

Queensland Retirement Villages

Discussion Paper

August 2011

Office of Fair Trading

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Background

About retirement villages and the closure of villages

Retirement village schemes in Queensland are governed by the *Retirement Villages Act 1999* (the Act). As at June 2011, there were 311 retirement village schemes registered in Queensland. Retirement villages complement other housing options for older Queenslanders, including aged rental accommodation and manufactured home parks geared towards older persons.

The Act (section 7) defines a retirement village scheme as:

a scheme under which a person—

- (a) enters into a residence contract; and*
- (b) in consideration for paying an ingoing contribution under the residence contract, acquires personally or for someone else, a right to reside in a retirement village, however the right accrues; and*
- (c) on payment of the relevant charge, acquires personally or for someone else, a right to receive 1 or more services in relation to the retirement village.*

In order to operate, a retirement village scheme must be registered with the Office of Fair Trading. The Act outlines the steps for ending the scheme's registration. This is either done through the operator applying to cancel the scheme under section 40, or through the chief executive deregistering the scheme under section 28A. Under section 40, the scheme operator may request cancellation of the scheme registration, but is required to provide written notice to each resident stating, among other things, how cancellation will affect the resident. The details or extent of the effects is not explained. Also, the legislation is largely silent on many issues associated with and arising from such closure, and does not provide clear rights and obligations for operators or residents when a village takes steps to close.

Closure of villages is rare, both in Queensland and Australia-wide at present. However the impact can be significant on residents, operators and the community. In Queensland in recent years, two villages have taken steps towards closing-down. Villages are currently able to close within the existing regulatory framework, however the Act is not prescriptive about how this happens as it was intended that scheme operators deal with this directly with residents. This may not happen in practice due to:

- the possibility that a scheme operator may allow a village to decline, while technically complying with the Act, thereby reducing the capital value of the residences and the amenity for remaining residents;
- scheme operators being willing to hold the retirement village in such a reduced state.

Villages can remain registered, but no longer accept new entrants. As some residents leave the village, the village may remain in limbo for several years with no new residence contracts being entered into. It may also take considerable time for remaining residents and the scheme operator to reach agreement about a fair buy-out price for the units. With such opposing interests, it may not be possible for such agreement to be reached at all. This could cause residents distress over the length of time being taken to resolve, for being involuntarily moved from their homes, and the possibility of not being able to buy into alternative accommodation that is either in the same area, of comparable amenity or near family and friends or necessary services such as medical facilities. Taking a matter to the Queensland Civil and Administrative Tribunal (QCAT) or the courts could appear to be a significant undertaking for some Queensland seniors. There may be a perception that the compilation of the required level of documentation and evidence, as well as costs, may result in some residents not feeling confident in pursuing this recourse.

Disagreements and lack of certainty are also to the detriment of scheme operators who no longer wish to operate this type of business. This could add unnecessary holding costs for scheme

operators or result in business opportunities or favourable economic conditions being missed due to long delays required for resolution of problems related to closure.

As land availability becomes more of an issue as Queensland's cities and towns expand to cater for population growth, well located retirement villages may present as opportunities to land developers.

As in most cases involving places of residence, the prospect of having to move, whether by choice or compulsion, creates stress and incurs financial costs. It is likely that residents in a village that is closing would experience stress and feelings of uncertainty, financial detriment and emotional distress during the 'winding-down' of the village. For many older or frail residents, or residents with health concerns, these stresses can be exacerbated by their circumstances. All residents would be concerned over whether there is a suitable alternative accommodation option for them to which to relocate. Higher levels of uncertainty could, in part, be attributed to an absence of legislation which details the rights and obligations of the operator and residents in the event of a closure.

Given that a resident's rights at a retirement village arise partly from the terms of their individual residence contract, they may have actions under general contract law in the event of a village closing. However, the expense, stress and uncertainty with pursuing such action would almost certainly make this a non-viable option for many village residents. Residents are generally on limited, fixed incomes and have reached a stage in life where they may not reasonably be expected to pursue such litigation.

It is also important to recognise that although a retirement village is a home for residents, it is also a business for the operator. As such, an operator may seek to close a village for a number of reasons. For example, the operator may wish to redevelop the land for other uses, or may find it no longer financially viable to continue running the village. Economic pressure, such as rising costs of holding land, and increased competition from alternative, and in many cases less expensive, accommodation models for older persons, may put pressure on operators to deregister those schemes which either under-perform or simply cost too much to continue operating. Additionally, some operators may have acquired existing retirement villages solely for the purpose of redevelopment, and would therefore not focus on repeat business or the impact of closure on the industry.

Impact of closure on residents

Although village closure is extremely rare in Queensland, the disadvantage experienced by residents when closure does occur can be significant to those individuals and their families. In accordance with the Act, village operators are only required to pay the resident their standard exit entitlement, and there is no requirement for the payment of compensation to the resident or provide any other sort of assistance, monetary or otherwise, despite the resident having to leave their home involuntarily. The calculation method for the exit entitlement is prescribed in the resident's contract, and there is no requirement for this amount to be adjusted in circumstances where the exit entitlement falls because the village is closing. In circumstances where the resident chooses to leave a continuing village, the departing resident is liable for a reinstatement fee—commonly around \$10,000. Where a village scheme is being cancelled, there would be no need to refurbish the vacated village unit so the departing resident in this case may not incur a reinstatement fee. The Act is silent on this, also.

There may also be differences, under the current Act, for residents depending on their tenure type, namely freehold, leasehold or under a licence or other type of arrangement. Residents who hold a freehold or leasehold interest are registered on the title to the land, whereas those occupying their unit under a licence are not and a statutory charge in favour of the residents may exist to provide a kind of protection for them.

Due to the exit fee payable when residents leave a village, affected residents may find themselves with insufficient funds to buy into a retirement village which is of the same standard as their existing village, or may need to move away from family and friends in order to find new accommodation. If a village with a large number of residences closes, it may be difficult for all residents to be accommodated elsewhere by virtue of the number of people seeking alternative places and the volume of places available. This might be particularly of concern in smaller population centres which may only support a few villages.

As the potential detriment to residents occasioned by village closure is serious, the government and the community must be satisfied village closure is being responsibly and effectively managed, possibly with the assistance and guidance of legislative provisions. Conversely, it is an important component of the operation of this type of business, and operators, or prospective operators, require as much certainty about this element of the business as they do about the operation of the business as a going concern. In acknowledgement of this, retirement village operators—conscious of the reputation and viability of the industry as a whole—and residents—concerned for the significant investment they have made—have sought changes to the retirement villages regulatory scheme so that village closure can be better addressed.

The retirement village industry may also be adversely affected when the Act does not sufficiently address issues. Retirement villages are, comparatively, an expensive form of accommodation for older persons to enter. The possibility of inadequate safeguards for residents and lack of comprehensive guidance on rights and responsibilities may make village life an unattractive option, creating less consumer demand in the industry.

If the Act is not amended, and the status quo retained, the following impacts may be experienced:

- Retirement village residents may find themselves in an unfavourable position should their village operator seek to close the village, in part due to the necessary time needed to cease operating the scheme. Experience suggests when a village begins to wind down (as the owners do not see the village as a going concern) and residents begin to leave, the remaining residents in the village are unable to adequately fund the upkeep of the village, and this in turn may cause the amenity of the village and value of the units to decline. Potentially, this might affect the exit entitlement which the resident ultimately receives when they vacate the unit. This may lead to a value inequity between residents who leave villages of their own volition, and residents who must leave because their village is closing.
- Operators may find themselves unsure about how to close a village which they no longer wish to operate. This is likely to cause disagreement with village residents over how the closure is carried out (including the time taken to close the village and what assistance can be given in finding alternative accommodation) and any amount of money liable to be paid to residents. Delays could incur extra costs for operators in maintaining the village beyond when they would like the business to cease operating. It may also result in opportunities for the operator being lost, or opportunities being more costly as a result of a delay.
- Residents and operators alike may be faced with the prospect of seeking legal advice and the daunting possibility of expensive and protracted litigation with no certain outcome. This is an extremely serious matter for retirees with limited fixed incomes in their latter stages of life, or for a business that is struggling financially.
- Consumer confidence in the retirement village industry may decline. This may have the flow-on effect of older persons seeking alternative accommodation, and reducing the viability of the industry.
- Competition in the industry may decrease with smaller operators with less capital or cash flow being deterred from becoming retirement village operators. This may result in a lack of diversity in the types of villages being developed.

How village closure is addressed in other jurisdictions

The issue of village closure is dealt with differently in other Australian jurisdictions and in New Zealand. Similar to the experience in Queensland, the number of closures in other states is either minimal or no closures have occurred at all. There is no uniformity of treatment of village closures across jurisdictions either. Some states include a statutory notice period when operators are seeking to terminate a retirement village scheme, but many do not specify a statutory notice period.

New South Wales provides a range of protections for residents where the operator seeks to close a village because they wish to use the land for other purposes. For example, the operator must give residents twelve months notice of the operator's intention to seek Tribunal approval to close the village, and the operator must provide assistance in finding comparable, alternative accommodation. The Tribunal may also order the operator to pay compensation to the residents where it considers this to be appropriate, for example to pay for removal and utility expenses, where the resident's new accommodation is more expensive or the resident will lose access to services or facilities as a result of relocating.

In Western Australia and South Australia, the Supreme Court must approve the "termination" of a retirement village. In Western Australia, the Commissioner for Fair Trading is a party to these proceedings, whilst in South Australia, the responsible Minister is a party.

In Victoria, Tasmania and South Australia, a village may be closed where the residents agree to the closure. In New Zealand, an operator who seeks to close a village must have the approval of at least 90% of the residents.

How to provide feedback

This discussion paper outlines some options for amending the Act to address issues which arise when a village closes, and seeks feedback from all sectors of the community, especially current and prospective retirement village residents, and retirement village operators.

Grey boxes containing questions for discussion appear after each issue and are designed to help you think about the different issues raised and guide your feedback. You should not feel constrained by these options. If you have other ideas on how these and other village closure issues could be dealt with, the Government would like to hear your suggestions.

It is very useful for the Office of Fair Trading to receive submissions which explain why you consider your suggestion is appropriate. For example:

*"I think the winding-down period for a village should be six months **because** ..."*

This will help the Government better understand your submission and allow us to compare, and give appropriate consideration to, submissions made by different sectors of the community. If you agree with a particular option discussed in the discussion paper because of the reasons provided, it is acceptable to say you have selected this option because you agree with the reasons provided.

Feedback can be emailed to: retirementvillage@deedi.qld.gov.au or mailed to:

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

The closing date for feedback is Sunday 9 October 2011.

Issues for discussion

Retirement villages Ministerial Working Party

The Office of Fair Trading chairs a Ministerial Working Party which considers retirement village policy and legislative issues. The Working Party comprises representatives from the Association of Residents of Queensland Retirement Villages, the Retirement Villages Reference Group, the Retirement Villages Association, Aged Care Queensland Incorporated, the Queensland Law Society Elder Law Committee, private practice solicitors who specialise in retirement village law, and officers from Fair Trading Policy and the Office of Fair Trading's Business Services branch.

The Working Party met in June 2010 to discuss the issues around retirement village closures and whether or how the existing regulatory scheme could be improved. The Working Party generally agreed:

- Retirement village scheme operators and the chief executive retain their existing power to deregister or cancel a scheme's registration.
- The chief executive should continue to be empowered to cancel registration where the chief executive reasonably believes a scheme is no longer operating, but is also able to cancel registration where it is believed the scheme operator has taken steps towards closure and deregistration would be in the best interest of residents.
- When a village closes, the winding down period should be longer than the existing 30 or 60 day periods, to enable residents to source, purchase and relocate to alternative accommodation.
- Surplus maintenance reserve fund monies should be distributed equally to remaining residents.
- The operator should be allowed to use surplus general services charges for ongoing running costs, such as administrative costs incurred in closing the village.

Issues

The Office of Fair Trading has identified the following issues which may need to be addressed when a village closes:

Closing a retirement village scheme

- Who should be able to trigger the closure of a retirement village scheme?
- For what reason should the chief executive be able to deregister a retirement village scheme?

Timeframes involved in closing a village

- For deregistration of a retirement village scheme, how long should the winding-down period be?
- For the cancellation of a retirement village scheme's registration, how long should the winding-down period be?

Financial considerations

- How should the surplus maintenance reserve fund monies be dealt with upon closure of a village?
- How should the surplus general services charges be dealt with upon closure of a village?
- Should a resident be liable to continue paying general services charges for the remainder of the winding-down period if the resident moves out of the accommodation unit during the winding-down period?

Entering and closure implications

- What role does pre-contractual disclosure between the operator and prospective resident play in spelling out the rights, responsibilities and obligations of residents in a village and how might this disclosure be enhanced to improve understanding of issues such as closure?

Issue 1: Closing a retirement village

An operator of a retirement village scheme may, for various reasons, want or need to close the scheme, and may apply to the chief executive to have the scheme deregistered, by cancelling the registration [s.40 of the Act]. Alternatively, the chief executive may deregister the scheme on the more limited ground of the chief executive believing the scheme is no longer operating [s.28A].

Issue 1.1 – Triggering deregistration of a scheme

The issue is: who should be able to trigger deregistration of a retirement village scheme, and thereby close the village?

- Option 1: Maintain the status quo, by allowing the chief executive and village operator the ability to trigger deregistration of a retirement village scheme.
- Option 2: Allow residents to be able to approach the chief executive to request a deregistration investigation.
- Option 3: Require the decision to be made by a court or the Queensland Civil and Administrative Tribunal.

Discussion of Option 1 – maintain status quo

The chief executive is responsible for registering a scheme, and must therefore also have a complementary power to close a village. This may occur in a number of circumstances. For example, the Act provides for circumstances in which the village “is no longer operating”—which may suggest that for practical purposes, the village is no longer operating as a going concern—or where it would be in the best interests of the residents and operator. The terminology “no longer operating” may require further explanation in the Act – for example, is it to mean that all residents have vacated? The operator may be in a position to understand the situation at their village in terms of their financial position, the circumstances of the business and residents’ concerns. Operators may be able to determine whether there is a justifiable reason to close the village, and also the impact of doing so on all the residents.

Discussion of Option 2 – residents to be able to approach the chief executive to request a deregistration investigation

Residents at the village may be well-placed to understand the situation at their village (for example, whether the village has become run down or whether the operator has told residents they wish to close the village) and the likely impact of closure on them and their fellow residents. In this context, it is suggested residents be able to bring issues to the chief executive and seek consideration of closing the village as the only viable option to address a scheme operator’s failure to maintain the village. Residents are the ‘consumers’ in this instance and therefore have an essential stake in the operation of the village. To make such a request would be a drastic action by residents and if this option is favoured, should it require consensus among residents before the chief executive is approached? Consideration should also be given as to whether some residents could become isolated and feel vulnerable if a group of residents pursues this path and puts pressure on some residents to agree to the motion.

Following an approach by residents, the chief executive would make a decision about the issues raised and, if appropriate, take action to close the village. It should be noted the chief executive

may consider other options are instead appropriate, such as compliance action. It should be noted that under the Act at present, residents have the ability to raise complaints with the chief executive. This option might merely formalise this ability under certain serious circumstances where the chief executive may be required to not only consider compliance action but also consider deregistration. The chief executive may possibly be able to require the scheme operator to present a business case as to why the chief executive should not initiate deregistration based on the operator's failure to maintain fundamental services or standards.

However, the question arises as to whether, in this circumstance, all residents need to agree on approaching the chief executive about closing the village, or if a special resolution (three-quarters majority) vote would suffice? If the agreement of all residents were required, it is possible this could be unachievable, and if only a majority were needed, this could seriously disadvantage the residents who did not agree, particularly where residents want to close the village for their financial benefit, not because it was no longer commercially viable or the amenity of the village was poor. Additionally, from the perspective of the operator, it may discourage the opening of retirement villages if residents are able to trigger deregistration.

It may also be appropriate to consider introducing a minimum set of standards that can be objectively measured and with which operators must comply, for example, standards about maintaining the amenity of the village. Where such standards are not met, and the quality of the village deteriorates, this could be used as the basis for residents to request the chief executive consider deregistration of the village. For this to proceed, there may be a requirement that, for example, a three-quarters majority of residents would have to agree to the request for deregistration.

Discussion of Option 3 – require a court or the Queensland Civil and Administrative Tribunal (QCAT) to approve deregistration

An independent tribunal may be best placed to decide whether closure of a village is both warranted and in the best interests of all parties. Given the significant financial, contractual and property issues involved, it may be more appropriate for the Supreme Court, and not QCAT, to be the forum. However, litigation in the Supreme Court is costly, takes considerable time and is highly formal. This provides a significant discouragement to village residents because of the resulting financial and health impacts. It should also be acknowledged that residents argue that any litigation process, even of a less formal nature such as that conducted at QCAT, is still a daunting prospect. Consideration should also be given as to whether the chief executive should be a party to any proceeding, as is the case for some other jurisdictions (see pages 6 – 7).

1. Who do you consider should be able to initiate the closure of a retirement village scheme?
2. What failures by the operator would you consider to be serious enough for the operator to “show cause” as to why the chief executive should not initiate the process of deregistration in the interests of the residents.
3. Do you think that complaints by residents can be sufficiently serious to be able to endanger a business and hence take away someone's livelihood?

Issue 1.2 – Grounds upon which the chief executive may deregister a scheme

The issue is: on what grounds should the chief executive be able to deregister a retirement village scheme, and thereby close a village?

- Option 1: Maintain the status quo, by allowing the chief executive to deregister a scheme where the chief executive reasonably believes a retirement village scheme is no longer operating.
- Option 2: Maintain the status quo, but also expand the grounds for deregistration to include the scenario where:
 - the chief executive reasonably believes the scheme operator has done acts with the intention of closing down the scheme, and
 - the scheme operator has not lodged an application to cancel the scheme's registration, and
 - deregistering the scheme would be in the residents' best interests.

Discussion of Option 1 – maintain status quo

The present power of the chief executive to deregister a scheme may be unduly limited, as it applies only where a village is no longer operating (as noted earlier, this phrase may need more definition). This limitation may be undesirable in the context of residents not having the power themselves to initiate closure (as discussed above). There may be situations where the operator refuses to close the village, despite circumstances (either of the operator's doing or from events beyond the operator's control) indicating such a course would be in the best interests of residents. In such a case the chief executive would be unable to act as the retirement village scheme was still operating.

Discussion of Option 2 – status quo and further ground

Where the chief executive retains the power to close a village (as discussed above), it is important for there to be adequate guidance for when such a power should be exercised.

The expanded ground could cover the two most likely scenarios which could prove detrimental to residents, namely (a) the failure of an existing scheme, or (b) where an operator adopts measures in an attempt to 'force' residents to leave the village by running down the village or in some other way making it undesirable for the residents to want to remain there. This new ground would not trigger deregistration merely because the scheme operator has done an action which could indicate the operator's intention to close the village, such as obtaining a valuation of the village land.

Given the relative rarity of village closure, a completely unfettered power for the chief executive to deregister a village would be difficult to justify and would not provide either residents or operators with sufficient certainty.

1. If feedback supports the chief executive being able to initiate deregistration of a retirement village scheme, do you consider the grounds for deregistration should remain as they presently exist?
2. If 'no' to question 1, do you consider the grounds for deregistration should be expanded as suggested in the above options?
3. Do you consider there are other grounds for deregistration, not discussed in the above options, which should be introduced?

Issue 2: Timeframes for closing a retirement village

The Act presently provides that the closure date of a scheme occurs a certain number of days after announcement of either deregistration by the chief executive [s.28A(2)] or cancellation of

registration by the operator [s.40(3)]. Residents therefore need to vacate the village by the end of the relevant winding-down period.

Issue 2.1 – winding-down period after deregistration

The issue is: for deregistration of a retirement village scheme by the chief executive, how long should the winding-down period be? It should be noted that residents would be required to permanently vacate their accommodation unit on or before the last day of the winding-down period.

- Option 1: Maintain the status quo, with the presently allowed 30 day winding-down period.
- Option 2: Adopt the same winding-down period which applies when a retirement village scheme's registration is cancelled by the operator, being 60 days.
- Option 3: Allow a longer period, to give residents sufficient time to find, and move into, alternative accommodation.

Discussion of Option 1 – maintain status quo

Under the Act where the chief executive has deregistered a scheme, the current period of 30 days may be inadequate. This is because outgoing residents would need to source, purchase, and relocate into alternative accommodation. For example, should an outgoing resident choose to buy a home, the standard settlement period on a house and land contract is 28 days. Further, there might be additional financial considerations. If additional grounds for deregistration are to be added (as discussed above), longer winding-down periods may be considered more appropriate. Additional winding-down time would assist in ensuring residents source comparable, alternative accommodation and have the opportunity to address other issues which may arise from the pending village closure.

Discussion of Option 2 – sixty day winding-down period

A sixty day winding-down period may be considered appropriate where residents are keen to move to new accommodation because the amenity of their current village has been allowed to deteriorate, or may suit the operator in order to settle outstanding financial matters as quickly as possible and keep ongoing costs to a minimum. However, sixty days may still be too short, particularly should the chief executive be using additional grounds to close a village (as discussed above). The appropriateness of a sixty day winding-down period is also discussed further under Option 1 of Issue 2.2 below.

Discussion of Option 3 – a longer winding-down period

A longer deregistration winding-down period, for example anywhere from three months up to 12 months, may be beneficial as this would allow more time for residents and the operator to deal with closure issues, such as securing suitable alternative accommodation for the residents. Although three months is still a relatively short period, the chief executive would only be taking action to deregister a scheme where it was absolutely necessary to do so – meaning it may not be viable or reasonable for the operator to continue operating the scheme for a longer period.

This option could be supplemented by allowing the chief executive or QCAT to grant an extension to this period where residents require additional time to settle their affairs and find alternative accommodation. In granting any such extension, the chief executive or QCAT could first consider submissions made by residents and the operator, to ensure neither side was unduly affected by the delay. This would allow the regulatory system to account for specific circumstances of villages, rather than apply a “one size fits all” approach to closure periods.

1. When a retirement village scheme is deregistered, how long do you consider the winding-down period should be?

2. What factors have you considered to arrive at the suggested period in Question 1 above?
3. If an extension of time to the winding-down period were necessary, should the decision about the additional length of time lie with the chief executive, QCAT or another entity?

Issue 2.2 - Winding-down period after cancellation of registration

The issue is: for cancellation of registration of a retirement village scheme by the operator, how long should the winding-down period be?

- Option 1: Maintain the status quo, with the presently allowed 60-day winding-down period.
- Option 2: Adopt the same winding-down period which applies when a retirement village scheme's registration is deregistered by the chief executive, being 30 days.
- Option 3: Allow a longer period, to give residents sufficient time to find, and move into, alternative accommodation.

Discussion of Option 1 – status quo

It is possible that 60 days may be an insufficient period in which to wind down the village. Given that the decision to close the village is made by the operator under this scenario and not the residents, residents may not have anticipated such a decision, and may therefore need more than 60 days to settle their affairs at the village and source alternative accommodation. As the residents will be older persons, this transition may be more difficult, costly and stressful than experienced by owners of a privately owned dwelling not under a retirement village scheme needing to unexpectedly find new accommodation.

Discussion of Option 2 – 30 day winding-down period

Arguably, once the operator decides to close the village, it is in the best interests of both the operator and residents to settle the situation as quickly as possible. However, as residents are older persons, the transition to new accommodation may be difficult, costly and stressful, and, similar to a 60 day winding-down period, 30 days may also be too short.

Discussion of Option 3 – a longer winding-down period

It may not be practical or reasonable to prescribe an overly lengthy winding-down period as the operator would be seeking closure of the village for a specific reason, such as wanting to redevelop the land or because it is no longer financially viable to continue to operate the village. However a period which is slightly longer than the current period, for example three months or up to 12 months, may be appropriate. In New South Wales, 12 months notice must be given.

It may also be useful to allow the chief executive or QCAT the power to grant a short extension to this period, in appropriate cases, as this would give residents additional time to settle their affairs and find alternative accommodation. In granting any such extension, the chief executive or QCAT could first consider submissions made by residents and the operator, to ensure neither side was unduly affected by the delay. As with Option 3 under Issue 2.1, this would allow more flexibility within the legislation to take particular circumstances into consideration.

1. When the registration of a retirement village scheme is cancelled, how long do you consider the winding-down period should be?

2. If an extension of time to the winding-down period were necessary, should the decision about the additional length of time lie with the chief executive, QCAT or another entity?

Issue 3: Financial considerations

When a village ceases to operate, consideration needs to be given to outgoing residents and the financial position in which they will be placed by virtue of the village closing.

Retirement village schemes involve payment into the Capital Reserve Fund (CRF) by the operator, payment into the Maintenance Reserve Fund (MRF) by the residents, and payment of general services charges by the residents. Contributions into these funds and for general services are calculated on a long-term basis, meaning there may be a balance of unspent funds when the scheme closes. Contributions for general services charges, for continuing retirement villages, can also be payable for a considerable time after a resident has vacated their unit.

Budgets for the MRF and CRF are determined upon advice from a quantity surveyor, and usually maintain a substantial balance to meet significant expenditure incurred on a yearly (or longer) basis. The costs incurred for which these funds are maintained are projected for up to ten years and contributions are then apportioned per year. Some capital items may require significant maintenance once every three years, such as resurfacing the village's roads, and funds must be reserved annually so there are adequate funds available in the MRF when the time for the maintenance falls due. In this example, if the village closed 2.5 years into this three-year maintenance cycle, the funds reserved for this purpose would be substantial. Once the village closes, the repairs for which this money has been set aside will not be required, so it may be equitable for surplus money to be returned to residents, as sole contributors to the fund, in the same proportion as it was raised.

A similar situation applies to funds reserved in the CRF to replace capital items on a regular basis, for example, purchasing a new village bus every five years. The funds paid in to the CRF derive solely from the operator, so it may be equitable for surplus money to be retained by the operator upon closure of the village.

General services charges are directed at more day-to-day operating expenditure, and are therefore budgeted so as to maintain only a small balance at any given time. Generally, when a resident exits a village that is a going concern, under normal circumstances they are required to pay the general services charge until the first of the following happens: the right to reside in the accommodation unit is sold, or a period of 90 days elapses [s.104]. If the unit is not sold within 90 days, the resident and the scheme operator are each liable in the same proportion as they are to share any gross incoming contribution on the sale of the unit. This arrangement continues until the first of, either the unit is sold or a period of 9 months has passed since the former resident vacated the unit. These provisions of the Act apply to retirement villages that are going concerns. Consideration should be given to whether these provisions should apply in the same way if the village ceases to operate.

Under normal circumstances where a village is a going concern, when a resident vacates a unit the resident may be required to contribute all or a portion of the reinstatement costs to bring the vacated unit up to a marketable condition, depending upon the type of interest the resident holds in the right to reside in the unit.

When a resident vacates a unit, the reinstatement work is completed before the unit is valued for resale of the right to reside in the unit. In the situation where the village is winding down and no reinstatement work is required for this reason, should the unit be valued in the condition it is in, or as if reinstatement had occurred?

Under the Act, section 63(1) requires the exit entitlement to be paid on or before the sooner of the day it must be paid in accordance with the residence contract, or 14 days after the settlement day. 'Settlement day' is defined in section 63(4) as meaning the day on which the sale of the right to reside, to a new resident or the scheme operator, is settled.

Issue 3.1 - Dealing with the maintenance reserve fund

The issue is: how should the balance of the MRF be distributed upon closure of a village?

- Option 1: The balance of the funds should be distributed evenly between all residents living in the village on the day the deregistration or cancellation of registration is announced - for example, if there are 50 residents, each resident will receive $1/50^{\text{th}}$ of the surplus MRF funds.
- Option 2: The balance of the funds should be distributed between all current and past residents who paid contributions to the MRF within the 12 months prior to the day the deregistration or cancellation of registration is announced, with each resident's distribution based on the proportion of money they contributed to the fund. For example, if there are 50 residents still in the village and 10 who left the village within the past 12 months, each resident will receive $1/60^{\text{th}}$ of the surplus MRF funds (although the break-up will not be even, as the 10 who left will have their amount reduced by the proportion of the time they were no longer in the village).

Discussion of Option 1 – distribute evenly between remaining residents

This method of distribution is in keeping with the community-living intent of the Act— that is, once funds go into the MRF they are used for the benefit of the village overall, not for the benefit of individual residents over other residents. It would also be relatively easy to calculate, as each resident would receive an equal amount.

Discussion of Option 2 – distribute between residents from the past 12 months

Arguably, as any resident of the village during the 12 months prior to closure would have contributed to the annual MRF budget, all such residents would be entitled to a share of the MRF balance, regardless of whether they are still at the village at the actual time of closure.

However in ordinary circumstances, a resident who leaves the village is not entitled to any refund on monies paid during their occupancy. For example, if such a resident contributed through the MRF to maintain the village bus, and after they leave the village the operator decides to purchase a new bus instead, the contribution merely forms part of the MRF surplus and is not refunded to the resident. Similarly, other residents who contributed and remain in the village also do not receive a refund.

Further, this option may be difficult to calculate, as the amount received by past residents would need to recognise they did not contribute a full year of payments into the MRF, and former residents who have left the village may be difficult to locate.

1. How do you consider the surplus maintenance reserve funds should be dealt with?

Issue 3.2 - Dealing with the general services charges

The issue is: who should receive the balance of surplus general services charges?

- Option 1: The residents should receive the balance of general services charges because they paid the charges.

- Option 2: The operator should receive the balance of general services charges because the operator may have ongoing running costs to cover even after the village ceases operating, such as administrative costs incurred in the closure, employee costs, and any long-term equipment rental obligations.
- Option 3: The residents and operator should share the balance of general services charges

Discussion of Option 1 – residents to receive the balance

As the residents paid the general services charges, it may be equitable to return any surplus to the residents.

Discussion of Option 2 – operator to retain the balance

Since general services charges are intended to cover ongoing day-to-day running costs of the village, it is not anticipated a substantial balance of such funds would remain when the village was closed.

Further, the actual costs of closing the village, including legal fees and administrative expenses could be viewed as ‘village business’ for which it is appropriate to use general services charges to fund.

Conversely, in the circumstance where the operator has made the decision to seek closure of the village it may be considered the expenses indicated above which could be incurred in ceasing the business, such as closure costs, staffing costs and ongoing equipment rental payments, are not expenses in running the retirement village as a going concern. Consequently, residents who have to vacate should not be held responsible for such costs.

Discussion of Option 3 – residents and operator to share the balance

It is not expected a substantial balance would remain, and this could fairly be directed at meeting some of the operator’s business costs incurred in effecting the actual village closure. Again, the effort in separately distributing the small amount of such funds may not be warranted, particularly under this option where that amount is even less for having to be shared with the operator.

1. How do you consider the surplus general services charges should be dealt with?
2. If the surplus is to be shared between residents and the scheme operator, on what basis, and how should this be calculated?

Issue 3.3 - Whether general services charges should continue to be payable

The issue is: should a resident be liable to continue paying general services charges for the remainder of the winding-down period if the resident moves out of the accommodation unit during the winding-down period?

- Option 1: The resident should continue paying general services charges because there is no incoming resident to take over the charges, so the original intention of the legislation is still applicable.
- Option 2: Although some running costs of the village may continue up until the village is finally closed, the major component of general services charges, being the resident’s maintenance reserve fund contribution, will not be necessary during the winding-down period, and therefore the operator could be made to bear any running/maintenance costs following vacation by the residents.

Discussion of Option 1 – resident to continue paying general services charges

In ordinary circumstances, a resident who leaves the village will still be responsible, at least for some period, for paying the general services charges over their unit until the right to reside in the unit is resold or until the expiry of 9 months since the unit was vacated. However, village closure means the right to reside will never be sold after the resident vacates, so it seems equitable that an exception to this general rule apply in this instance.

Discussion of Option 2 – operator to pay general services charges

Where the village is facing closure, the right to reside in a unit will not be re-sold, and there will also be a much-reduced need overall for the same amount of general services charges revenue. In fairness to the resident, their obligation to continue paying general services charges should cease once they leave the village – and if, as discussed above (under issue 3.2), the operator retains any balance of the general services charges, this should assist in covering the charges-share for those vacated residents.

1. If a village is closing, should a vacated resident continue to pay general services charges (as they would under the present legislation)?
2. What other method would present a solution to the charging of general services charges where a village will cease to operate?
3. If residents continue to reside in a village which is in the process of winding down, should their general services charges be reduced if facilities in the village are also being wound down?

Issue 3.4 – Reinstatement costs

The issue is: should a resident be required to pay any reinstatement costs following termination and vacation of their unit?

- Option 1: The public information document and residence contract should provide for what happens if the village is being wound down or ceases to operate.
- Option 2: The Act should provide that a resident cannot be required to pay any reinstatement costs in the event the village is being wound down or has ceased to operate.

Discussion of Option 1 – public information document and residence contract to provide for this circumstance

If a village is winding down and this is why residents are required to vacate their units, there will not be any requirement to reinstate the units to a marketable condition as there would be if the village was continuing to operate as a registered retirement village scheme. This may provide residents having to leave the village considerable savings compared with leaving the retirement village for any other reason. If the scheme operator intends to sell the units on the open market as normal residential housing, or use them for some other purpose but not as a registered retirement village scheme, should the vacating residents be required to reinstate their units in this case? Would such a requirement present a loophole whereby scheme operators could utilise the housing for another purpose for a short period of time in order to require the units to be reinstated, and then sell the units and take all the capital appreciation such reinstatement might deliver? As there are some types of right to reside interests where the scheme operator may be required to pay all the reinstatement costs, this would not be beneficial to scheme operators in every circumstance. It may be considered important that this information be provided in both the public information document and the residence contract for consideration by prospective residents.

Discussion of Option 2 – the Act should not permit reinstatement costs to be payable under this circumstance

It may be considered fair that where residents are required to move and sell their right to reside in their retirement village unit simply because the scheme operator intends to cease operating as a registered retirement village scheme, then they should be released from any requirement to pay some or all of the reinstatement costs, depending on their interest in the unit.

1. Should the public information document and the residence contract indicate the requirements around paying reinstatement costs specifically in the circumstances where the village for which those documents have been prepared were to close?
2. If a village is closing, what conditions should apply to paying reinstatement costs, as originally required under a residence contract?

Issue 3.5 – Valuation of the right to reside in a retirement village unit

The issue is: how should the valuation of a resident's unit be calculated when a retirement village is being wound down or ceasing to operate?

- Option 1: The unit should be valued in the condition it is in at the time the resident has had their agreement terminated and vacated the unit.
- Option 2: The unit should be valued as though a normal reinstatement has been undertaken.

Discussion of Option 1 – unit valued in its current condition

If a village is winding down there will most likely not have been any reinstatement work done to the units as there would have had to have been if the village was continuing to operate as a registered retirement village scheme. As residents with interests and contracts requiring payment of all or some of the reinstatement costs will save this cost, it may be considered fair that the valuation of the sale price of the right to reside in the unit be considered on the unit in its current condition.

Discussion of Option 2 – unit valued as if it had been reinstated

It may be considered fair that where residents are required to move and sell their right to reside in their retirement village unit simply because the scheme operator intends to cease operating as a registered retirement village scheme, then they should receive a valuation of the sale price of the right to reside in their unit as if reinstatement work had been performed.

1. What considerations should be applied to valuing a unit in a village that is winding down?
2. How should a unit be valued when a village is to close?

Issue 3.6 – Timing of payment of exit entitlement

The issue is: when should exit entitlements be paid to residents who have vacated their units?

- Option 1: The Act should stipulate a set time by which the exit entitlement must be paid.
- Option 2: The Act does not need revising and already legislates adequately for this.

Discussion of Option 1 – the Act should establish a time by which the exit entitlement should be paid

Under the Act, section 63(1) requires the exit entitlement to be paid on or before the sooner of the day it must be paid in accordance with the residence contract, or 14 days after the settlement day.

‘Settlement day’ is defined in section 63(4) as meaning the day on which the sale of the right to reside, to a new resident or the scheme operator, is settled. In the case of a resident having to vacate their retirement village unit because the village is closing down, in order for the resident to purchase an alternative residence, it would be preferable for the resident to have the exit fee payable as soon as possible to minimise the need for, or the term of, any bridging finance. One option might be to place a limitation on the time period for settlement, e.g. settlement must be effected within 30 days of a sale contract being signed by both parties. Section 63(2) of the Act already makes it permissible for the operator to pay the exit entitlement before the settlement day but after termination.

Also, ‘settlement day’ is defined as the day of the sale of the right to reside. If the village is winding down, there may be no sale of a right to reside. This definition may need to be revised so that sales due to villages winding down have a different definition provided for ‘settlement day’.

Discussion of Option 2 – The Act is adequate already

As discussed in the previous option, the Act requires the exit entitlement to be paid on or before the sooner of the day it must be paid in accordance with the residence contract, or 14 days after the settlement day.

1. Do you consider section 63 of the Act adequate for when a village closes?
2. Should a limitation be placed on the settlement period allowable for sales due to village closure?

Issue 3.7 – Compensation for residents

The issue is: should operators pay compensation to residents affected by village closure?

- Option 1: The Act should require operators to pay compensation to affected residents to ensure residents are no worse off should their village close.
- Option 2: The Act should not require operators to pay compensation to residents.

Discussion of Option 1 – the Act should require operators to ensure residents are no worse off should their village close

At present, village operators are only required to pay the resident their standard exit entitlement, and the law does not require the operator to pay compensation to the resident or provide any other sort of assistance (monetary or otherwise), despite the resident having to leave their home involuntarily. The calculation method for the exit entitlement is prescribed in the resident’s contract, and there is no requirement for this amount to be adjusted in circumstances where the exit entitlement falls because the village is closing.

When moving into a village, residents have an expectation they will be able to remain there until they elect to move or their personal circumstances necessitate leaving. Compensation would assist residents in covering the additional costs in moving, and would also reduce the stress caused by having to meet such costs themselves, particularly if they are on a limited or fixed income. The amount of compensation should ensure residents are no worse off financially – for example, ensuring the resident can move into a village in their local area, or ensuring the resident can move into a village with comparable amenities to their existing village.

Any such compensation would be in addition to the exit entitlement residents ordinarily receive upon leaving the village.

When a resident leaves a village through their choice, or because of their circumstances, an exit fee is payable which represents the profit the retirement village scheme operator makes on the

residence contract. This is based on the length of their residence. If the unit is sold and a capital gain is made, quite often the residence contract provides that the resident and the scheme operator share the gain. Equally common is for the residence contract to provide that any capital loss is borne solely by the resident. Because of the exit fee and loss of part or all of the capital gain or wearing of the capital loss, at the time a resident vacates their accommodation unit they can be in a position where their capital has been significantly reduced to the point where they are unable to afford comparable accommodation, along with the added expense of moving costs. If residents are placed in this position because of a decision by a scheme operator to cease operating as a retirement village, or the scheme operator has ceased to trade for financial reasons, such as bankruptcy, then there is a case to be argued that residents should be compensated to a point where they suffer no financial detriment.

Discussion of Option 2 – The Act should not require operators to pay compensation to residents

A retirement village may cease to be the most profitable use of the buildings and land on which the village is sited or become financially unviable for an operator. However, the capacity to change the way a village is operated without significant consideration of the impact on the residents is contrary to the benefits of retirement village accommodation promoted by operators. Such a view is reflected in the 99-year leases common at leasehold villages. In essence, if operators enter the industry which caters to older persons and markets itself on offering secure and long tenure, operators need to accept a level of responsibility for the impact on residents should the operator decide, or need, to close the village.

1. Do you consider a retirement village resident should be entitled to receive compensation (in addition to their exit entitlement) when the retirement village closes?
2. If 'yes' to question 1, do you consider compensation should be payable regardless of the reason why the village is closing (e.g. the village may be closing because the operator wants to redevelop the land, or because the operator is losing too much money running the village)?
3. If 'yes' to question 1, do you consider the compensation should be paid by the retirement village operator?
4. Is there another way to ensure residents affected by closure are no worse off should their village close?
5. How would you propose the compensation be calculated that is equitable for both the resident and the scheme operator?

Issue 3.8 – Exit fees

The issue is: should residents be required to pay their contracted exit fee if their village closes?

- Option 1: The Act should not require residents to pay their contracted exit fees if their village closes.
- Option 2: The Act should require residents to pay their contracted exit fees if their village closes.

Discussion of Option 1 – the Act should not require residents to pay their contracted exit fees if their village closes

Due to the exit fee payable when residents leave a village, affected residents may find themselves with insufficient funds to buy into a retirement village which is of the same standard as their existing village, or may need to move away from family and friends in order to find new accommodation. These factors would undoubtedly adversely impact on a resident's quality of life and (in the case of village closure) are being imposed upon the resident through no fault or choice of their own.

Discussion of Option 2 – The Act should require residents to pay their contracted exit fees if their village closes

Residents should be aware that the majority of retirement villages are run as a commercial enterprise which may fail or the owner may choose to use the land for other purposes, just like any other business; they may be required to leave the village earlier than they planned. The exit fee represents the profit the operator makes from running the village. Should no exit fee be payable, the operator would make no profit from those residents residing in the village at the time it closes despite having operated the village for all the time the residents had lived there. This would result in the scheme operator incurring significant financial losses, or in the case of a bankruptcy or insolvency proceeding, mean less residual funds available for distribution to creditors, giving some preference to residents.

The exit fee is a means of allowing a resident to buy a standard of accommodation that they may not be able to afford outright. The ingoing cost may be lower as the profit component of the ingoing price is “deferred” to be paid as an exit fee. This is paid out of the capital proceeds when a resident vacates the accommodation unit and the right to reside in the unit is sold. It may be that if a scheme operator faces the risk of not being able to charge an exit fee if they cease to operate, the original ingoing price may be higher. Residents may then no longer be able to afford to buy an acceptable standard of unit. Also, with such risks, potential scheme operators and developers of retirement villages may not be able to obtain the finance to invest in a retirement village. This could also result in supply not being able to meet demand and make it harder for prospective residents to find an available unit in a retirement village. In turn, this would also drive up prices.

1. Do you consider a retirement village resident should be required to pay an exit fee if the village closes?
2. If no exit fees were payable, how else could the detriment to the operator be minimised?
3. Would your answers to Questions 1 and 2 differ if the village closed because it was no longer financially viable for the operator, compared to the scenario where the operator wants to redevelop the land for another purpose?
4. Should the scheme operator receive the exit fee regardless of their reason for closing the village?

Issue 4: Entering a village and closure – implications for residents

This paper has focused on a range of immediate and tangible issues surrounding the closure of a retirement village. In considering these issues, it also becomes apparent that there are broader implications for residents that extend beyond the closure of the village and, arguably, go back to the point at which they decided to enter the village.

The Act prescribes for disclosure of particular pieces of information prior to a person entering a residence contract, and this approach is consistent with other fair trading legislation in which disclosure is used as a tool to inform a consumer about their rights, responsibilities and obligations. In doing so, it is assumed that disclosure will enable the consumer to make an informed choice based upon a sure knowledge of all the implications. There may be an argument to suggest that the way in which prospective residents are provided with disclosure information about their rights, responsibilities and obligations could change and be enhanced so that uncertainty about issues such as village closure could have a better shared understanding.

Varying levels of government in different pieces of legislation take different approaches to disclosure. In some cases, a prescriptive approach is taken, in which all desired parts of disclosure are spelt out in detail in legislation or through a regulation. In other cases, government tends to provide a guideline as to what should be disclosed and how, then provides for flexibility in the delivery of this to suit the circumstances.

The natural disasters which befell Queensland in early 2011 have highlighted the disclosure issue and how simply requiring *more* disclosure is not necessarily the best option in informing about rights, responsibilities and obligations. A number of media reports highlighted apparent situations in which holders of insurance policies understood they were covered in particular situations only to discover their claim may not be covered after all. It was further noted that although a reference to level of cover may have been made in the policy, the amount and detail of disclosure was extensive and detailed to such an extent that realising it or understanding it was impractical.

Attention has turned instead as to how to best refine and consolidate existing disclosure requirements so that they are clear, concise and most importantly, stand the best chance of being understood by the most number of effected parties.

1. How useful is the present legislation for retirement villages in assisting prospective residents to be informed of their rights, responsibilities and obligations on issues including village closure?
2. What changes or enhancements could be made to the disclosure requirements?
3. What particular items do you consider should be particularly addressed as part of disclosure requirements for prospective retirement village residents?
4. Are the financial implications of exiting a retirement village, as detailed in the public information document, adequate?
5. Do you consider that separate financial implications should be detailed in the public information document to explain what happens should the village close?

Other considerations?

1. Are there any other issues which you think are pertinent to this discussion of closure of retirement villages which you would like to raise?
2. Are there non-legislative things which could be done to ensure residents are protected if a village closes?