

# SECURITY OF TENURE FOR RETIREMENT VILLAGES IN WA – WILL THE LAW WALK THE WALK OR JUST TALK THE TALK? <sup>1</sup>

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*Until recently, the legislation governing retirement villages in Western Australia had not been altered significantly. In 2014, significant amendments were made. The legislation has also recently been judicially considered in the Supreme Court case of Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection [2013] WASC 219, and the case may have serious consequences for the retirement village industry. This paper examines the effect of the current legislative framework regulating retirement villages on residents' security of tenure, both in terms of their legal right and their practical option to remain in a village. It also discusses some unresolved issues and possible unintended consequences that may arise out of the legislation. The obvious point is that the regulation of the retirement village industry, including any reforms made to it, will only be as effective as the extent to which there are sufficient mechanisms to enforce compliance by operators and adequate resources have to be allocated to regulatory authorities for any amendments to achieve their purpose.*

## I INTRODUCTION

In Australia, retirement villages are an increasingly popular housing option chosen by people in later life. Data obtained from the Seniors' Housing Centre in December 2012 indicates that, at that time, there was a total of 215 retirement villages and 14,812 units of retirement village accommodation in Western Australia<sup>2</sup> which housed approximately 20,000 persons<sup>3</sup> or just under

<sup>1</sup> This paper is based on the study conducted by the Consumer Research Unit at UWA in collaboration with the Council on the Ageing Western Australia (COTAWA): see A Freilich, P Levine, B Travia and E Webb, *Security of tenure for the ageing population in Western Australia – Does current legislation in WA support seniors' on-going housing needs?* (UWA, November 2014) Ch 6 ('Retirement Villages').

<sup>2</sup> The retirement village industry in Western Australia comprises villages that are operated on a commercial 'for-profit' basis as well as many 'not-for-profit' villages: see Government of Western Australia, Department of Commerce, *Statutory Review of Retirement Villages Legislation 2010: Final Report* (Nov, 2010) xxiv ('Statutory Review'). Data obtained from the Seniors' Housing Centre indicates that in December 2012, villages operated by the not-for-profit

10% of all seniors in WA. These figures have the potential to increase as the state's population ages. Yet, the rate of growth of this housing type remains dependent upon many factors, including competition from other housing options, as well as the possibility that other new financial models will be developed.

Retirement villages in Western Australia are primarily regulated by the:

- *Retirement Villages Act 1992* (WA) (the Act);
- *Retirement Villages Regulations 1992* (WA) (the Regulations); and
- *Fair Trading (Retirement Villages Code) Regulations* (WA), which prescribes the Code of Fair Practice for Retirement Villages (WA) (the Code).<sup>4</sup>

In addition, the *Strata Titles Act 1985* (WA) applies where residential premises in a retirement village are strata titled.<sup>5</sup>

The Department of Commerce (Department) is principally responsible for the administration and enforcement of the legislative regime regulating retirement villages.

Until recently, the legislative regime had not been altered significantly.<sup>6</sup> However, on 18 November 2010, a very detailed and comprehensive review in the form of the *Statutory Review of Retirement Villages Legislation 2010: Final Report* (the Review) prepared by the Department was tabled in Parliament, containing several recommendations for reform. This Review was influential in Parliament's making amendments to the legislation which sought to implement some of the key recommendations for reform set out in the Review. On 1 April 2014, new provisions in the Act and the Regulations came into operation. In 2015, additional amendments to the Regulations and amendments to the Code were made.<sup>7</sup> The Department has indicated that it plans to implement the remaining legislative reforms recommended in the Review by further amendments to the Act.<sup>8</sup>

sector represented approximately 70% of the 215 retirement villages in Western Australia although villages in the not-for-profit sector tend to be smaller on average than those in the for-profit sector: see Government of Western Australia, Department of Commerce (Consumer Protection), *Consultation Discussion Paper – Review of the Terms of the Fair Trading (Retirement Villages Interim Code) Regulations 2013* (June 2013) 3 [2.2.2] ('*Consultation Discussion Paper*').

<sup>3</sup> Consultation Discussion Paper, above n 2, 3 [2.2.2].

<sup>4</sup> The current Code is the '*Fair Trading (Retirement Villages Code) Regulations 2015* (WA)'.

<sup>5</sup> Obviously, general fair trading legislation also applies to retirement villages in Western Australia, including the *Fair Trading Act 2010* (WA) and the Australian Consumer Law (ACL) as set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), specifically regulating the areas of pre-contractual disclosure, unconscionability and unfair contract terms.

<sup>6</sup> Statutory Review, above n 2, v.

<sup>7</sup> These amendments came into operation on 1 April 2015 and 1 October 2015.

<sup>8</sup> Consultation Discussion Paper, above n 2, 1.

This paper examines the adequacy of the overall legislative framework in Western Australia (including the recent amendments) in protecting the security of tenure of residents of retirement village complexes. The paper defines 'security of tenure' as 'the legal right or practical option that a resident has to remain in their existing accommodation or acquire alternative accommodation' to 'balance the legal and broader concepts of security of tenure.'<sup>9</sup>

The paper first considers the definition of 'retirement village'. Secondly, it identifies key events which may directly impact on a resident's legal right or practical option to remain in a retirement village as well as situations in which residents may find that although they feel that they cannot stay in the village, they cannot afford to leave because of their general financial position and the un-saleability or un-leasability of their units. It considers the likely operation of the legislation in each event as well as the adequacy of dispute resolution processes. This paper demonstrates the positive effect of the legislation and in particular, the recent amendments, on residents' security of tenure but makes it clear that there are still issues that need to be addressed before comprehensive meaningful protection is given to residents in this area. Indeed, the paper argues that the legislative framework falls short of completely achieving the purpose of the reforms and may even result in some unintended negative consequences for residents' security of tenure.

It is noted that this paper acknowledges that owners need an incentive to enter and remain in the retirement village industry. Achieving a sense of balance between the rights and obligations of owners and residents is therefore critical. The level of regulation of the industry must not be 'so excessive as to stifle desirable growth in the industry'.<sup>10</sup> This would be contrary to the purpose of the legislative framework that governs the industry and obviously, create very real challenges to security of tenure for residents and ultimately, tenure in general.

## II THE NATURE OF RETIREMENT VILLAGES

A retirement village is defined in s 3(1) of the Act to mean -

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.<sup>11</sup>

<sup>9</sup> This was the definition adopted in the study conducted by the Consumer Research Unit at UWA in collaboration with COTAWA: see A Freilich, P Levine, B Travia and E Webb, above n 1, 17.

<sup>10</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 May 1991, 2049-51 (Yvonne Henderson, Minister for Consumer Affairs).

<sup>11</sup> *Retirement Villages Act 1992* (WA) s 3(1).

The term 'retirement village scheme' is defined under the Act<sup>12</sup> to mean:

a scheme established for retired persons or predominantly for retired persons, under which:

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

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

The recent Western Australian Supreme Court case of *Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection* (Hollywood Case)<sup>13</sup> provides some clarity as to the definitions of a 'retirement village' and a 'retirement village scheme' under the Act. Pritchard J noted that although there is a close relationship between the two concepts, they are discrete concepts under the Act and cannot be understood interchangeably.<sup>14</sup> Her Honour explained that a 'retirement village scheme' is 'a programme of action or a plan or policy' concerning the use of residential premises which is adopted and implemented by the owner (as defined in s 3(1) of the Act), satisfying the following requirements:

- a) the scheme must be established for retired persons or predominantly for retired persons, being persons who have attained the age of 55 years or are retired from full time employment, or a person who is or was the spouse or defacto partner of such a person;
- b) it must be a scheme under which 'residential premises' in a wide possible variety of forms are occupied pursuant to a wide possible variety of legal arrangements; and

<sup>12</sup> Ibid.

<sup>13</sup> [2013] WASC 219.

<sup>14</sup> Ibid [96].

- c) at least one resident or prospective resident must pay a premium (as defined in s 3(1) of the Act) in consideration for, or in contemplation of, admission as a resident under the scheme.<sup>15</sup>

As to the definition of ‘retirement village’ her Honour noted,<sup>16</sup> *inter alia*, that the definition has two key elements: (1) the buildings and appurtenant land that physically make up the retirement village; and (2) the owner’s use or intended use for which the buildings and the land are to be used. That use must be for the purpose of, or in connection with, a retirement village scheme to bring it within the regulatory ambit of the Act.

Retirement villages should not be confused with residential parks or residential aged care. Although some villages are co-located with aged care facilities, those facilities are regulated by Commonwealth laws.<sup>17</sup> Unlike aged care facilities, retirement villages generally operate on the basis of residents caring for themselves in self-care units and being self-funded.

Different types of ownership and occupancy rights exist in retirement villages in Western Australia.<sup>18</sup> Under their residence contracts,<sup>19</sup> retirement village residents (apart from those that are renters) will likely be required to pay to the administering body<sup>20</sup> of the village:

- a) a premium<sup>21</sup> or an initial entry price<sup>22</sup>;

<sup>15</sup> Ibid [78]-[87].

<sup>16</sup> Ibid [88]-[95].

<sup>17</sup> Primarily, the *Aged Care Act 1997* (Cth).

<sup>18</sup> These include:

- a) direct ownership structures that offer freehold strata title or community title;
- b) indirect ownership structures that offer shares in a company or units in a unit trust involving the purchase of an undivided share of the village as a co-owner and carrying a right to occupy a unit in a village that is legally owned by the company or the trustee of the trust, which retirement villages are established on purple titles and are often referred to as purple title villages;
- (c) long term lease and licence structures that require an up-front capital payment (the most common structure in Western Australia); and
- (d) lease arrangements where the resident simply pays rent, often below market rates : see Statutory Review, above n 2, [xxiv].

<sup>19</sup> A ‘residence contract’ is defined in section 3(1) of the *Retirement Villages Act 1992* (WA) to mean ‘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’.

<sup>20</sup> An ‘administering body’ is defined in section 3(1) of the *Retirement Villages Act 1992* (WA) to mean ‘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’.

<sup>21</sup> Section 3(1) of the *Retirement Villages Act 1992* (WA) defines ‘premium’ as being ‘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)...’.

- b) recurrent charges<sup>23</sup> or operating charges during their stay and beyond (plus possible additional costs for the provision of optional services, such as meals, laundry and cleaning services); and
- c) a deferred management fee or exit fee when they leave.<sup>24</sup>

Reasons provided by industry for charging deferred management fees vary.<sup>25</sup>

Other payments that residents of retirement villages may be liable to pay include:

- a) special levies,<sup>26</sup> being once-off costs that management might require for special projects;
- b) contributions to any reserve fund;<sup>27</sup>
- c) a share of the capital gain upon the re-leasing of the unit; and
- d) other costs upon vacation of the unit including the costs of repair and refurbishment of the unit.<sup>28</sup>

<sup>22</sup> The nature of the premium will depend on the particular ownership or occupancy right of the resident provided by the residence contract but it may include, for example, the purchase of a strata unit, a share as co-owner of a village or payment for a lease or licence (which may be in the form of an interest free loan).

<sup>23</sup> Section 3(1) of the *Retirement Villages Act 1992* (WA) defines recurrent charges as being 'any amount (including rent) payable by a resident to an administering body of a retirement village on a recurrent basis'. They are costs charged to meet the costs associated with operating a village and may include staff salaries and maintenance of facilities. Recurrent charges may also be known as ongoing fees or maintenance fees and are generally paid on a weekly, fortnightly or monthly basis.

<sup>24</sup> Deferred management fees, which are sometimes called departure fees or exit fees, are the fees a resident is required to pay when they leave the retirement village. These fees will be deducted from the premium so that the resident will receive an 'exit payment' on departure, being the amount of their initial premium or entry price minus any deferred management fee. There are many different departure fee structures and they can produce very different financial outcomes: see for example, Senior Living Online, *Departure Fee Guide*, viewed on 6 Nov 2015, [http://www.seniorlivingonline.com.au/downloads/departure\\_fee\\_guide.pdf](http://www.seniorlivingonline.com.au/downloads/departure_fee_guide.pdf).

<sup>25</sup> Statutory Review, above n 2, 131. They include: lowering the cost of entry for residents; fairness to residents who only stay for a brief period as the fee is determined by length of stay; lowering of ongoing costs and other costs for residents because costs are factored into profit calculations; and funding of common facilities such as swimming pool, bowling greens etc. According to Richard Andrews, although the original intention of exit fees was to allow a discount in the cost of entry to a unit, now owners charge the full equivalent freehold price plus an exit fee: R Andrews, *Don't Buy Your Retirement Home without Me*, (Wrightbooks, 2012).

<sup>26</sup> A 'residence contract' is defined in section 3(1) of the *Retirement Villages Act 1992* (WA) to mean 'a single amount that the residents of a retirement village are required to pay to recover an unforeseen operating expense of the retirement village not provided for in the recurrent charges'.

<sup>27</sup> Reserve funds, also known as sinking funds, are monies set aside to pay for repairs, replacements, maintenance and renovations within a village: see *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 14(1).

<sup>28</sup> See *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 22.

### III KEY AREAS IMPACTING ON A RESIDENT'S SECURITY OF TENURE

This paper considers three key events which may directly impact on a resident's legal right or practical option to remain in a retirement village, and may result in a resident being forced to leave the village. These include circumstances in which:

- a) a retirement village 'fails'<sup>29</sup> as a result of operator insolvency or an operator chooses to terminate a retirement village scheme;
- b) a residence contract is terminated by an administering body; or
- c) living conditions in a village become untenable for a resident because of mismanagement and/or clashes with management.

The adequacy of a village's dispute resolution processes is also obviously relevant to the protection of a resident's security of tenure and will also be discussed.

This section examines the legislative framework in Western Australia (including the way it has been interpreted and applied) in relation to each of the above areas as to whether it adequately addresses each of these areas and in so doing, provides sufficient protection to residents' security of tenure. It explains that although the amendments may provide sufficient protection to a resident's legal right to remain in a village, there are still issues that need to be addressed in relation to the protection of a resident's practical option to stay in the village.

#### A *Village failures or voluntary termination of retirement village schemes*

Events that will have an obvious effect on a resident's legal right to remain in a retirement village are those where an operator becomes insolvent or desires to voluntarily terminate a village scheme. The Act currently aims to address residents' fears and protect their rights to remain in a village in these circumstances. It does this by various means including:

- requiring the registration of memorials under the *Transfer of Land Act 1893* in relation to land used, or proposed to be used for the purposes of a retirement village;<sup>30</sup>
- the creation of statutory charges on land used for retirement villages;<sup>31</sup>
- making residence contracts binding on successors in title of the owners of retirement villages;<sup>32</sup> and

<sup>29</sup>Les Armstrong, President of the Association of Residents of Queensland Retirement Villages (Inc), *What happens if a retirement village operator becomes insolvent or goes into receivership?*, 1 May 2011, Retirement Village Residents Association, <http://www.rvra.org.au/Documents/11-05-01-VillageReceivership.pdf>.

<sup>30</sup> *Retirement Villages Act 1992* (WA) s 15.

<sup>31</sup> *Ibid* s 20.

<sup>32</sup> *Ibid* s 17.

- prohibiting the termination of a retirement village scheme while any resident remains in occupation without the approval of the Supreme Court.<sup>33</sup>

These provisions seem to be effective. Indeed, in practice an eviction due to village failure is almost non-existent. Further, it has proved nearly impossible for an operator to obtain Supreme Court approval to terminate a retirement village scheme, as demonstrated by the Hollywood Case.

The Hollywood Case<sup>34</sup> concerned the land upon which the Hollywood Retirement Village (Hollywood Village) was situated in Nedlands. The owner and operator of the Hollywood Village, Retirement Care Australia (Hollywood) Pty Ltd (Retirement Care), subdivided the land into two lots and planned to sell one of the lots (Lot 889), while continuing to use the balance of the land (Lot 888) for the Hollywood Village.

Retirement Care applied to the court seeking:<sup>35</sup>

- a) an order granting the approval of the Court for the termination of the retirement village scheme relating to the Hollywood Village on Lots 888 and 889, pursuant to section 22 of the Act;
- b) a declaration that the charges under the memorial registered over the land in Lots 888 and 889 (in accordance with sections 15(3) and 15(4) of the Act) had been fully satisfied, extinguished or determined in respect of Lot 889 and no longer affected Lot 889; and
- c) a declaration that immediately from the time that any order granting the approval for the termination of the retirement village scheme in relation to Lots 888 and 889 takes effect, there was a retirement village scheme being conducted on Lot 888.

Pritchard J dismissed the application, finding that section 22 did not apply in the circumstances as Retirement Care was not proposing a termination of the operation of its retirement village scheme, but to use only Lot 888 for the purpose of this scheme. Retirement Care's real objective was to excise Lot 889 in a manner which would enable the cancellation of the memorial in respect of Lot 889 and the modification of the statutory charges created under the Act in relation to the land in the Hollywood Village to reflect the excision of Lot 889, enabling a sale of Lot 889. However, her Honour found that the Act did not contain any provision allowing these changes to occur and whether the Act should permit these changes to occur involves questions of policy which are

<sup>33</sup> *Ibid* s 22.

<sup>34</sup> [2013] WASC 219.

<sup>35</sup> *Ibid* [60].



matters for the legislature.<sup>36</sup>

Pritchard J went further, providing an insight into what would have been her decision had Retirement Care's true objective been the termination of the retirement village scheme and section 22 had applied in the case. Her Honour said that even if section 22 of the Act had applied in the circumstances, she would not have been prepared to exercise her discretion to grant approval for the termination of the scheme having sole regard to the existence of the statutory charges in respect of the land without the immediate repayment of all entry premiums to which existing residents were entitled.<sup>37</sup>

Relevantly her Honour said,

Although clearly the RV Act seeks to strike a balance between the rights and obligations of owners and residents, the balance falls heavily in favour of the protection of the interests of the residents of retirement villages, particularly in the long term certainty and security of their accommodation.<sup>38</sup>

Although the current legislation together with the Hollywood Case, provides significant comfort to residents in relation to any proposed termination of a retirement village scheme and to the security of their legal right to remain in a retirement village, the consequences of the legislation and the case remain uncertain as to how they may impact on residents' practical option to remain in a village. Certainly, owners of retirement villages need to be well aware of their responsibilities when it comes to the interests of residents and not allow any profit-making interests to adversely affect the legal right that a resident has to remain in their retirement village. But what if there is a genuine need to sell off land in a retirement village to maintain, if not enhance, the standard of accommodation and amenities in a retirement village? The question becomes even more relevant when considering the situation in relation to not-for-profit owners. It is clear that Parliament will need to carefully consider whether to include a new provision relating to the ability of an owner to excise and sell land in a retirement village scheme in order to, among other things, ensure the protection of the practical option of a resident to remain in the village.<sup>39</sup>

#### B *Termination of a village contract by an administering body*

Another issue that is clearly relevant to a resident's legal right to remain in a village is the potential for an administering body to terminate a residence contract. The legislation addresses this possibility in that it restricts the rights of

<sup>36</sup> Ibid [206].

<sup>37</sup> Ibid [189] and [205].

<sup>38</sup> Ibid [175].

<sup>39</sup>See P Levine, 'Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection – a windfall for residents or a disincentive to owners?' *Australian Property Law Bulletin*, June 2013, 169-173.

administering bodies to terminate a residence contract. Indeed, under the Act, an administering body of a retirement village cannot terminate a residence contract without the agreement of a resident (unless the resident dies or abandons the residential premises);<sup>40</sup> although it may make an application to the State Administrative Tribunal (SAT) to terminate the contract in certain very limited specified circumstances.<sup>41</sup> These circumstances include: where the residential premises becomes unsuitable for the resident due to their physical or mental ill health;<sup>42</sup> where the resident has breached their residence contract or the residence rules;<sup>43</sup> where the resident has caused injury or damage to the administering body or an employee or other resident;<sup>44</sup> or where the administering body would suffer undue hardship if the residence contract was not terminated.<sup>45</sup>

Although the Act provides for an administering body to make application to the SAT for the termination of a residence contract without the agreement of the resident, albeit in very restricted circumstances, the number of cases involving applications to terminate a residence contract on the basis of any of these circumstances is minimal. The reasons for this are unclear. The consultations undertaken in the CRU/COTAWA Study<sup>46</sup> revealed that the perception among operators and their legal advisers is that there is little if any chance of the SAT ever making an order to terminate a residence contract.<sup>47</sup> Operators may also likely be deterred from making such an application due to the potential negative impact on their reputation.

In view of the above, it appears that the legal right of residents to remain in a retirement village may be sufficiently protected by laws which restrict the right of an administering body to terminate a contract. However, in some circumstances, the termination of a particular resident's contract may be necessary to ensure that living conditions do not become untenable for other residents in the village. These circumstances may include, for example, a

<sup>40</sup> *Retirement Villages Act 1992 (WA)* s 17(1). However, it is noted that the section provides that if a holder of a security that was in existence before the commencement of the section becomes entitled to vacant possession of the premises pursuant to the terms of their security, this may enable the termination of a residence contract.

<sup>41</sup> *Ibid* s17(d).

<sup>42</sup> *Ibid* s 58.

<sup>43</sup> *Ibid* s 59. In this case, the SAT may make an order to terminate the residence contract but only if the SAT is satisfied that the breach, or persistent breaches by the resident justify termination or it is otherwise appropriate to do so.

<sup>44</sup> *Ibid* s 62.

<sup>45</sup> *Ibid* s 63.

<sup>46</sup> See A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>47</sup> However, it is noted that a review of the relevant SAT decisions that are available indicates that SAT may be more willing to make these types of orders than has previously been thought within the industry: see, for example, *Retirement Care Australia (Hollywood) Pty Ltd and Turpin* [2012] WASAT 125.

situation where one resident of a village is causing a serious nuisance to other residents. It is questionable whether the SAT has jurisdiction under the Act to terminate the contract of such a resident. This may need further consideration to protect the practical option of other residents to remain in the village, thus meaningfully safeguarding their security of tenure. It is noted that the apparent reluctance of operators to apply to the SAT in relation to the termination of residence contracts also seems to extend to these types of situations.

### C *Mismanagement and clashes with management*

The primary concern of residents interviewed for the purposes of the CRU/COTAWA Study<sup>48</sup> related to their circumstances in the village becoming untenable as a result of mismanagement and/or clashes with management. Issues relevant to this concern were:

- a) quality control of management;
- b) management's treatment of the village's finances;
- c) disputes between residents and management relating to, *inter alia*, who is liable for the costs of maintenance, repairs and replacement works, delays in these works being carried out and disagreements as to whether these works are necessary; and
- d) the lack of consultation and communication with residents.

These issues obviously have relevance to a resident's practical option to remain in a village. The question of whether the current legislation and its developments adequately address these areas will be discussed below.

#### 1 *Quality control of management*

Good management is essential to the protection of security of tenure in retirement villages. In this regard, amendments to the legislation relating to quality control of management in recent years have generally been a welcome development. These amendments will, in the author's view, contribute to making an improvement in the standard of living of a resident in a retirement village, thus protecting their practical option to remain in the village. However, there is still significant room for positive change.

Recent amendments to the Act prohibit unsuitable persons from being involved in the management of retirement villages<sup>49</sup> and enable a statutory

<sup>48</sup> See A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>49</sup> *Retirement Villages Act 1992* (WA) s 76. Such people include bankrupts; people who have been convicted of offences of violence, fraud or dishonesty punishable by imprisonment for more than 3 months or offences under Chapter XXI of the *Criminal Code* (WA); people who have been directors of corporations that have been the subject of involuntary winding up proceedings; people who have been disqualified from managing corporations under the *Corporations Act 2001* (Cth); and other prescribed persons.

manager to be appointed by SAT upon the application of the Commissioner (on behalf of the residents).<sup>50</sup>

However, although the amendments to the legislation do prohibit unsuitable persons from being involved in the management of a retirement village, they do not go so far as to specify the qualifications required to be a fit and proper person in the industry. In this regard, although they may assist in reducing the level of bad management within the retirement industry, they may have little or no effect on increasing the level of good management within the industry.<sup>51</sup> Indeed, the legislation does not provide for the training or licensing of managers, nor does it set competence standards for the management of retirement villages.<sup>52</sup>

Additionally, there appears to be no current mechanism for residents to provide any input or feedback in relation to the appointment of managers. Although the Department has recently started making visits to different retirement villages to meet with management and the chairs of residents' committees, it is only intended that these visits take place every 2-3 years.<sup>53</sup> Further, they are not mandated under the legislation and cannot be enforced.

Finally, it should be noted that a sufficiently high level of remuneration is necessary to attract good managers to the industry. In this regard, the question of whether the operator or the residents<sup>54</sup> should be liable for management fees in a village and whether any deferred management fees are being used to pay for management and if not, whether they should be, may need to be considered and clarified in the legislation.

## 2 *Management's treatment of the village finances*

Among the concerns expressed by residents interviewed for the purposes of the CRU/COTAWA Study<sup>55</sup> were those relating to management's treatment of a village's finances.<sup>56</sup>

Recent amendments to the law seek to improve reporting requirements in

<sup>50</sup> Ibid Part 5A. However, it is noted that the amendments do not provide elderly residents with a safe and confidential way of bringing matters of concern to the Commissioner's attention for an application to the SAT to be made in relation to the appointment of a statutory manager.

<sup>51</sup> A lack of resources may prevent the Department from actively involving itself in the improvement of training managers in the industry or the accreditation of the industry.

<sup>52</sup> Department of Commerce, Statutory Review of Retirement Villages Legislation 2010: Final Report, p 51.

<sup>53</sup> Interviews conducted with the Department of Commerce for the purposes of the study conducted by the Consumer Research Unit at UWA in collaboration with COTAWA: see A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>54</sup> The SAT case of *Maclean and Beacon Hill Village Incorporated* [2005] WASAT 29 illustrates that raising standards of management may result in increased fees to residents.

<sup>55</sup> See A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>56</sup> Note that the case of *Dowson and The Multiple Sclerosis Society of Western Australia (Inc)* [2005] WASAT 36 provides a good example of the issues associated with these concerns.

relation to village finances and provide residents with more control over village budgets.<sup>57</sup> Indeed, these amendments:

- a) clarify the format of village operating budgets, and what matters must be included in them, as well as financial statements in relation to a village's operating budget and any reserve fund budget;<sup>58</sup>
- b) require all annual financial statements to now be required to be audited, unless the residents decide, by special resolution, that an audit is not required;<sup>59</sup>
- c) clarify the importance of an administering body engaging in 'effective' consultation with residents<sup>60</sup>; and
- d) require the administering body to apply any surplus in the operating budget to the village in which the surplus arose, unless a special resolution of residents approves the application of all or part of these monies to any other purpose of benefit to the residents of the village;<sup>61</sup>
- e) require provisions to be included in residence contracts that set out payments to be made by a resident as well as the basis for these payments;<sup>62</sup> determination of these in relation to operating costs or expenses of a village or any other recurrent charges, reserve funds and their access to, or use of any personal amenity and personal service, operating
- e) require an administering body to provide information in relation to the steps taken to minimise increases in village operating costs and the costs of reserve fund works to a resident who makes a reasonable request for it;<sup>63</sup> and
- f) allow the residents to agree by special resolution to apply to the SAT in relation to a dispute about an increase in charges or the imposition of a levy.<sup>64</sup>

<sup>57</sup> These amendments to the Code in relation to a village's accounting and financial reporting requirements (being clauses 17, 18 and 19 of the *Fair Trading (Retirement Villages Code) Regulations 2015*) will only apply to retirement villages from 1 July 2016: see *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 37.

<sup>58</sup> *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cls 17,18 and 19.

<sup>59</sup> *Ibid* cls 19(9) and (10).

<sup>60</sup> *Ibid* cls 4(e) and 16.

extra line here

<sup>62</sup> These include payments for personal amenities and services; payments made on a recurrent basis and any contributions to be made to a reserve fund: *Retirement Villages Regulations 1992* (WA) reg 7B, 7D and 7F.

<sup>63</sup> *Ibid* cl 16(3).

<sup>64</sup> *Retirement Villages Act 1992* (WA) s57A. It is noted that the Department had recommended 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

These measures are all very positive developments and will likely improve residents' security of tenure in a village in the sense that they will have a positive effect on a resident's practical option to remain in a village. However, the amendments do not sufficiently take account of any anxiety that residents may have in their interactions with an administering body. Indeed, there is an assumption made that a resident will have the confidence to call upon an administering body for information in relation to any increases in operating costs and costs of reserve fund works. Obvious issues are also associated with the fact that the administering body is to call the meeting of residents<sup>65</sup> to decide whether an application should be made against the administering body in relation to an increase in charges or the imposition of a levy. Although the Department has tried to address these issues by clarifying that a residents' committee can, of its own volition, call a meeting of residents for any purpose,<sup>66</sup> this is of no use to a village without a residents' committee.

The amendments also require the administering body to be invited to attend a meeting of residents at which a special resolution is to be held.<sup>67</sup> Once at the meeting, the administering body may remain at the meeting unless a majority of residents decide that the administering body must leave the meeting.<sup>68</sup> It is difficult to contemplate any resident wanting to be the one to call the vote as to whether the administering body should leave the meeting.

An examination of other recent amendments to the legislation in relation to the treatment of village funds reveals further issues that may need to be addressed before comprehensive meaningful protection is given to residents in this area. For example, as recommended in the Review,<sup>69</sup> the new section 25 of the Act prohibits an administering body from demanding or receiving payment from residents in respect of any prescribed matter.<sup>70</sup> This is a welcome

full details of the proposed new services and amenities. The village operator would then have a right of appeal to the SAT in the event that residents did not approve the introduction of these new services and amenities. However, this recommendation was not incorporated in the Amendment Act, placing the onus on residents to apply to the SAT in relation to the introduction of new services and amenities: Statutory Review, above n 2, 60 (Recommendations 37 and 38).

<sup>65</sup> Ibid s57A(3); *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 26.

<sup>66</sup> *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 26(3).

<sup>67</sup> Ibid cl 26(15). The Code Consultation Paper discussed this issue and found that as most special resolution meetings affect the administering bodies as well as residents, it is an issue of natural justice that the administering body should be able to explain its position and discuss options to resolve problems at the meeting at which the special resolution vote is taken: see Consultation Discussion Paper, above n 2, 35 [3.2].

<sup>68</sup> Ibid cl 26(16).

<sup>69</sup> Statutory Review, above n 2, 67 (Recommendation 39).

<sup>70</sup> *Retirement Villages Act 1992* (WA) s 25(1) and *Retirement Villages Regulations 1992* (WA) reg 11.

development in an industry where administering bodies have been known to on-charge all manner of costs incurred by them to vulnerable residents.<sup>71</sup> However, whether this provision will have its intended effect and administering bodies will not find other ways of packaging these costs and passing them on to residents, specifically under contractual arrangements with new residents, is yet to be determined.

Indeed, whether these legislative changes develop into a pronounced change in the degree of transparency and the level of consultation with residents practised by managers in relation to financial spending and reporting remains to be seen. Any change is, likely to be very dependent on the quality of management within a village and the strength of any monitoring and enforcement functions by regulatory authorities.

### 3 *Disputes between residents and management relating to maintenance, repairs and replacement works*

The interviews conducted for the purposes of the CRU/COTAWA Study<sup>72</sup> revealed that residents were significantly affected by the disputes between residents and management as to which party is liable for the costs of maintenance, repairs and replacement works in a retirement village. These disputes appear to generally be caused by a lack of clarity in residence contracts, including the very ambiguous definitions of variable outgoings and refurbishment fund.<sup>73</sup> Residents also complain of significant delays in maintenance, repairs and replacement works being carried out by management. There may also be disagreements between management and the resident as to whether any maintenance, repair or replacement work is necessary.<sup>74</sup> Other disputes that were of concern to residents related to their ability to add or remove fixtures from their own unit or to do gardening.<sup>75</sup>

Standard form contracts, although rejected in the Review,<sup>76</sup> might assist greatly to overcome these issues. However, the recent changes to the legislation seem to go a significant way towards addressing them and in doing so, will

<sup>71</sup> This was the situation at Karrinyup Lakes Lifestyle Village, an inquiry into which was referred to the Economics and Industry Standing Committee. The findings and recommendations of this inquiry were taken into account in the drafting of the Statutory Review and the amendments to the *Retirement Villages Act 1992* (WA).

<sup>72</sup> See A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>73</sup> This is illustrated in the case of *Dowson and The Multiple Sclerosis Society of Western Australia (Inc)* [2005] WASAT 36.

<sup>74</sup> These were complaints raised by residents in interviews conducted for the purposes of the study conducted by the Consumer Research Unit at UWA in collaboration with COTAWA: see A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>75</sup> *Ibid.* These complaints were also raised in initial public meetings and written submissions for the Review conducted by the Department of Commerce: see Statutory Review, above n 2, 83.

<sup>76</sup> Statutory Review, above n2, 24.

likely increase protection of residents' security of tenure in the form of having a positive effect on their practical option to remain in a village. The recent regulations made under section 14A of the Act<sup>77</sup> include a requirement for a residence contract to set out:

- which party is responsible for arranging to carry out maintenance, repair or replacement work to ensure that the residential premises (and any fixtures, chattels and capital items on the premises) are maintained in a reasonable condition during the occupation of the premises;
- the contributions to be made by the resident and the administering body to these costs;
- the relevant procedures to be followed to obtain the consent of the resident to the carrying out of the work and the cost of the work;
- a provision allowing the resident to arrange for the work to be carried out at their own expense if they do not agree with the cost proposed by the administering body; and
- how any contribution to the costs by the resident is to be paid.<sup>78</sup>

These regulations also contain similar requirements in relation to the maintenance, repair, renovation or replacement work of other buildings in the village.<sup>79</sup>

Another recommendation made in the Review which would assist to address the concerns of residents in relation to the costs of maintenance, repairs and replacement works is the introduction of *mandatory* reserve funds to enable retirement villages to be maintained in a reasonable condition.<sup>80</sup> The Department had indicated that Review's recommendations in relation to reserve funds would be incorporated into future amendments to the Act.<sup>81</sup> However, other issues are likely to be associated with the mandatory introduction of reserve funds that will need to be properly addressed. For example, the question of whether retirement villages within the not-for-profit

<sup>77</sup> The new section 14A of the *Retirement Villages Act 1992* (WA) enables regulations to prescribe provisions that must or must not be included in residence contracts or in residence contracts of a specified kind. A person is prohibited from entering into a residence contract with a prospective resident unless the contract complies with the regulations and a penalty of \$20,000 applies to a contravention of this prohibition: *Retirement Villages Act 1992* (WA) s 14A(2).

<sup>78</sup> *Retirement Villages Regulations 1992* (WA) reg 7G, Table, Item 1.

<sup>79</sup> *Ibid* reg 7G, Table, Item 3.

<sup>80</sup> Reserve funds are monies set aside for repairs, replacements, maintenance and renovations within a village: see the definition of 'reserve fund' in *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 14 (1).

<sup>81</sup> Interviews conducted with the Department for the purposes of the study conducted by the Consumer Research Unit at UWA in collaboration with COTAWA: see A Freilich, P Levine, B Travia and E Webb, above n 1.



sector where residents are not currently liable to fund maintenance works under their residence contracts should be required to have a reserve fund will need to be considered. There will also be a need for the provision of information to residents in relation to any mandatory introduction of reserve funds so that residents are fully aware of how their contributions to any reserve fund will benefit them. Hopefully, any use of reserve funds will not simply allow operators to circumvent the ability for residents to apply to SAT (subject to a special resolution) in relation to increases in recurrent charges.

The recent regulations made under the Act also prescribe a provision to be included in a residence contract allowing non-owner residents to carry out urgent repairs by selecting a contractor from an approved list displayed in a prominent place after having given the operator a reasonable opportunity to carry out the work, and to be able to seek reimbursement of costs from the administering body.<sup>82</sup> This provision will hopefully help to significantly reduce clashes that residents may have with management in relation to delays in maintenance and repair works. But what of delays in the performance of non-urgent repairs? These would also seem to be undesirable and should be addressed. There may also be disagreements between management and the resident as to whether any maintenance, repair or replacement work is necessary.<sup>83</sup> It is clear that there are still issues that need to be addressed in the legislation in relation to these issues to further improve the practical option of a resident to remain in a retirement village.

Finally, the recent regulations made under the Act also require a residence contract 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. It also requires a contractual provision that the administering body must provide a resident with the statement of the terms and conditions that apply to any such approval. The new regulations also require residence contracts to provide a list of personal amenities that will be made available for a resident, such as gardening areas, and the conditions on which those amenities will be made available. It will also be necessary to include a provision in the contract, among others, setting out the circumstances in which the availability of the personal amenity may be withdrawn, which must be reasonable having regard to the nature of the amenity and the circumstances in which it is made available. Whether these provisions will reduce the number of disputes between residents and administering bodies in relation to these issues remains to be seen.

<sup>82</sup> *Retirement Villages Regulations 1992* (WA) reg 7H.

<sup>83</sup> See, for example, the case of *Winter and Salvation Army (WA) Property Trust* [2012] WASAT 17.

#### 4 *Lack of consultation and communication*

It seems obvious that an open relationship between the owners, management and the residents in a village would be a significant contributing factor not only to the satisfaction of residents but to a village's success and yet this open relationship does not always exist.<sup>84</sup> Although there are general objectives, principles and basic rights for residents set out in the Code in relation to a resident's freedom and autonomy over their property and affairs as well as the promotion of consultation with residents, the general nature of these objectives principles and rights do not assist in their practical application.

Recent amendments to the Code emphasise and detail the requirement of administrative bodies to consult with residents, not just in relation to the financial operations of a village but also on the day-to-day running of a village.<sup>85</sup> The Code was amended to make it clear that an objective of the Code is to facilitate *an effective means of consultation* between the administering body and the residents on the management of a retirement village.<sup>86</sup> Further, guidelines have been provided in a clearly marked area in the Revised Code in order to provide practical examples of what might constitute effective consultation and to clarify that the term consultation means effective consultation throughout the Code.<sup>87</sup> The Code also provides for the formation of a residents' committee to consult with the administering body on behalf of residents<sup>88</sup> and, under the recent amendments to the Code, administering bodies are required to establish appropriate procedures for consulting with a residents' committee.<sup>89</sup> However, the interviews conducted for the purposes of the CRU/COTAWA Study<sup>90</sup> made apparent that there is a real lack of effective residents' committees. A constructive recommendation made by the Department in its Review to increase the effectiveness of residents' committees included developing educational materials providing practical information relating to the establishment and operation of residents' committees for use by residents.<sup>91</sup> However, it is understood that a lack of resources may have prevented this

<sup>84</sup> In the SAT case of *Maclean and Beacon Hill Village Incorporated*, Dr de Villiers, the member of the SAT hearing the matter made the comment that: 'retirement villages can only function properly if there is a close relationship between the respective parties – in particular between the residents, owners/trustees and managers of a village. Most if not all of the issues that were raised could have been dealt with if proper channels of communication existed whereby residents could raise queries and receive proper and accurate information and responses.' : [2005] WASAT 29[49].

<sup>85</sup> *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cls 16(1)(d) - (e).

<sup>86</sup> *Ibid* cl 4(e).

<sup>87</sup> *Ibid* - see grey boxed area under cl 4.

<sup>88</sup> *Ibid* cls 24-25.

<sup>89</sup> *Ibid* cl 16(1) (e).

<sup>90</sup> See A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>91</sup> Statutory Review, above n 2, 100 (Recommendation 63).

recommendation from being implemented.<sup>92</sup>

The amendments to the Code in relation to consultation and communication with residents will hopefully have a positive effect on the practical option of a resident to remain in a village. However again, unless administering bodies genuinely believe that compliance of these obligations will be enforced, they are of little value.

#### D *Dispute Resolution Processes*

In circumstances where there are clashes with management in a village, the chances of these issues being resolved will be dependent on the effectiveness of any dispute resolution process. Therefore, the effectiveness of any dispute resolution process is essential to the protection of a resident's security of tenure in the form of their practical option to remain in a retirement village.

The Code outlines the processes<sup>93</sup> to be used to resolve a dispute within a retirement village between residents and the administering body or between residents which may not be determined by SAT.<sup>94</sup> Recent amendments to the Code require the administering body to nominate a suitable person or body to deal with the dispute that is acceptable to all parties.<sup>95</sup> Although the Code Consultation Discussion Paper made reference to the fact that it is important that the person should have good mediation skills,<sup>96</sup> the amendments to the Code do not incorporate this as a requirement.

If the dispute cannot be resolved using this village dispute resolution process, an application can be made to the Commissioner to refer the matter to mediation.<sup>97</sup> The Commissioner can also provide negotiation services to either party.<sup>98</sup> The interviews conducted with the Department for the purposes of the CRU/COTAWA Study<sup>99</sup> revealed that matters are very rarely referred to mediation, with the cost of mediation being the major deterrent. It is noted that the recent amendments to the Code provide that unless the Commissioner

<sup>92</sup> Interviews conducted with the Department for the purposes of the study conducted by the Consumer Research Unit at UWA in collaboration with COTAWA: see A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>93</sup> See *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) div 6.

<sup>94</sup> See *Ibid* cl 29 and the definition of 'retirement village dispute'. See also *Retirement Villages Act 1992* (WA) pt 4, div 5 which details the SAT's powers in relation to the resolution of disputes in retirement villages.

<sup>95</sup> *Ibid* cl 30(2)(a).

<sup>96</sup> Consultation Discussion Paper, above n 2, 29 [3.1.9].

<sup>97</sup> *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 31.

<sup>98</sup> *Retirement Villages Act 1992* (WA) s 8(1)(d) and *Ibid* cl 31(2)(b). If a potential serious breach of the legislation is identified at any stage of this negotiation 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: see Statutory Review, above n 2, 108.

<sup>99</sup> A Freilich, P Levine, B Travia and E Webb, above n 1.

decides otherwise, the costs of the mediation of a dispute must be shared equally between each of the parties.<sup>100</sup>

However, a dispute resolution process is only effective if it is utilised. As the Department has noted, there appears to be a distinct lack of awareness as to the current dispute resolution mechanisms.<sup>101</sup> Further, residents may be reluctant to institute complaints for various reasons.<sup>102</sup> Residents may also find themselves ostracised by management or even fellow residents as a result of instituting a complaint.<sup>103</sup> A mechanism must be put in place where it is part of the normal and regular operation of a retirement village that complaints and concerns are aired and discussed. Even administering bodies may be reluctant to use the Code's dispute resolution procedures and seek assistance from the Department in circumstances where the Department has a dual conciliatory and prosecutorial role.

In the interviews conducted for the purposes of the CRU/COTAWA Study, residents complained that in circumstances where they have sought assistance to resolve their disputes, they have come to a dead end.<sup>104</sup> It is unclear what the options are if the dispute remains unresolved.

A lack of government resources may be the main reason for the reluctance to set up any new structure for dispute resolution, such as a retirement village ombudsman.<sup>105</sup> But, at the very least, there is clearly a need for the establishment of an advocacy service for residents of retirement villages in WA.

<sup>100</sup> *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 33(2).

<sup>101</sup> Statutory Review, above n 2, 105. In its Review at p109, the Department proposed that the Seniors' Housing Information Service (discussed further below) develop guidelines and educational initiatives in regard to effective dispute resolution within villages. Although the Seniors' Housing Centre does run education forums for residents, there are no specific guidelines or educational initiatives that have been developed in respect of dispute resolutions. Apart from being stretched over all areas of seniors' housing, residents have complained that the majority of personnel at the Centre have no real knowledge of the industry and are unable to provide legal advice: see A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>102</sup> Some of the reasons given in the interviews conducted for the purposes of the study conducted by the Consumer Research Unit at UWA in collaboration with COTAWA for residents failing to institute complaints include their fear of management; their reluctance to let their families know for fear of being put into aged care; their unwillingness to give their village a bad reputation for fear that their units will become devalued or unsaleable; and elderly people wanting to live out their lives with a minimum level of stress: see A Freilich, P Levine, B Travia and E Webb, above n 1.

<sup>103</sup> Department of Commerce, *Statutory Review of Retirement Villages Legislation 2010: Final Report*, p 107.

<sup>104</sup> See A Freilich, P Levine, B Travia and E Webb, above n 1. According to the Western Australian Retirement Villages Residents Association Inc. (WARVRA), residents who have referred complaints to the Department of Commerce have generally not had satisfactory outcomes. This has been said to be due to the fact that the compliance section is not well versed in village operations and is under resourced. Residents also feared recriminations from management as they were readily identifiable after they made their complaint.

<sup>105</sup> Statutory Review, above n 2, 108.

The Aged-care Rights Service (TARS) is such a service in NSW, also providing legal advice and information to residents of retirement villages.<sup>106</sup>

#### IV THE RIGHT TO ACQUIRE ALTERNATIVE ACCOMODATION

In the event of a resident losing their legal right or practical option to remain in a retirement village, the resident's financial security may be significantly compromised, resulting in their being unable to afford alternative accommodation.

The security of a resident's capital investment and the timing and amount of any exit payment (being the full or part repayment of the premium, that is the premium minus the deferred management fee) in the event that a resident is forced to leave a retirement village is understandably of great concern to residents. Indeed, residents can be placed under considerable stress when they discover that they may not be able to afford to leave the village due to the deferred management fees (or exit fees) then payable.<sup>107</sup> Further, any imposition of excessive or unwarranted increases in recurrent charges or the unreasonable imposition of a levy during their stay in the village may have eroded their financial position.<sup>108</sup> The resident may also be liable for the costs of repair and refurbishment of their unit upon their vacation, a liability which is not always made clear in residence contracts. Moreover, there may be ongoing recurrent charges that a resident is liable to pay to the administering body even after they have vacated the unit.

Several industry insiders suggest that operators and residents are 'co-venturers', both wanting to obtain the highest price possible from a prospective purchaser/lessee of a unit.<sup>109</sup> However, the discrepancy in the rights and obligations of the owner and the resident becomes very pronounced at the stage of a resident's vacation of the premises, revealing at best an unequal 'co-ownership' arrangement. Moreover, the departing resident of a village is generally in a far more precarious position than a departing tenant in a residential tenancy arrangement.

The adequacy of the legislative framework in relation to the issues that arise if a resident is forced to leave a retirement village will be examined below.

<sup>106</sup> See <[www.tars.com.au](http://www.tars.com.au)>.

<sup>107</sup> Statutory Review, above n 2, 59.

<sup>108</sup> It is noted that as discussed earlier in this paper, welcome amendments to the Act allow for residents to agree by special resolution to apply to the SAT in relation to a dispute about an increase in recurrent charges or the imposition of a levy: see *Retirement Villages Act 1992* (WA) s57A.

<sup>109</sup> Interviews performed for the purposes of the study conducted by the Consumer Research Unit at UWA in collaboration with COTAWA: see A Freilich, P Levine, B Travia and E Webb, above n 1.

### A Remarketing

After leaving a village, a resident is often not entitled to receive any capital or exit payment until their unit sells or is re-leased, and it is common for the amount of that payment to be directly linked to the sale or re-leasing price that is ultimately achieved. In circumstances where the units are unsaleable or un-leasable, or there is significant delay in the sale or re-leasing of units, the departing resident may be left with no alternate accommodation pending the disposition of their unit and no ability to use the unsold or unleased unit as security for a bridging loan.

The Code currently requires operators to take reasonable steps to enable a residence to be put on the market as expeditiously as possible and provide the resident with a monthly marketing report that details their actions to market the premises.<sup>110</sup> Strangely, under the new amendments to the Code, this requirement seems to only apply in circumstances where a resident is required by a residence contract to pay the costs incurred by an administering body to market or advertise the resident's premises. In its Review, the Department found that in certain cases, the management of a village was responsible for delaying the sale or re-leasing of units by their tardiness in providing information about the units and the retirement village scheme to potential buyers.<sup>111</sup>

The legislation aims to address these concerns and protect residents' rights to acquire alternative accommodation by, for example, requiring that the resident's right to any exit payment is protected by way of a statutory charge on land in the retirement village (other than residential premises owned by a resident).<sup>112</sup> However, as Armstrong has opined, these provisions offer little comfort to residents in circumstances where an operator will be unlikely to be able to make any payment to the resident unless or until the unit sells and the amount of this payment is likely to be significantly reduced in circumstances where the units have likely lost their value.<sup>113</sup> Further, under the Act, any order by the Supreme Court for the enforcement of the charge must not be contrary to the interests of any of the residents of the retirement village<sup>114</sup> – this would seem a virtual impossibility unless all residents of a village sought to enforce their charge at the same time. Section 19 of the Act which requires an exit payment to be made within a limited period capped at 45 days is also able to be avoided by operators if the resident has the right to appoint an outside agent to effect a sale.<sup>115</sup>

<sup>110</sup> *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 21.

<sup>111</sup> Statutory Review, above n 2,117.

<sup>112</sup> *Retirement Villages Act 1992* (WA) s 20.

<sup>113</sup> Armstrong, above n 29.

<sup>114</sup> *Retirement Villages Act 1992* (WA) s 21(2)(b).

<sup>115</sup> *Ibid* s19(5).

The Department has indicated that the Review's recommendations in relation to the sale or releasing of premises within a retirement village<sup>116</sup>, including providing residents with greater input into the sale of their unit and requiring the operator to make available to prospective purchasers all relevant information regarding the unit, be implemented in future amendments to the Act.<sup>117</sup>

### B *Exit Fees*

Even if a resident's unit is sold or re-leased without delay and the resident receives the exit payment to which they are entitled, the quantum of this exit payment will be dependent upon the terms of their particular residence contract and any deferred management fees that are required to be paid. The considerable cost of these deferred management fees can significantly reduce the ability of residents to acquire alternative accommodation elsewhere, or even, in some instances, to another unit within the same village.<sup>118</sup> Unfortunately, there is no legislation governing the quantum of deferred management fees (or exit fees) that may be charged. It is hoped that operators will not increase these fees to cover any potential 'losses' to their revenue streams caused by the new amendments to the legislation as explained above.

In the author's view, there is a need for more transparency for residents in relation to the nature and purpose of the exit fee in order to provide them with some understanding as to what they are paying for, even if they are just informed that this amount constitutes the profit of the operator. The amendments to the Regulations requiring residence contracts to provide an explanation of the purpose of any exit fee do go some way towards providing this transparency.<sup>119</sup> However, it is noted that the deferred management fee terminology that is commonly used to describe the exit fee makes it very confusing for residents who understandably find it hard to reconcile this fee with the recurrent charges that they may have been paying during their residency in the village in relation to management costs.<sup>120</sup>

<sup>116</sup> Statutory Review, above n 2, 119 (Recommendations 71 and 72).

<sup>117</sup> Correspondence from the Department to the authors dated 17 July 2014 for the purposes of the study conducted by the Consumer Research Unit at UWA in collaboration with COTAWA: see A Freilich, P Levine, B Travia and E Webb, above n 1. It is noted that the new s 25 of the Act and its regulations prohibit charging a former resident a marketing and advertising fee which is more than any costs incurred in marketing or advertising the individual premises: see *Retirement Village Regulations 1992* (WA), reg 11(3)(c).

<sup>118</sup> Statutory Review, above n 2, 110 in relation to relocating within a village.

<sup>119</sup> *Retirement Villages Regulations 1992* (WA) reg 7F, Item 2.

<sup>120</sup> It is questioned whether the exit fee may be the subject of the unfair contract terms in the Australian Consumer Law, being dependent on whether the exit fee may be considered to be an upfront price.

### C Refurbishment Costs

A resident will also likely be liable for the costs of repair and refurbishment of their unit upon their vacation of the unit. The liability that a resident has for these costs is not always made clear in their contracts. Disputes may also arise in relation to the extent of the refurbishment that is required upon the resident's vacation of the unit.

The recent amendments to the legislation include the introduction of a definition of refurbishment work meaning 'maintenance, repair, replacement or renovation work carried out in respect of residential premises that return the residential premises to a *reasonable condition*'.<sup>121</sup>

The legislation now includes requirements for:

- a residence contract to set out who is responsible for arranging for residential premises to be refurbished, who is responsible for paying the costs associated with carrying out the work and how any contribution to be made by the resident is to be paid;<sup>122</sup>
- clarifying the information that an administering body must give a resident who is permanently vacating his or her premises, regarding items of refurbishment work to be done;<sup>123</sup>
- inserting a requirement for the former resident or their personal representative to be given a reasonable opportunity to inspect refurbishment works that they will be contributing to;<sup>124</sup> and
- building upon the SAT's existing jurisdiction to deal with refurbishment disputes to ensure that arrangements relating to the costs of refurbishment are fair, including, inter alia, that any refurbishment work is reasonably required and the cost of the work is not excessive or unreasonable.<sup>125</sup>

These are all welcome developments. However, these amendments still leave open the potential for disputes given that the words 'reasonable condition' are clearly subjective and difficult to determine. The draft amendments had proposed to clarify the matters to which an administering body must have regard when assessing what refurbishment work may be required<sup>126</sup> in order to

<sup>121</sup> Italics added for emphasis: *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 22(1).

<sup>122</sup> See *Retirement Village Regulations 1992* (WA), reg 7G, Item 2.

<sup>123</sup> *Fair Trading (Retirement Villages Code) Regulations 2015* (WA) cl 22(2)(a). The information required includes itemised details of the refurbishment work the administering body believes is required to be done, an estimated cost for each item of work and a proposed timeframe for the commencement and completion of the work.

<sup>124</sup> *Ibid* cl 22(2)(b)(iii).

<sup>125</sup> *Ibid* cl 22(3)-(4).

<sup>126</sup> *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*) cl 22(3) – these matters included the age, character and physical condition of the



‘introduce a level of consistency in the standard that residential premises must be refurbished [as] currently, refurbishment clauses in residence contracts range from a reasonable standard allowing for fair wear and tear, to wholesale gutting and renovation of premises without regard to the age and standard of other “like” premises in the village or the standard to which the retirement village as a whole has been maintained.’<sup>127</sup>

However, these amendments do not seem to have been incorporated into the current Code. In the author’s view, the failure to provide some clarity on the meaning of ‘reasonable condition’ may result in the amendments above falling short of achieving their intended purpose.

#### D Ongoing recurrent charges after departure

Until 1 April 2014, a former resident of a retirement village could still be liable to pay ongoing charges to an administering body for extended periods after they had left a village until their former unit was sold or re-leased.<sup>128</sup> However, the long awaited amendments to the Act do cap the liability of non-owner residents to pay these charges.<sup>129</sup>

Amendments made to the legislation in relation to recurrent charges include the new section 23 of the Act limiting the liability of a former non-owner resident<sup>130</sup> to pay recurrent charges. The regulations made under s 23 of the Act limit the time that these charges can be levied once a non-owner resident has permanently vacated<sup>131</sup> a village to three months for future

residential premises at the time the resident entered into occupation of the premises; the age, character and physical condition of other comparable residential premises in the retirement village at the time the resident permanently vacated the residential premises; and the age, character and physical condition of the common facilities and amenities in the retirement village at the time the resident permanently vacated the residential premises.

<sup>127</sup> Government of Western Australia, Department of Commerce, *Retirement Villages: Revised code supplementary information 1* at <<http://www.commerce.wa.gov.au/publications/retirement-villages-revised-code-supplementary-information>>.

<sup>128</sup> However, a strong argument could be made that a term requiring a resident to continue paying recurrent charges after termination of the contract is an unfair contract term under the Australian Consumer Law: see C Wall, ‘Unfair contract terms provisions: The saviour of retirees?’ (2012) 20 *Competition & Consumer Law Journal* 165, 188-191.

<sup>129</sup> *Retirement Villages Act 1992* (WA) s 23 and *Retirement Village Regulations 1992* (WA) reg 9.

<sup>130</sup> Residents who do not have any proprietary interest in the village as a tenant in common under a purple title scheme or as an owner under a strata title scheme of the residential premises that they formerly occupied: see definition of *former resident* in *Retirement Villages Act 1992* (WA) s 23(1).

<sup>131</sup> However, in the event of the death of a former resident, the former resident’s liability to pay recurrent charges will not cease until the administering body has been given evidence of death. It is understood that the requirement for the provision of death to an administering body is intended to address concerns by industry about matters beyond their control that can delay the

contracts and six months for existing contracts.<sup>132</sup>

Despite these changes, it is unclear what the position will be if the administering body is unable to afford to pay recurrent charges in the period between the former non-owner resident ceasing to pay these charges and the new resident becoming liable to pay them. There is no prohibition in the Act to prevent them from seeking to cover any additional costs by, for example, amending *new* residence contracts.<sup>133</sup> This raises the question of whether section 23 will have any real effect on the overall financial commitments of new residents with new residence contracts or whether their liability will be merely brought forward to be paid in the form of an increase in other costs.

A further unintended and undesirable consequence of the 'capping' of ongoing charges for former non-owner residents and the loss of the resulting income stream in the retirement village may be a deterioration of the quality of the amenities of the retirement village for both remaining and future residents adversely affecting their practical option to remain at the village. In these circumstances, owner-residents may find it more difficult to sell their units, and non-owner residents to re-lease theirs, leaving both owner and non-owner residents forced to pay recurrent charges for longer periods than they may have had to pay if they had put their unit on the market prior to the new amendments to the Act.

There may be a real incentive for operators to build future retirement villages as strata titled to avoid the effect of these provisions.

#### WILL THE LAW WALK THE WALK?

It is hoped that the current law, including the recent and proposed amendments, will have a positive effect on residents in a retirement village. However, as the above analysis explains, there are still issues that need to be addressed, some of which may arise as a result of the recent amendments to the law. What is obvious is that the regulation of the retirement village industry, including any reforms made to this, will only be as effective as the extent to which there are adequate regulatory mechanisms to enforce compliance. Indeed,

remarketing of a residence so that the specified period will not start until these matters are addressed: see Explanatory Memorandum, *Retirement Villages Amendment Bill 2012* (WA), p 9. However, it is hoped that administering bodies do not take advantage of the requirement relating to the provision of death and allow recurrent charges to be levied on the former resident's estate unnecessarily in excess of a three or six month period. For example, it should be expected that administering bodies notify family members of a deceased former resident of the requirement to provide evidence of death and the effect of their failure to do so: see P Levine, 'Capping the liability of former residents to pay recurrent charges under the Retirement Villages Act 1992 (WA) - what is the cap?' in *Australian Property Law Bulletin*, May 2014, 62-64.

<sup>132</sup> *Retirement Villages Act 1992* (WA) s 23 and *Retirement Village Regulations 1992* (WA) reg 9.

<sup>133</sup> Explanatory Memorandum, *Retirement Villages Amendment Bill 2012* (WA), 8.

whether any amendments to the law relating to residents' security of tenure are meaningful in the short and long term will depend on the extent to which they are enforced and further reforms enacted as required.

In this regard, the Review recommended that:

- a) the legislation be amended to provide that a breach of a clearly expressed obligation stated in the Code is an offence under the Act and establish a penalty for such breach;<sup>134</sup> and that
- b) the Department continue to strengthen its investigation, compliance, prosecution and dispute resolution functions and be adequately resourced to do so.<sup>135</sup>

The ongoing strengthening of monitoring and enforcement functions to ensure legislative compliance within the industry is essential to the protection of residents' security of tenure in a retirement village. The extent to which legislative compliance will be adequately monitored and enforced is unclear. The effect of the amendments to the law on residents' security of tenure will need to be observed closely to ensure that the law does what it says it is going to do.

<sup>134</sup> Statutory Review, above n 2, 156 (Recommendation 91). It is noted that the Consultation Discussion Paper provides that the Code will remain under the *Fair Trading Act 2010* (WA) until further amendments are made to the Act when the legislation will be restructured to comprise the *Retirement Villages Act 1992* (WA), the *Retirement Village Regulations 1992* (WA) and a Code made under the *Retirement Villages Act 1992* (WA) (as distinct from the *Fair Trading Act 2010* (WA) as is currently the case) so that all components regulating retirement villages are contained within a single legislative package: see Consultation Discussion Paper, above n 2, 2 [2.2.1]. This will enable a standardised and more effective enforcement process, allowing for a relatively immediate impact on the behaviour of an administering body that is not complying with its obligations.

<sup>135</sup> Statutory Review, above n 2, 153 (Recommendation 90). The Statutory Review also considered the possibility of an independent authority separate from the Department to actively monitor compliance with the Act and the Code. However, the Department's view was that any new structure would be costly and unnecessary – a similar view to that taken by it in relation to conciliation arrangements as discussed above. Again, it would appear that a lack of government resources may be the main reason for the reluctance to set up any new structure.