



Special Edition 12 December 2017

PRESENTATION BY

THE COMMISSIONER FOR CONSUMER PROTECTION

On Friday, November 10th, 2017, the Commissioner for Consumer Protection and his Senior Executives attended the WARVRA General Meeting at Piney Lakes. The party consisted of:

David Hillyard – Commissioner for Consumer Protection

Stephen Meagher – Director, Property Industries

Tim Banfield – Manager, Investigations Property Industries

Susan O'Brien – Legal Policy Officer, Industry Regulation

The meeting was highly successful with almost 200 members in attendance.

David Hillyard addressed the meeting for 30 minutes on important industry issues, and then our visitors participated in an hour-long Question & Answer session, addressing written questions submitted by members.

The whole meeting was devoted to critical village issues that are raised regularly by our members, and we are sure you will be significantly impressed with the frank and detailed responses offered by our guests.

As a result, we are very pleased to provide two documents in this Special Newsletter, detailing key points of the Commissioner's address and the full report on the Q & A session.

These documents are on the following pages.

Would you kindly help us by ensuring the residents of your village have the opportunity of reading this Special Newsletter?

May I offer our thanks to the Commissioner and his Executives, to the large number of volunteers that worked long hours – before, during and after the meeting, to make it so successful, to Des Cousins for his outstanding role as Moderator of the Q & A segment, and with particular thanks to my wife Rae who spent a week transcribing the recording.

The meeting was an outstanding culmination to a very successful year, and on behalf of your Committee, I wish you all a Merry Christmas and a Happy and Healthy New Year.

Ian Nordeck, President

SPEAKING POINTS FROM THE COMMISSIONER for CONSUMER PROTECTION PRESENTATION to the WARVRA GENERAL MEETING HELD ON 10 NOVEMBER 2017

Introductory remarks

- Independent research confirms that the vast majority of people are happy in retirement villages. In 2015, the Productivity Commission found that the popularity of retirement villages was increasing faster than any other age-specific housing.
- We acknowledge the grief and concern caused by Four Corners program. Consumer Protection (CP) has met with WARVRA and the Property Council re the issues posed and lack of attention in the reporting against existing legislation. In WA, most of the issues recently raised by the media already have a remedy.
- We and I think WARVRA find that residents often do not understand the financial consequences of their contract and other problems do arise from time to time. The way in which the legislation deals with some of these issues can be improved. No doubt residents will identify some areas during the panel session.
- CP will shortly be releasing an interim position paper on proposed reforms to legislation.
- However, it is important to first recognise that legislation is not the answer to every issue that may arise. Legislation is not, and cannot be, directed at meeting individual expectations.

Context for current reform project

- The Final Report (Statutory Review of Retirement Villages Legislation, Final Report, 2010) made over 100 recommendations for reform of retirement village legislation – 79 of these were fully or partially implemented between 2012 and December 2016.
- Significant reforms (important for current residents as distinct from prospective residents) include:
 - operators can no longer charge residents for certain matters – for example, provision of information to which a resident is entitled under the code or refurbishment beyond the cost of work reasonably required to return premises to the condition required by the contract;¹
 - reserve fund and operating budgets and statements are now separate, and have a prescribed level of detail;²
 - residents can apply to SAT where recurrent charges are increased or a levy is thought to be unreasonable;³
 - there is now an obligation on operators to instigate dispute resolution processes for resident/resident disputes;⁴
 - for non-owner residents, there is a cap on the time for which recurrent charges have to be paid after departing a village;⁵ and
 - the Commissioner now has power to apply to SAT to appoint a statutory manager where residents' finances or wellbeing are at risk.

Time taken to implement stage 2 reform

- There has been some perception that second stage reforms are delayed. WARVRA has been assured that this is not correct.
- In fact, scoping for implementation of the remaining Final Report recommendations commenced in early 2015, prior to the final measures for stage 1 reform being completed.
- Scoping was directed at responding to the retirement village industry having undergone a particularly vibrant period over 2010 to 2015.

- Many new village ownership structures and operating and financial models have emerged.
- Some of these posed issues for the traditional idea of a retirement village – reflected in the legislation made in 1992 – that a retirement village is a ‘standalone’ community operated for or on behalf of the land owner. Examples: villages located in mixed developments; merger of residential aged care with independent living in ‘continuum of care’ villages, which are operated as a joint venture between a number of entities; vertical villages; operator desire to share village amenities with the general public; and an increasing incidence of village land being leased to, rather than owned by, the village operator.
- Technical questions arose as to the suitability of various definitions and protections in the legislation to modern models and arrangements.
- Also, the growing popularity of villages and increasing complexity of ownership and financial arrangements has led to more focused research, with a series of important reports being produced subsequent to the Final Report. For example, the 2014 COTAWA report (Security of tenure for the ageing population in Western Australia: does current housing legislation support Seniors’ ongoing housing needs?); the Productivity Commission report on seniors housing in 2015; and Queensland and South Australian Parliamentary Committee reports on retirement villages regulation in those jurisdictions.
- Two Supreme Court cases, one in 2013 and one in 2014 raised technical issues with the legislation not considered in the statutory review.
- There were also proposed reforms to related legislation, in particular to strata titles legislation, including introduction of community title and broader planning use reforms directed at encouraging mixed use developments.
- While the scoping phase formally ended in late 2015, the dynamic policy environment has meant that scoping has had to be ongoing.
- New state reforms, including changes to sale of land legislation to encourage sale “off the plan” - raised further technical issues for some consumer protections in retirement village legislation.
- Legislation reviews in Queensland, South Australia, Victoria and New South Wales, particularly in the past 18 months, provided additional information that required consideration and reconsideration of some positions taken in the Final Report.
- Work on the various technical and ‘key concept’ issues, and options for implementing the outstanding Final Report recommendations, is now at the stage of finalising an interim consultation document.

What we will be consulting about

- Given the extensive consultations leading to the Final Report and during stage 1 reforms, WARVRA (as well as industry peak bodies) are keen to move directly to consultation on draft legislation. CP is sympathetic to that view.
- But the issues emerging since 2010 and new information on previously identified issues require that we ‘touch base’ with stakeholders on some reforms prior to settling the full reform ‘package’.
- The interim consultation will be focussed on those reforms that need to be settled before other reforms, or detailed stages of implementation, can be progressed.
- It will not deal with all strata title issues - state strata title reform will be implemented in 2018 but drafting is not yet sufficiently settled for retirement village legislation to be reviewed in light of those reforms. Work on these matters will occur in 2018.
- Practice of this Government through Minister Bill Johnston has been for Decision Regulatory Impact Statements (DRIS) to be published when settled and approved by Cabinet.

National Issues

- On 31 August this year, the Consumer Affairs Ministerial Council decided to set up a national working group on retirement village regulation. The terms of reference for this Working Group include to investigate:
 - whether there are any regulatory gaps in the Australian Consumer Law that may allow unfair practices in retirement villages;
 - the adequacy of current regulation of exit fees;
 - potential measures to strengthen dispute resolution mechanisms, including through use of a resident advocacy service;
 - whether all jurisdictions should adopt standard contract key terms and conditions; and
 - whether better consistency of legislation across jurisdictions would be practical and benefit consumers.
- There is overlap with some of WA's areas for proposed reform. The Working Group is in its scoping phase. To avoid duplication and potential for State measures to be inconsistent with working Group outcomes, some reforms have been delayed to a later stage of the State project.

Some specific reforms proposals

- Another project aim is to address the complexity of legislation. There is no such thing as a clear 'black and white' statement in law - meanings of words are always open to different opinion and circumstances need to be taken into account in deciding whether what has occurred is a breach of legislation. But frustration at the need to consider three or four different provisions to establish the obligation can be addressed.
- Important Final Report recommendations part implemented in stage 1 were that: the RV Code be made under the RV Act (not fair trading legislation); and (in effect), current RV Code obligations be revised to be more enforceable.⁶

Examples of proposals to simplify the law while implementing these recommendations:

- **operator obligation of good faith** – the RV Code 'general principle' as to operator behaviour - that residents be treated fairly and not be subject to abuse or exploitation - is framed more a guide than an enforceable obligation. It is proposed that this be reframed as a more enforceable, and broader, obligation to act in good faith, located in the Act.

Elevation to the Act more clearly identifies this obligation as a key part of the regulatory framework.

Treating residents fairly and not subjecting them to abuse or exploitation will remain in regulations as examples of not acting in good faith.

- **redevelopment and new developments** - the Supreme Court cases highlighted issues around village redevelopments that were not fully explored in the Final Report, such as implementation prior to proper resident consultation and lack of a process for a ruling on measures required to protect resident interests. Village redevelopment is a growing issue in WA, as much village stock is nearing its renewal date. Implementation of the Final Report recommendation that there be a process for operators to partially remove a village memorial – in effect, to excise land from a village – is likely to increase the incidence of village redevelopments.

Also giving rise to 'development issues', increasingly villages are leased or sold 'off the plan' and in staged developments. This poses issues in delay, changes during development approval and building approval processes, delay in delivery of promised facilities and cost of remedying building defects.

Public list of villages (identified by WARVRA in February 2016 as a particular recommendation to which it was giving attention)

The Final Report recommended Consumer Protection establish a public list of retirement villages, with prescribed information to be made publicly available. CP is currently exploring whether this can occur in digital format, including providing and updating information.

Consultation will be as to what information beyond 'name of operator', 'street address' etc should be publicly available. Proposals include: whether village land is subject to a secured interest that will take precedence to the retirement village statutory charge securing repayment of premiums; whether the village is part of a mixed development; whether any communal amenities or services are available to non-residents; and the relationships between the various entities that may operate or own various parts of a village.

For existing residents, this should clarify some misunderstandings that can lead to dispute – such as whether land on which a residential aged care facility or café is situated is part of a village or there is some relationship between the 'independent' manager and the village administering body.

Properly established, this list has potential to reduce pre-contract disclosure and contract length. However, this relies on prospective residents accessing the list and reading the information.

Delay in premium repayment

The Final Report made various recommendations directed at the issues underlying delay in unit sale or re-leasing – for marketing guidelines, power to apply to SAT where the proposed time for refurbishment is excessive etc. These were partially implemented in stage 1.

Consumer Protection is now of the view that a more direct response to the issue of delay is required. Consultation will occur on whether to stipulate a 6 month maximum that only applies where a resident does not have power to appoint their own selling agent (as occurs in NSW and Victoria) or have a longer maximum period for repayment that applies to all residents (as occurs in South Australia and is proposed for Queensland).

A proposal that operators pay the daily fee for residential aged care from any outstanding premium pending repayment, as occurs in some other jurisdictions, will also be considered.

Important considerations here are: what powers an operator retains when a resident can appoint their own sales agent; whether there are independent real estate agents willing to accept the brief; and whether there is sufficient publicly available information for a valuation to be independent of operator provided information.

Depending on the information provided, Consumer Protection may extend the current cap on recurrent charges to owner residents;

Capital maintenance, repair, renovation and replacement

It is proposed that the Act be amended to make express an obligation on an operator to maintain the village in reasonable condition having regard to (amongst other things) the age of the village, the services and amenities provided, any plans to redevelop on which residents have been consulted and the: premium; recurrent charges and levies and departure fees paid by residents.

This will expressly include maintaining the village in a 'safe' condition.

It is proposed that the obligation will be enforceable by application to SAT, which will have the power to order work to be performed and how cost should be apportioned bearing in mind funds already provided by residents and residents' share in capital gain.

Consultation will be on the considerations to be taken into account and unintended consequences.

Simplifying dispute resolution

Work is progressing on converting the State Administrative Tribunal to a 'one stop shop'. This will require agreement by SAT.

An issue is SAT's current inability to resolve Australian Consumer Law claims, such as unfair contractual terms, unconscionable conduct and misrepresentation. It is not yet clear if this proposal requires interim consultation.

Similarly, the Final Report recommendation that the Commissioner have power to accept an enforceable undertaking from an operator – which will, in part address concerns that conciliation does not produce a ruling – does not require interim consultation.

However, the proposal for an anti-victimisation provision to address one of the barriers to resident complaint, similar to that for making of discrimination complaints, was not a Final Report recommendation and will be put forward for consultation.

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(Footnotes)

¹ Section 25 of the RV Act and regulation 11(3)(j) and (i) of the RV Regs, Reg 11(3)(i) (refurbishment) read with cl 23(3)(a) and (d) of the RV Code.

² Clauses 17 to 19 of the RV Code.

³ Section 57A of the RV Act.

⁴ Clauses 30 and 29 of the RV Code.

⁵ Section 23 of the RV Act and Reg 9 of the RV Regs.

⁶ Recommendations 81 and 91.

QUESTION AND ANSWER SESSION

with the Commissioner for Consumer Protection

17 November 2017

1. AB abiding by Contract and Law

There has been a lot said on TV and radio and in newspaper articles about prospective residents making sure they understand the residence contract before they sign, but nothing is being said about Administering Bodies abiding by the said contract after the resident has paid up and moved in. In my village the AB is in breach of several clauses of the Contract and many clauses of the legislation. When can residents expect help from Consumer Protection to ensure that the AB abides by the contract and the legislation?

Susan Burns, Joseph Banks

The RV legislation was built around existing contractual arrangements - it provided checks and balances for the market. Consistent with this, breach of legislation often provides a civil remedy, enabling a resident to commence action.

Consumer Protection has already moved some obligations from the contract to legislation, giving it more scope to intervene in disputes. This process is continuing in the next round of reforms. Consumer Protection will recommend amending the legislation to enable it to accept enforceable undertakings from operators.

Consumer Protection continues to work with operators to ensure compliance with contracts and legislation.

2. Power of the Legislation

When the existing legislation is not enforced, what confidence can the residents have that bringing in new legislation will make any difference to the AB following the law?

Susan Burns, Joseph Banks

The assumption that legislation is not enforced is incorrect. Most matters are resolved without having to take court or State Administrative Tribunal (SAT) action. Consumer Protection's preferred action in all types of matters that we deal with is to gain voluntary compliance to modify market behaviour. I understand that this is also a view supported by WARVRA. Consumer Protection has a proven track record of taking action when it is required.

There are many cases that the public would not be aware of where we have negotiated significant financial outcomes for residents at particular villages. For confidentiality people who are not party to a matter would not know about those outcomes.

3. Refurbishment Costs

Clause 22 of the Code (Refurbishment of Residential Premises) created a new definition of "refurbishment work" - maintenance, repair, replacement or renovation work carried out ... to return the residential premises to a reasonable condition.

Has Consumer Protection carried out any educational/information program to ensure that ABs understand the new refurbishment clause?

Lou Halvorsen, Kingsway Court

The refurbishment provisions were developed in the course of 'round table' meetings over 2012 to 2014 in which operator representatives participated. Specific proposals were first released in a discussion paper in June 2013. Amended proposals with policy explanations were put to operator peak bodies (ACSWA and Property Council) in July 2014.

Property Council submissions in 2014 advised that the refurbishment provisions had been the subject of significant discussion within the industry. Discussion was ongoing through to finalisation of the reforms.

In addition, the management of each village was sent a letter dated 24 March 2015 advising them (amongst other things) that there had been significant change to refurbishment obligations that would take effect on 1 April 2015.

A Consumer Protection officer provided a presentation for a Property Council conference in May 2015 that included information on the new RV Code and regulation provisions re refurbishment.

New website content was developed for both operators and residents in April 2015 that, again, included advice as to new refurbishment provisions.

In addition, Consumer Protection carries out a proactive compliance program that aims to visit each village every three years. During those visits officers use an extensive checklist that aims to ensure that operators comply with all aspects of the legislation.

Does Consumer Protection undertake any compliance assessments to ensure that only the work required to restore premises to a reasonable condition is being demanded or is the onus wholly on the departing resident or personal representative to ensure the work does not exceed that required by the Code?

That is not possible, however we do react to complaints received.

We understand some villages are still requiring a fixed outgoing fee for refurbishment which seems contrary to Clause 22 (2)(a)(i).

Demanding an amount in excess of the actual cost to refurbish would be contrary to regulation 11 (3)(i).

Demanding a fixed sum per se is not contrary to legislation. Some contracts provide that the resident will pay a fixed sum. Where that amount is less than the cost of refurbishment, the contract overrides the legislation and the resident only has to pay the lesser amount.

4. Exit Fees

There are many concerns being expressed about the increasing level of exit fees from Retirement Villages. While the basic fee continues to be generally in the order of 3 per year running out after 10 years, newer contracts are increasing annual fees, lengthening the time used to calculate the fee, front loading the fee so that it is not charged pro rata (which seems contrary to Regulation 7K (3), and including various administration and sales/transfer of lease fees, so that some residents are now facing potential exit fees of 45 of the sale value of their property.

Has the Commissioner or the Government given any consideration to a cap on exit fees?

David Street, Arcadia Waters, Mandurah

This was considered in the last review. Overall, residents did not support prohibiting exit fees because it would likely result in increased entry sums, which they could not afford. Consumer Protection is currently reviewing the issue to see whether a different approach is required but capping 'exit fees' poses the same problem as banning them - 'entry' fees will simply increase.

'Entry' and 'exit' fees are a package - a change to one without the other rebalancing to give the same perating income is not likely to eventuate.

Consumer Protection will propose amendments to legislation to make it clearer to residents that the 'entry payment' is not usually the price for residing in the village. The entry payment is generally repaid - the price for residing in the village is actually the recurrent charges, deferred fees and interest forgone on the loan. There is a clear amount of work to be undertaken so that residents understand how these fees interact with one another.

5. Linking Residence Contracts and Retirement Village Schemes in one document

The retirement village industry in WA seems to have a universal or very widespread practice of producing a single document incorporating both the individual resident's personal and private financial arrangements with the Village operator and the general village arrangements ("retirement village scheme").

A negative outcome of this is that it becomes impossible to amend the retirement village scheme when the operator and / or the residents wish to do so. The result is that many villages have many versions of the contract often varying substantially.

Will the Commissioner and/or the Government give consideration when developing the next Amendment Bill to improving this situation which creates confusion and sometimes animosity between residents in a village?

David Street, Arcadia Waters, Mandurah

This is an important issue to which Consumer Protection has devoted a lot of attention. It is one of the 'key concept' issues that has had to be settled prior to progressing to more detailed reforms.

A 2014 Supreme Court case (SwanCare) noted that the legislation did not expressly state whether there could be more than one retirement village scheme in a village. It did, however, suggest this would not be the case.

An earlier case, (Hollywood in 2013) had made it clear that a residence contract is not part of a "retirement village scheme" as that term is used in the legislation.

"Retirement village scheme" actually has a very limited meaning in the legislation: in summary, it is the plan to operate a complex of seniors' housing under an arrangement by which at least one resident will pay a premium, not the other features of, or contractual arrangements used to implement, that plan.

That the legislation does not use the term "retirement village scheme" in the same way as industry does is evident from the fact that to terminate a retirement village scheme, you must seek a ruling from the Supreme Court. To terminate a residence contract, an operator has to make an application to SAT. A resident can terminate a residence contract simply by giving notice.

Residence contracts and the "retirement village scheme" are two completely different things.

Changing a residence contract has no impact on the retirement village scheme for the purposes of the legislation.

There is confusion over the promotion of a village "scheme" with how the legislation uses the term retirement village scheme.

The Hollywood case should have clarified this for operators but there still remains confusion.

Consumer Protection has explored two options:

- amend the legislation to introduce the concept that a retirement village scheme is founded in the residence contract reflecting some industry practices (not all villages call their residence contracts a "scheme"); or
- amend the legislation to expressly state what is currently the effect of reading a number of provisions together: that there can only be one retirement village scheme per village; and redefine "residence contract" to remove the reference to "scheme".

Consumer Protection prefers the second option. As the question suggests, the first option leads to too much confusion and Consumer Protection is not persuaded that it would provide any benefit to change the legislation in that way.

6. Accreditation of Villages

Has the accreditation of villages been considered as a means of providing quality assurance within the retirement village industry?

Ron Chamberlain, Joseph Banks

Yes however Consumer Protection is not persuaded that in general terms industry accreditation standards add anything to minimum legislative obligations. Most standards in any type of industry in fact simply require compliance with legislation.

7. Consultation

The Code, in a shaded box following Clause 4, gives examples of effective consultation. Clause 16 of the Code "Management procedures and resident consultation" includes four areas in which the Administering Body must establish "appropriate procedures" for consultation with the residents or the residents committee in a village.

Will the Commissioner use his powers under the Fair Trading Act 2010 to seek orders from the State Administrative Tribunal to require administering bodies to comply with the Code?

Ron Chamberlain, Joseph Banks

Consumer Protection is aware that there have been disputes as to what constitutes "appropriate procedures". There is also a gap in the legislation in that operators are required to have the procedures but there is no express obligation to comply with them.

Consumer Protection will be considering these issues in the proposals and will weigh up the benefit of more enforceable provisions - converting guidelines to obligations.

8. Insurance

What information and documentary evidence are residents entitled to receive to be assured that the Administering Body has secured adequate insurance for the residential premises (villas) in the Village?

Ron Chamberlain, Joseph Banks

There is no clear case law on this issue. However, if insurance is paid by residents in monthly recurrent charges, it is reasonable that they should be provided evidence of the existence of the insurance paid for if they ask for it. If the AB isn't prepared to release this information Consumer Protection would invite a complaint.

9. Audit of Village Finances

As it is the residents of a village who pay for the audit of the village finances, are the residents entitled to arrange the audit as opposed to an audit carried out by the AB appointed auditor?

Ron Chamberlain, Joseph Banks

No, however the auditor is required to be a person holding one of three specified, recognised professional qualifications. (RV Code (cl 19(9))).

10. Rectification of Construction Faults

A number of villages have or are still experiencing construction faults eg, drainage that does not comply with the local council guidelines, water mains that have not been laid in accordance with the Australian Standard for plastic water mains, lack of water-proofing in bathrooms, water penetration from the roof. The Administering Body in all these cases expected the faults to be rectified used funds generated from the village residents - it seems many operators build cheaply knowing that the residents will pay to fix up the problems.

What can be done to make Village Developers and Administering Bodies to fix these faults and meet the cost of the repairs?

*Dorothy Doak, Teranca Mews
Des Cousins, Harbourside Village
Peter Munday. Albany*

This is an emerging issue. Consumer Protection will propose reforms that would require the operator to pay to rectify building defects and recover any monies from the builder/developer.

11. Australian Accounting Standards

Do the Administering Bodies and Auditors of Retirement Village Accounts have to comply with the Australian Accounting Standards and in particular the Australian Accounting Standards Board document "Presentation of Financial Statements" (AASB 101, dated July 2015)?

Ted Brindal, Mercy Village

The short answer to this question is no. The Accounting Standards apply to entities: village financial documents apply to villages.

However, where the words "material" or "relevant" are used in the RV Code village management provisions, those words have the same meaning as when used in the Accounting Standards. This means that where appropriate, obligations are equivalent.

There are corporate accounting requirements based on an organisations structure and turnover. For example there are three different tiers of reporting for an incorporated association depending on its annual turnover.

12. Electricity Charges

In some villages, there is a single electricity service billed to the Administering Body which then charges out the cost to residents according to readings from sub-meters.

Is the Administering Body entitled to charge the residents collectively more that the AB has been charged by Synergy (or other supplier)? (This surplus is achieved by not passing on discounts or charging a supply charge on every individual.)

Joe Parker, Southern Cross Success

This is not expressly prohibited in the RV legislation because it is covered by other legislation. The Electricity Operators (Electricity Retail Corporation) (Charges) By-Laws 2006 allows certain operators to on-sell electricity, however the legislation stipulates that when they do, they must not on-sell at a higher charge. The Department of Finance has jurisdiction over complaints of this nature, however residents can and should lodge complaints with Consumer Protection in the first instance.