DIRECTORS AND OFFICERS OF RETIREMENT VILLAGES IN WESTERN AUSTRALIA–THE RETIREMENT VILLAGES AMENDMENT BILL 2024 MATERIALLY INCREASES YOUR RISK OF BEING PERSONALLY LIABLE FOR THE ACTS AND OMISSIONS OF YOUR ORGANISATION

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The changes in *Western Australia to the Retirement Villages Act 1992* (WA) (RV Act) that have been passed by the State Parliament and known as the *Retirement Villages Amendment Bill 2024* (RV Bill) have been more than a decade in the making.

These changes, when read with the subject matter of the foreshadowed new regulations, will be the most substantial re-write of the retirement village legislative framework in its 40-plus-year history.

Much commentary and analysis exist around many of the key changes. These key changes include (in summary):

- Revised and expanded disclosure requirements.
- The publication of information about the village on the operator's website.
- The payment of exit entitlements within 12 months.
- Contributions by the operator to the cost of aged care before the exit entitlement has been repaid.
- New refurbishment and renovation rules.
- New rules for making modifications to a village.
- Changes in the process to modify memorials.

But there appears to be one key aspect of the law reforms that has been largely overshadowed or underappreciated.

The law reform creates a raft of new circumstances where officers risk personal criminal liability for the offences of their organisation.

The sheer scale of the law reform and the plethora of new offences:

- Increases the risk of an organisation committing an offence.

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- Increases the risk that its officers will be personally liable for that offence.

The issue applies to both paid directors and officers and to volunteer directors and officers.

Criminal or civil liability for directors (whether direct, deemed or accessorial) is an increasing feature of the Australia corporate and legal landscape. This law reform specifically targets the Western Australia retirement living sector and will bring oversight of a retirement village's regulatory compliance to the top of the board agenda.

The Decision Regulatory Impact Statement in 2022 did not foreshadow a plan to attach personal liability to all of the newly created offences.

WHAT IS THE CURRENT PERSONAL LIABILITY POSITION FOR DIRECTORS AND OFFICERS OF RETIREMENT VILLAGE OWNERS AND OPERATORS AS CONTAINED IN THE RV ACT?

Located near the end of the RV Act is section 79 which is titled “Liability of officers for offences by body corporate”.

This section states that section 39 of the *Criminal Code* (WA) (Criminal Code) applies to those offences under the RV Act which are listed in section 79.

Section 39(2) of the Criminal Code provides that:

> “If a body corporate is guilty of an offence to which this section applies, an officer of the body corporate is also guilty of the offence if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate.” [emphasis added]

Section 79 then lists the sections of the RV Act to which section 39 of the Criminal Code applies. Currently, there are 12 sections of the RV Act listed in section 79.

In summary, in relation to the 12 offences under the RV Act currently listed in section 79, if an organisation is found guilty of any of those offences, then each officer of the organisation is also deemed to be guilty of the same offence if the officer failed to take all reasonable steps to prevent the commission of the offence.

For example, section 6(3) of the RV Act provides that:

> “A person shall not enter into any contract, agreement or arrangement with the intention, either directly or indirectly, of defeating, evading or preventing the operation of this Act.”

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Section 6(3) appears in section 79.

So, there is an obligation upon the officers to take all reasonable steps to ensure their organisation complies with section 6(3).

Put another way, if the organisation contravenes section 6(3) and the officers did not take all reasonable steps to prevent the contravention, then the officers are also taken to have committed the contravention.

WHAT ARE THE CHANGES AND INCREASES TO THE CURRENT PERSONAL LIABILITY POSITION FOR DIRECTORS AND OFFICERS OF RETIREMENT VILLAGE OWNERS AND OPERATORS?

Although there has always been a framework in the RV Act for personal liability of officers in some circumstances, the goalposts have moved. Or, more correctly, officers and organisations will soon be playing a completely different game on a completely different field.

The RV Bill amends section 79 of the RV Act to increase the sections of the RV Act referred to in section 79 from 12 to 28.

This means that:

- There are currently 12 offences where the officers of an organisation risk exposure to personal criminal liability.
- Soon there will be 28 offences where the officers of an organisation risk exposure to personal criminal liability.

Why the increase? Wherever the RV Bill introduces new offences for an operator, those new offences also apply to the officers if the officer failed to take all reasonable steps to prevent the commission of the offence.

There is no general principal at law that offences of an organisation must automatically apply to the officers. However, the RV Bill has been drafted to expand the liability risks for officers of retirement village owners and operators.

EXAMPLES OF SOME OF THE NEW OBLIGATIONS THAT CAN APPLY TO OFFICERS

Here are some of the new offences (in summary) that an officer is now exposed to personally if the officer fails to take all reasonable steps to prevent the commissioning of the offence by their organisation:

Section	New offences	Fine amount (AU$)
14B	A failure to ensure that the “current community arrangements statement” is	$20,000

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	continuously available to the public on the website	
14C	A failure to give a person a “prospective resident information statement” in time.	$20,000
14D	A failure to provide the resident with a report describing the condition of the premises within seven days of the resident moving in.	$20,000
28	Seeking to recover recurrent charges arising after the resident has permanently vacated.	$20,000
29	A failure to pay the exit entitlement within the required time.	$20,000
29	A failure to, at the same time as paying the exit entitlement, provide a statement as to how the exit entitlement was calculated.	$20,000
33	A failure to buy back residential premises.	$20,000
39	A failure to comply with the conditions of any exemption from the buy-back requirements.	$20,000
41A	A failure to maintain each capital item in the village in a reasonable condition.	$20,000
41A	A failure to carry out capital maintenance or capital replacement within a reasonable time.	$20,000
41B	A failure to prepare and keep up to date a plan for capital maintenance and capital replacement.	$20,000
41C	A failure to maintain a fund for capital maintenance.	$20,000
41D	The use of recurrent charges paid by a resident for capital replacement.	$20,000
41I	The carrying out of a modification (as defined) of a village unless an exception applies.	$20,000
41R	In the context of a dispute, a failure to attend a mediation when required by the commissioner.	$5,000

The above is a sample only and is not a complete list of all of the offences under the RV Act and the RV Bill where the officers are exposed to the risk of personal liability for the offence of their organisation.

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WHY ARE OBLIGATIONS BEING TAKEN OUT OF THE FAIR TRADING (RETIREMENT VILLAGES CODE) REGULATIONS?

It is clear from the explanatory memorandum accompanying the RV Bill that a material aspect of the law reform is to move a raft of obligations currently found in the Fair Trading (Retirement Villages Code) Regulations (the RV Code) into the new proposed regulations to be made under the RV Act.

What is not stated in the explanatory memorandum is the reason why this change is required.

In our opinion, the change has been made because the legal, financial and reputational consequences of a contravention of an obligation in the RV Code are materially less significant for an organisation and its officers when compared to a contravention of the same obligation once that obligation has been moved to the retirement village regulations.

For example, a contravention of the RV Code in the past that is remedied is unlikely to expose an organisation to a fine. However, going forward, once that same obligation is moved to the retirement village regulations, a contravention that is remedied will still expose an organisation to a fine and expose the officers to possible personal liability.

WHAT ARE "ALL REASONABLE STEPS"?

The test is not the taking of reasonable steps. The test is the taking of ALL reasonable steps.

The word "all" imposes a higher standard and has a similar meaning to "each and every" or "the entirety".

What constitutes all reasonable steps will always depend upon the circumstances.

Section 39(3) of the Criminal Code provides that:

"In determining whether things done or omitted to be done by the officer constitute reasonable steps, a court must have regard to –

(a) What the officer knew, or ought to have known, about the commission of the

offence by the body corporate; and

(b) Whether the officer was in a position to influence the conduct of the body

corporate in relation to the commission of the offence; and

(c) Any other relevant matter."

WHO ARE THE OFFICERS?

For the purposes of section 79 of the RV Act, the definition of "officer" means an "officer" as defined in section 9AD of the Corporations Act.

Officers of a corporation include:

- A director of the corporation.
- A secretary of the corporation.

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- A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation.
- A person who has the capacity to affect significantly the corporation's financial standing.
- A person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act.

In relation to an entity incorporated under the Associations Incorporation Act 2015, the definition of "officer" has a similar but not identical meaning.

The key takeaway is that the definition of officer is broader than just the named "directors".

For example, a director, chief executive officer or chief financial officer of a parent company who is not a named director of the subsidiary company may still be an officer of that subsidiary by reason of the last three bullet points mentioned above.

IS THERE A CORRESPONDING PROVISION IN OTHER CONSUMER PROTECTION-FOCUSSED TENURE LEGISLATION IN WESTERN AUSTRALIA? SHORT ANSWER: NO.

There is no equivalent to section 79 of the RV Act in any of:

- *The Commercial Tenancy (Retail Shops) Agreements Act 1985*.
- *The Residential Parks (Long-stay Tenants) Act 2006*.
- *The Residential Tenancies Act 1987*.
- *The Sale of Land Act 1970*.
- *The Strata Titles Act 1985*.

The officers of retirement village owners and operators shoulder materially extra personal liability.

OTHER OBSERVATIONS ON THE RV BILL FROM AN OFFICER LIABILITY PERSPECTIVE

There are consequences for an officer found guilty of contravening section 39 of the Criminal Code, including:

- The risk of a criminal record.
- The financial cost of the monetary fine.
- Public embarrassment and media scrutiny.
- Reputational damage both personally and to their organisation.
- Emotional and mental anguish, distraction and distress that can take years to resolve.

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- Detrimental impact on any other board positions.

There are going to be circumstances where officers need to obtain legal advice, separate to their organisation's legal advice as to:

- Their own personal circumstances.
- Whether their own actions constitute the taking of “all reasonable steps”.
- Their duties as an officer.

A person interested in becoming an officer of a retirement village owner or operator needs to do their own due diligence on the organisation and the then current officers. That due diligence will need to include a raft of matters, but in relation to the offences under the RV Act and the RV Bill, that due diligence should include obtaining written confirmation that the organisation, after having made enquiry, is not aware of any contraventions of the RV Act (or has disclosed the full particulars of any such contraventions).

This is in addition to other general duties of an officer at law, eg acting in the best interest of the company. A contravention of the RV Act opens the door for further regulatory scrutiny by the Australian Securities and Investments Commission and or the Department of Energy, Mines, Industry Regulation and Safety or both.

Keep records of your actions.

WHAT SHOULD OFFICERS DO NOW?

While directors may feel familiar with the concept of managing personal liability, the changes to the RV Act represent a potentially significant change in the risk profile of being a director in Western Australia's retirement living sector.

The changes to the RV Act increase the risk of personal liability. This should sharpen the focus that directors in the retirement living sector have on the compliance plans, compliance processes, risk controls and governance structures that their organisation has in place.

There is no “one-size-fits-all” approach to the reasonable steps that are required to ensure compliance with the relevant provisions of the RV Act. These matters listed below are just some of the things boards could implement to manage these risks.

Know the Offences

Create a list of the 28 offences under the RV Act (as it will be amended by the RV Bill) where there is a risk of personal liability and:

- Understand the actions required to prevent the offence and the circumstances when the offence might occur.
- The likelihood of the offence occurring.
- Take proactive steps to ensure there are systems and processes in place to ensure an offence is not committed.
- Ensure those systems and processes are stress tested and reviewed regularly.

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- Ensure that the management team reports to the board any possible contraventions.

Understand How the Changes Impact Your Financial Model

It is important that officers understand the organisation's business and financial model and the extent of the changes flowing from the RV Bill.

Revisit your financial model for the village and understand how that model needs to adapt having regard to the changes in the RV Bill.

Officers need to satisfy themselves that their organisation has the financial capacity to comply with the RV obligations in relation to buy-backs and the payment of exit entitlements and its financial obligations generally.

Residence Contracts Will Change Again

Be ready to review your residence contracts to respond to the RV Bill and the new regulations.

Ensure your residence contracts comply with the RV Act.

Sight the “legal sign-off” that your organisation has obtained confirming that your residence contract complies with the RV Act. If you do not have a formal legal sign-off, obtain one.

Ensure your organisation has a regular training program in place for all employees in relation to the RV Act and consider what is required for new employees.

Governance

Organisations need to devote and allocate resources to preparing for and implementing the RV Bill.

Ensure procedures and policies are in place to promote the right flow of information on compliance. The right information must flow up to the board in an easy-to-read format (ie not buried in board packs).

Monitor compliance with those procedures and take appropriate action if a breach of those procedures occurs.

Are your checklists, guides and internal audit processes in place to ensure:

- Residence contracts are completed correctly?
- The processes in the RV Act are followed?

Officers should proactively and regularly monitor their organisation's compliance with the RV Act. This may involve the preparation of a comprehensive compliance plan and regular monitoring, updating and auditing of the plan.

Properly maintain minutes of board meetings so there is a record of the board's oversight or compliance and engagement with management. There needs to be evidence of active consideration of compliance risks, appropriate management of those risks, questions of management and follow up.

Carefully read and ensure an understanding of all documents that are provided for sign off, approval or adoption.

According to the Australian Institute of Company Directors, there are more than 600 state and territory laws which impose personal liability on individual directors for corporate misconduct.

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Stay on top of other changes to the law that will impact your role as an officer of the organisation. For example, are you aware of the material changes that are proposed to the Western Australia Associations Incorporation Act 2015? Please see the recent K&L Gates article that explores this subject.

Culture

Ensure job descriptions for senior management make it clear where responsibility for compliance with the RV Act lies.

Foster and maintain a culture of compliance within your organisation. A culture that directs, encourages or tolerates noncompliance is a red flag for compliance risks.

While directors are entitled to rely upon the advice of management and advisers, directors must critically assess such advice and bring their own independent judgment to bear.

Ensure the management team understands the sections of the RV Act where there is a risk of personal liability for the officers and that it is expected to bring matters of this nature to the attention of the board.

Directors and Officers Insurance

Obtain advice as to whether the changes in the RV Bill require changes to your directors and officers (D&O) insurance.

Consider the organisation's D&O policy provides cover for liability or defence costs resulting from these offences, noting that there will usually be exclusions from a D&O policy for criminal liability.

Similarly, consider whether the indemnity in the organisation's constitution (or a deed of access and indemnity) will provide cover for the legal costs associated with defending a claim.

If the organisation has taken out D&O insurance, be familiar with the limits and exclusions and ensure that the premium is paid.

An increase in the number of offences will add to the ever-increasing cost of D&O insurance.

HOW CAN K&L GATES HELP YOU?

We are focussed locally and connected globally.

At K&L Gates, our lawyers have a deep understanding of the RV Act and the RV Bill, and our lawyers have been advising the sector in Western Australia for more than 20 years.

We also advise boards, independent directors, board committees and management on a wide range of corporate governance issues.

We can assist with:

- Buying and selling retirement villages.
- Developing and constructing retirement villages.
- Drafting and amending residence contracts.
- The provision of a “legal sign-off” as to compliance with the RV Act.

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- Advice and interpretation of the legislation applicable to retirement villages.
- Training programs for employees and officers.
- The development of guides, manuals and checklists.
- Modifications to memorials.
- State and federal taxes.
- Advising on suitable governance and compliance frameworks.

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