



Government of **Western Australia**
Department of **Commerce**

Statutory Review of Retirement Villages Legislation

Final Report

November 2010



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Retirement Villages
Legislation**

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EXECUTIVE SUMMARY

The ageing of Australia's population is well documented. According to the Australian Bureau of Statistics (ABS), ageing is the most noteworthy population change projected to occur internationally and in Australia over the next 50 years. Population ageing is the change in age structure where the population has an increasing proportion of older people (those aged 65 years and older) in comparison to the proportion of children (those aged 15 years and younger).¹

The ABS forecasts that in 2051, 22.2 per cent (nearly a quarter) 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 appears to be a growth industry and, with the ageing population, it is likely to continue to expand in the future.

An ageing population has significant policy implications for Government. The growth in demand for accommodation for older people is one such implication. The review of retirement villages legislation acknowledges the increasing popularity of retirement village living at both a state and national level.

The review has been undertaken in the knowledge that since the Retirement Villages Act was introduced in Western Australian in 1992, the legislation has not been altered significantly. Over the past few decades, the nature of the industry has changed considerably. Historically, retirement villages were owned and operated by churches and charitable institutions. Private sector for-profit involvement in the industry can be traced back more than thirty years. More recently, in light of Australia's ageing population, many institutional players have taken advantage of opportunities within the sector which has led to significant growth and investment in the industry.

Section 83 of the *Retirement Villages Act 1992* (the Act) requires a review of the operation and effectiveness of the Act to be conducted every five years. Section 43 of the *Fair Trading Act 1987* requires that a code of practice prescribed by regulations under this Act, be reviewed within three years of the date it first takes effect. In February 2006 the then Minister for Consumer Protection, the Hon Michelle Roberts MLA, approved a review of both the *Retirement Villages Act 1992* and the *Fair Trading (Retirement Villages Code) Regulations 2003* to be undertaken concurrently.

In conducting the review, Consumer Protection, a division of the Department of Commerce (formerly the Department of Consumer and Employment Protection), convened a series of public meetings in both metropolitan and regional Western Australia from July to September 2006. Over 900 people attended these meetings and a large number of issues relating to retirement villages were raised in this first stage of the review.

¹ ABS, *1301.0 – Year Book Australia*, 2008; <http://www.abs.gov.au>

The Department also called for written submissions on issues relating to retirement villages in August 2006. Over 150 written submissions were received. In June 2007 the Department released an issues paper bringing together all of the issues raised through the consultation process. A four-month period was allowed for public responses to the issues paper and a total of 131 written submissions were received in this second stage of the review.

The final stage of the review was a third round of consultation which commenced after the then Minister for Commerce Hon Troy Buswell, MLA, approved the release of a draft report on 29 July 2009. A six week period was allowed for further comment by interested stakeholders with a two week extension upon request. Fifty submissions from residents (individual and associations), industry and Government were received in this final round of consultation. The Department also held a final round of meetings with key stakeholders representing retirement village residents and industry.

During the drafting of this report, the Legislative Assembly of Western Australia referred an inquiry into the Karrinyup Lakes Lifestyle Village to the Economics and Industry Standing Committee. The terms of reference of this inquiry required the Committee to inquire into the actions of Moss Glades Pty Ltd and its individual directors in relation to the development of Karrinyup Lakes Lifestyle Village. In particular the Committee examined the extent to which state and local government legislation had been complied with. The findings and recommendations of this inquiry have been taken into account in this report.

It is essential that Western Australia has legislation in place to adequately protect the interests of senior consumers, in particular, retirement village residents. Senior consumers need to be confident that they will get a “fair deal” when moving into, living in, and exiting, a retirement village. It is also important that the industry is able to operate in a dynamic and competitive environment. Continued interest and investment in the retirement village industry is critical if retirement villages are to be developed and available to seniors as a housing option in the future.

In conducting the review, the Department found that while it has an important role to play in the administration of the legislation, consumers cannot devolve their decision-making responsibilities to the Department. Ultimately, consumers must take responsibility for any contractual arrangement entered into. Entering into a retirement village involves making critical financial and lifestyle decisions. Purchasing a right to reside in a village is a significant financial transaction, similar to buying a property in the general real estate market. The Department cannot emphasise strongly enough the importance of researching the industry and its alternatives, reading disclosure information, village contracts and any other relevant documents, and obtaining legal and financial advice, prior to entering into a retirement village.

This report makes numerous recommendations for change and these are listed in the next section. The key recommendations include:

- *Seniors housing Information service*: the establishment of a seniors housing information service to provide prospective residents and residents with independent information and support on housing matters relevant to seniors;
- *Management of retirement villages*: the introduction of a power to remove “non-performing” managers of retirement villages and a power to appoint an administrator to manage a village where the well being or financial security of residents is at risk;
- *Disclosure and cooling off*: more time for prospective residents to consider information and a longer time for “cooling off” from contracts;
- *Reserve funds*: mandatory reserve funds to enable retirement villages to be maintained in a reasonable condition;
- *Auditing of accounts*: mandatory auditing of retirement village operating accounts and special funds unless residents vote each year not to require an audit;
- *Recurrent charges*: provisions to enable residents to appeal at the State Administrative Tribunal against excessive and unwarranted increases in recurrent charges payable by residents;
- *Ongoing charges after a resident leaves*: provisions requiring that outgoing non-owner residents only pay ongoing charges for a prescribed period (a maximum of 6 months) from the time that the resident or residents’ estate delivers up vacant possession of the premises and the lease can be on-sold;
- *Residents’ committees*: strengthening the effectiveness of residents’ committees; and
- *Power of the Commissioner*: strengthening the powers of the Commissioner for Consumer Protection, including a power to seek enforceable undertakings.

Although the review process has been extensive and detailed, retirement villages legislation remains highly complex and evolving. Residents and industry groups continue to raise new issues or variations on existing issues. It is apparent that the Department will need to continue to consult with key stakeholders to address such issues and where possible attempt to devise practical solutions and recommendations for amendment of legislation where required.

LIST OF RECOMMENDATIONS

The Department recommends the following:

MARKETING INFORMATION

1. That the Department work with industry and residents' bodies such as the RVA, ACSWA, WARCRA and COTA to develop guidelines for industry as to appropriate marketing and promotion of villages.
2. That the legislation be amended to require that retirement village contracts must clearly state the terms and conditions as to when proposed amenities and services will be provided.
3. That the Act be amended to enable the State Administrative Tribunal (SAT) to make specific orders relating to the completion of works and the fulfillment of contract requirements.

AGED CARE FACILITIES

4. That the legislation be amended to:
 - replace the statement relating to aged care facilities, that is prescribed in the Code, with a statement redrafted into simpler terms; and
 - require that, in addition to inclusion in promotional material, this statement be incorporated into the key terms summary and the residence contract.

WAITING LIST FEES

5. That the Act be amended to provide that the maximum waiting list fee that can be charged may be prescribed by regulation.
6. That the Act be amended to provide that if a waiting list fee is applicable:
 - the operator must have a written waiting list policy setting out the way in which the waiting list operates;
 - the waiting list policy must be given to any person that pays the waiting list fee;
 - a receipt is to be provided to any person who pays the waiting list fee; and
 - the waiting list fee is fully refundable, on application, 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; and
 - the refund must be made within 14 days of a written request.

OTHER PRE-ENTRY COSTS

7. That the legislation be amended to provide that:
 - a holding deposit can only be charged on vacant or new premises or if the existing resident has given notice to vacate; and
 - 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, and if the resident decides to proceed, the monies are either refunded or credited towards the cost of any ongoing contribution.
8. That the legislation be amended to provide that any contract preparation fees charged must be fully disclosed and itemised prior to a residence contract being entered into and that non-disclosed or non-itemised fees are not recoverable from the resident by the operator.

DISCLOSURE TO PROSPECTIVE RESIDENTS

9. That the content of the *Information Statement For Prospective Resident* (Form 1) be reviewed and revised, in consultation with interested parties.
10. That two levels of disclosure which are consistent with each other be prescribed:
 - for initial enquiries, a 'key terms summary' containing prescribed information and a warranty that the information is correct and consistent with the contract; and
 - a full 'disclosure package' to be supplied once genuine interest in a particular residence is shown.
11. That the legislation provide that the prescribed full disclosure package of information must be provided within 10 working days of the initial request.
12. That the legislation provide that operators may not charge prospective residents for the prescribed disclosure information.
13. That the Department produce a comprehensive information booklet for residents and prospective residents of retirement villages.

DISCLOSURE REVIEW PERIOD

14. That the minimum period for the provision of the prescribed 'disclosure package' be increased from five working days to 10 working days prior to entering a residence contract.

COOLING-OFF PERIOD

- 15. That the cooling-off period be increased from five working days to seven working days.**
- 16. That, in the event that the village operator has not provided all of the required disclosure information in accordance with the prescribed time-frame, the cooling-off period be extended to 17 working days.**

VILLAGE CONTRACTS

- 17. That industry be encouraged to develop more comprehensible and readily comparable contracts.**

RESIDENCE AND SERVICE CONTRACTS

- 18. That the legislation be amended to provide that a residence contract comprises any contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy residential premises in a retirement village as well as any contract, agreement or arrangement for the provision of a service to be provided in the operation of the village that is essentially non-elective.**
- 19. That the legislation be amended to provide that optional or elective services must not be contained in the residence contract but in a separate document.**
- 20. That the legislation be amended to remove, where appropriate, any reference to a 'service contract'.**
- 21. That the legislation be amended to clearly state the termination or variation regimes for both residence contracts and the proposed 'optional' or 'elective' service contracts.**
- 22. That the legislation be amended to:**
 - empower the State Administrative Tribunal to deal with disputes with an administering body in relation to a residence contract or an 'optional' or 'elective' service contract; and**
 - provide that a resident, or a group of residents, or the Commissioner representing a resident, or group of residents, may apply to the State Administrative Tribunal where there is such a dispute.**

ENTERING INTO A RESIDENCE CONTRACT

- 23. That the Act be amended to recognise that an agreement to lease, or an agreement to licence, may be entered into before a lease, licence or deed by which rights to occupy are conferred and to provide a specific starting point for the mandated disclosure review period and cooling-off period.**

MATTERS NOT TO BE INCLUDED IN VILLAGE CONTRACTS

24. That the Act be amended to provide that the Regulations may prescribe matters which must or must not be included in village contracts, and if prohibited matters exist in a contract they are void.

POWERS OF ATTORNEY AND PROXY VOTING

25. That the legislation be amended to introduce provisions to:
 - prohibit a village operator, or their close associate or nominee from requiring or receiving a power of attorney or nomination of proxy from a resident or prospective resident where the operator, a close associate or nominee is the donee or proxy;
 - prohibit a village operator or their close associate or nominee from requiring that a resident or prospective resident appoint a power of attorney, regardless of the identity of the donee, as a condition of entering a village;
 - make void all existing grants of proxy or powers of attorney in contravention of this requirement upon the commencement of this provision;
 - enable developers and operators of purple-title villages to receive a limited power of attorney or nomination of proxy solely in relation to the granting a right of residency to new residents; and
 - provide a means of exemption from the provisions of this recommendation where the Public Trustee is the recipient of the power of attorney.

CONSUMER INFORMATION

26. That a seniors housing information service be established in consultation with non-government organisations.

PROTECTION OF RESIDENTS' FINANCIAL INTERESTS

27. That the legislation be amended to adopt provisions similar to those in NSW legislation which enable the appointment of an administrator to manage a retirement village where the well-being or financial security of the residents is at risk.
28. The legislation be amended to empower the SAT to deal with matters relating to the appointment of an administrator.

29. That the legislation be amended, as necessary, to ensure that a memorial under section 15 of the Act applies to all land pertaining to a retirement village scheme, including land on which are located:
- residential premises of the village; and
 - shared amenities of the village.
30. That the legislation be amended to provide that the procedures required for the partial removal of a memorial on title be prescribed by regulation and that the relevant dispute resolution body should be the SAT.
31. That the legislation be amended according to Recommendations 10, 11, 14, 15, and 16, of the 2002 Statutory Report as follows:
- 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 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 (Cth)*.
- 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 (Cth)*. 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.
32. That the Department of Commerce work with the Parliamentary Counsel's Office and the Registrar of Titles at Landgate to develop appropriate wording for memorial on title relating to retirement villages.

VILLAGE MANAGEMENT

- 33. That the legislation be amended to prohibit certain persons from operating or managing a retirement village, namely:**
- persons who are bankrupt;
 - persons who have been convicted of an offence involving violence, sexual offence, dishonesty or fraud;
 - consistent with the Corporations Act, persons who have been banned or disqualified from managing a corporation in any jurisdiction and persons who have managed a company that became insolvent in any jurisdiction; and that
 - the Commissioner should have discretion to waive these grounds for disqualification, subject to the person demonstrating to the Commissioner's satisfaction that those grounds do not give rise to a significant risk that the person is unsuitable to be a retirement village manager.
- 34. That the Department continue to work with the RVA, ACSWA, WARCRA and other industry and residents' representative bodies in:**
- improving the training of managers in the retirement village industry;
 - developing guidelines and procedures for appropriate and effective consultation; and
 - reviewing the retirement village accreditation system as it relates to village management.

RECURRENT CHARGES

- 35. That the legislation be amended to provide that, where residents in a village believe increases in recurrent charges to be excessive or unwarranted, they may, if the matter cannot be resolved by any other means under the legislation and within a reasonable time, and if agreed to by a special resolution of residents, make an application to the SAT to have their case heard.**
- 36. That the legislation be amended to empower the SAT to hear disputes relating to increases to recurrent charges and make any necessary orders in relation to these matters.**
- 37. That the legislation be amended to require that the introduction of new services and amenities which are not provided for in residents' contracts, and which will increase recurrent charges to residents, must be approved by special resolution of the residents, having received notice and full details of the proposed new services and amenities.**

38. That the legislation be amended to provide village operators the right of appeal to the State Administrative Tribunal if residents do not approve the introduction of new services and amenities which have not previously been provided for in residents' contracts and which will, if introduced, increase recurrent charges to residents.

VILLAGE BUDGETS

39. That the legislation be amended to allow for those fees and charges which may or may not be included in the village operating budget, or otherwise recouped from residents, to be prescribed by regulation following consultation with industry and residents' representative bodies.
40. That the legislation be amended to require that, if called upon, a village operator must demonstrate to residents that reasonable steps have been taken to minimise increases in village operating costs.
41. That the legislation be amended to require that any budget surplus be carried forward and applied to the village in which the surplus arose.
42. That the Department consult further with resident and industry stakeholder groups regarding the treatment of village budget deficits.
43. That the legislation be amended to require that:
- all operating costs accounts and reserve funds or similar accounts of retirement villages be audited by an independent auditor on an annual basis;
 - such audited statements continue to be provided to residents at the annual general meeting;
 - the above provisions be waived if at the previous annual budget meeting the residents decide by special resolution to dispense with this requirement;
 - the option remain that at a later time residents, by special resolution, may resolve to require the operating costs accounts and reserve funds or similar accounts of the village to be audited; and in such cases the audited accounts are to be provided to residents at the next annual general meeting, and on request to a residents' committee or individual resident prior to the next annual general meeting; and that
 - the cost of the audit be allocated according to provisions in the residence contract.

CAPITAL MAINTENANCE AND REPLACEMENT

- 44. That the legislation be amended to:**
- require the mandatory introduction of a reserve fund within each retirement village scheme (where such a fund is not already established); and
 - require the introduction of a reserve fund within two years of the commencement of the relevant amendment.
- 45. That the legislation be amended to:**
- require that the amount held in a mandatory reserve fund and/or the ongoing contributions to the fund are sufficient to ensure that the village can be maintained in a reasonable condition, having regard to the age, and prospective life of capital items at the time the reserve fund is established;
 - require the relevant amount and/or ongoing contributions be in place for all reserve funds within five years of the commencement of the relevant amendment;
 - enable the Commissioner for Consumer Protection to extend the five-year period, on application and for certain prescribed grounds, for a further period; and
 - provide for a decision by the Commissioner to be reviewable on application to the State Administrative Tribunal.
- 46. That where residents believe that the application of a levy or a proposed increase in their contribution to a reserve fund is inconsistent with existing contractual arrangements (including changing the proportionality of existing obligations), or excessive or unwarranted, they may, if the matter cannot be resolved by any other means under the legislation and within a reasonable time, and if agreed by a special resolution of residents, make an application to the SAT for the matter to be reviewed; and that this recommendation also apply to reserve funds already in existence.**
- 47. That the Department consult further with the RVA, ACSWA and WARCRA on matters of detail and implementation concerning the establishment of mandatory reserve funds.**
- 48. That the legislation require the village owner of a retirement village to be responsible for establishing and being accountable for administering a mandatory reserve fund.**
- 49. That the Department investigate and consult on alternatives for the way in which reserve funds may be held and administered in the future.**
- 50. That the legislation make provision to prescribe in regulations where reserve funds are to be held and purposes for which a reserve fund may or may not be used.**

51. That the legislation require that contributions to a reserve fund be used only for the village scheme in which the fund was established and not for any purpose outside that village scheme, and that income earned by the fund be credited to the fund.
52. That the legislation be amended as necessary to more clearly set out the requirements for administering bodies to provide information to existing and prospective residents, that defines and specifies:
 - the purpose of any reserve fund established for the village;
 - the source of the fund's income (including what residents will be required to contribute and what administering bodies will be required to contribute);
 - the purposes for which monies from the reserve fund may be or may not be used;
 - the way in which the fund will be administered; and
 - the differences between reserve fund maintenance and the operating costs maintenance referenced in clauses 4.7 and 4.8 of the Code.
53. That the Department consult on ways for ensuring that the information referred to in Recommendation 52 is provided to both existing and prospective residents.
54. That clauses 5.2 to 5.5 of the Code be amended as necessary to specify that the requirements for an administering body to consult with and provide financial information to residents apply to a reserve fund and any other fund or account established for purposes that include the maintenance, repair, replacement and renovation of the village (including replacement of capital items).
55. That the legislation provide that an administering body of a not-for-profit organisation may apply to the Commissioner for consideration to be given to alternative arrangements to establish a collective reserve fund in circumstances where the administering body operates more than one retirement village scheme and the administering body would be solely responsible for all contributions to the reserve fund.

56. That the legislation be amended to:
- allow residents who do not own their units to carry out urgent repairs, after having given the operator a reasonable opportunity to carry out the work, and require that residents select a contractor from an approved list displayed in a prominent place by the administering body and be able to seek reimbursement of costs from the administering body; and
 - where the administering body has an agreed process for urgent repairs, but fails to carry out its part in the agreed process within a reasonable time, the non-owner resident may make arrangements to carry out the urgent repairs according to the agreed process.

ALTERATIONS TO PREMISES

57. That the legislation be amended to provide that contracts clearly specify the designated private areas in which residents have the right to garden.
58. That the legislation be amended to provide that residents have the right to add or remove fixtures in their own dwelling, subject to approval from management, which should not be able to be unreasonably withheld.
59. That the legislation be amended to provide that residents may be held responsible for the reparation of any damage caused by the removal of any such fixtures, and if required, make good the unit upon vacating the village.
60. That the term 'fixtures' be deemed to mean non-structural additions such as air conditioners, water heaters and other items which can be added and removed without requiring structural changes to the dwelling.

RESIDENTS' COMMITTEES

61. That the Code be amended with respect to residents' committees established under section 5.10 to:
- require an administering body to establish appropriate procedures to consult with a residents' committee on matters relating to the committee's function, including responding to issues raised by a residents' committee on behalf of residents;
 - clarify that committee members do not incur any personal liability for acts done in the exercise of their duties.
 - provide that residents may appoint an incorporated association to undertake the statutory function of a residents' committee established under the Code on the following basis:

- by agreement of the majority of residents by special resolution in accordance with the Code;
 - upon such agreement, the powers and function of the residents' committee would be conferred to the incorporated association;
 - the residents (by special resolution) would be able at any time to remove the function and powers of a residents' committee that had been conferred to an incorporated residents' association;
 - the objects of the incorporated association would be conditional in providing for the association to either carry out the function of a residents' committee, where agreed by the majority of residents by special resolution, or be divested of this function if residents agreed otherwise;
 - membership of the association must be open to all residents and only residents of the village;
 - incorporated associations that are to undertake the function of a residents' committee under the Code would not be able to charge more than \$1.00 subscription fee for membership of the association, but the association may charge fees of members for their participation in other association activities, such as social activities;
 - provision in the association's rules regarding the length of time in office and election of committee members are to mirror the provisions applying to residents' committees under the Code; and
 - an appropriate mechanism be developed by which incoming residents are informed about their right to join an incorporated association that has been appointed to undertake the function of a residents' committee under the Code.
62. That the Code also be amended to clearly emphasise the intention of the Code, in relation to the duty of administering bodies to consult genuinely with residents.
63. That residents' committees established under the Code be made more effective by developing:
- educational materials for use by residents providing practical information about procedures relating to the establishment and operation of residents' committees and the carrying out of the committee's consultative function with the administering body and the residents;
 - educational materials which outline the various other committees or bodies that may exist within a village;

- guidelines for management which outline appropriate procedures for consultation and information provision to residents and residents' committees; and
- model rules for incorporated associations which are to carry out the function of a residents' committee under the Code.

VOTING PROCEDURES

64. That the legislation be amended to provide that where more than one eligible voter present at a meeting calls for, or supports, a written secret ballot in respect of a particular matter, then the vote must be undertaken in this manner.
65. That the status quo remain in respect to the quorum and number of votes required to pass a special resolution.
66. That the Department develop educational materials about voting procedures for residents.

DISPUTE RESOLUTION

67. That the proposed seniors housing information service develop guidelines and deliver educational initiatives in regard to effective dispute resolution within villages.
68. That the Code be amended to require that where the administering body must nominate a suitable person or body to deal with a dispute, that person or body must be acceptable to all parties to the dispute.
69. That village operators be encouraged to establish specific practices to reduce the likelihood of disputes arising.

RELOCATING WITHIN A VILLAGE

70. That the current provisions within the legislation remain in regard to arrangements for relocating from one unit to another within a village.

SELLING PREMISES WITHIN A RETIREMENT VILLAGE

71. That the legislation be amended to adopt a remarketing policy with provisions similar to those contained in South Australian legislation in order to provide residents with greater input into the sale of their unit.
72. That the legislation be amended to require that if a resident expresses a wish to leave the village, then within a reasonable period of time the operator make available to prospective purchasers all pertinent information regarding the unit of the outgoing resident and the village scheme in order to expedite the sale of the unit or the transfer of the lease or licence.

ONGOING CHARGES AFTER A RESIDENT LEAVES

- 73. That the legislation provide that outgoing non-owner residents only pay ongoing charges for a prescribed period from the time that the resident, or the executor or administrator of the resident's estate, delivers up vacant possession of the premises, thus enabling the lease to be on-sold. Beyond this point, the operator must assume responsibility for these charges.**
- 74. That the legislation provide that the operator must not attempt to recover these costs by increasing the recurrent charges payable by other residents.**
- 75. That the legislation provide that any ongoing charges payable by an outgoing non-owner resident must, on application, be deducted from refund entitlements with interest payable at a prescribed rate, and that this provision also apply to contracts entered into prior to the introduction of this provision.**

REFURBISHMENT COSTS

- 76. That the legislation be amended to require that contracts clearly distinguish between residents' contributions towards the costs of refurbishment following the resident permanently vacating a unit and the cost of on-going maintenance during occupancy, and clearly specify the obligations of each party in relation to the costs of refurbishment.**
- 77. That the Department may conciliate in matters where:**
 - residents, or their personal representative, believe that the proposed refurbishment works are not warranted; and/or**
 - the estimated cost of the proposed works is excessive; and/or**
 - the estimated time to complete the works is excessive.**

EXIT FEES

- 78. That, in relation to exit costs, the legislation be amended to require that a daily pro rata calculation be applied to any part of a 12 month period to avoid the outgoing resident and ingoing resident being charged for the same period; and that this provision apply to existing and new contracts.**

ESTATE MATTERS

- 79. That the status quo remain in relation to estate matters.**

TITLE MATTERS

80. That, in the case of resolutions or decisions which impact upon land use, the relevant legislation be amended to permit necessary resolutions or decisions to be made by at least 75 per cent of co-owners in a retirement village established on a purple title, and provide for the State Administrative Tribunal to have jurisdiction to adjudicate disagreements arising from such a resolution or decision, upon application by any co-owner, and that the provisions apply to existing or future purple title arrangements.

STRUCTURE OF THE LEGISLATION

81. That the legislation be restructured to comprise the Act, the Regulations and a Code made under the *Retirement Villages Act 1992* so that all components regulating retirement villages are contained within a single legislative package.

APPLICATION OF THE LEGISLATION

82. That, unless otherwise specified, amendments to the legislation not be retrospective in their application to existing contracts.

LIMITATION PERIOD

83. That the timeframe for bringing proceedings for an offence against the *Retirement Villages Act* should be extended to three years to accord with the *Australian Consumer Law*.

DEFINITIONAL MATTERS

84. That consideration be given to redefining the term 'retirement village' within the Act to reflect the changed nature of retirement village complexes.
85. That consideration be given to redefining the term 'retirement village scheme' within the Act to enable the definition to be more readily understood.
86. That a provision be introduced in the Act to the effect that only retirement villages to which the Act applies, may use the words 'retirement village' in their title.
87. That the following terms be redefined in the legislation:
 - administering body;
 - premium; and
 - any other terms identified in the legislative drafting process as requiring revision.
88. That the Act be amended to better define how payments of premiums are to be dealt with.

MONITORING AND COMPLIANCE

- 89. That the Act be amended to enable the Commissioner to obtain enforceable undertakings under both the Act and the revised Code.**
- 90. That the Department continue to strengthen its investigation, compliance, prosecution and dispute resolution functions and be adequately resourced to do so.**

PENALTIES

- 91. That the legislation be amended to:**
 - increase penalties for breaches of the legislation in keeping with similar consumer legislation in WA and other States;**
 - introduce penalty provisions for any new offences created under the Act;**
 - provide that a breach of a clearly expressed obligation stated in the Code is an offence under the Act and establish a penalty for any such breach; and**
 - provide that any penalties, as well as any legal, court or SAT costs arising from the matter which was the subject of the penalty, are to be paid directly by the operator and not passed on to residents.**

RETIREMENT VILLAGES ESTABLISHED ON CROWN LAND

- 92. That the legislation be amended to take into account situations where the land upon which a retirement village stands is Crown land, or section 75 Land Administration Act (LAA) conditional tenure, and specifically:**
 - allow various forms of tenure over Crown land under the LAA to come under the Retirement Villages Act, with exemptions from lodging a memorial being granted where appropriate.**
 - redefine 'owner' to accommodate situations where Crown land is being used, under various LAA tenures.**
 - provide for situations where the land is Crown, or section 75 LAA conditional tenure, and leased or managed by a retirement village operator, so that the statutory charges on the land in these circumstances affect the operator, and not the land.**

REGISTER OF RETIREMENT VILLAGES

93. That the legislation require operators to notify the Commissioner in writing that land comprising the retirement village (or land that is part of the retirement village) is used as a retirement village, and to provide specific information, as prescribed by regulation, and for the Commissioner to make this information publically available.
94. That both the prescribed 'key terms summary' and 'disclosure package' contain a statement to the effect that the village in question is a retirement village under the *Retirement Villages Act 1992*, and also provides the number of the memorial lodged on the title.
95. That the *Residential Parks (Long-stay Tenants) Act 2006* be amended to require that prospective residents are provided with a statement to the effect that housing arrangements regulated by the *Residential Parks (Long-stay Tenants) Act 2006* are not retirement villages, as defined under the *Retirement Villages Act 1992*, and as such, residents do not receive the protections of this Act.
96. That the *Residential Tenancies Act 1987* be amended to provide that where a residential complex that is not a retirement village, is marketed to a particular age demographic, prospective residents must be provided with a disclosure statement to the effect that the residential complex is not a retirement village as defined under the *Retirement Villages Act 1992*, and as such, residents do not receive the protections of this Act.
97. That the Department liaise with Landgate to explore ways to improve the accessibility of detailed on-line retirement village title information for seniors.

ACCREDITATION OF RETIREMENT VILLAGES

98. That representative bodies, such as the RVA, ACSWA, and WARCRA be encouraged to facilitate greater resident input into existing and future accreditation of retirement villages schemes through the involvement of resident representatives.

PREVIOUS FEDERAL REGULATIONS

99. That State-based retirement villages legislation be retained, but amended according to the recommendations of this review.

2002 STATUTORY REVIEW

100. That those recommendations of the 2002 Statutory Review that are supported by the Department of Commerce be carried forward as recommendations in the current review.

THE RETIREMENT VILLAGE INDUSTRY IN WA

The Western Australian retirement village industry which complies with the *Retirement Villages Act 1992* comprises villages that are privately run and operated on a commercial 'for-profit' basis, as well as many 'not-for-profit' villages. Churches, charities, faith based, local authorities, specific interest groups and membership based special interest associations make up the not-for-profit sector.

As at 30 June 2009, it was estimated by the Australian Bureau of Statistics (ABS) that there were 516,280 people aged 55 and over living in Western Australia.² Of this number, 249,025 (48.23 per cent) were aged 55-64 (that is people still within the standard working age). By including the 65-69 age groups, the number increases to 332,337 or 64.3 per cent of the seniors cohort. The total population aged over 70 and over was 267,255.

The precise structure of the retirement villages sector in Western Australia is not fully known. Recent industry figures³ indicate that in Western Australia in 2009 there were a total of 192 villages with 13,026 independent living units and 282 serviced apartments. Of this number, the not-for-profit sector administered approximately 75 per cent, totally about 10,000 units. Preliminary industry statistics indicate a total population of between 15,000 and 16,000 persons living in retirement villages in WA. Other industry commissioned research indicates that Perth has the highest proportion of any Australian capital city for people aged 65 and over living in retirement and lifestyle villages (Perth 8 per cent; national average 5.3 per cent).

The accommodation contained within a retirement village generally can range from independent living units to serviced apartments to hostel accommodation and full-care nursing home facilities. Retirement villages, however, should not be confused with nursing homes and aged care hostels. The retirement village industry caters mainly for retired persons who are able to live independently in self-care units. Although some villages have residential aged care facilities within the village, these facilities are regulated by Federal legislation.

A number of different types of schemes providing different ownership and occupancy rights exist in retirement villages in Western Australia. The basis of the relationship between a resident and the village operator is the contract signed between the two parties prior to entry. Some contracts are in the form of a licence or lease, some allow the resident to purchase the premises outright as a strata title unit, and a small proportion acquire ownership through purple title arrangements which enable the resident to buy an undivided share of the village as a co-owner.

Retirement villages are just one of the housing options currently available to seniors in Western Australia. There is considerable diversity in the types of accommodation available to seniors. Accommodation options include lifestyle villages, over-55's residential complexes, residential parks, aged rental villages, as well as retirement villages.

² 3235.0: Population by Age and Sex, Regions of Australia released 10 August 2010

³ Figures provided by the Retirement Villages Association (RVA) and based on figures provided by Jones Lang Lasalle.

Despite the fact that many of these types of accommodation are marketed to seniors, they are not all necessarily covered by the *Retirement Villages Act 1992*, meaning that residents of these other types of accommodation do not receive the specific protections of this legislation. The term ‘retirement village’, as defined in the *Retirement Village Act 1992*, is complex and determining whether a particular residential complex is a retirement village under the Act, is not a simple task. There is considerable confusion, for example, as to the difference between a ‘retirement village’ and a ‘lifestyle village’. A retirement village may be called a lifestyle village however not all lifestyle villages are retirement villages under the Act. In terms of appearance and functions, a retirement village and a lifestyle village may be very similar. The main difference between the two types of village relates to the type of ownership and occupancy arrangements, the permanency of tenure and the protections provided to residents. One criterion that distinguishes a retirement village under the *Retirement Villages Act* from other residential schemes offered to seniors is that a memorial must be lodged on the retirement village title. This restricts the land from being used for anything but a retirement village, thus providing residents with security of tenure. The Act therefore 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 Titles⁴. 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. The Act also provides that a retirement village scheme cannot be terminated while any resident remains in occupation, without the approval of the Supreme Court.

Another distinguishing feature of a retirement village is that a “premium” must be paid to the operator of the village.⁵ A premium is in effect a payment for the right to be admitted and live in the village through a variety of arrangements, for example payment for a lease for life, a licence to reside, the purchase of a strata unit or a share as a co-owner of the village.⁶ Various arrangements exist for the refund of part of the premium at the end of the resident’s occupancy. Lifestyle villages also offer various forms of occupancy arrangements including short-term leases equivalent to those used in mainstream private rentals and longer term leases which may span decades. In terms of ownership, residents may buy into a lifestyle village as a strata-title type arrangement or alternatively, residents may purchase a dwelling and lease the land on which it stands. Lifestyle villages that are not retirement villages may come under the *Residential Parks (Long Stay Tenants) Act 2006*, the *Residential Tenancies Act 1987* or the *Strata Titles Act 1985*. Generally, neither the Residential Parks Act nor the Residential Tenancies Act offers residents the same security of tenure as the Retirement Villages Act.

⁴ The Registrar of Titles is located within Landgate (formerly the Department of Land Information), the agency responsible for Western Australia’s land and property information.

⁵ Section 3 (1) of the Act states that **premium** means a payment (including a gift) 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 (including any such payment made for the purchase of residential premises in a retirement village or for the purchase, issue or assignment of shares conferring a right to occupy any such residential premises).

⁶ Retirement villages in Western Australia in which people buy shares and become co-owners are established on purple titles and are often referred to as purple title villages.

BACKGROUND TO THE REVIEW

This report provides the findings and recommendations of the third review of the *Retirement Villages Act 1992* (the Act) and subsidiary legislation.

Section 83 of the Act requires the responsible Minister to carry out a review of the Act after the first year of operation, and thereafter, every five years. Section 43 of the *Fair Trading (Retirement Villages Code) Regulations 2009* requires that a review be carried out within three years of the Code first taking effect.

The first review of the Act was concluded in 1995 and the report of that review was tabled in Parliament in the same year. At this time the Federal Government was considering fundamental changes to the regulation of residential aged care facilities. Given that many aged care facilities were (and remain) located within retirement villages, these proposed changes had the potential to significantly impact on the way in which retirement villages are regulated. For this reason, the progress of a number of the recommendations in the 1995 report was postponed.

The second review was commenced in 1999 and resulted in the release of the 2002 Statutory Report.⁷ This report provided the findings and recommendations of the second review as well as reassessed some of the recommendations of the 1995 report in light of various national developments including:

- the Commonwealth taking on the role of regulating residential aged care facilities with the introduction of the *Aged Care Act 1997*; and
- the obligations of state governments to review legislative restrictions on competition under the *National Competition Policy Competition Principles Agreement*.

Further information on the 2002 Statutory Review and a list of that review report's recommendations can be found at Appendices 1 and 2. The current review was commenced in July 2006.

RETIREMENT VILLAGES 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
- *Fair Trading (Retirement Villages Code) Regulations 2009* made under the *Fair Trading Act 1987* (the Code).

The Act, the Regulations and the Code together regulate the retirement village industry in Western Australia. The *Fair Trading Act 1987* also applies to retirement villages.

7 The full title of the "2002 Statutory Report" is *The Review of the Regulation of the Western Australian Retirement Village Industry Final Report*, February 2002.

THE REVIEW PROCESS

To enable a comprehensive review of retirement village laws, in 2006 the (then) Minister for Consumer Protection, the Hon Michelle Roberts MLA, and key stakeholders agreed that the Act, the Regulations and the Code should be reviewed concurrently. Current provisions require that the Act must be reviewed after every five years, while the Code must be reviewed after every three years. Stage 1 of the review commenced in July 2006. This involved a series of 18 public consultation meetings that were held in metropolitan and regional locations over a three-month period. Over 900 people attended these consultation meetings to provide input to the review and almost 200 written submissions were received. The issues raised at the public consultation meetings and in subsequent written submissions formed the basis of an Issues Paper. The Issues Paper was published in June 2007 and marked the beginning of Stage 2 of the review. The Issues Paper resulted in 131 submissions following a four-month consultation period, which closed at the end of October 2007. Stage 3 of the review was a final round of consultation which commenced after the Hon Troy Buswell, MLA, Minister for Commerce, approved the release of a draft report on 29 July 2009. A six week period was allowed for comment. Fifty submissions from residents, residents' associations, industry and Government were received in this final round of consultation. The Department also held a final round of meetings with key stakeholders representing retirement village residents and industry.

The makeup of the 2007 and 2009 submissions was as follows:

	2007	2009
• Individual respondents	85	22
• Village residents' organisations	31	9
• Industry members	8	10
• Government/other	7	9
• Total	131	50

This report considers the findings of the review and makes recommendations regarding the future regulation of the retirement village industry. The report is largely based on the submissions received, but also takes into account reviews conducted in other jurisdictions, as well as the findings and recommendations of the 2002 Statutory Report and the Economic and Industry Standing Committee (EISC)⁸ which inquired into the operation of Karrinyup Lakes Lifestyle Village (KLLV).

The issues examined in the review cover 40 chapters, all of which outline the existing legislation, identify the issues relating to the problem, report on the submissions received, and provide the Department's findings and recommendations. Most chapters make recommendations, some of which require legislative change, while others can be executed by the Department without the need for amendments to the legislation.

⁸ Economics and Industry Standing Committee Report No 10, presented by Hon Bob Kucera, APM JP MLA. Laid on the Table of the Legislative Assembly on 19 June 2008.

1. MARKETING INFORMATION

The review⁹ considered the availability and accuracy of information contained in marketing and promotional material for retirement villages.

CURRENT PROVISIONS

The Code requires that 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.

Under the Code¹⁰, the administering body is required to state the latest date by which amenities or services will be made available to residents of the village or the happening of an event upon which the provision or availability of those amenities and services depends. If there are any conditions upon which the provision or availability of those amenities and services depend, then these must also be disclosed.

Details of amenities and services that are, or are to be provided must also be included in residence and service contracts, meaning that operators are contractually obliged to deliver on the amenities and services that are detailed in contracts.¹¹

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

IDENTIFIED ISSUES

In the initial public meetings, a number of residents complained that certain services or amenities, such as clubhouses, pools, spas, security, and parking, were promised in marketing brochures but were 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.

⁹ The term “the review” refers to the review team which comprised policy officers from the Legislation and Policy Directorate of the Consumer Protection Division of the Department of Commerce (formerly the Department of Consumer and Employment Protection) in Western Australia.

¹⁰ Clause 2.3 of the Code

¹¹ Clauses 4.4 and 4.5 of the Code

The Economic and Industry Standing Committee (EISC)¹² Inquiry into Karrinyup Lakes Lifestyle Village (KLLV) highlighted a problem with regard to the marketing and promotion of a particular village. In this situation, a village clubhouse had allegedly been promised to prospective residents in various promotional material for the village.

The two main issues uncovered in this inquiry concern the type of building being constructed on site, including its deviation from what had been indicated to prospective residents when the village was being promoted, and the changes to expected completion dates. Representations about the KLLV clubhouse are currently before the courts.

SUBMISSIONS

A number of respondents reported that they had difficulty accessing independent and impartial information when seeking a suitable residential facility. The Council on the Ageing (COTA) asserted that there is a critical need for an independent advisory service for prospective residents. COTA considered that, of all the options canvassed in the Issues Paper, such a service would prove to be the most effective in addressing problems associated with the marketing of retirement villages.

The Office of Seniors Interests and Carers (OSIC) submitted that the legislation needs to be strengthened to ensure that village developers, owners and operators are not able to renege on their promises regarding the provision of facilities and services that are made prior to selling or leasing premises. OSIC suggested that the legislation should include sanctions for developers, owners and operators where they fail to meet these obligations, and compensation for residents.

The RVA suggested that this matter be dealt with in the residence contract to provide residents with greater clarity with regard to the availability of services and amenities.

One respondent suggested that all facilities should be built and fully equipped before developers are able to market the village. Another respondent stated that the promise of facilities affects a prospective resident's decision to enter a village and where facilities are not yet under construction, then details of marketing promises must be contained in contracts. There was also a suggestion that village developers should be required to show that they have sufficient funding, or access to funds, to build the village before they may commence building. A further suggestion was to retain the disclosure provisions but stipulate a timeframe in which the facilities will be provided, for example within 18 months of the first unit being sold.

The EISC Inquiry report recommended that "the relevant authorities review the sales information and promotional material for retirement villages as part of the approval process to ensure compliance with legislation."

¹² Economics and Industry Standing Committee Report No.10. Presented by Hon Bob Kucera, APM JP MLA. Laid on the Table of the Legislative Assembly on 19 June 2008.

This report also recommended that the Department ensure that promised services and facilities are provided. In their report into Karrinyup Lakes Lifestyle Village, the EISC recommended that the legislation should be amended to provide that major common facilities and amenities such as a club house or a pool, must be constructed in the first stage of a retirement village development.¹³

FINDINGS AND RECOMMENDATIONS

Given that the decision to enter a retirement village is a significant one, and that often prospective residents need to consider contractual arrangements that are very different to those which a normal home owner needs to consider, it is important that they receive promotional and sales material that is truthful, accurate, and unambiguous and that unbiased information is available from an independent source.

In order that residents have ready access to impartial information, the Department recommends the establishment of a seniors housing information service within the Department with referrals to non-government organisations. The recommendation for the establishment of such a service is discussed in more detail in Chapter 14 (*Consumer Information*).

In addition, it is recommended that the Department seek to work with peak bodies such as the Retirement Village Association (RVA), Aged and Community Services WA (ACSWA), the Western Australian Retirement Complexes Residents' Association (WARCRA) and the Council on the Ageing (COTA) to develop guidelines for industry as to appropriate marketing and promotion of villages. The development of such guidelines would ensure that industry is clear as to the requirements of the legislation in relation to the marketing and promotion of villages.

The Department notes that the current provisions of the Code require that promotional materials must clearly state the terms and conditions as to when amenities and services must be provided.¹⁴ The Department recommends that retirement village **contracts** must also clearly state these terms and conditions as to when amenities and services will be provided.¹⁵

In view of the fact that the availability of certain amenities or services would be a significant factor in a resident's decision to enter a village, it is important that any amenities or services promised are, within reason, available during their residency in the village. For this reason, it is further recommended that the *Retirement Villages Act 1992* (the Act) be amended to enable the State Administrative Tribunal (SAT) to make specific orders relating to the completion of works and the meeting of contract requirements. It is intended that the SAT be given the flexibility to make specific orders as it sees fit under the circumstances.

¹³ EISC Report Recommendation 5 (p 44)

¹⁴ Clause 2.3 of the Code.

¹⁵ Amendment will be required to current provisions in Clauses 4.4. and 4.5 of the Code to require that operators clearly state the terms and conditions as to when amenities and services will be provided.

For example, in some cases the cost to the operator of performing a certain contractual obligation may have increased significantly from the time when the contract was signed by the parties, or some other intervening factor may have arisen which may have made the original proposal unviable. In such circumstances it might be preferable for the SAT to order the operator to pay the residents compensation instead of performing the obligation. The intention is to authorise the SAT to weigh up the situation, consider the options available, choose an outcome that is fair, and make specific orders.

With regard to false and misleading conduct, there are already some protections under the FTA and residents should be encouraged to report any such incidences to the Department so that they may be investigated more fully.

The *Review of Australia's Consumer Policy Framework by the Productivity Commission*¹⁶ (the Productivity Commission review) recommended giving consumer regulators the power under national generic law to require suppliers to substantiate claims and representations. The Productivity Commission's review suggested that the proposed substantiation requirements could provide for more cost-effective and timely remedies than ex-post court action using the misleading or deceptive conduct provisions.

The legislative provisions, arising from the recommendations of the Productivity Commission's review, includes a power for consumer regulators to issue substantiation notices. These provisions were passed by the Commonwealth Parliament on 1 July 2010. It is intended that similar legislation will be introduced in Western Australia on 1 January 2011.

Empowering the Commissioner for Consumer Protection to require the substantiation of claims contained in promotional or marketing material might assist in addressing some of the problems with the non-delivery of promised facilities or amenities. This provision may assist the Commissioner in investigating claims which village operators might make to attract residents and uncovering promises of future amenities or services which operators may have no realistic chance of fulfilling.

In summary, the Department recommends:

- 1. That the Department work with industry and residents' bodies such as the RVA, ACSWA, WARCRA and COTA to develop guidelines for industry as to appropriate marketing and promotion of villages.**
- 2. That the legislation be amended to require that retirement village contracts must clearly state the terms and conditions as to when proposed amenities and services will be provided.**
- 3. That the Act be amended to enable the State Administrative Tribunal (SAT) to make specific orders relating to the completion of works and the fulfillment of contract requirements.**

¹⁶ *Review of Australia's Consumer Policy Framework: Productivity Commission Inquiry Report.* No. 45, 30 April 2008

2. AGED CARE FACILITIES

The review examined ways in which prospective residents can be made more aware of the fact that the availability of aged-care facilities cannot be guaranteed by village operators.

CURRENT PROVISIONS

Aged-care falls under the jurisdiction of the Federal Department of Health and Ageing and is funded by the Federal Government. Funding for placements is determined using a needs-based classification model that is administered by that Department. Placements cannot be guaranteed by village operators.

The Code requires that any promotional or sales material making reference to the availability of residential care services must contain the following statement in 16-point type and boxed:

You should be aware that current Commonwealth policy guidelines on admission to Commonwealth funded residential aged care facilities require places to be allocated on a “needs” basis. It is not possible for an organisation providing services for older people to guarantee admission to Commonwealth funded residential aged care facilities.

SUBMISSIONS

Some residents commented that they had been led to believe that they could automatically access on-site Federal 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. Other residents submitted that they were told that they would have priority placement in the adjoining aged-care facility as it was owned by the same organisation. Two years into their contract, the same residents learnt that the aged-care facility was to be excised and possibly sold.

FINDINGS AND RECOMMENDATIONS

It appears that, despite the existing requirement for a statement relating to aged-care facilities to be included in any promotional material making reference to the availability of such care, many prospective residents are under the impression that they will have access to on-site aged care facilities. For this reason it is suggested that this statement needs to be re-drafted in simpler terms. It is also recommended that, in addition to inclusion in promotional material, this statement be incorporated into a key terms summary (see chapter 5) and the residence contract.

In addition, the Department will ensure that any education materials which the Department develops in future regarding retirement villages and residents' access to aged care will be readily available to real estate agents who sell retirement village units so that they may advise prospective residents at the outset of the process for aged care admission. The proposed *Seniors Housing Information Service* (see chapter 14) will also provide this information to residents to ensure that they are clear about the process for access to on-site aged care facilities.

In summary, the Department recommends:

4. That the legislation be amended to:

- **replace the statement relating to aged care facilities, that is prescribed in the Code, with a statement redrafted into simpler terms; and**
- **require that, in addition to inclusion in promotional material, this statement be incorporated into the key terms summary and the residence contract.**

3. WAITING LIST FEES

The review asked whether the fees charged by village operators for registering on a waiting list should be regulated or prohibited by government.

CURRENT PROVISIONS

The legislation does not currently regulate waiting list fees.

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.

IDENTIFIED ISSUES

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 a reasonable administrative cost.

There are some concerns as to the fairness of imposing a fee to register on a waiting list and whether it is warranted.

SUBMISSIONS

More than half of the submissions received supported the prohibition of waiting list fees. Many of these were of the view that such a fee is not necessary and 'ties up the funds' of persons seeking to be placed on more than one waiting list. A number of the submissions suggested that retirement villages already operate quite successfully without charging waiting list fees and therefore to prohibit such fees would not have any adverse consequences.

A further one third of the submissions supported some form of regulation such as adopting the NSW model and imposing a monetary limit on the fee that can be charged. Those supporting some level of regulated option fee felt that the option fee served to control waiting lists and discourage people from placing their names on several lists on a "just in case" basis.

Only a very small number of submissions suggested the status quo of no regulation should remain. These respondents felt that market forces alone were sufficient to control the responsible use of waiting list fees. It was also suggested that the deposit of a waiting list fee is an indication of genuine interest which may in turn influence development decisions that are made, for example, the staging of villas or the timing of sales releases.

FINDINGS AND RECOMMENDATIONS

It is considered to be in the interests of the operator to have a waiting list of potential residents to fill vacancies as they arise. While not all operators charge a waiting list fee, it is recognised that there may be some justification in operators charging a waiting list fee in order to establish whether interest in a particular village is genuine. It is important, however, that any fees charged are justifiable on a cost recovery basis.

The Department recognizes that in spite of best intentions, people's circumstances can change and they may no longer be able to take up residence in a village. The Department therefore recommends that the waiting list fee be refundable on application if the person, for whatever reason, is unable to take up residence. In cases where a person has died, the waiting list fee will need to be refunded to the person's estate.

In summary, the Department recommends:

- 5. That the Act be amended to provide that the maximum waiting list fee that can be charged may be prescribed by regulation.**
- 6. That the Act be amended to provide that if a waiting list fee is applicable:**
 - the operator must have a written waiting list policy setting out the way in which the waiting list operates;**
 - the waiting list policy must be given to any person that pays the waiting list fee;**
 - a receipt is to be provided to any person who pays the waiting list fee; and**
 - the waiting list fee is fully refundable, on application, 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; and**
 - the refund must be made within 14 days of a written request.**

4. OTHER PRE-ENTRY COSTS

The review asked whether there is a need for holding deposits or contract preparation fees to be regulated by government.

CURRENT PROVISIONS

The legislation does not currently regulate pre-entry costs such as holding deposits, contract preparation or contract termination fees.

The NSW legislation provides that 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.

In respect to contract preparation fees, the NSW 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.

IDENTIFIED ISSUES

Holding deposits are different to waiting list fees in that a holding deposit can only be charged to one person at a time, that being the person who has been offered a property. The deposit is held for the duration of the decision-making period and is either refunded if the applicant elects not to take residence in the property or fully deducted from any in-going contributions that may be charged.

Contract preparation fees are sometimes charged, as there are usually legal and other costs associated with the preparation of village contracts.

As with waiting list fees, there were some questions raised as to the fairness of holding deposits and contract preparation fees and whether they are warranted.

SUBMISSIONS

The submissions were divided on whether there should be any regulation of holding deposits and contract preparation fees. The use of a holding deposit was seen by many as a fair tool of business to indicate genuine interest as the marketing of a property ceases while an applicant is given time to consider whether or not to accept a property.

Some submissions also indicated that these monies should be held in trust and that they should be fully refundable where an application does not proceed, or credited to any in-going payments where the contract does proceed.

One respondent noted that other sectors of the property market charge "option fees" and the like and that they are not prohibited from doing so, therefore retirement villages should not be penalised or disadvantaged through the introduction of regulation.

Approximately half of the respondents felt that contract preparation fees were unreasonable and should be prohibited by government. Some of the responses claimed that contract preparation fees should be prohibited as the developer's solicitor draws up the contract long before it is offered to any prospective resident and all incoming residents sign the same contract. Industry claims that there are significant costs associated with the drawing up of retirement village schemes and, as such, they should be able to reapportion these costs to incoming residents.

FINDINGS AND RECOMMENDATIONS

Reviews of retirement village legislation in other States have highlighted concerns regarding the cost of holding deposits and contract preparation fees. The charging of a holding deposit is of benefit to the prospective resident in that the operator is prevented from offering the premises to any other person pending the resident's entry into a residence contract. It is important however that this payment is recoverable if the resident decides not to proceed to enter into a residence contract and, if the resident decides to proceed, the monies are either refunded or credited towards the cost of any ingoing contribution.

The Department recognises that there are costs associated with the drawing up of village schemes and village contracts. At the same time the Department finds that, it is desirable that, if these costs are to be passed on to incoming residents, they are transparent. For this reason it is recommended that any contract preparation fees and associated fees must be fully disclosed and itemised prior to a residence contract being entered into and that non-disclosed or non-itemised fees are not recoverable from the resident by the operator.

In summary, the Department recommends:

- 7. That the legislation be amended to provide that:**
 - **a holding deposit can only be charged on vacant or new premises or if the existing resident has given notice to vacate; and**
 - **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, and if the resident decides to proceed, the monies are either refunded or credited towards the cost of any ingoing contribution.**
- 8. That the legislation be amended to provide that any contract preparation fees charged must be fully disclosed and itemised prior to a residence contract being entered into and that non-disclosed or non-itemised fees are not recoverable from the resident by the operator.**

5. DISCLOSURE TO PROSPECTIVE RESIDENTS

The review asked whether the current disclosure provisions are adequate or whether they could be improved.

CURRENT PROVISIONS

The Act requires that all retirement village operators provide a package of information to prospective residents at least 5 working days before that person enters into a residence contract.

This package includes

- a comprehensive information statement (Form 1)¹⁷;
- information regarding the prescribed cooling-off period;
- a copy of the residence rules; and
- a copy of the Code.

The comprehensive information statement is referred to as Form 1 or *Information statement for prospective resident* and is set out in a schedule to the Regulations. This form is, in effect, a checklist that 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.

Division 3 of the Code also provides that certain information must be provided to prospective residents prior to entering into a residence contract or service contract.

IDENTIFIED ISSUES

There were two main issues identified with regards to disclosure. These are:

- effective disclosure; and
- different levels of disclosure.

Effective disclosure

Much of the protection afforded to consumers under retirement villages legislation is based on disclosure of information. The legislation does not regulate terms or conditions of occupancy, so it is important that prospective residents read and understand disclosure material before entering into retirement village contracts.

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. There is increasing evidence that lengthy disclosure documents do not necessarily result in more informed consumers.

¹⁷ Information Statement For Prospective Resident: Schedule 1, Form 1 Retirement Villages Regulations 1992

Different levels of disclosure

It is recognised that the need for information differs depending on the stage in the village selection process of each prospective resident. Those who have just started looking are best served by basic information which can help them to narrow down the field, while those about to commit to a particular village require more specific details about the arrangements they are contemplating entering into.

The NSW *Retirement Villages Amendment Act*¹⁸ distinguishes between general enquiries and enquiries of a more specific nature. This is done by prescribing a 'general inquiry document' to give a basic explanation of the residential premises, services and facilities that are available within the retirement village, and a 'disclosure statement' to provide specific information in respect of particular residential premises within a retirement village.

SUBMISSIONS

A number of respondents 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.

The Association of Independent Retirees (AIR) contends that the biggest problem is that people take away all the literature available from a village office but then don't study it properly. According to the AIR, people must be prepared to take the time to read the papers that they receive. The AIR also reported that people often complain that they were not informed about a certain matter when in fact it was contained in the information provided by the village.

Some respondents maintained that the questions contained in Form 1 are too broad and allowed operators to provide non-specific responses. It was suggested that some operators may draft their responses in as vague, ambiguous and lengthy a manner as possible so as to avoid simple and direct answers to the statutory questions.

The RVA submitted that the current Form 1 requires amendment, and is of the view that it contains repetitive questions, contradictions and covers some relatively unimportant matters. In many cases, the questions are too broad and therefore require lengthy answers. It was suggested that Form 1 should deal with important village scheme issues and should do so with more succinct and relevant questions.

The RVA further suggested that disclosure could be improved by the inclusion only of a 'key terms' summary of the important village scheme terms. The Western Australian Retirement Complexes Residents' Association (WARCRA), the Council on the Aging (COTA) and a number of individual respondents suggested that standard terminology should be introduced across the industry, especially in regards to financial matters.

¹⁸ The *Retirement Villages Amendment Act 2008* (NSW) was assented to on 10 December 2008. This Act has not yet come into force.

Fini Villages suggested the implementation of a Scheme Summary in which each village would have a stand-alone 2 or 3 page document to be made available to prospective residents for comparison when considering different villages. One respondent suggested that a standardised ‘tick box’ statement be produced so that prospective residents can compare village features and costs against each other. There was considerable support for the option of implementing 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.

FINDINGS AND RECOMMENDATIONS

Current disclosure requirements could be made more effective by reducing and simplifying some of the disclosure requirements in the Regulations. This would involve redrafting the questions in Form 1. From the responses to the Issues Paper, it is clear that there are a number of ways of improving the contents of the Form. Further consideration of these suggestions will be given when the Regulations are being redrafted. It is suggested that a working party be established to simplify and clarify the information contained in this Form. This working party would comprise representatives from industry, residents’ and seniors’ associations, and consumer associations. It is recommended that WA adopt a similar approach to NSW by differentiating between the two levels of enquiries by prospective residents. These levels are outlined below.

Level 1

Persons making initial enquires could be given a “key terms summary”. This document would be a two or three page summary of the important village scheme terms. This summary document would contain mandatory prescribed information (for example how the village deals with pets). This requirement would not limit the operator including other important information as suited to the particular retirement village scheme. Administering bodies would also be required to provide a warranty that the information is correct and consistent with the contract. The purpose of such a summary would be to enable prospective residents to understand the key features and costs of a particular village and to be able to compare villages more easily. Operators are to supply this information to prospective residents free of charge.

Level 2

Persons showing a genuine interest in a particular residential premises should then be provided with a full “disclosure package”, comprising:

- a comprehensive disclosure statement (the revised Form 1);
- a copy of the village rules;
- a copy of any contract required to be entered into; and
- a copy of the Code.

Genuine interest would include paying a holding deposit or making a written request for a disclosure package in relation a specific property.

Operators are to supply this information to prospective residents within 10 working days and free of charge.

It is intended that the operator be required to ensure that the two levels of disclosure are consistent with each other and the eventual contract and that if any divergence between the two disclosures needs to occur, the operator brings this to the prospective resident's attention, including the reasons for the change, subject to the requirements of section 13(4) of the Act. This provision is not intended to prevent the operator from recovering the cost of any subsequent information requested by the resident above and beyond the prescribed disclosure information, especially if the information requests require the operator to spend considerable time and resources in making the information available to the prospective residents.

The NSW Office of Fair Trading also produces an information booklet¹⁹ for prospective residents, residents and operators of retirement villages. This booklet is a comprehensive outline of matters to consider before deciding to move into a retirement village. The booklet may also serve as a general reference guide for those already residing in retirement villages. Consumer Protection currently produces a publication entitled "*So you're thinking about moving into a retirement village.*" The Department recommends that this booklet be revised so that it is more comprehensive, in line with the level of information contained in the "*Park Living*" information booklet and the NSW booklet.

In summary, the Department recommends:

- 9. That the content of the *Information Statement For Prospective Resident (Form 1)* be reviewed and revised, in consultation with interested parties.**
- 10. That two levels of disclosure which are consistent with each other be prescribed:**
 - for initial enquiries, a 'key terms summary' containing prescribed information and a warranty that the information is correct and consistent with the contract; and
 - a full 'disclosure package' to be supplied once genuine interest in a particular residence is shown.
- 11. That the legislation provide that the prescribed full disclosure package of information must be provided within 10 working days of the initial request.**
- 12. That the legislation provide that operators may not charge prospective residents for the prescribed disclosure information.**
- 13. That the Department produce a comprehensive information booklet for residents and prospective residents of retirement villages.**

¹⁹ Retirement village living; an overview of the NSW retirement village laws: Office of Fair Trading (NSW) 2007

6. DISCLOSURE REVIEW PERIOD

The review asked whether the time that is required to be given to review disclosure information should be increased.

WHAT THE CURRENT LEGISLATION PROVIDES²⁰

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, under section 13 of the Act.

Victoria currently prescribes a 21-day disclosure review period whilst NSW prescribes 14 days. The NSW legislation provides that operators must provide prospective residents with a general inquiry document within 14 days of that person expressing interest in becoming a resident. The operator must also provide a prospective resident with a disclosure statement within 14 days of that person requesting the statement. South Australian legislation provides that if the prescribed disclosure information is not provided, the resident has the right to rescind the contract up to 15 business days after the information is provided. Queensland does not have a specific time-frame but requires the prescribed public disclosure documents to be provided prior to entering into a residence contract.

IDENTIFIED ISSUES

Comments provided in the early stages of the review, as well as in a number of written submissions, indicated that the five-day disclosure review timeframe is too short. It was noted that five days does not provide adequate time to obtain legal advice or have a friend or family member look over the contract or any other information provided. (There is currently no legislative requirement for operators to provide prospective residents with a copy of the contract that they will be entering into).

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. Some respondents spoke of encountering difficulties in accessing expert legal advice before signing a contract.

²⁰ Clause 3.1 of the Code

SUBMISSIONS

An overwhelming majority of respondents supported increasing the time that is required to be given to review disclosure information prior to entering into a contract. There was also considerable support for the option of increasing the disclosure review period but providing for circumstances where this may be reduced, for example where legal advice has been obtained.

The responses to the question of what would be considered a reasonable timeframe for the review of disclosure varied from 14 days to 56 days. The most frequently suggested responses were 14 days and 21 days.

Industry respondents did not support increasing the disclosure review period claiming that this may serve to disadvantage outgoing residents in that outgoing residents may be in a hurry to sell their unit so as to be able to move into alternative accommodation. Another industry respondent stated that increasing the disclosure time frame could be problematic in 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 was countered by another industry respondent who stated that people entering retirement villages are seldom doing so in an “urgent” manner.

In the final round of consultation, a number of respondents queried whether the recommendation in the draft report relating to the disclosure review period, pertained to calendar days or working days. Some respondents formulated their response on the basis that a disclosure period of 14 working days was being recommended. The recommendations in this report have been amended to clarify this.

In this final round of consultation, many industry respondents re-iterated their earlier concerns that extending the disclosure review period could potentially disadvantage incoming residents whom require accommodation in a hurry and could also potentially disadvantage outgoing residents by increasing the amount of time they have to wait before receiving any refund that they are entitled to. A couple of respondents suggested the adoption of a ‘resident opted’ waiver of the disclosure review period. A waiver was seriously considered however such a waiver could be problematic in that it creates the potential for village operators to pressure prospective residents to sign the waiver so as to circumvent their (the operator’s) legislative obligations. This is particularly relevant where there may be considerable interest in a particular unit as an operator may use the threat of other interested parties if a prospective resident does not agree to the waiver.

One industry respondent claimed that extending the disclosure review period would be “literally forcing people to remain living in cars and caravans or, at best in difficult and cramped circumstances with friends or relatives” until the disclosure review period had expired.

FINDINGS AND RECOMMENDATIONS

The potential for outgoing residents to be disadvantaged in regard to selling their unit is considered to be outweighed by the need for prospective residents to have sufficient time to review the information that is available to them and to seek independent advice where necessary. Given that the majority of outgoing residents would give notice of their intention to vacate a unit, and that operators have the option of supplying disclosure information to interested persons well in advance of the minimum requirements, it appears that the problems raised are not necessarily as considerable as suggested by some industry respondents. There is nothing to prevent the village operator from providing the 'disclosure package' at any point from the time a prospective resident expresses interest in becoming a resident in a village.

If, for example, prospective residents were supplied with the disclosure information once they reached the top of the waiting list, then the operator would have fulfilled their legislative obligation and there would be few delays in new residents entering the village.

In response to some industry respondents concerns that extending the disclosure review period would further disadvantage residents-to-be who require "crisis" or "emergency" accommodation, there is nothing in this recommendation to prevent operators from offering temporary accommodation until such times as a residence contract is entered into.²¹

In view of the fact that the majority of persons entering into retirement villages are seldom doing so in an urgent manner, it is unlikely that any significant detriment would be created by increasing the disclosure review period by 5 days.

In summary, the Department recommends:

- 14. That the minimum period for the provision of the prescribed 'disclosure package' be increased from five working days to 10 working days prior to entering a residence contract.**

²¹ The provision of temporary accommodation must be considered with reference to section 14(2) of the Act which provides that 'a person is not entitled to rescind a residence contract under this section after entering into occupation of residential premises in a retirement village under the residence contract'.

7. COOLING-OFF PERIOD

The review asked whether the cooling-off period should be increased and, if so, what would be an appropriate time period.

CURRENT PROVISIONS²²

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.²³

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.

In NSW, prospective residents have 14 days to review disclosure information with a seven business day cooling-off period. In South Australia, a cooling-off period of 15 business days commences from the date the residence contract is signed. In Victoria, where prospective residents have 21 days in which to review disclosure documents, the cooling-off period is three business days.

IDENTIFIED ISSUES

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.

In the initial consultation phase, a number of residents and prospective residents suggested 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 needing to draw upon their cooling-off rights may be reduced.

SUBMISSIONS

The vast majority of submissions supported increasing the cooling-off period. A cooling-off period of between 14 days and 21 days was the most commonly suggested time frame.

A number of respondents remarked on the relationship between the disclosure review period and the cooling-off period and suggested that if the disclosure review period is extended, then the need to extend the cooling off period is not so critical.

²² Section 14 of the Act

²³ The cooling-off period applicable in WA to a door-to-door sale for over \$50 is 10 working days.

One submission noted that, with the exception of the initial sale of a new retirement unit where the seller is the owner or developer, the outgoing resident is a 'seller' and the prospective resident is a 'purchaser'. In changing legislation dealing with timing issues such as cooling-off periods to advantage the purchaser, the seller may be disadvantaged.

FINDINGS AND RECOMMENDATIONS

In view of the fact that it is recommended that the disclosure review period be increased from five working days to 10 working days, the need for a considerably extended cooling-off period is reduced. Taking into account the needs of incoming and outgoing residents, the Department recommends that the cooling-off period be increased to 7 working days.

If the retirement village has not provided all of the required disclosure information at least ten working days before the contract is signed, the Department recommends that the cooling-off period be extended to 17 working days.

In summary, the Department recommends:

- 15. That the cooling-off period be increased from five working days to seven working days.**
- 16. That, in the event that the village operator has not provided all of the required disclosure information in accordance with the prescribed time-frame, the cooling-off period be extended to 17 working days.**

8. SETTling-IN PERIOD

The review asked whether there should be provision 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?

Note. The Issues Paper framed this matter as a "try before you buy" scheme. This has been revised. The intention behind a settling-in period is not to benefit prospective residents who are unable to decide whether they would like to live in a retirement village but rather those residents who may be required to leave the village soon after entering, for health or other extenuating reasons.

CURRENT PROVISIONS

The Western Australian Retirement Villages Act does not provide for a settling-in period.

South Australia has a 90-day statutory settling in period in place since 1994. Despite the availability of this settling-in period, the Office of the Ageing (SA) reports that few residents actually draw upon this provision.

The NSW Retirement Villages Amendment Act 2008 makes provision for a settling-in period. If adopted, 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.

IDENTIFIED ISSUES

The recent NSW review²⁴ raised the issue of problems associated with the entry to self-care premises (retirement villages) of people incapable of independent living. One submission to this review stated that "it is inequitable for operators to allow such prospective residents to outlay the legal, removal, capital and emotional expenses of entering such premises, and then, very soon afterwards, having to be removed to more appropriate care.

A settling-in period was proposed as a means of removing the temptation for unscrupulous operators to encourage frail residents to move into unsuitable accommodations in the hope of making a quick profit. It was also proposed as a means of ensuring that those residents who pass away or move to a higher level of care within a very short space of time, only pay a fair and reasonable amount for the time spent in the village.

²⁴ Review of the *NSW Retirement Villages Act 1999*: Report, Office of Fair Trading (NSW) March 2005

SUBMISSIONS

It must be noted that these submissions were in response to the “try before you buy” scheme which was canvassed in the Issues Paper.

A significant two-thirds of respondents indicated that they supported a settling-in period, with the preferred length of time being 90 days.

Industry tended to oppose the proposal with a number of submissions highlighting the practical difficulties associated with a settling-in period. These difficulties include the issue of stamp duty, settlement fees, and land transfer fees that need to be paid upon the transfer of freehold land; and also, the fact that residents waiting on a unit in a village may be adversely affected.

FINDINGS AND RECOMMENDATIONS

The Department finds that a settling-in period may be impracticable and may also have unintended consequences for outgoing residents in that they would not receive any proceeds from the sale of their unit until the expiry of the settling-in period. For these reasons, a settling-in period is not recommended.

It is desirable that any resident who, after having moved into a retirement village, passes away or move to a higher level of care within a very short space of time, only pays a fair and reasonable amount for the time spent in the village.

This could be achieved by residents only being charged for the actual time that they spend in the village. This could be done by ensuring that any fees payable upon departure from a village are calculated upon a daily pro rata basis for the period in which the resident resided in the village. A recommendation to this effect is contained in Chapter 28 (*Exit Fees*) of this report.

9. VILLAGE CONTRACTS

The review examined a number of options to determine what would be the most effective way of addressing some of the problems associated with village contracts. These problems relate primarily to residence contracts but may also relate to service contracts. The distinction between residence contracts and service contracts is discussed in the following section.

CURRENT PROVISIONS²⁵

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.

IDENTIFIED ISSUES

Format, wording and content of village contracts

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 advisers determine these details. The major concerns are that the language used in contracts and the complex nature of the contracts makes it difficult for the everyday reader to understand.

Standard contracts and standard clauses

The Issues Paper suggested that standard contracts would allow for greater uniformity and ensure that contracts were written in plain English. The purpose of such contracts would be to enable prospective residents to better understand and compare contracts, resulting in better-informed choices.

The standardisation of clauses in contracts was another suggestion towards the simplification of contracts. Standard clauses could cover matters such as the basic rights and obligations of residents and operators that are common to all types of retirement village arrangements. The purpose of standard clauses would be to make contracts more uniform and also more transparent. Standard clauses are seen as a means of reducing the current level of complexity without the problems associated with developing a whole standard contract.

Model contracts

The implementation of a model or prototype contract was another proposal that was put forward during consultation. A model contract could be developed, in collaboration with industry, 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.

²⁵ Section 13 and 19 of the Act and Division 4 of the Code

Appraisal of contracts

One of the proposals raised in the initial public meetings was the implementation of some form of contract appraisal system. This system would require retirement village operators to provide the Department (or other 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.

Unfair contracts

A contract term is deemed to be 'unfair' when it causes a significant imbalance in the parties' rights and obligations arising under the contract and further is not reasonably necessary to protect the legitimate interests of the supplier

The Issues Paper raised the matter of unfair contract terms in light of the proposed move towards introducing nationally consistent legislation prohibiting the use of unfair terms in consumer contracts. Late last year the Council of Australian Governments agreed to the introduction of unfair contract terms provisions in national legislation however it is intended that these provisions will only apply to standard form contracts. Standard form contracts are pre-prepared contracts where all the terms have already been set and where there is little or no negotiation prior to the parties entering into the contract. Standard form contracts are generally offered on a "take it or leave it" basis and differ to non-standard form contracts or negotiated contracts where both parties sit down and work through the issues and terms.

It is important to note that the unfair contract terms provisions will not apply to contracts entered into before the date on which the provisions commence unless such a contract is renewed or varied after that date but then only to the extent of that renewal or variation. Unfair contract terms provisions commenced at the Commonwealth level on 1 July 2010. It is anticipated that these provisions will apply through WA's Fair Trading law from early 2011.

SUBMISSIONS

Submissions to the review from residents were often critical 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. It was also submitted that it is very difficult to compare the terms and conditions of different retirement villages' contracts. The proposal to standardise contracts was met with considerable support from individual respondents however industry and some residents' committees argued strongly against it.

The Western Australian Retirement Complexes Residents' Association (WARCRA) suggested that there could be standard contracts for each type of title, set out in a standard format, the first part of which could contain all standard matters, followed by a section to cover non-standard matters.

WARCRA was of the view that this would alert consumers to the aspects not covered in a standard way and would facilitate comparisons whilst still permitting innovation and competition.

Aged and Community Services Western Australia (ACSWA) submitted that a standard contract would not be fair, realistic or workable.

Operators largely opposed standard contracts on the grounds that it could limit their commercial independence and could be impractical given the diversity of arrangements within the industry.

One respondent suggested the development of a contract with standard clauses similar to the home building contracts produced by the building industry, with the opportunity to provide alternative clauses where appropriate.

Approximately one third of residents who made submissions supported the proposal to implement some form of contract approval process with respect to contracts used within the industry.

FINDINGS AND RECOMMENDATIONS

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

Having a standard contract that covers all retirement villages in WA is unlikely to be achievable given the diversity of arrangements that exist. Contracts need to be sufficiently flexible to cover the requirements of specific villages and parties to the contract. One of the more considerable shortcomings associated with standard contracts is that it is difficult to amend such a contract. Operators would require some flexibility to adapt terms to meet the specific needs of parties to the contract. At the same time, making amendments to standard contracts is fraught with problems. Amendment of one provision may have undesirable ramifications for the entire contract.

The introduction of model contracts or standard clauses in contracts is not supported for similar reasons. It is clear from the submissions received that industry acceptance of standard or model contracts, or standard clauses, would be minimal. A contract approval process for all contracts used within the industry is not desirable. Such a proposal would be a considerable burden on the Department or any other body charged with the task.

Whether a need for such onerous regulatory intervention, as outlined above, exists can be revisited in future reviews. The Code already prescribes in considerable detail what must be disclosed in a residence contract. The extent of information to be contained in contracts is considered to be sufficient. The prescribed *Information Statement For Prospective Resident*²⁶ is also designed to serve as a more “user-friendly” guide to retirement villages and addresses a lot of the information contained in the contract.

²⁶ Schedule 1, Form 1 of the Regulations

While the Department is reluctant to recommend any mandatory interference in the right of the parties to contract on whatever terms they wish, it does recommend that industry be encouraged to consider measures that may help residents and prospective residents understand their contracts. To this end, standard headings could be considered for contracts. This would facilitate better comparison of contracts between villages. In addition, the Department would be willing to participate with industry and residents association representatives to develop model contracts applicable to lease, licence, strata and purple title arrangements.

Furthermore, the key terms summary recommended in Chapter 7 (*Disclosure to Prospective Residents*) would enable prospective residents to better understand and compare residence contracts. A key terms summary is a standard summary of the residence contract that addresses prescribed generic headings. The advantage of this approach is that the individual characteristics of particular residence contracts, catering as they do for a wide variety of consumer demands, can be retained whilst still offering consumers meaningful comparisons between the various options available in the industry.

If a retirement village contract (or an amended part of it) was found to be a standard form contract, then the unfair contract term provisions would apply. In such cases, this would provide an additional degree of protection to residents and prospective residents by enabling the removal of unfair terms in standard-form contracts and providing certain redress to residents or prospective residents in the event that a contract does contain an unfair term.

The provision of a seniors housing information service will also assist prospective residents and residents to understand the provisions of their contracts and procedures to remedy unfair contracts terms (see Chapter 14: *Consumer Information* for more details).

In summary, the Department recommends:

- 17. That industry be encouraged to develop more comprehensible and readily comparable contracts.**

10. RESIDENCE AND SERVICE CONTRACTS

The review examined whether the distinction between a residence contract and a service contract should be abolished to provide for a single contract.

CURRENT PROVISIONS²⁷

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

A residence contract is defined as a “contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy residential premises in a retirement village, and may take the form of a lease or a licence.”

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.

The Code specifies a number of items that must be disclosed or specified in a residence contract, including title and tenure arrangements, information about the premises to be occupied as well as the amenities that are to be provided or made available to the resident. 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 disclosed and the basis for future determination of these costs must also be specified. (The basis for the future determination of the cost of providing amenities or services must be included in both the residence and service contract).

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 any other services,*
- h) *and any collateral agreement or document relating to the provision of any such services.”*

²⁷ Section 13 and 19 of the Act and Division 4 of the Code

The SAT currently has powers to make orders for the specific performance of the terms of a “service contract”.²⁸ However the SAT’s powers are excluded from making any order inconsistent with a residence contract.²⁹

Legislation in other States

The NSW Act explicitly provides that a residence contract, a service contract and any other village contract may be contained in a single document. Victorian and 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.

IDENTIFIED ISSUES

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

The State Administrative Tribunal’s (SAT) jurisdiction with regard to residence contracts was identified in the review as a matter that needs to be addressed. It appears that the SAT’s jurisdiction with regard to threshold contractual issues such as the existence of, and enforceability of, a residence contract - as distinct from its operation and termination is not clear.

ANALYSIS OF SUBMISSIONS

There were very few submissions on this topic. One respondent suggested that there should be a single contract which contains the residence agreement as well as any additional services and facilities offered.

The RVA submitted that contracts that deal solely with the supply of services, for example, meals and domestic services, should not be the subject matter of the Act or the Code. These services are often provided by external service providers who are not regulated by those laws, but are subject to the common law and various consumer and health laws.

In an early submission to the review, the RVA suggested that the breadth of definition of service contracts contained in the Act is problematic because some matters that fall within the definition of a service contract are also inherently the subject matter of residence contracts. The RVA proposed that service contracts be confined to the provision of optional services and that sub-sections (e) to (h), as outlined above in the definition of a service contract, be deleted.

²⁸ Section 56 of the Act.

²⁹ Section 52 of the Act.

The RVA also submitted that a service contract should be able to be terminated by the resident or varied pursuant to its terms, and that the parties should be able to amend such contracts, without making an application to the SAT. The RVA questioned section 19 (2) of the Act which states

every term relating to the provision of a service to a resident under a service contract binds a resident and each successor in title of the resident until the term is varied or cancelled by the State Administrative Tribunal under this Act.

The RVA proposed the deletion of the words “and each successor in title of the resident” as the next resident may not wish to continue receiving certain services agreed to by the previous resident. The RVA submitted that many services in retirement villages rely on external service agreements, such as those for independent contractors providing meals and emergency call services.

The RVA has argued that service contracts, by reason of being in the nature of contracts for optional services, should not be binding on successors, as presently required by legislation. The RVA has presented a strong case for an optional or elective service contracts to be terminated or varied pursuant to its terms and the parties being able to amend the terms of the contract without having to make an application to the SAT.

The RVA also suggested that the Act should plainly state the termination or variation regimes for both residence contracts and service contracts.

Within villages, certain services may be available ‘on request’. It is recognised that there may be costs associated with certain services being available to residents. For example, if a meals service is offered as an optional service to residents, there may need to be a minimum number of residents availing of the service to ensure the viability of the service. The Department considers that this is a planning and budgetary matter that can be managed at village level.

Jurisdiction of SAT and enforceability of residence contracts

In its submission, the RVA cited a case³⁰ which illustrated the limitations of SAT’s power to enforce a residence contract. The case showed that the jurisdiction of SAT is limited by the terms of the State Administrative Tribunal Act and the enabling legislation, namely the Retirement Villages Act. There is currently nothing in either of those Acts which vests SAT with authority or jurisdiction to deal with threshold contractual issues such as the existence and enforceability of residence contracts, as distinct from the operation of and termination of such contracts. The RVA suggests that the SAT’s jurisdiction should be explicit and certain. The uncertainty surrounding the SAT’s jurisdiction is problematic to the extent that, because of the restrictions imposed on legal representation, laypersons will frequently appear before the Tribunal. Jurisdictional matters are complex and technical and as such, it is not reasonable to expect a layperson to have an understanding of such matters.

³⁰ Derek John Jones & Anor and Settlers Ridgewood Village Limited (2005) WASAT 62

FINDINGS AND RECOMMENDATIONS

It is important that there is some sort of distinction between residence contracts and service contracts. The main reason for this is that there are different types of services offered within a village. Some services may be a condition of residence whereas others are optional and may or may not be taken up by a resident. Examples of optional services include meals, laundry and cleaning services. Given that such services are not necessarily required on an ongoing basis and that such services may be required to be varied, terminated or re-instated at various intervals, it is desirable that they be contained in a separate contract.

It is therefore recommended that the legislation provide for two types of contracts. A residence contract which includes all of those services which are a condition of residence in the village (examples include services such as general maintenance and gardening) and a service contract or agreement which is purely for optional, elective or personal services that are not contained in the residence contract or not necessary that the operator provide for the purposes of the maintenance of the village.

It is not intended that the legislation require that a residence contract be contained in a single document. Instead, it is recommended that the legislation stipulate that a residence contract comprises any contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy residential premises in a retirement village as well as any contract, agreement or arrangement for the provision of a service that is a condition of residence in a village. While it is preferable that a residence contract be contained within a single document, there will not be any legislative imperative to do so.

In regard to contracts that are already in existence, where there is a separate residence contract and service contract, and the services that are contained in the service contract are a condition of residence in the village, the service contract will be construed as a residence contract.

It is further recommended that any contract, agreement or arrangement for the provision of optional services be contained in a separate document entitled "optional" or "elective" services. Residence contracts would apply to contracts between administering bodies and residents and would not apply to service contracts arranged between residents and a private service providers.

In light of the above recommendations, there no longer appears to be a need to retain in the legislation any reference to a service contract in its current form. It is intended that the amended legislation will refer to a residence contract and an 'optional' or 'elective' service contract. Therefore it is recommended that any reference to a service contract be removed from the legislation.

In light of the limitations of SAT's authority to deal with threshold contractual issues such as the existence and enforceability of residence contracts, as distinct from the operation of and termination of such contracts, the Department recommends that the Department liaise with the SAT to amend the SAT Act to clarify SAT's jurisdiction with regard to residence contracts.

Currently there is no provision for an application to be made to the SAT by a resident, a group of residents, (or the Commissioner on behalf of a resident) where there is a dispute with an administering body in relation to a residence contract. This means that a resident or group of residents cannot apply to SAT and are compelled to sue privately for breach of a residence contract, a costly and time consuming process and one that can be considerably stressful for seniors. The Department recommends that the legislation be amended to provide that a resident, a group of residents, or the Commissioner on behalf of a resident or a group of residents, may apply to the SAT where there is a dispute with an administering body in relation to a residence contract or optional/elective services. The intention is to increase the range of issues that the SAT can consider in relation to retirement village contracts and remove those sections of the legislation which prohibit the SAT from considering matters contained in a residence contract. The Department further recommends that, in the interests of clarity, that the legislation be amended to clearly state the termination or variation regimes for both residence contracts and 'optional' or 'elective' service contracts.

In summary, the Department recommends:

- 18. That the legislation be amended to provide that a residence contract comprises any contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy residential premises in a retirement village as well as any contract, agreement or arrangement for the provision of a service to be provided in the operation of the village that is essentially non-elective.**
- 19. That the legislation be amended to provide that optional or elective services must not be contained in the residence contract but in a separate document.**
- 20. That the legislation be amended to remove, where appropriate, any reference to a 'service contract'.**
- 21. That the legislation be amended to clearly state the termination or variation regimes for both residence contracts and the proposed 'optional' or 'elective' service contracts.**
- 22. That the legislation be amended to:**
 - empower the State Administrative Tribunal to deal with disputes with an administering body in relation to a residence contract or an 'optional' or 'elective' service contract; and**
 - provide that a resident, or a group of residents, or the Commissioner representing a resident, or group of residents, may apply to the State Administrative Tribunal where there is such a dispute.**

11. ENTERING INTO A RESIDENCE CONTRACT

The review considered whether the Act should be amended to recognise the common industry practice of having a two-stage contract, whereby a prospective resident enters into an agreement to lease and is then granted a lease.

CURRENT PROVISIONS ³¹

A residence contract is defined in the Act as:

a contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy residential premises in a retirement village, and may take the form of a lease or licence.

IDENTIFIED ISSUES

For certain types of occupancy arrangements, prospective residents enter into an “agreement to lease” and are then granted a “lease” pursuant to that agreement. The agreement to lease is a contract that is a preliminary to the grant of a lease. Both the agreement and the lease can be considered to constitute a “residence contract” under the current definition of the term. The RVA 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.

There is no restriction on the length of time between which a prospective resident enters into an agreement to lease and the lease being conferred. In practice there may be some time between the prospective resident entering into an agreement to lease and taking up residence in the village. As evidenced in a matter that was heard before the SAT³², this may have implications for the termination of residence rights as termination of residence rights is based upon a resident having been granted a right of occupation. It appears that this right of occupation cannot be conferred on the basis of an “agreement to lease” because the title has not been transferred at this stage. In this particular matter, however, the SAT held that a conditional agreement to lease was a ‘residence contract’ notwithstanding that it did not create, or immediately give rise to, a right to occupy residential premises.

The two-stage process currently practiced by industry also has ramifications for the application of a cooling-off period. According to the current Act, the cooling-off period applies from the time the prospective resident enters into a residence contract.

³¹ Section 3 (1) of the Act.

³² D.J & M.R. Jones v. Settlers Ridgewood Village Limited (No. RET/5/2004)

SUBMISSIONS

There were few submissions on this matter - two submissions from industry and three submissions from individual respondents, all of whom lent support to the proposed amendment, as stated below.

FINDINGS AND RECOMMENDATIONS

The Department recommends that the Act be amended to reflect 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.

Given that there is some ambiguity surrounding what constitutes a residence contract it is recommended that the Act be amended to address this ambiguity and to also provide a specific starting point for the mandated disclosure review period and cooling-off period.

In summary, the Department recommends:

- 23. That the Act be amended to recognise that an agreement to lease, or an agreement to licence, may be entered into before a lease, licence or deed by which rights to occupy are conferred and to provide a specific starting point for the mandated disclosure review period and cooling-off period.**

12. MATTERS NOT TO BE INCLUDED IN VILLAGE CONTRACTS

The review asked whether it was necessary to prescribe matters that may not be included in a village contract.

CURRENT PROVISIONS

There is nothing in the current legislation to require that certain matters be excluded from village contracts.

IDENTIFIED ISSUES

Legislation in other States includes provisions with regard to what may not be included in village contracts. In Victorian legislation³³ there are provisions stating that regulations may be made with regard to matters which may be excluded from village contracts. South Australian legislation³⁴ provides that regulations may make provisions in regard to the form or content of residence contracts;

NSW legislation³⁵ explicitly states which matters are to be excluded from village contracts. This legislation requires that a village contract must not:

- require the parties to attempt to resolve disputes between them by any process other than the process provided under the Act;
- require a resident to have a Will or to advise the operator of the location of any Will;
- contain a provision under which the resident is required, or agrees, to take out an insurance policy, including contents insurance, ambulance fund or other form of health insurance. The only exception to this is that the contract may require a resident who uses a motorised wheelchair to take out appropriate insurance in relation to the wheelchair;
- contain a provision enabling the resident to be charged individually for legal, accounting or other services incurred by the operator in corresponding with the resident or a person acting on the resident's behalf or in enforcing the contract;
- restrict the period of time the resident may be absent from the village;
- provide that, if the resident breaches the contract or village rules, the resident is liable to pay an increased amount of recurrent charges, any amount as a penalty or any amount as liquidated damages;

³³ Section 43 Retirement Villages Act 1986 (Vic)

³⁴ Section 44 Retirement Villages Act 1987 (SA)

³⁵ Schedule 4 Retirement Villages Regulation 2000 (NSW)

- contain a provision to the effect that the resident will not have the benefit or advantage of any statute that may come into force and has the effect of relieving the resident of any obligation or liability under the contract;
- include a component relating to the actual or proposed expenditure of the village (where a provision is made for the recurrent charges payable by a resident to be varied according to a fixed formula);
- contain a provision removing liability from the operator for any negligent act or omission by the operator, its employees or agents; and
- contain a provision to the effect that the written contract represents the entire agreement between the parties.

SUBMISSIONS

There were few submissions on this topic. WARCRA supported the option that the legislation prescribes matters not to be included in contracts. Examples given included requiring residents to make a will, insure contents or give power of attorney to management. (The matter of power of attorney is discussed further in the next chapter).

In the final round of consultation, all respondents to this topic supported the recommendation however, in some instances, this support was conditional upon industry and resident representative bodies being consulted before any specific provisions are drafted.

FINDINGS AND RECOMMENDATIONS

Whilst it is not suggested that the inclusion of the matters outlined above is commonplace in village contracts, it is desirable that protections exist in the legislation to ensure that such matters are not included in contracts. While the review does not operate from the premise that older people are all frail, easily duped and in need of protection and assistance in their daily lives, it does acknowledge that elder vulnerability is a real issue. This vulnerability extends to being susceptible to coercion and bullying, prone to exploitation and an accentuated trust in authority.

The provisions in the NSW legislation are well-considered, reasonable and give proper protection to retirement village residents. Given that other states prescribe, or are able to prescribe, those matters which must and must not be included in village contracts, the Department recommends that the same power exist in Western Australian legislation.

In summary, the Department recommends:

- 24. That the Act be amended to provide that the Regulations may prescribe matters which must or must not be included in village contracts, and if prohibited matters exist in a contract they are void.**

13. POWERS OF ATTORNEY AND PROXY VOTING

While the issue of powers of attorney was not addressed directly in the Issues Paper, some residents' associations subsequently raised concerns that a number of residence contracts include a requirement that residents and prospective residents must provide the village operator with an enduring power of attorney as a condition of entry to the village. Furthermore it is often required that residents appoint the village operator as their proxy if they are unable to attend a meeting requiring a vote.

CURRENT PROVISIONS

The Act is silent on the subject of powers of attorney and enduring powers of attorney. Clause 5.12 (6) of the Code excludes a representative or close associate of the village operator, or a person nominated by the village operator, from the category of persons who may be appointed as a proxy.

The States of Victoria, New South Wales, Tasmania and Queensland have all prohibited a village operator, or a close associate or nominee of a village operator, from demanding or receiving a power of attorney from a village resident, unless the village resident is a family member or close associate of the village operator.³⁶ These jurisdictions also prohibit the village operator, close associate of the village operator or nominee from requiring the resident to nominate them as their proxy.³⁷ In Western Australia, there are general powers of attorney and enduring powers of attorney. A general power of attorney is only valid while a person is legally competent – meaning that they can make decisions for him or her self. An enduring power of attorney is valid even if a person becomes legally incompetent. In other words, it endures after the time that a person is unable to make decisions for him or her self.

The *Guardianship and Administration Act 1990* (the GA Act) sets out the requirements for creating a valid enduring power of attorney. Under the GA Act, the person granting the enduring power of attorney is the 'donor', and the person receiving the enduring power of attorney is the 'donee'. The GA Act does not place any limits on who may be appointed as a 'donee', however it requires, amongst other things, that the donee act at all times in the best interests of the donor of the power of attorney and, if the donee becomes bankrupt, advise the State Administrative Tribunal of such an event.

SUBMISSIONS

In the final round of consultation, some submissions highlighted the fact that there may be a bona fide need for developers or operators to require a power of attorney or proxy power in the case of purple title villages.

³⁶ Retirement Villages Act 1999 (Qld) s89;
Retirement Villages Act 1986 (Vic) s38C;
Retirement Villages Act 2004 (Tas) s36;
Retirement Villages Act 1999 (NSW) s64.

³⁷ Retirement Villages Act 1999 (Qld) s133(2)(c);
Retirement Villages Act 1986 (Vic) s38D;
Retirement Villages Act 2004 (Tas) s37;
Retirement Villages Act 1999 (NSW) s65.

In this sort of village, operators generally require that they be given a power of attorney or nomination of proxy to facilitate the admission of new residents to the village. This is because in purple title villages all residents - as co-owners, are required to consent to granting new residents the right to exclusive use of one of the residences in the village. Obtaining the written consent of all residents in a particular village each time a new resident enters the village would create a considerable administrative burden.

WARCRA originally supported the proposal to exempt developers and operators from the prohibition upon receiving a power of attorney in relation to the grant of a right of residency but later retracted their support on the basis of residents' concerns. Upon becoming aware of this proposal, many residents became concerned about what they perceived to be an inherent conflict of interest in allowing developers or operators of purple title villages to be exempted. Although the exemption would only apply where a developer or operators had a bona fide need to receive a power of attorney or proxy power for the purpose of granting a right of residency, residents who approached WARCRA were concerned that the power of attorney would be misused and that any misuse would be difficult to monitor. WARCRA, on behalf of residents, acknowledged that there is a need for someone to have the authority to act for all co-owners in relation to granting a right of residency and suggested that residents appoint a trustee in place of granting a specific power of attorney to the village operator. WARCRA pointed out that some purple title villages already appoint trustees for whose services they pay through their operating budgets.

FINDINGS AND RECOMMENDATIONS

An enduring power of attorney enables a competent adult to give another person or agency the legal authority to make financial and/or property decisions on his or her behalf and in his or her best interests. This is not an insignificant responsibility. The expectation that a donee or a person appointed as a proxy will act in the best interests of the donor has the very real potential to create a conflict of interest for the village operator. This potential for a conflict of interest clearly extends to close associates of the village operator and any persons nominated by a village operator. The right of the person to choose whether to appoint a power of attorney or proxy and whom to appoint as attorney or proxy is fundamental and should be protected. The Department recommends that the Act be amended to prohibit a village operator, or their close associate or nominee from requiring or receiving a power of attorney or nomination of proxy from a resident or prospective resident where the operator, a close associate or nominee is the donee or proxy. The Department further recommends that the Act be amended to prohibit a village operator or their close associate or nominee from requiring that a resident or prospective resident execute a power of attorney, regardless of the identity of the donee, as a condition of entering a village. Any existing powers of attorney or proxy granted to a village operator, their close associate or nominee, should become void upon the commencement of this provision. On advice from ACSWA, the Department proposes that the legislation provide a means of exemption from the provision of this recommendation where the Public Trustee is the recipient of the power of attorney.

This will better enable the not-for-profit sector to cater for the needs of its residents. Where a resident becomes incapable of managing their own affairs, and no power of attorney exists, nor is there any close relative or friend who can responsibly assist with managing the resident's affairs, the village operator can make an application to the State Administrative Tribunal under the GA Act for a guardian and/or administrator to be appointed. Such provision provides for the protection of the interests of both the resident and the village operator and eliminates any need for a residence contract to require a power of attorney to be appointed.

It is recognised that developers or operators of purple title villages may still have a legitimate need to receive a power of attorney or nomination of proxy in relation to the grant of a right of residency to new residents. To overcome the administrative burden of every resident, as co-owner, being called upon to provide a signature granting each new resident the right to reside in the village, it is recommended that developers or operators of purple title villages be able to receive a limited power of attorney or nomination of proxy from a resident or prospective resident solely in relation to granting a right of residency to new residents. In response to the concerns of residents, this exemption would enable developers or operators to receive only a very specific power of attorney - namely the power to grant a right of residence to new residents. The developer or operator would not be permitted to use the power of attorney in any other way. Misuse of a power of attorney may amount to a criminal offence. This exemption does not remove the right of residents to decide whether to grant a developer or operator a power of attorney or to nominate them as a proxy or to appoint a trustee.

In summary, the Department recommends:

25. That the legislation be amended to introduce provisions to:

- **prohibit a village operator, or their close associate or nominee from requiring or receiving a power of attorney or nomination of proxy from a resident or prospective resident where the operator, a close associate or nominee is the donee or proxy;**
- **prohibit a village operator or their close associate or nominee from requiring that a resident or prospective resident appoint a power of attorney, regardless of the identity of the donee, as a condition of entering a village;**
- **make void all existing grants of proxy or powers of attorney in contravention of this requirement upon the commencement of this provision;**
- **enable developers and operators of purple-title villages to receive a limited power of attorney or nomination of proxy solely in relation to the granting a right of residency to new residents; and**
- **provide a means of exemption from the provisions of this recommendation where the Public Trustee is the recipient of the power of attorney.**

14. CONSUMER INFORMATION

The review examined whether there was a need for an independent service to provide information and educational programmes to residents and operators of retirement villages.

CURRENT PROVISIONS³⁸

Current legislation regulating retirement villages is based on individual contracts entered into by residents with the operators of the retirement village. 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. A limited amount of consumer and industry education is provided by the Department as well as seniors' associations and to some extent, industry.

IDENTIFIED ISSUES

In the consultation process conducted with residents, prospective residents, and industry and residents' associations, the need for an independent seniors housing information service was identified and justified for the following reasons:

- to assist prospective residents in making informed decisions and to counter the glossy marketing information that is often supplied by industry;
- to raise awareness of the requirements of the laws and the practical implications of entering a village;
- to assist operators to comply with their obligations under the legislation; and
- to develop a "knowledge repository" of retirement village issues to maximise quality of information and also contribute to policy development in this area.

The review has identified that there are significant failings in the existing regulatory framework because:

- there is significant information asymmetry in the seniors housing market – with providers having a clear and significant advantage in understanding of the market compared to prospective residents;
- the major source of information about seniors housing options comes from marketing information produced by providers for the specific purpose of attracting business;
- contracts are drafted on behalf of providers and they are often very comprehensive and difficult to read and understand;
- there are few existing sources of information about the relative merits of the various housing options available to seniors;

³⁸ Division 3 of the Code

- there is confusion about what a retirement village, a lifestyle village or a residential park is and what the differences are between these alternative housing options;
- even people who have been in residence in a retirement village, a lifestyle village or residential park for some considerable time have significant misconceptions about their rights and responsibilities.

The functioning of a 'perfect market' involves consumers making rational decisions about buying homogeneous products based on perfect information. Seniors housing options are becoming increasingly differentiated, which makes decision-making difficult. The physiological and social changes that accompany the ageing process can place additional difficulties upon seniors in making housing decisions which involve subtle differences in characteristics and require an understanding of complex markets.

SUBMISSIONS

During consultation with residents and industry and residents' associations, the review received overwhelming support for the proposal for the establishment of a seniors housing information service. There was also support for this service to be provided by the Department and for adequate resources to be allocated to the Department to enable it to provide a useful service. It was generally thought that giving responsibility to another body would introduce another layer in the administration of the legislation.

ACSWA supported the Department having the primary role in this service and work with ACSWA and other peak bodies to achieve the desired level of service.

The RVA stated that it supported all initiatives that provide accurate and responsible information to facilitate education for both consumers and industry. The RVA also considered that the Department should have a primary role in the initiative and work collaboratively with the RVA and other interested parties, such as the Aged Care Association Australia (ACAA), Aged and Community Services Australia Inc. (ACSWA) and the Council on the Aging (COTA). The RVA also saw a continued role for professional legal and financial advisors.

The EISC found that there is a need for further education of both retirement village managers and residents.³⁹ In addition the EISC recognised the massive expansion expected in retirement and lifestyle villages and recommended that the Minister for Consumer Protection (read Minister for Commerce) should ensure that the Department is adequately funded and resourced to allow it to fulfill its obligations to the lifestyle and retirement village residents and industry.⁴⁰

³⁹ EISC Report Finding 66 (p 216)

⁴⁰ EISC Report Recommendation 14 (p 105)

The EISC, however, proposed that a Retirement Village Board could administer the education function in relation to the retirement village industry.⁴¹ The establishment of a Retirement Village Board is not supported by this review for a number of reasons, as outlined in Chapter 35 (*Monitoring and Compliance*).

FINDINGS AND RECOMMENDATIONS

The Department recognises that in the past, some residents have been dissatisfied with the services that it has provided although in recent times the response has been more favourable. The Department believes that much of the criticism resulted from a mis-match between the residents' expectation of the services that the Department should provide and the reality of the services that the Department is currently resourced and empowered to provide. The Department believes that the establishment of a seniors housing information service would go a long way towards eliminating this expectation gap.

The establishment of such a service, independent of industry and marketeers, for seniors, either contemplating a move into, or currently residing in, a retirement village, residential park or other accommodation arrangement would enable each of the significant failings in the current regulatory framework to be addressed, without the need for significant additional government regulation.

The Department proposes that the service should not be limited to retirement villages, but should extend to residential parks, caravan parks, lifestyle villages (which are not regulated by retirement village legislation) and to any other alternative housing arrangements chosen by seniors as an alternative to traditional family housing.

The proposed service would offer general and more specific information about housing options and assist residents and prospective residents by referrals to relevant agencies and independent legal practitioners who have knowledge of the regulation and operation of retirement villages.

The Department is currently considering a number of possible options for the funding and delivery of the service. The Department is not currently resourced to provide this service, however, for a variety of reasons, particularly those relating to cost, capacity to bring together the required expertise, flow-on to policy development, and general support services available in the community, the Department is likely to be the best placed organisation to coordinate the establishment such a service.

It is intended that this service would be established in consultation, and ideally in partnership, with non-government organisations that have an interest and experience in matters relating to seniors.

In summary, the Department recommends:

- 26. That a seniors housing information service be established in consultation with non-government organisations.**

⁴¹ EISC Report Recommendation 33 (p 217)

15. PROTECTION OF RESIDENTS' FINANCIAL INTERESTS

The review examined ways in which residents' financial interests and their tenure could be better protected, particularly if an operator were to become insolvent.

CURRENT PROVISIONS ⁴²

The following provisions of the Act aim to protect the financial interests of residents and provide security of tenure:

Memorial 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 Titles.⁴³ This has the effect of giving notice to potential purchasers or lenders that the land is subject to the operation of the Act and can only be used as a retirement village while any resident remains in occupation. The memorial cannot be removed unless the Registrar of Titles is satisfied that no part of the land to which the memorial relates is still used, or proposed to be used, as a retirement village.⁴⁴ A further important 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.

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.

To protect the financial interest of residents entering a 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.

⁴² Sections 15, 17, 18, 19, 20 and 22 of the Act.

⁴³ The Registrar of Titles is located within Landgate (formerly the Department of Land Information), the agency responsible for Western Australia's land and property information.

⁴⁴ Currently there is no provision under the Act for a partial removal of a memorial which for practical reasons may be required on occasion. It is proposed that the Act be amended in this respect (see page 44).

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 mechanism that secures a debt by creating a right over the title of the land and the Act gives priority to these charges belonging to residents ahead of the interests of other parties such as registered mortgagees.

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.

IDENTIFIED ISSUES

The potential financial risks to residents, and the fear of eviction and loss of security of tenure in the event that a retirement village operator became insolvent, were overwhelming concerns raised at public meetings and in written submissions.

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 was an issue of particular concern. Residents in retirement villages can be financially vulnerable and for this reason, having their investment protected, as well as providing security of tenure, is particularly important.

SUBMISSIONS

2002 Statutory Report Recommendations

Issues relating to the financial interests of residents, such as premiums, the statutory charges on land, the memorial regime under the Act, and the termination of a retirement village scheme were dealt with in Recommendations 10-20 of the 2002 Statutory Report⁴⁵. These recommendations have not been previously implemented, and given the lapse in time since the report was published, stakeholders were asked to review these recommendations and state whether they agreed with them.

Recommendations which stakeholders supported as being practical and in the interests of residents were Recommendations 10, 11, 14, 15, 16 and 17 (1), (3), (5) and (6)⁴⁶, (see page 178).

Recommendations which stakeholders rejected were Recommendations 12, 13, 17 (2), 17 (4), and 20, (see pages 175-179).

⁴⁵ 2002 Statutory Report: List of Recommendations (see Appendix 2).

⁴⁶ The Department is proposing a new recommendation to replace Recommendation 17 of the 2002 Statutory Report (see recommendation 32, p. 50).

WARCRA, representing the interests of retirement village residents, and a significant number of individual submissions from residents, were concerned that these recommendations if implemented would remove important protections currently available to residents and that these recommendations were not in the best interests of residents. Details of these recommendations are outlined below.

Statutory charges on land

Recommendation 12 of the 2002 Statutory Report recommended the repeal of the provision relating to the statutory charge on land as it was considered that the real protection of a resident's right to security of tenure and a premium refund is provided by:

- the memorial which has the effect of giving notice that the land is used, or proposed to be used, as a retirement village and is thereby subject to the provisions of the Act;
- the provisions of section 17 of the Act which make residence contracts binding on successors in title to the village (including mortgagors and other interest holders) and limits the circumstances under which the residence contracts can be terminated; and
- the provisions of section 22 of the Act which prevent the termination of any retirement village scheme while a person remains in occupation unless the Supreme Court approves of the termination on terms it thinks fit, including terms for the protection of the interests of the residents⁴⁷.

The repeal of the statutory charge provision was not supported by stakeholders to this review. There was overwhelming support, both by residents and industry (including the RVA), to retain the statutory charge on land and not to repeal this provision. Respondents generally agreed that the repeal of this provision is likely to erode residents' rights to financial protection.

Termination of a retirement village scheme and a memorial on title

Recommendations 13, 17 (2) and 17 (4) which dealt with the termination of a retirement village scheme were rejected by a significant number of respondents to the review because it is feared that group pressure may be used on a minority of residents to terminate a retirement village scheme, whereas current provisions require the approval of the Supreme Court.

Where recommendations 18, 19 and 20 dealt the cancellation of a memorial, the procedures were rejected because it was considered that the recommendations were based on the notion of securing the agreement of all residents and that this could be open to abuse in a situation where there is a vulnerable population and a marked imbalance of power.

⁴⁷ The 2002 Statutory Report recommended that a retirement village scheme should be able to be terminated with the mutual consent of all the residents, the administering body and any person who holds a charge over the land. An application would still have to be made to the Supreme Court if any resident or other party did not agree to the termination.

Memorial on title

In the third round of consultation the Department was advised of an incident in which the operator of a retirement village placed a memorial on the land upon which the residences were situated but not on the land comprising the village amenities and recreational facilities.

It was suggested that the legislation needs to clearly stipulate that the memorial is to cover all land that is being used for the purpose of a retirement village scheme and this includes residential and shared amenities and aged care facilities where they exist within a village.

Partial removal of a memorial

Under section 15 of the *Retirement Villages Act 1992* a memorial must be lodged with the Registrar of Titles where land is, or is proposed to be used for a retirement village. Section 15(8) specifies the procedures required to cancel the registration of the memorial. Landgate has alerted the Department to the fact that there is currently no provision under the Act for the partial removal of a memorial. The Land Titles Registration Practice Manual maintained by Landgate recognizes that the Act does not authorize the partial removal of memorials and an administrative procedure has been adopted to allow for this until an amendment can be made to the Act. The procedure includes seeking written confirmation from the Commissioner for Consumer Protection that certain land (usually a portion of the retirement village land) is not longer being used as a retirement village.

These processes are often used for correcting mistakes caused by applying a memorial to an entire parcel of land rather than just the retirement village areas. The Department obtains sworn statements from the owners of the land that it is not being used as a retirement village or that it is not part of the retirement village. The Department also consults with the residents committee representing the residents on the remaining land to ensure that the partial removal of the memorial will not significantly disadvantage them. The Department then writes to Landgate that it is satisfied to this effect. The Registrar of Titles at Landgate then lifts the partial memorial on the land. To formalise this administrative arrangement Landgate has requested that there be an amendment to section 15 of the *Retirement Villages Act* to include a further subclause to deal with the partial removal of a memorial.

Other possible options for financial protection

In response to the question as to whether there were other ways to better protect residents' financial interests, the following suggestions were made:

- ensure that residents are fully briefed on all financial matters relating to their village and have the right to participate in decisions about those financial matters. This would enable them to monitor their own financial interests (if a resident is unable to do this, it is recommended they be able to appoint a family member, an attorney or a guardian to look after their interests, vote at budget meetings, and so on).
- prohibit powers of attorney being given to village operators;

- prohibit the inclusion of indemnity clauses in contracts; and
- prohibit village operators from offering reverse mortgages. It was claimed that this option is available from other sources without the same level of conflict of interest.

These issues are dealt with in more detail in Chapter 12 (*Matters Not To Be Included In Village Contracts*) and Chapter 13 (*Power of Attorney and Proxy Voting*) of this report:

Recommendations of the EISC Report

Matters which were highlighted by the EISC inquiry into the management of Karrinyup Lakes Lifestyle Village have alerted the Department to the need for provisions that would allow for the removal of non-performing managers who are placing residents' financial interests at risk. Recommendation 34 of the EISC report recommended that the Minister for Consumer Protection introduce provisions that allow for the removal of non-performing retirement villages managers.

FINDINGS AND RECOMMENDATIONS

The Department finds that although existing provisions help to minimise the risk, the potential remains for residents to lose their refund entitlements and risk eviction if the village operator becomes insolvent. The Department notes that there is the potential for village operators to 'go broke' and that this can place some residents in a difficult position even though the existing statutory charge gives residents priority over certain other registered interest holders in the event that the village must be sold. The Department also notes that a statutory charge is of benefit for those residents with a licence or a lease with no registered interest in the property. The Department has accepted the advice of WARCRA and other submissions from residents not to repeal the statutory charge on land. The Department further notes that, following an extensive review in NSW, the statutory charge provision has been introduced in NSW legislation and remains in force in Victoria and Queensland.

The Department accepts that the statutory charge on land may be of limited benefit in some instances. For example, 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. In these instances, however, residents own their property and by the very nature of that title arrangement, are protected.

The 2002 Statutory Report argued that the statutory charge causes confusion for financiers who may not be willing to lend monies on land already subject to a charge.

It was argued that the presence of statutory charges 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.

The Department notes the comments of the NSW review report which stated that there is no evidence of the charge having any significant negative impact on industry, and that the charge does not impose any direct costs on operators or residents.

The NSW review conceded that a statutory charge may impact on the lending practices of financial institutions but felt that this is not necessarily a bad thing as it may make lending bodies take a closer look at the financial viability of proposed retirement village developments. The Department considers that it is preferable that unviable villages not be built in the first place rather than have them suffer financial difficulties later on, to the detriment of those residents involved.

In relation to the application of village funds, the Department notes that clause 5.6 of the Code requires the administering body to apply any surplus in the operating budget of a retirement village towards the future operating expenses of that village, except where:

- (a) the residence contract provides otherwise; or
- (b) the residents, by special resolution, approve the application of the whole or a part of the budget surplus to any other purpose or purposes that is, or are, generally of benefit to the residents of that retirement village.

The Department believes that a budget surplus should be applied in the village in which it arose and that the Code should prohibit funds from payments towards operating costs invested in one village being used to develop another village. The Department therefore recommends that the legislation should be amended to require that any budget surplus be carried forward and applied to the village in which the surplus arose (see chapter 18: *Village Budgets*).

The Department recommends that there be a similar provision for the application of village funds in regards to reserve funds (see chapter 19: *Capital Maintenance and Replacement*).

In relation to the EISC report regarding power to remove a non-performing manager,⁴⁸ the Department noted that provisions similar to those in NSW would enable the appointment of an administrator to manage a retirement village where the well-being or financial security of the residents of the retirement village is at risk.⁴⁹

⁴⁸ EISC Report Recommendation 34 (p 219)

⁴⁹ *Retirement Villages Act 1999* (NSW) Division 6, sections 84-90

The Department also noted that the *Strata Titles Act* contains provisions for the appointment of an administrator with the power to carry out all the functions of the strata company or with power limited to carrying out specific tasks, as determined by the State Administrative Tribunal.⁵⁰

The Department envisages that this is a power that would be rarely used and only in serious cases.

Nevertheless, the Department acknowledges the EISC's proposal for the removal of a non-performing manager. The Department therefore recommends that the legislation be amended to adopt provisions similar to those in the New South Wales Act which enable the appointment of an administrator to manage a retirement village where the well-being or financial security of the residents is at risk.

In implementing this recommendation it is envisaged that:

- the Commissioner for Consumer Protection would give at least 5 days notice to the village proprietor and the manager prior to making an application to the SAT⁵¹ for the removal of the manager;
- the Commissioner would apply to the SAT for the removal of the manager and for the SAT to appoint an administrator;
- as in the *Strata Titles Act* the administrator would either have all the powers, authorities, duties and functions of the owner and manage the village independently from the owner until all concerns were resolved, or be assigned certain powers as ordered by the SAT; and
- the legislation would be amended to empower the SAT to deal with matters relating to the appointment of an administrator.

The Department recognises that there could be cases where the owner of the retirement village becomes insolvent. If the village has been poorly run it may be the case that the village suffers a bad reputation and becomes difficult for the owner to sell. In such extreme cases the village would remain in the hands of the administrator until such time as the village is restored to good financial health and the owner is in a financial position to continue running the village or is able to find a buyer.

The remuneration of the administrator is specified in Australian corporations legislation. As retirement villages are, in the main, owned by companies, they are subject to federal regulation under the *Corporations Act*. This law requires that the administrator is either paid by the company or has the right to company property before the rights of any creditors.⁵² In such cases, any arrangement to appoint an administrator to a retirement village would be consistent with the *Corporations Act*.

⁵⁰ Section 102 Strata Titles Act 1985

⁵¹ Section 84 *Retirement Villages Act 1999* (NSW) requires the Director General to apply to the Supreme Court.

⁵² Australian Corporations Legislation: section 443D

Where a retirement village is not a company, it is envisaged that any costs associated with the appointment of the administrator would be recouped from funds normally available to the operator of the village.

With regard to the issue of refund of settlement entitlements, the Department supports Recommendations 33 and 34 of the 2002 Statutory Report (see Appendix 1). The Department notes that where a unit has been sold or released the outgoing resident is entitled to a refund of the premium within 7 days of the other person taking up or being entitled to take up occupation of the unit. In this case the definition of contingency applies, as outlined in Recommendation 34. In other cases, if, for example, the unit is to be redeveloped and not sold or released, the premium is to be paid within 45 days of the day on which the resident ceases to reside in the village.⁵³

The Department considers the EISC recommendation⁵⁴ regarding clarifying the definition of the term 'in trust' and the issue of securing premiums on behalf of residents is adequately covered by the current provisions of the Act.

Section 18 (1) of the Act requires that a premium paid to an administering body must be held in trust and not released until the prospective resident takes occupation of the unit, or until it becomes apparent that the prospective resident will not take occupation of the unit.⁵⁵

With regard to memorials on title, the legislation needs to make it clear that the whole retirement village scheme must be protected by a memorial covering all areas pertaining to the village scheme, including residential and shared amenities, as well as aged care facilities, if they are sited on land pertaining to the scheme.

With regard to the partial removal of memorial on titles, the Department recognises that current legislation does not provide for partial removal and therefore supports Landgate's proposal that current administrative arrangements be formalised. The Department therefore recommends that the Act be amended to include a provision to prescribe by regulation the procedures required for the partial removal of a memorial on title.

With regard to the explanatory statements to appear on the memorial the Department proposes a number of statements alternative to those in the 2002 Statutory Report and recommends that the Department works with the Parliamentary Counsel Office and the Registrar of Titles at Landgate to develop appropriate wording for memorial on title relating to retirement villages. To date the wording proposed is as follows:

⁵³ Sections 19(3)(a) and 19(3)(b) of the Act

⁵⁴ EISC Report Recommendation 10 (p 64)

⁵⁵ The requirement to hold a premium in trust will be further strengthened by Recommendations 7, 10 and 11 of the 2002 Statutory Report (see pages 174-175 of this report).

- (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* (Cth).
- (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. 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.
- (3) 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.
- (4) 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.
- (5) A resident's right to full or part repayment 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. The statutory charge 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.

In summary, the Department recommends:

- 27. That the legislation be amended to adopt provisions similar to those in NSW legislation which enable the appointment of an administrator to manage a retirement village where the well-being or financial security of the residents is at risk.**
- 28. The legislation be amended to empower the SAT to deal with matters relating to the appointment of an administrator.**
- 29. That the legislation be amended, as necessary, to ensure that a memorial under section 15 of the Act applies to all land pertaining to a retirement village scheme, including land on which are located:**
 - residential premises of the village; and
 - shared amenities of the village.
- 30. That the legislation be amended to provide that the procedures required for the partial removal of a memorial on title be prescribed by regulation and that the relevant dispute resolution body should be the SAT.**

31. That the legislation be amended according to Recommendations 10, 11, 14, 15, and 16, of the 2002 Statutory Report as follows:

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 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 (Cth)*.

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 (Cth)*. 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.

32. That the Department of Commerce works with the Parliamentary Counsel's Office and the Registrar of Titles at Landgate to develop appropriate wording for memorial on title relating to retirement villages.

16. VILLAGE MANAGEMENT

The review asked whether there was a need to improve the standard of village management, and if so, how this best could be achieved. The review also asked whether there was a need to regulate who could be involved in the management of a retirement village and whether residents should have the right to participate in the appointment of management.

CURRENT PROVISIONS ⁵⁶

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

Various Australian jurisdictions set out who may not operate or manage a retirement village. Victoria, New South Wales, Queensland, South Australia and Tasmania all have similar provisions in their respective legislation, which prohibit persons who are bankrupt or who have been committed of an offence such as fraud or violence from managing or operating a retirement village.

The Code sets out minimum standards for management in terms of management procedures and resident consultation. These standards mainly relate to administrative or operating financial arrangements of the village.

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 that is run by the RVA. This system is known as the Australian Retirement Village Accreditation Scheme and is available to both member and non-member retirement villages. Accreditation is discussed in more detail in Chapter 39.

IDENTIFIED ISSUES

Issues identified included:

- the skills and level of knowledge required to effectively manage a retirement village;
- the extent of input by village residents in the recruitment, training, performance review and reappointment of village managers; and
- the term of office to be allowed for management appointments.

⁵⁶ Schedule 1, Form 1 of the Regulations

SUBMISSIONS

In the initial 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. Many residents claim 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.

The public meetings also raised some concerns about the level of knowledge and expertise possessed by managers in retirement villages. Residents felt that managers should be required to have a certain level of administrative skills and financial management skills, as well as experience in working with seniors. Some residents felt that there should be minimum standards in terms of the training and qualifications possessed by managers. In those villages where there was a greater degree of resident dissatisfaction, residents spoke of poor communication between managers and residents and also reported having experienced intimidation and being treated disrespectfully in interactions with managers.

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.

An additional concern raised by residents in the initial phase of the review, related to the term of office of management appointments.

The overwhelming majority of submissions received, from both residents and industry, suggested a need for improvement in village management. Communication with seniors appeared to be the main area of concern amongst residents who provided submissions.

Village management was defined as the management of the day to day affairs of the village, and was seen as “absolutely central to the morale, sense of community and general wellbeing of a village”.⁵⁷

The question of how village management could be improved drew varying responses from industry and residents.

A number of submissions suggested specialised training for the managers of retirement villages. Whilst there were differing viewpoints as to whether such training should be voluntary or mandatory, similar themes ran through the responses as to the content of such training. The suggested areas for training included communication skills, administration and financial skills.

⁵⁷ Mercy Aged Care submission

The RVA submitted that it supports the concept of continuous improvement for managers and has, in conjunction with, the Australian Institute of Management (AIM) developed a Diploma in Business for retirement village managers. This course has been made available in Western Australia and will be rolled out to other states over the next twelve months.

The majority of submissions from industry and from residents supported the introduction of legislative controls as to who could manage a retirement village, with the New South Wales and Victorian models being highlighted as positive examples.

The review also notes the findings and recommendations of the EISC report which examined complaints about the management of the Karrinyup Lakes Lifestyle Village and recommended that the Minister for Commerce (formerly the Minister for Consumer Protection) introduce provisions into the legislation that allow for the removal of non-performing retirement village managers.⁵⁸ This is discussed in more detail in Chapter 17 (Protection of Residents' Financial Interest) of this report.

In respect of resident input into the recruitment of village managers, the responses were divided. Submissions from residents were strongly in favour of mandating resident participation in the selection of village managers, on the basis that it was residents' funds that paid the salary of managers. There were different suggestions as to how participation could be achieved, with the more popular recommendation being that a representative of the residents' committee be elected to participate in the selection process. WARCRA⁵⁹ noted that some retirement villages actively encourage residents to participate in decisions which are 'crucial to their well-being', and have embodied in their village policies the right of residents to participate in the selection of managers.

Some submissions however noted that many residents enter a retirement village to be free of administrative and management cares and therefore will not want to be involved in such matters. Other submissions suggested that resident participation should not be mandatory but rather, encouraged as industry best practice.

Industry submissions held quite the opposite view in response to the question of whether residents should be involved in the selection of village managers. The RVA and village operators vehemently rejected the idea of resident participation in the selection of management, on the basis that the 'proprietor, not the residents, bears the full legal responsibility for the proper operation of the retirement village'. Further it was stated that it is the role of the Act to protect the residents, not to provide opportunity for the proprietor to delegate or pass on his or her responsibilities to the residents.

⁵⁸ EISC Report Findings 56, 57, 58 (p197-201) and Recommendation 34 (p 219).
⁵⁹ WARCRA submission

In relation to term of appointment for management in retirement villages, there was general consensus that a term of 5 years was reasonable, with an option to review performance and reappoint managers whose performance was satisfactory.

FINDINGS AND RECOMMENDATIONS

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

The Act does not contain any provisions relating to who may operate or manage a retirement village. It would seem appropriate that a minimum standard should be set for the management of a retirement village. This would help address the concerns relating to village management raised by respondents to the review.

The Department recommends that the legislation be amended to prohibit persons who are bankrupt, or who have been convicted of an offence involving violence, sexual offence, dishonesty or fraud from operating or managing a retirement village.

As many retirement villages are operated by corporations, the Department also recommends that to be consistent with the Corporations Act, two additional grounds for disqualification as a retirement village manager, namely:

- if the person has been banned or disqualified in any jurisdiction from managing a corporation; and
- if the person has ever been a manager of a company that became insolvent, in any jurisdiction.

As there may be extenuating circumstances the Commissioner should have discretion to waive grounds for disqualification, subject to the person demonstrating to the Commissioner's satisfaction that those grounds do not give rise to a significant risk that the person is unsuitable to be a retirement village manager.

Processes for the appointment and performance review of managers are matters for ongoing discussion with industry and residents' representative bodies. The Department believes that these matters should be part of any retirement village accreditation system which provides for rigorous standards and processes for the recruitment, training, performance review and reappointment of village managers. Accreditation is discussed further in Chapter 39 (Accreditation of Retirement Villages) of this report.

In view of anecdotal evidence which suggests that residents are most satisfied in villages that engage in consultation with residents, the Department encourages industry to consult with residents as far as is practicable in matters to do with the appointment of village managers. It is also desirable that residents be given an opportunity to provide feedback on management and that this feedback be used to inform performance reviews and re-appointment of management.

In summary, the Department recommends:

- 33. That the legislation be amended to prohibit certain persons from operating or managing a retirement village, namely:**
 - persons who are bankrupt;
 - persons who have been convicted of an offence involving violence, sexual offence, dishonesty or fraud; and
 - consistent with the Corporations Act, persons who have been banned or disqualified from managing a corporation in any jurisdiction and persons who have managed a company that became insolvent in any jurisdiction; and that
 - the Commissioner should have discretion to waive these grounds for disqualification, subject to the person demonstrating to the Commissioner's satisfaction that those grounds do not give rise to a significant risk that the person is unsuitable to be a retirement village manager.

- 34. That the Department continue to work with the RVA, ACSWA, WARCRA and other industry and residents' representative bodies in:**
 - improving the training of managers in the retirement village industry;
 - developing guidelines and procedures for appropriate and effective consultation; and
 - reviewing the retirement village accreditation system as it relates to village management.

17. RECURRENT CHARGES

The review considered issues relating to the recurrent charges payable by residents towards the operating costs of the village.

CURRENT PROVISIONS⁶⁰

The *Information Statement For Prospective Resident* 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.

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; and
- any ongoing village operating costs or charges that the resident will be liable for if the resident permanently vacates the residential premises.

In Queensland, retirement villages legislation provides that a village operator may offer residents a service not already supplied, for which a services charge applies, only where the residents agree by way of special resolution to the service being provided.⁶¹ This legislation also requires that a village operator, before increasing the charge for a new service, must consider whether there is a more cost-effective alternative to the general service.⁶²

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.

Recent NSW amendments to that State's retirement villages legislation impose a number of controls on operators in relation to increases in recurrent charges and budgets. For example, as in Queensland and Victoria, operators are not able to vary recurrent charges beyond the CPI without residents' consent. Operators seeking to increase charges beyond the CPI must advise residents about what steps have been taken to reduce costs.

⁶⁰ Schedule 1, Form 1 of the Regulations; Clauses 4.7, 5.2, 5.3, 5.4, and 5.5 of the Code

⁶¹ Section 108, Retirement Villages Act 1999 (Qld)

⁶² Section 107A, Retirement Villages Act 1999 (Qld)

Where operators refuse to provide this information, a tribunal may make an order requiring the operator to provide information requested by residents for the purposes of deciding whether to consent to a proposed variation of recurrent charges

IDENTIFIED ISSUES

Retirement villages require residents to pay recurrent charges to meet the costs associated with operating a village. These costs can include staff salaries, maintenance of facilities and provision of some services. Recurrent charges may also be known as ongoing fees or maintenance fees and are generally paid on a weekly, fortnightly or monthly basis.

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

Increases in recurrent charges are an issue of concern to residents of retirement villages. The review considered whether increases in the recurrent charges payable by residents of retirement villages should be regulated, how the rate of increases should be determined, and issues relating to the introduction of new services and amenities that have the potential for increasing recurrent charges to residents.

SUBMISSIONS

Increases in recurrent charges were one of the most significant issues for residents identified during consultations and in their written submissions. 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.

The submissions from industry were unanimously opposed to the introduction of a standardised method for increasing recurrent charges. The submission from Aged and Community Services Western Australia Inc (ACSWA) stated:

There are significant differences in the operating costs of different villages and therefore budgets. There is a real risk that if standardisation were introduced, it might make some existing villages economically unsustainable to the detriment of residents in those villages.

Residents' submissions were almost unanimous in their support for standardisation of increases to recurrent charges. Those who were not in favour of standardisation stated that it would be difficult to achieve a standardised method for increasing recurrent charges as each village was different and each had differing needs. One submission expressed a fear that if recurrent charges were standardised the level of services at some of the villages may decline.

In response to the question as to how any increases should be determined, those in favour of standardisation predominantly supported the Consumer Price Index (CPI) as the method of calculating the increase, claiming that the CPI most closely reflected the actual increase to the cost of providing a service. Some submissions however expressed concern that often the rate of CPI was higher than the annual increase to pensions and that to use the CPI as the measure for increasing recurrent charges would place some residents in financial hardship.

The RVA submission was largely reflective of all submissions from industry where it stated the RVA did not support the proposition that increases should be artificially controlled by limiting increases to the Consumer Price Index or to the pension rate. RVA asserted that each are imprecise and arbitrary tools that should not be used in substitution for accurate and responsible fiscal budgeting by the village operator.

A majority of submissions supported the concept that resident approval should be sought where the increase is to exceed the prescribed rate. Some of the submissions suggested that approval by 75 per cent of residents would be an appropriate benchmark. In addition, 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.

Industry and residents' submissions received in the third round of consultation strongly opposed the proposal that increases in recurrent charges be capped by CPI. The Department originally proposed that a CPI cap apply except where the residents, by special resolution, approve the increase in recurrent charges beyond CPI, and that if residents did not approve the increase beyond CPI, a village operator be provided the right of appeal to the State Administrative Tribunal. Reasons given for opposing the proposal for a statutory regulation on recurrent charge increases included that:

- recurrent charges should be derived from a budget soundly based on costs and projected costs;
- CPI bears no relation to the real costs of running a village in Western Australia; the CPI imposes an artificial ceiling on the costs which can be passed through to residents;
- some costs entailed in running a village, for example electricity costs, have increased by 25 per cent, and these increases are beyond the control of the village operator;
- other costs such as the cost of procuring maintenance have increased substantially due to the resources boom and are likely to continue rising in the next boom; and
- the actual cost of running the village must be able to be reclaimed from residents each year.

A submission from industry received in the third round of consultation supported the proposal that residents have the right to apply to the SAT for a review of proposed fee increases if, after consultation with management and the provision of supporting information, the residents remain convinced that the proposed increase in recurrent charges is unwarranted or excessive.

FINDINGS AND RECOMMENDATIONS

The concern for this review is not how initial charges are calculated, as these are set out in the information for prospective residents, but rather how recurrent charges are increased and whether current arrangements are fair. The Department 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 necessarily afford to leave the village due to the exit fees payable. The considerable cost of exit fees means that the ability of residents to buy into another village, or into the general housing market, is reduced.

The Department also recognises 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. The Department has accepted advice from residents' representative bodies and industry that the CPI is not an appropriate measure, does not accurately reflect the costs of operating a retirement village in this State, and may have adverse effects on residents.

The Department believes, however, that there needs to be some safeguard against excessive and unwarranted recurrent charge increases available to residents. For this reason, the Department recommends that the legislation be amended to provide that, where residents in a village believe the increases in recurrent charges to be excessive or unwarranted, they may, if the matter cannot be resolved by any other means under the legislation and within a reasonable time, and if agreed to by a special resolution of residents, make an application to the SAT to have their case heard. The Department further recommends that the SAT be empowered to hear disputes relating to increases to recurrent charges and make any necessary orders in relation to these matters.

While resident contracts are required to establish the amount of resident contribution to operating costs, and the basis for future determination of those costs, residents currently have no way of knowing what recurrent charges will potentially be charged to them following the introduction of new services and amenities. The ongoing costs of new services and facilities can add considerably to the recurrent charges to residents each year.

The Department recommends the adoption of provisions similar to those in Queensland's legislation whereby residents must approve, by special resolution, any new services or amenities not included in their contracts that will, or may, result in an increase in recurrent charges payable by residents. It is further recommended that residents must receive notice and full details of the proposal for new services and amenities, and that where residents do not approve the introduction of the service or amenity, village operators be provided a right of appeal to the State Administrative Tribunal. It is envisaged that this particular provision may be drawn upon in the event that an operator believes the introduction of a proposed service or amenity to be in the best interests of the village and existing and future residents.

In summary, the Department recommends:

- 35. That the legislation be amended to provide that, where residents in a village believe increases in recurrent charges to be excessive or unwarranted, they may, if the matter cannot be resolved by any other means under the legislation and within a reasonable time, and if agreed to by a special resolution of residents, make an application to the SAT to have their case heard.**
- 36. That the legislation be amended to empower the SAT to hear disputes relating to increases to recurrent charges and make any necessary orders in relation to these matters.**
- 37. That the legislation be amended to require that the introduction of new services and amenities which are not provided for in residents' contracts, and which will increase recurrent charges to residents, must be approved by special resolution of the residents, having received notice and full details of the proposed new services and amenities.**
- 38. That the legislation be amended to provide village operators the right of appeal to the State Administrative Tribunal if residents do not approve the introduction of new services and amenities which have not previously been provided for in residents' contracts and which will, if introduced, increase recurrent charges to residents.**

18. VILLAGE BUDGETS

The review considered issues relating to processes for setting village budgets, including the application of surpluses and deficits, and the extent of resident input in these processes.

CURRENT PROVISIONS ⁶³

The Code requires the administering body to establish procedures for consulting with residents on planning and budgeting, and for 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 also specifies that an administering body of a retirement village must provide prudent, efficient and economical management of the village, having regard to the terms and conditions of the residence contract and any related contracts. The Code provides model operating budget forms, quarterly income and expenditure statements, and a reserve fund statement. The use of these model forms is not compulsory.

With regard to the application of budget surpluses and deficits,⁶⁴ the *Information Statement For Prospective Resident* 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.⁶⁵ 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, including the circumstances under which these charges apply.

Queensland's legislation provides that a village operator must provide, on request from the residents' committee, a document explaining any increase in expenditure involved in the provision of general services that varies from the budget.⁶⁶

⁶³ Schedule 1, Form 1 of the Regulations; Clauses 4.7, 5.2, 5.3, 5.4, and 5.5 of the Code

⁶⁴ Schedule 1, Form 1 of the Regulations; Clause 5.6 of the Code

⁶⁵ Clause 5.6 of the Code

⁶⁶ Section 112(4)(b), *Retirement Villages Act 1999* (Qld)

Both the Queensland and NSW legislation prohibit certain expenses from being included in the village operating budget. These include:

- funds for the replacement of village capital items;
- costs awarded by the Tribunal against the village operator;
- fees for membership of industrial or professional associations;
- overseas travel by the operator or an agent or employees; and
- internal painting of vacant residential premises in the retirement village.⁶⁷

With regard to annual auditing of accounts, mandatory auditing provisions exist in all states except South Australia and Western Australia.

IDENTIFIED ISSUES

The review considered the following specific issues:

- the degree of input residents should have into proposed annual expenditure and village budgets;
- resident access to information regarding the broader financial status of the retirement village;
- matters that should not be included in the general operating budget;
- what explanation should be given to residents, if any, should expenditure exceed the general operational budget of the village;
- whether the legislation should prescribe how any surpluses or deficits should be addressed in the annual operating accounts of a retirement village; and
- the need for financial statements to be audited by an independent auditor.

SUBMISSIONS

The responses to all of the questions relating to village budgets were polarised. Almost all residents advocated greater regulation, whilst the majority of industry respondents advocated maintaining the status quo as set out in the Code of Practice.

In public meetings and written submissions a number of residents commented 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. Several submissions suggested that residents' committees, or dedicated finance committees made up of residents, could be consulted on budgetary matters.

⁶⁷ Section 103(3) and 103(7), *Retirement Villages Act 1999* (Qld); Section 20, *Retirement Villages Regulation 2000* (NSW)

In the third round of consultation, WARCRA submitted that residents should have the right to accept or reject the budget. WARCRA pointed out that some villages already have in place very effective systems permitting resident participation in the monitoring of accounts and formulation of the budget. According to WARCRA, budget matters in these villages are handled very well. Statements, including ledger statements, are given to the residents' finance sub-committee monthly and adjustments made through discussion and negotiation on the part of management and residents on an ongoing basis over the year. Residents and management work together to formulate the budget. WARCRA submitted that acceptance of the final budget by the body of residents at a general meeting is consequently quite straightforward and does not diminish management's role in ensuring prudent financial oversight.

Some residents considered that expenses that are not related to the operation of the village, such as membership of associations and certain legal costs incurred by the operator, should not be included in the village operating budget or otherwise recouped from residents.

Residents' submissions to the review were overwhelmingly in favour of a requirement for village operators to provide an explanation where actual expenditure exceeds an approved or agreed budget. In particular, residents were concerned as to the consequences of a budget deficit, resulting in an increase in ongoing fees and charges.

In its submission, COTA stated:

There must be ongoing consultation throughout the year and, where possible, discussion about any departures from the budget before they are incurred. Full information about why expenses may be greater than anticipated should be given at least quarterly, and as in the Queensland model, operators be required to show they have considered more cost-effective alternatives before increasing any general service charges. This model of ongoing consultation has been shown to be very effective when implemented.

One of the recurring themes arising from residents' submissions was the desire for some degree of certainty as to current and future costs charged to residents. One individual respondent claimed that residents should have a say as to what extent they are prepared to fund each proposed new service or amenity.

The administrative costs involved in providing residents with financial statements were raised as 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 was also an issue raised by village operators.

Village operators unanimously agreed that the current provisions of the Code in relation to the development of budgets are sufficient and provide transparency for residents.

Issues relating to budget surpluses and deficits were raised on numerous occasions in the public meetings and in written submissions. There was broad support for the introduction of some level of regulation of the application of budget surpluses and deficits. The RVA supported the notion of transparency and prudential management, stating that an operator should be required to explain how a budget deficit arose.

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. It should be noted that the Code deals specifically with how an administering body must apply a budget surplus and would appear to prohibit a budget surplus from one village being applied to the operating expenses of another village.⁶⁸

Church groups, responding to this review as well as to the 2002 review, were in strong support of prohibiting a budget surplus in one village being used for the benefit of another village or business activity. Only one respondent supported the surplus being retained and applied to other villages owned or administered by the operator, provided that the operator had made this clear in the residence contract. Most other submissions claimed that this practice is unacceptable.

The RVA stated that it did not support budget surpluses being retained and applied to a different retirement village business as “that money was provided by residents of the village in which the surplus was created”. With regard to the issue of budget deficits, respondents suggested that budget deficits should be carried forward to the following financial year, with the ability for residents to approve, by special resolution, the payment of the deficit by a special levy.

ACSWA has identified that there may be situations where a not-for-profit operator legitimately maintains a budget deficit in order to minimize the burden on residents and may seek to remove the deficit should a surplus arise. Residents’ groups remain concerned about a large one-off levy arising when an operator has not demonstrated prudential, efficient and economical management.

With regard to the need for financial statements to be audited by an independent auditor, Recommendation 15 of the EISC report recommended that it be a legislative requirement that retirement and lifestyle village annual accounts must be audited and presented to residents in a prescribed format.

Currently the legislation allows residents to request auditing of annual accounts. Where such a request is made in accordance with this provision, the administering body must arrange for this to be done as soon as is practicable.⁶⁹ The EISC was of the view that annual auditing of accounts should be mandatory to allay the concerns of residents in relation to the quality of financial documents.

⁶⁸ Clause 5.6 of the Code.

⁶⁹ Clauses 5.5 (2) and 5.5 (3) of the Code

Auditing of annual accounts would also assist the Department, as regulator, in the event of any problems with a villages' annual accounts.

In the third round of consultation, the RVA and ACSWA submitted that the status quo in regard to auditing should be retained, thus giving residents, by special resolution, the option of whether to request an audit or not. WARCRA was of the view that smaller villages in particular were vulnerable and therefore did not support the proposal for a prescribed threshold below which auditing of accounts would not be mandatory. WARCRA supported mandatory auditing of accounts for all villages, with a proviso that residents by special resolution should be able to decide to dispense with this requirement if they are satisfied with the financial management of the village.

FINDINGS AND RECOMMENDATIONS

The review considers that the provisions contained in the Code for the development of the village budget are relatively sound in terms of the degree of transparency and level of consultation with residents required. It appears, however, that the degree of transparency and consultation required is not practiced by many managers given the level of dissatisfaction voiced by residents in public meetings and in their submissions. The Code, however, currently does not provide for an independent review process if residents find that the budget proposed by management is not acceptable.

The Department finds that provisions similar to those in Queensland and NSW regarding expenses not to be included in the general operating budget assist in giving greater clarity to both operators and residents in regard to what constitutes legitimate village operating expenses. The Department recommends that, in consultation with industry and residents' representative bodies, the legislation be amended to prescribe those matters that must not be included in a village operating budget.

The provisions within the Code relating to quarterly and annual financial statements of the retirement village provide relatively sound reporting requirements to residents as to the financial position of the village. The Code, however, does not require annual financial statements to be audited by an independent registered company auditor. While the Code empowers residents to request that village accounts be audited, this can only be done by special resolution and also places considerable responsibility upon the residents to seek what should be a given in the financial accountability of any medium to large business. It is possible that some residents may be reluctant to seek an independent audit if they feel that this will incur an additional cost for which they are liable. Others may not even be aware that they can request such an audit.

The Department noted the concerns about financial transparency and accountability expressed by residents generally throughout the review, and specifically by residents of the Karrinyup Lakes Lifestyle Village during the inquiry conducted by the EISC.

Therefore, in view of the increasing size and financial strength of many retirement villages, the Department recommends that all operating costs accounts and reserve funds or similar accounts of villages be audited by an independent auditor on an annual basis. In some villages, the administering body voluntarily arranges for accounts to be independently audited. In such cases, the Code currently requires the administering body to provide to residents copies of audited accounts at the annual general meeting (AGM) of residents. It is recommended that this requirement, for audited accounts to be provided to residents at the AGM, continue when auditing becomes mandatory.

The Department notes that in some villages there is ongoing consultation regarding budget matters such that residents are satisfied and confident about the state of the financial cost accounts and special funds. Therefore the Department proposes that residents be given the option to dispense with the auditing requirements. This decision would be made by special resolution of residents at the previous annual budget meeting. The option would also remain that at a later time residents, by special resolution, may resolve to require the operating costs accounts and special funds of the village to be audited. In such cases, the administering body would be required to provide the audited accounts to residents at the next annual general meeting, and on request to a residents' committee or individual resident, prior to the next AGM.

The audited accounts would include details of the income and expenditure of the village, including details of any special funds, such as reserve, capital replacement or maintenance funds. Other special funds to be audited would include those of a strata council in strata titled villages. The Department recognises that mandatory auditing of accounts is an additional village operating cost. Audited operating accounts, however, would provide residents with access to an independent assessment of the financial status of the retirement village.

The Code, whilst requiring that quarterly financial statements show actual against projected operating costs, income and expenditure, does not require the provision of any explanation where expenditure exceeds that which is proposed in the budget as required in Queensland's legislation. The Department finds that while residents should not be required to approve the initial budget, they should be able to trust that, except in exceptional circumstances, expenditure will generally marry with the budget predictions. At all times in the budget process, and especially if the budget falls into deficit, the village operator should be required to demonstrate to residents that reasonable steps have been taken to minimise increases in village operating costs. By way of explanation operators should explain the differences between budget projections and the actual operating costs and what they have done to minimize these increases.

It should be noted that the Code already specifies how budget surpluses must be applied.⁷⁰ The Department believes, however, that contracts should not be able to override the general provision of the Code in regard to the application of budget surpluses.

⁷⁰ Clause 5.6 of the Code

The Department therefore recommends that the legislation be amended to require that any budget surplus be carried forward and applied to the village in which the surplus arose. The Department believes that there are various ways that management may deal with budget deficits and this should be done in consultation with village residents. As there continue to be some concerns about the handling of budget deficits, the Department is resolved to consult further regarding the treatment of village budget deficits.

In summary, the Department recommends:

- 39. That the legislation be amended to allow for those fees and charges which may or may not be included in the village operating budget, or otherwise recouped from residents, to be prescribed by regulation following consultation with industry and residents' representative bodies.**
- 40. That the legislation be amended to require that, if called upon, a village operator must demonstrate to residents that reasonable steps have been taken to minimise increases in village operating costs.**
- 41. That the legislation be amended to require that any budget surplus be carried forward and applied to the village in which the surplus arose.**
- 42. That the Department consult further with resident and industry stakeholder groups regarding the treatment of village budget deficits.**
- 43. That the legislation be amended to require that:**
 - all operating costs accounts and reserve funds or similar accounts of retirement villages be audited by an independent auditor on an annual basis;**
 - such audited statements continue to be provided to residents at the annual general meeting;**
 - the above provisions be waived if at the previous annual budget meeting the residents decide by special resolution to dispense with this requirement;**
 - the option remain that at a later time residents, by special resolution, may resolve to require the operating costs accounts and reserve funds or similar accounts of the village to be audited; and in such cases the audited accounts are to be provided to residents at the next annual general meeting, and on request to a residents' committee or individual resident prior to the next annual general meeting; and that**
 - the cost of the audit be allocated according to provisions in the residence contract.**

19 CAPITAL MAINTENANCE AND REPLACEMENT

The review examined issues relating to capital maintenance and replacement of common property and individual units in retirement villages and considered the feasibility of establishing a mandatory reserve fund for each retirement village. The review also examined the issue of urgent repairs.

CURRENT PROVISIONS ⁷¹

Reserve funds

Reserve funds⁷² are monies set aside to pay for repairs, replacements, maintenance, and renovations within a village. Currently, the legislation does not require villages to have a reserve fund, nor does it prescribe who is responsible for funding maintenance works or how such funds are to be accumulated. Consequently, arrangements have evolved in the industry that differ from village to village and between the for-profit and not-for-profit sectors.

Both the Code and the Regulations contain some safeguards for residents about what information must be disclosed prior to entering into a residence contract, and what information must be included within a contract, in relation to reserve funds or other arrangements for repairs, replacement, maintenance and renovation.

Pre-contract disclosure

Prospective residents must be provided with information before entering into a contract about how repairs, replacement, maintenance and renovation are dealt with within the retirement village. Under section 13 of the Act, the owner of residential premises in a retirement village (including an administering body) is required to provide this information. The information is prescribed in the Regulations and a statutory form titled "*Information Statement For Prospective Resident*". The form requires that information be provided on:

- Whether there is provision for a reserve fund to fund repairs, replacement, maintenance and renovation within the retirement village; and if so
- What if any contribution does the resident make to the reserve fund, including how this contribution is to be calculated; and
- Where there is no provision for a reserve fund, what are the arrangements for the carrying out, and funding of, repairs, replacement, maintenance and renovation works.

Significant penalties apply to an administering body or an owner of residential premises for failure to provide the information required under section 13 of the Act.

⁷¹ Clauses 4.8 and 5.4 of the Code (Reserve Funds); Schedule 1, Form 1 of the Regulations

⁷² Reserve funds are also known as sinking funds.

Contract details

Clause 4.8 of the Code requires that residence contracts include details of:

- any reserve fund that is established or proposed to be established for the purpose of accumulating funds to meet the costs of maintenance, repairs, replacements, and renovations within a village; and
- any contribution that a resident is required to make to the reserve fund; and
- the method or calculation used to determine the resident's contribution.

Clause 5.4 of 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.

Urgent repairs

Currently retirement village legislation and industry practices do not adequately manage the issue of urgent repairs. In the rental industry proposed amendments to the *Residential Tenancies Act*⁷³ include provisions regarding urgent repairs by tenants. The *Residential Tenancies Act* proposals define a "reasonable" timeframe in which a property owner should make arrangements for urgent repairs as "within 24 hours".

If the owner is not contactable or does not take action within 24 hours, the tenant can arrange for a suitable repairer and authorise repairs to the minimum extent necessary and the owner must reimburse the tenant.

Legislation in other States

The legislation relating to capital maintenance and replacement in most other Australian States is similar to Western Australia's. The legislation in Victoria, South Australia, Tasmania, the ACT and the Northern Territory provides for mandatory disclosure, but does not prescribe responsibility or require reserve funds to be established.

Queensland's legislation is the most prescriptive with regard to capital maintenance and replacement. Under Queensland's *Retirement Villages Act 1999*, operators are required to establish a capital replacement fund and a maintenance reserve fund. The Act specifies 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. An independent quantity surveyor is required to assess and report on each village's capital needs for the subsequent 10 years.

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. The NSW legislation⁷⁴ deals comprehensively with capital replacement and maintenance.

⁷³ Proposed change to section 43 of the *Residential Tenancies Act 1987*.

⁷⁴ Retirement Villages Amendment Act 2008 (NSW)

This law 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. NSW law also sets out the circumstances where a resident may carry out urgent capital replacement or maintenance, and seek reimbursement of costs from the operator.⁷⁵

The Department has noted that in Queensland and NSW it is the residents, rather than the operators, that contribute the monies that go into reserve funds required or provided for by State legislation.

IDENTIFIED ISSUES

The Issues Paper posed the following questions relating to capital maintenance and replacement:

- whether provisions should be introduced in legislation to make reserve funds mandatory;
- whether provisions should be introduced in legislation specifying who is responsible for capital improvements in a retirement village; and
- whether residents should be able to carry out urgent capital works, without the consent of the operator, in certain circumstances.

Reserve funds: current industry practices

As stated previously, various arrangements have evolved in Western Australia to deal with the immediate and long term upkeep of retirement villages. Although the Administering Body in the for profit-sector is responsible for the upkeep of the village, the costs of this are normally met by the residents, either through a reserve fund, the operating budget, or a combination of both of these. In this sector, the most common practice is for residents to fund all aspects of repair, replacement, maintenance and renovations within the village, under their contracts.

In the not-for-profit sector, some, but not all, villages operate differently to the for-profit sector. Residents may be required to make a minimal contribution or zero contribution to the up-keep of the village, because this is solely or largely the responsibility of the proprietor. In some not-for-profit villages, residents may be required to contribute through annual operating fees towards repair, replacement, maintenance and renovations within the village, rather than through contributions into a reserve fund.

In the case of strata title villages, the strata company is responsible for ensuring that common property and facilities are adequately maintained. Depending on the type of strata scheme, it is also possible for the building structure of residential units to be the responsibility of the strata company. In a significant proportion of strata title villages the majority control of the strata company is exercised by the administering body of the village. This control extends to the management of the strata company's reserve fund, if one exists.

⁷⁵ Sections 92-100 of the *Retirement Villages Amendment Act 2008* (NSW)

There are, however, various types of strata title villages and arrangements may differ from one village to another depending on the contractual arrangements between the administering body and the residents. These varying arrangements require the Department to conduct further research.

There is anecdotal evidence that a significant proportion of retirement villages, especially those established in the last 10 to 15 years, now maintain reserve funds in order to plan for and deal with major costs. It is estimated that well over half of the industry now maintains reserve funds and that the prominent trend is towards establishing villages which incorporate reserve funds within their financial structures.

Contributions to the reserve fund made by residents over time enable the cost burden to be spread out. Contributions to the reserve fund are made in various ways. These include, residents contributing to a reserve fund as a component of in-going or recurrent charges, or through a percentage of the sale price of the unit (based on the number of years of residence in the village) being deducted from the balance paid to a resident on termination.

Where reserve funds are established, they variously cover the costs of maintenance works and capital replacement of common facilities and the external parts of residential units. Some village owners cover the costs of major capital works (such as the building of a new village wing or car park) themselves without charging residents. These costs are development costs and would not be covered by reserve funds. Other village owners cover the costs of all maintenance (including major and minor capital works) by having a reserve fund and a separate account (sometimes also called a reserve fund) for village operating costs that residents contribute to or fund entirely. These funds are generally used at the discretion of the village owner.

The Department has examined a range of village contracts and is concerned that in some instances, there is a lack of clarity about the differences between maintenance and repairs that are to be funded out of charges for village operating costs (operating costs maintenance) and maintenance and repairs that are to be funded from the reserve fund (reserve fund maintenance).

This lack of clarity tends to arise from the same or similar terms being used in reference to reserve fund maintenance and operating costs maintenance. As a result it is often unclear what is meant by: "maintenance", "replacements", "facilities", "common facilities", "works of a structural or capital nature", "routine repairs", and "major replacements" in each of these contexts.

Where the application of these terms is unclear, residents could be expected to have difficulty in understanding the differences between the purpose and use of reserve fund monies and the purpose and use of funds for operating costs as both are directed towards maintaining the state of the village. Where there are no reserve funds, village owners sometimes allocate money for capital maintenance works through village operating accounts to which residents contribute varying amounts.

SUBMISSIONS

In the public meetings and in written submissions, capital maintenance and replacement were identified as areas of significant contention between residents and administering bodies and there were a considerable number of responses on various aspects of this issue.

Some residents expressed concerns about the absence of reserve funds in their particular villages and reported that they were worried about how capital maintenance and replacement would be funded in the future.

There was considerable support by residents for the establishment of mandatory reserve funds. The main reason given for doing so would be to protect the long-term asset value of the village.

Some submissions considered that the engagement of a quantity surveyor, paid from the fund, to assess a village's long-term capital needs has merit. It was also suggested that villages should have timelines and funding plans in place for any redevelopment.

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 that it was not clear to residents as to how much was held in the fund and what the funds were to be used for. This is contrary to the Code's requirements.

In the initial public meetings and in written submissions, residents complained that there is often confusion as to who is liable to pay for the required works. This confusion 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.

WARCRA's submission stated that the ambiguity and misunderstandings about the purpose and application of reserve funds is a major cause of conflict and dispute in some villages and called for clear definition and prescription in the legislation and provisions similar to those in Queensland's legislation.

WARCRA further commented that village owners should also be required to contribute to the reserve fund when the very first sale/lease transfer is made. Currently reserve fund charges are only made on the subsequent sale/transfer of the lease from one resident to the next.

Other submissions also suggested that operators, particularly in lease-for-life villages, being the main beneficiaries of the capital investment, should be responsible for contributing to the fund which pays for major works.

One resident submission stated that the operator of their village does not contribute to the reserve fund in any way. It was suggested that when residents vacate a village and pay a "deferred facility fee", a percentage of this fee should be paid to the reserve fund for the purpose of capital maintenance and replacement.

The RVA suggested that residence contracts and pre-contractual disclosure material should clearly specify the respective capital maintenance and replacements obligations of residents and operators.

This material should specify the extent to which the cost of performing capital maintenance and replacement obligations is paid for by the respective parties and whether payment is to be made out of operating budgets or reserve funds.

Originally the RVA supported maintaining the status quo suggesting that any new statutory requirements for greater governance would require detailed consultation with industry representatives. Following further consultation the RVA has suggested that if a reserve fund were to be made mandatory, the Government should consider establishing a statutory fund in which village reserve funds could be held.

Urgent works

Following reports by residents that delays are sometimes experienced in getting operators to carry out maintenance, repairs and replacements, the Issues Paper asked whether residents should be able to carry out urgent work within their own units without the consent of the operator in certain circumstances. Residents generally agreed with this suggestion.

Some of the suggested circumstances in which residents should be able to carry out such work included broken windows, blocked toilets, flooding, and other urgent situations that impact on day-to-day life. WARCRA submitted that managers should inform all residents of procedures to access assistance for urgent works, even if it was only a list of approved tradespeople. WARCRA contended that, if a resident were to carry out urgent work in an emergency, they should have the right to seek reimbursement later.

ACSWA stated that it did not support residents being able to act independently in these matters and expected residents to work through their village management for all such requirements. The RVA stated that there may be numerous reasons why it is not appropriate for a resident to carry out urgent repair works. For example, residents may not be aware of building design standards. There may also be adverse insurance and worker safety consequences. Works undertaken by residents can also have adverse impacts on other residents. It is often necessary to carefully manage works undertaken in a village so as to minimise the impacts of those activities on residents. Furthermore, works have to be performed by suitably qualified tradespersons who are properly insured and use appropriate materials and fittings.

In the third round of consultation the RVA agreed with the proposition that if a bona fide need for urgent works arises that is not being addressed by the operator, residents should be able to select the appropriate trade from a list of approved contractors and that this list must be maintained and displayed by the operator.

The RVA and other industry submissions noted that in some strata titled retirement village schemes, the strata company has the responsibility of maintaining common property, including the structure of dwellings. Some strata and survey-strata titled schemes may define the residential lot owned by the resident to include the structure of the dwelling and require the resident to be responsible for structural and general maintenance.

FINDINGS AND RECOMMENDATIONS

Mandatory fund

The Department notes that many residents, although wishing to reside in a well-maintained village, are anxious that they may be required to pay large unexpected costs in the future to fund capital maintenance and replacement as the village ages. For people on fixed incomes, such as the age pension, dealing with unexpected expenses can be very stressful.

The Department finds that there is considerable variation across the industry in the way capital maintenance and replacement is currently funded. To avoid confusion, residents need to be clear from the outset as to who is responsible for the upkeep of the village including the maintenance and replacement of capital items and what financial arrangements are in place to fund these works.

The Department believes that as retirement village buildings and facilities age, funds need to be available for capital maintenance and replacement. The Department understands that a significant proportion of villages already have reserve funds in place and considers this to be good management practice.

The Department notes that the risk of not establishing mandatory reserve funds is that residents in villages that do not have such a fund may be charged large amounts of money unexpectedly when major repairs, replacements and renovations are required if existing contracts provide for residents to contribute to or bear in full the cost of such works.

The Department believes there are immediate and long term benefits in progressively putting funds aside for village upkeep. For example, residents who are contractually able to receive capital gains on exit from the residential unit are likely to benefit from higher capital growth if their village is well maintained.

The Department therefore recommends the mandatory establishment of a reserve fund within each village scheme so that clear arrangements are in place to ensure the village is maintained in a reasonable condition. In circumstances where an administering body operates more than one retirement village scheme **and** the administering body would be solely responsible for all contributions to the reserve fund for those schemes, the administering body will be able to apply to the Commissioner for consideration to be given to alternative arrangements to establish a reserve fund to cover the group of schemes.

The Department considers that establishing a mandatory reserve fund in villages that do not currently have one will need to be done in a way that ensures that the proportionality of existing contractual obligations between residents and the village owner is maintained and provides a reasonable period of transition. This will necessitate therefore the establishment of processes by which villages can transition to the mandatory reserve fund requirement. See the heading "Transition to a mandatory reserve fund below" for more information about this and other transitional issues.

Size and contributions to a mandatory fund

The Department does not believe that the legislation should prescribe an amount to be contributed to a mandatory reserve fund or the source of the contribution (e.g. residents and/or village owner). These decisions will continue to be at the discretion of the village owner and industry practice as communicated through disclosures and contracts. The Department will, however, conduct further research into the methods by which village owners determine the level at which existing reserve funds need to be maintained.

The Department recommends as a minimum, that the legislation require that the amount held in a mandatory reserve fund and/or the ongoing contributions to a mandatory fund are sufficient for ensuring that the village is maintained in a reasonable condition, having regard to the age, and prospective life of capital items at the time the reserve fund is established. For example, a new village is unlikely to need to draw on a reserve fund at inception as the buildings and fittings would be in good condition; however the operator would be expected to maintain the village in that condition over time and so would need to be able to pay for the repairs and replacements that will inevitably be required in the future.

With respect to “reasonable condition”, the Department notes that the term “reasonable” is commonly used at law. It is intended to be a generic and relative term that applies to that which is appropriate for a particular situation. It is important, therefore, that operators plan for sufficient amounts to be kept in the reserve fund and use these funds for the upkeep of the village, so as to avoid residents having to pay large unexpected amounts or sharp rises in recurrent charges to cover the cost of unforeseen events.

Currently churches and charities in the not-for-profit sector in some cases take total responsibility for the maintenance of the village. The requirement for mandatory reserve funds in the not-for-profit sector would help to ensure that villages in this sector are kept in a reasonable condition. Under the legislation there will be an expectation that churches and charities that currently take full responsibility for the upkeep of these villages will continue to do so where existing contracts accept this responsibility.

There is a risk that some village owners may seek to levy from residents a contribution to a reserve fund that is inconsistent with existing contractual obligations (including changing the proportionality of existing obligations) or that residents believe to be excessive or unwarranted. The Department recommends that the legislation be amended to provide for residents who believe that the application of a levy or a proposed increase in their contribution to the reserve fund is inconsistent with their contractual obligations, (including changing the proportionality of existing obligations) or is excessive or unwarranted, may apply to the SAT for the matter to be reviewed.

The capacity to apply to the SAT would however be limited to those residents who are unable to resolve the matter by any other means under the legislation and would require residents to approve the making of the application by special resolution. It is proposed that this recommendation also apply to reserve funds already in existence.

Transition to a mandatory fund

Villages that do not have reserve funds may need time to restructure their financial arrangements and new resident contracts to prepare for the introduction and accumulation of a mandatory reserve fund. Villages that already have reserve funds may need to take steps to ensure that their fund is sufficient to meet current and future demands on the fund. These matters may be particularly relevant for some villages operated by not-for-profit organisations. To accommodate these matters, the Department recommends that the legislation provide a two-year period (after the commencement of the relevant provisions of the Act) for villages that do not have a reserve fund to introduce such a fund.

In addition, the Department recommends that the legislation provide a **concurrent** five-year period for all villages to implement the recommended requirement regarding the amount to be held in a reserve fund and/or ongoing contributions to the fund (as described in the preceding section “Size and contributions to a mandatory fund” and the relevant recommendation at the end of this chapter). The Department also recommends that the legislation allow the Commissioner for Consumer Protection to extend this five-year period for a further period. The exercise of this function by the Commissioner would be discretionary, on application, and only for certain prescribed grounds. A decision by the Commissioner would be reviewable by the State Administrative Tribunal.

The Department recognises that the creation of mandatory reserve funds is complex and may affect residents and the financial structures of villages, especially those in the not-for-profit sector that do not currently hold reserve funds and those strata title villages for whom the establishment of a reserve fund is currently discretionary. As a result the Department will consult further with the RVA, ACSWA and WARCRA on matters of detail and implementation concerning the establishment of mandatory reserve funds. In addition to those issues that have already been identified, other issues to be addressed through consultation would include:

- the transitional arrangements for a mandatory reserve fund where a village owner currently bears in full the costs of maintenance, repairs, replacements and renovations within the village;
- the arrangements for a reserve fund in the event of:
 - the termination of a retirement village scheme under section 22 of the Act;
 - a retirement village being unable to continue operating due to financial difficulty;
 - a change in the ownership of a retirement village;
- arrangements for reserve funds in relation to the different types of strata title villages.

Long-term options for holding reserve funds

The current model used by the retirement villages industry in Western Australia is for reserve funds to be established and administered by the administering body of a village. It is recommended below that this approach continue when reserve funds become mandatory.

The Department has, however, received useful suggestions from industry representatives as to alternative ways reserve funds might be held and administered and has considered two further options. These include:

- a) The Government setting up a statutory fund in which the reserve monies of individual villages are centrally held.

This model would ensure that contributions to a reserve fund from residents (and village owners) would be held “in trust” in a secure place, reducing the risk of misappropriation. Lodgments and payouts from the fund would be administered by the Department using standard processes.

Establishing a central statutory fund for reserve funds might also reduce the cost of each village maintaining a reserve fund and the tax burden on villages. In addition, a portion of the interest earned from the fund could be applied to industry and residents’ education programs. The administration of such a fund would need to be cost neutral to Government.

A model for this type of fund is provided by the *Residential Tenancies Act 1987*, under which tenancy bonds are held in a central fund administered by the Department. This provides certainty and security for landlords and tenants about how funds are held and accessed, and reduces disputes. Some of the income from interest on the bonds is used for public purposes relating to tenancy.

- b) The Government setting up a statutory fund in which interest from the reserve funds of individual villages is centrally held and applied for the benefit of the retirement villages sector and the protection of residents. This model would be similar to the fund model established under the *Real Estate and Business Agents Act 1978*. Under the latter Act, real estate and business agents are required to lodge deposits from purchasers in a trust account held with an approved financial institution. A portion of interest derived from these trust accounts is paid by the financial institution into a central fund administered by the State. In broad terms, the central fund is used to operate a fidelity fund for real estate transactions, to assist first home buyers and to provide consumer protection and education programs relating to the real estate market.

Adapting this model for retirement villages would require villages to lodge reserve fund monies in a dedicated account with an approved financial institution. A part of the interest earned on the fund would be paid by the financial institution to a central State-operated fund.

The latter fund could be used to provide consumer protection and education in the retirement villages sector and a fidelity account to assist in the event of residents' contributions to a reserve fund being misappropriated or badly mismanaged.

Implementation of either of these models would require considerable legislative change, as well as detailed financial modeling and taxation and accounting advice. Implementation would also require significant consultation with retirement village owners and residents, and with the Department of Treasury and Finance and the State Solicitors' Office.

As mentioned previously, a significant number of villages are already self-operating reserve funds. As a result the Department recommends that this practice continue for the introduction of mandatory reserve funds. However the Department will continue to investigate and consult on the options described above, with a view to assessing the long-term benefit for retirement villages residents and operators.

Use and administration of reserve funds

The security and proper use of reserve funds are issues that have been raised by both resident and industry representative groups. The Department is of the view that the administering body of each village should remain responsible for establishing and maintaining a reserve fund and remain accountable for the administration of the fund, not with standing that there are other possible long-term options for the holding of reserve funds as discussed earlier in this chapter.

It is desirable that reserve fund monies be held separate from other village funds. The Department therefore recommends that the legislation may prescribe where reserve funds are to be held, such as in a trust account at an approved financial institution, separate from the village operating account. It is also recommended that contributions to a reserve fund be tied to the relevant village scheme, and may not be applied to another scheme, and that income from a reserve fund be credited to the fund, to help grow the fund in the long term.

In addition, the Department recommends that the legislation contain the ability to prescribe within regulations certain purposes for which reserve funds may or may not be used. For example, it would not be appropriate for a reserve fund, comprising contributions from residents, to be used to fund staged expansions of a village, as these development costs would normally be borne by the village owner.

It is further recommended that the legislation be amended as necessary to more clearly set out the requirements for administering bodies to provide information to new and existing residents that defines and specifies:

- the purpose of any reserve fund established for the village;
- the source of a funds income (including what residents will be required to contribute and what village owners will be required to contribute);
- the purposes for which monies from the reserve fund may be or may not be used;

- the way in which the fund will be administered; and
- the differences between reserve fund maintenance and operating costs maintenance referenced in clauses 4.6 and 4.7 of the Code.

The Department will consult in relation to this recommendation on ways for ensuring this information is provided to existing and prospective residents.

The Department also recommends that clauses 5.2 to 5.5 of the Code be amended as necessary to specify that the requirements for an administering body to consult with and provide financial information to residents apply to a reserve fund and any other fund or account established for purposes that include the maintenance, repair, replacement and renovation of the village (including replacement of capital items).

Urgent repairs

With regard to urgent repairs, the Department recognises that some villages have an established process to deal with urgent maintenance, repairs and replacement. Where the administering body has an agreed process for urgent repairs, but fails to carry out its part in the agreed process within a reasonable time, a non-owner resident would be able to make arrangements to carry out the urgent repairs according to the agreed process and obtain reimbursement from the administering body for reasonable costs incurred.

Where a village has not established a process to deal with such urgent repairs, the Department recommends that, provided the operator is given a reasonable opportunity to carry out the work, residents should have the right to rectify urgent items that may cause harm, damage or difficulty, such as a burst water service, a serious roof leak, a gas leak, a dangerous electrical fault, or the breakdown of any essential service for hot water, cooking, heating or laundering.

If a bona fide need for urgent repairs arises that has not been addressed by the operator within a reasonable period, for example within 24 hours, residents should be able to select an appropriate tradesperson from a list of approved contractors to carry out the repairs. The administering body would have responsibility for maintaining the list and making it accessible to all residents, including by displaying it in prominent places within the village.

The Department further recommends that residents who do not own their units be entitled to claim reimbursement from the administering body for reasonable costs incurred.

The above recommendations would not apply for owner-residents because, being owners, they already have the ability to have to arrange for maintenance, repairs or replacement work on their property.

In summary, the Department recommends:

- 44. That the legislation be amended to:**
 - require the mandatory introduction of a reserve fund within each retirement village scheme (where such a fund is not already established); and
 - require the introduction of a reserve fund within two years of the commencement of the relevant amendment.
- 45. That the legislation be amended to:**
 - require that the amount held in a mandatory reserve fund and/or the ongoing contributions to the fund are sufficient to ensure that the village can be maintained in a reasonable condition, having regard to the age, and prospective life of capital items at the time the reserve fund is established;
 - require the relevant amount and/or ongoing contributions be in place for all reserve funds within five years of the commencement of the relevant amendment;
 - enable the Commissioner for Consumer Protection to extend the five-year period, on application and for certain prescribed grounds, for a further period; and
 - provide for a decision by the Commissioner to be reviewable on application to the State Administrative Tribunal.
- 46. That where residents believe that the application of a levy or a proposed increase in their contribution to a reserve fund is inconsistent with existing contractual arrangements (including changing the proportionality of existing obligations), or excessive or unwarranted, they may, if the matter cannot be resolved by any other means under the legislation and within a reasonable time, and if agreed by a special resolution of residents, make an application to the SAT for the matter to be reviewed; and that this recommendation also apply to reserve funds already in existence.**
- 47. That the Department consult further with the RVA, ACSWA and WARCRA on matters of detail and implementation concerning the establishment of mandatory reserve funds.**
- 48. That the legislation require the village owner of a retirement village to be responsible for establishing and being accountable for administering a mandatory reserve fund.**
- 49. That the Department investigate and consult on alternatives for the way in which reserve funds may be held and administered in the future.**
- 50. That the legislation make provision to prescribe in regulations where reserve funds are to be held and purposes for which a reserve fund may or may not be used.**

- 51. That the legislation require that contributions to a reserve fund be used only for the village scheme in which the fund was established and not for any purpose outside that village scheme, and that income earned by the fund be credited to the fund.**
- 52. That the legislation be amended as necessary to more clearly set out the requirements for administering bodies to provide information to existing and prospective residents, that defines and specifies:**
 - the purpose of any reserve fund established for the village;**
 - the source of the fund's income (including what residents will be required to contribute and what administering bodies will be required to contribute);**
 - the purposes for which monies from the reserve fund may be or may not be used;**
 - the way in which the fund will be administered; and**
 - the differences between reserve fund maintenance and the operating costs maintenance referenced in clauses 4.7 and 4.8 of the Code.**
- 53. That the Department consult on ways for ensuring that the information referred to in Recommendation 52 is provided to both existing and prospective residents.**
- 54. That clauses 5.2 to 5.5 of the Code be amended as necessary to specify that the requirements for an administering body to consult with and provide financial information to residents apply to a reserve fund and any other fund or account established for purposes that include the maintenance, repair, replacement and renovation of the village (including replacement of capital items).**
- 55. That the legislation provide that an administering body of a not-for-profit organisation may apply to the Commissioner for consideration to be given to alternative arrangements to establish a collective reserve fund in circumstances where the administering body operates more than one retirement village scheme and the administering body would be solely responsible for all contributions to the reserve fund.**

56. That the legislation be amended to:

- **allow residents who do not own their units to carry out urgent repairs, after having given the operator a reasonable opportunity to carry out the work, and require that residents select a contractor from an approved list displayed in a prominent place by the administering body and be able to seek reimbursement of costs from the administering body; and**
- **where the administering body has an agreed process for urgent repairs but fails to carry out its part in the agreed process within a reasonable time, the non-owner resident may make arrangements to carry out the urgent repairs according to the agreed process.**

20. ALTERATIONS TO PREMISES

The review sought to determine whether there was a need to regulate a resident's right to undertake alterations to their property, both in terms of the building itself and the gardens surrounding the resident's home.

CURRENT PROVISIONS ⁷⁶

The legislation is silent on the matter of alterations to premises.

One of the general principles outlined in the Code is that the freedom of decision and action of each resident must be restricted as little as possible and must be recognised in the relationship between a resident and the administering body of a retirement village. The Code also stipulates that 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.

IDENTIFIED ISSUES

The major issues of concern identified in the review were:

- residents' perceived lack of autonomy in regard to their residential premises;
- the imposition of unreasonable village rules about issues such as what can be planted in gardens and whether pictures may be hung on walls; and
- restrictions imposed on altering or improving premises.

SUBMISSIONS

The subject of a resident's right to autonomy over their own garden area evoked a response from a large number of respondents. Almost all respondents agreed on the importance of having a garden space to work in for the health and well-being of residents. This however was countered by the stated need to maintain the interests of all residents in the complex and to maintain the repair and value of a retirement village complex into the future.

The most contentious issue related to access to garden beds at the front of units or in common areas. A number of individual respondents however felt that the gardens at the front of the units was an important part of the individual's home and often played an important part in how the resident perceived their home environment.

⁷⁶ Clauses 1.3 and 1.5 of the Code

Other individual respondents felt that if they 'owned' their retirement home it should be a matter of course that they are entitled to garden around their home without interference or power of veto by the village proprietor.

Almost all industry respondents and some individual respondents indicated that it was important for the overall value, aesthetics and safety of the village to maintain the gardens in common areas and public view to an overall scheme as determined by the village proprietor.

In respect of the garden beds in the courtyards or private zones of the unit, there was general industry agreement that a resident should have full right to garden as they choose, subject to the following:⁷⁷

- there should not be any conflict with any disclosed landscaping and planting plan prescribed for the village, including any water use restrictions;
- the plant or tree should not cause or be likely to cause structural or superficial damage to any village improvements; and
- there should not be any conflict with any developmental or environmental conditions that apply to the village.

In the third round of consultations WARCRA submitted that it is very important that prospective residents be given information about village policies in regard to gardening especially about the gardens which usually front villas to avoid disappointment on the part of keen gardeners after they move in.

In respect of minor renovations and fixtures there were two issues raised by respondents to the review. The first issue related to the right of residents to carry out minor renovations and alterations to a unit, and the second was the question of what happens to the alterations or improvements when a resident leaves a property.

In respect of the right to carry out minor repairs and renovations, the majority of respondents agreed that residents should be able to have such repairs and renovations carried out in their homes, subject to the work being performed by an appropriately skilled tradesperson and that any changes should not be to the detriment of the village or other residents. There was a general consensus that such work should only be carried out with the approval of management but that such approval should not be unreasonably withheld.

The question as to what should happen to any improvements upon sale of the unit was more contentious. The majority of retirement villages require that units be returned to their original state upon the departure of a resident. Many respondents believed this to be unreasonable, particularly if the addition improves the unit in some way, such as a pergola or an air-conditioning unit. It is the case that, in many villages, if the improvements are left in situ, the resident will not be financially compensated upon the sale of the unit.

⁷⁷ This point of view was reflected in submissions from the Retirement Villages Association; Mercy Aged Care; and the Becton Property Group.

Many respondents claimed that this is unfair in that they are financially penalised either way, either by having to pay to have the improvement removed or reversed, or by not being compensated for the added value of the renovation.

A number of villages charge a 'deferred management fee'. In the majority of retirement villages, any increase in the value of a unit resulting from renovations or improvements, forms part of the deferred management fee calculation.

Many residents believe that any capital gain resulting from an improvement, such as air-conditioning, should be deducted from the sale price of the unit before the deferred management fee is calculated.

FINDINGS AND RECOMMENDATIONS

The Department finds that it is fair and reasonable for residents to have some control over their living conditions. Residents should have the right to add or remove fixtures within their property, or to garden at their own expense in their own designated space, as specified in village policies. Industry practices should encourage village operators to set aside spaces for individual gardens that are integrated with the layout of the village and their landscaping schemes in recognition of the value of gardening to the wellbeing of village residents.

Residents should also have the right to remove any fittings or fixtures added during their occupancy, prior to giving up the unit for vacant possession, as well as the right to negotiate the sale of these items to a future resident. The Department recognises that residents often make substantial improvements to the interior and exterior of their units in the course of their residence in the village. These improvements include building and enclosing pergolas, adding air conditioning and extra storage. The Department believes that compensation for any such improvements is a matter for negotiation between the resident and the management of the village. In addition, should any damage be incurred when fittings or fixtures are removed, residents must accept that the property must be returned to its original condition at their own expense.

The Department therefore acknowledges that individual rights must be balanced against the rights of other residents and the village as a whole. To this end, it is reasonable that village management have some role in setting parameters for private gardening and granting approval for renovations, provided that such approval shall not be unreasonably withheld.

The Department recommends that "fixtures" be deemed to include non-structural additions such as air conditioners, water heaters and other items which can be added and removed without causing structural changes to the dwelling. Fixtures will not include construction of structural improvements which may need building approvals.

In summary, the Department recommends:

- 57. That the legislation be amended to provide that contracts clearly specify the designated private areas in which residents have the right to garden.**
- 58. That the legislation be amended to provide that residents have the right to add or remove fixtures in their own dwelling, subject to approval from management, which should not be able to be unreasonably withheld.**
- 59. That the legislation be amended to provide that residents may be held responsible for the reparation of any damage caused by the removal of any such fixtures, and if required, make good the unit upon vacating the village.**
- 60. That the term 'fixtures' be deemed to mean non-structural additions such as air conditioners, water heaters and other items which can be added and removed without requiring structural changes to the dwelling.**

21. RESIDENTS' COMMITTEES

The review explored various models for effective consultation with, and representation of, residents in the day-to-day running of retirement villages, including consideration of the role and function of representative groups such as residents' committees, incorporated residents' associations, advisory committees, liaison committees, and strata councils. The review also considered ways in which consultation between residents and the administering body could be improved.

CURRENT PROVISIONS ⁷⁸

Consultation between the administering body and the residents

An important objective of the Code is to facilitate consultation between the administering body and the residents on the management of a retirement village⁷⁹. The intent and spirit of the Code is for genuine and effective consultation between residents and the administering body.

The Code contains specific provisions which impose certain consultation requirements on the administering body.

In particular, the Code requires the administering body to establish appropriate procedures for:

- consulting on the future planning and budgeting of the retirement village and other proposed changes to the administrative or operating financial arrangements of the village;⁸⁰ and
- providing the residents with access to management information relating to the administrative or operating financial arrangements of the retirement village⁸¹.

The Code is silent on what "consulting" with residents should involve. There are no guidelines which outline for administering bodies what might be deemed 'appropriate procedures' for consultation. This has been addressed in this chapter and in Chapter 16 of this report which deals with village management.

Residence rules

The administering body is required to consult with the residents prior to making, changing or revoking the residence rules covering the rights and obligations of residents of the retirement village and residents are permitted to change or revoke these rules by special resolution⁸².

⁷⁸ Clauses 1.4(e); 4.11(2); 5.2(1)(b) and (c); 5.2(3); 5.2(4); 5.3; 5.4; 5.5; 5.9; 5.10; 5.11(1)(d); and 5.11(3) of the Code.

⁷⁹ Clause 1.4(e)

⁸⁰ Clause 5.2(b). Administrative and operating financial arrangements include amenities and services provided to residents, operating budgets, expansion or alteration plans, capital works and residence rules (clause 5.2(2)).

⁸¹ Clause 5.2(c)

⁸² Clause 5.9(3)-(5). The administering body's consent to any change of the rules by the residents must be obtained. The Code provides that this consent must not be unreasonably withheld.

Administrative and financial management

The Code provides for transparent administrative and financial management of the village by the administering body. To facilitate this transparency, the Code requires that the administering body must⁸³:

- for each quarter of the financial year, publically display operating income and expenditure statements and make these documents available to each resident on request⁸⁴;
- publically display documents relating to the proposed operating budget for the next financial year in the village and make these documents available to each resident on request⁸⁵;
- hold an annual budget meeting with residents before the end of the financial year before finalising the operating budget for the following year⁸⁶; and
- present the annual accounts for the previous financial year to residents at an annual general meeting of residents. The residents may require by special resolution that these accounts be audited⁸⁷.

Residents' rights to request information and call meetings

Each resident individually has the right to request information from the administering body on a specific administrative or operating budget matter and to inspect documents relating to that request. The administering body must respond to such a request within 10 working days and if the request is refused, give reasons in writing⁸⁸.

The administering body can also be required by residents to call a meeting of residents, either by the residents' committee, or by 5 residents or 10% of residents (whichever is the greater number)⁸⁹.

Residents' representative bodies

It is the intention of the Code that residents have the right to form representative groups and that their formation is not opposed by administering bodies. There are a number of possible models for representative bodies in retirement villages and these include residents' committees, incorporated associations, strata councils, advisory committees and liaison committees. The function of representative bodies of residents is to provide a mechanism by which consultation between the administrative body and residents over the day to day running of the village can be facilitated. Residents' committees are currently the only representative bodies with a statutory role in this consultative process, however this does not mean that residents cannot establish other such bodies to deal with their interests⁹⁰.

⁸³ Clause 5.2(2) defines administration and operating financial arrangements

⁸⁴ Clause 5.4

⁸⁵ Clause 5.3(1)

⁸⁶ Clause 5.3(6), 5.11(b)

⁸⁷ Clause 5.5

⁸⁸ Clause 5.2(3)

⁸⁹ Clause 5.11(d) and (e)

⁹⁰ There cannot however be 2 residents' committees with statutory standing under the Code.

Decisions by residents under the Code

Regardless of which form representative bodies of residents take, they do not have any decision making authority on behalf of residents. Residents may discuss and consult with management in regards to various issues raised by residents, however decisions to be made under the Code by residents can only be made by the residents at a meeting called by the administering body.⁹¹

Residents' committees

In order to facilitate consultation between the residents and the administering body, the Code provides for the establishment of voluntary residents' committees.

A residents' committee is a statutory body under Clause 5.10 the Code whose function 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 way in which a committee may be established is set out in the Code⁹². The Code states that the residents of a retirement village may establish a residents' committee by an election conducted either among themselves; or in the absence of an election, by the administering body if requested by a minimum of 5 residents or 10% of the residents, whichever is the greater; or if the village has fewer than 10 occupied residential premises, residents from a majority of the occupied residential premises.

The Code specifies that only one residents' committee (regardless of its name) may be established in the retirement village for the purposes of carrying out this consultation and that only a resident of the village may be a member of the committee.⁹³ The Code also specifies that notwithstanding the provisions regarding residents' committees, nothing prevents residents from establishing other committees or bodies of residents for other purposes⁹⁴.

Residents' committees may require the administering body to call a meeting of residents and may also call meetings of residents themselves⁹⁵.

Residents' committees do not have any decision making authority on behalf of residents. The decisions which can be made by residents under the current Code are to:

- request that the annual accounts be audited⁹⁶;
- approve the application of the whole or part of a budget surplus to a purpose of benefit to the residents;
- change, or revoke the residents rules with the agreement of management;
- establish a residents' committee under the Code;

⁹¹ Clause 5.11 of the Code.

⁹² Clause 5.10; 5.12: residents' committees may also form subcommittees.

⁹³ Clause 5.10

⁹⁴ Clause 5.10(6)

⁹⁵ Clause 5.11(1) (d) and (3)

⁹⁶ It is proposed in the report that annual accounts be audited as a matter of course. The residents would in that case then have the power to not require auditing of the account.

- remove a member of the residents' committee from holding office; and
- vary the dispute resolution process with the agreement of management.

Apart from the establishment of a residents' committee, which can be formed by an election conducted by the residents themselves, the remainder of the above decisions are made by special resolution. **Special resolution**⁹⁷ means a resolution passed at a meeting of residents called by the administering body at the request of residents, the residents' committee or the administering body.⁹⁸ To pass a special resolution the residents must:

- have been given written notice of the meeting;
- there must be a quorum present (whether in person or by proxy) of a minimum of 5 residents entitled to vote on the resolution or 30% of the number of residents entitled to vote on the resolution (whichever is the greater); or if the retirement village has fewer than 10 occupied residential premises, a majority of residents entitled to vote; and
- the resolution must be carried by at least 75% of the number of residents who are present (whether in person or by proxy) and entitled to vote.

Incorporated associations

Not-for-profit associations can become incorporated under the *Associations Incorporation Act 1987*. The Code is silent on incorporated associations of residents, however as noted above, the Code provides that nothing prevents residents from establishing other committees or bodies of residents for other purposes.

Strata councils

In retirement villages where residents own strata title units, the *Strata Titles Act 1985* requires the establishment of a strata council. A strata council is a decision-making body whose function is to make decisions as a corporate body on issues such as the extent of funds that should be reserved for repairs and renovations, and other matters affecting common property within the village. Under the Code, meetings of strata councils must be held separately to other residents' meetings.

Advisory committees

In a number of villages, it appears that advisory committees or boards have been established to facilitate consultation and communication between an administering body and residents. The role and composition of the advisory committee may be specified in the residence contract, and generally provides for both resident and management representation.

⁹⁷ Clause 5.1 of the Code
⁹⁸ Clause 5.11 of the Code

The existence of an advisory committee does not negate the right of residents to establish a residents' committee under the Code, however, this appears to cause confusion in some villages.

Liaison committees

One option raised in the Issues Paper was for residents' committees under the Code to be replaced by liaison committees which would allow for representation along similar lines to that of liaison committees in residential parks. 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.

IDENTIFIED ISSUES

The issues identified in the review include:

- determining the most effective model for resident consultation and representation (existing models for representation include residents' committees, advisory committees, and liaison committees);
- whether the establishment of any of these groups should be compulsory;
- the changes that need to be made to improve the effectiveness of residents' committees in the day-to-day running of a village;
- whether the function of the residents' committee under the Code should be able to be carried out by an incorporated association;
- how overlap and duplication can be avoided, particularly when a number of different resident representative groups may exist within the same village.

SUBMISSIONS

Residents' committees

Many villages have established voluntary residents' committees in accord with the Code, however some villages, particularly those that are small, or where residents are very elderly, have not seen the need to establish a committee. It is evident that, in some villages, residents' committees are effective and play an important role in representing the interests of residents, and communicating effectively between residents and village management. In addition, there has been a growing trend for residents of retirement villages to establish incorporated residents' associations, or signal their wish to establish incorporated associations.

Functioning of residents' committees

At public meetings, and in a number of written submissions, some 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 many residents do not have experience in the process of electing, establishing and running a committee.

During the initial consultation phase, several residents approached the Department with requests for information on how to establish a residents' committee and conduct meetings.

Many of the submissions contained useful and practical suggestions as to how to improve the effectiveness of residents' committees. A consistent theme was the need for the provision of training and advice to retirement village residents in the governance of residents' committees and the establishment of model rules.

One submission stated that the role of residents' committees should be expanded so that they carry out a role similar to that of a body corporate in strata title complexes.

The suggested role of the resident body included:

- hearing submissions from residents;
- planning and establishing village rules and policies;
- considering financial issues, including budget formation;
- employing and managing staff responsibilities; and
- conducting residents' meetings.

Compulsory residents' committees and incorporation

Opinion was divided about whether the establishment of residents' committees should be compulsory. Some residents considered that the current provisions of the Code are adequate and that in some villages, particularly small villages with aged residents, it is difficult to find volunteers to serve on committees.

Other respondents strongly supported compulsory establishment, as well as the incorporation of residents' committees. WARCRA, advocating on behalf of residents, has stated that incorporation would benefit residents by giving residents' committees status and legal protection. WARCRA also strongly maintains that being an incorporated body will assist a residents' committee in the application for grants from agencies, such as the Lotteries Commission, and being granted licenses for social activities such as bingo and liquor licensing.

The RVA stressed that the establishment of a residents' committee in a village should not be taken to be the creation of another management body within the village and opposed the incorporation of residents' committees established under clause 5.10 of the Code as not being possible within the current requirements of the Code and the Associations Incorporations Act.

The key reasons provided were that:

- the residents' committee is created by and is accountable to residents. It has a special consultancy role;
- a residents' committee does not meet the requirements making it eligible for incorporation under the Associations Incorporation Act and has a different function from that for which an incorporated association can be formed;
- in some villages such bodies also undertake social activities. It is undesirable that the social function and the residents' committee function be blended;
- it is possible that some residents may be excluded from having a say in voting for the residents' committee if they do not choose to be members of the incorporated association;
- non-residents may be members of the incorporated association;
- any clause deeming residents to be members of an incorporated association amounts to coercion; and
- an incorporated association can only represent the majority of its members and an administering body cannot be sure that the residents' committee represents all village residents.

Advisory committees

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 that their particular village advisory 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 councils

In some villages where a proportion of the units are strata units owned by the residents, the existence of a strata council, in addition to the existence of a residents' committee established under the Code, can be problematic if residents do not understand the different roles and functions. Residents reported confusion as to requirements relating to a residents' committee and strata council and about the matters that the respective bodies should be involved in, and consulted on, by the village operator.

Liaison committees

The liaison committee model obtained very little support from respondents to the Issues Paper. It is apparent that residents prefer to meet freely without the presence and influence of management. There were also concerns that management would "stack" committee meetings in their favour and that the attendance of managers would intimidate resident members.

FINDINGS AND RECOMMENDATIONS

Model for resident consultation and representation

The Department found that residents' committees were the most effective model for resident consultation and representation in preference to the other models considered. Residents' committees are made up solely of residents of the retirement village and as such provide an effective model for representation of residents' issues to the administering body. Residents' committees are also established solely by an election of the residents and committee members can be removed by residents. This ensures that such committees are accountable to only the residents and will represent residents' interests.

Whether the establishment of residents' committees should be compulsory

The Department found that the formation of residents' committees should remain voluntary but that the Department encourages residents to form such committees as an effective means under the Code for engaging and consulting with the village administering body. The Department believes that effective residents' committees should represent the needs and concerns of residents and also liaise effectively with management. It is desirable that these committees meet regularly to consider matters to do with the day-to-day running of the village and any issues or proposals raised by the residents. Either the whole committee, or some delegation from the committee, should meet with management as regularly as required to consult on these matters.

The changes that need to be made to improve the effectiveness of residents' committees in the day-to-day running of the village

The Department believes that the Code adequately details numerous provisions for the right of residents to be consulted on, and have access to information about the administrative and operating financial arrangements of their retirement village. The Code sets out clear requirements for the provision of administrative, planning and financial information to residents and requires the administering body to establish procedures for consultation with residents in regards to these arrangements.

Cases where residents complain about not being consulted or not having access to information, point to the need for greater compliance with the Code by administering bodies and the need to improve the training of managers in effective consultation, as well as the education of residents in regards to their rights under the Code.

The Department believes that retirement village managers need to be trained in best practice consultation which goes beyond just informing people and includes seeking genuine feedback from residents, making every effort to address the concerns of residents, and establishing village practices that reflect, where possible, the feedback obtained from residents. The issue of improving the training of village managers in appropriate and effective consultation is also addressed in Chapter 16 of this review report which deals with village management.

It is noted however that the Code may not be clear enough in regards to the consultation obligations of the administering body towards the residents' committee. Under the Code, the function of a residents' committee is to consult with the administering body on behalf of residents in regards to the day-to-day running of the retirement village and any issues or proposals raised by the residents. The Department considers that it would be advantageous to clarify the consultation requirements in regards to this function and therefore recommends that the Code be amended to require the administering body to establish appropriate procedures to consult with the residents' committee on matters relating to the committee's function, including responding to issues raised by residents' committees on behalf of residents. This will facilitate communication between the residents' committee and the administering body in regards to day-to-day issues.

The Department also found considerable support for other proposals to strengthen the functioning of residents' committees. These proposals include:

- developing a set of guidelines which outline the election process, and the functions and procedures of residents' committees; and
- providing advice on governance to help a residents' committee to carry out its consultation function with the administering body and the residents.

Consultation in substance not form

Notwithstanding the above, the Department notes that the consulting obligations imposed on the administering bodies under the Code apply in substance between the administering bodies and *all* residents. As such, administering bodies should not use the form of certain bodies established by residents to avoid their obligations under the Code to consult with residents.

In particular, where communications are received by the administering body from residents or groups of residents (including strata councils, advisory committees and incorporated residents associations) it is expected that administering bodies should make all reasonable efforts to respond to those communications.

The issue of whether a consultative body within a village is a residents' committee, an incorporated association, an advisory committee, a liaison committee or a strata council is one of form. Consultation should be a matter of substance and not of form. Irrespective of the form of the body, management should consult genuinely with residents on village matters that affect them as required by the Code.

The Department therefore recommends that the Code be amended to more clearly emphasise the intention of the Code, in relation to the duty of administering bodies to genuinely consult with residents. The Code should clearly state that administering bodies should not rely on procedural requirements, such as the form of the representative body, to avoid or refuse consulting with residents. Breaches of the consultative requirements of the Code by administering bodies can be dealt with by the Commissioner by requiring the administering body to give a Deed of undertaking to comply with the Code and/or rectify the consequences of its failure to comply.

Incorporated residents' associations carrying out the function of a residents' committee under the Code

The Department notes that there is a growing desire on the part of residents of retirement villages to establish incorporated residents' associations to deal with their communal interests in the village, such as the organisation of social activities which may require making submissions for funding, entering into agreements and contracts, handling of money, applying for licenses for social purposes, and charging of fees for social activities.

The Department recognises that a benefit of incorporation is that the body becomes a legal entity. The legal entity has a distinct personality which continues regardless of changes to the membership and individual members limit their exposure to personal legal liability. This facilitates for example owning bank accounts and operating a social club.

Currently the Code is silent on the issue of residents establishing incorporated associations, however the Department considers that as long as the procedural requirements under the *Associations Incorporation Act 1987* are satisfied, there is no legal impediment under that Act for the establishment of incorporated associations by residents.

The Department recognises the advantages to residents wishing to establish incorporated associations to deal with their communal interests in the retirement village and that setting up such a body may be beneficial to the management of residents' communal interests.

Residents who choose to establish incorporated residents' associations within the village may sometimes use or wish to use this incorporated association to fulfil the consultative functions of the residents' committee under the Code. Residents may see practical benefits in combining the functions of an incorporated association and a residents' committee under the Code, especially given that it is likely that the same people may be involved in the management of both bodies. Further, a view was expressed in the submissions that incorporation of residents' committees would be beneficial as it would limit residents' legal liability when acting as members of such a committee.

A close examination of the Code reveals that there is actually no benefit, in regards to the limitation of legal liability, in the incorporation to a residents' committee formed under the Code.

The function of a residents' committee formed under 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 residents⁹⁹.

⁹⁹ Clause 5.10(5) of the Code

Members of residents' committees only have a consultative role under the Code. In carrying out this role, committees do not need to handle money, enter into contracts, give advice or take part in litigation. Members, therefore, will not incur any legal liability in carrying out this consultative function.

As some residents may mistakenly believe that they can be legally liable as a member of a residents' committee established under the Code, the Department recommends that the Code clarify that members of residents' committees do not incur any personal liability for acts done in the exercise of their duties as members of a residents' committee. This will clarify that residents' committees do not need to incorporate simply for this reason.

The Department has carefully examined the issue of incorporation and the wish of some village residents for incorporated residents' associations to undertake all activities relating to the communal interests of residents within their village, including the functions of the statutory residents' committee. As noted above, the Department is of the view that assuming the requirements of the *Associations Incorporation Act 1987* are satisfied, there is no legal impediment to residents forming an incorporated association.

The Department however considers that there may be some technical difficulties with such an incorporated association undertaking the statutory functions of a residents' committee under the current provisions of the Code, due to some inconsistencies between the statutory requirements of the Code and the nature of incorporated associations¹⁰⁰.

The Department is mindful of one of the General Principles of the Code set out in clause 1.3(b) which states that:

“the freedom of decision and action of each resident must be restricted as little as possible and must be recognised in the relationship between a resident and the administering body of a retirement village.”

Further, the Department acknowledges the strong desire of residents to be able to use incorporated residents' associations to carry out the function of residents' committees under the Code. Accordingly, the Department recommends that amendments be made to the Code to enable incorporated residents' associations to be able to carry out the function of a residents' committee. The function of the residents' committee would be performed by the management committee of the association if residents choose to adopt this model.

¹⁰⁰ For example, a residents' committee established under clause 5.10 of the Code is a statutory body governed by specific provisions under the Code. The Code requires residents' committees to be elected by the residents and for members of the committee to be able to be removed by a special resolution of the residents. An incorporated association is however regulated under the *Associations Incorporation Act 1987* and voting is conducted amongst members of that association. Incorporated associations are also able to preclude some residents from membership. The Code contemplates, however, that elections be open to all residents of the village.

The amendments will need to ensure that residents' rights of representation are maintained when residents prefer that an incorporated residents' association carries out the function of a residents' committee under the Code. Accordingly, the Code should provide that:

- the majority of residents must agree (by special resolution) that an incorporated residents' association carry out the function of the residents' committee;
- where residents so agree, the powers of the residents' committee will be conferred to the incorporated association;
- one of the objects of the incorporated residents' association would be to carry out the function of a residents' committee; the objects of the incorporated association would be conditional in providing for the association to either carry out the function of a residents' committee, where agreed by the majority of residents by special resolution, or be divested of this function if residents agreed otherwise;
- the membership of the incorporated residents' association must be open to all residents of the village and only to residents of the village;
- the residents (by special resolution) would be able to remove the powers conferred to an incorporated residents' association at any time;
- incorporated residents' associations that are to undertake the function of a residents' committee under the Code would not be able to charge more than \$1.00 subscription fee for membership of the association¹⁰¹, but the association may charge fees of members for their participation in other association activities, such as social activities;
- the incorporated residents' associations rules would provide for similar provisions regarding the length of time in office and election of committee members as currently applies to residents' committees under the Code; and
- there would be an appropriate mechanism by which incoming residents are informed about their right to join an incorporated residents' association and its function under the Code.

The Department considers that this approach achieves the maximum autonomy to residents in their desire to manage as much as possible their communal affairs in the way in which they so choose whilst also retaining the statutory protections afforded in the Code for all residents. It also addresses some of the key concerns raised in the submissions in regards to the use of incorporated associations to carry out the function of a residents' committee.

As already noted previously, residents' committees have no decision making powers on behalf of residents. The use of an incorporated residents' association to fulfil the function of a residents committee would not change this fact as such an incorporated association would only have the same powers as a residents committee. The residents would continue to make decisions about the running of the retirement village by special resolution at meetings called under clause 5.11 under the Code.

¹⁰¹ \$1.00 represents an arbitrary peppercorn fee which symbolises affordability and no barrier to entry to membership.

Overlap of resident representative groups

The Department proposes that to avoid confusion and duplication, especially where various forms of representation and residents' bodies exist within the one village, residents and administering bodies should have ready access to educational materials and model rules which clearly explain the respective roles, functions, rights and responsibilities, election processes and other procedures of residents' committees established under the Code and incorporated residents' associations carrying out this function, as compared to other possible committees or bodies in retirement villages.

Given that respective roles and functions can be clearly delineated, there does not appear to be any reason why the various bodies should not be able to operate effectively within the same village.

In summary, the Department recommends:

61. That the Code be amended with respect to residents' committees established under section 5.10 to:

- **require an administering body to establish appropriate procedures to consult with a residents' committee on matters relating to the committee's function, including responding to issues raised by a residents' committee on behalf of residents;**
- **clarify that committee members do not incur any personal liability for acts done in the exercise of their duties.**
- **provide that residents may appoint an incorporated association to undertake the statutory function of a residents' committee established under the Code on the following basis:**
 - **by agreement of the majority of residents by special resolution in accordance with the Code;**
 - **upon such agreement, the powers and function of the residents' committee would be conferred to the incorporated association;**
 - **the residents (by special resolution) would be able at any time to remove the function and powers of a residents' committee that had been conferred to an incorporated residents' association;**
 - **the objects of the incorporated association would be conditional in providing for the association to either carry out the function of a residents' committee, where agreed by the majority of residents by special resolution, or be divested of this function if residents agreed otherwise;**
 - **membership of the association must be open to all residents and only residents of the village;**

- incorporated associations that are to undertake the function of a residents' committee under the Code would not be able to charge more than \$1.00 subscription fee for membership of the association, but the association may charge fees of members for their participation in other association activities, such as social activities;
 - provision in the association's rules regarding the length of time in office and election of committee members are to mirror the provisions applying to residents' committees under the Code; and
 - an appropriate mechanism be developed by which incoming residents are informed about their right to join an incorporated association that has been appointed to undertake the function of a residents' committee under the Code.
62. That the Code also be amended to clearly emphasise the intention of the Code, in relation to the duty of administering bodies to consult genuinely with residents.
63. That residents' committees established under the Code be made more effective by developing:
- educational materials for use by residents providing practical information about procedures relating to the establishment and operation of residents' committees and the carrying out of the committee's consultative function with the administering body and the residents;
 - educational materials which outline the various other committees or bodies that may exist within a village;
 - guidelines for management which outline appropriate procedures for consultation and information provision to residents and residents' committees; and
 - model rules for incorporated associations which are to carry out the function of a residents' committee under the Code.

22. VOTING PROCEDURES

The review asked what was considered to be a fair system for voting on matters at residents' meetings and whether a 'vote per person' or 'vote per unit' system was supported.

CURRENT PROVISIONS

Unless it is otherwise provided in the residence contract, if two or more residents occupy the same residential premises in a retirement village, each of them may vote at a meeting of residents on any matter that requires, or provides for, a vote of the residents.¹⁰²

In addition, the Code requires that to pass a special resolution:

- a) residents must have been given written notice of the meeting;
- b) there must be a quorum present (whether in person or by proxy) of —
 - (i) a minimum of 5 residents entitled to vote on the resolution or 30% of the number of residents entitled to vote on the resolution (whichever is the greater); or
 - (ii) if the retirement village has fewer than 10 occupied residential premises, a majority of residents entitled to vote; and
- c) the resolution must be carried by at least 75 per cent of the number of residents who are present (whether in person or by proxy) and entitled to vote and vote.¹⁰³

The *Strata Titles Act 1985*¹⁰⁴ provides that a sufficient quorum is present if there are present at the meeting either personally or by proxy at the time when the resolution is voted on —

- (i) the proprietors of not less than 50% of the lots in the scheme; and
- (ii) proprietors whose votes have a value of not less than 50% of the aggregate unit entitlement of the lots in the scheme.

IDENTIFIED ISSUES

'Vote per person' or 'vote per unit'

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.

¹⁰² Clause 5.11 of the Code

¹⁰³ Clause 5.1 of the Code

¹⁰⁴ Section 3C (1)(b) of the *Strata Titles Act 1985*

Anonymous voting

The voting procedures 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.

SUBMISSIONS

System of voting

The majority of submissions suggested that anonymous voting in the form of a secret ballot should be adopted as this promotes a fair system of voting by protecting voters from pressure from other residents or village management.

Many of the submissions that support an anonymous system of voting also place a proviso on this, by stating that an anonymous system of voting should be used when a contentious or sensitive matter is being decided and that circumstances in which anonymous voting is used should be prescribed.

A few submissions suggested that a show of hands was sufficient because it was a more open way of conducting a vote. However, many felt that a show of hands should only be used when the issue was not contentious.

Some submissions stated the need for more information and education regarding voting procedures and issues. They felt it was important that attendees are made aware of the agenda prior to meetings. It was also submitted that information regarding voting procedures should also be provided in the form of educational materials.

'Vote per person' or 'Vote per unit'

There were many strong arguments for both systems of voting. The majority of submissions suggested that a 'one vote per unit' system of voting would be desirable, as this system of voting reflects ownership of units and protects the rights of single occupants of units.

Some submissions also suggested that there are certain issues that might warrant per unit voting and other issues per resident voting. There was support for financial issues and contentious issues being dealt with on a one vote per unit basis to reflect the per unit payment structure and social issues should be dealt with on a 'one vote per resident' basis.

In the final round of consultation, some respondents claimed that a 'one vote per unit' rule was unfair and that couples should have the ability to vote on an individual basis, especially given that in some instances, the couple may not wish to vote the same way.

The Bethanie Group supported the recommendation that each dwelling as opposed to each person have equal voting rights in a village. The Group suggested that a system of two votes per dwelling would allow a single occupant to exercise both votes and also allow a couple to vote to their individual intention.

Types of Consent

A small number of submissions raised the issue of type of consent. The responses regarding this matter were varied. Some submission suggested a simple majority, particularly for smaller issues. Those that addressed the issue showed a preference for special resolutions to be passed by a 75 per cent majority, as is currently the case.

In the final round of consultation, some respondents suggested that the quorum required for special resolutions should be increased. As stated previously, a quorum for passing a special resolution is a minimum of 5 residents entitled to vote on the resolution or 30% of the number of residents entitled to vote on the resolution (whichever is the greater). If the retirement village has fewer than 10 occupied residential premises, a quorum would be a majority of residents entitled to vote. It was pointed out that the current quorum of 30% of the number of residents entitled to vote on a special resolution cannot be considered to be sufficiently representative of all residents.

FINDINGS AND RECOMMENDATIONS

The Department recognises that being able to vote in an anonymous and confidential manner is important to many retirement village residents. Being able to vote on an anonymous basis would ensure that residents are not intimidated or pressured by fellow residents or village management into voting in a particular way. It is also acknowledged that it is not always practicable or efficient to require an anonymous vote on all issues. Therefore is the Department recommends that, where more than one eligible voter present at a meeting calls for or supports a written secret ballot in respect of a particular matter, then the vote must be undertaken in this manner.

The Code currently provides that residents are to be given written notice of meetings, the time and place of the meeting and the business to be transacted, including any resolution that is to be put as a special resolution.¹⁰⁵

The Code also outlines the requirements in regard to voting on any matter that requires, or provides for, a vote of the residents. Although it was suggested in several submissions that voting entitlements reflect the 'per unit structure' in which fees and charges are levied, the vast majority of matters that require a vote of the residents are those that impact broadly upon life in the village. It is considered reasonable that all residents of the village have a right to vote on matters that impact upon village life. Having reviewed the Code's current requirements and well established voting processes, the Department recommends that the status quo remain in regard to voting entitlements in both existing and new retirement villages.

¹⁰⁵ Clause 5.11 (7) of the Code.

The Department noted WARCRA's statement that it can be extremely difficult to get a substantial number of residents to attend meetings and that increasing the size of the quorum required to consider and pass a special resolution would create difficulties in many villages. The Department therefore recommends that the current provision in the Code for a quorum to vote on a special resolution be retained. Further, the Department recommends that the current provisions which require the support of at least 75 per cent of those present at a meeting (whether in person or by proxy), in order to pass a special resolution, also be retained.

Given that new residents may be inexperienced in voting processes, the Department recommends that information on voting procedures be developed so that new comers are aware of what may be required at meetings of residents. It is envisaged that this information would be established by the proposed seniors housing information service.

In summary, the Department recommends:

- 64. That the legislation be amended to provide that where more than one eligible voter present at a meeting calls for, or supports, a written secret ballot in respect of a particular matter, then the vote must be undertaken in this manner.**
- 65. That the status quo remain in respect to the quorum and number of votes required to pass a special resolution.**
- 66. That the Department develop educational materials about voting procedures for residents.**

23. DISPUTE RESOLUTION

The review examined how existing dispute resolution processes could be improved.

CURRENT PROVISIONS ¹⁰⁶

The Code outlines the processes to be used to resolve a dispute within a retirement village. If the dispute cannot be resolved using the village dispute resolution process, the Commissioner for Consumer Protection can provide conciliation services to either party, or refer the matter to mediation. 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 dispute resolution processes outlined in the Code apply to disputes between residents and the administering body as well as to disputes between residents.

IDENTIFIED ISSUES

Existing dispute resolution mechanisms for retirement villages in Western Australia do not appear to be as effective as they could be. The current review of retirement villages legislation has found that stakeholders consider current mechanisms to be ineffectual and the enforceability of orders made by the State Administrative Tribunal to be deficient. There also appears to be a distinct lack of awareness as to the current processes available to disputing parties.

In the last three financial years, the Department has conciliated 49 matters arising out of retirement villages¹⁰⁷. These matters ranged from concerns about fees for maintenance, refurbishment, general levies and termination of contract, to lack of communication on the part of management. Many of the matters that were conciliated were ones that required clarification of the legislation or the responsibilities of operators. In the majority of investigations into complaints against village operators for fees charged, it was demonstrated that fees charged were in accordance with contracts and permissible under current law.

The Commissioner's power to refer a matter to an independent mediator¹⁰⁸ has been rarely exercised. Some doubts have arisen as to the appropriateness of the Commissioner having the power to refer matters to mediation, particularly where aspects of the case may be prosecuted at a later date.

¹⁰⁶ Division 6 of the Code; Part 4, Division 5 of the Act details the State Administrative Tribunal's powers in relation to the resolution of disputes in retirement villages

¹⁰⁷ The number of matters conciliated by the Department of Commerce in the last three years are as follows: 2007/2008 = 18; 2008/2009 = 12; 2009/2010 = 19.

¹⁰⁸ Clause 6.3 of the Code.

This problem was highlighted in the EISC report¹⁰⁹ into Karrinyup Lakes Lifestyle Village which found that:

the Department of Consumer and Employment Protection's role currently combines three relatively incompatible functions in the one department; those of regulator, prosecutor and dispute resolution facilitator.

SUBMISSIONS

A recurrent concern raised by respondents was that many residents do not want to confront management about a dispute because they are afraid of being expelled by management or branded a troublemaker. Many residents feel intimidated by management and as such are reluctant to approach them, particularly if management is considered to be the cause of the problem.

Many resident respondents felt that the existing dispute resolution provisions in the legislation are unworkable because the administering body is required to nominate a "suitable person or body to deal with the dispute." This requirement does not explicitly require impartiality in such an appointment.

Submissions on this topic suggested a broad range of ways of dealing with retirement village disputes. A significant proportion of respondents favoured the establishment of an independent disputes tribunal. There was also strong support for expanding the enforcement and dispute resolution powers of the Commissioner for Consumer Protection.

FINDINGS AND RECOMMENDATIONS

The EISC report¹¹⁰ into Karrinyup Lakes Lifestyle Village stated that there is a need to address the inherent conflict between the regulatory, prosecutorial and dispute resolution roles currently carried out by the Department.

As highlighted earlier, under the current Act, the Department is required to undertake three roles, namely regulator, prosecutor and dispute resolution facilitator. Section 8(1) of the Act provides that one of the functions of the Commissioner is:

to investigate and attempt to resolve complaints by residents and administering bodies of retirement villages and to take action by negotiation, prosecution of any offence or otherwise.

Under the Code, mediation is a voluntary process whereby all parties must agree to attend mediation. Parties to a dispute may apply to the Commissioner to have their dispute mediated. The Commissioner, upon consideration of the matter in dispute, may refer the matter for mediation. The Commissioner may decline to refer a matter to mediation if he or she considers that the application should not be accepted for some reason.

¹⁰⁹ EISC Report, Finding 59, p 202

¹¹⁰ EISC Report, Finding 59, p 202

As a safeguard the Code provides for a mediation process independent of the Department. If mediations are carried out, the Code requires that information exchanged during mediation is not disclosed outside of the mediation. Therefore the Commissioner would be advised about whether the mediation has been successful or not, but is not privy to any exchange of information that has occurred in the mediation process.¹¹¹

There are many other examples where a matter being heard by a disciplinary body or tribunal is referred to mediation by that body in the first instance. The State Administrative Tribunal is one such example. Upon making an application to the SAT, parties to a dispute may be referred to mediation prior to their matter being heard. The process is carried out independently in that persons mediating a matter do not participate in any subsequent hearings of the matter.

Given that mediation is conducted by an independent mediator and that the Department does not have access to information divulged in a mediation, there does not appear to be a problem with the existing arrangement whereby the Commissioner can refer a matter to mediation.

It is recognised that there is a need for a model of dispute resolution that adequately addresses the needs of residents whose age and vulnerability place them in a very limited position in terms of representing themselves. Older people tend to enter retirement villages seeking stability and security, not conflict.¹¹² As discussed above, some of the existing dispute resolution options can be daunting for many residents. Instituting a complaint can be very stressful in that in doing so, residents may find themselves ostracised by management or even fellow residents.

Effective dispute resolution for seniors must:

- be accessible and approachable;
- take into account the specific needs of seniors;
- be fair; and
- be well promoted amongst retirement village residents.

It is not desirable for a separate tribunal to be established to resolve retirement village disputes, as suggested by the EISC. The SAT already has this role and the creation of a secondary tribunal would be a duplication of this service. This is discussed in more detail in Chapter 35 (*Monitoring and Compliance*).

In September 2007, the *House of Representatives Standing Committee on Legal and Constitutional Affairs* (the Standing Committee) published a report entitled *Older People and the Law*.

¹¹¹ Clause 6.3 (11) and (12) of the Code.

¹¹² Margaret Craig (2007) *Dispute Resolution and the Retirement Villages Act 2003: A fair and independent process?* The University of Waikato.

On the subject of retirement villages, the Committee noted that some submissions called for the creation of a retirement village ombudsman or commissioner in each State to investigate and resolve disputes.

The Standing Committee was informed that New Zealand had passed legislation introducing statutory supervisors to assist their elderly in addressing their particular retirement village problems. The concept of a statutory supervisor was supported by the Standing Committee. A further possible option raised in this report was the establishment of a state-based Commissioner for Older People.

Having considered a range of dispute resolution options for the retirement village industry in Western Australia, including establishing a statutory supervisor, a dedicated commissioner and an ombudsman, the Department proposes that the current conciliation arrangements established within the Department remain. The Department provides a conciliation service for retirement villages within its Industry and Consumer Services Directorate. If disputes are not able to be resolved at village level, then disputing parties are able to apply to the Department and the matter is taken up by the appropriate conciliation section of the Department.

Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may make suggestions with regard to options available to disputing parties or terms of settlement and may also actively encourage participants to reach an agreement.

The current conciliation service is desirable for many reasons. These are summarised below:

- Retirement village issues are dealt with in an ethical, sensitive, non-biased and strictly confidential manner.
- Residents do not enter into an adversarial or confrontational process with the village operator and as such the dispute resolution process is less stressful.¹¹³
- Parties to disputes are not required to have knowledge of legal processes.
- Power imbalances are significantly reduced when the Department intervenes.
- The cost of using the Department's conciliation service is minimal.

If a potential serious breach of the legislation is identified at any stage during the conciliation process, the potential breach is referred to the compliance area within the Industry and Consumer Services Directorate of the Consumer Protection Division within the Department of Commerce.

¹¹³ Margaret Craig (2007) *Dispute Resolution and the Retirement Villages Act 2003: A fair and independent process?* The University of Waikato.

If a satisfactory outcome is not achieved and the matter involves a breach of the law that is in the public interest to pursue, disputes may be referred to the State Administrative Tribunal.

The current model requires that some attempt must be made to resolve disputes via a village dispute resolution process. Requiring the administering body to nominate a suitable person or body to deal with the dispute according to processes outlined in the Code, and where “*suitable*” can be taken to mean “*appropriate in the circumstances*”, can still be problematic, particularly where there is a dispute between residents and the administering body (operator). The most significant problem is that there is no certainty that the dispute will be dealt with in an impartial or unbiased manner. Residents are effectively being asked to have faith in a dispute resolution process that may be potentially biased.

To address this particular problem, the Department recommends that the Code be amended to require that where the administering body must nominate a suitable person or body to deal with a dispute, that person or body must be acceptable to all parties to the dispute.

The Department also recommends that village operators be encouraged to develop practices to reduce or minimise disputes occurring within the village. Such practices could involve the use of ‘good faith’ or ‘fair dealing’ agreements which involve defining mutual objectives between residents and operators, setting out means of improved communication and the identification of likely problems. The purpose of this agreement would be to formalise problem-solving and dispute resolution within villages.¹¹⁴ The proposed seniors housing information service could develop guidelines and deliver education initiatives in this regard.

In summary, the Department recommends ¹¹⁵:

- 67. That the proposed seniors housing information service develop guidelines and deliver educational initiatives in regard to effective dispute resolution within villages.**
- 68. That the Code be amended to require that where the administering body must nominate a suitable person or body to deal with a dispute, that person or body must be acceptable to all parties to the dispute.**
- 69. That village operators be encouraged to establish specific practices to reduce the likelihood of disputes arising.**

¹¹⁴ Ibid

¹¹⁵ See also chapter 35 (Monitoring and Compliance)

24. RELOCATING WITHIN A VILLAGE

The review asked whether the legislation should regulate the costs involved in relocating within a village, and whether deferred amenities fees should be charged upon termination of residency in a village or upon termination of residency in a particular unit.

CURRENT PROVISIONS ¹¹⁶

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.

The *Information Statement For Prospective Resident*¹¹⁷ requires the disclosure of costs associated with moving to alternative accommodation in a village. The circumstances where this may occur must also be disclosed.

IDENTIFIED ISSUES

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, particularly in the not-for-profit sector of the industry, relocation is a relatively inexpensive process with little or no cost involved. However, in other villages the costs involved can be substantial. In some situations the entire exit fee becomes payable and a completely new contract is 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 whether these fees should be calculated on the basis of the length of residency in the village or in a particular unit.

Exit fees are essentially an 'agreed share of sales proceeds'. The reasons provided by industry for charging exit fees are to:

- lower the cost of entry for residents,
- lower ongoing costs for all residents because costs are factored into profit calculations
- provide funding for long-term expenses; and
- cover the cost of some of the services provided to residents.

¹¹⁶ Clause 4.9 of the Code

¹¹⁷ Schedule 1, Form 1 of the Regulations; Clause 4.9 of the Code

Where the unit in question 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.

SUBMISSIONS

There was strong support for the proposition that the legislation regulate the costs involved in relocating within a village. Some residents submitted that the 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. One respondent suggested that relocation costs should be limited to the actual cost of moving a person and their belongings.

The AIR suggested that there is too much diversity in retirement villages to regulate costs or even procedures, however guidelines would be appropriate for residents.

The Becton Property Group submitted that most villages are not able to offer relocation rights. The Group claimed that there is no sound justification for regulating relocation within a village and further, these matters should be determined by contract freely entered into by the resident.

The RVA submitted that the financial model for most villages is based on a resident being entitled to occupy one residence as a permanent home with deferred fees being payable following the termination of that occupancy and the re-occupancy of it by a new resident.

OSIC suggested that deferred amenities fees should only be charged upon termination of residency in a village but that it would be fair to allow industry to charge a fee for moving within the village to cover related administrative costs such as changes to contracts.

FINDINGS AND RECOMMENDATIONS

The diversity of arrangements within the retirement village industry would makes it very difficult to regulate relocation costs within a village. It is recognised that when residents buy into a village scheme, they are purchasing a right to a particular unit, not a right to live anywhere in the village.

In most resident-funded villages, transfer rights are not provided as the occupation of a unit depends upon an entry consideration being received. In the main, this entry consideration generally benefits the outgoing resident, where a unit is being on-sold, or the operator at initial sale. If a resident moves to a new unit within the village, without paying an entry consideration for that particular unit, then the outgoing resident would be disadvantaged in that they would not be 'paid out'.

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

It appears that the best way to address this matter is to encourage residents to consider their future needs when moving into a retirement village. It is also desirable that village operators address this matter when entering into a contract with a prospective resident.

In view of the fact that most village business models rely on receipt of deferred income following each residence termination or re-sale, it is recommended that the status quo remain with regard to intra-village transfers.

In summary, the Department recommends:

- 70. That the current provisions within the legislation remain in regard to arrangements for relocating from one unit to another within a village.**

25. SELLING PREMISES WITHIN A RETIREMENT VILLAGE

The review examined whether residents should have greater input into the marketing and sale of their retirement village properties and whether practices relating to marketing and selling practices could be improved.

CURRENT PROVISIONS ¹¹⁸

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

The two main issues related to selling premises within a retirement village were identified as:

- residents' input into the sale of premises; and
- unfair marketing and sales practices.

Related issues such as refurbishment and exit fees are considered in Chapters 20 and 30 of this report.

SUBMISSIONS

Resident input

Submissions to the review overwhelmingly supported the proposition that the legislation should provide that departing residents have greater input into the sale of their unit. The extent of this input included proposals that:

- residents should be free to appoint their own real estate agent as opposed to an agent appointed by management;
- residents should have the right to acquire independent advice and valuations;
- residents should be free to negotiate selling fees and sale price;
- the sale price should be discussed and agreed with village management prior to sale;
- parties use an independent assessor if they cannot agree on a minimum price;
- residents, or their beneficiaries, should be allowed to reduce the price to suit the market or accept a lesser offer;
- residents should not be prevented from exhibiting 'for sale' signs in the standard manner; and

¹¹⁸ Division 2 and clause 5.7 of the Code and Schedule 1, Form 1, of the Regulations.

- residents and/or their agent of choice should be able to obtain from village managers copies of all the necessary documents, including disclosure booklets, deeds, and contracts of sale, to ensure that potential buyers are fully informed.

Many respondents claimed that village operators exert undue control over the sale process by being able to select the real estate agent to sell the unit; determine the selling fees which are charged by agents and not providing residents with an opportunity to negotiate the fees; determine the marketing strategies to be used, such as the type of advertising and level of promotion; and determine the marketing price of the property. These issues can become particular problems when operators may be selling new unoccupied releases that are in competition with older units which are for sale because the residents wish to leave, have moved to aged care or have died.

A submission from the Australian Property Institute (API) also agreed that residents should have input into the determination of the marketing price for a retirement village unit. The API suggested that if the parties cannot agree on the price, either party may access the services of a licensed valuer and that both parties should be entitled to appoint their own valuer at their own expense. The API recalled the 2002 Statutory Report which recommends an averaging of two valuations. API also recommended that if the difference in valuation is more than 10%, the parties would have the discretionary right to refer the matter to the API to appoint an independent experienced licensed valuer to complete a 'determination of market value', the costs of such determination being shared equally by the parties.¹¹⁹

The Becton Property Group stated that, in their villages, the sale price of a unit is usually agreed upon with the outgoing resident, or failing this, determined by a valuer. The Group considered that the Code's current requirement to provide a monthly marketing report to residents is satisfactory.

Fini Villages (Fini) considered that provisions relating to the marketing and sale of individual premises should be included in village contracts rather than in the legislation. Fini pointed out that the circumstances in a leasehold village will differ to that of a freehold village. Fini supported the proposition that in a freehold situation residents should have the ability to choose their sales agent and have a say in the sales price. Fini asserted, however, that the minimum selling price for a unit needs to be set by the operator to protect the long-term interests and value of the village as a whole. For example, the sale price determines the amount of the contribution that is made to the village refurbishment fund.

Additionally, if a unit is sold for a price significantly below market value, it will devalue the price of other units in the village. Contract clauses in Fini's villages allow for an independent party to value the property if there is a dispute about the suggested price. The Group believes that the interests of operators and residents are aligned to sell vacant units as quickly as possible for the best price possible, otherwise the "economic interests of both parties are compromised".

¹¹⁹ It should be noted that free appraisals are also available from licensed real estate agents should a person wish to get an estimate of market value.

The RVA submitted that in strata titled villages, residents are entitled to sell their own properties. In purple titled villages, residents offer for sale their freehold estate as tenants-in-common and the occupancy right to their unit. Under both these schemes residents are entitled to appoint a selling agent to market their property. The RVA also stated that in most cases the sale price is agreed to with the outgoing resident, or failing that, determined by a valuer.

Industry representatives also reported that in many retirement village schemes the intended sale price is reviewed periodically (for example quarterly), so that if the market is slow the price may be reconsidered and adjusted, either by agreement with the resident, or failing this, as determined by a valuer.

All industry submissions contended that in leasehold or licence villages, residents do not have an assignable estate or interest in their village residence to sell. In this case only, the operator is entitled to appoint a selling agent, market the residence, and grant a new lease or licence to the new occupier.

In the case of retirement village units which are sold on a 'lease for life' basis, the API suggested the establishment of a publicly accessible data base which records past transactions similar to that available for strata lots and freehold property. This existing service is provided by Landgate and assists the valuation profession (and potential buyers and sellers) in making comparisons between various properties. The API recommended that the Valuer General's Office establish an appropriate "sale collation system" and data base for lease for life units to be available to valuers and the public for a reasonable fee.

Unfair marketing and sales practices

Respondents to the review raised a number of matters relating to the marketing and selling of property in a retirement village, which they considered to be unfair. These include:

- problems associated with the marketing and selling of older units;
- the time taken by management to place a unit on the market for sale;
- management not providing sufficient pertinent information about the unit or the retirement village scheme to fully inform prospective buyers; and
- unnecessary delays between the sale of a property and its settlement.

Some respondents claimed that owners of older units are disadvantaged by operators' tendency to concentrate their marketing efforts on newer units or developments. These tend to be more lucrative and easier to sell than older units. It is claimed that since departing residents are still liable for ongoing fees and charges there is little incentive to sell older units.

It was suggested that, in some circumstances, village owners should be required to buy back units at market value to relieve the stress and pressure on residents, for example those needing to leave urgently to enter a nursing home.

Some submissions reported that the time taken by management to place a unit on the market for sale is often caused by lengthy delays in refurbishing the units. Refurbishment matters are discussed at greater detail in Chapter 27 (*Refurbishment Costs*) of this report.

In addressing the matter of the amount of time that is taken to sell a retirement village unit, one industry submission¹²⁰ pointed out that selling property in a retirement village is similar to selling property in the general property market. If a unit is unsold for a period of time, it may be for a variety of reasons. These reasons include the possibility that the unit is overpriced; the unit is not in optimal condition; the real estate market is 'flat'; or delays may occur where an offer is conditional and the conditions of that offer are not met.

In response to the question about what would be a reasonable time limit between the sale of a property and settlement, submissions ranged between 15 days and 3 months. One to two months appeared to be the most widely acceptable time frame within which settlement should occur.

The RVA submitted that operators are currently obliged to take reasonable steps to enable a residence to be put on the market as expeditiously as possible¹²¹. The RVA also pointed out that there are many factors that may quite legitimately cause delays in marketing including:

- delays in the outgoing resident providing vacant possession;
- delays in obtaining probate or letters of administration for a deceased resident;
- the need to obtain quotations and reach agreement with the outgoing party as to the extent and costs of refurbishment;
- the need to carry out refurbishment works to present the property in a marketable condition; and
- the need to reach agreement on the value for which the residence is to be marketed or, failing agreement, obtain a valuer's determination of the market value.

The RVA stated that most operators have a financial incentive, apart from a legal obligation, to market a residence promptly as deferred fees and, in some cases, a share in the capital growth in the value of a residence, will not be received until settlement of the sale of the residence.

¹²⁰ Fini Villages
¹²¹ Clause 5.7 of the Code

The RVA asserted that it is not possible to set a reasonable time limit on the period between the time of sale and settlement. Like all forms of residential accommodation, a successful sale and the time taken to achieve one, depends on the location, accommodation, presentation, price and demand for the product in the market place.

The RVA contended that any artificial time limit is likely to encourage 'forced sales' and put downward pressure on sale prices which is primarily detrimental to the outgoing resident, other remaining residents, and secondarily detrimental to the operator. The RVA also stated that the imposition of a time limit infers a compulsory buy back being required after the expiry of the permitted time limit. The RVA considered this arrangement to be unworkable for operators.

The 'buy back' proposition was generally supported by residents' submissions, but strongly opposed by the RVA. The RVA argued that:

- it is not reasonable or practicable for an operator to be required to compulsorily buy back a residence at market value after a certain time frame has elapsed;
- any or all of the delays outlined could apply and are not necessarily due to the fault of the operator;
- if a unit has not previously changed hands the market value cannot be established;
- most retirement village schemes and underlying businesses rely on a settled 're-sale' of a residence to fund payment of the financial stake held by an outgoing resident; and
- the imposition of a compulsory buy back obligation has the potential to cause operators to become insolvent and this would not be in the interests of consumers.

FINDINGS AND RECOMMENDATIONS

The Department agrees that residents who own property within a retirement village should have the right to have input into decisions about selling price, choice of agent, selling fees and marketing strategies. It seems reasonable, also, that responsible operators and managers should consult with residents who are leasing or holding a licence to occupy, as the sale price affects the residents' financial position when leaving the village. If the unit realises good capital gains, the amount paid in exit fees can be substantially reduced. Therefore, the Department believes that although the resident does not own the property, he or she has a defined interest in its successful sale.

The Department found that in a particular case the management of a retirement village was particularly tardy in providing sufficient information about the units and the retirement village scheme to potential buyers, thus creating serious delays in the sale of several units once residents had expressed a wish to leave the village.

The Department therefore recommends that the legislation be amended to require that if a resident expresses a wish to leave the retirement village, the operator make available to prospective purchasers all pertinent information regarding the unit and the retirement village scheme.

The Department found that South Australian legislation¹²², which provides a 'remarketing policy' for administering authorities of retirement villages, would be beneficial for Western Australian retirement village residents if introduced in this State. A copy of South Australia's remarketing policy is at Appendix 3. This policy provides practical guidelines as to the methods and extent to which departing residents are involved in the sale of their residence. The Department noted that no distinction is made in the South Australian remarketing policy between whether the resident owns the unit or whether the resident is leasing or holding a licence to occupy.

Some of the key practical remarketing provisions which the Department considers should be in the Western Australian Code include:

- making arrangements to meet with outgoing residents;
- identifying any work that should be undertaken to ensure that the residence is in a reasonable condition for remarketing;
- discussing the remarketing process with residents;
- addressing the fixing of a price at which the residence will initially be remarketed and when and how changes to that price will be considered and made;
- agreeing on the type, level and frequency of advertising;
- clarifying who will be responsible for any costs associated with the valuation of the residence;
- detailing what will be required of the outgoing resident in relation to the remarketing of the property;
- addressing what action will be taken if the residence is not sold or relicensed after 90 days and 6 months;
- agreeing on settlement procedures;
- providing monthly written reports of progress; and
- matching the marketing of new and older residences.

The Department considers that the establishment of a publicly accessible data base of 'lease for life' transactions is a practical proposal that should be postponed for future consideration. Such a proposal would need to be costed and its manner of function better defined before it could be implemented. Such a data base could assist in establishing the market value for lease for life units and be useful for both departing residents and operators.

¹²² Remarketing policy (Schedule 1 – Code of Conduct to be observed by administering authorities of retirement villages: *Retirement Villages Regulations 2006* under the *Retirement Villages Act 1987* (SA))

The Department believes that establishing a remarketing policy within Western Australia's Code of Conduct, based on South Australian legislation (see Appendix 2, pages 168-169), appears to be a very practical way of raising marketing standards within the retirement village industry in Western Australia and decreasing the incidence of unfair marketing and sales practices.

In addition, it should be noted that provisions for remarketing exist in other legislation. The *Real Estate and Business Agents Act 1978* sets out certain requirements with regard to how a property is to be marketed, for example time limits can be set for the period of the appointment of the agent. This legislation regulates the practices of real estate agents and their sales representatives and applies equally to the marketing and selling of a unit within a retirement village as it does to the sale of a property in the general housing market.

In summary, the Department recommends:

- 71. That the legislation be amended to adopt a remarketing policy with provisions similar to those contained in South Australian legislation in order to provide residents with greater input into the sale of their unit.**
- 72. That the legislation be amended to require that if a resident expresses a wish to leave the village, then within a reasonable period of time the operator make available to prospective purchasers all pertinent information regarding the unit of the outgoing resident and the village scheme in order to expedite the sale of the unit or the transfer of the lease or licence.**

26. ONGOING CHARGES AFTER A RESIDENT LEAVES

The review examined what might be the fairest method of dealing with any ongoing charges after a resident leaves a retirement village.

CURRENT PROVISIONS

The current legislation does not regulate ongoing charges after a resident leaves a village.

The Code provides that where a residence contract has been terminated or a resident has temporarily ceased to reside in, or permanently vacated, a residence, then that resident is not liable to pay for personal services that they do not receive, other than any reasonable costs incurred in making any service available. In this context, charges for optional, personal or elective services such as meals, laundry and cleaning services are not considered to be ongoing charges.

The NSW Act distinguishes between residents who are owners and those who are non-owners when it comes to ongoing charges for departing residents. The Act provides that residents who have a lease or licence contract cease to be liable for ongoing charges six weeks after vacating their unit. Owners, on the other hand, must keep paying ongoing charges until the premises are sold.

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

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

Victoria's legislation provides that a former 'non-owner' resident ceases to be liable for maintenance charges in respect of the premises 6 months after the date the former resident delivers up vacant possession of the premises.

IDENTIFIED ISSUES

Retirement villages require residents to pay ongoing charges to meet the costs associated with operating a village. Ongoing charges may also be known as operating costs contributions or levies, outgoing charges or levies, ongoing fees, maintenance fees or similar description and are usually charged on a weekly, fortnightly or monthly basis.

These charges may cover costs such as management and administration, gardening and maintenance and the provision of recreational facilities within a village. In this context, charges for optional, personal or elective services such as meals, laundry and cleaning services are not considered to be ongoing charges.

Ongoing charges apply to all villages whether the resident owns the strata title to the residence or holds a lease or licence to occupy the residence. In a strata title situation, the resident as freehold owner will directly incur usual property costs which do not fall into the category of ongoing charges.

A significant concern for many residents is that they continue to be liable for ongoing charges after they leave a village. Residents who move elsewhere, such as an aged care facility, may be required to pay two lots of charges until their property is sold or, for leased properties, until another resident takes up the lease. If a resident dies, liability for ongoing charges falls upon the estate of the deceased.

SUBMISSIONS

Responses to the question as to whether former residents should be responsible for any ongoing charges once they have left the village were varied. On the whole, responses from residents supported the termination of ongoing charges after a certain time limit, ranging from 30 days to six months in the case of leased units.

Some respondents suggested that operators should be required to buy back units from residents. Others felt that in the case of ongoing village costs, it is fair to the remaining residents that these charges continue to be levied until the unit is sold, otherwise the burden falls upon the remaining residents to meet those costs.

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.

Many participants believe that requiring former residents to continue to pay ongoing charges after exiting a village serves as a disincentive for operators to find replacement residents immediately.

One respondent submitted that if a departing resident is selling a unit, then after a period of time, for example six weeks, there should only be a nominal charge, until the unit is sold.

Some respondents saw merit in the South Australian approach and suggested that a cap be introduced for ongoing charges payable by former residents, and that these be deducted from the refund entitlements with no interest payable. This would reduce the financial burden on outgoing residents which might otherwise impact on their ability to move to other accommodation.

A significant proportion of residents supported the NSW recommendation that liability for lease holders should continue for a maximum period of 30 days (now amended to six weeks) as this would provide an incentive for the operator to find a new occupant quickly.

A number of submissions agreed that in the case of the death of a resident, the operator should pay any ongoing charges and recoup these from the sale proceeds or refund entitlements. Other respondents believed that charges should cease altogether on the death of a resident.

Industry groups unanimously supported the status quo and stated that any changes may result in higher contributions being required from village residents. 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.

Irrespective of the state of occupancy, all units incur ongoing overheads by way of operating costs which most retirement village business models rely on residents paying. Industry claims that for this reason it is necessary to continue to charge former residents to ensure a sufficient income level for the village. Some operators, however, take into account potential vacancies when determining ongoing charges from year to year.

Industry also advised that in many instances residents in lease or licence village schemes are entitled to any growth in capital value of the unit at re-sale in the same manner as a title-holding resident. Industry claimed that these residents enjoy the benefits of this form of occupancy and for this reason should be responsible for associated costs, as are title-holders, until a replacement resident is found.

In the final round of consultation, many industry respondents objected strongly to the following proposal contained in the first draft report:

That if a replacement resident is not found within 90 days, the former resident and the operator must then pay ongoing charges in the same proportion as they are entitled to share in any increase in the market value of a residence, as provided for in the residence contract.

Industry respondents claimed that this recommendation would have a detrimental impact on the not-for-profit sector with an inevitable long term consequence being that not-for-profit villages would have to increase their entry price to compensate, thus reducing the supply of affordable accommodation for seniors.

Southern Cross Care contended that this recommendation would compel the operator to impose an additional levy on remaining residents given that contracts typically stipulate that these charges are payable from the service fees. This group further stated that village budgets are calculated on the basis of consecutive agreements with no effective gap in the billing of service fees when one resident leaves and another moves in.

FINDINGS AND RECOMMENDATIONS

The Department recognises that operators are liable for a range of fixed costs which are payable whether or not all units are occupied. Removing outgoing residents' liability for ongoing charges upon their departure from a village could potentially result in unfairly increased costs for the administering body or the remaining residents.

The Department also recognises that in many village schemes residents are entitled to receive all or part of any increase in the market value of their residence which may be realised when their residence is successfully marketed to the replacement resident.

At the same time, the review finds that the practice of continuing to charge residents who are lease or licence holders for an extended period after they have died or moved out is unfair and can act as a disincentive to on-lease the unit. People who have left a retirement village do not 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.

Other State's legislation imposes limits as to how long a resident is to pay ongoing charges. The retirement village industries in these States appear to be able to incorporate these legislative requirements into their business model.

The Department therefore recommends that the legislation be amended to provide that outgoing non-owner residents must only pay ongoing charges for a prescribed period from the time that they deliver up vacant possession of the premises. The prescribed period that is proposed is a maximum of 6 months. A maximum of 6 months is considered a reasonable timeframe as it allows operators the opportunity to find a new resident or alternatively, take into account any vacancies when forward planning. Beyond this 6-month time limit, the operator must assume responsibility for ongoing charges and may not attempt to recover these costs by increasing the recurrent charges payable by other residents.

It is expected that outgoing owner residents would continue to be liable for ongoing charges until their property is sold. Increased involvement in the sale of their property, as proposed in the previous chapter, will go some way to ensuring that their property is sold in an expeditious manner, and potentially limit the timeframe in which ongoing charges are payable.

It is intended that, if implemented, the above recommendations will be applied prospectively. This means that non-owner residents who enter contracts after the enactment of new legislation would not pay ongoing charges beyond the prescribed period from the time that they leave the premises thus enabling the lease to be on sold.

To address concerns regarding former non-owner residents having to pay two sets of ongoing charges, one for retirement village and the other for aged care, the Department further recommends that the legislation be amended to provide that any ongoing charges payable by an outgoing non-owner resident may be deducted, on application, from refund entitlements with interest payable at a prescribed rate. It is intended that if implemented, this recommendation also apply to existing non-owner contracts after the enactment of new legislation.

In summary, the Department recommends:

- 73. That the legislation provide that outgoing non-owner residents only pay ongoing charges for a prescribed period from the time that the resident, or the executor or administrator of the resident's estate, delivers up vacant possession of the premises, thus enabling the lease to be on-sold. Beyond this point, the operator must assume responsibility for these charges.**
- 74. That the legislation provide that the operator must not attempt to recover these costs by increasing the recurrent charges payable by other residents.**
- 75. That the legislation provide that any ongoing charges payable by an outgoing non-owner resident must on application, be deducted from refund entitlements with interest payable at a prescribed rate, and that this provision also apply to contracts entered into prior to the introduction of this provision.**

27. REFURBISHMENT COSTS

The review asked whether the current arrangements regarding refurbishment when a resident permanently vacates a residential unit adequately balance the needs of residents and industry.

CURRENT PROVISIONS ¹²³

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

Some of the concerns identified in the review include:

- the need for refurbishment;
- lack of clarity in village contract terms and each party's responsibilities with regard to refurbishment; and
- the cost of refurbishment.

SUBMISSIONS

The need for refurbishment

Industry considers that it is in the interests of residents to have premises refurbished when they are permanently vacated so as to present them for re-sale 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.

Submissions by residents referred to disputes that arise over whether a particular residence needs refurbishment prior to re-sale. Attendees at the review's public meetings cited examples of residents who had lived in a unit for a relatively short period of time yet were still liable for the total cost of substantial refurbishments. Some respondents submitted that, where refurbishment is a condition of the residence contract, it must be carried out even though the residence is in perfectly good condition.

¹²³ Clause 5.8 of the Code (Repair and refurbishment of residential premises).

Unclear contract terms and responsibilities

Some residents are concerned that their contracts contain unclear financial terms which make it difficult to:

- distinguish how much they have to pay towards the ongoing and long term maintenance of the village and common property; and
- ascertain their responsibilities in contributing to the refurbishment of their unit when leaving the village.

Respondents to the review also spoke of a lack of clarity in regard to what funds are available for refurbishment, and the responsibilities of the respective parties to the contract.

Several submissions suggested that where refurbishment is required, operators should be obliged to provide a written notice of any claim for work to be carried out, as well as a fully itemised quote¹²⁴ for the cost of work before payment is demanded.

Other submissions suggested that greater clarity is needed in regard to refurbishment responsibilities, particularly in cases of deceased former residents where their representatives are not conversant with the arrangements pertaining to the refurbishment and re-sale of units.

It was also suggested that, in order to settle the question as to the extent and value of refurbishment work required, an independent assessor should inspect recently vacated units.

The cost of refurbishment

Another issue that was raised at the public meetings and in written submissions relates to the cost of unit refurbishment. 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 quite clear that at such times residents are highly vulnerable and are in an unequal bargaining position. It is often the case that residents require funds as quickly as possible to enable them to move to more appropriate care facilities.

Another submission claimed that there have been cases where the outgoing resident pays for the proposed refurbishment, but after vacating the premises, no refurbishment is actually carried out. There are no invoices and village owners are not penalised for taking money in this situation. This submission called for legislation to allow departing residents some redress where such practices occur.

¹²⁴ There are no provisions in the current Code for residents to be given a fully itemised quote. Clauses 5.8 (a) (ii) and (b) (ii) require that before any repair or refurbishment work is commenced, the administering body must give a resident permanently vacating the residential premises an **estimate** of the work, and on completing the work the administering body must give the resident a **fully itemised account**.

FINDINGS AND RECOMMENDATIONS

It appears that there may be some confusion on the part of residents about the meaning of the term 'refurbishment' and how it must be applied. Some residents appear to be under the impression that maintenance costs that are paid throughout their residency go towards the maintenance of their unit and question the need to pay for refurbishment of their unit upon permanently leaving it.

The Department reviewed clauses 4.7 and 5.8 of the Code in relation to residents' contributions towards on-going operating costs and refurbishment costs upon permanently vacating a unit. To address the issue of payments that residents must make when living in a village and when permanently vacating their unit, the Department recommends that the legislation be amended to require that contracts clearly distinguish between residents' contributions towards the costs of refurbishment following the resident permanently vacating a unit and the cost of on-going maintenance during occupancy, and clearly specify the obligations of each party in relation to the costs of refurbishment.

Although residents have a right of appeal to the SAT if they consider refurbishment work to be unwarranted or the cost excessive, the Department recognises that some issues may be resolved, to the satisfaction of both parties, through the use of other dispute resolution processes without the need for a SAT order.

The Department therefore will endeavour, wherever possible or practicable, to conciliate in matters where residents, or their personal representatives, believe that:

- the proposed refurbishment works are not warranted;
- the estimated cost of the proposed works is excessive; and/or
- the estimated time to complete the work is excessive.

The Department finds that although the current legislation outlines the administering body's obligations in relation to the refurbishment of residential premises, it appears that some operators are not complying with the current Code. In such cases the Department will investigate complaints that an administering body:

has not given the resident or the resident's personal representative an estimated cost of the work before the commencement of any repair or refurbishment work;

has accepted or demanded payment for refurbishment prior to the work being completed;

has not given the resident or the resident's personal representative a fully itemised account for the final cost of the work; and

has charged departed residents for work that was never done.

Further issues regarding repair, replacement, maintenance and renovations in relation to capital maintenance and replacement, reserve funds and on-going operating costs are discussed in chapter 19.

In summary, the Department recommends:

- 76. That the legislation be amended to require that contracts clearly distinguish between residents' contributions towards the costs of refurbishment following the resident permanently vacating a unit and the cost of on-going maintenance during occupancy, and clearly specify the obligations of each party in relation to the costs of refurbishment.**
- 77. That the Department may conciliate in matters where:**
 - **residents, or their personal representative, believe that the proposed refurbishment works are not warranted; and/or**
 - **the estimated cost of the proposed works is excessive; and/or**
 - **the estimated time to complete the works is excessive.**

28. EXIT FEES

The review examined the costs payable upon departure from a village, how exit fees are calculated and disclosure requirements.

CURRENT PROVISIONS

The current legislation does not regulate the nature of fees charged upon departure from a retirement village.

Residence contracts must outline whether the resident is entitled to a refund of the whole or a part of the premium on termination of the residence contract, including:

- the method of calculation used to determine the refund and when it is to be paid;
- any fees or commissions charged by the administering body and the method or calculation used to determine those fees or commissions; and
- any other costs or charges that may be deducted from the refund entitlement of the resident.¹²⁵

The Regulations require 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.¹²⁶

IDENTIFIED ISSUES

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 fees', 'deferred facilities fees,' 'deferred management fees', or 'deferred payments'.

Exit fees may be determined and calculated in a variety of ways including a percentage per annum of the relevant ingoing contribution or purchase price for a specified maximum number of years of occupancy or as a percentage of the sale price upon departure.

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 five per cent refurbishment and improvement fund contribution).

¹²⁵ Clause 4.6 of the Code
¹²⁶ Schedule 1, Form 1 of the Regulations

Issues of concern to residents that were identified throughout the review include:

- disclosure of costs;
- the costs payable upon departure from a village;
- how exit fees are calculated;
- alternatives to charging fees upon departure from a village;
- terminology relating to exit fees; and
- the purposes for which exit fees are used.

SUBMISSIONS

Many resident respondents asserted that the true costs of entering a retirement village should be disclosed up front. A number of respondents pointed out that disclosure of exit fees in a contract is already required and some suggested that a detailed explanation of the costs of living in, and leaving, a retirement village needs to be provided to incoming residents well before they enter into a contract to reside.

Comments provided at the public meetings, as well as in a number of written submissions, revealed some concerns as to the level of 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 could be difficult for residents to re-establish themselves in other housing or alternatively in an aged-care facility. One respondent suggested that there should be a cap on exit fees and the rate at which exit fees may be increased should be regulated.

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.

It was also pointed out that exit fees are 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.

An example provided by WARCRA illustrated that when a resident pays an exit fee (referred to as the 'deferred facilities fee' in the WARCRA submission) of 25 per cent of the sale price, GST equal to 10 per cent of the deferred facilities fee, and a refurbishment fee equal to 5 per cent of the sale price, the resident, upon leaving a retirement village, may end up with less than the initial amount they paid 10 years before. This calculation was disputed by the RVA and other industry groups who alleged that due to the substantial increases in the property market in the last few years, residents would realise a far better return on their investment than in the example provided by WARCRA. These submissions reflect the fact that the vagaries of the real estate market and the broader economy can have a significant impact on the refund entitlements of residents.

Another issue raised in the written submissions is the way in which refund entitlements are calculated. In general, 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.

The charging of all fees up front was not supported as residents generally indicated they would find the initial outlay of funds too great. If current arrangements were to be restructured, village operators may replace exit fees with higher entry and ongoing fees to maintain their profit levels. Exit fees are charged at the end of the residency for a variety of reasons. According to industry, deferring these charges:

- lowers the cost of entry for residents;
- is fair to residents who only stay for a short period of time as the fee is determined by length of stay;
- 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.

Some residents claim that they do not understand the terminology used for various components of the exit fees. The EISC Report recommended that the fees payable by residents departing a retirement village must be explicitly defined and clearly communicated in the residency contracts.¹²⁷

FINDINGS AND RECOMMENDATIONS

There are already clear requirements in the Code as to the disclosure of exit fees payable by residents upon departure from a village. The Department believes that resident confusion around the true costs of exit fees is an area that needs to be addressed through a better advice and education service than is currently available to residents and prospective residents. It is envisaged that regular education forums for residents and prospective residents could be provided by a cooperative service coordinated by residents associations and involving contributions from industry associations and government and non-government organisations.

It is unlikely that there would be widespread industry support for a cap to be placed on exit fees and for rates of increase to be regulated as the costs of operating a retirement village and the size of company profits are factored into exit fee calculations.

It is therefore important for prospective residents to be aware from the outset as to the likely costs of leaving the village and the amount of the final return that they can expect after residing in the village for 1, 2, 5 and 10 years. This information to residents is currently required by regulation¹²⁸.

¹²⁷ EISC Report Recommendation 25 (p 197).

¹²⁸ Schedule 1, Form 1 of the Regulations

On the issue of how exit fees are calculated, the Department found that paying a pro rata amount would be fairer to both incoming and out-going residents than requiring residents to pay exit fees based on a full year. The requirement to pay a pro rata amount would be retrospective in that it would apply to existing and new contracts.

In summary, the Department recommends:

- 78. That, in relation to exit costs, the legislation be amended to require that a daily pro rata calculation be applied to any part of a 12 month period to avoid the outgoing resident and ingoing resident being charged for the same period; and that this provision apply to existing and new contracts.**

29. ESTATE MATTERS

The review examined whether owner-residents should be permitted to bequeath right to reside in freehold property, under certain conditions, for example, if the beneficiary is over 55 years of age.

CURRENT PROVISIONS

The existing legislation is silent on 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 with the remainder of the funds being distributed to beneficiaries. 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

One of the issues identified with allowing the right of residence of heirs of freehold property is that a unit may remain unoccupied for a number of years until such time as a beneficiary is of eligible age to enter the village.

A further issue is that recurrent charges and/or strata levies must continue to be paid. These charges are factored into village operating budgets and beneficiaries would be required to pay these charges even if they were not residing in the village.

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 heirs were automatically granted the right to reside, operators would stand to not 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 the right of residence by heirs would impact considerably upon village income.

SUBMISSIONS

People at meetings and in written submissions suggested that there should be a provision in the legislation to allow for the right of residence by heirs. Owner-residents generally supported the proposal that they should be able to bequeath the right of residence in their unit to their children or a relative so that that the beneficiary can become a resident in the village when of an eligible age. It should be noted that as people are living longer, the likelihood of a beneficiary being over 55 at the time of a resident's death is increasing.

Submissions from residents generally agreed to only allowing right of residence where the beneficiary is eligible for admission to the village (ie. over 55 years of age) at the time of the resident's death and takes up residence within 3 months.

Industry groups unanimously opposed the proposal. The RVA stated that retirement village schemes, regardless of the type of tenure, operate on the premise that residences, when no longer required by the occupying resident, are "re-sold" under the scheme to a replacement resident. The financial underpinnings of the scheme rely upon the successful re-sale of residences and the payment of the deferred fees and reserve fund contributions in a time frame that is based on the resident's anticipated period of occupancy.

The RVA stated that the financial model for retirement villages depends upon an anticipated "re-sale" cycle. The model depends on the residence being offered and available only for the remaining lifetime of the resident regardless of freehold ownership. If bequests of a freehold residence to beneficiaries are permitted, the re-sale of the residence would not occur and the property could be tied up with successive occupancies by subsequent bequests for a lengthy period. In addition, a person to whom the right to reside in a village residence is bequeathed may, due to health conditions or other reasons, not be a person who is suitable to be a village resident.

The RVA submitted that it is quite common for village schemes to allow a relative or other person to co-habit with a resident on the basis that he or she is the resident's 'live-in carer'. This assists a resident to continue residing in the residence. When the resident leaves or dies, the live-in carer is required to vacate immediately.

FINDINGS AND RECOMMENDATIONS

The Department recognises that industry depends on the revenue from exit fees on the sale of a unit. The review canvassed the option that industry could restructure its operating costs to enable beneficiaries to inherit the right to reside in freehold property within a retirement village under certain circumstances. This option was not supported by industry groups and the current arrangements were vigorously defended. The Department believes that the status quo should remain in relation to estate matters.

In summary, the Department recommends:

- 79. That the status quo remain in relation to estate matters.**

30. TITLE MATTERS

The review examined a number of matters relating to title arrangements in retirement villages, which can impact on the rights and responsibilities of residents. This section does not relate to lease or licence occupancy agreements, as there is no transfer of title involved in these agreements.

CURRENT PROVISIONS ¹²⁹

A title is a certificate that describes a piece of land, verifies 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.

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 used in 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 rights to use common property in which all owners may or may not also have an interest, for example driveways, verges and gardens.

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

IDENTIFIED ISSUES

Levels of consent in purple title arrangements

The requirement for unanimous consent in decisions about the use of land subject to purple title arrangements has been identified as a significant problem in terms of obtaining the consent of all the owners to proposed changes within a village.

Currently purple title arrangements require unanimous consent. By contrast, in the case of strata titled properties, the *Strata Titles Act 1985* (Strata Titles Act) 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.

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.

¹²⁹ Division 2 and clause 5.7 of the Code; Schedule 1 Form 1 of the Regulations.

Issues related to strata title

Concerns related to strata title arrangement have arisen since the commencement of the review. Retirement village residents who hold a strata title 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.

In addition, disputes can arise in a village if there are mixed forms of ownership and occupancy agreements within the same village, for example between residents who own strata units and residents who are lease-for-life or licence holders. One particular example that was brought to the review's attention was a situation whereby there are two different types of tenure arrangement in the one village. The village in question consists of approximately 25 per cent strata title owner residents and 75 per cent leaseholder residents. Submissions from the non-owner residents claimed that decisions made by owners through their strata council affect the non-owner residents. It is further claimed that these decisions are not always in keeping with the wishes of the majority of residents. It is important to bear in mind that parts of villages that are not owned by residents are usually owned by the operator or developer of the village. Decisions by strata councils generally require, at very least, a majority vote to effect any changes to the operation of a strata scheme. Changes to by-laws require unanimous resolution or resolution without dissent.

SUBMISSIONS

Purple titles

Early in the review, the Department was made aware of a case in which a village operator of a purple titled village was proposing the conversion of part of the retirement village to a low-care aged facility. The proposal was supported by a majority of the residents, but not unanimously, which meant that the proposed conversion could not proceed. Landgate advised that a possible future solution would be to require that all villages be developed on strata titles.

The Issues Paper suggested two other potential remedies to this situation. These were:

- amend the legislation to allow for a majority consensus of purple title holders as opposed to unanimous consensus where a resolution is required; and
- amend the legislation to provide that the State Administrative Tribunal can override lone, or a clear minority of, dissenting title holders in order to pass a resolution where unanimous consent is required.

A significant proportion of submissions indicated that there was support for retaining existing purple titles, but allowing a majority consensus, as opposed to unanimous consensus, in purple title arrangements, similar to that provided by strata title legislation.

A significant number of respondents felt that a 75 per cent majority would be reasonable and suggested that a 100 per cent agreement is impossible in any situation where a vote of residents is required.

The proposal for residents of purple title villages to be able to take contested issues to the SAT for adjudication was also well supported. It was felt that an independent assessment of the matter in contention would ensure that the outcome would be in the general interests of the residents and that a majority group would not be able to stonewall a dissenting minority. The majority vote and the SAT adjudication process would also ensure that developers would not be able to use their power of veto to exercise control over the village.

The possibility that these proposals would change the rights of people who may have bought a purple title specifically so they would have the right of veto did not appear to be a major concern for respondents to the review. As discussed above, the proposals for a majority consensus and the provision for SAT to adjudicate were well supported, indicating that the change should apply to existing contracts in purple titled villages.

In the third round of consultations the Law Society advised that this recommendation would require significant amendment to the *Property Law Act 1969* and the *Transfer of Land Act 1893*. The Law Society stated that the recommendation “*attempts to circumvent the requirement in property law that the grant of rights in respect of real property must be by way of a document executed as a deed by the owner of the property, or of the superior title to the property in the case of a sublease*”.

Strata title and retirement village laws

In relation to the problem of overlap between strata laws and retirement village laws within the same village, the Issues Paper proposed the creation of a completely separate form of title specifically for retirement villages. The views of respondents were divided on these issues. Some supported the proposal that retirement village titles should be restricted to strata titles, some supported the creation of a new retirement village title, while others supported retaining the status quo.

FINDINGS AND RECOMMENDATIONS

The Department found that there was substantial support for the proposal to allow for a 75 per cent majority vote of residents as co-owners, as opposed to unanimous agreement, for important resolutions or decisions regarding land use, in purple titled retirement villages. Further consultations will need to be conducted with Landgate with regard to any consequential amendments which will be required to the Property Law Act 1969 and the Transfer of Land Act 1893 as advised by the Law Society to effect the necessary change to voting on major proposals in purple titled villages.

The Department found that the SAT is willing to expand its jurisdiction in order to adjudicate cases, where a majority agreement of at least 75 per cent of the residents has been obtained.

The Department therefore recommends that in the case of resolutions or decisions which impact on major decisions such as those of land use, the relevant legislation be amended to permit necessary resolutions or decisions to be made by at least 75 per cent of co-owners in a retirement village established on a purple title, and provide for the State Administrative Tribunal (SAT) to have jurisdiction to adjudicate disagreements arising from such a resolution or decision, upon application by any co-owner and that these provisions apply to existing or future purple title arrangements. If a majority resolution or decision is approved and upheld by the SAT, it would be deemed for all purposes in law to have been validly approved by all co-owners as a unanimous resolution or decision.

Given that this amendment may potentially require the removal or partial removal of any memorial over land, depending on what action in relation to the land is being proposed, it is expected that the SAT would make every effort to ensure that any resolution or decision is comprehensively considered and results in a fair outcome.

The problems associated with the interface between the *Retirement Villages Act* and the *Strata Titles Act* are complex. The Department finds that creating a new type of title specific to retirement villages would be an involved process and would also be subject to approval from Landgate, the state agency responsible for registering land ownership and issuing certificates of title. It is considered that this would be an overly burdensome regulatory measure and accordingly, the Department has sought to identify alternative solutions to the problems associated with various types of title and tenure.

The concerns relating to the co-existence of owner residents and non-owner residents that were brought to the attention of the Department have been duly considered. While it is not usual for retirement villages to contain a mix of owner and non-owner residents, there is the potential for this sort of arrangement to be problematic. This is a matter which the Department considers should be resolved by management through dispute resolution procedures, as outlined in Chapter 23 (Dispute Resolution) and as such does not require a legislative solution. A possible practical solution could be that meetings of the strata title council and residents' committee could be combined, provided that only strata title holders could vote on strata council issues, whereas on general issues affecting the whole village, all the residents could vote.

In summary, the Department recommends:

- 80. That, in the case of resolutions or decisions which impact upon land use, the relevant legislation be amended to permit necessary resolutions or decisions to be made by at least 75 per cent of co-owners in a retirement village established on a purple title, and provide for the State Administrative Tribunal to have jurisdiction to adjudicate disagreements arising from such a resolution or decision, upon application by any co-owner, and that the provisions apply to existing or future purple title arrangements.**

31. STRUCTURE OF THE LEGISLATION

The review considered the type of regulatory framework which would best serve the interests of retirement village residents, prospective residents and the retirement village industry.

CURRENT PROVISIONS

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

- *Retirement Villages Act 1992*;
- *Retirement Villages Regulations 1992*; and
- *Fair Trading (Retirement Villages Code) Regulations 2009* made under the Fair Trading Act 1987.

The aim of the legislation is to ensure the maintenance of fair trading practices and consumer protection without obstructing the efficient, economic and competitive operation of the industry.

IDENTIFIED ISSUES

The Issues Paper invited comments in regard to the best regulatory option to adopt in order to address concerns identified since the inception of the legislation. The options were:

- Option 1: retain the current system (separate Act and Code);
- Option 2: consolidate the Act and Code;
- Option 3: industry self regulation; and
- Option 4: create a Code under the *Retirement Villages Act 1992* .

SUBMISSIONS

The overwhelming majority of submissions expressed support for Option 4, in relation to the creation of a Code under the Retirement Villages Act 1992. Many submissions suggested that this would provide the best regulatory structure for the protection of residents of retirement villages. A few submissions supported this option on the basis that adopting such a regulatory framework would create much needed flexibility in terms of amending the legislation.

A few submissions expressed support for Option 1 which supports retaining the current system, on the basis that it appears to provide the necessary balance for all involved.

The second option, which suggests consolidating the Act and Code, attracted very little support because it was claimed that restructuring the Act and Code in this way would lead to a loss of flexibility. The process involved in amending the Act can be time consuming and complicated, and may delay responses to immediate issues that may arise in the future.

There was a clear lack of support for the third option which deals with industry self regulation. Under such a system, the primary responsibility for the conduct of the industry would be with the industry associations.

Many submissions suggested that this type of regulatory structure would not be in the interests of residents. The perception was that it would create a greater power imbalance between the residents of retirement villages and the administering bodies.

The EISC inquiry suggested that creating a new Code under the Act would allow for a one-stage enforcement process for major breaches with a more effective range of penalties and remedies being provided for in the Act.

FINDINGS AND RECOMMENDATIONS

The current structure presents some disadvantages. The Fair Trading Act process to enforce codes of practice made under this act are cumbersome. For a breach of the Code, the Commissioner for Consumer Protection must first seek an undertaking in regard to the breach. A party in contravention of the Code must undertake to discontinue certain conduct, comply with the Code in the future or take some action to rectify the consequences of the contravention. If the undertaking is not observed, the Commissioner can apply to the SAT for an order which would render the undertaking enforceable. If the order is not complied with, a penalty may be applied. The maximum penalty for such an offence is \$10,000. It is often the case that the penalty imposed is considerably less than this amount, especially in the case of a first-time offence. It is suggested that this approach is time consuming, not cost-effective, and further, is not an effective deterrent.

The Department supports adopting Option 4 as the most appropriate change to the regulatory framework. Currently there is a 'split arrangement' of the two pieces of retirement village legislation, the Retirement Villages Act and the Code. It is recommended that the legislation be restructured to comprise the Act, the Regulations and a Code made under the Retirement Villages Act 1992 so that all components regulating retirement villages are contained within a single legislative package.

The Code would be a regulation under the Retirement Villages Act 1992 and not the Fair Trading Act 1987 as is currently the case. It would also mean that structure of retirement village legislation in Western Australia would be consistent with other states, such as Victoria, Queensland and New South Wales. Another advantage would be that the Act and its supporting subsidiary legislation (the Code and Regulations) would be more easily understood as an integrated package.

In summary, it is recommended:

- 81. That the legislation be restructured to comprise the Act, the Regulations and a Code made under the Retirement Villages Act 1992 so that all components regulating retirement villages are contained within a single legislative package.**

32. APPLICATION OF THE LEGISLATION

The review examined whether any changes to the retirement village legislation should apply retrospectively to existing contracts.

CURRENT PROVISIONS¹³⁰

The Act applies to retirement villages established before or after the commencement of this Act.

The Act, however, does not apply to contracts, agreements or arrangements made or entered into before the commencement of this Act, unless that contract, agreement or arrangement is silent on a particular matter, in which case the provisions of the Act would apply.

The 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, unless the contract, agreement or arrangement is silent on a matter which is dealt with by Division 2 of the Code.

SUBMISSIONS

It was evident from some of the submissions that there is some confusion as to what retrospective application of amendments would mean. Some submissions appeared to be under the impression that existing residents and new residents would be governed by two different pieces of legislation. This is not the case. It is intended that, where possible, any amendments that are made to the legislation will apply to all residents.

Where residents have entered into a contract under the existing Act and the Act is subsequently amended then, it is intended that, unless otherwise specified, the provisions of their particular contract will still stand unaffected. Where a resident's contract is silent on a particular matter, the revised legislation would apply.

Amongst the submissions that supported retrospective application of amendments to the legislation, it was strongly asserted that it must be made clear to residents whether the new legislation applies to their contract. Most of the submissions supported such a change on the basis that changes to the legislation should apply to all contracts so as to be fair to all residents. One residents' committee suggested that it would be an untenable situation if residents within the one village held different deeds. An individual respondent claimed that "it is absolutely essential that the revised Act be made retrospective in its entirety in order to bring everyone into line."

¹³⁰ Section 5 and 6 (1) and (2) of the Act; Clause 1.2 of the Code

Amongst the submissions that did not support retrospective application, many felt that it would be unfair and unacceptable on the part of Government to apply the legislation retrospectively. One respondent claimed that it would be patently unfair that legislation should apply retrospectively to existing agreements. Another stated that, as a matter of principle, contracts or agreements should not be affected by amendments to the legislation. Some submissions recognised the considerable administrative difficulties associated with amending contracts and also pointed out that existing residents may be adversely affected by changes to their contract.

The RAAF Association submitted that not all changes to the legislation should apply retrospectively. The Association gave the example of entry and exit financial arrangements, suggesting that original arrangements should continue to be honoured.

The AIR submitted that the process of amending existing contracts would be time consuming and costly. COTA stated that they do not support retrospectivity in principle. However, if contract conditions are unfair, avenues of redress should be available. ACSWA indicated that it would be strongly opposed to retrospectivity in relation to contracts stating that it would be an *“untenable situation for Government to override commercial contracts between people.”*

The Becton Property Group was also opposed to retrospective application stating that it is not acceptable for the Government to retrospectively change the law in a manner that may have an adverse impact on either or both the contracting parties. It further stated that both the proprietor and the consumer rely on legal certainty when entering their contracts. The retrospective application of new legal rules to existing contracts, which have adverse consequences on either or both parties, can only be justified in very extreme circumstances.

FINDINGS AND RECOMMENDATIONS

In keeping with general statutory principles, namely the strong presumption against legislation having a retrospective effect, it is recommended that, in so far as possible, any amendments to the legislation not apply to vary existing contracts, arrangements or agreements.

Retrospective legislation is considered to be:

*“...contrary to the general principle that legislation by which the conduct of mankind is to be regulated, ought not to change the character of past transactions carried upon the faith of the existing law.”*¹³¹

As a matter of principle, governments do not ordinarily favour making laws that have a retrospective effect unless there are compelling reasons to do so. This ensures that those who have entered into agreements based on their understanding of the law at a particular point in time are not adversely affected.

¹³¹ Bennion, FAR 1997, Statutory Interpretation 3rd ed, Butterworths, p 235

Further, there can be considerable administrative difficulties associated with making legislation retrospective. For example, existing contracts would need to be reviewed and revised to be made consistent with any new legislative provisions. Parties to contracts would potentially be required to enter into new contracts, an undertaking that could cause considerable confusion. Many elderly residents who have submitted that they want to 'retire in peace' may not wish revisit the contracting process, or incur the costs of having to obtain independent advice on their contract.

The fact that the legislation is not made retrospective does not necessarily mean that existing residents will not have access to any increased protections arising as a result of amendments to the Act. It does mean that, in the main, the provisions of their particular contract would stand unaffected despite changes to the legislation (provided that these provisions complied with the legislation at the time their contract was entered into).

Although many of the recommendations contained in this report, if taken up, will not affect existing contracts, there may be some instances where it will be desirable for existing contracts to be amended to comply with the new legislation to maintain equity in the village and practical management of the village. Other than financial recommendations concerning the establishment of mandatory reserve funds, retrospective amendments will be largely confined to non-financial matters. These matters will include practical matters such as changes to residents' voting rights and power of attorney.

On the whole, if a certain legislative amendment is to apply retrospectively, this will be clearly indicated within the legislation.

Any legislative amendments that do not directly impact on resident's contracts will apply to all residents. Where a resident's contract is silent on a particular matter, the new legislation would apply.

In summary, it is recommended:

- 82. That, unless otherwise specified, amendments to the legislation not be retrospective in their application to existing contracts.**

33. LIMITATION PERIOD

The review examined the timeframe in which proceedings for an offence against the Act can be brought.

CURRENT PROVISIONS

The Act currently provides that proceedings for an offence against the Act may be commenced within two years of the day on which the offence is alleged to have been committed.¹³² The *Fair Trading Act 1987* provides that proceedings for an offence against that Act may be commenced within 3 years after the alleged commission of the offence.

Legislation in other States

The NSW *Retirement Villages Act* provides for a 3-year limitation period for contravention of that Act. Under the Queensland *Retirement Villages Act*, a proceeding for an offence under the Act must be commenced within one year of the offence being committed or six months after the offence comes to the complainant's knowledge. In the latter instance, proceedings must still be commenced within two years of the offence being committed. Neither Victoria's nor South Australia's *Retirement Villages Act* specifically provide for a limitation period.

IDENTIFIED ISSUES

The review considered whether the timeframe for bringing proceedings for offences against the Act should be extended to 3 years. This was considered in light of the fact that the *Fair Trading Act* (to be replaced by the *Australian Consumer Law* on 1 January 2011) provides for a limitation period of 3 years.

FINDINGS AND RECOMMENDATIONS

The Department considers that the current limitation period of two years under the *Retirement Villages Act* is too short and is inconsistent with other relevant legislation, such as the *Australian Consumer Law*. The Department recommends that the *Retirement Villages Act 1992* limitation period mirror the *Australian Consumer Law* by providing for a 3-year limitation period for bringing proceedings for an offence.

In summary, it is recommended:

- 83. That the timeframe for bringing proceedings for an offence against the *Retirement Villages Act* should be extended to three years to accord with the *Australian Consumer Law*.**

¹³² Section 80 of the Act

34. DEFINITIONAL MATTERS

The review examined whether the term 'retirement village' needs to be expanded to encompass all types of retirement village arrangements and whether there should be any restrictions on the use of term 'retirement village'. The review also considered whether there were any other definitions within the Act that could be better expressed.

CURRENT PROVISIONS ¹³³

In the Act, a 'retirement village' is defined 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:

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 license;*
- (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 the 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.*

The term 'premium' is defined as:

a payment (including a gift) 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 (including any such payment made for the purchase of residential premises in a retirement village or for the purchase, issue or assignment of shares conferring a right to occupy any such residential premises) but does not include —

- (a) any such payment excluded by regulation from the ambit of this definition; or*
- (b) recurrent charges;*

¹³³ Part 1, section 3 of the Act.

The term 'administering body' is defined as:

the person by whom, or on whose behalf, the retirement village is administered and includes a person (other than a resident who is the owner of land within the retirement village).

IDENTIFIED ISSUES

Those terms in the Act that were identified as confusing or unclear include:

- retirement village;
- retirement village scheme;
- administering body;
- premium;
- residence contract; and
- owner

The review examined whether the term 'retirement village' needs to be expanded to encompass all types of retirement village arrangements. This proposal was developed in response to the confusion that exists where residential complexes are being promoted and used as a retirement village without necessarily being a retirement village under the Act. Expanding the definition would mean that the various types of arrangements such as lifestyle villages and over 55's residential complexes would be captured by the Act.

The option of restricting the use of the term 'retirement village' to bona fide retirement villages was also raised in the review. The introduction of such a measure would mean that only those retirement villages that fall within the definition of retirement village as outlined in the Act would be able to call themselves a retirement village.

The definitional issues surrounding the terms 'premium', 'administering body', 'residence contract' and 'owner' were raised in submissions to the review and are further discussed below.

SUBMISSIONS

Retirement village

A number of submissions suggested that 'retirement village' be better defined so as to allow people to readily identify those villages that are covered by the Act.

In an early submission to the review, the RVA proposed the following definition for 'retirement village':

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

In a later submission, the RVA supported the expansion of the definition of the term 'retirement village', however not to the extent that it would capture other types of seniors housing such as lifestyle villages.

The RVA suggested that the definition be amended to include not only "a complex of residential premises" but also "several complexes of residences closely located to one another, the residents of which share the same communal facilities."

Some villages are built as clusters of residences that are closely located to one another, but not necessarily adjoining, with a shared village centre. One of the reasons that villages are being built in this manner is to overcome the need to find a large single site for development as a village. The purpose of the suggested amendment would be to cover not only those villages where the residences and communal facilities are adjoining but also those that may be nearby.

A significant number of respondents requested that the difference between a retirement village and a lifestyle village be clarified. One respondent suggested that the legislation should apply only to residents in bona fide retirement villages and that the present definition is adequate. The term lifestyle village does not appear in the Act and, as such, there is no need to define it. It is, however, defined within the *Residential Parks (Long-stay Tenants) Act 2006*.

The overwhelming majority of submissions supported a restriction on the term 'retirement village' to villages that are bona fide villages under the Act. Some submissions suggested that this would reduce confusion as to what constitutes a retirement village.

Retirement village scheme

A couple of respondents suggested that the current definition of retirement village scheme is not clear as it is difficult to establish whether a particular village falls within the definition of retirement village as appears in the Act. It was suggested that the definition could be re-worded to make it more readily understood.

Administering body

A small number of submissions claimed that the term 'administering body' needs to be better defined. Some residents maintained that it is unclear as to whom the definition refers to. Chapter 37 (Retirement villages established on Crown land) highlighted the fact that the use of the term 'owner' within the definition of administering body could be problematic in that lessees of land may have certain obligations in lieu of the owner of the land.

Payment of premiums

One of the recommendations of the EISC Report was that the Department examine existing legislation and regulations to clarify the definition of the term 'in trust' and, if necessary, seek legislative change to secure premiums on behalf of residents.

The current legislation states that:

a premium paid to the administering body shall be held in trust (in a bank account or invested as trust funds may be invested under Part III of the Trustees Act 1962) until -

- (a) the person by or on whose behalf the premium was paid enters into occupation of the residential premises: or*
- (b) it becomes apparent that that person will not enter into occupation of the residential premises.*

The RVA submitted that the definition of a 'premium' should be expanded to include the payment of consideration on a deferred basis to the administering body (for example payment of deferred amenities fees. The RVA further submitted that the definition should also exclude nominal sums.

Owner

The term 'owner' is discussed in detail in Chapter 37 (*Retirement villages established on Crown Land*).

FINDINGS AND RECOMMENDATIONS

It is recommended that the definition of the term 'retirement village' be amended to reflect the changed nature of retirement villages. The Department recognises that as new villages are developed, the current term may be too limited. For example, a retirement village may exist as more than one complex of residential premises that shares one set of communal facilities as opposed to 'a complex of residential premises'. It is important that the definition is flexible enough to capture future retirement village models.

The Department considers that it may be useful to give consideration to amending the definition of retirement village scheme to make it easier to identify whether a particular village can be considered to fall within the definition of retirement village scheme.

It is further recommended that only villages that are retirement villages for the purpose of the Act should be able to use the words 'retirement village' in their title. The impact of this would not be significant in that many villages, including bona fide retirement villages, are moving away from using 'retirement village' in their name. The reasons for this relate mainly to the marketing and promotion of villages as a 'lifestyle concept' as opposed to a place to retire and one which historically has had close associations with ageing and mortality. There should be no requirement for bona fide retirement villages to contain the words 'retirement village' in their title.

Although a number of submissions requested that 'lifestyle village' be defined in the Act, such villages do not necessarily come under the jurisdiction of the Retirement Villages Act and as such, there is no reason to define it in this Act.

It is anticipated that the proposed amendments to the *Residential Parks (Long-stay Tenants) Act 2006 and the Residential Tenancies Act 1987*¹³⁴ (refer Chapter 38 *Register of retirement villages*) as well as the establishment of the proposed seniors housing information service will serve to address much of the confusion around the various types of seniors' housing.

The Department recommends that the current definition of 'administering body' be amended to reflect the fact that lessees of land may have certain obligations to the owner of the land.

The Department agrees with the EISC Report recommendation that the Act be amended to better define premiums and also recommends that the definition be expanded to include the payment of consideration on a deferred basis to the administering body and to exclude nominal sums.

It is recommended that the Act be amended to ensure that any reference to a contract is expressly a residence contract which, by definition, covers any contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy residential premises in a retirement village and may take the form of a lease or licence.

In summary, the Department recommends:

- 84. That consideration be given to redefining the term 'retirement village' within the Act to reflect the changed nature of retirement village complexes.**
- 85. That consideration be given to redefining the term 'retirement village scheme' within the Act to enable the definition to be more readily understood.**
- 86. That a provision be introduced in the Act to the effect that only retirement villages to which the Act applies, may use the words 'retirement village' in their title.**
- 87. That the following terms be redefined in the legislation:**
 - administering body;
 - premium; and
 - any other terms identified in the legislative drafting process as requiring revision.
- 88. That the Act be amended to better define how payments of premiums are to be dealt with.**

¹³⁴ The proposed amendments to the *Residential Parks (Long-stay Tenants) Act 2006 and the Residential Tenancies Act 1987* as outlined in Chapter 37 (*Register of Retirement Villages*).

35. MONITORING AND COMPLIANCE

The review examined how compliance with retirement village legislation could be better monitored and enforced.

CURRENT PROVISIONS ¹³⁵

The Act sets out the functions of the Department 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 a relevant court or in the State Administrative Tribunal (SAT) if the dispute is one in which the SAT has jurisdiction. The SAT has a number of powers under the Act which were formerly vested in the Retirement Villages Disputes Tribunal.

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 SAT for a decision. A decision (or order) by the SAT is enforceable by law. An administering body that fails to comply with an order made by the SAT commits an offence that is punishable by a fine of up to \$10,000.

The Act enables the Commissioner to institute proceedings on behalf of a resident once the Commissioner is satisfied the resident may have a right to institute proceedings in respect of a breach of the Act. Also, the Commissioner may institute proceedings where the Commissioner considers it in the public interest to act on behalf of residents in such proceedings.

IDENTIFIED ISSUES

It appears that residents do not, in general, appear to be aware of the current powers of the Commissioner to institute or defend proceedings on behalf of residents, to order deeds of undertaking, or to take matters to the SAT on behalf of residents, if the matter is deemed to be in the public interest.

There was also a general perception expressed at a number of community consultation meetings, and in written submissions, that residents do not receive much protection from the government. The legislation and the Department were perceived by some as ‘toothless tigers’ and by others as ‘tigers that do not use their teeth’.

¹³⁵ Sections 8 and 9 and Part 4 (sections 42 –74) of the Act;
Schedule 1 of the Code;
Sections 44 and 46 of the *Fair Trading Act 1987*;

Some participants at the community meetings 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 the event of a dispute.

The Issues Paper proposed the following options for consideration:

- maintain the status quo;
- establish an independent information and advice service specifically for residents and prospective residents;
- establish an education programme 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 programme within the Department to monitor industry compliance with retirement villages legislation on a regular basis; and
- expand the enforcement powers of the Department and allocate additional resources to enable the agency to effectively exercise its investigation, compliance, mediation and prosecution functions.

SUBMISSIONS

The proposal for establishing an independent seniors information and advice service specifically for residents and prospective residents had overwhelming support and this issue is further dealt with in Chapter 16 (*Consumer Information and Advice*).

There was significant support for the proposal that the Department allocate additional resources to undertake more monitoring and compliance work. A small number of respondents were of the view that there needs to be an independent authority (other than the Department) that actively monitors compliance with the Act and the Code and has the power to order changes to deeds to ensure compliance with the Act and the Code.

There was also strong support for introducing a proactive compliance programme within the Department to monitor industry compliance with retirement villages legislation. This would involve a targeted programme whereby the Department's investigators would inspect retirement villages to assist operators to comply with the legislation. The proactive programme would be aimed at raising operators' awareness of their responsibilities under the legislation.

There was overwhelming support for the proposal that the enforcement powers of the Department be expanded and that additional resources be allocated to enable the agency to effectively exercise its investigation, compliance, and prosecution functions, particularly in support of seniors' interests. The expectation of residents generally is that the Department should have greater powers to impose fines and prosecute operators who do not observe the legislation.

The EISC Report

A number of the findings and recommendations of the EISC¹³⁶, which relate to monitoring and compliance issues, are relevant here. The EISC found that the Department's role currently combines three relatively incompatible functions in the one department; those of regulator, prosecutor and dispute resolution facilitator. The EISC recommended that:

- the government establish an independent statutory authority such as a Retirement Village Board to improve the regulation of the retirement village industry (Recommendation 29);
- the government establish a Retirement Village Board to perform the registration, education, training, monitoring and compliance as part of the four stage framework of retirement village building, development and monitoring (Recommendation 30); and
- DOCEP (now the Department of Commerce) retain its investigatory and prosecutorial role in relation to breaches of retirement village legislation (Recommendation 31).

FINDINGS AND RECOMMENDATIONS

Since the commencement of this review, the Department has established a comprehensive pro-active compliance programme and allocated additional resources to its Building and Tenancy Branch to monitor retirement villages on an ongoing basis to ensure that they are compliant with the legislation.

The Department has also brought several matters before the State Administrative Tribunal and the District Court in relation to Karrinyup Lakes Lifestyle Village.

The Department believes that the establishment of a seniors housing information service, as discussed in Chapter 14 (*Consumer Information*), would address some of the issues to do with monitoring and compliance, particularly in regard to providing information on the rights and responsibilities of both residents and industry and opportunity for early identification of non-compliance that can be resolved early.

Increasing the powers of the Commissioner would facilitate improved regulation of the industry by ensuring compliance with the legislation. The Department recommends strengthening the power of the Commissioner for Consumer Protection to obtain enforceable undertakings so as to ensure that retirement village operators comply with all aspects of the law. This is supported by the findings of the EISC.¹³⁷

The current provisions of the Code under the *Fair Trading Act* are considered to be an unacceptably long and circuitous process to enforce residents' rights. The *Retirement Villages Act* provides the Commissioner with a more direct response to alleged breaches.

¹³⁶ ESIC Report Findings 17, 59, 62, 63, 67; and Recommendations 29,30, 31, and 33

¹³⁷ ESIC Report Finding 17.

For this reason, the Department recommends that a revised Code, as discussed in chapter 33 (*Structure of the Legislation*), be placed under the umbrella of the *Retirement Villages Act* and allow the Code currently under the *Fair Trading Act* to lapse. This will ensure that the compliance restrictions currently experienced by having a Code under the *Fair Trading Act* will no longer exist.

In response to concerns that the current legislation is not clear as to the rights and responsibilities of operators and residents, the Department has examined the legislation in a number of key areas and has sought to address any ambiguity and uncertainty.

Lack of clarity in relation to matters such as village contracts (Chapter 11), recurrent charges (Chapter 19), exit fees (Chapter 30), capital maintenance and replacement (Chapter 21), operating surpluses and deficits (Chapter 20), selling premises (Chapter 27), and refurbishment fees (Chapter 29), are of particular concern to residents and are discussed in greater detail in the relevant sections of this review paper.

The Department does not support the EISC's recommendation to establish a separate statutory authority, referred to as a Retirement Village Board, to regulate the retirement villages industry. Machinery of Government reforms which took place in 2001, sought to address what was considered to be wasteful complexity and overlap in the public sector. The report of the taskforce established to review the machinery of Western Australia's Government found that:

Western Australia has an excessive number of overlapping Government agencies. The diverse and fragmented nature of the State's public sector compromises its ability to deliver services effectively and efficiently. Despite a range of expert and independent reviews, Western Australia's machinery of Government has continued to grow in a haphazard fashion, offering no cohesive support for the delivery of Government priorities.

The taskforce recommended that a statutory authority should be established only if its proposed functions could not be performed by a department, or it would be inappropriate for them to be performed by a department.

The Department believes that establishing a separate statutory authority in the form of a Retirement Villages Board, would be costly and unnecessary, would create potential regulatory gaps and duplications, and further, would be inconsistent with government policy to reduce the number of boards and committees.

In summary the Department recommends:

- 89. That the Act be amended to enable the Commissioner to obtain enforceable undertakings under both the Act and the revised Code.**
- 90. That the Department continue to strengthen its investigation, compliance, prosecution and dispute resolution functions and be adequately resourced to do so.**

36. PENALTIES

The review asked whether it was necessary to amend any offences and/or penalties prescribed in the legislation and if so, what level of penalties would be appropriate for particular offences.

CURRENT PROVISIONS

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. The Act provides for new offences to be created by regulation, however, 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 SAT under the FTA. An administering body that fails to comply with an order made by the SAT commits an offence which is punishable by a fine of up to \$10,000.

There have been concerns about compliance with retirement village legislative provisions in other jurisdictions. Some States, such as Queensland and Tasmania, have taken steps to encourage compliance by increasing penalties. In Queensland, there has been some attempt to make retirement village management more accountable for their actions, particularly in regard to serious breaches. For example, where a public information document is found to contain an inaccuracy, the retirement village must rectify it or a maximum penalty of 540 penalty units (\$40,500) applies. The Queensland *Retirement Villages Act 1999* has penalties that range from 10 penalty units (\$750) to 540 penalty units (\$40,500). In Tasmania, the *Retirement Villages Act 2004* provides for 25 (\$3000) to 350 (\$42,000) penalty units for breaches of that Act.

The South Australian *Retirement Villages Act 1987* has a wide range of penalties. This includes a maximum of \$750 for minor breaches and a maximum of \$35,000 for more serious breaches. In Victoria, the *Retirement Villages Act 1986* provides for penalties that range from 10 penalty units (\$1000) to 200 penalty units (\$20,000).

The NSW *Retirement Village Act 1999* contains penalties ranging from \$550 to \$22,000. The 2005 review¹³⁸ suggested that there needed to be an increase in the penalty provisions for serious offences, although this issue was not addressed by the *Retirement Villages Amendment Act 2008* which was recently passed in that State's Parliament.

The proposed national Australian Consumer Law is likely to provide for banning orders. Banning orders are a type of civil penalty that limit the future opportunities of a person found by a court to have breached the law. Banning orders can be used to restrict individuals from managing corporations or engaging in particular business activities. Banning orders have typically been used in corporate and financial services regulation.

¹³⁸ NSW Office of Fair Trading: Review of the NSW *Retirement Villages Act 1999*. (March 2005)

It is intended that the introduction of such orders will improve the ability of enforcement agencies to enforce consumer protection law.

SUBMISSIONS

The majority of submissions expressed dissatisfaction with the current penalty provisions in the legislation. Many claimed that there are no real incentives, or disincentives, to comply with the legislation. There were no submissions on whether it is necessary to amend the offence provisions in the legislation.

An overwhelming majority of respondents believed that the current penalties are inadequate and that they should be updated and increased. It was submitted that penalties need to be substantial enough to ensure that the legislation is taken seriously and adhered to.

The penalties contained in the legislation have not been increased since the inception of the Act in 1992. Since that time, the retirement village industry has grown considerably. Many residents and stakeholders stated that penalties which were adequate in 1992 are no longer adequate. Many of the submissions also suggested that the penalties should reflect the financial position of retirement villages today.

Some submissions called for a thorough examination of provisions relating to penalties suggesting that specific attention needs to be placed on the effectiveness of the prescribed penalties and the level at which they would encourage compliance. A number of suggestions were made as to what would be appropriate penalties for non-compliance. These figures ranged from \$10,000 to \$100,000.

Other penalties that were suggested ranged from daily penalties to large fines to enforce compliance. Several respondents submitted that the effectiveness of monetary penalties is relative to the financial position of the operator. Where the operator is a large company with access to considerable funds, the application of a monetary penalty will have less impact than where applied to a smaller village that may be a small independent operation.

One respondent raised the possibility that, where fines are imposed upon a not-for-profit village, the penalty may be paid out of the villages operating revenue and not by the individual operator.

Another respondent suggested that if there was a registration scheme for retirement villages, de-registration or sanctions against their accreditation would seem a more appropriate way of ensuring compliance with the legislation.

In the final round of consultation, a number of respondents supported an increase in penalties, with ACSWA giving support on the proviso that it be consulted in the determination of appropriate penalties.

Also in final consultations, WARCRA raised the issue whereby an operator who is requested to pay a penalty and/or associated legal costs, attempts to pass on some or all of these expenses to residents. WARCRA requested that this practice be prohibited by the legislation (see Recommendation 90).

FINDINGS AND RECOMMENDATIONS

The Department notes that the penalties provided in the Act have been in place since the inception of the Act in 1992. Given that the average annual rate of inflation has been approximately 2.7% in the years in between, and having regard to penalty provisions in other states, the Department finds that it would be timely to review and increase the penalties contained in the Act. A number of factors must be taken into consideration when framing penalties in order to ensure that the penalties are effective and appropriate.¹³⁹ Generally, a breach should be punishable by a penalty if the size of the maximum penalty will justify the expense and time required to take the matter to court. The penalty for breaches should be increased to a level that encourages compliance. This report contains a number of recommendations which, if introduced into the legislation, may require that an offence be created under the Act. Where this is the case, it is recommended that penalty provisions be introduced for any new offences created under the Act.

The Act states that offences under a regulation may be punishable by a penalty not exceeding \$500.¹⁴⁰ It is recommended that penalties for a breach of a regulation also be increased.

In Chapter 31 (Structure of the legislation) the Department recommends that the Code be brought under the *Retirement Villages Act* as opposed to the *Fair Trading Act* where it currently sits. It is therefore recommended that the legislation be amended to provide that a breach of the Code is an offence under the Act and that a penalty be established for any such breach.

The Department considers that the introduction of banning orders under the proposed Australian Consumer Law will better enable the Department to enforce consumer protection law and will be particularly useful when addressing problems that arise with 'repeat offenders' in breaches of consumer law.

In summary, the Department recommends:

91. That the legislation be amended to:

- **increase penalties for breaches of the legislation in keeping with similar consumer legislation in WA and other States;**
- **introduce penalty provisions for any new offences created under the Act;**
- **provide that a breach of a clearly expressed obligation stated in the Code is an offence under the Act and establish a penalty for any such breach; and**
- **provide that any penalties, as well as any legal, court or SAT costs arising from the matter which was the subject of the penalty, are to be paid directly by the operator and not passed on to residents.**

¹³⁹

¹⁴⁰

A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers
Section 82 (3) of the Act

37. RETIREMENT VILLAGES ESTABLISHED ON CROWN LAND

A submission from the Lands Division of the Department of Regional Development and Lands (RDL)¹⁴¹ regarding retirement villages on Crown land recommended a number of amendments to the Act in order to bring Crown land under the provisions of the Act and to provide for consistency with other State legislation and better protection for residents living in villages established on Crown land.

CURRENT PROVISIONS¹⁴²

The Act allows administering bodies or retirement villages which predate the Act, to be exempt from all or any provision of the Act, by order of the Minister.

IDENTIFIED ISSUES

Although provisions for exemptions exist, RDL considers that the Act should be amended to allow pre-1992 arrangements relating to retirement villages on Crown land to be recognised and for new villages on Crown land to come under the provisions of the Act.

RDL advised that there are historical issues behind this recommendation. When the Act was introduced in 1992, the issue of retirement villages located on Crown land was not considered in consultation with the then State's Crown Land Administration Unit (now part of RDL). At that time there were 80 reserves constituted under the then *Land Act* and 99 'Crown grants in trust' or 'conditional freeholds' set aside for the purpose of housing for 'aged persons'.

The then Department of Housing and Works had a long-standing policy of entering into joint venture development agreements with local governments that managed retirement villages on Crown land. DPI advised that this policy was impacted by the requirement of the Act for land to be under the *Transfer of Land Act* and owned in freehold by operators. Retirement villages established on Crown land are therefore currently inconsistent with that Act's requirements.

SUBMISSIONS

RDL submitted that Crown land on which retirement villages are located should come under the provisions of the Act. RDL advised, however, that in villages established on Crown land, and where the administering body is a Crown or a local government agency, the need to record a memorial under the Act diminishes.

¹⁴¹ The Submission was lodged by State Land Services when it was part of the former Department for Planning and Infrastructure (DPI). DPI was split into three new agencies in July 2009. The relevant agency is now the Department of Regional Development and Lands (RDL).

¹⁴² Schedule 1 (3) of the Act

There are other means of protecting the interests of residents under the provisions of the *Land Administration Act 1997* (LAA). RDL therefore considered that the Retirement Villages Act should allow for exemptions from lodging a memorial in such cases. Memorials would still be lodged in relation to situations involving Crown land where the operator has a lease or conditional tenure. However, the charge arising under section 20 of the Act would be against the operator's tenure, not the Crown land itself.

Reserves used for villages are subject to management orders issued under section 46 of the LAA, and such orders can be conditioned to ensure appropriate protection for residents. Protection can be provided by conditions inserted in standard leases issued by management bodies under management orders. Ultimately, the land remains in State ownership with the State being able to revoke management orders where serious breaches occur, and the leases then become leases from the State.

Where the land is a section 75 LAA 'conditional tenure' (which replaced the former Land Act 'Crown grants in trust'), there are:

- provisions to ensure the land continues to be used for its specified purpose;
- provisions for the placement of LAA memorials against the land; and
- requirements for the consent of the Minister for Lands to dealings in the land, and protection of the State's equity in the land.

Ultimately, tenure can be forfeited to the State and existing leases can continue as leases from the State. The RDL recommended that the statutory charge created by the memorial should affect the interests of the operator, rather than the land, where:

- a memorial affects reserved land owned by the Crown (and generally under a management order to a local government with power to lease, but also conceivably held by some other management body);
- Crown land is leased to another party;
- section 75 LAA 'conditional tenure' land is held by a local government or other party, but where that land is leased and managed by a retirement village operator; or
- a registered lease is granted to a retirement village operator by some other entity,

RDL therefore submitted that the definition of "owner" in the relevant sections of the Act should be amended to allow various forms of tenure over Crown land, provided by the LAA, to be used for the purposes of the Act, while ensuring that the interests of residents are protected.

Currently there is a problem with the definition of 'owner' in sections 3 of the Act and the use of that term in section 15 of the Act in that the 'owner' must be someone who owns the land in fee simple (clearly not the case with Crown land); and the 'owner' must lodge a memorial with the Registrar of Titles.

RDL recommended that sections 3 and 15 of the Act be amended so that they are compatible with the provisions of Sections 75, 79, and 80 of the *Land Administration Act 1997*. The RDL also submitted that in the case of Crown land, the operator should be required to lodge a memorial and that the statutory charge on the land in these circumstances affect the operator and not the land. There would therefore need to be corresponding changes to memorial and enforcement provisions of the Act. RDL recommended that section 21 of the Act be amended to accommodate situations where the land is Crown, or section 75 LAA conditional tenure, and leased or managed by a retirement village operator, so that the statutory charges on the land in these circumstances affect the operator, and not the land. . In relation to this issue, the RVA submitted that in section 17 of the Act, which relates to the termination of residence rights, the definition of owner should be amended to reflect that a lessee of land may have certain obligations in lieu of the owner of the land.

FINDINGS AND RECOMMENDATIONS

The Department recognises that the issue of villages established on Crown land may not have been fully considered in the enactment of the *Retirement Villages Act in 1992* and that villages established on Crown land should be integrated into retirement village legislation for reasons of consistency and in order to give residents in such villages the full protection of the relevant laws. In order to fully integrate Crown land arrangements into retirement village legislation, a number of amendments need to be made to sections 3, 15, 17 and 21 of the *Retirement Villages Act 1992* to make them compatible with the provisions of sections 75, 79 and 80 of the *Land Administration Act 1997*. The Department recommends that the details of these amendments be finalised in consultation with RDL.

In summary, the Department recommends:

92. That the legislation be amended to take into account situations where the land upon which a retirement village stands is Crown land, or section 75 Land Administration Act (LAA) conditional tenure, and specifically:

- **allow various forms of tenure over Crown land under the LAA to come under the *Retirement Villages Act*, with exemptions from lodging a memorial being granted where appropriate.**
- **redefine 'owner' to accommodate situations where Crown land is being used, under various LAA tenures.**
- **provide for situations where the land is Crown, or section 75 LAA conditional tenure, and leased or managed by a retirement village operator, so that the statutory charges on the land in these circumstances affect the operator, and not the land.**

38. REGISTER OF RETIREMENT VILLAGES

The review asked whether a Government retirement village register should be introduced in Western Australia and, if so, what information should be included on the register.

CURRENT PROVISIONS

There are currently no provisions in Western Australian legislation for a register of retirement villages.

IDENTIFIED ISSUES

At present, there is no straightforward way for prospective residents to identify at the outset whether a housing scheme that they are contemplating entering into is a retirement village under the *Retirement Village Act 1992*. The Issues Paper contemplated that a register of retirement villages could be established to enable prospective residents to readily identify whether a retirement village is a bona fide retirement village which complies with the legislation. A register would also 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.

SUBMISSIONS

There was general support from residents and prospective residents for a register which provides comprehensive information, as well as a process for examining who should operate and manage a retirement village.

Industry groups generally supported the establishment of a simple register of retirement villages to provide a database of current retirement villages and their schemes. It was suggested that the register be established and maintained by Consumer Protection and accessible to the public. It was also suggested that the registration process should be simple and inexpensive.

The EISC report supported the proposal for a full registration scheme, similar to that operating in New Zealand.¹⁴³ The EISC further proposed that the regulation of retirement villages could be better achieved through the establishment of an independent statutory authority dedicated to registration, education, training, monitoring and compliance.¹⁴⁴ The establishment of such an authority or “board” is not supported by this review for reasons more fully outlined in Chapter 35 (*Monitoring and Compliance*).

¹⁴³ EISC Report Finding 61 (page 207).

¹⁴⁴ EISC Report Finding 62 (page 207) and Recommendation 30 (page 211).

Legislation in other Australian States

The *Retirement Villages Amendment Act 2008* in New South Wales requires operators to notify the Registrar General in writing that land comprising the retirement village (or land that is part of the retirement village) is used as a retirement village and for the information to be recorded on a register¹⁴⁵.

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 *Retirement Villages Act 1986* (Vic).

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.

FINDINGS AND RECOMMENDATIONS

The Department does not believe that the EISC's recommendation for a full registration scheme is warranted. Comprehensive registration schemes generally require some evidence of general or widespread market failure. This has not been demonstrated in the retirement village industry.

The Department believes that it is important that prospective residents are readily able to distinguish between the various seniors housing schemes on offer in the marketplace. There are a number of ways in which this information can be obtained.

The creation of a public register of all retirement villages under the Retirement Villages Act would enable prospective residents to obtain certain information about the village. The register would also assist the Department in developing and delivering education and compliance programs.

The Department therefore recommends that a register of retirement villages, similar to that which exists in New South Wales and Victoria, be established for information purposes. Operators of retirement villages would be required to notify the Commissioner in writing that land comprising the retirement village (or land that is part of the retirement village) is used as a retirement village and provide specific information, including proprietorship and management details and advice of any changes to those details. The Commissioner would make this information readily accessible to the public.

Determining whether a village is a bona fide retirement village can also be achieved via a title search to establish whether there is a memorial on the title of a retirement village. Landgate is the principal authority to refer to in order to establish whether there is a memorial on the title of a retirement village.

¹⁴⁵ Section 24A Retirement Villages Amendment Act 2008 (NSW)

A prospective resident can request a title search to confirm that a memorial has been registered on the title of the land on which the retirement village has been established. Landgate also has on-line search facilities which enable the public to conduct on-line enquiries for a small fee.

As some seniors may not be aware that title searches can be carried out, or may for some reason be unable to conduct on-line searches, it is recommended that the Department liaise with Landgate to explore ways of further improving access to title information for seniors, particularly in regard to establishing whether there is a memorial on a village title.

The Department also proposes a number of other possible measures to address those problems that support the proposal for a register. These measures include strengthening the (proposed) disclosure provisions under the *Retirement Villages Act 1992* and the disclosure provisions under the *Residential Parks (Long-stay Tenants) Act 2006* and the *Residential Tenancies Act 1987*.

The Department recommends that under the proposed amendments to the *Retirement Villages Act 1992*, operators of retirement villages must disclose whether the village that they operate is a retirement village under the Act. The prescribed information to be provided to prospective residents at the various disclosure stages would be required to state whether the village is a retirement village, as defined under the Act.

This provision is intended to inform prospective residents that the village they are considering entering into will provide them with specific protections. The proposed disclosure requirements would also require the operator to state the number of the memorial lodged on the village title. The information contained in the memorial is intended to inform prospective residents that they would have security of tenure if entering a retirement village.

The Department recommends that the disclosure provisions of the *Residential Parks (Long-stay Tenants) Act 2006* be amended to make it clear to prospective residents that housing arrangements regulated by that Act are not retirement villages, as defined under the *Retirement Villages Act 1992*, and do not receive the protections of this Act.

The Department recommends that the *Residential Tenancies Act 1987* be amended to provide that where a residential complex that is not a retirement village is marketed to people over 45 years old, prospective residents must be provided with a disclosure statement to the effect that the residential complex is not a retirement village as defined under the *Retirement Villages Act 1992*, and as such residents of such a village do not receive the protections of this Act.

The Department will monitor the effectiveness of the proposed disclosure provisions once implemented, to ascertain whether these particular measures sufficiently address the problems faced by prospective residents in distinguishing between retirement villages and other forms of seniors housing.

In summary, the Department recommends:

- 93. That the legislation require operators to notify the Commissioner in writing that land comprising the retirement village (or land that is part of the retirement village) is used as a retirement village, and to provide specific information, as prescribed by regulation, and for the Commissioner to make this information publically available.**
- 94. That both the prescribed 'key terms summary' and 'disclosure package' contain a statement to the effect that the village in question is a retirement village under the *Retirement Villages Act 1992*, and also provides the number of the memorial lodged on the title.**
- 95. That the *Residential Parks (Long-stay Tenants) Act 2006* be amended to require that prospective residents are provided with a statement to the effect that housing arrangements regulated by the *Residential Parks (Long-stay Tenants) Act 2006* are not retirement villages, as defined under the *Retirement Villages Act 1992*, and as such, residents do not receive the protections of this Act.**
- 96. That the *Residential Tenancies Act 1987* be amended to provide that where a residential complex that is not a retirement village, is marketed to a particular age demographic, prospective residents must be provided with a disclosure statement to the effect that the residential complex is not a retirement village as defined under the *Retirement Villages Act 1992*, and as such, residents do not receive the protections of this Act.**
- 97. That the Department liaise with Landgate to explore ways to improve the accessibility of detailed on-line retirement village title information for seniors.**

39. ACCREDITATION OF RETIREMENT VILLAGES

The review examined whether a mandatory accreditation scheme should be introduced and if so, whether such a scheme should be independently operated.

CURRENT PROVISIONS

There are currently no provisions in the legislation for the accreditation of retirement villages.

There is an established national system of accreditation that is run by the Retirement Villages Association (RVA). This is a voluntary scheme. Accreditation is currently open to all villages irrespective of whether the village is a RVA member or not.

The RVA's accreditation system is known as the Australian Retirement Village Accreditation Scheme (ARVA). The purpose of the RVA's accreditation scheme is to set minimum standards for management practices, services and amenities in retirement villages. This industry-based scheme sets out a number of criteria that must be met in order to achieve accreditation. The ARVA sets minimum standards for a village to attain, covering 29 standards in the areas of resident services and lifestyle; organisational management; human resource management; and physical resource management.

The RVA is in the process of seeking ISO/IEC¹⁴⁶ certification status for its accreditation scheme through the Joint Accreditation Systems of Australia and New Zealand (JAS-ANZ). The RVA is also in the process of incorporating the accreditation arm of its organisation into a limited liability company, which would operate independently of the Association.

IDENTIFIED ISSUES

Accreditation provides a recognisable standard which allows for comparisons to be made between villages and also facilitates the identification of specific village strengths and weaknesses.

In the early public meetings, a number of residents commented 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 claimed that the ARVA 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.

¹⁴⁶ International Organization for Standardisation/ International Electrotechnical Commission

SUBMISSIONS

The majority of submissions from residents were in favour of a mandatory government operated accreditation scheme, much like those operated in the health and aged care fields.

The Council on the Ageing supported the introduction of a government operated accreditation scheme.

The EISC Report recommended that “the state government work with industry to develop a retirement village accreditation scheme.”¹⁴⁷ This Report found that there is an opportunity for government and industry cooperation in the development of a suitable accreditation system for the retirement village industry, one that builds on the Retirement Village Association accreditation scheme.

Submissions from the smaller industry groups, whilst supporting an accreditation scheme, were strongly opposed to accreditation being mandatory and government operated. Concerns were raised regarding the burdens that would be placed upon smaller retirement villages, particularly those in rural areas, if accreditation were mandatory. Strong support was shown for the RVA’s existing accreditation scheme. The RVA expressed a desire to work with government to further the accreditation scheme that it currently provides.

FINDINGS AND RECOMMENDATIONS

The Department notes that it is not uncommon for industries to operate accreditation schemes through their own peak organisations. Accounting and engineering associations, for example, have industry-established standards that are generally well regarded. Credibility and reputation within the marketplace are strong motivators for the industry associations to operate the accreditation schemes with vigilance. Under these circumstances, the Department believes that there may not be a strong justification at this stage for the government to develop a new accreditation scheme for retirement villages.

In view of the fact that the RVA is seeking ISO/IEC¹⁴⁸ certification status for its industry accreditation scheme and is also in the process of incorporating the accreditation arm of its organisation into a limited liability company, which would operate independently of the association, the Department believes that this scheme will provide a greater level of independence than currently exists.

The Department finds that it would not be feasible or cost effective to abandon the RVA scheme in its entirety and replace it with a government accreditation scheme, given that the RVA scheme is well established, has been subject to significant investment by the industry, and has industry support.

¹⁴⁷ EISC Report. Recommendation 32 (p 215)

¹⁴⁸ International Organization for Standardisation/ International Electrotechnical Commission

The Department advocates greater resident input into the existing accreditation scheme and recommends that peak industry bodies such as the RVA and ACSWA be encouraged to invite resident representatives to advise on matters of importance to residents. Resident representatives could be drawn from WARCRA or similar representative bodies.

In summary, the Department recommends:

- 98. That representative bodies, such as the RVA, ACSWA, and WARCRA be encouraged to facilitate greater resident input into existing and future accreditation of retirement villages schemes through the involvement of resident representatives.**

40. PREVIOUS FEDERAL REGULATIONS

The review examined the EISC's statement¹⁴⁹ that retirement village residents were better protected under the previous federal regulations.

CURRENT PROVISIONS

The retirement village industry in Western Australia is currently regulated by state legislation which seeks to protect residents and prospective residents of retirement villages against unfair practices, clarifies the rights and obligations of residents and operators, promotes fair-trading practices, and aims to provide an effective system for resolving disputes.

IDENTIFIED ISSUES

The EISC report stated that retirement village residents were better protected under federal regulation than they are under the current State legislation. This statement appears to have been made in the context of the committee seeking a legal opinion as to whether there were any legislative provisions for a non-performing village administrator to be removed from that position compulsorily.

The EISC found that in the previous federal regulations, a village advisory board was required, consisting of the developer, a representative of the manager, and a representative of the residents and an independent business person and that the board had the power to remove a non-performing manager. The legal opinion suggested that the scope of the SAT to deal with such matters under current legislation is restricted.

SUBMISSIONS

Although not a direct submission to this review, the EISC report has raised issues which are directly relevant to this review.

FINDINGS AND RECOMMENDATIONS

The review researched the previous federal regulations and chronicled the subsequent creation of state legislation. Prior to the inception of the current State legislation, control of retirement villages involved various aspects of the companies and securities legislation and retirement village regulations came under corporations legislation. The legislation was not specifically designed or intended to cover the regulation of retirement villages.

The main aim of the companies and securities legislation was to ensure that investors and creditors received appropriate information about companies in which they were investing or potentially investing¹⁵⁰. In the 1950s it became apparent that there were a number of schemes, including retirement villages, which sought investors.

¹⁴⁹ EISC Report: Finding 67 and Recommendation 34 (p 219)

¹⁵⁰ Retirement villages In Western Australia: The Need for Control and Options for Regulation of Resident Funded Retirement Accommodation: Discussion Paper, May 1987, Bureau for the Aged: p. 6-7.

In order to regulate such business dealings and compel retirement village promoters to disclose the same sort of information as conventional companies, village shares/units were recognised in the companies code as 'prescribed interests'. Many retirement villages were covered by the 'prescribed interests' provisions which required promoters to:

- be a public company;
- have an investment dealer's licence; and
- register a deed with the State Corporate Affairs Department and appoint another company as an approved trustee.

These provisions did very little to provide adequate consumer protection to residents. The 'prescribed interest' provisions required promoters of retirement villages to provide a prospectus, or disclosure statement. These statements were (and still are) considered an essential part of any regulation of retirement village accommodation. The requirements of the 'prescribed interests' provisions were more directed to investor protection, rather than information that could actually assist people in deciding which type of accommodation to opt into.

By the 1960s and 1970s there was also a relatively high level of federal Government subsidy for the not-for-profit retirement village sector and a corresponding widespread belief that the fine print of retirement village residents contracts was not of vital importance, since these charitable and community based organisations could be relied on to act in good faith towards residents¹⁵¹.

Some of the retirement accommodation industry was exempt from federal provisions. Exemptions included religious bodies, community organisations and local government where bodies could demonstrate a proper financial base and have rules prohibiting the distribution of profits and assets to their members.

Overall the Department does not support Finding 67 of the EISC report because it believes that current State legislation deals specifically with the retirement village industry, whereas the previous 'prescribed interest' section of the companies legislation was not designed for the regulation of retirement villages or the protection of residents. As the companies legislation was not intended to regulate retirement villages, it would have been more difficult to amend the legislation for the sole purpose of covering the retirement village industry.

In the Second Reading Speech for the *Retirement Villages Bill 1991*¹⁵², there were a number of arguments put forward for the implementation of retirement village legislation to replace the federal regulations. It was argued that the federal regulations did not have the scope to cover the various legal and financial arrangements that were common in the retirement village industry.

¹⁵¹ Review of *Retirement Villages Act 1992*, Ministry of Fair Trading Report 1994, p. 4

¹⁵² Parliamentary Debates Hansard Legislative Council and Legislative Assembly Thirty Third Parliament Third Session Thursday 16 May 1991 Retirement Villages Bill, Second Reading

It was stated that the proposed retirement village legislation would both protect residents' occupancy rights and provide a more comprehensive system for resolving disputes.

The experience in other States has also contributed to the development of specific retirement village legislation in Western Australia. The financial failures in the early 1980s of several retirement villages in the eastern states run by benevolent and charitable organisations and the subsequent loss of tenure and financial security by the residents led the Western Australian Government to decide to regulate this industry before something similar happened in Western Australia¹⁵³. Current legislation provides a measure of protection of residents' financial interests. Previously, under many residence contracts, a resident's occupancy rights would have been lost if the retirement village company became insolvent.

State legislation, on the other hand, is reviewed on a regular basis and can be amended to alleviate any deficiencies. For example, the Department supports a change in the regulatory framework. It recommends that the current Code be revised and transferred under the *Retirement Village Act 1992*. This will facilitate a one-stage enforcement process for major breaches with a more effective range of penalties being provided for in the Act. It also recommends greater penalties for serious breaches which have a major impact on the well-being of residents as these are likely to act as deterrents to retirement village owners exploiting residents.

This report further recommends amending the Act to enable the appointment of an administrator to manage a retirement village where the well-being or financial security of the residents is at risk. This provision accords with Recommendation 34 of the EISC report and is discussed in more detail in Chapter 19 (*Protection of a Residents' Financial Interests*) of this report.

It is therefore recommended that State legislation should be retained, because in the main, residents are better protected under this legislation. The inception of the *Retirement Villages Act 1992* and its subsidiary legislation aims to ensure that basic consumer rights are protected and other rights and obligations of parties under contractual agreement are known and understood. The previous legislation was not intended specifically for the regulation of retirement villages and consequently there were a number of deficiencies in regard to the regulation of retirement villages.

The Department notes, however, that ultimately it is likely that there will be a move towards nationally consistent retirement village legislation. The Council of Australian Governments (COAG) currently has a significant national reform agenda under way that is intended to harmonise State laws. At the moment, retirement village laws are not part of this national agenda.

In summary, the Department recommends:

- 99. That State-based retirement villages legislation be retained, but amended according to the recommendations of this review.**

¹⁵³ Review of *Retirement Villages Act 1992* (WA) 1994 Ministry of Fair Trading p 4

41. 2002 STATUTORY REVIEW

A statutory review¹⁵⁴ was previously 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 2002¹⁵⁵. The 2002 Statutory Report contained 50 recommendations which were reassessed as part of the current review to determine whether they are still applicable. These recommendations are contained in Appendix 1 of this report. Some recommendations have already been implemented through subsequent amendments to the Act or the Code. Code changes arising from the recommendations of the 2002 Statutory Report include:

- 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;¹⁵⁶
- increased disclosure requirements regarding any administrative and financial changes which require the consent of residents;¹⁵⁷
- the introduction of a requirement for each village in a group of retirement villages controlled by the same organisation to maintain separate financial arrangements;¹⁵⁸
- the introduction of a requirement to provide quarterly operating income and expenditure statements to residents;¹⁵⁹
- improvements in the disclosure of annual village operating budgets;¹⁶⁰
- the requirement to apply any surplus in the operating budget of a retirement village towards the future operating expenses of that village;¹⁶¹
- 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;¹⁶²
- the requirement to provide a resident with monthly marketing reports when selling their premises;¹⁶³

¹⁵⁴ The *Retirement Villages Act 1992* requires a review of the operation and effectiveness of the legislation to be carried out every five years.

¹⁵⁵ A copy of this report is available on www.docep.wa.gov.au by following the links to the Retirement Villages Legislation Review.

¹⁵⁶ Recommendation 21 implemented in Clause 5.2 of the Code

¹⁵⁷ Recommendation 22 implemented in the Regulations (Schedule 1, Form 1)

¹⁵⁸ Recommendation 23 implemented in Clause 5.3 (5) of the Code

¹⁵⁹ Recommendation 24 implemented in Clause 5.4 of the Code

¹⁶⁰ Recommendation 25 implemented in Clause 5.3 of the Code

¹⁶¹ Recommendation 26 implemented in Clause 5.6 of the Code

¹⁶² Recommendation 28 implemented in the Regulations (Form 1 of Schedule 1)

¹⁶³ Recommendation 30 implemented in Clause 5.7 (b) of the Code

- 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;¹⁶⁴
- that on leaving a retirement village, a resident is no longer charged fees for personal services, such as meals, laundry or cleaning services;¹⁶⁵ and
- the retention of existing processes for the resolution of disputes within a retirement village.¹⁶⁶

Other recommendations, however, have not been implemented and the current review has reassessed each of these recommendations to determine whether they should be carried forward. The Department's specific findings with regard to each recommendation are contained in Appendix 1.

In summary, the Department recommends:

100. That those recommendations of the 2002 Statutory Review that are supported by the Department of Commerce be carried forward as recommendations in the current review.

¹⁶⁴ Recommendation 32 implemented in the Regulations (Form 1 of Schedule 1)
¹⁶⁵ Recommendation 35 and 36 implemented in Clause 4.5 (2) and (3) of the Code
¹⁶⁶ Recommendation 37 and 44 implemented in Division 6 (Clause 6.1 to 6.3) of the Code

Appendix 1: 2002 Statutory Review Recommendations

Recommendation 1 (Not supported)

That there be an additional legislative objective to —

“Encourage investment in, and the development of, retirement villages”.

Recommendation 1 carries with it the assumption that Government has determined that retirement villages are in some way a preferred form of accommodation for retired person. It also implies that the Government will or should do something pro-active to progress this objective, whereas this is not the intention. The current objective of the Act “*to regulate retirement villages and the rights of residents in such villages and for related purposes*” is considered adequate. For these reasons, the Department of Commerce does not support Recommendation 1 of the 2002 Statutory Review.

Recommendation 2 (Already implemented)

That residential aged care facilities which achieve and maintain Commonwealth certification or accreditation under the provisions of the Aged Care Act 1997 (Cth), 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.

Recommendation 2 of the 2002 Statutory Report has been implemented through the *Consumer Protection Legislation Amendment and Repeal Act 2006* which 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 (Supported)

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.

The Department of Commerce supports Recommendation 3 of the 2002 Statutory Report as it accords with Recommendations 84 and 83 in Chapter 34 (*Definitional Matters*) of the 2010 Statutory Report which propose redefining the term ‘retirement village’ and ‘retirement village scheme’.

Recommendation 4 (Supported)

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.

The Department of Commerce supports Recommendation 4 of the 2002 Statutory Report to the extent that any amendments to the definition of ‘service contract’ are consistent with Recommendations 18 to 21 of the 2010 Statutory Report which propose that services essential to the operation of the village, arranged between the administering body and residents, must be contained in a residence contract, while services which are optional or elective must not be contained in a residence contract but in a separate document. The intention of these amendments is to draw a clear distinction between essential services contained in a binding contact and non-essential, personal or elective services, such as services for meals, laundry or podiatry, which can be cancelled if no longer required by the resident.

Recommendation 5 (Supported)

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.

The Department of Commerce supports Recommendation 5 of the 2002 Statutory Report for those circumstances where a strata titled scheme is restricted to persons aged 55 years and over but is not a retirement village for the purposes of the Retirement Villages Act.

Recommendation 6 (Supported)

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

The Department of Commerce supports Recommendation 6 of the 2002 Statutory Report as it is consistent with Recommendation 92 of the 2010 Statutory Report. It is intended that villages established on Crown land should be integrated into retirement village legislation for reasons of consistency and in order to give residents in such villages the full protection of the relevant laws.

Recommendation 7 (Supported subject to further investigation)

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.

The Department of Commerce supports Recommendation 7 of the 2002 Statutory Report subject to further investigation. The 2002 report referred to a case where the administering body at a particular village operated as a 'two dollar company' while an associated company received the premiums. The same individuals were involved in the management of both companies. The 2002 review believed that in such a case, the village would not technically be subject to the Act as the definition of 'premium' covers money paid to the administering body, but not money paid to a different legal entity. The 2002 review believed that this would potentially jeopardise the security of tenure and financial investment of the residents. For this reason the 2002 review recommended that the Act should be amended to close the apparent loophole whereby the Act could be avoided by the payment of the premiums to a separate legal entity to the administering body.

The 2010 review believes that protections such as the need to hold premiums in trust, the requirement to lodge a memorial, the statutory charge provision, the requirement to maintain reserve (or sinking) funds, and the prohibition on dispersing funds from one retirement village to another village, may be sufficient to protect the financial interests of residents. The adoption of Recommendation 7 of the 2002 Statutory Report may be required but is subject to the advice of Parliamentary Counsel during the drafting of amendments.

Recommendation 8 (Not supported)

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.

The Department of Commerce does not support Recommendation 8 of the 2002 Statutory Report. Currently the definition of a 'retired person' in the Act (and in the Strata Titles Act) means 'a person who has attained the age of 55 years **or retired from fulltime employment** or a person who is or was the spouse of such a person'. This definition also applies to the definition of 'retirement village scheme' which means 'a scheme established for retired persons or predominantly for retired persons...'. This definition effectively means that people who are younger than 55 years of age, but are retired from full time employment, may also enter a retirement village.

In reality, as the 2002 Statutory Report pointed out, the type of people who reside in retirement villages is self-regulated through village contracts and rules. It is also a lifestyle option that would not necessarily attract younger residents. However, there may be certain circumstances in which a younger person, who is not working full time, may wish to live in a retirement village. The definition, as proposed by Recommendation 8 in the 2002 Statutory Report, would narrow, not broaden, the definition of 'retired person'. The 2010 review found that the current definition of a 'retired person' has not been an issue in recent consultations, nor a source of complaint, and indeed redefining the term may result in unintended consequences.

Recommendation 9 (Already implemented)

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".

Both the *Retirement Villages Act 1992* and the *Strata Titles Act 1985* now refer to "spouse or de facto partner".¹⁶⁷

Recommendation 10 (Supported)

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

The Department of Commerce supports Recommendation 10 of the 2002 Statutory Report for the same reasons outlined in Recommendation 7 above. The 2002 review believed that an amendment will need to be made to section 18 of the Act to close an apparent loophole whereby a legal entity (not being the administering body) to whom a premium has been paid can avoid the requirement to place the premium in a trust account pending occupation of the residential premises by the resident.

Recommendation 11 (Supported)

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.

The Department of Commerce supports Recommendation 11 of the 2002 Statutory Report as it streamlines the administrative process of entry to a retirement village after the resident has paid a premium.

¹⁶⁷ Section 3 of the Retirement Villages Act 1992 and Section 6A of the Strata Titles Act 1985.

The need for this amendment is based on an example where a prospective resident pays the premium but delays moving into the unit until after an extended trip. In such a case, the premium must be held in trust until the resident actually takes up residence. Although the administering body can apply to the Commissioner for Fair Trading for an exemption from section 18 (1) of the Act, this process imposes some administrative burden on both the administering body and government. The 'trigger' which permits a premium to be released from a trust account, needs to be modified to provide for the release of the funds when the person who has paid the premium, or on whose behalf the premium was paid, is entitled to occupy the premises.

Recommendation 12 (Not supported)

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.

The Department of Commerce does not support Recommendation 12 of the 2002 Statutory Report which proposes the repeal of the statutory charge on the land on which a retirement village is established for the reasons outlined in Chapter 15 (*Protection of Residents' Financial Interests*) of this review report. The repeal of the statutory charge provision was not supported by stakeholders to this current review. There was overwhelming support, both by residents and industry (including the RVA), to retain the statutory charge on land and not to repeal this provision. Respondents generally agreed that the repeal of this provision is likely to erode residents' rights to financial protection.

Recommendation 13 (Not supported)

That provision be made in the Act for the Commissioner for Fair Trading¹⁶⁸ or the Registrar of the Retirement Villages Disputes Tribunal¹⁶⁹, 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.

The Department of Commerce does not support Recommendation 13 of the 2002 Statutory Report for the reasons outlined in Chapter 15 (*Protection of Residents' Financial Interests*) of this review report. Recommendation 13, as well as Recommendations 17 (2) and 17 (4), which dealt with the termination of a retirement village scheme, were rejected by a significant number of respondents to the review.

¹⁶⁸ Now the Commissioner for Consumer Protection
¹⁶⁹ Position no longer exists

It was feared that group pressure may be used on a minority of residents to terminate a retirement village scheme, whereas current provisions require the approval of the Supreme Court. Similarly in Recommendations 18, 19 and 20, where the proposals dealt with the cancellation of a memorial, these were also rejected because it was considered that the proposals were based on the notion of securing the agreement of residents and that this could be open to abuse in a situation where there is a vulnerable population and a marked imbalance of power.

Recommendation 14 (Supported)

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.

The Department of Commerce supports Recommendation 14 of the 2002 Statutory Report as being consistent with the intent of Chapter 15 (*Protection of Residents' Financial Interests*) of this review report. Stakeholders making submissions to this review supported the recommendation as being practical and fair to all parties.

Recommendation 15 (Supported)

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* (Cth).

The Department of Commerce supports Recommendation 15 of the 2002 Statutory Report for the reasons outlined in Chapter 15 (Protection of Residents' Financial Interests) of this review report. Recommendation 15 of the 2002 Statutory Report is consistent with Recommendation 29 of the 2010 Statutory Report which states that the legislation specify that the prescribed memorial on title is to cover all areas pertaining to the retirement village scheme, including residential, aged care and shared amenities.

Recommendation 16 (Supported)

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* (Cth). 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.

The Department of Commerce supports Recommendation 16 of the 2002 Statutory Report for the reasons outlined above under Recommendation 15.

Recommendation 17 (Partially supported)

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* (Cth). **(Supported)**
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. **(Not supported)**
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. **(Supported)**
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. **(Not supported)**
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. **(Supported)**
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. **(Supported)**

The Department of Commerce supports parts (1), (3) (5) and (6) but not (2) and (4) of Recommendation 17 of the 2002 Statutory Report which proposes the wording to appear on a memorial of a land title on which a retirement village is established. Parts (2) and (4), which deal with the termination of a retirement village scheme subject to the agreement of all residents, is not supported because the Department believes that group pressure may be used on a minority of residents to terminate a retirement village scheme, whereas current provisions require the approval of the Supreme Court. The Department also recommends including additional information in the memorial about a statutory charge on the land which gives priority to the interests of residents ahead of the interests of other parties such as registered mortgagees. These issues are dealt with in Chapter 15 (*Protection of Residents' Financial Interests* and Recommendation 32) of this review report.

Recommendation 18 (Partially supported)

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.

The Department of Commerce supports Recommendation 18 of the 2002 Statutory Report to the extent that that the Commissioner must be satisfied that residents have been fully consulted as outlined in Chapter 15 (*Protection of Residents' Financial Interests*) of this review report. This would not necessarily require the consent of all residents which may be very difficult to obtain but consultation with representatives of the residents, for example through a Residents Committee. The Department of Commerce also recommends that the legislation be amended to provide that the procedures for the partial removal of a memorial on title be prescribed by regulation and that the relevant dispute body would be the SAT (see Recommendation 30 of the 2010 Statutory Report).

Recommendation 19 (Partially supported)

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.

The Department of Commerce supports Recommendation 19 of the 2002 Statutory Report to the extent that it is consistent with Recommendation 30 of the 2010 Statutory Report for the partial removal of a memorial (see Chapter 15 (*Protection of Residents' Financial Interests*)) and for similar reasons as those outlined above under Recommendation 18 of the 2002 Statutory Report.

Recommendation 20 (Not supported)

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.

Because the Department of Commerce does not support Recommendation 13 the 2002 Statutory Report, it also does not support Recommendation 20 as both recommendations would allow memorials to be removed if residents agreed rather than maintaining the current provision which requires the matter to be referred to the Supreme Court. The Department of Commerce agrees with the view that group pressure may be used on a minority of dissenting residents to terminate a retirement village scheme, whereas current provisions require the approval of the Supreme Court.

Recommendation 21 (Already implemented)

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.

Recommendation 21 of the 2002 Statutory Report has been implemented in Clause 5.2 of the Code.

Recommendation 22 (Already implemented)

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 22 of the 2002 Statutory Report has been implemented in the Regulations (Form 1 of Schedule 1).

Recommendation 23 (Already implemented)

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 23 of the 2002 Statutory Report has been implemented in Clause 5.3 (5) of the Code.

Recommendation 24 (Already implemented)

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 24 of the 2002 Statutory Report has been implemented in Clause 5.4 of the Code.

Recommendation 25 (Already implemented)

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.

Recommendation 25 of the 2002 Statutory Report has been implemented in Clause 5.3 of the Code.

Recommendation 26 (Already implemented)

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 26 of the 2002 Statutory Report has been implemented in Clause 5.6 of the Code.

Recommendation 27 (Supported)

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.

The Department of Commerce supports Recommendation 27 of the 2002 Statutory Report which deals with a situation where a resident may end up losing their unit to a mortgagee in the process of a home equity conversion loan (also known as a reverse mortgage). The report recognized that section 17(1) of the Act, which prevents the holder of a mortgage from terminating a residence contract, deters credit providers from offering home equity conversion loans to the residents in a retirement village who own their own unit. In effect, the residents cannot grant enforceable mortgages over the property they own. The report proposed that residents should be able to mortgage any interest they have in residential premises. However, where the holder of a mortgage (mortgagee) lawfully takes vacant possession of the premises in pursuance of rights conferred by the mortgage, the terms and conditions of the residence contract must be observed. As such, it is the suspension of the resident's 'occupation rights' rather than the termination of the 'residence contract', that should occur if a mortgagee takes this action. The suspension of the resident's occupancy rights should remain while the mortgagee remains in possession. If the resident fails to remedy the breach of the mortgage, the residence contract should only be terminated where the mortgagee exercises a right to dispose of the resident's interest in the residential premises in accordance with the terms and conditions of the village scheme. This means that until a replacement resident is found, a mortgagee in possession of residential premises would be liable for the ongoing charges relating to the premises. The mortgagee would then claim these costs from the proceeds of the sale of the unit or from the resident's estate.

Recommendation 28 (Already implemented)

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?”

Recommendation 28 of the 2002 Statutory Report has been implemented in the Regulations (Form 1 of Schedule 1).

Recommendation 29 (Not supported)

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.
- 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).

The Department of Commerce does not support Recommendation 29 of the 2002 Statutory Report as it considers that the recommendations contained in Chapter 25 (*Selling premises within a retirement village*) of this review more appropriately address problems in relation to the selling of premises within a retirement village.

Recommendation 30 (Already implemented)

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 30 of the 2002 Statutory Report has been implemented in Clause 5.7(b) of the Code.

Recommendation 31 (Partially supported)

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
- 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.

The Department of Commerce supports the principles of Recommendation 31 of the 2002 Statutory Report to the extent that they are consistent with the findings and recommendations of Chapter 25 (*Selling premises within a retirement village*).

Recommendation 32 (Already implemented)

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.

Recommendation 32 has been implemented in the Regulations (Form 1 of Schedule 1).

Recommendation 33 (Supported)

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.

The Department of Commerce supports Recommendation 33 of the 2002 Statutory Report and notes that this recommendation is consistent with Recommendation 11 of the 2002 Statutory Report.

Recommendation 34 (Supported with amendment)

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”.

The Department of Commerce finds that Section 19 (3)(a) and (b) of the Act needs to be re-drafted for the purpose of clarification. The intention of this section is to ensure that residents are paid out within 7 days of a replacement resident taking occupation of the premises, and where it is not intended that a replacement resident be found, within 45 days of the day on which the resident ceases to reside (at that place) in the retirement village. The 2002 Statutory report stated that there are certain circumstances in which a replacement resident will not necessarily be sought. This may occur where a village or part of a village is to be redeveloped.

The Department of Commerce recommends that this section be re-drafted to better convey the intention of the Act.

Recommendation 35 (Already implemented)

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 35 of the 2002 Statutory Report has been implemented in Clause 4.5 (2) and (3) of the Code.

Recommendation 36 (Already implemented)

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

Recommendation 36 of the 2002 Statutory Report has been implemented in Clause 4.5 (2) and (3) of the existing Code. The Department of Commerce recommends that these clauses be made consistent with amendments proposed in Chapter 10 (*Residence and Service Contracts, pages 26-30*) in relation to non-optional services contained within a residence contract and elective, personal services not to be contained in the residence contract but contained separately in another document or agreement.

Recommendation 37 (Already implemented)

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.

Recommendation 37 of the 2002 Statutory Report has been implemented in Division 5 (Clause 8(2)(b) of the Code. Instead of the Retirement Villages Disputes Tribunal, the Code refers to the ‘relevant Tribunal’, which is now the State Administrative Tribunal.

Recommendation 38 (Supported)

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

The Department of Commerce supports Recommendation 38 of the 2002 Statutory Report however proposes some minor amendments to the legislation as outlined in Chapter 23 (*Dispute Resolution*) of this review report.

Recommendation 39 (Not supported)

That the Department of Consumer and Employment Protection¹⁷⁰ 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.

The Department of Commerce believes that the functions and role of the proposed Seniors Housing Information Service will address the matters that lay behind Recommendation 39.

¹⁷⁰ Now the Department of Commerce

Recommendation 40 (Partially supported)

That following the market research, the Department of Consumer and Employment Protection develop education programmes, 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.

The Department of Commerce partially supports Recommendation 40 of the 2002 Statutory Report in that the proposed Seniors Housing Information Service will address a range of educational matters, including dispute resolution processes.

Recommendation 41 (Supported)

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.

The Department of Commerce supports Recommendation 41 of the 2002 Statutory Report, however it is intended that the proposed Seniors Housing Information Service will undertake educational initiatives with regard to raising awareness of dispute resolution processes available to retirement village residents.

Recommendation 42 (Not supported)

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 Western Australian Retirement Complexes Residents' Association (WARCRA), investigate other ways of ensuring that the needs of the residents of retirement villages for advice and counselling are addressed.

The Department of Commerce does not support Recommendation 42 of the 2002 Statutory Report, as it does not consider this recommendation to be relevant given that the proposed Seniors Housing Information Service will have an information and referral function for retirement village residents.

Recommendation 43 (Not supported)

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.

The Department of Commerce does not support Recommendation 43 of the 2002 Statutory Review on the basis that it is no longer relevant given that the requirement for a Village Disputes Resolution Committee no longer exists.

Recommendation 44 (Not supported)

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.

The Department of Commerce does not support Recommendation 44 of the 2002 Statutory Review on the basis that it is no longer relevant given that the requirement for a Village Disputes Resolution Committee no longer exists.

Recommendation 45 (Not supported)

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”;
- 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”.

The Department of Commerce does not support Recommendation 45 of the 2002 Statutory Review on the basis that it is no longer relevant as the Retirement Villages Disputes Tribunal has been replaced by the State Administrative Tribunal,

Recommendation 46 (Already implemented)

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.

The Department of Commerce notes that the Retirement Villages Disputes Tribunal no longer exists and that the above proposals for dispute resolution and mediation are now part of the functions of the State Administrative Tribunal.

Recommendation 47 (Supported)

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.

The Department of Commerce supports Recommendation 47 of the 2002 Statutory Review, however given that the Retirement Villages Disputes Tribunal no longer exists, recommends that the definition of "court" be broadened to include the State Administrative Tribunal.

Recommendation 48 (Supported)

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.

The Department of Commerce supports Recommendation 48 of the 2002 Statutory Report as it is consistent with the findings and recommendations of Chapter 40 (*Previous Federal Regulations*) of this review.

Recommendation 49 (Supported)

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.

The Department of Commerce supports Recommendation 49 of the 2002 Statutory Report as it is consistent with the findings in Chapter 31 (*Structure of the legislation*) and recommendation 81 which proposes that the legislation be restructured to comprise the Act, the Regulations and a Code made under the *Retirement Villages Act 1992* so that all components regulating retirement villages are contained within a single legislative package.

Recommendation 50 (Not supported)

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

The Department of Commerce does not support Recommendation 50 of the 2002 Statutory Report as it is inconsistent with the findings and recommendation of Chapter 32 (*Application of the legislation*). This chapter states that, unless otherwise specified, amendments to the legislation not be retrospective in their application to existing contracts.

Appendix 2: South Australian Remarketing Policy ¹⁷¹

3—Remarketing policy

- (1) The administering authority of a retirement village may take preliminary steps for the remarketing of a residence in the retirement village as soon as the administering authority receives notice of the decision of the resident (the **outgoing resident**) to vacate the residence (or of any other circumstance that means that the resident will no longer be residing in the retirement village).
- (2) The administering authority must act under its remarketing policy as soon as the administering authority receives notice of the decision of the outgoing resident to vacate the residence (or of any other circumstance referred to in subclause (1)).
- (3) The requirements under the administering authority's remarketing policy must at least include or address—
 - (a) arrangements to meet with the outgoing resident, or an agent, nominated person or personal representative of the outgoing resident, to view the residence, complete the premises condition report, and explain and discuss the remarketing process (unless this is not reasonably practicable to do in view of the resident's circumstances); and
 - (b) procedures to identify any work that should be undertaken to ensure that the residence is in a reasonable condition for remarketing, and to determine when and how any such work will be undertaken, and who will be responsible for organising the work, and for the cost of the work; and
 - (c) the fixing of the price at which the residence will initially be remarketed, and when and how changes to that price will be considered and made; and
 - (d) the type, level and frequency of advertising that will be undertaken in relation to the marketing of the residence; and
 - (e) who will be responsible for any costs associated with the valuation of the residence, any advertising, and other relevant matters, and how any such costs are to be calculated or determined; and
 - (f) what will be required of the outgoing resident in relation to the remarketing of the residence, and the extent to which the resident may or will assume responsibility for any aspect of the remarketing process; and

¹⁷¹ *Retirement Villages Regulations 2006* under the *Retirement Villages Act 1987*(SA); Schedule 1—Code of conduct to be observed by administering authorities of retirement villages

- (g) what action will be taken if the residence is not sold or relicensed—
 - (i) after 90 days; and
 - (ii) after 6 months; and
 - (h) what steps are to be undertaken by—
 - (i) the administering authority; and
 - (ii) the outgoing resident,
when the residence is sold or relicensed; and
 - (i) settlement procedures, including what fees, charges and costs will be deducted by the administering authority at the time of settlement, and the provision to the outgoing resident of a statement at (or at an appropriate time after) the settlement.
- (4) In addition to any requirement or undertaking in a remarketing policy, the administering authority must—
- (a) provide ongoing written reports to the outgoing resident on the progress of the matter at least monthly; and
 - (b) if new residences within the retirement village are on the market at the same time, at least match the level of marketing for the residence of the outgoing resident that applies to those new residences.

Appendix 3: Glossary of Terms

Term	Synonymous or related term
Administering body	Operator, village management, owner, proprietor
Exit fee	Deferred fee; deferred management fee; deferred facilities fee
Operating costs	Outgoings; variable outgoings; ongoing fees; maintenance fees
Pre-entry cost	Reservation payment; reservation fee; waiting list fee; holding deposit
Premium	Loan; entry contribution; ingoing sum
Recurrent charge	Ongoing charge; ongoing fee
Reserve fund	Sinking fund
Village contract	Village deed

Appendix 4: Glossary of Abbreviations

ABS	Australian Bureau of Statistics
ACSWA	Aged and Community Services Western Australia
ACAA	Aged Care Association Australia
AIR	Association of Independent Retirees
API	Australian Property Institute
COAG	Council of Australian Governments
Commissioner	Commissioner for Consumer Protection (a statutory office established by the <i>Consumer Affairs Act 1971</i>)
Consumer Protection	The Consumer Protection Division of the Department of Commerce (formerly Department of Consumer and Employment Protection)
COTA	Council on the Aging
CPI	Consumer Price Index
DOCEP	Department of Consumer and Employment Protection (now the Department of Commerce)
DPI	Department for Planning and Infrastructure (now the Department of Planning and the Department of Transport. State Land Services and Pastoral Leases are now part of the Department of Regional Development and Lands.)
EISC Report	Economics and Industry Standing Committee Report No 10, presented by Hon Bob Kucera, APM JP MLA. Laid on the Table of the Legislative Assembly on 19 June 2008.
FTA	<i>Fair Trading Act 1987</i>
Landgate	The Government department responsible for administering land titles (formerly Department of Land Information; Department of Land Administration)

MCCA	Ministerial Council on Consumer Affairs
NSW	New South Wales
NSW Act	<i>Retirement Villages Act 1999 (NSW)</i>
OSIC	Office of Seniors' Interests and Carers (now part of the Policy and Planning Division of the Department for Communities)
Productivity Commission	Review of Australia's Consumer Policy Framework by the Productivity Commission
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> Department of Consumer and Employment Protection (Feb 2002)
Tas	Tasmania
TAS	Tenants Advice Service Inc.
The Act	<i>Retirement Villages Act 1992</i>
The Code	<i>Fair Trading (Retirement Villages Code) Regulations 2009 made under the Fair Trading Act 1987</i>
The Department	The Department of Commerce (formerly the Department of Consumer and Employment Protection)
The Regulations	<i>Retirement Villages Regulations 1992</i>
Vic	Victoria
WARCRA	Western Australian Retirement Complexes Residents' Association, Inc.

Department of Commerce

Consumer Protection Division

Advice Line 1300 30 40 54

(for the cost of a local call from anywhere in the state)

8.30am - 5.00pm weekdays

Forrest Centre

219 St Georges Terrace

Perth Western Australia 6000

Locked Bag 14 Cloisters Square Western Australia 6850

Administration: (08) 9282 0777 Facsimile: (08) 9282 0850

National Relay Service: 13 36 77

Website: www.commerce.wa.gov.au/consumerprotection

Email: consumer@commerce.wa.gov.au

Great Southern (08) 9842 8366

South-West (08) 9722 2888

Mid-West (08) 9920 9800

Goldfields (08) 9026 3250

North-West (08) 9185 0900

Kimberley (08) 9191 8400