

THE IMPACT OF TENURE TYPE ON THE DESIRE FOR RETIREMENT VILLAGE LIVING

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ABSTRACT

In 2005 17.3% of Australians were aged 60 years and older (Australian Bureau of Statistics). A consequence of this aging population is the increased use of self-contained independent living units (SCILU) in Retirement Villages by older Australians. The retirement village sector has thus become a significant sector within the residential property market. In seeking to determine the impact of tenure type on the desirability of RV living this paper first profiles a typical SCILU in Australia, before explaining and examining the various tenure types offered by the market. This paper concludes that the multiplicity of offerings of the SCILU product with respect to tenure type, when combined with deferred management fees and participation in capital gains/losses, may be contributing to a lack of clarity in what the SCILU product entails and the security of investment it offers. This perception is supported by litigated disputes and may be damaging the reputation, ongoing viability and desirability of SCILUs.

Key words: Retirement Village, Land tenure, freehold, leasehold, license

INTRODUCTION

Reflecting an international trend, the number of Australians retiring or soon to retire accounts for over 14% of the population. (ABS 2009-10) Many Australians look to change their home in retirement by down-sizing or moving into a retirement village. However, retirement village living is no longer restricted to those who have reached the formal 'retirement age'. As Western Australian data shows, many retirement-style villages throughout Australia welcome, or are specifically targeted to apply to, those aged 55 years and over. (ABS, 2006a) As such the retirement village sector is becoming a noteworthy residential sector with the potential to become even more so for younger retirees as villages are increasingly being designed to satisfy a particular standard of living. However, not all Australian retirees are seeking to relocate. Many prefer to either remain in their own home or to live in, or acquire, non-village accommodation. (ABS census 2006 data). Professional experience shows that for some the deciding factor is that their tenure will not be freehold tenure. Available data however is not conclusive.

The rationale for a lack of uptake of retirement village living is, subsequent to the GFC, more likely to have been influenced by the current down turn in the property market. For many desiring to relocate, without the sale of their existing dwelling, they do not have the capacity to do so. This market downturn, coupled with anticipated reduced retirement income (ABS 2009) does not make retirement village living attractive. Added to this are the issues arising from the available land tenure of the SCILU village offerings. Some self contained independent living units ('SCILU') are granted on freehold tenure. This study has shown, however, that the majority, are only available on either a license-to-occupy or under leasehold tenure. These latter 'tenures' may significantly impact on the consumers' perceptions of their security of tenure and consequently security of their capital investment. Complicating consumer perceptions are the fee and capital participation arrangements applied in most retirement villages. Although not consistently termed by the legislation, most villages require the payment of an exit fees and many do not enable the resident to participate in any capital growth.

As with many other 'real world' businesses (Craddock, 2011) village operators are increasingly using the internet, and village specific websites, to advertise their 'product'. This includes providing details of the facilities available in the village itself, as well as specific information regarding the SCILU, such as layout and, in a very few cases, information

regarding the tenure and related matters such as capital gains participation and exit fees. While regulation requires that prior to entry into a village proscribed disclosure must be made *in writing* to the prospective resident, regulation does not require the same level of disclosure in advertising or on websites. As such, advertisements and websites tend to target the *lifestyle* component of the villages with little or no mention of matters such as tenure or fees. Some prospective residents often remaining unclear as to what fees they are to pay even after having entered into their occupation agreement, with the issue only being resolved after referral to a tribunal or court. (Cossey & Pye, 2008)

Despite the high level of regulation of the sector, exit and other fees, plus a perceived lack of tenure, mean that SCILUs are viewed by many otherwise prospective residents as less desirable when compared to the traditional family home. Desirable means 'worth having and wanted by most people' (Cambridge, 2008). In the context of this paper a desirable retirement village equates to a village with high consumer demand meaning that the available product is absorbed into the market within a reasonable time. The paper aims to identify the impact that tenure type has on the desirability of retirement village living. This paper first profiles a typical SCILU in Australia, before explaining and examining the various tenure types offered by the market. This is done for the purpose of benchmarking the risk that a prospective resident will tolerate with respect to security of investment which will contribute to the ongoing desirability of the sector. Whether exit fees are charged; and the extent to which the resident participates in any capital growth also is considered.

LITERATURE

To date much of the academic writing in the area of retirement villages has been focused around appropriate valuation methodologies and the valuation process for retirement villages. This includes studies by Elliot, Earle & Reed (2002) and recently McAuliffe (2010). The Australian Housing and Urban Research Institute (AHURI) also has maintained a focus on aged care and the role of SCILU within the context of public housing and rental accommodation (McNelis, 2004) but has not focused on the complexities or limitations of purchasing a self-funded SCILU within a retirement village scheme. More recently Csesko and Reed (2008) focused on the ability of residential aged care facilities in Victoria to meet long term demand rather than SCILUs *per se*.

Other studies examined the factors that may influence the decision making process regarding purchase of SCILU stock. The study by Stimson and McCrea (2004) separated the factors that influenced retirees, when voluntarily moving into retirement village accommodation, into push factors (the factors that lead to leaving the family home) and pull factors (those factors associated with moving to a retirement village). Stimson and McCrea (2004) identified that the most common push factors were health issues and the need for greater assistance; death of a spouse; problems in maintaining the home; the need for a lifestyle change; and a desire to be close to family. The pull factors were identified to include the built environment and affordability; location and convenience of location; and maintenance of existing lifestyle and familiarity. They did not however examine issues relevant for tenure type, or costs associated with exiting the village. In addition, other issues arise resulting from the fact that many *over 55s* villages are not 'retirement villages' as proscribed by the relevant State/Territory legislation. These issues however are beyond the scope of this paper to consider.

The focus of this study is on the legal structure of SCILU offerings within retirement villages. The focus in particular is on the legal rights to land and land tenure which purchasers/residents receive in exchange for their ongoing contribution. This is as against the payment for charges for services provided; the DMF payable; and the residents share (if any) in the capital growth of the SCILU when leaving the village. These factors also influence the decision making process.

PROFILE OF A SCILU

An SCILU differs substantially from other legal interests in land in that it exists in a heavily regulated, and at times inconsistent, environment. Each State and Territory has enacted specific legislation for retirement villages. This legislation, as detailed in Table 1, seeks to promote consumer protection and best-practice. It does this by providing a statutory framework within which the retirement village industry may operate in an attempt to provide greater certainty to all participants.

Table 1: Retirement Village Legislation

State	Legislation
Australian Capital Territory	<ul style="list-style-type: none"> • <i>Fair Trading Act 1992</i> • Retirement Villages Industry Code of Practice
New South Wales	<ul style="list-style-type: none"> • <i>Retirement Villages Act 1999</i> • <i>Retirement Villages Regulation 2009</i>
Northern Territory	<ul style="list-style-type: none"> • <i>Retirement Villages Act 1995</i> • <i>Retirement Villages Regulations</i> • <i>Retirement Villages Code of Practice</i>
Queensland	<ul style="list-style-type: none"> • <i>Retirement Villages Act 1999</i> • <i>Retirement Villages Regulations 2010</i>
Victoria	<ul style="list-style-type: none"> • <i>Retirement Villages Act 1986</i> • <i>Retirement Villages (Contractual Arrangements) Regulations 2006</i> • <i>Retirement Villages (Records and Notices) Regulations 2005</i>
South Australia	<ul style="list-style-type: none"> • <i>Retirement Villages Act 1987</i> • <i>Retirement Villages Regulations 2006</i>
Tasmania	<ul style="list-style-type: none"> • <i>Retirement Villages Act 2004</i> • <i>Retirement Villages Regulations 2005</i>
Western Australia	<ul style="list-style-type: none"> • <i>Retirement Villages Act 1992</i> • <i>Retirement Villages Regulations 1992</i>

The definition of ‘retirement village’ is consistent across all States and Territories as being a complex of dwellings where older, or retired, members of the community reside or that which is used for the purpose of a retirement village scheme. (Sec. 5(1) Qld; Sec. 5 NSW; Sec. 3 NT; Sec. 3 Vic; Sec. 3 SA; Sec.3T; Sec. 3 WA) However, there is no statutory definition of a ‘self contained independent living unit’ which is the focus of this paper. In practice these include stand alone villas, duplexes, townhouses, units and apartments. Where the purchaser is a couple, rights of occupancy generally are joined, with an ongoing right to the survivor of the two after which time, generally, the SCILU forms part of the survivor’s estate for succession law purposes.

As McAuliffe (2010) describes a retirement village typically operates by residents ‘buying’ their SCILU from the village operator. In freehold villages, this occurs by direct purchase from the current resident, although if the tenure is also tied to a licence-back arrangement, some form of documentation and/or consent from the village operator is required. In any event, most acquisitions occur at a discount when compared to the market value for similar accommodation in a more traditional non-retirement village environment. In exchange for the discounted price the residents agree to pay an exit fee, also known as a Deferred Management Fee (DMF), to the village operator when they leave the village for whatever reason. The DMF may be calculated either as a percentage of entry fee or the achieved resale figure.

Residents also may be able to participate in any capital gain *or* losses that have accumulated during their residence upon ‘sale’ to a new resident, as well being liable to pay other approved fees and charges (McMullen and Day 2007 as cited in McAuliffe 2010). Where the residents have passed on, these fees and gains/losses vest in their estate. Professional experience shows that it is only at this time, i.e. when the deceased estate of the last surviving parent needs to be administered, that many adult children realise that their parents did not *own* their SCILU.

TENURE TYPES

As identified in Table 1, each State/Territory has its own retirement village laws. Generally these laws are consistent, for example all require some form of pre-disclosure; however other rights and obligations are not necessarily the same. Also, in practice, this study shows that there is no consistency across the States/Territories as to the preferred tenure type. From a consumer awareness perspective, this impacts upon the exact form of the SCILU tenure offering as well, and in cases other than of freehold, the underlying land tenure system. These differences by themselves lead to a level of confusion particularly when in retirement many Australians choose to relocate to another State/Territory either to be closer to family or because of the warmer climate (ABS 2009-10) and consequently move away from the land system they are use to.

Generally throughout Australia the primary tenure types for SCILUs are – leasehold, freehold, loan/licences and rentals. While this paper refers to Queensland legislation to describe the land tenure types that may be applicable to SCILU development, all other States and Territories have similar legislative provisions. Any significant variations to the Queensland position have been highlight.

Leasehold

Under this arrangement the resident is granted a long term lease (i.e. for 99 years) following the payment of a lump sum lease premium that is the equivalent of the market value of the SCILU. In all other respects this scheme is similar to the loan/license arrangement in that upon exit, or re-sale, the resident is paid a lease termination payment which is offset by a DMF. In addition the resident may share in capital gains, or losses. In contrast to the loan/license agreement, payment to the outgoing resident usually is dependent upon and subject to receipt of monies from the incoming resident. McGovern and Baltins (2002) comment that registration of the lease with the State Land Titles Office does offer the resident an additional level of security in addition to that which is provided in the Act. In Queensland, and similarly throughout Australia, registration of the lease in the Titles Office would offer the resident the security of indefeasibility of their leasehold title upon registration. (Section 184, LTA).

Freehold

Freehold interests in land are established under the *Body Corporate and Community Management Act 1997* (Qld) (BCCM) or other similar Strata Titling legislation in other States and Territories. Under the BCCM separate titles are issued for each SCILU. Residents have indefeasible title upon registration of their transfer. (Section 184). Craddock and Blake (2010) note that indefeasibility offers protection by way of a State guarantee of title backed by a State compensation system. This system will, in specified circumstances provide compensation to parties deprived of their interest in land which would include interest in a SCILU (Part 8, Div. 2, Subdivision C, *Land Titles Act 1994*). The essence of the State guarantee of title is not that the rightful owner of land who is wrongfully deprived of it will have it returned, but that they will be monetarily compensated for their loss.

Although the benefits of security of title are evident, McGovern and Baltins (2002) note that it is not without cost. That is that the resident will be responsible for payment of the statutory and utility charges. The purchase transaction also will attract State stamp duties and transfer fees.

It must be noted however that a pure freehold retirement village is rare. Even when the SCILU is freehold tenure, the village is operated on the basis that as condition of the purchase the resident must lease the SCILU to the village which then sub-leases it back to the resident. Professional experience shows that this sublease arrangement can be useful for second marriages. The sub-lease can be to both partners whilst the freehold is held only by one and ultimately is dealt with only under that person's estate thus 'protecting' the asset for their family. It is suggested however that it also can be confusing as the sub-lease arrangement is utilized by operators to impose conditions more commonly found in retirement villages but not in freehold arrangements. It is confusing because these rare villages are marketed on a 'freehold' basis.

Loan and/or licences

Under this arrangement the residents make a payment to the retirement village operator in the form of an interest free loan when taking up residence in the SCILU. In exchange for this loan the retirement village operator then grants a license over the unit for the resident to occupy and permission to access common facilities. The loan is repaid to the resident (or their estate) upon departure from the village on the unit being resold. The departure generally also attracts a DMF which is offset against the loan being repaid. There also

may be an apportionment of capital gain or alternatively a share in the capital loss to the resident as a result of the re-sale. In not every case is there a loan linked with a license to occupy. In some instances the license to occupy exists independently without a loan arrangement. This is the most common tenure structure in many states such as Queensland.

Rental

In some instances residents occupy their SCILU under a rental arrangement. This occurs when, for example, the residents become tenants under the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld). However, very few retirement villages operate on a purely rental basis and many do not provide rental accommodation at all. As such rental accommodation of SCILUs has not been considered for the purposes of this study.

The variety of tenure offerings for retirement village occupation may confuse consumers. This confusion may account for resistance in the market to the SCILU as a real alternative in Australia as compared to its acceptance internationally. According to ABS only 2.7% of people aged 65 years or over live in retirement villages compared to 6-7% in the United States (ABS 1996 as cited in Stimson 2004) Although this participation level has increased it has not done so proportionally to the ageing population.

Newell and Peng (2006) noted that in 2006 there was an increased level of institutional investment in the retirement village sector. They identified that 12 property funds included retirement facilities as part of their portfolio. These accounted for 99% of all retirement villages with a total value of \$528 million. Whilst the composition of investments may have changed significantly in the last few years, the fundamentals of this sector, particularly with respect to population growth, would suggest that the retirement village sector will continue to grow in the future.

One of the primary sources of litigation in the retirement village sector occurs as a result of the contracts signed by residents when they enter into self-care accommodation. Disputes also occur in respect of SCILUs. While litigation more recently is in respect of village operation, (*Filmer v Carlyle*, [2001]) disputes also occur in relation to issues arising from the financial arrangements residents entered into when joining the village and the imposition of DMFs when they seek to leave. Keogh (2002) notes that some of the major points of legal conflict arise from the wide variety of contract and tenure structures; or alleged unconscionable conduct on the part of the owners and developers of villages.

METHODOLOGY

The aim of this study is to identify typical SCILU structures which are deemed to be viable retirement village products based on market absorption. This has been undertaken with a view to benchmarking the maximum risk that a prospective purchaser/resident will tolerate with respect to security of investment. Factors such as perceived and actual security of investment will have an influence over the long term market acceptability of the SCILU product and sustainability of the sector.

This study builds upon prior Queensland based research by Blake and Craddock (2010) which reviewed the tenure offerings of SCILU's in Queensland. This preliminary research reviewed the SCILU offerings in Brisbane and the Sunshine Coast. This study builds upon this preliminary research and data was collected from 523 retirement villages comprising SCILU offerings throughout Australia. All of these villages are currently operational and have attracted residents based on the structure of their offering. These villages comprise over 100 retirement village providers including independent providers, churches or charitable providers, and institutional providers. Data collected includes the following:

1. Tenure of the SCILU: is the scheme offered on a freehold, leasehold or loan/license back arrangement?
2. Deferred Management Fees or Exit Fees: What is the quantum or percentage of those Fees?
3. Capital Gains/Losses upon Exit: Does the outgoing resident participate in any capital gains/losses on the SCILU upon exit and if so how is this allocated?

The purpose of this analysis is to benchmark the minimum security of tenure that is acceptable to the resident market and the tolerable levels of DMF and Capital Gains apportionment within the retirement village sector.

Disputes occurring within the sector have also been analysed to determine the most commonly contested issues for residents against village proprietors. It is acknowledged that there are limitations with the analyses of litigated disputes due to the mandatory dispute resolution provisions that are in place in the sector for each state and territory of Australia.

Whilst the mandatory dispute resolution process and voluntary mediation process may encourage early resolution of disputes, the processes themselves raise issues. The confidentiality of mediation in particular, as opposed to the openness of litigation, limits the public data available to prospective residents.

LIMITATION OF RESERACH

The retirement villages reviewed for this study were chosen due to the availability of publically accessible information pertaining to the villages via an internet site. This was done firstly, because the generation of younger retirees as generally computer literate and thus more likely to undertake preliminary research via the internet; and secondly more villages are actively promoting themselves and providing information online. (Craddock, 2011) However, the existence of a web site *per se* did not mean that relevant information regarding a particular village as considered by this study was available to the prospective resident without making further request of the RV proprietor.

A very small number of villages, no more than 10, clearly *and* easily provided information regarding tenure type, exit fees and capital participation. These were most commonly retirement villages that provided freehold tenure to residents. The balance of village websites examined required interested parties to provide contact details in order for a representative to contact them directly and/or for an information kit to be provided. For the purposes of this study further requests for information were not made and the data analysed was therefore limited to information available on the internet site.

IMPACT OF TENURE TYPE ON DESIRABILITY

Results of the study were analysed according to tenure arrangements, DMF and any capital gains/losses payable to or by the resident on leaving the SCILU. There was considerable variation in the SCILU tenure and transaction arrangements pertaining to the retirement villages considered in this study. The villages examined in this study comprised freehold tenure, leasehold tenure and loan/license to occupy agreements. The composition of tenure structures in the villages studied is detailed in Table 2.

Table 2: Composition of Tenure Structures in Retirement Villages across Australia

Tenure Type	Occurrence of Tenure Type
Freehold Tenure	3.25% of villages studied
Leasehold Tenure	25.52% of villages studied
License to Occupy	16.06% of villages studied
Loan	8.99% of villages studied
Unknown	48.18% of villages studied

Of the villages that provided tenure information on their web sites (51.82%), by far the most dominant tenure structure within the studied villages is the leasehold structure with 25.52% of villages taking on this tenure form. This type of structure is widely accepted as the preferred structure for retirement village operators. Interestingly this is in contrast to the most dominant structure in Queensland identified by Blake and Craddock (2010) as being the License to Occupy which accounted for 52.63% of all villages in their initial study of Brisbane and Sunshine Coast retirement villages. The license to occupy is by far the most dominant structure in Queensland with 35.32% of the known tenure types being under this structure. The license to occupy is relatively uncommon outside of Queensland with only 1 example of the use of the license to occupy adopted in New South Wales. A breakdown of the tenure types for each state can be found in Table 3.

Table 3: Retirement village tenure types used across Australia

State	Leasehold	Freehold	Licence to occupy	Loan	Unknown	Total number of villages
ACT	0.00%	0.00%	0.00%	0.00%	100.00%	2
QLD	17.87%	3.40%	35.32%	0.00%	43.40%	235
NSW	46.21%	5.30%	0.76%	6.82%	40.91%	132
NT	0.00%	0.00%	0.00%	0.00%	100.00%	1
VIC	0.00%	2.41%	0.00%	44.58%	53.01%	83
SA	11.76%	0.00%	0.00%	2.94%	85.29%	34
TAS	0.00%	0.00%	0.00%	0.00%	100.00%	3
WA	48.48%	0.00%	0.00%	0.00%	51.52%	33
Total number of villages						523

The leasehold structure is still under relatively high usage in Queensland at 17.87% and is the most common tenure structure in New South Wales (46.21%) and South Australia (11.76%). In Victoria, the Loan arrangement is the most commonly used tenure structure (44.58%). Most notable is the infrequent use of a freehold tenure with a small percentage of villages in Queensland, New South Wales and Victoria (3.40%, 5.30% and 2.41% respectively) adopting this tenure type.

Although not finding empirical evidence to confirm why the specific tenure structures are used, the authors suggest from professional experience that the frequency of use of leasehold and licence to occupy may be due to the fact that the ownership of the land is retained by the retirement village operator. This provides the operator with the long term flexibility to re-develop the land at a future point in time should a retirement village no longer be considered the highest and best use of the site. This structure also may enable streamlining of the development process due to the fact that separate titles do not need to be issued over each SCILU. In addition, the developer is not burdened by the need to formally establish a body corporate with body corporate administrative requirements for the first 12 months of operation as is required under the *Body Corporate and Community Management Act 1997(Qld)* or State/Territory equivalent strata titling legislation. Further, any minor future alterations to services do not require body corporate approval as would be deemed necessary by the *Body Corporate and Community Management Act 1997 (Qld)* in a freehold context.

With Queensland having the largest share of the retirement village market accounting for 45% of all those villages with a presence on the internet, nationally the license to occupy tenure type is significant. In a License To Occupy village, residents are able to occupy their SCILU upon receipt of a Certificate of Occupancy. From the resident's perspective their ingoing costs are reduced as there is no requirement to pay transfer fees or stamp duty on the transaction because they are not in receipt of an interest in land. This is also the case with the loan arrangement which features in New South Wales, Victoria and South Australian retirement village offerings.

Whilst the potential cost and time savings related to the LTO tenure structure are evident for some prospective residents it is difficult to ignore the lack of security of tenure pertaining to the residents' interest. Generally a LTO would not accrue an interest in land and therefore in the case of being dispossessed of their rights there will be no rights in *rem* but only rights *in personam* accruing to the resident (Craddock and Blake, 2010). In effect a dispossessed resident/licensee will have no right of recovery of the property but merely a right to be compensated monetarily following legal action.

The personal rights associated with the LTO also are not protected by the indefeasibility of title provisions in the *Land Titles Act 1994* as they offer no registrable interest in land. However, with respect to retirement villages the rights that the resident in a LTO has exist by virtue of the common law in contract and through the Act.

In Queensland, the Act stipulates that once the retirement village scheme is registered a statutory charge is created and registered under the *Land Titles Act 1994* (Section 116 of the Act). This statutory charge will have priority over most registered securities in or over the retirement village land and will have the effect of preserving the residents' right to occupy their SCILUs, use the village's communal facilities and be paid the exit entitlement in accordance with the residence contract upon termination of the contract (Sections 118 and 119 of the Act). However, some charges will take a higher priority in the order of securities. These include charges created and given priority under Commonwealth law or another State law and securities registered prior to 1989 (Section 119(2) of the Act).

In addition, under certain circumstances an exemption may be given by the Registrar from the creation and registration of a statutory charge (Section 116(5) of the Act). This may occur in situations where the retirement village is an organization that is –

- (i) *an organization established for a religious, charitable, or community purpose; and*
- (ii) *of good standing in operating retirement village schemes; or*

(b) because of other exceptional circumstances and the chief executive is satisfied the proposed scheme operator provides another security to secure the rights under a residence contract of a resident in the retirement village.

By contrast, the tenure structures offered by leasehold and freehold interests are capable of registration in the States Land Register with freehold tenure accruing the highest possible bundle of rights available under the land tenure system in Australia. However, the disadvantage of these structures is that transfer fees or stamp duty will be payable by the resident albeit that the stamp duty on a lease generally is less than for a transfer of freehold. Further, residents with a freehold interest in land will be liable for all the costs of local government fees and charges and utility charges which are likely to be exempt from LTOs. The area of land tenure is complex and may be a source of confusion to potential residents. This situation is exacerbated by the lack of clarity of publicly available information concerning the transaction structure including tenure arrangements. Despite the legislative requirement for a public information document to be given to all prospective purchasers prior to entry into a residence contract (Section 84 of the Act) and fact that this document must include information regarding any statutory charges or securities applicable to the retirement village land (Sections 74 and 80 of the Act) the information is generally not made easily available in the public domain.

Although all villages examined had either their own website, or were 'part of' a corporate site, and had information easily available as to the *lifestyle* residents enjoyed, information regarding tenure and fees was less accessible. Less than half of all retirement villages (48%) have information regarding village tenure publically available on their web site. Instead prospective residents are required to leave their details so that a representative may contact them. In addition, when the proscribed information is ultimately provided, it is generally not in a form that is easily understood without the assistance of legal and financial advisors. Most retirement village operators choose not to make information publically available beyond statutory disclosure obligations (Sec. 18(1) ACT Code; Sec. 18(3) and (3A) NSW; Sch. 2, Regs, NT; Sec. 20 Vic; Sec. 17 SA; Sec. 6(1) Tas and Sec. 13 WA). These statutory provisions require detailed, and in most cases, overly proscriptive information to be provided to prospective residents, however the resulting PDSs are not in a format that can be easily understood without recourse to legal advice.

'Tenure also can have a significant impact upon tenants' rights if a RV closes (DoJ, 2011) as licences to occupy and leasehold interests attract lesser protection than freehold tenures. The newly enacted changes to the Queensland RV legislation (CPA, 2011, Section 242) although making future calculations of exit fees fairer, does not assist in making available information any clearer. Despite the recognition of tenures' impact the current scrutiny does not extend to an examination of tenure types per se nor their impact upon desirability. (DoJ, 2011)

Interestingly, of the disputes that have proceeded to court, most do not tend to involve tenure arrangements, or what residents thought the tenure arrangement was to be. These matters generally are more focused on the calculation and application of DMFs or exit fees; (*Taylor v Mistern*, [2001]) the calculation of market value of SCILU for the purposes or calculating capital gains or losses or in respect of approved, or not approved, pets.

4.2 Deferred Management Fees

The use of DMFs or exit fees is common in the retirement village industry and permitted by law, although some jurisdictions restrict the fee chargeable to that calculated on a daily basis. (i.e. Sec 28(2) Code ACT and Sec. 156(3) NSW) Despite the applicability of DMF to the majority of leasehold and license/service arrangements this information

is frequently not made available beyond the statutory requirement for disclosure in the public information document pertaining to the scheme.

A summary of the deferred management fees of the leasehold and license agreement structures considered in the study, and as disclosed by the RV operators on their websites, is contained in Table 4.

Table 4: Deferred Management Fee Structure

State	No public information available concerning DMFs	DMFs are applicable but quantum and method of calculation not specified	DMFs are applicable and disclosed	No DMFs
ACT (2 villages)	2	0	0	0
QLD (235 villages)	121	47	57	10
NSW (131 villages)	66	29	32	4
NT (1 village)	1	0	0	0
VIC (82 villages)	70	12	0	0
SA (34 villages)	33	0	1	0
TAS (3 villages)	2	0	1	0
WA (33 villages)	33	0	0	0

The 14 villages nationally that are not subject to DMFs are largely those that are held under freehold title. Generally freehold tenure will not have DMFs as this is not generally applicable to freehold title. Although disclosure of all chargeable fees, including DMFs, is a general requirement of each States/Territory's legislation, 63% of villages nationally have no information publically available via the internet site as to the applicability or quantum of DMFs. This appears to be most acute in states/territories such as ACT, NT and WA where not a single village proprietor had any publicly available information pertaining to DMFs on the internet site.

As previously noted, full information would be available in legislatively required PDS, although such information is not required to be provided in all forms of advertising, and must be provided to the prospective resident prior to entry into the occupation agreement for their SCILU.

Of the RVs reviewed, QLD and NSW had the highest level of disclosure on the internet of DMFs and their quantum or method of calculation of all the States with 24% of villages that were subject to leasehold or license structures providing full disclosure of DMFs. A summary of the quantum of DMFs is provided in Table 5.

Table 5: Quantum of Deferred Management Fees nationally

Retirement Villages	Quantum of DMFs
24 villages	3% per annum for a maximum of 12 years
14 Villages	2.5% per annum for a maximum of 12 years
13 villages	Maximum 34% capped after 6 years
8 Villages	Maximum 34% capped after 10 years
7 Villages	Maximum 30%
6 villages	4% flat
4 Villages	Maximum 25% capped at 6 years
4 Villages	4% per year capped at 10 years
2 Villages	Maximum 22% after 5 years
2 Villages	5-25% capped after 8 years
2 villages	3.5% per annum for a maximum of 10 years
2 Village	Maximum 25% after 5 years
1 village	10-25% maximum
1 Village	7% per annum for a maximum of 5 years
1 Village	6% for 6 years; 4% 7 th year. Capped at 7 years
1 Village	2.75% per annum for a maximum of 15 years

It is evident that the DMFs applicable are specific to a particular village, or operator, and vary significantly from each other. The DMF contributions in this study were found to be broadly between 20 and 40% over a period of up to 12 years. This is consistent with the findings other writers (McMullen & Day 2007 and Gelbert & Harris 2008 as cited in McAuliffe 2010) who note that a DMF is typically from 20 to 40% over 5 to 10 years. It is difficult to draw any conclusions as to what would be considered standard in terms of industry offerings. This may create a level of confusion amongst prospective residents.

1.3 Capital Gains/Losses on Exit

Despite the requirement of the exit entitlement to be fully stipulated in the residence contract, like the DMF this information is not always otherwise made publically available by retirement village owners/operators. Only 80 of the villages of the 523 in the study clearly identified whether the resident was to participate in any capital gains or losses in exiting the village. Of these 80 only 39 provided information regarding the quantum of capital apportionment.

There appears to be little consistency with respect to the residents' entitlement to capital growth generated upon exit from the SCILU. Generally the share of capital growth or loss being retained by the resident varies from 50 to 100%. The study in fact highlights the variation in offerings amongst the retirement villages involved which is likely to be reflective of the broader retirement village industry. It appears from the study that residents are willing to accept a

situation where they do not participate in any capital uplift that the dwelling may achieve over the time of their occupation.

Rightly or wrongly the calculation of exit entitlement is one of the primary sources of disputes within the retirement village sector. The exit entitlement generally includes the ingoing contribution less any deferred management fees or exit fees and any other applicable fees such as reinstatement fees. This figure is then adjusted against the resident's portion of the capital growth or loss of the dwelling. It seems that disputes may arise from a lack of understanding of the intricacies of the residence agreement with respect to calculation of the fees.

The variations across villages and operators and the likely capability of many of the residents to interpret these variations may lead to confusion about the product that is actually being purchased. One such example is the case of *Williams v Carlyle Villages Pty Ltd*. [2009] QCA 301 (*William's Case*). Mr Williams was found not to be entitled to a portion of the appreciation of his leased unit when the subsequent lessee paid a considerably increased in-going contribution.

The disturbing element of *William's Case* was the misinterpretation of the situation by Mr Williams when the residence agreement was silent on the issue of allocation of capital growth. The potential for confusion was identified by McMurdo J. who commented as follows:

“Those entering into contracts to reside in retirement villages are usually elderly and sometimes anxious to speedily finalise their new residential arrangements. This case is a salutary reminder to prospective retirement village residents to take care to ensure that the objective terms of their contracts meet their subjective intentions and expectations. The requirements of the Act, the public information document and contracts may appear daunting to prospective residents. It may be prudent for them to obtain independent legal advice.

Further, it was noted by McMurdo J. that there is no requirement under the Act for the public information document to include information pertaining to capital apportionment upon exit from the village.

Professional experience shows that even when the resident fully understands and accepts how the fees are to work, as this is the only way they are able to afford the lifestyle and personal security that village life brings, issues still arise. This is because in the majority of cases it is the executor/family who is left to manage the exit from the village after death of the resident and who may have great expectations of capital gains and little appreciation of a SCILU's true position.

This situation is further exacerbated by the lack of uniformity in the industry which could be achieved through standard form contracts. Although other sectors of the market, such as commercial leasing, are without standard form contracts the distinction between this sector and the retirement village sector is marked with participants in the commercial leasing market generally possessing a superior level of business acumen.

Frequently individuals (and their families) in the retirement village sector do not possess the same level of business acumen as the retirement village operators resulting, rightly or wrongly, in the 'appearance' of an unfair bargaining process weighted in favour of the operator and reflected in the agreements. Keogh (2002) noted that the nature of contracts between residents and operators/owners accounted for between 80 and 90% of all matters litigated in the retirement village sector.

CONCLUSION

This paper builds from the authors' preliminary work by continuing their study into the Australian SCILU product by expanding analysis to 523 SCILU offerings across Australia. The objective of this study was to benchmark the maximum risk that a prospective purchaser/resident will tolerate with respect to security of their investment resulting from land tenure and the transaction structure. Security of investment is considered to be fundamental to the sustainability of the SCILU sector. The overall finding of this study was that there is no 'typical' product when it comes to SCILUs within retirement villages. Professional experience shows that this exacerbates issues for prospective residents as they are unskilled at understanding and analysing existing product offerings in order to make comparisons.

When considering the tenure arrangements; exit fees; and the extent to which the resident participates in any capital growth there are a number of significant concerns arising for prospective residents. These concerns may negatively impact on the desire of potential residents to invest in any given village. Whilst outside the scope of this study it is likely that for many, although acknowledging the benefits of the retirement village lifestyle, these concerns lead them away from retirement village life to a more traditional form of home ownership. Lesser tenure than that granted by a freehold interest is but one of the potential negative influences on the desirability of RV living, making RVs "unattractive" to many older Australians. (DoJ, 2011, 6) Although the extent to which this perceived lack of security of

investment results in lost SCILU absorption is not known, it is likely that the sustainability of the retirement village sector would be strengthened if these perceptions were overcome.

The tenure structure of retirement villages vary from freehold rights equivalent to that of the standard residential product to leasehold and even loan/license products. Exit fees also vary significantly as does the method of their calculation. Upon exiting the village the residents' capability to share in any capital uplift also varies from no participation at all to 100% accrual of capital gains. Although these factors have been considered in isolation in the study it is likely to be the combination of these factors and the in-coming contribution amount that will determine the level of risk tolerance that a prospective resident will accommodate.

As demonstrated in *Williams Case*, frequently litigation in the area of retirement villages results in a failure by both sides to fully appreciate aspirations of the other. Further, the residents' lifestyle aspirations for their retirement may be at odds with the aspirations of the business owner/operator who is seeking to maximize profit and with the expectations of their family to capital growth that would otherwise occur in respect of the 'family home'.

From this study it is concluded that although there are a variety of factors which contribute to the ongoing sustainability of the SCILU sector the multiplicity of offerings within the sector with respect to land tenure, deferred management fees and participation in capital gains or losses on exit may have a negative impact. This may lead to retirees either choosing to stay within a more traditional home market or entering the SCILU market without due regard for the consequences.

This study has uncovered a number of areas that would be worthy of further research including the influence that land tenure has on decision making within the retiree market. Also worthy of further research is an assessment of the adequacy of disclosure documents relating to the SCILU transaction with a view to identifying the benefits of increased, and more easily understood and accessible, disclosure by retirement village operators and developing plain English, standard form contracts in the SCILU sector. Extending disclosure obligations to all forms of advertising also may assist prospective residents in understanding the available products and offerings.

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