

THE RETIREMENT VILLAGES BILL 1999

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1. BACKGROUND

In 1991, US gerontologist Matilda White Riley, delivering the Boettner lecture on *Ageing in the Twenty-First Century*, remarked:

*Perhaps the most notable of all the historical alterations in the ageing process spring from the unprecedented increases in longevity which allow recent cohorts of young people to stay in school many years longer than their predecessors did, prolongs retirement, postpones many diseases of old age, accumulates the experiences necessary for wisdom, extends family relationship so that husbands and wives now typically survive together for four or even five decades or more.*¹

Based on demographic projections for Australia, the proportion of people aged 65 and over, as a percentage of the total population, is predicted to rise from 10% in 1985 to

¹ M W Riley, *Ageing in the Twenty-first Century, Boettner Lecture*, Boettner Research Institute, Bryn Mawr Pennsylvania, 1991, quoted in E Ozanne, 'Aged care in the 21st century - A new social agenda', in *Economic and Social Consequences of Australia's Ageing Population - Preparing for the 21st Century: Papers presented at an Office of EPAC Seminar held in Canberra on 25 September 1992*, Background Paper No 23, AGPS, Canberra, December 1992, p 115.

17% in 2025.² For Queensland, the proportion of people over 60 is expected to increase from 15% in 1991 to 19% in 2011.³

According to the 1992 Queensland Government Discussion Paper on *Review of Regulation of Retirement Villages in Queensland*, demographic trends, coupled with early retirement, have led to a significant demand for accommodation for older people, which neither government nor charitable bodies have been able to adequately meet. In response, a new industry has emerged in the shape of the retirement village industry. Retirement villages basically comprise a group of dwellings in which occupation is restricted to people over a certain age or to those who are no longer employed. The attraction of such establishments is related not only to commonality of interests and outlook among residents, but also the prospect of access to particular services, especially nursing and medical services, as medical needs increase with age.⁴ In 1993, there were almost 40,000 people living in retirement villages in Australia; 8.5% of these resided in Queensland.⁵

1.1 THE DEVELOPMENT OF THE RETIREMENT VILLAGE CONCEPT

According to retirement village developer Tony Baldwin, the retirement village concept originated in the 1950s when the federal government offered a capital subsidy for construction under the *Aged or Disabled Persons Homes Act 1954*. As a result of the government funding made available, churches and charitable organisations were able to establish retirement villages with self-care units and nursing facilities. Capital subsidy for independent living or self-care retirement units was largely phased out when the Commonwealth Act was reviewed in 1974. Over the next decade, private sector

² Tasmania. Law Reform Commissioner of Tasmania, *Report on the Operation of Retirement Villages and Other Types of Older Persons Accommodation in Tasmania*, Report No 72, Government Printer, Tasmania, p 3.

³ Queensland. Government. Discussion Paper, *Regulation of Retirement Villages in Queensland*, June 1992, p 3.

⁴ *The Laws of Australia on CD-ROM*, Chapter 28.12 “Retirement Villages”, paras [4] and [8].

⁵ Australian Bureau of Statistics, *Disability, Ageing and Carers Australia, 1993 Summary of Findings*, Catalogue No. 4430.0, 1993, cited in R Stimson, M Manicaros, A Kabamba and A Murray, *Ageing and Retirement Housing in Australia*, Australian Housing and Urban Research Institute, Queensland University of Technology, 1997, p 131.

retirement villages absorbed many of those who were or would have been on waiting lists for places in self-care units built by churches or charities.⁶

According to Baldwin:

Significant changes in the extent of facilities, flexibility in services and options available have come about since the mid 1970s when private retirement villages have been built without government subsidy (the so called 'resident funded' villages).

With this change, we now see one in three units occupied by couples compared with one in eight units in the church or charitable model of 1974. Similarly the facilities and lifestyle of the modern village generally have attracted a greater proportion of single men than before.⁷

In relation to the preferred geographic location of retirement villages and the average age of their residents, Baldwin noted the following trends:

... although retirement villages are advertised to people over 55 years, in Australia to date it is unusual to find a village with the average age of residents under 75 years in the major capital cities, even where most of the units are designed for independent living.

When there was an extreme shortage of purpose-built retirement accommodation, residents tended to accept locations on the fringe of residential development. However, remote locations, particularly without regular public transport are not favoured when a more convenient alternative is available.

Very large villages (those with more than 150 units) are still expanding in areas like the Central Coast of New South Wales and in south-east Queensland. However, smaller villages with more flexible service arrangements are tending to outstrip the performance of larger villages in the metropolitan areas.⁸

2. RETIREMENT VILLAGES LEGISLATION IN AUSTRALIA

In Queensland, a *Retirement Villages Act* was passed in 1988. Prior to the enactment of the Queensland legislation, Victoria and South Australia had enacted Retirement

⁶ T Baldwin, 'Retirement accommodation in the 1990s: a developer's perspective', *Valuer and Land Economist*, August 1993, pp 37-39 & 50, at p 37.

⁷ Baldwin, pp 37-38.

⁸ Baldwin, p 38.

Villages Acts in 1986 and 1987 respectively. In New South Wales, the *Retirement Villages Act 1989* applies, together with a Code of Practice under the state's *Fair Trading Act 1987*. Western Australia enacted its *Retirement Villages Act* in 1992. In the Northern Territory, a *Retirement Villages Act* was introduced in 1995. A Code of Practice forms a Schedule to the NT Retirement Village Regulations.⁹

In Tasmania, in 1994, the Law Reform Commissioner, in his *Report on the Operation of Retirement Villages and Other Types of Older Persons' Accommodation in Tasmania*, recommended that specific legislation should be enacted in Tasmania to regulate the provision of older persons' accommodation (including retirement villages). The Law Reform Commissioner took the view that the focus of reform should be not on the type of accommodation offered (eg retirement villages) but rather on the people for whom the accommodation is meant (older persons).¹⁰ No legislation has been introduced to date.

Neither has the Australian Capital Territory yet developed specific retirement village legislation.

3. PRINCIPLES AND PHILOSOPHY FOR LAW REFORM

In his 1994 *Report on the Operation of Retirement Villages and Other Types of Older Persons Accommodation in Tasmania*, the Tasmanian Law Reform Commissioner argued that the development of legislation for older persons' accommodation, including retirement villages, should have its basis in a systematic body of principles, as follows:

Comprehensiveness - Older persons' accommodation legislation should apply comprehensively to all residents of older persons' accommodation establishments (including retirement villages).

Coherence - The older persons' accommodation industry should develop in a coherent and orderly fashion ensuring nothing but the highest standards of service;

Contribution - Older persons within the community are deserving of consideration based upon the contribution they have already made throughout their lives to the community;

Expectations of residents - Older persons have a legitimate and reasonable expectation that they can enjoy an uninterrupted and untroubled retirement from work. An agreement for accommodation will be one, if not the single,

⁹ Retirement Villages Regulations (NT), Schedule 2 (Code of Practice)

¹⁰ Law Reform Commissioner of Tasmania, p 5.

most important agreement that person will make to ensure a contented and trouble free retirement;

Dignity - *A philosophical foundation for any discussion of the rights and responsibilities of older persons must recognise the dignity of the individual;*

Protection - *It is paternalistic to base legislation on a philosophy that regards all older people as more vulnerable, just because they are older. This is not to deny however that some older people are more open to be exploited than some other members of the community. As such, the law should be able to assist those older persons who require such support and be able to assist those older persons who continue to manage their own affairs.¹¹*

4. BACKGROUND TO PROPOSED CHANGES TO QUEENSLAND'S RETIREMENT VILLAGES LEGISLATION

In 1991, an informal working party was established under the former Labor Government to review and evaluate the retirement village industry, in conjunction with an evaluation of Queensland's *Retirement Villages Act 1988*. The working party, chaired by Mr Terry Mackenroth MLA, issued a Discussion Paper in June 1992. The Retirement Villages Act was also subsequently reviewed under the Government's systematic review of business regulations.

In February 1996, following representations from retirement village industry and residents' groups, the then National/Liberal Coalition Government decided to rewrite the retirement villages legislation. A draft exposure Retirement Villages Bill 1997 was released in February 1997 for the purpose of public consultation. In August 1997, the then Attorney-General and Minister for Justice, Hon DE Beanland MLA, released a second consultation draft of the Retirement Villages Bill 1997 for public comment and consultation.

In July 1998, following the election of the Labor Government, Hon JC Spence MLA, Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women's Policy and Minister for Fair Trading, established a Retirement Village Working Group comprising resident and owner representatives. The Working Group, which met between August 1998 and January 1999, was facilitated through mediation services provided by the Alternative Dispute Resolution Branch of the Department of Justice and Attorney-General.¹² Heads of agreement were delivered to the Minister in February 1999, and the

¹¹ Law Reform Commissioner of Tasmania, pp 13-14.

¹² Hon JC Spence MLA, Retirement Villages Bill 1999 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 21 July 1999, pp 2767-2770 at p 2767.

Minister announced that these would form “the blueprint” for retirement villages legislation to be brought before Parliament.¹³ A draft Bill was released for public comment in May 1999.¹⁴ On 21 July 1999, the Retirement Villages Bill 1999 was introduced into the Legislative Assembly. The 1999 Bill repeals and replaces the existing Retirement Villages Act 1988: **Clause 237**.

The remainder of this *Bulletin* looks first at key provisions of the 1999 Bill and compares them, where appropriate, with the existing legislation. Significant provisions in the existing and proposed legislation are also compared with the legislation in force in other Australian jurisdictions, where relevant.

5. MAIN PROVISIONS OF THE BILL

5.1 THE BILL’S OBJECTIVES

Clause 3 of the Retirement Villages Bill 1999 sets out the 8 principal objects of the Bill, namely to:

- declare particular rights and obligations of residents and retirement village scheme operators;
- promote fair trading practices in the operation of retirement villages and the provision of services to residents;
- facilitate the disclosure of information to prospective residents to ensure that the obligations and entitlements of the retirement village’s residents and operator can be easily understood;
- encourage the continued growth and viability of the retirement village industry in Queensland;
- encourage the adoption of best practice standards by the retirement village industry;
- provide a clear regulatory framework to ensure certainty for the retirement village industry in planning for future expansion;
- facilitate participation by interested residents in the management of retirement villages, and

¹³ Hon JC Spence MLA, Ministerial Statement “Retirement Villages”, *Queensland Parliamentary Debates*, 25 March 1999, pp 832-33 at p 832.

¹⁴ Hon J Spence MLA, Retirement Villages Bill 1999 (Qld), Second Reading Speech, p 2767.

- make provision for mechanisms for resolving disputes between residents and retirement village scheme operators.

5.2 SCOPE OF APPLICATION OF THE LEGISLATION

5.2.1 The Current Legislation

Under s 4 of the Retirement Villages Act 1988, unless a contrary intention appears, the Act is intended to apply to any scheme for a retirement village, its operator(s), and inducements and invitations to participate in any retirement village scheme, where:

- the retirement village is situated or to be situated in Queensland, irrespective of where the retirement village scheme is operated, or the inducements or invitations to participate in the scheme are given, uttered or published; or
- the scheme is operated in Queensland, regardless of where the retirement village is located or is to be located, or the inducements or invitations to participate in the scheme are given, uttered or published.

5.2.2 The Proposed Legislation

Like s 4 of the existing Act, the Retirement Villages Bill 1999 (**cl 23(a)**) provides that the proposed legislation will apply to a retirement village scheme, the scheme operator and inducements and invitations to enter the scheme if :

- the retirement village is or will be situated in Queensland, regardless of where the retirement village scheme is operated or inducements or invitations to enter into the scheme are given or published, or
- the retirement village scheme is operated in Queensland, regardless of where the retirement village is or will be situated or inducements or invitations to enter into the scheme are given or published.

Retrospectivity

Under **Clause 23(b)**, the Retirement Villages Bill 1999 will apply to residence contracts entered into before or after **Clause 23** commences, unless the legislation says otherwise.

5.3 “RETIREMENT VILLAGE” DEFINED

5.3.1 The Current Legislation

Under s 6 of the current Queensland Retirement Villages Act, “retirement village” is defined to mean premises run or promoted as suitable for use (exclusively or primarily) by elderly or retired individuals where, as consideration for paying an in-going contribution, a

right of residence and a right to receive a service (eg administrative, maintenance, nursing, medical or laundry services) are acquired pursuant to contract. The right of residence must be one which cannot validly be disposed of or whose right of disposal is governed by restrictions (ie the key elements of the definition of a retirement village in Queensland are that premises for the elderly or retired are provided, there is an entry fee, and there is a restriction on alienation).

5.3.2 A Comparative Survey

In his Report on the Operation of Retirement Villages and Other Types of Older Persons Accommodation in Tasmania, the Tasmanian Law Reform Commissioner noted:

One of the principal areas of contention in the “retirement village” legislation of other States is what exactly that legislation covers. Are stratum developments included? What about nursing homes and hostels? Is it always necessary that the resident pay something - either specifically in respect of the accommodation or more generally to the accommodation provider?¹⁵

In practice, the definition of a retirement village in each Act has a different focus due to the variety of legal structures under which residents are granted rights of occupation. The definitions in the legislation enacted in the five states all require an initial charge to be imposed for the village to constitute a retirement village for the purpose of the legislation; however, this requirement is absent from the Northern Territory Act. Under the existing Queensland, NSW, SA and WA legislation, a village in which a permanent interest is granted to residents without any restriction on disposing of the interest would not be subject to the legislation.¹⁶

The type of physical form of accommodation occupied by residents in retirement villages can also vary considerably, while still falling within the definition of premises which constitute a retirement village. In New South Wales, South Australia, Western Australia and the Northern Territory, hostel units (NSW, s 3(1); SA, s 3; WA, s 3(1); NT, s 3), which have been held to include single rooms with supporting shared facilities, are included.¹⁷ In Victoria, it is sufficient that residents are provided with “accommodation” (s 3), so any level of accommodation is covered under the legislation.¹⁸ In Queensland, the legislation refers to residence in “premises”, but the physical nature of the premises is

¹⁵ Law Reform Commissioner of Tasmania, p 5.

¹⁶ *The Laws of Australia on CD-ROM*, Chapter 28.12, para [11].

¹⁷ *Brown v Commonwealth Bank of Australia* (1993) 63 SASR 188 (Debelle J).

¹⁸ *The Laws of Australia on CD-ROM*, Chapter 28.12, para [12].

not defined other than to say it does not include a site within the meaning of the *Mobile Homes Act* 1989 (Qld): s 6.

5.3.3 The Proposed Legislation

Clause 5(1) of the Bill defines a “retirement village” as premises where **older members of the community or retired persons** reside or will reside, in either independent living units or serviced units, under a retirement village scheme.

The proposed legislation further specifies that “premises” does not include a site within the meaning of the *Mobile Homes Act*: **cl 5(2)**.

By virtue of **Clause 7**, a “retirement village scheme” is defined as a scheme under which someone enters into a residence contract and, in consideration for paying an ingoing contribution under the contract, acquires a right to reside in a retirement village, and on payment of whatever charge is relevant, acquires the right to receive a service or services.¹⁹ **Clause 10(3)(d)** provides that to qualify as a residence contract, a contract must restrict how, or to whom, the right to reside may be disposed of during the resident’s lifetime.

5.4 EXEMPTIONS

5.4.1 The Current Legislation

The Retirement Villages Act 1988 does not apply to nursing homes licensed under the *Health Act 1937*: s 11(1). Religious and charitable organisations may apply for exemption from any or all of the provisions of the Retirement Villages Act: s 11(2). Anyone who operates a retirement village can apply to the Minister to have that village declared to be an exempt retirement village: s 11(3).

5.4.2 The Proposed Legislation

Clause 229 of the 1999 Bill will allow an exemption given to an organisation or retirement village under the 1988 Act to continue under the proposed new legislation. However, these exemptions will expire after two years.

¹⁹ The right to reside, together with the right to receive one or more services, may be acquired personally or for someone else.

5.5 AGE RESTRICTIONS

5.5.1 The Current Legislation

In the 1992 Queensland Government Discussion Paper, the view was expressed that some of the complexity associated with the contractual documentation for retirement villages schemes is related to maintaining a legally binding age restriction. Including a clause containing an age restriction in residence contracts maintains the integrity of a retirement village as accommodation occupied exclusively or primarily by elderly or retired people.²⁰

In group-titled villages, maintaining an age restriction had been sought to be effected by enacting a by-law (eg that a lot owner would not sell an interest in the lot to someone under 50). However, by-laws of this kind were generally considered to contravene ss 8(3) and 30(6) of the former *Building Units and Group Titles Act 1980*. According to the 1992 *Discussion Paper*, the problem was further complicated because, in the case of straightforward group-title subdivisions, inserting a provision in the by-laws is the only feasible method of maintaining an age restriction.²¹ Although the issue was considered in a Discussion Paper on *Reform of the Building Units and Group Titles Act* (BUGTA 80), the Discussion Paper on *Regulation of Retirement Villages* considered it unlikely that BUGTA 80 would be amended to allow age restrictions to be included in body corporate by-laws. The *Building Units and Group Titles Act 1980* has since been repealed and replaced by the *Body Corporate and Community Management Act 1997*. Part 5 of the Act, which deals with by-laws, does not appear to allow the inclusion of age restrictions in body corporate by-laws.

The Discussion Paper on *Regulation of Retirement Villages in Queensland* suggested that further consideration be given to the simplification of age restrictions by statutory or other means, to ensure that subject to certain exemptions (eg spouses of eligible persons, surviving widows/widowers of eligible persons, people with disabilities for whom retirement village living is appropriate) only people of a specified age (eg 50 years or over) would be allowed to be residents of a retirement village.²²

²⁰ 1992 Discussion Paper, p 23.

²¹ 1992 Discussion Paper, p 23.

²² 1992 Discussion Paper, p 24.

5.5.2 The Proposed Legislation

Section 7(1)(f) of Queensland's *Anti-Discrimination Act 1991* prohibits discrimination on the basis of age. **Clause 26** of the draft Retirement Villages Bill provides that despite the *Anti-Discrimination Act 1991*, it is not unlawful for a retirement village scheme operator to discriminate on the basis of age if the discrimination simply takes the form of restricting residence in a retirement village to older members of the community or retired persons. However, the proposed new legislation does not include specific age restrictions, as it is intended that any specific age restrictions to apply will continue to be regulated under the residence contracts themselves.²³

5.5.3 A Comparative Survey

In the Northern Territory (s 3(1)) and NSW (s 3(1)), a retired person is someone who has attained the age of 55 years or is retired from full-time employment, or a person who is or was the spouse or de facto partner of such a person.

Section 3 of the Victorian *Retirement Villages Act 1986* defines a retired person as a person who is 55 or more or has retired from full-time work, and that person's spouse or widow/widower, but does not include de facto partners in the definition.

For the purpose of South Australia's *Retirement Villages Act 1987*, a retired person is someone who has attained the age of 55 years and retired from full-time employment; neither the spouses nor de factos of such people are mentioned in the definition (s 3).

5.6 SCHEME APPROVALS/REGISTRATION

5.6.1 The Current Legislation

Under s 22(1) of the Retirement Villages Act, the Registrar must first approve a retirement village scheme before a residence contract can be entered into. The Registrar is not to give his approval to a scheme unless he is satisfied in relation to the matters set out in s 17(2), namely:

- the name and residential address of anyone who is or will be in the foreseeable future controlling the operation or the promotion of the scheme, and their qualifications, if any: s 17(2)(a);
- the method of service of documents on anyone controlling the operation of the retirement village scheme (the method must be one of which the Registrar approves): s 17(2)(b);

²³ Discussions with officers of the Department of Equity and Fair Trading.

- the financial ability of anyone controlling the operation of the scheme to establish the retirement village and to continue to operate the scheme: s 17(2)(c)(i);
- all particulars of the scheme, including the provisions to be used if the scheme fails: s 17(2)(c)(ii).
- the contents of all documents about the scheme that are to be published for the information of the public (ie public information documents): s 17(2)(c)(iii)
- that, where necessary, local government approval has been given to the establishment of the retirement village on the site chosen: s 17(2)(d).

In addition, under a catch-all provision in s 17(2)(c)(iv), the Registrar is required to be satisfied about “*all other matters that are prescribed or that the registrar considers relevant*”.

Section 17(3) of the Act provides that public information documents must contain the following information to satisfy the Registrar:

- the authority under which, and the terms upon which, retirement village residents occupy their premises
- any entitlement retirement village residents have to use parts of the retirement village other than the premises they occupy
- notification of services which are to be provided to retirement village residents under the retirement village scheme
- the form and contents of the contract to be made under the retirement village scheme with people wishing to become residents of the retirement village
- notification of the documents that will be given to residents of the retirement village as evidence of their entitlements in the village
- notification of the extent of the control over the retirement village to be exercised by the residents of the village.

To further ensure that potential residents are well-informed about the transaction they propose to enter into, a potential resident of a retirement village must be given a questionnaire drawing his or her attention to legal, financial and other implications of the transaction. Pursuant to administrative guidelines issued by the Department of Justice, this questionnaire forms part of the public information documents.

When a retirement village scheme is approved, copies of any public information documents are entered in a register maintained by the Registrar of Retirement Villages and are deemed to be part of residence contracts: s 23.

Section 16 prohibits an retirement village scheme operator from engaging in various forms of promoting a retirement village, or extending an existing retirement village, unless the Registrar has approved the scheme. The penalty for contravening s 16 is 400 penalty

units (\$30,000) if the offender is a corporate entity, and 100 penalty units (\$7500) or two years imprisonment if the offender is an individual.

5.6.2 The Proposed Legislation

The 1999 Bill replaces the current approval process with what the Minister has described as “*a more streamlined registration process*”.²⁴

Clause 27 of the 1999 Bill allows application to be made to the chief executive²⁵ to register a retirement village scheme. The application must be in the approved form, and accompanied by particulars of certain matters (set out in **cl 27(2)(a)**), a copy of the public information document for the retirement village (**cl 27(2)(b)**) and the prescribed fee (**cl 27(2)(c)**). The chief executive has the power to register, or refuse to register, a retirement village scheme : **cl 28(1)**, and has 60 days from the day the application is received within which to make his or her decision: **cl 28(2)**.²⁶ Before registering a scheme, the Chief Executive must be satisfied firstly, that the application for registration complies with the requirements of cl 27, and secondly, that the applicant isn’t prohibited from operating a retirement village scheme under cl 88. The Bill makes provision for appeal to the District Court where an application for registration is refused: **cl 29**.

By virtue of **Clause 228**, existing retirement village schemes will be taken to be registered under the proposed new Act if, at the time cl 228 commences, the scheme had been approved under the repealed 1988 Act and the approval is still in force.

The 1999 Bill makes it an offence to operate a retirement village scheme, induce or invite people to participate in the scheme, publish documents or advertisements to induce people to participate in the scheme, or to extend an existing retirement village, without being registered: **cl 34**. The maximum penalty is 540 penalty unit (\$40,500).

Under the proposed new legislation, when a retirement village scheme is registered, the registration certificate and public information documents will be entered onto a retirement village scheme register to be kept by the Registrar: **cl 35(1) and (2)**. For a fee, the register may be inspected and extracts taken or copies made of entries in it: **cl 35(4)**.

²⁴ Retirement Villages Bill 1999 (Qld), Second Reading Speech, p 2767.

²⁵ (presumably the Director-General of the Department of Equity and Fair Trading): see *Acts Interpretation Act 1954* (Qld), s 36 and s 33.

²⁶ However, if the particulars which are to accompany the application do not conform with the requirements of cl 27(2), and the chief executive asks for further particulars, then the chief executive’s decision must be made within 60 days of the day the further particulars are given: **cl 28(2)(b)**

5.7 PUBLIC INFORMATION DOCUMENTS

Clause 74 sets out the requirements for a public information document. A public information document must:

- be in the approved form,
- be accompanied by a copy of the registration certificate for the retirement village scheme
- state the day it was given to the chief executive
- state any age limits for residents that apply to the retirement village scheme
- provide, for a retirement village scheme, information about:
 - accommodation
 - residents' contributions
 - payments the scheme operator must make to residents
 - funds
 - facilities
 - the village land
 - residents' rights and obligations
 - the resale process
 - dispute resolution.²⁷

Clauses 75 to 83 further define the information that is to be provided in a public information document.

Clause 84 of the Bill provides that a scheme operator must give a prospective retirement village resident a copy of the public information document before the prospective resident enters into a residence contract for the village. The maximum penalty for failing to comply with this provision is 540 penalty units (\$40,500).

5.7.1 A Comparative Survey

The proposed Queensland legislation does not appear to specify how long before entering into a resident contract a prospective resident should be given a copy of a relevant public information document.

By contrast, the Victorian *Retirement Villages Act 1986* requires a retirement village owner or the owner's agent to give all residence documents (defined below) relating to

²⁷ The above requirements do not limit the information that may be included in a public information document: **cl 74(6)**

the particular retirement village concerned to a prospective resident at least 21 days before the prospective resident enters into a residence contract: s 19. For the purposes of the Victorian legislation, the term “residence documents” includes:

- a residence contract,
- a management contract,
- a disclosure statement completed and signed by the owner,
- a check list in the form set out in Schedule 3 to the Act,
- a copy of the retirement village’s by-laws,
- a document in which a resident agrees to observe the by-laws, or promises to pay an in-going contribution or a recurring charge for the provision of goods or services by a manager, or
- any other document which is a prescribed document or contains prescribed information: s 3.

5.8 OPERATORS OF RETIREMENT VILLAGES

5.8.1 The Current Legislation

The current Retirement Villages Act prohibits insolvents under administration and people convicted of an offence involving physical violence to another, or an offence involving fraud or dishonesty punishable by imprisonment for at least three months, from:

- participating in promoting schemes for retirement villages;
- participating in selling residence rights in retirement villages, or
- being involved in the management of a retirement village, either directly or indirectly: ss 44 & 45.

The maximum penalty imposed under the existing Retirement Villages Act for any of these offences is 40 penalty units (ie \$3000).

5.8.2 The Proposed Legislation

Clause 88 of the Retirement Villages Bill 1999 prohibits insolvents under administration (as understood under the *Corporations Law*),²⁸ and people with a conviction for offences involving fraud or dishonesty punishable by not less than three months imprisonment, or offences involving physical violence to others, from:

²⁸ Under the *Corporations Law* (s 9), an insolvent under administration means a person who, under the *Bankruptcy Act 1966* (Cth) or the law of an external Territory, or the law of another country, is a bankrupt who has not been discharged from his or her bankruptcy.

- being a scheme operator
- promoting a retirement village scheme
- selling rights to reside in a retirement village or
- being involved, directly or indirectly, in managing a retirement village.

The penalty under the 1999 Bill has been increased to 100 penalty units (ie \$7500).

5.8.3 A Comparative Survey

Under s 18 of the South Australian *Retirement Villages Act 1987*, a person:

- who is an insolvent under administration within the meaning of the *Companies (South Australia) Code*;
- has during the previous five years, been convicted of an offence to the person or an offence involving fraud or dishonesty, or
- has served a prison sentence for an offence to the person or an offence involving fraud or dishonesty, if the sentence ended during the preceding five years,

is not allowed to be involved in the administration or management of a retirement village.

The maximum penalty that may be imposed under the South Australian provision is a fine of \$35,000.

In Victoria, s 17(1) of the *Retirement Villages Act 1986* prohibits a person who is an insolvent under administration from being involved in promoting or selling residence rights or being in any way involved in the management of a retirement village. Section 17(2) provides that a person who has been convicted of an offence of fraud or dishonesty punishable on conviction by imprisonment for not less than three months must not, within a period of five years after being convicted or, if the person was sentenced to imprisonment, after the sentence has expired, be involved in the promotion or sale of residence rights, or be directly or indirectly concerned in or take part in the management of a retirement village.

In both cases, the penalty for a breach of these offences is 50 penalty units (ie \$5000).

5.9 EXERCISE OF POWER OF ATTORNEY BY SCHEME OPERATOR

Clause 89 of the 1999 Bill prohibits a scheme operator from exercising a limited, general or enduring power of attorney given by a resident of a retirement village in favour of the scheme operator. The maximum penalty for failing to comply with this provision is 540 penalty units (\$40,500).

However, the above provision will not apply if:

- the resident is a relative of the scheme operator

- the operator is exercising the power of attorney to execute the surrender of a registered lease after having lawfully terminated a resident's contract, or
- the resident gives the power of attorney under the Body Corporate and Community Management Act.

5.10 RESIDENCE CONTRACTS

5.10.1 Cooling off Period

The Current Legislation

Section 27(3) of the Retirement Villages Act 1988 gives a prospective resident a seven day cooling off period within which to rescind a contract.

The Proposed Legislation

Under the Retirement Villages Bill 1999, the cooling off period is extended to 14 days: see **cl 48** and the definition of "cooling off period" in **Schedule 2**.

A Comparative Survey

By contrast, the Western Australian *Retirement Villages Act 1992* normally allows a prospective resident to rescind a residence contract only within five working days after the date the contract is entered into: s 14(1)(a).

In Victoria a resident who signs a residence contract must give notice that he or she wishes to rescind the contract within three business days after signing the contract: s 24(2).

5.10.2 Termination of Residence Contracts

Termination by resident

Under **Clause 52(1)** of the 1999 Bill, a resident of a retirement village may terminate his or her contract by giving the retirement village scheme operator one month's written notice. Under **Clause 52(2)**, a resident will also be entitled to terminate a contract if the retirement village scheme is not registered.

Automatic termination

Clause 55 of the 1999 Bill provides that a resident's right to reside automatically terminates on the death of the resident.

Termination by Scheme Operator

A retirement village scheme operator may terminate a residence contract for any of the following reasons:

- the resident has breached the contract in a material respect: cl 53(3)(a)
- the resident has intentionally or recklessly (or is likely intentionally or recklessly to):
 - injured a person while the person is in the retirement village: cl 53(2)(a)(i) & (b)
 - seriously damaged the resident's accommodation unit: cl 53(2)(a)(ii) & (b)
 - damaged any other property of anyone in the retirement village: cl 53(2)(a)(iii) & (b)
- the operator reasonably believes the resident has abandoned the resident's right to live in the village: **cl 53(3)(b)**
- the scheme operator and someone who has assessed the resident's needs under the Commonwealth's *Aged Care Act 1997* reasonably believes the resident's type of accommodation is now unsuitable for the resident: **cl 53(3)(c)**.

5.11 SALE OF RESIDENTS' UNITS

As explained previously in this Bulletin, one element of the definition of "retirement village" under s 6 of the Qld legislation is that a person acquiring a right of residence under a contract cannot validly dispose of that right to another, or is restricted as to whom or in what manner that right may be disposed of. In practice, residence contracts generally include standard provisions giving a retirement village operator the exclusive rights to sell a resident's unit. A major concern expressed by retirement village residents relates to residents' rights to sell their own units.²⁹

In a Ministerial Media Statement issued in November 1996, the then Coalition Attorney-General and Minister for Justice stated:

²⁹ Hon DE Beanland MLA, Attorney-General and Minister for Justice, 'Legislative revamp for retirement villages', Ministerial Media Statement, 1 November 1996, in *Ministerial Media Statements for the Period 27 October 1996 to 2 November 1996*, pp 16-17, at p 16.

*In some cases, this has led to the appalling situation where a resident has left, died or moved to a nursing home, yet their unit remains unsold. Two or three years down the track, the resident, or their estate, may still be paying the full range of annual fees and charges.*³⁰

Part 3, Division 5 (cls 56-70) of the 1999 Bill covers the situation where a retirement village scheme operator has the controlling right under a residence contract to sell the right to reside if the residence contract terminates, and the residence contract does not include provisions at least equivalent to the provisions of **proposed new Part 3, Division 5**.

Within 30 days after a resident's right to reside is terminated, the scheme operator and the former resident are encouraged to agree in writing on the resale value of the right to reside in the retirement village unit: **cl 60(1)**. In the absence of agreement, the scheme operator is to obtain a valuation of the right to reside from a registered valuer within a further 14 days: **cl 60(2) & 70**.

Under the 1999 Bill, if the right to reside is not sold within six months after the residence contract ends, and the former resident has not been paid an exit entitlement:

- the former resident may engage a real estate agent to sell the right to reside: **Clause 64** (the former resident must pay the real estate agent's costs of sale, if any, and the agent's commission: **cl 68(2)**) and
- the former resident and the scheme operator are required to reconsider the resale value of the right to reside at least every three months and are encouraged to agree in writing on a new resale value: **cl 67(2)**.

5.12 STATUTORY CHARGE

5.12.1 The Current Legislation

Part 4 of the existing Retirement Villages Act provides for the creation of a statutory charge over the whole of the retirement village land where residents of the village do not acquire a freehold title. The purpose of the statutory charge is:

- to secure the performance of each residence contract made under a particular retirement village scheme, and
- to secure repayment of monies payable in relation to the residence contracts: s 34.

³⁰ Hon DE Beanland MLA, Attorney-General and Minister for Justice, 'Legislative revamp for retirement villages', p 16.

The statutory charge has priority over all interests, charges and mortgages other than those existing in or over the land when the *Retirement Villages Act 1988* commenced, or any charge created by any Act or law of the Commonwealth, or of the State, where it has priority: s 35.

Under s 36 of the Retirement Villages Act 1988, in certain circumstances where monies are owed to a resident by the owner of a retirement village, the resident may apply to the Supreme Court for an order that the retirement village land subject to the statutory charge be sold and the proceeds from the sale applied to repay the debt.

In the 1992 Discussion Paper on *Regulation of Retirement Villages in Queensland*, the view was expressed that:

The existence of the statutory charge would appear to be of particular importance to residents of retirement villages which offer a licence to occupy and who do not acquire a registrable interest in the village land.

If such a village found itself in financial difficulties residents could be in the position of unsecured creditors.

To date, there have been no instances where enforcement of the statutory charge has been sought.

*It would be reasonable to say that it is a last resort remedy which would be sought only after all other avenues of redress have been exhausted.*³¹

5.12.2 The Proposed Legislation

Part 6 of the 1999 Bill continues to make provision for the creation of a statutory charge over retirement village land.

Scope of Application

Under the Retirement Villages Bill 1999, the provisions relating to statutory charges will not apply to secure the rights of a resident who holds either a freehold or a leasehold interest in an accommodation unit in a retirement village: **cl 114**.

Coverage of the Charge

Clause 116(1) of the 1999 Bill provides that a statutory charge is immediately created over the village land upon registration of a retirement village scheme. The chief executive is obliged to give notice of the charge to the Registrar of Titles identifying the retirement village land and stating the day on which the scheme was registered: **cls 116(2) &(3)**.

³¹ 1992 Discussion Paper, pp 28-29.

However, **cl 116(5)** provides that cl 116(1) will not apply if, before registering a retirement village scheme, the chief executive considers it should not apply either:

- because the scheme operator is an organisation established for a religious, charitable or community purpose and of good standing in operating retirement village schemes; or
- because of other exceptional circumstances and the chief executive is satisfied that the scheme operator provides another security to secure the rights of a resident under a residence contract in a retirement village.

Effect of Charge

Clause 118 of the 1999 Bill provides that a statutory charge only secures a resident's rights to:

- occupy the resident's accommodation unit;
- to use the village's communal and recreational facilities, and
- to be paid an exit entitlement if the resident's contract is terminated.

Enforcing a Charge

Under **Clause 120** of the 1999 Bill, if retirement village land is subject to a statutory charge under clauses 116 or 117 of the Bill, a resident will have the right to apply to the District Court to have the village land sold where:

- a court makes an order for an amount to be paid by a scheme operator in relation to one of the rights secured by a statutory charge (see cl 118, as discussed above) and
- the amount remains unpaid six months later.

Written notice of the intention to apply for an order of the kind above must be given to the chief executive. Furthermore, where the amount left unpaid is an exit entitlement, the amount must be at least \$10,000 or a higher amount prescribed by regulation: **cl 116(3)**.

5.13 CAPITAL REPLACEMENT AND MAINTENANCE

5.13.1 Responsibility for Capital Improvement

Clause 90(1) of the 1999 Bill provides that a scheme operator is solely responsible for the cost of the capital improvement of the retirement village, including its communal facilities.

However, if a resident makes a written request to the scheme operator for a particular capital improvement to the resident's accommodation unit, to which the scheme operator

agrees, and the resident does not have a freehold interest in the unit, the resident is solely responsible for the cost of the capital improvement: **cl 90 (2) & (3)**. If retirement village residents, by special resolution at a residents' meeting, vote to give the scheme operator a written request for another type of capital improvement to the village, and the operator agrees to make it, all the village residents when the vote was taken are jointly and severally responsible for the cost of the capital improvement: **cl 90(4)**.

5.13.2 Capital Replacement Fund

Clause 91(1) of the 1999 Bill provides that a retirement village scheme operator must establish and maintain a capital replacement fund for the purpose of replacing the retirement village's capital items. Amounts held to the credit of the capital replacement fund are to be held by the operator in a trust account established for that purpose. The operator is solely responsible for the contributions to the capital replacement fund: **cl 91(2)**.

5.13.3 Replacement of Certain Capital Items

Clause 96 of the 1999 Bill makes it clear that a resident will be liable for the cost of replacing any capital item which he or she deliberately damages, or which is subjected to accelerated wear due to the resident's actions.

5.13.4 Maintenance Reserve Fund

A retirement village scheme operator must also establish and keep a maintenance reserve fund for maintaining and repairing the retirement village's capital items: **cl 97(1)(a)**. Residents are solely responsible for contributing to this fund: **cl 97(2)**.

5.14 SERVICE CHARGES

This section discusses how service charges are to be calculated, when they will no longer apply, and when new services may be provided. Increases in service charges are discussed in Section 5.15.5 of the *Bulletin*.

5.14.1 General Services Charges

"General services" are those services supplied, or made available, to all residents of a retirement village: **cl 12(3)**.

The amount a resident is to be charged for services provided collectively is to be worked out in the way specified in the public information document: **cl 103(1)**. The Bill prohibits a scheme operator from charging an amount greater than that worked out in this way - the maximum penalty for a breach is 200 penalty units (\$15,000): **cl 103(2)**. Subject to

cl 104, a retirement village resident is responsible for paying only the resident's proportion of the services charges for the period the resident resides in the resident's accommodation unit: **cl 103(5)**.

Clause 104 goes on to provide that, after a resident vacates his or her unit, the former resident is responsible for paying general service charges for whichever is the shorter of the periods below:

- until the right to reside is sold: cl 104(1)(a)
- a period of ninety days: cl 104(1)(b) (and see also cl 104(2))
- until a tribunal orders the payment of the former resident's exit entitlement: cl 104(1)(c).

If the right to reside is not sold within 90 days, the resident and scheme operator are each liable to pay the general services charges in the same proportion as they are to share the sale proceeds of the right to reside in the unit on its sale: **cl 104(2)**. However, **Clause 104(3)** provides that cl 104(1)(a) and (b) and (2) do not apply to existing residence contracts.

As explained in the Second Reading Speech to the Bill:

After a great deal of discussion with the working party, it was agreed that these provisions would not apply to existing residence contracts. The agreement was reached after operator representatives agreed to the remainder of the resale provisions applying to existing residence contracts and agreed to giving the tribunal power to order the payment of an exit entitlement to a resident if those resale provisions are not complied with.³²

5.14.2 Personal Services Charges

Personal services are optional services supplied or made available for a retirement village resident's benefit, care or enjoyment: **cl 12(3)**.

Under the Retirement Villages Bill 1999, where a resident vacates a village, after 28 days, the resident will no longer be liable for any charges for any personal service he or she is no longer receiving. The maximum penalty for a scheme operator who breaches this provision is 540 penalty units (\$40,500): **cl 102**.

5.14.3 New Services

Clause 108 of the Retirement Villages Bill 1999 prohibits a retirement village scheme operator from offering a new service that is neither a personal service nor a service

³² Retirement Villages Bill 1999 (Qld), Second Reading Speech, p 2769.

proposed in the public information document, unless the residents to whom it is offered have agreed to its provision by special resolution at a residents' meeting.

5.15 RESIDENTS' PARTICIPATION

The following provisions of the current Retirement Villages Act 1988 provide opportunities for residents' participation in retirement village affairs:

- Annual meetings of residents - ss 47 and 48
- Establishment of a residents' committee - s 49
- Power of residents to make by-laws - s 50
- Increase in service charges - s 51.33

5.15.1 Annual Meetings

The Current Legislation

Under s 47 of the Retirement Villages Act, a retirement village manager is to convene an annual meeting of all residents of the retirement village. The maximum penalty for failing to comply with this provision is 40 penalty units (\$3000).

The Proposed Legislation

A requirement to convene an annual meeting of all residents of a retirement village, as soon as is reasonably practicable after the annual financial statements are available, is contained in **cl 130(1)** of the 1999 Bill. Breaching this provision makes a scheme operator liable to a maximum penalty of 100 penalty units (\$7500).

5.15.2 Operator's Statement

The Current Legislation

By virtue of s 48, the operator of the retirement village scheme is to present, or cause to be presented, a written statement to the annual meeting, setting out:

- whether all refundable ingoing contributions that became payable during the prescribed period have been paid and if they haven't, the amount(s) outstanding and the details of and reasons for the delay

³³ 1992 Discussion Paper, p 41.

- whether the retirement village operator is aware of any reason why he or she may be prevented from meeting debts in the 12 months period after the end of the prescribed period, and if there is any such reason, details of it.

The maximum penalty for failing to comply with the requirements of this position is 40 penalty units (\$3000).

The Proposed Legislation

The 1999 Bill obliges the scheme operator to present the annual financial statements referred to in cl 130(1) to the annual meeting of residents: **cl 130(4)**. The maximum penalty for failing to comply with this provision is 100 penalty units (\$7500).

5.15.3 Residents' Committee

The Current Legislation

Section 49(2) of the Retirement Villages Act 1988 gives the residents of a retirement village the right to establish and maintain a residents' committee. This is to be done by election conducted amongst themselves. Section 49(4) provides that, where a residents' committee decides that further action should be taken about a complaint or proposal raised at a meeting, then it must give written notice to the retirement village scheme operator and the manager with particulars of the complaint or proposal. However, the current legislation imposes no obligation on management to respond to that notice.³⁴ And matters raised by residents' committee "*could be and on occasions [have] been deferred (at least) or in some cases ignored by the management*".³⁵

The Proposed Legislation

Clause 126(1) of the Retirement Villages Bill 1999, like s 49(2) of the current Act, allows residents of a retirement village to establish a residents' committee. As under the existing Act, this is to be effected by election amongst themselves.

Clause 126(4) provides that the scheme operator for the retirement village may address the residents at a residents' committee meeting.

Clause 128 of the Bill says that the function of the residents' committee is to deal with the scheme operator on behalf of residents about the day to day running of the village and

³⁴ 1992 Discussion Paper, p 42.

³⁵ 1992 Discussion Paper, p 43.

any complaints or proposals raised by the residents. However, the proposed legislation does not appear to contain any provision obliging retirement village scheme operators to respond to complaints or proposals raised by a residents' committee.

5.15.4 By-laws

The Current Legislation

The Retirement Villages Act 1988 provides that by-laws relating to a retirement village may be made, revoked or altered by special resolution of a meeting of village residents: s 50(1)(b).

However, this has limited application to retirement villages which were already in existence when the Act commenced. Where this is the case, a meeting of residents living in the village may, by special resolution, make by-laws which are not inconsistent with by-laws made prior to the commencement of s 50, and alter or revoke by-laws made after s 50 commenced: s 50(1)(a). As explained in the Second Reading Speech to the Retirement Villages Bill 1988, the reason for including this limitation is that:

*Obvious problems might otherwise arise where a village has been operating in a harmonious fashion for several years under existing By-laws.*³⁶

The retirement village scheme operator and manager are entitled to attend any meeting of villages residents held to make, alter or revoke by-laws: s 50(2), but do not have a right to address the meeting: s 50(2A). However, as the Discussion Paper 1992 pointed out:

*“there is nothing to prevent the developer from changing [the by-laws] again”.*³⁷

The Discussion Paper suggested that legislative amendment appeared necessary to avoid a continuing trail of changes invoked by the residents and then altered by the developer, only to be again altered by the residents.³⁸

³⁶ Retirement Villages Bill 1988 (Qld), Second Reading Speech, Hon P J Clauson, Minister for Justice and Attorney-General, *Queensland Parliamentary Debates*, 26 April 1988, pp 6337-6341 at p 6341.

³⁷ 1992 Discussion Paper, p 43.

³⁸ 1992 Discussion Paper, p 43.

The Proposed Legislation

Clause 129(1) of the Retirement Villages Bill 1999 provides that a meeting of village residents may, by special resolution, make, change or revoke by-laws, but only with the scheme operator's agreement. By virtue of **cl 129(4)**, if there is an inconsistency between a by-law and a provision of a residence contract, the provision in the residence contract prevails to the extent of the inconsistency.

As is the case under the current Act, the retirement village operator and manager may attend a residents' meeting held for the purpose of making, changing or revoking a by-law: **cl 129(5)**, but the Bill does not give them a right to address the meeting. As noted above, however, the operator's agreement will now be required to effect any changes.

5.15.5 Increases in Services Charges

The Current Legislation

The Retirement Villages Act 1988 restricts managers of retirement villages from increasing service charges payable by residents by more than an adjusted services charge determined in accordance with a formula laid down in the section (ie a services charge adjusted in accordance with the Consumer Price Index): s 51(2), unless the greater increase has either:

- been approved by resolution of a majority of the retirement village at a meeting of the residents, or
- approved by resolution of the residents' committee: s 51(5).

Where a manager cannot reasonably provide goods and services without an increase in excess of the adjusted services charge, and the residents do not approve such an increase, s 51(4) ensures that the manager will not be civilly liable for failing to provide them.

In considering this provision, the 1992 Discussion Paper stated that s 51 appeared to have been included in the legislation to:

... discourage the unsavoury practice of enticing would be residents with unrealistically low levies that are subsequently increased.

The theory behind s 51 appears to be that an operator will not be able to engage in such a practice as he then would be locked into the low levies.³⁹

³⁹ 1992 Discussion Paper, p 44.

The Proposed Legislation

Clause 106(1) provides that a scheme operator is allowed to increase charges for general services for a retirement village only as provided for in cl 106 or as allowed under cl 107.

Under **cl 106(2)** of the Retirement Villages Bill 1999, if residents do not approve, by special resolution at a residents' meeting, of an increase in the general services charge in excess of the CPI movement, then charges for services can only be increased in line with the CPI. If residents do approve an increase in the general services charge for the retirement village above the percentage increase in the CPI for a particular year, the general services charge may be increased only by the amount of the approved increase: **cl 106(3)**.

Clause 107 provides that a resident is not required to pay for a general service where the charge is more than the amount set out in the residence contract and approved as an increase under cl 106, unless the excess is due to specified factors such as rates or taxes, salaries or wages, insurance premiums or maintenance reserve fund contributions.

5.16 DISPUTE RESOLUTION

5.16.1 The Current Legislation

Section 42(1) of the existing Retirement Villages Act gives a resident of a retirement village a right to apply to the Supreme Court for an injunction to restrain a loss or restriction of residency. Alternatively, an aggrieved resident can apply to the Registrar to make the application to the Supreme Court on the resident's behalf. The Registrar has a discretion as to whether he will act on a resident's behalf (ie s 42(3) provides that the Registrar may, having regard to the physical, mental and economic condition of the applicant, and the alleged facts of the case, agree to act on the resident's behalf in making an application to the Supreme Court for an injunction).

There are no alternative dispute resolution mechanisms provided for under the Act. Accordingly, residents must use the court processes described above to obtain a remedy. As Nugent points out:

*For many residents, access to the Courts is prohibitively expensive, as such, those people are effectively denied any legal remedy unless they can obtain the assistance of the Registrar of retirement villages pursuant to s 42 of the Act.*⁴⁰

⁴⁰ Peter Nugent, 'Two approaches to retirement industry regulation: Queensland v New South Wales', *Bond Law Review*, 2(2), 1990, pp 233-240 at p 236.

5.16.2 The 1992 Discussion Paper

According to the 1992 Discussion Paper on Review of Regulation of Retirement Villages in Queensland:

Experience has shown that residents and developers can develop differences over a wide range of matters. In some cases the tardiness or reluctance of one party to take action to resolve a matter or even to recognise a problem, could cause ill will, bad relations and personal stress to parties affected especially if they do not perceive a means of resolution of their problem/dispute.

The Discussion Paper canvassed a number of options for dispute resolution, including:

- the establishment of an internal mechanism for mediation of disputes over matters such as:
 - the condition of accommodation prior to occupation, and the extent of refurbishment necessary when a resident vacates their accommodation, and
 - disputes relating to the day to day operation of a retirement village, access to external second tier dispute resolution mechanisms for disputes over matters such as service charges, the return of moneys upon winding up of a village and the appointment of a manager for a retirement village
- extension of jurisdiction to the Small Claims Tribunal to mediate on matters which cannot be resolved internally.⁴¹

5.16.3 The Proposed Legislation

The 1999 Bill provides for a new three-stage process for resolving disputes, including the establishment of a Retirement Village Dispute Tribunal. A retirement village dispute is defined in **Clause 21** as a dispute between a scheme operator and a resident of a retirement village about the parties' rights and obligations under a residence contract or under the proposed legislation.

The first stage

The first stage involves a mandatory dispute resolution process: **cl 153**. **Clause 153** provides that retirement village disputes can only be referred to mediation if the parties have first held a meeting within the village to attempt to resolve the dispute.

The second stage

⁴¹ 1992 Discussion Paper, pp 38-39.

Where the mandatory dispute resolution process fails to resolve the dispute, a party to the dispute may apply to the chief executive to have the dispute referred to mediation: **cl 156**.

Under the 1999 Bill, a mediation conference will not be open to the public: **cl 159**. A party to a retirement village dispute that has been referred to mediation will be entitled to be represented by a lawyer or an agent unless the mediator considers that the party should not be represented in this way: **cl 158**.

If a mediated agreement between the parties is reached, it must be recorded in writing by the mediator who must then have it signed by or for the parties: **cl 162(2)**. A copy of the signed agreement is then to be given to the chief executive as soon as practicable: **cl 162(3)**.

The third stage

A party to a retirement village dispute may apply to the chief executive to refer the dispute to a tribunal where:

- a mediated agreement to the dispute cannot be reached
- a party to the dispute does not attend the mediation conference for the dispute (under cl 160, a party to a retirement village dispute cannot be compelled to attend a mediation conference)
- the dispute is not settled within four months after a party has applied to the chief executive to have the dispute referred to mediation
- the party claims that another party to a mediation agreement has not complied with the agreement within the time specified in it or, if no time is specified, within two months after the agreement is reached: cl 166.

Within 14 days after an application under cl 166 is made, the chief executive must appoint a tribunal from a tribunal panel to hear the dispute: **cl 167**. The tribunal will be composed of a chair who is someone who has been a Supreme or District Court judge, or is a lawyer of at least five years standing, a representative of scheme operators and a representative of residents of retirement village: **cl 202, 206 & 207**. The tribunal may make the orders the tribunal considers to be just to resolve a retirement village dispute: **cl 190(1)**.

The Bill also makes provision for applications to be made to the tribunal for specific orders if:

- a resident is threatened with removal, deprivation or restriction (see cl 168)
- a resident is given false or misleading documents (see cl 169), or

- a scheme operator contravenes provisions relating to the resale process (see cl 170).

5.16.4 A Comparative Survey

In New South Wales (s 14) and South Australia (s 14), specialist tribunals which deal with residential tenancy disputes also deal with disputes between owners or managers of a retirement village and residents. In SA, the tribunal is known as the Residential Tenancies Tribunal; in NSW it is called the Residential Tribunal. In Western Australia, a Retirement Villages Disputes Tribunal is established (s 27).

In Victoria, s 35 of the *Retirement Villages Act 1986* provides for disputes between residents, or between a resident and the manager or owner of a retirement village, to be resolved by an independent arbitrator, whose decision is final and binding on the parties to the dispute. However, the residence contract, the by-laws of the retirement village or a residents' committee may have made provision for other modes of arbitration. If another mode of arbitration has been laid down, and is available to the parties to a dispute, that procedure must be followed rather than referring the matter to an arbitrator under the *Commercial Arbitration Act 1984*.

The SA Tribunal also has the power to deal with the dispute by arbitration if:

- before or during the course of proceedings it appears to the Tribunal that it would be preferable to try to resolve the dispute by arbitration, or
- the parties advise the Tribunal that they wish to resolve the dispute through arbitration: s14(3).

5.17 REPORTING REQUIREMENTS

In the 1992 Discussion Paper on *Regulation of Retirement Villages in Queensland*, it was argued that:

*Any consideration of the extent of reporting requirements may need to have regard to those with interests in the retirement village scheme including operators, residents, regulators, financiers and creditors.*⁴²

Options canvassed in the Discussion Paper included the following:

- that retirement village managers be required to report on the day to day affairs of the retirement village scheme to residents annually, lodge copies of audited accounts with the Registrar of Retirement Villages, and be liable to pay penalties personally should they fail to comply with the above requirements; and that, as residents should be given the opportunity of independent review of these

⁴² 1992 Discussion Paper, p 34.

accounts by way of audit, the auditor should therefore be appointed by the residents

- that auditors be required to submit reports only to the Registrar on the capacity of scheme operators to meet their debts as and when they fall due and to continue to operate the scheme, and that failure to comply should attract penalties payable personally by those acting on behalf of the scheme operators.
- that auditors' responsibilities be enhanced by providing that a report should be submitted to the Registrar if any material irregularities are discovered and that auditors be required to make unscheduled visits.
- that enforcement of punitive provisions in retirement village legislation be supported by making penalties personal.

5.17.1 The Proposed Legislation

Part 5, Division 9 (cl 111-113) of the 1999 Bill deals with financial accounts and statements. Matters relating to the provision of an annual financial statement are also dealt with in **cl 130**.

Clause 112 of the 1999 Bill provides that a scheme operator must ensure that a quarterly financial statement about the income and expenditure of the capital replacement fund and the maintenance fund is given to a resident, if he or she requests it.

Clause 130(4), discussed previously in Section 5.15.2 of this Bulletin, obliges a retirement village scheme operator to present an annual financial statement relating to the village's operation to the annual meeting of residents of a retirement village. A scheme operator is also obliged to ensure that the annual financial statement is given, on request, to a resident within five months after the end of each financial year: **cl 113(1)**. The particulars that an annual financial statement is to contain are as follows:

- income and expenditure during the financial year, including income and expenditure of the capital replacement fund and the maintenance reserve fund
- amounts received for insurance claims relating to the retirement village during the financial year
- assets and liabilities relating to the village as at the end of the financial year
- interests, mortgages and other charges affecting the village's property as at the end of the financial year: cl 113(1)(a)-(d).

Clause 113(2) requires that the annual financial statement must be audited by a member of the Australian Society of Certified Practising Accountants or the Institute of Chartered Accountants, or a registered company auditor. However, the Discussion Paper's proposal that the auditor should be appointed by residents does not appear to have been taken up.

Under the 1999 Bill, failing to supply a quarterly financial statement under cl 112 attracts a maximum penalty of 100 penalty units (\$7500). Failing to provide an financial statement under cl 113 makes a village scheme operator liable to a penalty of 200 units (ie \$15000), as does failing to have the statement audited.

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LEGISLATION

New South Wales

- *Retirement Villages Act 1989*
- Retirement Village Industry Code of Practice

Victoria

- *Retirement Villages Act 1986*

South Australia

- *Retirement Villages Act 1987*

Western Australia

- *Retirement Villages 1992*

Northern Territory

- *Retirement Villages Act 1995*
- Retirement Villages Code of Practice

APPENDIX A - REFORMING THE RETIREMENT VILLAGES ACT

Source: *The Comet - The Voice of Pensioners & Superannuants*, August 1998, pp 4-5.

One of the boom industries has been retirement villages and the new retired lifestyle. This industry is governed by the *Retirement Villages Act* 1988. For the past six years this Act has been 'in review'. The Association of Residents of Qld Retirement Villages Inc (ARQRV) have been involved [in] the review and in their April newsletter, highlighted their concerns and the need for new legislation.

Formation of the Act

Retirement Villages arose from the Church and Charity groups providing low cost housing for older people. Developers saw a commercial opportunity for community living and associated services. In 1988, the *Retirement Villages Act* was introduced to regulate the development of Retirement Villages. In the view of residents, the Act enshrined many practices and procedures that were detrimental to residents.

Reviewing of the Act

A review into the *Retirement Villages Act* began in 1990 by the then Labor Government. The Working Party reviewing the legislation included representatives from the Developers, Residents and Government. In 1992, a report and recommendations were released for public scrutiny. With a change in Government in 1995, the review process was taken up by the new Government with the intention of

developing a Draft Bill. The Attorney General and Minister for Justice, The Hon Denver Beanland, stated that the *Retirement Villages Act* was "seriously flawed" and that there would need to be more consumer protection".

The Government wanted the following items to be addressed:

- village operators provide prospective residents with a standard disclosure statement which outlines the required fees, charges and contributions;
- extend the current 7 days contract cooling off period to 14 days;
- clarify the circumstances under which contracts can be determined;
- village operators to mediate disputes between residents and management, when mediation fails, the Small Claims Tribunal be given the power to solve minor disputes; and
- operators to provide residents representatives with quarterly accounts or allow them to access the village's books.

Other safe-guards included the right for residents to sell their own units, that when a resident leaves a unit, they are no longer liable for personal services after 28 days, that uncommon personal services are charged on a user-pays basis and that no new service will be introduced into existing villages without the agreement of the

majority of residents likely to receive those services. Similar issues were raised in *Choice Magazine*, April 1998 concerning what issues should be standard for Retirement Villages.

Developing Draft Bills

A draft Bill was released in November 1996. Developers found this Draft unacceptable and further consultation was undertaken. A second Draft Bill was released in 1997 but was unacceptable to residents as it failed to meet any criteria of 'Consumer Protection'. Many of the governments previous objectives were altered in the second draft.

What Residents Want

The critical issues of the residents that needed to be addressed are:

1. Equitable sharing of risks and responsibilities;
2. Clear definition of terms used and the attendant application; and
3. Government instigated performance audits, appropriate penalties and enforcement arising from the dispute process.

Residents are looking at challenging *interpretations* of the current legislation, NOT challenging existing contractual commitments. Legislation needs to provide clear definition of critical terms, the allocation of spheres of responsibilities between the parties, and equity and justice as an over-riding requirement. Negotiations with the new Minister for Fair Trading,

The Hon Judy Spence, have begun with the intention that the government re-address the first draft and that legislation is put to Parliament by the end 1998.

APPENDIX B - NEWSPAPER ARTICLES

‘Fines soar for fraud on elderly.’

Madigan, Michael

Courier Mail, 17 July 1999, p 8.

UNSCRUPULOUS retirement village operators who rip off the elderly will face fines of \$40,000 with the creation of a powerful new tribunal. The tribunal, with the backing of the Supreme Court, is the centrepiece of wide-ranging legislation to be introduced to State Parliament next week. The proposed laws, the first comprehensive attempt to regulate the retirement village industry, have the full backing of the Association of Residents of Queensland Retirement Villages. Fair Trading Minister Judy Spence said the tribunal would be headed by a retired judge or a lawyer with at least five years’ experience. It will be a forum exclusively for complaints about retirement villages that cannot be resolved through mediation. Orders of the tribunal such as fines will be enforced by filing an order with the Supreme Court Registry. Penalties for unscrupulous practices such as unregistered trading or providing false or misleading information will carry fines of up to \$40,000. Retirement Villages Association president Cliff Grimley said the legislation was the first effective measure to legally protect owners of the estimated 12,000 retirement village homes throughout the state.

- The legislation, expected to be passed as early as August, will:
- Prevent operators charging families exorbitant maintenance and associated costs after the death of a resident.
- Force operators to provide buyers with standardised statements detailing all fees and contributions.
- Establish provisions enabling residents to participate in the sale of their units.
- Force operators to provide adequate insurance cover over the entire village.
- Increase the cooling-off period for contracts from seven days to 14 days.

Ms Spence said the new laws would give people a new confidence in taking up residence in a retirement village.

“The reforms will be workable, meaningful and responsive to ensure that residents’ futures are sound and secure,” Ms Spence said. Mr Grimley said the concept of retirement villages had never been legislatively established. Residents were responsible for repairs, maintenance and replacement in very general terms. But many found themselves facing massive cost outlays when roofs and walls or wiring needed replacing.

“But under new legislation capital replacement is the owners’ responsibility, and they have to put funds in place to meet that cost,” Mr Grimley said.

Residents also had suffered heartache after finding that after vacating the unit they or their families were still responsible for providing maintenance and associated costs. That allowed operators to allow homes to remain empty without suffering any financial penalty. The legislation also

would address those problem areas, Mr Grimley said.

**‘Trouble stirs in the villages:
Regulations offer no protection for
retirees.’**

Bruce Montgomery

The Australian, 1 May 1999, p 4

RETIREMENT villages came across the Pacific to Australia as part of our pursuit of the American Dream. But the dream included a few cowboys. The vision was of tanned Golden Sunset Club retirees, who cycled along immaculate, paved streets, commuting between bridge and bowls. Their only problem was choosing the next cruise.

In Australia, perception is not reality. Today, free-wheeling baby boomers, a generation born to communal living, are considering the retirement village option. They confront a chequered, unduly complicated industry of 1400 villages, only 230 of which are accredited with the Retirement Village Association of Australia, and where there is no requirement for operators to be licensed. The aged hippie might be outlaying anything up to \$400,000 to join a new commune where an attraction is the emergency button to bring help when their body fails them in the bedroom or the loo. Occasionally, things go wrong, seriously wrong. The 55 unit owners at the Rutherglen Residential Club outside Launceston, in northern Tasmania, lost title to their units for four years after the company that had developed the village, Rutherglen Management Pty Ltd, went into liquidation. As is normal practice with retirement units, the Rutherglen unit owners had agreed, on purchase, to pay a deferred management fee to the developer when each owner sold their unit.

It amounted to 2.5 per cent per year of the purchase cost - \$18,500 on a \$74,000 unit over 10 years. They also had to pay a

service fee of about \$120 a month to cover the cost of a caretaker, mowing, rubbish removal, maintenance and insurance. In this case, because of the liquidation, the services were not provided but encumbrances to pay the deferred management fee remained on each stratum title.

Developer Keith Pybus used the encumbrances to raise other loans with the Westpac Bank or subsidiaries (as he was legally entitled to do).

Body corporate member Alec Hawkins said when Pybus's company collapsed, Westpac held out for \$230,000 payment of the deferred management fees. After four years, during which no unit could be sold and values plummeted, a \$60,000 settlement was negotiated and titles were liberated for sale. Values are rising.

Meanwhile, the residents' collective also had to buy the clubhouse, which an outside individual had bought from Pybus's company for \$25,000, although the State taxing authority put its value at about \$230,000. The residents had thought that it was part of the common property. Now, the Rutherglen residents run their own village, controlling their own finances. Retirement villages are governed by separate, inconsistent State legislation. There is no uniformity in contracts and residents might not even get title. Some operators belong to State retirement village associations, others to charity-based village associations but membership by operators is neither compulsory nor the norm. Accreditation and, therefore, adherence to certain standards is restricted to those villages that are members. A common thread of concern about the industry is the power imbalance between operators and elderly consumers, people brought up on trust, not used to dissecting voluminous

licence agreements. Brian Mitchell, 68, and his wife, Ronda, paid \$89,000 nine years ago for their unit in the Adelaide suburb of Holden Hill. Like most retirement village units in South Australia, they did not buy the freehold, nor even a leasehold title. They bought a licence to occupy the unit, based on its value. That licence agreement, for a loan to the developer, was 85 pages long and, in this one village, Mitchell said, there were 11 different forms of licence agreement. With each detected deficiency, a new licence evolved. When the Mitchells leave the village, the operator will give them, or their estate, its market value less 25 per cent. Today, that value is about \$115,000, Mitchell having spent \$10,000 on improvements such as a verandah, extra cupboards and gas heating.

The operator would pocket \$28,750 of the proceeds. There is the potential for windfall returns. If there were a continuing demand for the units, an operator would encourage regular turnover. "I've heard of one village where the entry age is 82, for that very reason," Mitchell said. Mitchell's Holden Hill village, with 235 units and a population of 400, has supplied its own roads, stormwater and sewerage connections, yet still has an annual rates bill to the local government authority of \$90,000. The main service given for that is rubbish collection. The residents pay the rates as well as land tax, payroll tax and other government imposts. If a unit owner goes to the bank to use his licence as collateral for a loan, the banks will not regard it as title. Mitchell, who heads the South Australian Retirement Villagers' Association, said: "Until the industry is cleaned up, there is a risk we will lose the value of our investments because there will be fewer buyers."

'Need for national uniformity.'

Bruce Montgomery

The Australian, 1 May 1999, p 4.

RETIREMENT villagers in three States have united with a leading operators' group to call for some national uniformity in the running of villages. The alliance between the NSW, Queensland and South Australian resident associations and the Retirement Villages' Association of Australia has called for uniformity in the manner in which the units are sold and the services provided to them. "The biggest problem is the lack of information by providers to potential residents," said Jack Allen, president of the Retirement Villages Residents' Association of NSW. "I've never found one giving incorrect information, but I've never found one that gives it all." His association is considering adopting a 10-page model contract, written in large print, so as to be more easily understood by the elderly people to whom it applies. Cliff Grimley, president of the Association of Residents of Queensland Retirement Villages, said some "consensus" legislation across the country would help to remove the concerns of people facing these agreements. Retirement villages are governed by separate, inconsistent legislation in each State. Inquiries in NSW and Queensland are leading to long overdue changes. While a spokesman for federal Aged Care Minister Bronwyn Bishop said the minister had no jurisdiction over villages, Opposition spokesman Chris Evans said there was a constant stream of concerns and complaints about the villages. Evans suggested a meeting of State and federal ministers with responsibility for the aged to address the problems.

‘Cabinet approves changes to retirement home laws.’

Jacob Greber

***Courier Mail*, 16 February 1999, p 4.**

UNSCRUPULOUS retirement village owners no longer will be able to “ransom” retirees by using contracts that restrict the sale of homes, under legislative changes approved by Cabinet. A long-awaited review of laws governing Queensland’s 12,000 retirement homes also will mean people who inherit houses or units from dead relatives will not be forced to pay thousands of dollars in village management fees for empty units.

The Retirement Villages Act gives operators control over when and if units are sold, as well as the power to charge management and service fees for units irrespective of whether they are occupied. The loophole is so serious that in some cases descendants of residents have been forced to pay service fees of \$120 a week for almost four years on homes that remain unsaleable.

Fair Trading Minister Judy Spence will take a range of amendments into State Parliament aimed at removing the “gross inequalities” of the outmoded Act. Proposed changes include the introduction of formal dispute resolution services and a doubling of the “cooling-off” period on contracts of 14 days, with enforced disclosure of fees and contributions. Aged Care Queensland chief executive officer Michael Isaac - who represents village operators - said the laws would introduce an element of “goodwill”.

'Make way for not-so-retiring retirees.'

Adrian McGregor

The Australian, 9 February 1999, p 6.

THE retirement village industry has been compelled to rethink its building plans for the next decade to cater for a wave of baby boomers who will expect to maintain their lifestyle of al fresco dining, the Internet and multi-channel cable television. Already industry advisers are talking to public utilities to prepare larger power boxes to cope with the technology used by the computer generation. And since the boomers are used to elbow room, rather than building single-bedroom units, developer-owners are now examining how to convert existing single units into doubles. "The boomers will have different needs and different tastes and the challenge for the village industry is to focus on services rather than real estate," says Michael Isaac, chief executive officer of Aged Care, Queensland, an industry representative body. "They've visited their parents in these villages, they like what they see, but know what they need. "Definitely larger units and space for two cars. An office for their business will be more important than the kitchen."

Colin Cruse of TriCare, a Queensland-based retirement village company, agrees. "They'll be the fussiest buggers of all time," he says. "The boomers are more affluent and they'll want computer centres and workshops, and financial services to advise on their investments."

Australia's demand for retirement villages is set to jump as the baby boom demographic bulge doubles the proportion of people aged over 65 - from 2 per cent in 1995 to 4 per cent in 2025. Baby boomers - so named because they are the result of the postwar baby boom have since sparked a series of other booms: in

baby food in the 1950s, education in the 1960s, jogging in the 1970s, real estate in the 1980s and financial services in the 1990s. Since Australia has only 4 per cent of its retirees living in villages, compared with 20 per cent in the US, the industry is confident of an exponential leap in demand in the next 10 years. A decade ago, retirement villages and nursing homes were the preserve of church and charities, but the private sector is growing so fast it now accounts for nearly half the residents in national village accommodation. Developer Pat O'Dea, who runs a company called Preferred Living Environments, is in Surfers Paradise planning a high-rise village - if that's not an oxymoron. "Not at all," he says. "They're not unusual in Sydney, in Nelson Bay or on the Gold Coast. The advantages are views and added security. "The old perception was that villages were for dodderly old people, but we have villages in Sydney where the average age has dropped from 76 to 69, and is still falling. Which means there are plenty of people aged only 60 already resident." O'Dea believes the boomers will discriminate. "It will be no use slapping something together on the outskirts of town," he says. "It won't work. Boomers want more than that." The news is not all rosy for the industry. Dennis Bashford, of Winchcombe Carson Financial Planning, says life-expectancy rates are rising by three months every year. "The rest of the story is that villages are dependent upon turnover to make a dollar. If boomers live longer, there's absolutely no option for villages other than to increase buy-in prices to remain viable."

‘Developers see a fortune coming out of retirement.’

Michael Cave

***Australian Financial Review*, 24 August 1998, p 1.**

Australians are growing older and richer and the nation's biggest development companies and investors are circling.

They can smell opportunity and big dollars - the next property boom - in retirement.

Delfin, APN Funds Management, Becton, Lend Lease, Silverton and Dick Pratt's Thorney Village are all jostling for a seat at the table.

They are focused on the bulging demographic that shows the number of Australian retirees is set to skyrocket - from 12 per cent now to 20 per cent in 2030.

Those retirees are going to be cashed up with superannuation funds and looking for a place to live.

Only 3 per cent of Australia's elderly now live in retirement homes, but if we follow the American trend - as analysts believe we will - that figure could reach 15 per cent.

This year, the self-funded retirement accommodation market in the US will be worth \$12 billion.

Developers and investors are beginning to recognise that the Australian retirement market is under-going revolutionary change.

As well as the bulging demographic, there is a federal push towards self-funded retirement, attractive tax benefits, dramatic changes to the retirement village product - even the meaning of the word "retirement" seems to be changing.

"Retirement is suddenly a good word," Prime Life Corporation's CEO, Mr Ted Sent, said.

"In the past, people associated retirement with dying.

These days we associate it with a change of activities."

Retirement villages today are designed for younger people - 60 year olds rather than 75 year olds - and have more in common with holiday resorts than hospitals.

They are places that provide a secure environment, access to medical care and leisure facilities for people who want to remain active in their old age.

This concept is central to projects in Prime Life's \$125 million aged-care portfolio.

Six of its retirement villages incorporate tennis courts, bowling greens, swimming pools and gymnasiums.

One, the \$100 million 450-villa Waterford Valley project in Melbourne's eastern suburbs, will be Victoria's first integrated golf and retirement community.

The Retirement Village Association of Australia is the biggest aged-care accommodation group in the country, representing 90 per cent of the nation's resident-funded retirement accommodation: 237 retirement villages and 38,000 residents.

The RVA national secretary, Mr Peter Govan, estimates the value of member retirement villages at about \$2.5 billion.

He is awaiting approval from the Australian Research Council to launch a \$1 million, three-year project to identify what retirement accommodation is available in Australia.

The information will be vital for developers and investors keen to enter the market, and should do a lot to avoid a repeat of the mistakes that saw a number of retirement developers in the 80s enter poorly planned ventures that went belly up.

APN Funds Management is involved in due diligence on a \$25 million retirement village portfolio spread through Victoria and NSW.

That will amount to “a toe in the water”, according to APN Funds Management’s managing director, Mr Rod Keown, who says it could lead to a much greater commitment.

“The bulge in the demographic has captured our interest and we’ve been doing a lot of research into the retirement village market,” said Mr Keown.

“According to the demographic and the trends we’ve seen in markets in North America and Canada, the retirement village market is going to be a fairly fertile field for property owners.”

APN plans a passive involvement in the industry: buying and holding the properties and leasing them on to professional operators.

It is the same for Becton, which paid \$11.5 million recently for a 5.2 ha former Gascor site in the Melbourne suburb of Bentleigh, which it plans to turn into a 440-unit aged-care facility.

The developer has lodged a building application already and is talking to potential operators.

“We are looking at major retirement work,” said Becton’s managing director, Mr Hamish Macdonald, as he prepared recently to begin a tour of US retirement facilities.

“The emerging demographic pattern suggests retirement-related development has a lot of potential.”

National Mutual’s development arm, Silverton, has been researching the retirement village market for two years and plans several major projects in the near term.

“We see an emerging trend within aged care,” said Mr John Bruzzaniti, Victorian manager for Silverton.