

Your Ref:

Our Ref: Elder Law Committee

14 October 2011

Retirement Villages Project Team
Fair Trading Policy Branch
Department of Justice and Attorney-General
GPO Box 3111
BRISBANE QLD 4001

retirementvillage@deedi.qld.gov.au

Dear Project Team

QUEENSLAND RETIREMENT VILLAGES DISCUSSION PAPER – CLOSURE OF RV SCHEME

Thank you for the opportunity to provide comments to the Department in response to the Queensland Retirement Villages Discussion Paper (the Paper), which proposes consideration of the closure of schemes under the *Retirement Villages Act 1999* (RVA).

At the outset the Society would like to caution against piecemeal consideration of reform of the RVA. The QLS notes that amendments to the issue of exit fees is proposed under the *Civil Proceedings and Other Legislation Amendment Bill 2011* and that the Paper seeks to consider the issue of closure of schemes specifically. The Society is keen to see the issues which need to be addressed in the RVA being dealt with as a part of a substantive and holistic review which engages all relevant stakeholders. The danger, as we see it, is that piecemeal amendments will result in fractured and ineffective legislation which will have unintended adverse consequences.

The closure of a retirement village is a relatively rare event and one which is presently dealt with by the RVA. While we are not opposed to some reform in this area it is considered that there are other areas which are of greater pressing concern within the RVA which are deserving of a coordinated review, including:

- The disclosure requirements;
- Clarification of the budgeting provisions, particularly in connection with the development of schemes;
- Harmonization of cooling off provisions with other legislation;
- Seeking greater efficiencies in QCAT matters;
- Establishing residents committees; and
- A standard form of residents constitution.

The Society notes that the factual scenario motivating the closure of a village will significantly affect the nature of the measures and provisions which should apply in the circumstances. Where a village is intended to be closed so that the site can be redeveloped for some other profitable purpose it may be appropriate to provide residents with generous protections and even possibly some form of compensation to assist them into their next accommodation. Where a village is intended to be closed due to the insolvency of the village itself and its operator, there will be a conflict of laws between Federal insolvency law and the State RVA, competing demands of creditors for insufficient resources and possibly an abrupt cessation of services to residents. In this circumstance what can reasonably be provided to residents may be determined by receivers in light of their statutory duties to creditors and may be quite limited.

On this basis the QLS is keen to see any consideration of the closure of villages involving a broad and flexible working discretion to permit the requirements to be tailored to the circumstances as far as is possible.

The Paper poses a number of issues which will be addressed.

Issue 1.1 – triggering deregistration of a scheme

The QLS is only qualified to provide comments regarding the legal aspects of this issue but is of the view that the involvement of an independent tribunal or court is a good way to provide an impartial and objective assessment of the need for deregistration.

It may be appropriate for the Chief Executive, a threshold percentage of residents acting as a group or the scheme operator to make an application to either the Supreme Court or to a judicial member of QCAT to have the deregistration considered. In these cases it would be appropriate for the party requesting the deregistration to serve copies of the application on all the other parties (including all affected residents).

The Society considers that while there is some formality to the process of making applications, closing a scheme is no trivial matter and requires a conscious action by an applicant party and should not be an action taken lightly.

The judicial body considering the application should have the ability to direct the Chief Executive to undertake an investigation in relation to any application and should also have the power to levy costs against an applicant where an application is held to be vexatious or frivolous.

It may also be appropriate to provide the Chief Executive the power to deregister a village on his / her own volition where it is seen as urgent or necessary, provided that there is an appropriate right to judicial review of the decision.

Issue 1.2 – for what reason should a scheme be deregistered

Given the serious nature of the deregistration of a scheme and the ability for this to affect the lives of residents and the business of the scheme operator there should be a balancing of relevant considerations. The current test is whether the scheme is operating and may be too vague to provide proper guidance in making a decision as it presupposes that the scheme has already effectively come to an end and the deregistration is formal recognition of that fact.

The Society considers that any basic test for deregistration must balance the two objectives of the RVA, being:

- to promote consumer protection and fair trading practices in operating retirement villages and in supplying services to residents; **and**
- to encourage the continued growth and viability of the retirement village industry in the State.

Consequently the considerations should be a balance between the best interest of the residents and the financial viability of the scheme. There will be factual circumstances where one of these two factors will outweigh the other so heavily that it will be proper to deregister the scheme. There may also be other circumstances where the balance will mitigate against deregistration and will promote continued operation, which may be the case where funding issues can be addressed by management action or where an almost defunct scheme can be re-enlivened by continued operation.

In making any determination the balancing of factors should be performed on the basis of evidence following investigation rather than the mere belief of the decision-maker.

Issue 2.1 and 2.2 – how long should the winding down period be?

The winding down period should be determined by the decision-maker who decides that deregistration is the most appropriate course of action, subject to a reasonable maximum period.

As we stated earlier it is important for the conditions of the deregistration to match the factual scenario at play in the decision.

Issue 3.1 – how should the maintenance reserve fund be distributed?

The MRF should be distributed at the time of making of the deregistration decision to all residents in occupation or who have not received their exit entitlement according to the proportions by which residents contribute to the fund.

In this regard the provisions should have appropriate regard to the way that sinking fund monies are distributed to lot owners in a body corporate according to their interest schedule lot entitlements when the body corporate is wound up.

Issues 3.2 – 3.6 – financial matters

The specific financial aspects of the deregistration process should be determined by the decision-maker who decides that deregistration is the most appropriate course of action, subject to a reasonable maximum period.

As we stated earlier it is important for the conditions of the deregistration to match the factual scenario at play in the decision.

Issue 3.7 - compensation for residents and others

The issue of compensation for residents on deregistration of a village is complex and by necessity must relate to the exact factual scenario which has caused the deregistration to come about.

Where a scheme itself has become unsustainable and has gone into insolvency there may be little money available to effect payments of compensation to residents, even if there is a standing obligation to do so. On the other hand, in situations where a scheme operator stands to gain significantly from a redevelopment of a former retirement village site following deregistration, funds for compensation payments may be available and payments even justified.

The Society submits that the issue of compensation is too dependent on the nature of the facts of each scheme to provide any general entitlement for residents.

The issue of compensation is properly an issue which should be determined by the decision-maker who decides that deregistration is the most appropriate course of action in order to be appropriate in all the circumstances. Considerations relevant to the payment of compensation to residents may include:

- the general circumstances of the closure of the scheme, including conduct of interested stakeholders - eg. the Scheme Operator, village manager, Body/s Corporate (if in a freehold scheme), residents, and those who acquire rights to reside for occupation by another (eg a unit owner in a freehold scheme who purchased the unit for occupation by someone else);
- any proposed new use of the village and any benefit to be derived by the scheme operator;
- any disadvantage, loss and damage caused to resident/s (including price and cost of acquiring a right to reside elsewhere and cost of relocation, less net sale price (if any) and other amount/s received as a consequence of exiting the closed village)
- any disadvantage, loss and damage caused to those who acquire rights to reside for occupation by someone else (including price and cost of acquiring a right to reside elsewhere and cost of relocation, less net sale price (if any) and other amount/s received as a consequence of exiting the closed village);
- the rights and obligations of the interested parties under the Public Information Document, contractual documents and agreed terms pertaining to the respective rights to reside;
- the financial viability and position of the scheme;
- any applicable fidelity or "insurance" fund; and
- the risk of closure to residents upon entry to the scheme, and contractual terms and disclosure pertaining to that risk.

In any event the aggregate of the exit entitlement (if any) and compensation of a resident, or of the holder of a right to reside, should not exceed the greater of:

- the ingoing contribution; or
- their loss and damage as assessed (including price and cost of acquiring a right to reside elsewhere and cost of relocation, less net sale price (if any) and other amount/s received as a consequence of exiting the closed village).

Issue 3.8 - exit fees

The payment of exit fees, as with all the financial matters should be dependent on the nature of the circumstances of the closure. We propose that this is a matter considered by the decision-maker who decides that deregistration is the most appropriate course of action given the nature of the individual facts of the scheme.

In many cases payment of the exit fee is a legitimate part of the revenue expectation of the scheme operator and may be justified in payment. There may be cases, however, where the conduct of the scheme operator is egregious and warrants residents being excused from such payments.

Again, payment of exit fees is an issue which necessitates a balance between the best interests of residents and the financial viability of the individual scheme and industry as a whole.

Issue 4 – entering a village and closure, implications for residents

Disclosure of information about closure as a part of the general information in the PID would be advantageous. It is important that a resident appreciates the bargain that they are entering with the scheme operator when entering a village and also appreciates the risks that is inherent in the scheme.

A final matter

The Society suggests with respect to implementation:

- if the Act is amended in relation to village closure - the amendments should not apply to residence contracts entered into before commencement of the amending legislation - other than amendments (if any) which (having regard to the fundamental legislative principles) should have appropriate retrospective application; and
- if an amendment is to have retrospective application - the Explanatory Notes, amendment, transitional provisions and Part 1 of the proforma PID (Generic Information) should clearly and unambiguously state so and whether and the extent (if any) that the amendment applies to residence contracts entered into before commencement of the Act and to residence contracts entered into before commencement of the amending legislation.

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Thank you for providing the Queensland Law Society with the opportunity to provide these comments. If you would like to discuss any aspect of this submission please contact Louise Pennisi, Policy Solicitor, on l.pennisi@qls.com.au or via telephone on 3842 5872.

Yours faithfully

Noela L'Estrange
Chief Executive Officer