

Retirement Living COVID-19 Update

COVID-19: Impact on retirement village residents meetings

Background

Since March 2020, state and territory governments across the nation have implemented a wide range of social distancing measures, backed by mandatory public health directions, intended to contain the spread of COVID-19.

These measures extend to retirement villages and include closure of facilities and services, restrictions on gatherings of multiple people in the same place and mandatory 'stay at home' directions for most people in the community.

While the precise details of these restrictions differ in each jurisdiction, all of them present practical difficulties for holding residents meetings under the retirement villages legislation.

Typically, a residents meeting involves:

- all residents being invited to attend a meeting in person at a particular time, date and place (usually a community centre or similar building in the village which may now be closed);
- the meeting taking place between the operator, all residents who wish to attend (or their proxies/representatives), a chairperson and any persons invited to address the meeting, who will all be in close proximity to each other in the meeting venue; and
- any necessary vote being taken by show of hands, written ballot or other prescribed method at the meeting venue (or by postal votes submitted earlier).

Residents meetings under retirement villages legislation

All retirement villages legislation requires residents meetings to be held for a variety of reasons, depending on the jurisdiction. The most commonly required meetings are:

- an annual village meeting to report to the resident body on the financial performance of the village in the previous financial year, and to discuss any proposals, changes or budgets for the upcoming year;

- meetings to approve increases to service charges or proposed village spending; and
- special residents meetings regarding proposed changes at the village (eg redevelopments or changes to the facilities or by-laws).

Operators are sometimes required to hold meetings with a smaller section of the resident community such as:

- the residents committee (if any), to discuss matters raised by the resident body generally; and
- one-off meetings with individual residents, such as to manage a dispute or provide an estimate of an exit entitlement.

Failing to hold a required meeting will usually be a breach of the legislation and may give rise to penalties.

The failure to hold a required meeting may also lead to further consequences for the village as a whole. For example, a residents meeting may be required to implement new services charges or a village budget for a new financial year. If that does not occur, village expenditure and operations may be impacted until the meeting is held.

Given the wide range of residents meetings that may be required in each year, and the usual practice of holding these meetings in person, the social distancing measures currently in place create practical and legal obstacles for operators. This is particularly relevant for operators of villages in Queensland and Western Australia, who may be required to hold such meetings shortly to finalise the village budgets for the upcoming financial year commencing on 1 July.

Do the meetings still need to occur while the restrictions are in effect?

The retirement villages legislation generally does not provide for any suspension of, or basis to delay, residents meetings that must occur within specified time periods. The legislation does not cover a situation where it may be impractical, unsafe or unlawful to hold a meeting.

Nor has any state or territory government amended their retirement villages legislation or issued a legal direction in response to the COVID-19 crisis that suspends or extends statutory meeting timeframes.

Is there flexibility to avoid or delay a meeting?

In some cases, the legislation will provide some flexibility to avoid or delay a particular meeting. For example:

- In **Queensland**, a residents meeting to approve a new services charges budget is only required where the services charges will increase by more than CPI other than due to increases to s107 cost items or a deficit carried forward under s106. The annual residents meeting also has no fixed deadline and may be held 'as soon as practicable' after the audited financial statements for the previous financial year are available. Arguably, scheme operators can delay the annual meeting on the basis that it is not 'practicable' to hold the meeting until after the social distancing measures are lifted or relaxed.
- In **New South Wales** and **Victoria**, a residents meeting to approve a new services charges budget is only required where the services charges will

increase by more than CPI.

- Operators in **Western Australia** are generally able to apply to the State Administrative Tribunal to extend the timeframes for complying with their obligations under the legislation.

There are some meetings that only need to be held if requested by the residents/residents committee or if a particular outcome is sought by the operator (eg changing village facilities or by-laws). Operators may be able to avoid the need for such requests from residents/residents committees by maintaining full communication and consultation with the resident body while the restrictions are in place. For meetings where a particular outcome is sought, it may be preferable to postpone the meeting until after the restrictions are lifted or relaxed. Factors to consider when deciding whether or not to postpone include:

- whether the outcome is 'business critical' in the circumstances; and
- the ability to successfully hold the meeting by audio/video conference. If a special resolution of residents is required, and the subject matter is likely to require a presentation and discussion, a postponement may be preferred.

Can meetings be held other than in person (eg by audio/video conference)?

The position as to whether a residents meeting can be held other than in person (eg by audio/video conference) differs across the states and territories.

The default common law position is that a meeting can be held by telephone, video link or other means, provided that the type of technology used allows the parties to be 'present' with, and respond to, each other. Accordingly, operators may conduct residents meetings other than in person using appropriate technology in every state and territory, unless the relevant retirement villages legislation applying to the village overrides the common law by specifically requiring meetings to be held in person.

The position under the legislation in each state and territory is as follows:

- **Queensland:** The legislation does not require meetings to be held 'in person', except potentially a preliminary negotiation meeting under section 154 of the Act, which requires the parties to meet 'within the village' to attempt to resolve the dispute'. The Department of Housing and Public Works appears to support this position by stating on its website that retirement village operators should '*host meetings held by the residents committees, residents and operators via distance such as video or teleconferencing*'.

Further, on 22 April 2020, the Queensland Government passed the [COVID-19 Emergency Response Act 2020](#) (Qld) which establishes powers to make emergency regulations, including to specifically allow the holding of meetings required under legislation in a way that does not involve physical attendance, including, for example, using communication technology. At the date of this update, a draft regulation in respect of these issues under the retirement villages legislation has not been released. While arguably not necessary given that the retirement villages legislation seems to preserve the common law position, if such regulations are issued, operators will have a very clear mandate to hold residents meetings other than in

person.

- **New South Wales and Australian Capital Territory:** The legislation does not generally require residents meetings to be held 'in person', except for certain meetings that may impliedly be required to be held physically (for example, meetings with a proposed new operator of the village) because the legislation states that they must be held 'in or near the village'. NSW Fair Trading appears to support this position in New South Wales by stating on its website, *'Resident committees or residents may make alternate arrangements to vote and discuss issues if they do not want to attend meetings in-person. The options available include voting in writing, by email, teleconference or other technologies'*. It further states that annual contract check-up meetings with individual residents should be held *'by electronic means only... face to face meetings should not occur'*.
- **Victoria and Northern Territory:** The legislation does not require residents meetings to be held 'in person'. Consumer Affairs Victoria appears to support this position in Victoria by stating on its website, *'If you [i.e. retirement village managers] cannot postpone a meeting, you can meet remotely via a teleconference or video conference. Managers should contact residents as soon as possible to agree on a preferred approach'*.
- **South Australia:** Meetings that are required to be held under an Act can expressly be held by audio/video means during the COVID-19 emergency under the [COVID-19 Emergency Response Act 2020](#) (SA). This Act commenced on 9 April 2020 and will last for 6 months, or until the declaration of the COVID-19 public emergency is revoked in South Australia. The Office for Ageing Well (SA) appears to support operators making use of the emergency legislation by directing operators as follows: *'Do not conduct any face to face group meetings, e.g. annual meetings, budget meetings (i.e. mandatory meetings), including any resident committee meetings, regardless of meeting group size'*. Instead, operators should *'encourage the use of mobile phones, video call systems such as Skype or FaceTime to preserve resident contacts and conduct group meetings'*.
- **Western Australia:** The position is unclear as the legislation could be interpreted to mean that all meetings are to be held 'in person' (by requiring that a notice of meeting must state the 'place' of the meeting, indicating it must be held physically). We understand that the Commissioner for Consumer Protection has indicated that the requirement for physical meetings will not be enforced, provided residents are given the opportunity to consider the relevant material and respond. However, nothing formal has been released in support of audio/video meetings. In the absence of that, the legal position remains uncertain. Regulatory or legislative guidance or intervention would assist operators in Western Australia.
- In **Tasmania**, a meeting of a 'body of persons' required to be held under an Act can be held by telephone, electronic communication or other means during the current emergency under the [COVID-19 Disease Emergency \(Miscellaneous Provisions\) Act 2020](#) (Tas), which commenced on 27 March 2020, but only if one of the 'body of persons' or the meeting organiser obtains an exemption in advance from the relevant Minister. An exemption can be granted for up to 12 months, but will expire no later than 60 days

after the public emergency declaration for Tasmania is revoked. An exemption of this kind could potentially be sought by a retirement village operator (or a resident) on behalf of the general 'resident body' of a village, or a section of it, that is required to have a meeting under the retirement villages legislation. If an exemption is not obtained, the position is unclear as a notice of meeting must state the 'place' of the meeting, suggesting that it must be held 'in person'.

In summary, audio/video meetings are most clearly permitted in **South Australia** (in all cases) and **Tasmania** (where an exemption from the Minister is obtained). Operators in **Queensland, New South Wales, Victoria, the Australian Capital Territory** and the **Northern Territory** can hold their meetings by audio/video means with reasonable confidence on the basis that the common law position permitting such meetings is preserved in those jurisdictions (subject to the exceptions mentioned above). For **Queensland** the matter will be even clearer if the expected regulations are passed. The position is least clear in **Western Australia** where the legislation may require physical meetings – regulatory guidance from the relevant authorities to put the matter beyond doubt would be welcome.

What should operators do?

We recommend that operators take the following approach to meetings required under the retirement villages legislation while the COVID-19 restrictions are in place:

- Consider whether the meetings can be lawfully avoided or delayed until after the COVID-19 emergency passes.
- If a meeting cannot be avoided or delayed (for example, because a resolution of residents is required to pass the services charges budget for the new financial year), consider whether it can lawfully be held by audio/video means instead of in person, having regard to our comments above. For **Western Australia**, it would be ideal to wait (if possible) for the government to pass regulations specifically permitting the holding of non-physical meetings to ensure there is a clear mandate to do so, and to avoid the risk of any subsequent challenge to the validity of the meeting by residents. In **Tasmania**, the safest course of action is to apply to the relevant Minister for an exemption allowing a non-physical meeting as soon as possible.
- If a non-physical meeting is to be held, make arrangements to hold the meeting in a way that complies with the common law requirement that all parties be able to be 'present' with, and respond to, each other. This will involve selecting an appropriate communication or technology platform that allows for full communication between participants, and which can handle a large number of participants at the same time. Various available technology platforms allow for audio (ie telephone only) and/or video participation. They also have in-built meeting functions such as voting, sharing information or videos, asking or submitting questions, and producing a recording or transcript of the meeting. Operators should consider which platform is best for the type of meeting planned, and any assistance residents may require to have access, such as the installation of any necessary software or hardware in their unit.
- Engage with the resident body (or residents committee) as soon as possible

to ensure all residents are informed and consulted about the format of the meeting and any vote to be held, and that any specific concerns are addressed. Consider inviting residents to submit questions for the meeting in writing as soon as possible so they can be efficiently answered in the meeting.

- Make any supplementary practical arrangements necessary to allow full participation and voting (if required) at the meeting, which may include:
 - delivering physical ballot papers and information packages to residents' units;
 - providing a locked container in the village for postal votes;
 - providing clear instructions to residents on how to interact and vote; and
 - checking and testing the technology before the meeting.
- Ensure that the conduct of the meeting (particularly if a vote is to be taken) complies with all rules for meetings under the relevant retirement villages legislation and common law. This may include rules about the giving of meeting notices, who may attend, quorums, voting rights and proxies, voting by former residents of vacated units, the counting of votes, and recording of minutes.

What are the requirements for my state/territory?

To assist you to comply with your obligations, a summary of the meeting requirements under the retirement villages legislation in each state and territory can be found [here](#).

The table does not include strata/body corporate meetings, or meetings that may be required under the terms of residence contracts, trust deeds or other village-specific arrangements. Separate legal advice should be sought in respect of those meetings, where required.

This summary is accurate as at close of business on 30 April 2020.

MinterEllison remains committed to keeping operators updated regarding any relevant changes in regulation to assist them to efficiently determine and implement the appropriate response, particularly during this challenging time.


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