



23 May 2024

Department of Energy, Mines, Industry, Regulation and Safety
Consumer Protection Division,
Locked Bag 100, East Perth, WA, 6892.
(Attention - Penny Griffiths - Consumer Protection)

Via email: consultations@dmirs.wa.gov.au

Joint industry submission – Retirement Villages Amendment Bill 2024

To Whom It May Concern,

The Property Council together with the Retirement Living Council appreciates the opportunity to put forward an industry submission on the *Retirement Villages Amendment Bill 2024* ("draft Bill").

By way of background, the **Property Council** is the voice of Australia's property industry, championing a strong, thriving sector that leaves a positive legacy for all Australians.

Our 2,300 member companies are the nation's major investors, owners, managers and creators of properties and places that matter: homes, retirement communities, shopping centres, offices, industrial areas, education, research and health precincts, tourism and hospitality venues, and more.

Similarly, the **Retirement Living Council** ("RLC") is Australia's national leadership group representing the retirement living sector, championing policies that support more investment in age-friendly communities.

As Australia's pre-eminent industry voice, the RLC champions the growth and sustainability of retirement living, affordable housing options for senior Australians, advocating for fair and balanced regulation, ensuring best practices, providing strong industry leadership, and showcasing excellence.

Given the state government's legislative review, it is important to acknowledge the nation's retirement industry provides a user-pays (rather than taxpayer funded) purpose-built solution to two complex challenges facing Governments around Australia - namely housing affordability and supply, and an ageing population. The latter is becoming more pronounced as the number of people in WA aged over 75 is due to grow by over 150,000 by 2040, the biggest percentage growth of any state in the country.

In responding to the draft Bill, the Property Council and Retirement Living Council ("PCRLC") and its collective industry membership is motivated by a desire to increase consumer and investor confidence, raise industry standards, and pursue better regulation.

Legislation that balances consideration of both residents and operators alike is key to driving investor confidence and meaningful housing solutions for West Australians.

We ask particularly that attention be given to our commentary around mandatory capital maintenance funds and exit entitlement frameworks.

A viable retirement living industry in WA advances the state government's capacity to pursue an ambitious ageing, health and wellbeing agenda by improving wellness outcomes for seniors and providing efficiencies that can be reinvested in services and infrastructure.

With this in mind, we would also highlight recent relevant research that underpins the important housing and health benefits of retirement villages. Like government, industry is guided by research, evidence and data because we know it helps to deliver better outcomes.

Better housing for better health, report (2023)

Retirement communities allow older Australians an opportunity to maintain their independent lifestyle as they age, while still ensuring they have ready access to support, care and community. These communities feature tailored amenities that are designed to maintain a holistic scope of wellbeing for residents by considering both their physical and emotional health.

By reducing barriers to physical activity and providing access to fitness and recreational facilities, research shows that retirement communities help residents remain healthier and happier for longer, leading to 14,000 avoided annual hospitalisations across the country.

This means retirement villages – whose units are on average 46 per cent lower than median house prices in similar areas across metropolitan Perth – deliver societal, economic, and environmental benefits including reducing pressure on housing markets, hospitals and aged care facilities.

There is also an important role older Australians can play within housing markets when they consider 'rightsizing' into homes better designed and suited to their ageing needs.

Across WA, there are approximately 148,000 people over 75 living in dwellings that are oversized for their needs, which makes rightsizing an important piece of the housing puzzle. Larger homes can also increase health risks as people age, with most cases of falls in older people occurring at home.

This is an important transition because when an older person sells the family home and moves into a house that is more suitable for their ageing needs – in a retirement community, for example – it frees up housing stock for young people, couples and growing families.

With an ageing population and housing crisis, it has never been more critical to develop age-appropriate and age-friendly housing that can address these issues in meaningful ways.

Research also shows that compared to older Australians not living in a retirement community, residents are 15 per cent more physically active, 41 per cent happier, five times more socially active, twice as likely to catch up with family or friends and have reduced levels of depression and loneliness.

Residents are also 20 per cent less likely to require hospitalisation after only nine months living in a retirement community.

All of this reduced interaction with doctors and hospitals releases capacity back into health systems, while delaying entry into aged care facilities leads to \$945 million in annual financial efficiencies for the Australian Government.

Consultation

It should also be conveyed that this submission and the recommendations contained herein carry the support of both the Property Council and Retirement Living Council, its combined memberships and both associated Boards ("Division Councils").

This collective membership base includes private operators – big and small – as well as church and charity operators right across Western Australia.

Despite supporting the intent of this draft Bill, there are several considerations that should be acknowledged and rectified to ensure that industry and residents will not be adversely impacted by the amendments. Recommended changes to the amendments have been listed below.

It is also noteworthy that the timeframe within which to respond to the consultation has been highly challenging. This has led to shorter consultation with operator members, which is problematic given these reforms have a significant impact on an operator's ability to operate sustainably.

On behalf of the PCRLC and our collective retirement living operator membership, we extend our thanks and appreciation to you, your department and staff and submit this report for consideration.

Yours sincerely



Emily Young
Interim Executive Director, Property Council
WA



Daniel Gannon
Executive Director, Retirement Living Council

Definition of permanently vacated

The PCRLC notes that the definition of “permanently vacated” has been set out on page 5 of the draft Bill. The definition differs from the one set out in the *Retirement Villages Act 1992* by the removal of the following clause:

“...if required by the residence contract – the administering body has been given notice of the former *Retirement Villages Act 1992* Rights and obligations of residents, owners and administering bodies resident’s intention to vacate the residential premises.”

The PCRLC recommends that the definition of “permanently vacated” retains this clause, noting that residents should be required to give appropriate notice to their respective administering body of their intention to vacate a premise.

Furthermore, noting that the draft Bill contains the obligation to contribute to the aged care payments for outgoing residents, it is recommended that the definition of ‘permanently vacated’ should include the circumstances where a resident enters permanent residential care. There have been instances where residents move to residential care but maintain their village premises on the assumption they may return. This places operators in a difficult position of requiring residents or families to remove all belongings.

Definition of “facilities”

The PCRLC notes that inclusion of the word “facilities” alongside “amenities” and “services” throughout the draft Bill has the potential to cause confusion in its interpretation.

Given the term “facilities” has not previously existed in the legislation, the inclusion now risks uncertainty in existing contracts. The PCRLC requests that a definition of “facilities” be removed to ensure consistency. Industry recommends that the existing definitions of communal amenities be preserved to reduce confusion through the adoption of new legislation.

Prospective costs document

Prospective costs documents set out the requirements for administering bodies to provide a prospective cost document to incoming residents.

Section 14C(2)(a) states that the document must be in the “approved form”. The PCRLC requests an opportunity to review the draft proposed prospective costs document before it becomes a requirement.

Public online database of retirement villages

Sections 78 requires administering bodies to provide the Commissioner with information for the register of retirement villages and *Section 78A*, which requires the Commissioner to keep and publish register of retirement villages, sets out the requirement for administering bodies to provide the Commissioner with information for register of retirement villages within 14 days of establishment of village or any change to the information.

The PCRLC requests that industry be provided an opportunity to review any additional requirements that may need to be provided to the Commissioner.

Modifications of retirement villages

Under *Section 21A: Modifications of retirement villages*, clause (4) states that the modification plan must be approved by:

- A special resolution passed at a residents' meeting; or
- An order under *Section 21B: State Administrative Tribunal* orders relating to modifications, clause (1)

The PCRLC believes that consideration needs to be given to how this requirement to consult would impact multi-stage developments, especially in circumstances where the development approval (DA) for the build has lapsed.

If a development that is being built in multiple stages has already been approved by a special resolution passed at a residents' meeting or is disclosed to all prospective residents as part of the master plan, each stage of the development should not be required to be repeatedly approved by residents before commencement. This requirement would add unnecessary time burdens to village operators, delaying project completion time, and impacting a project's financial feasibility.

Furthermore, the provisions currently refer to "any change to the services and amenities" as well as provision of "new services". There should be exceptions for any upgrade of existing services where the fundamental nature of the service does not change. Additionally, it is recommended that the language of "any other change" is amended to make it more prescriptive.

Liability for recurrent charges

Under *Section 28: Liability for recurrent charges*, clause (1) states that the liability of a resident to pay recurrent charges arising after the resident has permanently vacated residential premises in a retirement village ends on the earliest of five provisions. The second of these provisions is defined as "the prescribed date" (b).

Currently under *Section 23(1) Retirement Villages Act 1992* the caps in regulation 9 (three months / six months) do not apply to strata and purple title.

The PCRLC seeks clarification whether this is the same as is currently prescribed under the existing legislation.

Reinstatement of units

The PCRLC notes and welcomes the definition of “reinstatement” as set out within the draft Bill.

We seek clarity on the term “fixed amount” as set out in *Section 27: Reinstatement and renovation of residential premises*, clause (4)(b)(ii), relating to the amount payable for the reinstatement of the residential premises. The PCRLC questions whether this “fixed amount” refers to a fixed lump sum, a percentage, or will be otherwise defined in the regulations.

Exit entitlements

In the recently released South Australian Retirement Villages Act Amendment Bill 2024, a statutory buyback period of 12 months plus a 30-business day prescribed period has been introduced to allow for the commencement of reinstatements and/or renovation when a resident vacates a residence.

These conditions, while shorter than industry’s proposal, have been supported in South Australia. The PCRLC recommends that consideration be given to implementing a similar prescribed period within the draft Bill to ensure that operators have sufficient time to reinstate or renovate their units before sale.

Additionally, the PCRLC strongly believe that the following conditions regarding exit entitlements need to be addressed within the draft Bill:

- Exit entitlement requirements should not apply retrospectively to any residence contract in force prior to the commencement of mandatory exit entitlement requirements.
- Exit entitlements should not apply to strata or purple title retirement villages where the departing resident owns the unit and therefore receives payment from an incoming resident upon sale of the unit and not the operator.
- Exit entitlements should not apply to the estates of former residents, as beneficiaries of the estate are not consumers for the purposes of this policy because they are not parties to the residence contract.
- Exit entitlements should not apply when the operator does not have control over the sale of the premises, i.e., when the resident markets the property themselves.

Aged Care Rule

The PCRLC notes the inclusion of *Section 31* relating to payment of daily accommodation payments (DAPs) from exit entitlements, also known as the Aged Care Rule.

The PCRLC firmly believes that payment of DAPs should only occur when all residents of an independent living unit (ILU) have vacated the property. In the situation where a couple are occupying a property in a retirement village, but one is required to move into an aged care facility, operators should not be required to pay DAPs until the second resident also vacates the unit. This is consistent with the general principle of village contracts that no refund of a premium is payable until all residents under the village contract have departed.

Mandatory capital maintenance funds

The PCRLC acknowledges the inclusion of *Section 41C: Capital Maintenance*, that stipulates that the administering body for a retirement village must maintain a fund for capital maintenance (mandatory reserve fund).

The PCRLC emphasises that industry is not opposed to the introduction of a mandatory reserve fund, noting that approximately 90 per cent of operators already have reserve funds in place. However, industry believes the Department of Energy, Mines, Industry Regulation and Safety (DEMIRS) needs to provide greater explanation of how the transitional arrangements will impact this existing cohort, especially when the mandate to have a reserve fund is designed to target those operators who do not currently have one.

However, no consideration has been made for information provided during the consultation period regarding the impact new requirements will have on existing reserve funds that have been established in accordance with the law as it exists.

The current Act and regulations do not have a definition of “reserve fund”, although the definition of “reserve fund” is found in *Section 14* of the *Fair Trading (Retirement Villages Code) Regulations 2022*. The current definition refers to amounts out of a reserve fund being used for repairs, maintenance, replacement and renovation. Current regulation 7F, item 5 refers to amounts into a reserve fund from recurrent charges or an exit fee after a resident permanently vacates.

The draft Bill has not contemplated how amounts are paid into the capital maintenance fund and only contemplates amounts paid out of capital maintenance fund, which are limited only to capital maintenance.

The PCRLC believes that the requirements for a capital maintenance fund should only be applied to a new village or an existing village without any reserve fund.

Many existing reserve funds collect amounts for a purpose as specified in the contracts and are consistent with the current law. The proposed new law will imply the amounts cannot be used for the purpose collected (e.g. cannot be used for repairs, replacement or renovation). As such, it is completely unworkable for the sector that the capital maintenance fund can only be used for capital maintenance (i.e., cannot be used for capital repair or capital replacement).

This amendment must be urgently revisited because there appears to be unintended consequences where the significant amounts collected from residents and held for a purpose now cannot be used for that purpose and as a result much needed replacement of capital items may not be done because of concern with breaching the law.

The new provisions about a capital maintenance fund, *Section 41C: Capital maintenance* and *Section 41D: Capital replacement*, should only apply to villages that have no reserve fund (which was the purpose of the recommendation) and to villages that begin operations after the commencement of the Amendment Bill. The new provisions should not apply retrospectively to the existing villages with reserve funds in place.

Rules of conduct for administering bodies and residents

The PCRLC notes *Section 21C: Rules of conduct for administering bodies and residents*, clause (2) (a), which states that the regulations may prescribe rules of conduct for administering bodies and residents of retirement villages. The PCRLC awaits the opportunity to review the regulations to fully understand the full extent of these conduct obligations.

The PCRLC recommends that, as set out in recommendation 13.1 of the Decision Regulatory Impact Statement (DRIS), the draft Bill should be amended to include “the resident must:

- a) respect the peace, comfort and privacy of other residents and persons in the retirement village
- b) not harass or intimidate other residents and persons in the retirement village (including the operator and any person employed in the retirement village)
- c) not act in a manner that may place the safety of other residents and persons in the retirement village at risk of harm, and
- d) comply with the residence rules.”

The PCRLC notes that it is unreasonable that recommendations for operators’ conduct were included in the draft Bill but conduct guiding residents’ behaviour were not.

The independent, industry-led Retirement Living Code of Conduct (the Code) was introduced in 2020 to help operators provide a trustworthy and high-quality service for those living in, and considering moving to, a retirement community. There are 99 retirement villages, representing 12,494 retirement units in Western Australia that are signatories to the Code. Since its inception, there has only been one complaint lodged through the Code framework which was received in October 2022 and resolved in January 2023.

Furthermore, it is important to recognise that the bulk of abusive behaviour occurring in retirement villages is committed by residents, with the 2023 *Ageing without Fear Report*, commissioned by the NSW Retirement Village Residents Association in collaboration with the NSW Department of Fair Trading finding that over 70 per cent of reported abuse was resident-on-resident.

The PCRLC requests further clarity on *Section 21C*, clause (2)(b) regarding training requirements for staff members of retirement villages. The PCRLC is concerned that extensive training requirements may prohibit the number of staff that administering bodies are able to hire given that costs that may arise as a result.

Advertising and marketing

The PCRLC notes that *Section 82* has been amended to provide a power for regulations to be made with respect to advertising or marketing of retirement villages.

We require an opportunity to review the draft regulations that set out the advertising requirements to ensure they do not negatively impact the sector and an operator’s ability to operate.

Review of regulations

The PCRLC notes that regulations that will enforce the draft Bill are referenced frequently throughout the documentation.

Given the impact that these regulations will have on an operator's ability to operate, the PCRLC seeks confirmation that ongoing consultation will occur during the final drafting process to ensure that amendments do not create unintended consequences that arise during implementation.

Next Steps

If you require further information or clarification on anything contained within this document, please contact Andrew Thomson, WA Policy and Research Officer, at athomson@propertycouncil.com.au or on 0409 470 336.

Similarly, RLC National Policy Manager Oliver Luckhurst-Smith is contactable at oluckhurstsmith@propertycouncil.com.au or on 0422 506 261.