

Trips and Traps of Aged Residential Housing

By Andrew Roberts

Many local governments own residential housing complexes which are leased to elderly residents at a reduced rent. However, it is all too common for local governments to not be aware of, and fail to apply, the legislative requirements in respect of such housing complexes. This article examines some of the common trips and traps local governments in Western Australia should watch for in respect of aged residential housing.

Wrong Legislation

The first mistake that some local governments make is to assume that the *Residential Tenancies Act 1987* (WA) (**RT Act**) applies when in fact it is the *Retirement Villages Act 1992* (WA) (**RV Act**) or the *Aged Care Act 1997* (Cth) (**AC Act**) that is the relevant Act.

Section 5(3) of the RT Act provides that the RT Act does not apply to nursing homes and premises used to provide residential care to approved care recipients by an approved provider under the AC Act. Section 5(2)(g) of the RT Act and regulation 3 of the *Residential Tenancies Regulations 1989* (WA) (**RT Regulations**) provide that the RT Act does not apply to any residential tenancy agreement in respect of premises in a retirement village. Thus, if the AC Act or RV Act applies to a residential housing complex, the RT Act does not apply and the requirements of the RT Act are irrelevant.

It is generally fairly obvious if the AC Act applies as AC Act complexes provide care to residents in addition to the provision of accommodation. Furthermore, the relevant local government must go through the process of becoming an approved provider under the AC Act to run an aged care complex to which the AC Act applies.

However, it is not always easy to distinguish between a RT Act complex and an RV Act complex. One of the main distinguishing factors between these two types of aged residential housing complexes is the payment of a premium by one or more residents, that is, a payment (including a gift) made to the local government in consideration for, or in contemplation of, admission as a resident of the complex: see the definition of “premium” in section 3 of the RV Act.

If no resident has paid a premium to reside at the complex, then the RV Act will not apply and consequently the RT Act will be the relevant Act: see the definitions of “retirement village” and “retirement village scheme” in section 3 of the RV Act, which exclude any scheme pursuant to which no resident pays a premium for admission as a resident from the operation of the RV Act.

However, if any resident has paid a premium, the RV Act will apply, provided that the other elements of the definition of “retirement village” in section 3 have been met. It is important to note that even if only one resident has paid a premium, the RV Act will apply to the whole complex, not just to the resident who paid the premium.

Wrong Form

The other major mistake sometimes made by local governments is to use the wrong form of written tenancy agreement.

In respect of RT Act complexes, prior to 2011 lessors could use their own form of residential tenancy agreement provided that the agreement complied with the provisions of the RT Act. However, since the introduction of the 2011 amendments to the RT Act, lessors must not enter into a written residential tenancy agreement except in the prescribed form: section 27A of the RT Act. In the case of a residential tenancy agreement that is not a social housing tenancy agreement the prescribed form is Form 1AA, and in the case of a social housing tenancy agreement the prescribed form is Form 1AB: regulation 10AA of the RT Regulations. The lessor may annex additional terms and conditions to the prescribed form provided that those additional terms and conditions are not inconsistent with the RT Act, RT Regulations or the relevant prescribed form. If any additional clauses are inconsistent with the RT Act, RT Regulations or Form 1AA, this constitutes an offence and the lessor will be liable for a penalty of up to \$10,000 (or \$50,000 in the case of a body corporate) for each tenancy agreement: section 82 of the RT Act and section 40 of the *Sentencing Act 1995* (WA).

Many local governments are not aware of the requirement to use the forms prescribed by the RT Act and instead use their own non-compliant residential tenancy agreements. The consequence of a local government failing to use the prescribed forms is that it will be liable for a fine of up to \$25,000 (being five times the penalty that could be imposed on a natural person) in respect of each non-compliant tenancy agreement entered into by the local government: section 27A of the RT Act and section 40 of the *Sentencing Act 1995*.

In respect of RV Act complexes, local governments must ensure that the agreements entered into between the local government and residents of the complex comply with the *Fair Trading (Retirement Villages Interim Code) Regulations 2014* (WA) (**Code**) (which is prescribed under section 46 of the *Fair Trading Act 2010* (WA) as a code of practice that applies in relation to retirement villages as defined in the RV Act). We note that this Code is an interim code and is only in force for the period of 6 months commencing on 1 April 2014 and will presumably be repealed and replaced with another code on 1 October 2014. The Code prescribes everything from legibility and presentation requirements of the residency agreement to information that must be included in the agreement and the circumstances in which the residency agreement can be terminated.

Complex Management

In circumstances where a local government is administering an RV Act complex, the relevant local government must ensure that it manages the complex in accordance with the village management requirements in Division 5 of the Code. This Division contains requirements in respect of management procedures, resident consultation, the village operating budget, accounts, budget surplus, marketing, repair and refurbishment and the establishment of residence rules.

Unfortunately, some local governments are unaware of these requirements, or are even unaware that the complex they are running falls within the definition of “retirement village” under the RV Act, and thus fail to meet the necessary requirements. In circumstances where it has come to the attention of a local government that the RV Act applies to a complex but the complex has not to date been run in accordance with the RV Act, it is advisable for the local government to contract a third party with the relevant experience and expertise in managing retirement villages to administer the retirement village on the local government’s behalf or, at the very least, to review and advise the local government on its management of the

complex to ensure that the local government is compliant with the requirements of the RV Act.

Where a local government manages an RT Act complex, the relevant local government must ensure that it manages the complex in accordance with the requirements of the RT Act. These requirements include mandatory property condition reports, the requirement that security bonds must always be deposited with the Department of Commerce and the restriction that the local government must not pass on its legal costs of drafting the tenancy agreement to the tenant. The Department of Commerce publishes some documents on its website that local governments can consult to assist them in complying with the requirements of the RT Act.

Conclusion

In short, where a local government administers an aged residential housing complex, the local government must be careful to ensure that it:

- a. First of all, understands whether the RT Act, RV Act or AC Act applies to the complex; and
- a. Secondly, ensures that it is familiar with the applicable Act and complies with the requirements of that Act in regard to the leasing of premises and management of the complex.

As with anything in life, when it comes to the management of aged residential housing complexes, knowledge is the key to success.

If you would like any further information, please do not hesitate to contact Melissa Restifo on 9434 6234.

The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.