

# Retirement villages in WA

## Series - Part 2:

### Tenure and memorials

David McMullen presents the second of his three part series on the relevant legal frameworks and issues faced by seniors and their families in this area.  
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#### Tenure

The WA retirement village legislation does not create a discrete form of land tenure. Retirement villages are based on the same forms of land tenure used in other property contexts. The difference is that they are overlaid with the specialised regulatory framework of the retirement village legislation described in Part 1 of this series.

The most common retirement village model in WA appears to be a 'lease for life' or long term lease arrangement. Commonly, units within retirement villages that operate on this model are not individually titled. In other words, they are constructed on a single lot (or limited number of lots).

Developers should note that under the *Planning and Development Act 2005 (WA)*, there are controls on the long term leasing of land where the land is not a discrete lot which must be managed in these types of retirement village developments.

Fees and charges in a typical lease for life retirement village fall into the following 3 categories:

#### 1 On entry - an in-going / entry payment

A usual feature of these upfront payments is that the resident is entitled to be repaid in whole or in part when they depart their unit. The payment in these cases is a 'loan'; and not-for-profits in particular will be concerned with ensuring that these loans are characterised not as a form of income, but as a loan. The distinction is the subject of ATO rulings.

#### 2 On a recurrent basis

Regular charges to cover the operating costs of the village and a reserve fund contribution (unless payable on a deferred basis instead). Note that there are various restrictions on the fees and charges that may be levied, and a prohibition on the indefinite charging of recurrent charges after a resident has permanently vacated premises in a retirement village.

#### 3 On departure

An exit fee (often called a Deferred Management Fee or 'DMF'), refurbishment costs and marketing costs.

It is also possible to have a strata-titled retirement village in which residents either own the freehold in their units or lease them. The interplay between the *Strata Titles Act 1985 (WA)* and the retirement villages legislation can, however, create its own challenges.

## **Memorials on title**

An important legal characteristic of a retirement village is the existence of a memorial on title, under the *Retirement Villages Act 1992* (WA) (**RV Act**).

The RV Act requires the owner of a retirement village to lodge a memorial '*before entering into a contract which creates or gives rise to a right to occupy residential premises in the retirement village*' or even before inviting persons to make applications, offers or proposals to enter into such contracts. Failure to comply can attract a penalty.

The memorial will contain the following information, prescribed by regulation:

- That the land is (or is proposed to be) used for the purpose of a retirement village;
- That the land may be subject to a statutory charge securing repayment of money to village residents; and
- That the provisions of the RV Act pertaining to retirement village rights and obligations apply.

A 'statutory charge' of the kind referred to in these memorials will protect a resident who has paid an ingoing sum by way of a loan to the administering body, which must later be repaid when the resident departs the retirement village (see earlier discussion).

RV Act memorials can create a degree of difficulty for retirement village owners and developers, including the following:

- In the first instance, the RV Act prevents the selling of units until a memorial is lodged;
- Once lodged, a memorial creates considerable difficulty in achieving mixed use developments, or the use of retirement village land for a different purpose if plans change over time; and
- Under the current state of the law, it seems there is no mechanism to sever a portion of land affected by an RV Act memorial, and convert it to a different (non-retirement village) use.

## **How can I find out more?**

At IRDI Legal, our Health & Ageing lawyers can advise you on the various legal issues arising in the retirement village, health aged care industries.

Together with our experienced Property and Commercial teams, we can help you complete a broad range of transactions and resolve the associated legal issues without compromising our friendly, personal service. Please contact David McMullen on (08) 9443 2544 or [david.mcmullen@irdi.com.au](mailto:david.mcmullen@irdi.com.au) to discuss how we can assist.