding services charges and fund contributions*
- *expenses relating to the resale of the right to reside in the unit, under Section 68 (including costs of valuations and agent's commission) in the same proportion they are to share the gross ingoing contribution*
- *other payments provided for in the contract (e.g. legal fees, and payments of or towards reinstatement costs under sections 61 or 62).*

The exit fee is usually not difficult for the scheme operator and resident to calculate themselves, using the formula and information set out in the PID and residence contract.

However, calculation of the estimated exit entitlement as at a given date requires an estimate of the above expenses payable by the seller under s 63(3), RVA - and if the entitlement is calculated by reference to the resale price payable by the buyer, then an estimate of that price – and time, effort and expense is required to provide those estimates and potential increase in general services charges.

The Society considers that on balance it would be more practical and cost effective for the village to:

- change the six month period in s 54(3), RVA to 9 months, if it is amended so that the resident is not required to state that he/she is considering terminating the right to reside; otherwise
- retain the six month period.

2.13 As a resident, do you have certainty of your financial obligations?

The Society cannot express a view about whether individual owners or residents have or believe they have certainty in their financial obligations.

Certain costs, such as those detailed in Section 107, RVA are uncertain and generally increase each year.

The RVA contains provisions for disclosure and reporting by the scheme operator, both periodically and upon request.

A balance is difficult to achieve between:

- keeping residents advised and containing the charges and contributions they must pay, while aware that many are pensioners; and

- enabling the scheme operator to recover its costs of running the village, while aware that it cannot predict and budget for all eventualities that may occur in the course of a year.

2.14 *Mandatory financial reporting?*

The Society understands that owners and residents would generally prefer mandatory periodic reporting, with disclosure of any changes to general services charges and/or exit fees.

Proactive periodic financial reporting would appear to represent best practice, however the Society does not express a view as to whether or not it should be mandatory.

2.15 *Is the "exit fee" system fair and transparent*

The Society is still concerned with the retrospective effect of s53A, RVA.

To that end, the Society considers that there should be further consideration as to the "exit fee" system, at the start, during and at the end of a retirement village agreement.

2.16 *Personal services charges on termination*

The Society notes the requirement to pay after termination by death is for one month after a resident dies.

It is important to note that s102, RVA provides for different scenarios and considers that the section be amended and refer to the date the resident *leaves* the village, as opposed to the date of termination. This is because a scheme operator may not know that the resident having personal services has left until they have vacated.

Personal services are provided by additional staff and when the provision was drafted the Society understands that it was to allow the scheme operator to manage its additional personnel in terms of workplace obligations. Otherwise the scheme operator may have to continue to employ additional staff and not receive the income from a resident.

The resident may have the right to give earlier notice of termination under the terms of a personal service agreement (for example, the resident or his/her attorney may decide to give notice if the resident becomes ill).

A "right to reside" is a right given under a "residence contract", and the Society considers that those terms are not synonymous.

2.17 *Has RVA Section 53A improved certainty about how to work out exit fees?*

The Society reiterates its concerns of the retrospective effect of s53A, RVA and notes its earlier submissions on this issue.

The Society considers that the amendment has not improved certainty for current residents and scheme operators as to the calculation of exit fees.

2.18 *Has there been any litigation over "Exit Fees"?*

The Society is not aware of any litigation in relation to s53A, RVA but notes that there has been litigation on exit fees. The Society refers to the Queensland District Court decision of Justice Robin in *Saunders v Paragon Property Investment Pty Ltd* [2008] QDC.

2.19 *Is the RVA clear about residents' obligations on closure of village?*

The Society refers to its previous submissions in Attachment 1.

2.20 *Should exit fee calculation be adjusted upon village closure?*

The Society refers to its previous submissions in Attachment 1.

2.21 *Is the RVA clear about how money in village funds, such as capital replacement, are managed upon village closure?*

The Society does not consider that the RVA is clear about how money in village funds are managed upon village closure.

The charge over the capital replacement fund under s91(6), RVA is irrevocable and continues until the village ceases to operate as a retirement village scheme and all former residents have been paid their exit entitlement.

Fourth Terms of Reference:

Consider whether the Act provides sufficient clarity and certainty in relation to the rights and obligations of residents and scheme operators.

2.22 *Is there sufficient clarity in the PID and residence contract about rights and obligations of residents?*

The Society considers that generally the PID provides relevant information, however it is repetitive and needs simplification.

2.23 *Is the RVA clear about rights and obligations of scheme operator?*

Owners / residents

The Society considers the rights and obligations of the scheme operator pertaining to non-resident **owners** are not adequately recognised or addressed.

Scheme - control

Section 8, RVA provides that:

*"A person is a **retirement village scheme operator** if the person, alone or with someone else, controls the scheme's operation or purports to control the scheme's operation."*

However, the Society considers that the core definition lacks clarity, and gives rise to ambiguity and the potential for conflict and litigation. For example:

- The land containing the communal facilities and (in non-freehold schemes) the land containing the accommodation units may be owned and controlled by different entities (under the terms of an agreement between them);
- The village operation may be managed and controlled by either of them or another entity under an agreement between them, and under Service Agreements entered into by the manager with each person who acquires a right for the person or someone else to reside in the accommodation unit; and
- In the case of a freehold scheme, a person acquires the freehold of the accommodation unit and the right for the person or someone else to reside in it, and the Body Corporate owns and controls the common property.

In those and other like scenarios, who is said to "control the schemes operation or purport to control the schemes operation" and have the rights and obligations of scheme operator in terms of s8, RVA?

The Society recommends that, so there is no doubt, words to the following effect be considered and if appropriate inserted at the end of s8, RVA:

"... and if the scheme is registered under this Act is the person in whose name the scheme is so registered."

If s8, RVA is amended in that regard, the amendment should not apply to residence contracts entered into before the first anniversary of the amendment (so that if necessary scheme operators may review their arrangements and proforma PID and residence contract).

Powers of attorney given as security

Section 89(2)(b), RVA recognises that in the case of a leasehold scheme the scheme operator may be given a power of attorney by a resident to surrender a registered lease after the residence contract is terminated (ie a power of attorney is given to the scheme operator as security for performance of obligations by the resident and to protect the scheme operator's interest in the unit and power of sale).

However, recognition is not given to powers of attorney given as security to a scheme operator of a freehold scheme under s10, *Powers of Attorney Act 1998* for performance of obligations by the unit owner and resident (although such powers of attorney commonly form an integral part of such schemes to protect the scheme operator's interest in the unit and power of sale).

The Society recommends that, so there is no doubt, s 89(2)(b), RVA be amended to include powers of attorney given as security to scheme operators under s 10, *Powers of Attorney Act 1998*.

Exit fee and ingoing contribution

The Society recommends that, so there is no doubt, the RVA be amended to confirm that the exit fee / deferred management fee (payable by or on behalf of the outgoing resident) and the ingoing contribution (payable by or on behalf of the ingoing resident) are distinct and separate payments and obligations, and that one does not form and will not be construed as forming part of the other even if by agreement the former is funded in whole or part from the latter at settlement of a resale.

2.24 Is there sufficient clarity about rights and obligations for termination, reinstatement or resale?

Terminology

It is also noted that under the RVA a "right to reside" is a right given under a "residence contract" (see for example ss7, 9, 10(4)(a) and 57(1), RVA), and the residence contract may still be on foot even if the right to reside under it is terminated.

However it appears that the terms "right to reside" and "residence contract" are sometimes used interchangeably and synonymously in the RVA, which gives rise to ambiguity and potential for conflict and litigation.

The Society recommends that, so there is no doubt (particularly about issues pertaining to termination), those terms be defined and used discretely (not synonymously) in the RVA.

Fifth Terms of Reference:

Consider whether the Act should make provision for scheme operators to develop and adopt best practice standards in operating villages, or require operators to comply with mandatory standards or accreditation.

2.25 How does the RVA encourage best practice for village operation?

The Society has not conducted an analysis or survey, and makes no comment about whether the RVA encourages best practice for village operation.

2.26 Should best practice be achieved through mandatory accreditation?

It is recommended that accreditation remain voluntary as the cost would be prohibitive for large villages, and for small villages (which may require some level of exemption or other relief) and may increase the level of red tape.

2.27 Would mandatory accreditation or standards improve standard of care?

The Society is unable to make a comment on this issue.

2.28 Advantages and disadvantages of mandatory accreditation?

The Society is unable to make a comment on this issue.

Sixth Terms of Reference:

Consider whether the Act adequately promotes innovation and expansion in the retirement village industry, avoids purely 'red tape' requirements, and facilitates the ongoing viability of villages.

2.29 Does the RVA support or limit expansion of retirement village industry?

The Society considers, when compared with the retirement village acts in other states, the Queensland RVA is one of the most regulated together with NSW. The Act appears to limit flexibility for both residents and scheme operators. The Society calls for a review of the current fee model.

2.30 Any "red tape" requirements in the RVA?

The Society considers that there are red tape requirements in the RVA.

PID simplification

The PID is an important document, but the existing prescribed proforma PID is confusing and repetitive.

The Society notes that a simplified version has been prepared and presented to the Department of Works and Housing for consideration.

PAMDA Cooling-off period

The Society recommends that RVA and/or PAMDA be amended to provide that the 5 business day cooling-off period under PAMDA not apply to freehold retirement village schemes registered under the RVA, as that period and the onerous statutory requirements pertaining to it are unnecessary and superfluous to the 14 day cooling-off period under the RVA.

RVA Cooling-off period - anomaly

Before commencement (on 15 March 2006) of the *Retirement Villages Amendment Act 2006* (the 2006 Act), the definition of "cooling-off period" was:

"cooling-off period for a residence contract means a 14 day period starting on the day the contract is made".

The 2006 Act changed that definition so that the cooling-off period commences on:

- (a) *the day the residence contract is **signed**; or*
- (b) *if the residence contract is subject to a later event happening or another contract being entered into - **the day the later event happens or the other contract is entered into**".*

The above change was not disclosed before its introduction in the 2006 Bill on 14 February 2006, was passed on 4 March 2006 without community consultation, and since then has caused serious disruption and concern in the retirement village industry (for scheme operators, buyers, sellers and residents alike).

2.31 Does the RVA support or limit innovation in the retirement village industry?

The Society considers the RVA appears to limit innovation in the retirement village industry. As discussed above, the Queensland RVA is one of the most regulated together with NSW. The Act appears to limit flexibility for both residents and scheme operators.

2.32 Some key factors that facilitate or hinder viability of retirement village industry?

The Society refers to His Honour Justice Applegarth's observations in *Jomal's Case*.

2.33 Is there enough flexibility in the RVA for different retirement village models to cater for the varying needs and desires of retirees?

The Society does not consider there is enough flexibility in the RVA for different retirement village models to cater for the varying needs and desires of retirees.

2.34 Any difference in viability of "for profit" and "not for profit" retirement villages?

The Society understands that "for profit schemes" and "not for profit schemes" generally have and use similar legal and financial models, however in approved cases "not for profit" enjoy tax exemptions and/or Government funding, and also receive donations (for which the donors receive tax deductions).

As discussed above, viability also depends on prevailing market and economic conditions.

Seventh Terms of Reference:

Consider whether the Act affords residents all reasonable opportunities to be involved, should they wish to be, in budgetary and other decisions affecting their financial obligations.

2.35 Do all villages have residents committees?

The Society cannot comment on whether all villages have residents committees.

2.36 Does the RVA have appropriate provisions for participation by residents in financial decisions?

The Society notes that residents have only limited rights under the RVA to participate in final decisions (for example, they have power to make decisions under s108, RVA).

Arguably non-resident owners have no such rights, and limited other rights under the RVA.

In the case of freehold schemes, owner residents and non-resident owners have voting and final decision making rights under BCCM.

The experience of our members has been that when dealing with legal issues, it is easy to "overlook" the underlying subject – in this case "retirement" accommodation.

Some residents and owners of rights to reside may prefer and request the right to fully participate in management and operation of village affairs.

Others deliberately withdraw from participation and prefer a more relaxed retirement lifestyle (often after a busy or difficult work life, or because of illness or age) – however since amendments to the Body Corporate legislation and passage of the RVA and their subsequent amendments, owners and residents may no longer delegate management issues to a scheme operator and its representative under the RVA or the *Body Corporate and Community Management Act 1997* (BCCM), even if it is their choice.

The concept of a discrete retirement village module under BCCM for freehold schemes was previously considered but did not proceed.

Should residents and owners who so prefer have freedom of choice and be permitted to appoint the scheme operator or its representative as their attorney and/or proxy for management purposes (under the RVA and BCCM), subject to adequate disclosure and reporting requirements and their right to revoke the appointment at any time (particularly if a *Charter of Residents' Rights and Responsibility* and *User Rights Principles* are adopted under the RVA, similar to those under the Commonwealth Aged Care Act)?

2.37 Is level of power of residents appropriate?

The Society does not express a view as to whether the level of power of residents is appropriate and considers that individual residents and their associations would be best to assist with this question.

2.38 Should resident participation in decision making be mandatory?

The Society does not recommend mandatory participation by residents, but considers that all residents should have the opportunity to participate and contribute in decision making.

2.39 How are residents otherwise involved in financial decision making?

Residents may appoint a proxy or attorney under the RVA, and in the case of freehold schemes unit owners may participate in decisions about the Community Titles Scheme personally or by proxy or attorney under BCCM.

Eighth Terms of Reference:

Consider whether the Act adequately provides a timely, informal and cost-effective process for resolving disputes between residents and scheme operators.

2.40 As a resident, did you receive adequate information about the dispute resolution process (DRP)?

Whilst the Society cannot comment on the experience of all residents, the Society notes that detailed information about the DRP is given in generic Part 1 of the proforma PID.

A "retirement village dispute" is defined in s21, RVA and does not include a dispute between:

- a scheme operator and a non-resident owner (other than a former non-resident owner);
- any parties, one of whom is not a scheme operator; nor
- the resident and/or owner of the right to reside in one accommodation unit and those of another accommodation unit.

In the case of freehold schemes, the owner or occupier of a lot may use the dispute resolution provisions in BCCM (and any internal dispute resolution process of the Body Corporate), to resolve a dispute with the owner or occupier of another lot in the same Community Title Scheme – but not with the owner or occupier of a lot in another Community Title Scheme (for example, in a staged development where a separate Body Corporate and Community Title Scheme is created for each stage).

The Society recommends that s 21, RVA be amended to include existing non-resident owners, and generic Part 1 of the proforma PID be amended where appropriate to include statements that a resident and/or owner of a right to reside in an accommodation unit may:

- seek confidential mediation services from the Dispute Resolution Centre about a dispute between them or a dispute with the resident and/or owner of a right to reside in another accommodation unit;

- proactively complain to the scheme operator, or any authority or body having jurisdiction (particularly if there is no residents committee for the village);
- proactively negotiate with the scheme operator or any other interested party (if the scheme operator or other party agree to negotiate).

2.41 How effectively are disputes resolved in your village?

The Society cannot comment on the experience of all residents in relation to dispute resolution.

2.42 Should the RVA require that all villages have an internal DRP?

The Society notes that section 154, RVA already provides for an internal DRP, to be adhered to if a party wants to later proceed to mediation under the RVA or before QCAT.

No change to that process is recommended.

Mandatory internal DRP may be beneficial to residents and the scheme operator – but may increase the cost of the village's operation, general services charges and/or deferred management fee.

The DRP under the RVA does not apply to non-resident owners (other than former non-resident owners) - nor to disputes between the owner or resident of an accommodation unit and those of another accommodation unit.

The Society recommends that the internal DRP (whether mandatory or otherwise) – and the DRP under the RVA – be amended to also apply to existing non-resident owners (not only to existing and former residents and former non-resident owners).

In the case of freehold schemes, the term "internal dispute process" or like terms are not defined in BCCM, however the term "internal dispute resolution" is defined as follows in s 227, BCCM for the purposes in s 228, BCCM:

"internal dispute resolution" means the resolution of a dispute by the parties to the dispute using informal processes or the community titles scheme's body corporate processes.

Examples—

- by the parties communicating with each other
- by writing to the committee for the body corporate
- by presenting a motion for consideration at a general meeting of the body corporate"

2.43 Is the DRP effective?

The DRP under the RVA does not apply to non-resident owners (other than former non-resident owners) - nor to disputes between the owner or resident of an accommodation unit and those of another accommodation unit.

The chief executive under the RVA may take action and/or issue a fine for non-compliance under the Act in certain cases.

Other than these observations, the Society is unable to comment on the experience of all parties in relation to the DRP process.

2.44 Are residents aware of their right to complain? Include in the RVA?

The Society understands that legally represented residents are advised about their rights and responsibilities under the RVA and the Agreement.

2.45 Are complainants protected from victimization?

The Society does not have access to information to comment.

It is noted generally that complainants may:

- obtain independent legal advice about victimization, and about asserting and protecting their rights generally;
- seek advice and assistance from the Dispute Resolution Centre;
- in appropriate cases, have access to internal DPR or DRP under the RVA and/or under BCCM.

It is also noted that in the *Charter of Residents' Rights and Responsibility* under the *Aged Care Act 1997 (Cth)* each resident of an aged care service has a right:

"to be free from reprisal, or a well-founded fear of reprisal, in any form for taking action to enforce his or her rights".

Should a similar Charter, or right, be adopted under the RVA, with the resident also being given the additional right to a cause of action for breach of the right/s (if not given in the residence contract), rather than a mere right to complain and rely on action by the chief executive?

2.46 Disputes resolved through residents' committees

The Society does not have access to information to comment.

2.47 Is QCAT effective for resolving disputes for residents of retirement villages?

The Society is not aware of the extent that QCAT is effective for resolving disputes for residents or scheme operators.

It is noted that lawyers may not appear for a party before QCAT without leave to appear.

Section 43(2), *Queensland Civil and Administrative Tribunal Act 2009* (the QCAT Act) provides that:

"a party may be represented by someone else if an enabling Act that is an Act states the person may be represented".

Elderly parties may consider (subjectively and not unreasonably) that the facts or law pertaining to a retirement village disputes are complex or confusing to them, and it may be particularly daunting and stressful (and often untenable) for them to appear before QCAT without legal representation.

On the other hand they may appoint an unqualified representative or advocate (whether experienced or not) to appear for them, and the scheme operator may also appoint an unqualified representative or advocate (whether experienced or not) to appear for it.

The view has been expressed that QCAT's power to grant leave for a lawyer to appear for a party is and remains restricted by its objective determination of the criteria in s 43(3), QCAT Act, unless and until the legislation is changed.

Accordingly the Society recommends that an enabling Act provide to the effect that:

"A party to a retirement village dispute under the Retirement Villages Act 1999 may be represented by an Australian legal practitioner in proceedings before the Tribunal under the Queensland Civil and Administrative Tribunal Act 2009."

3. Attachment 1 - Previous submissions

Your Ref:

Quote in reply: Elder Law Committee

14 October 2011

Retirement Villages Project Team
Fair Trading Policy Branch
Department of Justice and Attorney-General
GPO Box 3111
BRISBANE QLD 4001

retirementvillage@deedi.qld.gov.au

Dear Project Team

QUEENSLAND RETIREMENT VILLAGES DISCUSSION PAPER – CLOSURE OF RV SCHEME

Thank you for the opportunity to provide comments to the Department in response to the Queensland Retirement Villages Discussion Paper (the Paper), which proposes consideration of the closure of schemes under the *Retirement Villages Act 1999* (RVA).

At the outset the Society would like to caution against piecemeal consideration of reform of the RVA. The QLS notes that amendments to the issue of exit fees is proposed under the *Civil Proceedings and Other Legislation Amendment Bill 2011* and that the Paper seeks to consider the issue of closure of schemes specifically. The Society is keen to see the issues which need to be addressed in the RVA being dealt with as a part of a substantive and holistic review which engages all relevant stakeholders. The danger, as we see it, is that piecemeal amendments will result in fractured and ineffective legislation which will have unintended adverse consequences.

The closure of a retirement village is a relatively rare event and one which is presently dealt with by the RVA. While we are not opposed to some reform in this area it is considered that there are other areas which are of greater pressing concern within the RVA which are deserving of a coordinated review, including:

- The disclosure requirements;
- Clarification of the budgeting provisions, particularly in connection with the development of schemes;
- Harmonization of cooling off provisions with other legislation;
- Seeking greater efficiencies in QCAT matters;
- Establishing residents committees; and
- A standard form of residents constitution.

The Society notes that the factual scenario motivating the closure of a village will significantly affect the nature of the measures and provisions which should apply in the circumstances. Where a village is intended to be closed so that the site can be redeveloped for some other profitable purpose it may be



appropriate to provide residents with generous protections and even possibly some form of compensation to assist them into their next accommodation. Where a village is intended to be closed due to the insolvency of the village itself and its operator, there will be a conflict of laws between Federal insolvency law and the State RVA, competing demands of creditors for insufficient resources and possibly an abrupt cessation of services to residents. In this circumstance what can reasonably be provided to residents may be determined by receivers in light of their statutory duties to creditors and may be quite limited.

On this basis the QLS is keen to see any consideration of the closure of villages involving a broad and flexible working discretion to permit the requirements to be tailored to the circumstances as far as is possible.

The Paper poses a number of issues which will be addressed.

Issue 1.1 – triggering deregistration of a scheme

The QLS is only qualified to provide comments regarding the legal aspects of this issue but is of the view that the involvement of an independent tribunal or court is a good way to provide an impartial and objective assessment of the need for deregistration.

It may be appropriate for the Chief Executive, a threshold percentage of residents acting as a group or the scheme operator to make an application to either the Supreme Court or to a judicial member of QCAT to have the deregistration considered. In these cases it would be appropriate for the party requesting the deregistration to serve copies of the application on all the other parties (including all affected residents).

The Society considers that while there is some formality to the process of making applications, closing a scheme is no trivial matter and requires a conscious action by an applicant party and should not be an action taken lightly.

The judicial body considering the application should have the ability to direct the Chief Executive to undertake an investigation in relation to any application and should also have the power to levy costs against an applicant where an application is held to be vexatious or frivolous.

It may also be appropriate to provide the Chief Executive the power to deregister a village on his / her own volition where it is seen as urgent or necessary, provided that there is an appropriate right to judicial review of the decision.

Issue 1.2 – for what reason should a scheme be deregistered

Given the serious nature of the deregistration of a scheme and the ability for this to affect the lives of residents and the business of the scheme operator there should be a balancing of relevant considerations. The current test is whether the scheme is operating and may be too vague to provide proper guidance in making a decision as it presupposes that the scheme has already effectively come to an end and the deregistration is formal recognition of that fact.

The Society considers that any basic test for deregistration must balance the two objectives of the RVA, being:

- to promote consumer protection and fair trading practices in operating retirement villages and in supplying services to residents; *and*
- to encourage the continued growth and viability of the retirement village industry in the State.

Consequently the considerations should be a balance between the best interest of the residents and the financial viability of the scheme. There will be factual circumstances where one of these two factors will outweigh the other so heavily that it will be proper to deregister the scheme. There may also be other circumstances where the balance will mitigate against deregistration and will promote continued operation, which may be the case where funding issues can be addressed by management action or where an almost defunct scheme can be re-enlivened by continued operation.

In making any determination the balancing of factors should be performed on the basis of evidence following investigation rather than the mere belief of the decision-maker.

Issue 2.1 and 2.2 – how long should the winding down period be?

The winding down period should be determined by the decision-maker who decides that deregistration is the most appropriate course of action, subject to a reasonable maximum period.

As we stated earlier it is important for the conditions of the deregistration to match the factual scenario at play in the decision.

Issue 3.1 – how should the maintenance reserve fund be distributed?

The MRF should be distributed at the time of making of the deregistration decision to all residents in occupation or who have not received their exit entitlement according to the proportions by which residents contribute to the fund.

In this regard the provisions should have appropriate regard to the way that sinking fund monies are distributed to lot owners in a body corporate according to their interest schedule lot entitlements when the body corporate is wound up.

Issues 3.2 – 3.6 – financial matters

The specific financial aspects of the deregistration process should be determined by the decision-maker who decides that deregistration is the most appropriate course of action, subject to a reasonable maximum period.

As we stated earlier it is important for the conditions of the deregistration to match the factual scenario at play in the decision.

Issue 3.7 - compensation for residents and others

The issue of compensation for residents on deregistration of a village is complex and by necessity must relate to the exact factual scenario which has caused the deregistration to come about.

Where a scheme itself has become unsustainable and has gone into insolvency there may be little money available to effect payments of compensation to residents, even if there is a standing obligation to do so. On the other hand, in situations where a scheme operator stands to gain significantly from a redevelopment of a former retirement village site following deregistration, funds for compensation payments may be available and payments even justified.

The Society submits that the issue of compensation is too dependent on the nature of the facts of each scheme to provide any general entitlement for residents.

The issue of compensation is properly an issue which should be determined by the decision-maker who decides that deregistration is the most appropriate course of action in order to be appropriate in all the circumstances. Considerations relevant to the payment of compensation to residents may include:

- the general circumstances of the closure of the scheme, including conduct of interested stakeholders - eg. the Scheme Operator, village manager, Body/s Corporate (if in a freehold scheme), residents, and those who acquire rights to reside for occupation by another (eg a unit owner in a freehold scheme who purchased the unit for occupation by someone else);
- any proposed new use of the village and any benefit to be derived by the scheme operator;
- any disadvantage, loss and damage caused to resident/s (including price and cost of acquiring a right to reside elsewhere and cost of relocation, less net sale price (if any) and other amount/s received as a consequence of exiting the closed village)
- any disadvantage, loss and damage caused to those who acquire rights to reside for occupation by someone else (including price and cost of acquiring a right to reside elsewhere and cost of relocation, less net sale price (if any) and other amount/s received as a consequence of exiting the closed village);
- the rights and obligations of the interested parties under the Public Information Document, contractual documents and agreed terms pertaining to the respective rights to reside;
- the financial viability and position of the scheme;
- any applicable fidelity or "insurance" fund; and
- the risk of closure to residents upon entry to the scheme, and contractual terms and disclosure pertaining to that risk.

In any event the aggregate of the exit entitlement (if any) and compensation of a resident, or of the holder of a right to reside, should not exceed the greater of:

- the ingoing contribution; or
- their loss and damage as assessed (including price and cost of acquiring a right to reside elsewhere and cost of relocation, less net sale price (if any) and other amount/s received as a consequence of exiting the closed village).

Issue 3.8 - exit fees

The payment of exit fees, as with all the financial matters should be dependent on the nature of the circumstances of the closure. We propose that this is a matter considered by the decision-maker who decides that deregistration is the most appropriate course of action given the nature of the individual facts of the scheme.

In many cases payment of the exit fee is a legitimate part of the revenue expectation of the scheme operator and may be justified in payment. There may be cases, however, where the conduct of the scheme operator is egregious and warrants residents being excused from such payments.

Again, payment of exit fees is an issue which necessitates a balance between the best interests of residents and the financial viability of the individual scheme and industry as a whole.

Issue 4 – entering a village and closure, implications for residents

Disclosure of information about closure as a part of the general information in the PID would be advantageous. It is important that a resident appreciates the bargain that they are entering with the scheme operator when entering a village and also appreciates the risks that is inherent in the scheme.

A final matter

The Society suggests with respect to implementation:

- if the Act is amended in relation to village closure - the amendments should not apply to residence contracts entered into before commencement of the amending legislation - other than amendments (if any) which (having regard to the fundamental legislative principles) should have appropriate retrospective application; and
- if an amendment is to have retrospective application - the Explanatory Notes, amendment, transitional provisions and Part 1 of the proforma PID (Generic Information) should clearly and unambiguously state so and whether and the extent (if any) that the amendment applies to residence contracts entered into before commencement of the Act and to residence contracts entered into before commencement of the amending legislation.

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Thank you for providing the Queensland Law Society with the opportunity to provide these comments. If you would like to discuss any aspect of this submission please contact Louise Pennisi, Policy Solicitor, on l.pennisi@qls.com.au or via telephone on 3842 5872.

Yours faithfully



Noela L'Estrange
Chief Executive Officer