



THE LAW SOCIETY
OF NEW SOUTH WALES

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16 August 2019

Retirement Village Exit Entitlements Discussion Paper
Regulatory Policy, Better Regulation Division
Department of Customer Service
2-24 Rawson Place
HAYMARKET NSW 2000

By email: rvdiscussionpaper@finance.nsw.gov.au

Dear Sir or Madam,

Retirement Village Exit Entitlements Discussion Paper

Thank you for the opportunity to comment on this Discussion Paper. The Law Society's Elder Law, Capacity & Succession Committee and Property Law Committee contributed to this submission.

The Law Society supports a policy position that strengthens the ability of retirement village residents to transition to more appropriate living arrangements as required and helps to address the risk of elder abuse. We acknowledge that serving the needs and interests of older people in NSW includes continuing to provide a regulatory environment that supports a sustainable retirement village industry across the State, particularly in areas with a growing older population. As noted in the Report on the Inquiry into the NSW Retirement Village Sector (the 'Greiner Report'),¹ transparency, fairness and timeliness are key to achieving both of these aims.

1. Detailed supporting data

Noting that the Discussion Paper is intended to prompt discussion rather than put forward a detailed framework, an overarching concern is the need for more detailed data to support an assessment of the proposed model. For example:

- The criteria for determining whether 6 or 12 months applies to the payment of exit entitlements ('payment period') is whether the village is located in the Sydney Metropolitan Area – itself a conglomeration of local government areas. However no data is provided on relevant factors such as population density, age, demographics, property values, or the sizes and types of retirement villages operated in comparable areas. This information would help to inform whether the local government areas are an appropriate determinant of the applicable payment period.
- There is little data provided on the mechanisms by which properties are transferred and exit entitlement funds obtained: for example, the proportion of properties that are bought back by operators prior to or shortly after vacation versus those sold on the market by residents prior to vacation; and the

¹ NSW Government, *Inquiry into the NSW Retirement Village Sector, Report* (2017), 7.

proportion of exit entitlements paid from the proceeds of sale versus from other funding sources. This type of data would provide a better understanding of the financial landscape and the experience of both residents and operators.

- Concern is raised in the Discussion Paper about the risk of operators facing liquidity problems if their obligations regarding exit entitlements and recurring charges are too onerous. However little data is provided to support an assessment of this risk. The industry includes operators of various sizes, with various business structures and factors affecting profitability. A more detailed understanding of these dynamics across the industry is needed to inform an appropriate balance between the interests of residents and operators.

Our responses are based on the data provided in the Discussion Paper and the professional experience of our members.

2. Structured process for paying exit entitlements

We recommend prescribing a structured process for the payment of exit entitlements with clear forms of notice and defined maximum periods for each stage. In our view the process should include the following requirements:

- The payment period should be triggered by a notice served by the resident on the operator, which also gives notice of a vacation date within the payment period.
- The parties should have a prescribed period in which to agree on a value.
- If the parties fail to agree on the value within that period:
 - the resident should have a right to “opt out” and go to market, exercisable within a prescribed period by way of a notice served on the operator;
 - otherwise the valuation process must be commenced.
- The valuation must be completed within a further prescribed period.
- On receiving the valuation, the resident should once again have a right to “opt out”, pay the full valuation costs and go to market, exercisable within a prescribed period by way of a notice served on the operator.
- Otherwise, at that point:
 - the exit entitlement should be payable on the expiry of the payment period, based on the valuation, and subject to the resident providing vacant possession; and
 - the operator should have the right to list the property for sale (any actual sale price being irrelevant to the exit entitlement calculation).

Our responses to the questions set out in the Discussion Paper are provided in the attached table.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President

Encl.

Discussion Paper – Retirement villages – exit entitlements and recurrent charges cap – July 2019

Submission by the Law Society of NSW – August 2019

NO.	QUESTIONS	COMMENTS
Q.1.	Is the description of the 'Sydney Metropolitan Area' appropriate? If not, why not, and what areas should be included or excluded?	If the payment period is to be determined by differentiating metropolitan areas from non-metropolitan areas, then the description is appropriate, taking into account a general growing population of older people in rural areas. Alternative approaches could be considered, for example differentiating areas according to the prevalence of older people in the area, property values or the size and nature of operators in the area.
Q.2.	Are the proposals for appointing a valuer, to determine the value of the property, necessary and appropriate?	<p>Yes, subject to comments in our covering letter, we support the appointment of a valuer as a key part of the proposed process.</p> <p>The cost of the valuation may be a deterrent to some residents and operators. Clarity should be provided in relation to who bears the cost of the valuation, for example whether it is shared equally between the resident and the operator, or otherwise.</p> <p>We support provisions to address the situation where a valuer cannot be agreed upon being modelled on similar provisions in the <i>Retail Leases Act 1994</i>.</p> <p>Consideration should be given to providing an express timeframe for the operator and resident to first try to reach an agreement on the value of the property. In the absence of agreement, the process should default to valuation, unless the resident opts out of the process.</p>
Q.3.	Should the valuation be done by someone independent of both parties?	In our view the valuer should be independent of both parties. This is a necessary requirement for the integrity of the proposed process. It is also important that the valuer have appropriate knowledge of the local market. We note these requirements may pose challenges in regional areas where there are fewer valuers with local knowledge.

NO.	QUESTIONS	COMMENTS
Q.4.	Do the provisions, above, adequately manage any potential or actual conflicts of interest? If not, why? How could conflicts of interest be better addressed?	The ability to have an independent valuer appointed sufficiently deals with risks of conflict of interest. We support strengthening the requirement that the valuer be independent by legislative provisions. We acknowledge, however, that in regional areas the need for independence may challenge the ability to appoint a local valuer.
Q.5.	What information should the operator be required to provide to the resident when the exit entitlement has been determined?	<p>The operator should be required to provide the resident with all the information required by the valuer in making the valuation. This will make the process transparent and will also assist the resident in considering whether to accept the valuation.</p> <p>Both the operator and the resident should also be obliged to supply the valuer promptly with all information requested for the purpose of the valuation.</p> <p>At the commencement of the valuation process, the valuer should inform the operator and resident what information they require to make the valuation. We expect this would include copies of recent sales in the village, copies of the resident's contract, any copies of market analyses held by the operator, copies of building or inspection reports etc that indicate the condition of the property including defects, and basic information about the property such as the year it was built, the builder's details, any private certifier's details etc.</p>
Q.6.	Where residents wish to sell their residence on their own terms, under what circumstances should they be able to opt in or opt out of the exit entitlement provision?	<p>A resident who wishes to leave the village should be able to decide at the outset to sell the property on their own terms. This helps to ensure the resident is not pressured to agree on prejudicial terms.</p> <p>We suggest other key points where the resident could be given the right to opt out are:</p> <ul style="list-style-type: none"> • on failing to agree on a value; and • on receiving a valuation.

NO.	QUESTIONS	COMMENTS
Q.7.	At what point, or time should residents be able to exercise these rights?	<p>We suggest that once the exit entitlement provisions have been triggered, the resident should be able to opt out of the process at two points in time:</p> <ul style="list-style-type: none"> • If the parties fail to agree on a value between themselves, the resident should have the choice to either opt out (and go to market) or proceed to valuation. • Once the valuation has been served on the resident, they should have the choice to either opt out and go to market (and bear the full cost of the valuation) or accept the valuation as the basis of the exit entitlement. <p>Clear timeframes will need to be provided for any such mechanisms.</p>
Q.8.	Should former residents be able to change their mind and opt back into the provisions, after they have notified the operator they are opting out?	<p>In our view, fairness dictates that unless the parties agree otherwise, once the resident has opted out, they should not be able to opt back in again.</p>
Q.9.	What issues should the Tribunal take into account when considering whether or not the operator has done everything in their power to enable the sale of a premises?	<p>In our view, the Tribunal should examine similar factors to those that apply to a mortgagee sale.</p> <p>The Tribunal should examine all the steps taken by the operator in considering whether it genuinely tried to sell the premises. The extent to which the resident and his/her family/representatives were kept informed of the steps being taken during the process is also an important part in reviewing the conduct of the operator.</p> <p>The Tribunal must also look at the steps taken in the context of the particular location of the property and the market conditions at the time.</p>
Q.10.	Are there any additional circumstances the Tribunal should be able to consider when considering a hardship application from an operator?	<p>An important consideration is the liquidity of the operator and its capacity to pay. When assessing this, factors such as the operator's corporate structure (e.g. if the operator is part of a larger corporate group), the financial position of the parent company is also relevant.</p>

NO.	QUESTIONS	COMMENTS
Q.11.	Are there any other factors that could affect the setting of a 'trigger point'?	The "trigger point" should accommodate residents who elect to opt out as well as those who wish to vacate immediately. Other factors which could affect the setting of a 'trigger point' include the death of a resident or the resident needing to move to aged care.
Q.12.	Do you think any of the 'triggers' listed would be suitable to start the 6 and 12 month periods? Can you think of any others?	<p>We suggest that given the variety of situations that can cause a resident to leave a retirement village, the most appropriate trigger is an irrevocable notice in writing from the resident, notifying the operator that they wish to leave the village and indicating the date by which they will vacate the property. The trigger date could be the date of receipt of the notice. Consideration could also be given to providing a short cooling off period during which the resident could withdraw the notice.</p> <p>Issues for consideration include whether there should be a prescribed maximum period between the date of the notice and the vacation date, and whether the resident should be permitted to change the vacation date once notified.</p> <p>In our view, triggers such as when the property is put up for sale are difficult to ascertain and the parties need to know with certainty the timeframes that are applying.</p>
Q.13.	Would any of the current provisions in Victoria and South Australia as set out in Appendix A , be of benefit to NSW residents of retirement villages?	Yes, given many residents move from retirement villages to aged care facilities it is appropriate to consider incorporation of similar provisions. We support the approach taken in the South Australian provisions.
Q.14.	Would it benefit residents if the provisions were to apply to both registered interest holders and non-registered interest holders?	There may be benefit in the provisions applying to both registered interest holders and non-registered interest holders, depending upon the approach adopted. It is important to understand the drivers for entering into a registered or an unregistered arrangement (including market availability) and the consequences on both groups of applying the provisions equally.
Q.15.	Can you think of any other benefits or costs of this reform? What are they?	<p>In our view the Discussion Paper articulates the main benefits and costs.</p> <p>We appreciate the provisions aim to strike a balance in order to support a viable retirement village industry.</p>

NO.	QUESTIONS	COMMENTS
Q.16.	Are the cost and benefits listed above, accurate? If not, please provide information to help work out the true costs and benefits.	We defer to the expertise of other stakeholders.
Q.17.	As with residents with a non-registered interest, should the 'trigger' to commence the 42-day period commence when the resident permanently vacates the premises?	Yes, we see no reason for a different approach to apply.
Q.18.	When is it appropriate to commence the provisions?	As soon as possible, but allowing industry sufficient time to prepare for the changes, including the updating of documentation.
Q.19.	Should one or both of the reforms be 'grandfathered'? If not, please provide your reasons?	Both reforms should be grandfathered. To do otherwise would have a deleterious impact upon the industry, especially given the nature of the contractual arrangements already in place. The Law Society does not generally support retrospectivity.