



20 September 2021

Mr Gary Newcombe  
Commissioner for Consumer Protection  
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Dear Mr Newcombe,

## **SECOND JOINT INDUSTRY SUBMISSION ON RETIREMENT VILLAGES ACT REVIEW**

On behalf of Western Australia's Retirement Living sector, represented by the Property Council of Australia, Retirement Living Council, Leading Age Services Australian and Aged & Community Services Australia, below is a supplementary submission on the *Retirement Villages Act* review.

This second submission provides the industry's response to outstanding reform proposals not contained in the Joint Industry Interim Submission on the review, submitted on 23 July 2021 (attached), and further industry feedback with the Review Team on items raised in the initial submission.

The Industry Working Group intends to provide a further submission following the finalisation of mandatory exit entitlement recommendations, which are understood to be delivered in October.

Industry reiterates its priorities through the review process, including that reforms:

- Allow for a strong and viable retirement living industry into the future;
- Maintain strong consumer protections for residents without requiring further disclosure that adds unnecessary complexity and confusion;
- Retain sufficient flexibility within the retirement village model to enable product innovation and meet diverse and evolving consumer demand; and
- Remain consistent with overarching State Government objectives in housing, ageing and planning policies that recognise the important role of retirement villages as a core provider of purpose-built aged-friendly communities.

Industry representatives are available to provide additional information or assistance as required. Queries can be directed to Nick Warland, Property Council Policy Advisor, on [REDACTED] or via [NWarland@propertycouncil.com.au](mailto:NWarland@propertycouncil.com.au).

The industry looks forward to the conclusion of the review, working alongside Consumer Protection to secure a strong sector for the future.

Yours sincerely,



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## **SUBMISSION OVERVIEW**

The *Retirement Villages Act* review has provided an opportunity to examine a suite of policy measures that aim to clarify, and maintain momentum, within the retirement living sector. Key priorities for industry in the review process include:

- Allowing for a strong and viable retirement living industry into the future;
- Maintaining strong consumer protections for residents without requiring further disclosure that adds unnecessary complexity and confusion;
- Retaining sufficient flexibility within the retirement village model to enable product innovation and meet diverse and evolving consumer demand; and
- Remaining consistent with overarching State Government objectives in housing, ageing and planning policies that recognise the important role of retirement villages as a core provider of purpose-build aged-friendly communities.

The industry group acknowledges the consideration of several policy areas in Consultation Regulatory Impact Statement 4 (CRIS4) that did not contain specific proposals in the same format as previous CRIS papers. Industry reaffirms its view that areas which impact retirement living, but which do not form a part of the retirement living product, should remain regulated by existing structures. Examples include Aged Care regulation, the provision of private home services and building defects.

Industry awaits finalised modelling and proposals in relation to mandatory exit entitlements, and will respond to those recommendations in due course. A summary of recommendations and industry's response is below.

Proposal	Industry position	Comments/actions required
<p>6.2 – Inclusion of "exit entitlement" term for all payments</p> <p>Original option: That the RV legislation be amended to:</p> <ul style="list-style-type: none"> <li>- insert a new term "exit entitlement" for all the payments an operator may make to a former resident, however they are calculated and however they arise; and</li> <li>- use that term in relevant provisions, including sections 19 to 21 of the RV Act.</li> </ul> <p>The precise wording as to what "exit entitlement" means will be determined during drafting.</p> <p>Original Option J: The RV legislation prohibit terms in residence contracts that purport to confer an obligation to make a payment on a person who is not a party to the contract.</p> <p>Original Option K: The RV legislation provide that residence contracts must provide that exit entitlements are payable by an operator.</p>	<p>Qualified support for original option; Option J &amp; Option K not supported</p>	<p>It is noted that any definition of "exit entitlement" will be subject to final proposals relating to mandatory exit payments being considered.</p> <p>The qualified support for the original option acknowledges it is a simpler means of capturing all exit entitlements. Industry recommends a further simplification of proposed and current definitions under RV legislation, including the introduction of "exit payment" to assist prospective residents and relevant parties in understanding how different components of the RV product relate to each other. Language such as 'payment' are also more reflective of the benefit received upon departure from a retirement village and avoids further complication of the use "fee."</p> <p>With respect to Option J – it is understood this proposal refers to Strata and Purple Title villages. In these circumstances, operators do not own the units, meaning it is the outgoing resident who is liable for any ongoing fees and charges. It also complicates the payment of exit entitlements as outgoing residents are typically transferring their obligations to incoming residents, rather than the operator.</p>
<p>8.2 – Definitions for capital works categories</p> <p>That the RV legislation be amended to insert definitions in the legislation for categories of capital works</p>	<p>Does not support</p>	<p>Consistent with industry's interim submission, industry does not support measures to define capital works or their sources of funding. It is clear in the contract and disclosure process what capital works include and how they are funded. Industry is concerned the proposal would lead to a NSW Asset Management Plan requirement scenario, which is cumbersome and costly for both operators and resident, without providing consumer benefits or protections.</p>

		<p>There are practical challenges in applying this proposal retrospectively to contracts already in force.</p>
<p>8.3 – Operator obligation to maintain village in reasonable condition</p> <p>That the RV legislation be amended to provide an express provision imposing an obligation on operators to maintain the capital items owned by the operator in a retirement village in a reasonable condition.</p>	<p>Does not support</p>	<p>Industry does not support the proposal and is unaware of any existing issues within the sector that would require this standard to be included in legislation.</p> <p>It is standard practice for operators to plan for routine maintenance and, where necessary, replacement of capital items within a village in order to retain the amenity, services and benefits those items provide for residents. This maintenance is disclosed and updated to residents through a village’s annual budgeting process. It is not in an operator’s interest to allow capital items to deteriorate in condition, as doing so diminishes the ability of operators or residents to sell units.</p> <p>Retirement villages subject to additional requirements under Strata Titles legislation are also required to clearly outline maintenance plans and funding, in addition to standard considerations through the annual retirement village budgeting processes.</p> <p>Industry draws the Review Team’s attention to the Retirement Living Code of Conduct, currently covering 53 retirement villages in Western Australia.</p> <p>Clause C5.2 of the Code (Maintain fit-for-purpose products) requires signatories to ensure older villages and buildings consider embedding universal access where possible, and consider adaptations as requested or necessary by residents.</p>

<p>9.2 – Exit Fee Clarity post-departure from a village</p> <p>Option A – status quo. The RV legislation continues to allow residence contracts to require residents to fund improvements.</p> <p>Option B – The RV legislation be amended to provide that:</p> <ul style="list-style-type: none"> <li>• all residents are required to pay for reinstatement through a refurbishment fee; and</li> <li>• contracts can require former residents to fund improvements but only in proportion to their share in any upfront payment increase (Queensland approach).</li> </ul> <p>Option C – The RV legislation be amended to provide that all residents must fund reinstatement but cannot be required to fund improvement (Australian Capital Territory and previous New South Wales approach).</p>	<p>Supports Option A; does not support Option B &amp; Option C.</p>	<p>While industry acknowledges that scenarios exist where further clarity on exit fees is required for operators, residents or their estates, it is challenging to apply a blanket approach in legislation considered by Options B or C. The status quo protects existing flexibility for residents and operators to agree on refurbishments of units upon departure of a village, in particular situations where a higher refurbishment cost is agreed to give a unit a competitive advantage against other retirement village units or seniors' housing products on the market. As such, industry believes the status quo contemplated by Option A is retained, as there are no better alternatives available and the status quo requires mutual agreement on costs to be reached.</p>
<p>10.2 – Joint and several liability</p> <p>The RV legislation be amended to expressly state that:</p> <ul style="list-style-type: none"> <li>• unless otherwise indicated, all responsibilities are joint and several; and</li> <li>• when an obligation requires a particular act or actions, compliance by one responsible entity is sufficient.</li> </ul>	<p>Support</p>	<p>Industry supports the proposal to clarify joint and several liabilities. There are advantages to both operators and residents by adopting the proposal as it stands.</p>
<p>11.3 – Elder abuse</p> <p>No specific proposal – general discussion only</p>	<p>Does not support</p>	<p>There is no specific CRIS proposal on this item, however industry notes significant existing tools and requirements to address this issue and believes it is unnecessary to consider elder abuse within RV legislation. Examples of the existing body of work being undertaken includes the National Plan to Respond to the Abuse of Older Australians 2019 – 2023 and the WA Strategy to Respond to the Abuse of Older People. The WA Strategy specifically notes the need for aged-friendly communities, in line with WHO Aged-Friendly City guidelines, which industry is well positioned to support through the delivery and redevelopment of retirement villages.</p>
<p>13.1 – Restricting use of the term “retirement village”</p> <p>Adopt Recommendation 86 of the 2010 Final Report</p>	<p>Does not support</p>	<p>Industry does not believe it is easy to accurately capture what a 'retirement village' is in legislation. From a policy perspective, there is also the risk</p>

		that emerging forms of retirement living may be excluded through a narrow definition of what a retirement village is under RV legislation. If the purpose of defining a retirement village in legislation is to clarify where protections under the RV act apply, an unintended consequence could be to exclude new communities that intend to function as retirement villages.
<p>14.1 – Clarification of definitions for RV scheme &amp; residence contract</p> <p>That the RV Act definitions for retirement village scheme and residence contract be clarified by amending the RV Act so that it no longer provides that the word scheme (when used alone) has the same meaning as retirement village scheme.</p>	Does not support	Industry understands the intent behind the reform proposal and refers to its interim submission where definitions of RV product and scheme are contemplated. Similar to proposal 13.1, industry believes it is difficult to see how a safe or adequate definition could be drafted or included in legislation.
<p>15.2 – Limiting schemes to individual villages</p> <p>That the RV Act be amended to expressly provide that a retirement village scheme applies to one retirement village only.</p>	Does not support	The risk in limiting schemes to individual villages is to reduce the capacity of operators to offer innovative and different products. For example, services and amenities could be shared across villages operated by the same operator, or where there maybe retirement villages in close proximity to one another. By allowing schemes to cover multiple villages, the ability to pool funding for those services and amenities is greater, thereby providing a greater benefit to residents at a lower cost.
<p>16.1 – Clarifying s18 of the <i>RV Act</i></p> <p>That Recommendation 31 (of the Final Report) be implemented by amending the RV Act to define a premium as a payment to any legal entity in connection with admission into a village.</p>	Does not support	Industry is not aware of any existing issues where section 18 of the RV Act currently applies. Industry notes that even in scenarios where contracts include the payment of a premium to entities other than the administering body (for example, payment from an incoming resident to an outgoing resident or seller of a strata lot), the settlement is typically arranged by the administering body, and it is the administering body who complies with trust account requirements.
<p>16.2 – Clarification that premium includes deferred fee</p>	Does not support	Implementation of this proposal risks confusing different financial components, obligations,

<p>That the RV Act definition of premium be amended to specifically include all payments made by a person in consideration of or in contemplation of admission to a village whether the payment is made before, during or after admission of the person to the village.</p>		<p>payments and benefits at different stages of a resident's tenure. It is also noted that the final DMF or premium amount cannot be certain or guaranteed upon entry, which provides challenges if definitions are changed.</p> <p>Excessive use of the term "fee" within legislation is also seen by industry as a risk as it may lead to confusion among residents where different types of fees exist. Consideration to consolidate language and limit what is described as a fee is recommended.</p> <p>Previous industry recommendations in the interim submission included simplifying language in the RV Act to use terms such as "entry payment", which could be easily linked to terms such as "exit payment."</p>
<p>17.1 – Renting and sub-letting in a Retirement Village</p> <p>No specific proposal – general discussion only – focus on operators</p>	<p>No position – refer to interim submission</p>	<p>In its interim submission made to Consumer Protection in July, industry explained the circumstances where operators may sub-let vacant units in retirement villages. The interim submission also explained the practical and legal challenges of extending sub-letting rights to residents, and seeks to reiterate that residents should not be permitted to sub-let their units to others.</p>
<p>18.2 – Retirement Village comprises a whole parcel/s of land</p> <p>That the RV Act be amended:</p> <ul style="list-style-type: none"> <li>• to clarify that a retirement village must comprise the whole of any parcel of land on which RV product accommodation, amenities or services are provided; and</li> <li>• to recognise that portions of the land used for a RVS may also be used for an additional purpose without compromising that land being secured by the RV Act statutory charge.</li> </ul>	<p>Does not support</p>	<p>The proposal would limit flexibility for complementary or additional uses of land where there are legitimate land uses other than a retirement village on the same parcel of land.</p> <p>Protecting the ability for land to be mixed-use will be important in encouraging future retirement village development and reflect aspirations of government to deliver urban consolidation and infill development. The proposal would cause difficulties for newer multi-storey retirement village products, which may operate over multiple floors</p>

		<p>and also include other non-retirement village services or housing products within the same building.</p> <p>From an administrative perspective, the proposal complicates the lodgement, operation and ability to remove memorials in order to preserve a site for retirement village use.</p>
<p>19.3 – Minimum consultation requirements (changes to villages)</p> <p>Six minimum requirements:</p> <ul style="list-style-type: none"> <li>• Proposed Draft Change Implementation Plan</li> <li>• Operator to consult residents' committee prior to release of draft documents</li> <li>• Draft individual resident impact statement</li> <li>• At least one residents meeting</li> <li>• Requirement for operators to provide written response to request for information without deadline for response</li> </ul>	Does not support	<p>Industry understands the need for rigorous consultation with residents prior to major village changes. However, the proposed approach to consultation is onerous, lengthy and could be consolidated to a simpler approach that adequately caters for resident needs.</p> <p>Any modified consultation proposal should also include a deadline for residents and operators to respond to requests for information.</p>
<p>20.1.1 – Multiple residence contacts – pre-contract disclosure</p> <p>That the RV Legislation provide that:</p> <ul style="list-style-type: none"> <li>• its pre-contract disclosure requirements only apply to the first residence contract that a prospective resident is asked to sign; and</li> <li>• prospective residents must be given at least 10 working days to consider any additional residence contracts that are not to be signed at the same time as the first residence contract.</li> </ul>	More information required	<p>Retirement village agreements where units are yet to be constructed (such as 'off-the-plan' apartment style products) may give rise to scenarios where the concept of multiple residence contracts exists. In practicality, there can only be one residence contract, which confers a right to occupy (or ownership of) a retirement village unit.</p> <p>Industry acknowledges the need for further clarity around the timing of information disclosure and how cooling off periods may apply in 'off-the-plan' circumstances. Industry recommends disclosure occurs at the relevant time prior to a residence contract being entered into, rather than the potential for several rounds of formal disclosure.</p>
<p>20.1.2 – Cooling off</p> <p>That the RV Legislation provide that its consumer cooling-off rights:</p> <ul style="list-style-type: none"> <li>• apply to each residence contract that a prospective resident must sign;</li> <li>• have effect even though the contract may be subject to the SL Act; and</li> </ul>	Does not support	<p>As stated above, cooling off periods should only apply where a residence contract that contains the right to occupy or own a retirement village unit is entered into. However, industry agrees that RV Legislation should not derogate from rights under</p>

<ul style="list-style-type: none"> <li>• do not derogate from the SL Act rights.</li> </ul>		<p>the SL Act where those provisions may apply to a residence contract (for example, a strata unit).</p>
<p>21.1 – RV Act and residential aged care residents</p> <p>No specific proposals – general discussion only – consideration of whether regulation is required where villages/village sites include Residential Aged Care Facilities</p>	<p>Does not support</p>	<p>While there are no specific proposals on this item, industry believes the Commonwealth aged care system and associated regulations is sufficient to regulate aged care requirements</p>
<p>22.1 – (Dispute Resolution) SAT Jurisdiction</p> <p>No specific proposal – seeking feedback on broadening SAT's jurisdiction to hear and settle RV disputes, as well as other matters</p>	<p>Qualified support</p>	<p>Industry only supports expanding SAT's jurisdiction to resolve complex matters involving retirement villages, primarily where significant village changes or lifting of memorials is concerned.</p> <p>Industry notes that a search of WA caselaw databases identifies 21 cases involving the RV Act before the SAT since 2005, and 5 cases before the Supreme Court since 2009. Consumer Protection's complaints data, provided to industry representatives during the CRIS1 consultation period, demonstrated less than 1 per cent of complaints made to Consumer Protection in relation to retirement villages required formal or further action.</p> <p>Given SAT's already significant workload (outside of retirement villages) and the insignificant number of retirement villages disputes requiring SAT intervention, industry believes an expanded jurisdiction for retirement village matters would not lead to better or more efficient dispute resolution.</p> <p>Alternatively, the Retirement Living Code of Conduct sets out procedures for signatory villages to follow in order to resolve disputes between residents. The procedures are aimed at efficient dispute resolution that does not require escalation to agencies or Courts and is focussed on the need to maintain strong relationships between residents and village staff. Complaints in relation to Code</p>

		breaches, including for complaints regarding the use of dispute resolution procedures, are managed by an Independent Code Panel.
<p>22.1.1 – (Dispute Resolution) Advocacy service</p> <p>No specific proposal – seeking feedback on need for a new, separate senior's advocacy service to be established</p>	Does not support - alternative recommendation	<p>There are already a number of agencies in existence that can provide support and advice to both prospective and current RV residents. As part of simplifying the pre-contractual disclosure process, industry recommends a consolidation of existing advice and guides through the Seniors Housing Advice Centre.</p> <p>In addition to existing government provided or regulated services, the Retirement Living Code of Conduct places a strong emphasis on dispute resolution and acts as an independent dispute resolution mechanism itself.</p> <p>Policy and procedural obligations on operators contained within the Code include requirements for dispute resolution procedures to exist, those procedures to be clearly communicated and accessible to residents, and regular reporting of disputes and complaints within a village.</p> <p>A core element of the Code of Conduct is the ability for residents to seek advice from the Code administrator on Code and retirement village practice queries. Residents can refer disputes or alleged breaches of the Code to an Independent Code Panel for investigation and determination. Possible outcomes under the Code model include operators facing sanctions for Code breaches and additional requirements for them to demonstrate improvement in their practices.</p>
<p>22.2 – Building defects</p> <p>Questions relating to building defect issues experienced within Retirement Villages</p>	Does not support	While there are no specific proposals contained under this item, it is not clear what issue this discussion aims to resolve. Industry believes there are already legal obligations through residence contracts, building contracts and other legislation

		<p>which adequately covers building defect liability issues. Industry is also aware of significant building reforms underway which relate to multiple building classes and will increase building standards.</p> <p>Clauses C5.1 and C5.2 of the Retirement Living Code of Conduct deal directly with the issues of building defects and warranties, under the category of 'Maintain fit-for-purpose products.'</p>
<p>22.4.1 – Strata Title Villages</p> <p>Questions about pre-disclosure of information to residents as required by the Strata Titles Act and Retirement Villages Act</p>	More information required	<p>Industry's priority is to ensure disclosure requirements are balanced in volume and in terms of the information disclosed. Additional disclosure, which risks adding complexity to the pre-contract period, should be minimised unless where it is absolutely necessary. Industry is confident that it is capable of amending relevant residence contracts to satisfy the requirements of both Acts.</p> <p>Industry is in the early stages of implementing and understanding the practical impact of recent changes to Strata Titles legislation in Western Australia. Industry cautions against additional changes in RV legislation as they relate to Strata and Purple Title villages, until the full effects of Strata Title reforms are known.</p>
<p>22.4.2 - Financial reporting (for Strata Title RVs)</p> <p>Questions about financial disclosure requirements under the Strata Titles Act and Retirement Villages Act</p>	More information required	<p>Recent changes to Strata Titles legislation has had a particular focus on financial disclosure under Strata schemes, especially through the introduction of 10 year mandatory reserve funds and associated maintenance plans. While it remains early in the change process, operators have reported significant additional work required around financial disclosure under new Strata Title legislation, in addition to obligations under RV legislation.</p>
<p>22.4.3 - Rules governing occupation (for Strata Title RVs)</p>	More information required	As above.
<p>22.5 - Provision of private home care services in RVs</p>	Does not support	While there are no specific proposals considered, it is understood this item relates to examples

		<p>where private care services and housing is provided to seniors that is neither funded by the Commonwealth, nor regulated by the <i>Aged Care Act</i>. These arrangements are also not regulated by any form of service specific legislation in WA. Industry believes it is not appropriate to use the RV Act to regulate these arrangements, as they are not retirement specific circumstances. It is also possible that these private and housing circumstances are not exclusive to seniors housing and could include other forms of specialist housing and support services.</p>
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