



Government of Western Australia  
Department of Commerce

# **EXPLANATORY MEMORANDUM**

## **Retirement Villages Amendment Bill 2012**

## RETIREMENT VILLAGES AMENDMENT BILL 2012

### Overview of Bill

The Retirement Villages Amendment Bill 2012 (the Bill) amends the *Retirement Villages Act 1992* (the Act) to implement some key reforms identified in the final report of the *Statutory Review of Retirement Villages Legislation 2010* (final report) (tabled in the Parliament on 18 November 2010).

The Act regulates the relationship between residents, owners and administering bodies of retirement villages in Western Australia. Although not expressly stated, the primary objectives of the Act are to:

- outline the rights and obligations of residents, owners and administering bodies;
- determine how residence contracts and retirement village schemes can be terminated; and
- provide cost effective mechanisms for the resolution of disputes.

Key reforms in the Bill include:

- giving a group of residents the ability to appeal to the State Administrative Tribunal (SAT) against excessive increases in charges relating to the operating costs of the village;
- enabling regulations to be made that limit a former non-owner resident's liability to pay recurrent charges incurred after leaving the village;
- providing a mechanism for a statutory manager to be appointed in circumstances where the welfare or financial interests of residents may be at risk;
- prohibiting persons that represent an unacceptable risk for residents (such as those convicted of a criminal offence) from administering or being involved in the administration of a retirement village for a specified period of time;
- enabling regulations to be made specifying matters and clauses that must or must not be included in residence contracts; and
- enabling regulations to be made stipulating certain fees and charges which are not to be payable by the residents of a retirement village.

### Contracts to which the Bill's provisions will apply

Section 6(2) of the Act limits the contracts, agreements or arrangements to which the Act's provisions apply. The provisions only apply to new contracts, agreements or arrangements made or entered into after a particular provision commences. As a result, the current provisions of the Act only apply to contracts entered into after 10 July 1992. The final report highlighted that to address some of the issues adversely affecting residents of retirement villages, it is appropriate for some amendments to apply to all residence contracts, regardless of when they were entered into. Some amendments in this Bill will apply to, and therefore potentially alter, existing contracts that are already on foot.

Specifically, clauses 8 (new section 14A(5)), 11 (new sections 23(7), 24(10) and 25(2)), 15 (new section 57A(6)) and 21 (new section 5(3) in Division 2, relating to transitional regulations) contain provisions negating the effect of section 6(2). It is important to note however that the provisions will operate prospectively by only applying to events that occur after the new provisions commence.

The Bill's provisions are consistent with Government policy to support seniors, establish a fair marketplace for older consumers and protect the vulnerable. The amendments are also the first round of proposed amendments. Work has commenced on a second round of amendments that will appropriately implement remaining legislative reforms recommended by the final report.

**Clause 1      Short Title**

This clause provides the short title of the *Retirement Villages Amendment Act 2012* (amendment Act).

**Clause 2      Commencement**

This clause provides that sections 1 and 2 of the amendment Act will commence on Royal Assent and the remainder of the Act on a day fixed by proclamation. Different days can be fixed for different provisions.

**Clause 3      Act amended**

This clause provides that the amendment Act amends the *Retirement Villages Act 1992*.

**Clause 4      Section 3 amended**

Clause 4 amends section 3 of the Act to insert some additional definitions for terms used in the Act.

The new definition of “levy” recognises circumstances where an unforeseen operating expense within the village warrants village residents paying a single amount to cover that expense. A “levy” is to be contrasted with “recurrent charges” that are paid by residents to cover the day to day operating expenses of a village over a financial year. The definition is relevant to new section 57A (clause 15 of the Bill) and the amended definition of “premium” in section 3.

The definition of “premium” is amended to exclude “a levy”, for consistency with the current exclusion of “recurrent charges”.

Paragraph (g) of the definition of “service contract” is amended to clarify that in addition to “recreation services” a service contract may provide “recreation amenities or entertainment services or amenities”. Currently paragraph (g) refers only to “recreation services”. This clarification relates to service contract disputes that can be heard by the State Administrative Tribunal (SAT) under section 56 of the Act. (See the amendment to section 56 at clause 14 of the Bill below).

## **Clause 5      Section 6(2) amended**

Section 6(2) currently provides that a provision of the Act does not apply to contracts, agreements or arrangements which were entered into, prior to the provision's commencement. Clause 5 amends section 6(2) so that the amending Act can specify provisions for which section 6(2) does not have effect, so that those provisions will also apply to contracts signed prior to the provision's commencement.

This amendment relates to various sections in the amending Act that negate the effect of section 6(2). Specifically clauses clause 8 (new section 14A(5)), 11 (new sections 23(7), 24(10) and 25(2)), 15 (new section 57A(6)) and 21 (new section 5(3) in Division 2, relating to transitional regulations) contain a provision negating the effect of section 6(2).

A consequential amendment has also been made to section 6(1) to reference new sections 23(4) and 24(6). The reference to section 23(4) makes it clear that if the terms of a particular residence contract provide that a former resident's liability for recurrent charges will cease prior to the time provided in regulations, made for the purposes of section 23(3), the terms of the contract will apply. Similarly, if a residence contract specifies a lower interest rate for deferred recurrent charges than regulations made under section 24, the terms of the contract will apply.

Applying certain provisions of the amending Act to new and existing contracts recognises that residency arrangements in a retirement village are generally for the long-term and in relation to some matters it is appropriate for all residents to have the same contractual rights and responsibilities under the Act.

## **Clause 6      Section 11 amended**

Section 11 currently provides the Commissioner (including a delegate of the Commissioner) and any officer of the Department responsible for the administration of the Act with statutory immunity from liability for acts or omissions that occur in good faith in the performance or discharging of functions under the Act.

Clause 6 amends section 11 to include a statutory manager (and their agent or employee) who may be appointed under section 75B. It also makes provision for the Crown to be relieved of any liability it might otherwise have had in relation to any act or omission of the statutory manager that occurs in good faith.

**Clause 7      Section 13 amended**

Section 13 sets out certain rules relating to residence contracts and ensures that prior to signing a residence contract, prospective residents receive important information about the retirement village. The information is intended to assist prospective residents to make informed decisions on whether a particular village will meet his/her needs and expectations.

Clause 7(1) amends section 13(2) of the Act to increase the time within which such information must be provided, from 5 to 10 working days.

This amendment is also relevant to the amendments to section 14(1), explained in relation to clause 9 below.

Clause 7(2) amends section 13 to insert an additional subsection (4A) to provide that a fee or charge must not be imposed in relation to the provision of information or documents under sections 13(2) or 13(3). A penalty of \$5,000 will apply to a contravention of section 13(4A).

**Clause 8      Section 14A inserted**

**Section 14A: Residence contracts to comply with prescribed requirements**

Clause 8 inserts new section 14A into the Act so that the regulations may prescribe provisions or matters that must or must not be included, in residence contracts or in residence contracts of a specified kind. A person will be prohibited from entering into a residence contract with a prospective resident unless the contract complies with the regulations, and a penalty of \$20,000 will apply to a contravention of this prohibition.

Some of the prescribed provisions or matters will apply to residence contracts irrespective of when they were signed, while other provisions or matters will apply only to residence contracts entered into after the regulations commence. To enable this, clause 8 provides for the regulations to negate the effect of section 6(2) in relation to specified regulations or specified provisions of regulations made under section 14A(1).

Some regulations will apply to residence contracts generally, others to residence contracts of a specified kind. Residence contracts "of a specified kind" recognises the differences between residence contracts for lease/licence villages and residence contracts for strata or purple title villages.

To ensure residents benefit from the provisions, section 14A contains two deeming provisions. The first treats matters or provisions that must be included in a residence contract, so that these will be taken to be included in residence contracts to which the regulations apply. The other treats residence contracts containing excluded matters or provisions, as void to the extent of those matters or provisions.

Given the vulnerability of some older persons and the complex nature of many contracts, section 14A is intended to ensure that residence contracts in a retirement village set out important matters in a consistent way and do not impose inappropriate requirements on residents. For example, some residence contracts lack clarity as to when a resident will be entitled to get their premium repaid and others require residents to confer on the administering body an enduring power of attorney over the resident's personal affairs.

#### **Clause 9      Section 14 amended**

Section 14 of the Act provides a cooling off period within which a prospective resident can rescind the residence contract. Clause 9 amends subsection 14(1) to increase the cooling-off period, as outlined below:

- where the pre-contractual documents have been given to the prospective resident within the required period under section 13(2), the cooling off period increases from 5 to 7 working days from entry into the contract; and
- where section 13(2) has not been complied with, the cooling-off period increases from 10 to 17 working days after the date on which the documents are given to the prospective resident.

The amendments to section 14(1) complement the amendments to section 13(2), and recognise that residence contracts are complex documents that prospective residents need time to review, and if necessary, seek independent advice on.

When considered together, the periods specified in sections 13(2) and 14(1) will ensure that all prospective residents have at least 17 working days within which to review relevant documentation before being contractually bound to take up residency within the village.

#### **Clause 10      Section 18 amended**

Section 18(1) of the Act requires premiums paid by prospective residents to be held in trust until the resident moves into the village, or it becomes apparent that they will not. Clause 10(1) amends section 18(1) so that a premium can also be released from trust when a resident is entitled to enter into occupation of the premises and the cooling off period has expired.

The new provision retains the substance of section 18(1) and addresses a problem for administering bodies where releasing a premium from trust is held up because a resident delays moving into the retirement village. This can occur, for example, where a resident decides to take an extended holiday prior to moving into the village.

Section 18(5) of the Act contains an offence provision for contraventions of section 18 as a whole. In reviewing section 18, it was found that section 18(5) applies too broadly and should only apply to sections 18(1) and (4) because section 18(3) is a separate offence provision relating to non-compliance with conditions applying

to an exemption granted under section 18(2). Clauses 10(2) and 10(3) of the Bill seek to tidy up these provisions by inserting separate offence provisions for sections 18(1) and 18(4) in new sections 18(2A) and 18(5) respectively.

## **Clause 11      Sections 23 to 25 inserted**

### **Section 23: Recurrent charges payable by former residents**

Recurrent charges are paid by residents to cover the operating costs of a village. Currently the Act contains no provisions limiting the liability of former residents of lease/licence premises to pay recurrent charges. Most residence contracts, especially in villages operating on a for-profit basis (run by for-profit and not-for-profit organisations) impose an obligation on residents to continue paying recurrent charges after leaving the village, until a new lease/licence on their former unit is entered into. This can result in former residents paying recurrent charges for extended periods after leaving a village.

Clause 11 inserts new section 23 into the Act so that regulations can provide when a former resident's liability to pay recurrent charges will cease.

Section 23 will only apply to former residents who cease to occupy premises in the retirement village after the section commences and who do not have any proprietary interest in the village as a tenant in common under a purple title scheme, or as an owner under a strata title scheme of the residential premises that they formerly occupied. The regulations will apply except where a former resident's contract provides for the resident's liability to cease earlier than it would under the regulations, in which case the resident's liability ceases in accordance with the contract.

Once a former resident's liability to pay recurrent charges ceases, the administering body will be required to pay the recurrent charges at the same time as the resident would have been obliged to pay them, until the day on which a new resident becomes liable to pay recurrent charges in respect of the residential premises previously occupied by the former resident. This will ensure there is no shortfall in monies available for paying the village's operating expenses, due to the former resident's liability to pay those charges ceasing.

Administering bodies will also be prohibited from recovering the monies payable by them from residents within the retirement village, either by increasing recurrent charges or by imposing an additional fee or charge. A penalty of \$20,000 will apply to a contravention of this prohibition. This prohibition is not however intended to prevent an administering body seeking to cover any additional costs by, for example, amending new residence contracts to increase the premium amount a prospective resident pays to occupy premises within the village, or by including an additional amount as a deduction from any premium that will be repayable to those residents when they leave the village.



As identified in relation to clause 5 (section 6(2) above), section 23 will operate to benefit all non-owner residents who leave a village after the section commences regardless of when the contract was entered into. That is, section 6(2) will not apply in relation to regulations made for the purposes of section 23(3) and the recurrent charges liability of residents who entered into a contract before section 23 commenced, will cease in accordance with the regulations. An additional provision has been included at new section 23(2) to clarify the intention that section 23, in applying prospectively, will only apply to non-owner residents who leave a village after the section commences.

It is anticipated that regulations to be made under section 23(3) will need to :

- address concerns raised by industry about matters that are beyond their control that can delay the remarketing of a residence; and
- specify the period after which a former non-owner resident's liability to pay recurrent charges ceases.

The specified period will not start until those matters which are beyond the control of an administering body have been addressed. For example in relation to a deceased estate, probate or letters of administration will need to have been granted.

Limiting the application of section 23 to non-owner residents recognises that non-owner residents on lease/licence arrangements have virtually no control over the remarketing or sale of the former premises.

#### **Section 24: Recurrent charges may be deducted from premium repayable to former resident**

Clause 11 inserts new section 24 into the Act to allow non-owner residents to defer the payment of recurrent charges incurred after they have ceased to occupy the premises in the village, until their premium is repaid, at which time the deferred charges can be deducted from the amount payable to the former resident. Provision is made so that a former resident can decide at any time after ceasing to occupy premises that they wish to defer paying the recurrent charges. This will give former residents or their estates the flexibility to keep paying the recurrent charges when they fall due or to stop paying them if there is difficulty in doing so.

Provision is made for interest at the prescribed rate, or at a rate which by agreement or by contract is lower than the prescribed rate, to accrue in relation to any deferred recurrent charges.

An administering body that receives notice of an election to defer the payment of the recurrent charges will be required to cover the cost of those charges as they fall due until they can be deducted from the premium. This is intended to ensure that the operating costs of the village will continue to be met despite a decision of a former resident to defer paying the recurrent charges.

An administering body will also be prohibited from demanding or receiving payment of any recurrent charges that the former resident has elected be deferred and deducted from the premium, and a penalty of \$20,000 will apply to a contravention of this prohibition.

Section 24 will apply to all former non-owner residents, regardless of when they entered into a residence contract, due to section 24(10) negating the effect of section 6(2). In applying prospectively, section 24 will only apply to those recurrent charges incurred after the commencement of the section. The provision will therefore apply to all non-owner residents who became former residents before section 24 commenced but only in relation to recurrent charges incurred after the provision commences.

**Section 25: Administering body not to require payment in respect of prescribed matters**

Clause 11 inserts a new section 25(1) into the Act prohibiting an administering body from demanding or receiving payment from a resident or former resident in respect of any prescribed matter. Where a matter is prescribed, an administering body will not be able to charge any resident or former resident in relation to that matter. The purpose of section 25 is to stop an administering body charging residents for matters that are unrelated to the operating costs of the village. Such matters may include fees for membership of industry associations, certain legal or court costs incurred by the administering body, or overseas travel by the administering body. A penalty of \$20,000 will apply to a contravention of section 25(1).

Section 25(2) negates the effect of section 6(2) in relation to section 25(1) so that prohibited charges cannot be collected under existing contracts, once the relevant regulations commence.

**Clause 12      Section 52 amended**

Section 52 limits the SAT's capacity to make orders so that it cannot make orders that are inconsistent with an applicable code or a residence contract. In order for some reforms in the Bill to operate effectively, clause 12 amends section 52 so that in some instances the SAT may make orders that are inconsistent with a residence contract. The amendment provides that section 52(1)(b) will not apply to an order made under new sections 55(3) or 57A(4), or new Part 5A; or an order that is made in relation to a residence contract under section 56(4). This amendment will enable the SAT to make appropriate orders under:

- new sections 55 and 57A (clauses 13 and 15 of the Bill respectively) which give the SAT the capacity to hear disputes regarding a residence contract's compliance with regulations made under new section 14A, and regarding an increase in recurrent charges or the imposition of a levy respectively, and make orders including varying or cancelling the terms of a residence contract;

- new Part 5A (clause 16 of the Bill), which provides for the SAT to make orders appointing a statutory manager to perform certain functions of the administering body of a retirement village; and
- amended section 56 (clause 14 of the Bill), which makes it clear that the power of the SAT to make orders under section 56 in relation to the provision of a service or amenity, may include an order varying or cancelling the terms of the contract, and will also apply to a residence contract where the provision of the service or amenity is provided for in that contract rather than in a separate service contract.

## **Clause 13      Section 55 inserted**

### **Section 55: Applications to SAT in relation to residence contracts**

Clause 13 of the Bill inserts a new section 55 so that the parties to a residence contract, or the Commissioner, may apply to the SAT to resolve a dispute as to whether the residence contract complies with a requirement of regulations made for the purposes of section 14A.

New section 55 will also give the SAT the capacity to make orders that apply to other residence contracts, including residence contracts of another retirement village. This extension of the SAT's powers is aimed at ensuring broad contractual compliance with a requirement of regulations made in relation to section 14A and to reduce the potential for multiple disputes requiring resolution by the SAT on the same matter.

In deciding whether its orders should apply to other residence contracts, the SAT may order an administering body or other person to provide it with specified information or documents in relation to any residence contract, if the SAT is of the opinion that the order it intends making may be relevant to other residence contracts. The SAT may, at its own initiative or at the request of the administering body or other person, join the relevant administering body or other person as a party to the proceedings.

The clause also clarifies that the authority of the SAT on its own initiative, to require the administering body or other person to provide specific information or documents, does not limit the right of a party to the proceeding to apply to the SAT under section 35 of the *State Administrative Tribunal Act 2004* (SAT Act) for an order that a third party produce any relevant document or material. Similarly, the authority of the SAT to order that the administering body or other person providing information be joined as a party to the proceeding, does not limit the SAT's powers under section 38 of the SAT Act to join additional persons as parties to the proceeding.

In relation to the orders that may be made, the SAT will be able to specify terms of the residence contract that are to be varied or cancelled, order specific performance of the residence contract, order the payment of a sum of money or make such other orders as it considers appropriate and may specify the residence contracts to which the orders apply.

## **Clause 14      Section 56 amended**

Clause 14 amends section 56 by inserting new subsection (1A) to clarify that a reference to a service contract includes a reference to a residence contract, but only to the extent that the residence contract provides for the provision of a service or amenity as defined in relation to "service contract" at section 3.

For this purpose, paragraph (g) of the definition of "service contract" in section 3 of the Act is also amended (see clause 4 above) to make it clear that the services to which this definition applies include recreation or entertainment services or amenities.

The insertion of the new section 56(1A) recognises that the provision of services or amenities to a resident may be in the residence contract rather than in a separate service contract.

This amendment, and the amendment to the definition of "service contract", reflects decisions of the District Court and the SAT where it has been found that:

- a residence contract, in so far as it relates to the provision of services to residents, is to be construed as being a service contract rather than a residence contract;
- the provision of facilities, for which an amenities fee is paid, amounts to the provision of "recreational services" for the purposes of the definition of "service contract"; and
- a "service" includes physical structures such as a workshop, swimming pool, gymnasium or bowling green.

Clause 14(2) amends section 56 for consistency with new section 55 in relation to the SAT's capacity to apply its orders to other contracts. That is, under section 56(3) as amended, if the SAT is of the opinion that an order, made under section 56, may be relevant to other residence contracts (including contracts that relate to another retirement village), it will be able to require the administering body of a retirement village or other person to provide specified information or documents in relation to any residence contract, and may, at its own initiative or at the request of the administering body or other person, join the administering body or other person as a party to the proceedings. Clause 14 also contains provisions similar to those outlined in clause 13 above, in relation to sections 35 and 38 of the SAT Act not being limited by these new powers in relation to information gathering.

This provides the SAT with the flexibility to request information and documents in relation to service contracts within the retirement village to which a particular application applies, or another retirement village, and if appropriate apply its orders to all such contracts. This is considered an efficient and effective way of dealing with a matter consistently across service contracts containing like terms in Western Australia.

Clause 14(3) inserts new paragraph 56(4)(aa) to clarify that the SAT can order the variation or cancellation of terms in a service contract in relation to a dispute under section 56. This addition tidies up an anomaly in section 56 of the Act whereby a party to a service contract could propose a variation or cancellation of any of the terms of the contract (paragraph 56(1)(a)) and could apply to the SAT in relation to that matter, but the SAT did not have the express power to order that the terms of the contract be varied or cancelled. The amendment is also consistent with new section 55(3) that applies to disputes in relation to residence contracts. (Refer to clause 13 above.)

**Clause 15      Section 57A inserted**

**Section 57A: Disputes in relation to recurrent charges or levy payable by residents**

Clause 15 inserts a new section 57A so that the residents of a retirement village may agree by special resolution to apply to the SAT in relation to a dispute about an increase in recurrent charges or the imposition of a levy. In relation to an application under new section 57A, the SAT may make such orders as it considers appropriate which may include alternative strategies for the provision of amenities and services for example, by discontinuing certain services or engaging a cheaper service provider.

Section 57A includes a provision clarifying that it is not intended to limit the capacity of an individual resident to apply to the SAT under section 56(1) and contains the provision limiting the effect of section 6(2) so that residents will be able to object to an increase in recurrent charges or the imposition of a levy regardless of when their contract was entered into.

Section 57A recognises that many residents within retirement villages are on limited incomes such as the aged pension and as such would be adversely affected by substantial increases in recurrent charges or the unexpected imposition of a levy. The ability to take such matters to SAT will safeguard residents against excessive or unwarranted increases in recurrent charges or the unreasonable imposition of a levy.

## **Clause 16      Part 5A inserted**

### **Part 5A — Statutory manager**

#### **Section 75A: Terms used**

One of the most important reforms in the Bill relates to circumstances in which an administering body may be struggling to meet its statutory or contractual obligations and residents raise significant concerns with the Commissioner. Clause 16 of the Bill inserts new Part 5A into the Act enabling a statutory manager to be appointed by the SAT. A primary objective of these provisions, which it is anticipated will be utilised rarely, is to enable the Commissioner to take some action, on behalf of residents, as early as possible. Section 75A inserts definitions for terms used in Part 5A.

“Assets” is relevant to orders of the SAT relating to the remuneration and expenses of the statutory manager. The definition references the land of the “owner” of the village regardless of whether it is the person administering the village or not. This reflects the definition of “administering body” in section 3 of the Act.

“Functions” is a reference to the powers and duties of the administering body that a statutory manager may be appointed to perform.

“Property” links with the definition of “assets” and “statutory manager” references a person appointed under section 75B.

#### **Section 75B: SAT may appoint statutory manager on application of Commissioner**

Section 75B confers on the SAT the power to appoint a statutory manager on application of the Commissioner. A statutory manager can be appointed to perform:

- all the functions of the administering body;
- specified functions of the administering body; or
- all the functions other than specified functions of the administering body.

The provisions have been drafted to give the SAT the ability to make orders that address the particular issues within the retirement village. Further, in deciding whether to make an order the SAT must satisfy itself that:

- the wellbeing or financial interests of the residents of the retirement village may be at risk (section 75B(5)(a));
- the administering body has contravened, or is contravening, an order made by the SAT or a court in relation to the administering body or the retirement village (section 75(5)(b));
- or

- the administering body has contravened, or is contravening, section 18 which requires a premium to be put into trust until the new resident has moved into the retirement village, or another prescribed provision of the Act or regulations (section 75B(5)(c)).

In addition, section 75B recognises that there may be circumstances in which more than one statutory manager needs to be appointed to a particular retirement village. The administering body of the village will be given a copy of any application and be a party to any proceeding.

In making an application, the Commissioner will have obtained the statutory manager's consent to being appointed (see section 75C) and will be prepared to make recommendations as to the terms and conditions that will apply to the appointment.

In assessing the wellbeing or financial interests of residents, the SAT will be required to have regard to the prescribed provisions of any applicable code, such as clauses 1.3 and 1.5 of the *Code of Fair Practice for Retirement Villages 2009* (the Code). Clause 1.3 sets out general principles for all involved in the provision of retirement villages and includes matters such as "the well-being and interests of residents, together with the rights of administering bodies, must be given due consideration" and "residents must be treated fairly and not subject to abuse or exploitation". Clause 1.5 deals with residents' basic rights, including that the administering body must respect the residents' rights to "privacy" in the residential premises and to "quiet enjoyment of his or her residential premises and any communal amenities".

An order under section 75B will specify a period of effect and the Commissioner cannot be required to give an undertaking as to damages in making an application to have a statutory manager appointed.

#### **Section 75C: Proposed statutory manager must consent to appointment**

Section 75C reflects the process by which a statutory manager may be selected. That is, prior to making an application under section 75B, the Commissioner will use an administrative process to identify the appropriate person, and obtain their written consent to being appointed as statutory manager.

#### **Section 75D: Variation and revocation of orders**

Section 75D gives the SAT the ability to vary or revoke its orders upon application of the Commissioner, the statutory manager or the administering body. The provision seeks to provide flexibility so that depending on the circumstances, orders can be appropriately varied or revoked.

For example, a statutory manager may need to apply for orders to be varied in circumstances where its functions need to be broader than those provided in the original orders.

#### **Section 75E: Matters to be dealt with in order appointing a statutory manager**

Section 75E lists a range of matters that are to be addressed in any orders made by the SAT under section 75B. Such orders must:

- set out the terms and conditions that are appropriate to the appointment, including as to the remuneration and expenses that will be payable to the statutory manager;
- specify the assets of the administering body that are to be under the statutory manager's control; and
- specify the assets of the administering body that may be applied for the performance by the statutory manager of the functions conferred on it or the payment of the remuneration and expenses of the statutory manager.

Under section 75E the SAT will also be able to give directions that are necessary or expedient for the purposes of the section and the provision makes it clear that the Crown, the Minister and the Commissioner will not be liable for the remuneration and expenses of a statutory manager.

#### **Section 75F: Other matters arising from appointment of statutory manager**

Section 75F has been included to ensure that once a statutory manager has been appointed, the administering body and statutory manager will be able to perform their respective functions separately but subject to the same terms. For example, the administering body will be prohibited from performing any of the functions that the statutory manager is performing and a penalty of \$20,000 will apply to a contravention of this prohibition.

In addition, the statutory manager will have to perform functions in accordance with any residence contract, service contract or other contract, agreement or arrangement to which the administering body is a party and which relates to the performance of that function.

Section 75F also provides:

- that any act or thing done, in good faith, by or with the consent of the statutory manager, in the performance of any function, will be valid and effectual for the purposes of the Act; and
- a reporting mechanism whereby the regulations may prescribe information that the statutory manager must give to specified persons in relation to any function that the statutory manager is appointed to perform.



**Section 75G: Appointment of both statutory manager and external administrator**

Section 75G is inserted to manage the situation where an external administrator may be appointed under Chapter 5 of the *Corporations Act 2001* (Commonwealth) either before or after a statutory manager is appointed.

In the event that an external administrator is appointed, the statutory manager will be required to inform the external administrator of their appointment as statutory manager and obtain the administrator's written authorisation to perform any function that it has been appointed to perform. The authorisation may also be subject to conditions and limitations imposed by the external administrator.

**Section 75H: Administering body to cooperate with statutory manager**

Like section 75F, section 75H is intended to manage the relationship between the statutory manager and the administering body, by requiring the administering body to co-operate with the statutory manager so that the statutory manager is able to perform the functions conferred on it. A penalty of \$20,000 will apply to contravention of this requirement.

Under this section, the administering body may also be required to answer questions orally or in writing, produce relevant documents, give the statutory manager access to relevant electronic records and provide such assistance as the statutory manager reasonably requires.

The administering body will also be prohibited from hindering or obstructing the statutory manager in performing the functions that have been conferred by the SAT and may be fined up to \$20,000 for contravening this provision.

**Section 75I: State Administrative Tribunal may require reports and recommendations from statutory manager**

Section 75I provides the SAT with the ability, of its own initiative or upon application of the Commissioner, to order a statutory manager to prepare a report and make recommendations concerning the retirement village in respect of which the statutory manager has been appointed. In making such an order, SAT is to specify the matters that are to be the subject of the statutory manager's report and recommendations, and the period within which the report is to be prepared.

This provision recognises that there may be circumstances in which the SAT is satisfied that a statutory manager needs to be appointed but is unclear as to exactly which functions will need to be performed. In such and similar circumstances, a statutory manager could be appointed for the limited purpose of reporting to the SAT on the issues that need to be addressed in relation to a particular village.

## **Clause 17      Sections 76 to 77C inserted**

Clause 17 inserts new sections 76 to 77C to prohibit certain persons from being the administering body of a retirement village or being involved in the administration of a retirement village. The provisions have been drafted so that both corporate entities and individuals may be prohibited.

### **Section 76: Persons who are not to be involved in administration of retirement villages**

New sections 76(1) and 76(2) together prohibit certain persons from being the administering body of a retirement village or being in any way, whether directly or indirectly, concerned in the administration of a retirement village.

Persons who have been made bankrupt or who have been convicted of certain serious offences, such as offences involving violence to another person or sexual offences, are prohibited. Similarly, persons who have been disqualified from managing corporations under Part 2D.6 of the Corporations Act (Cth) or who were a director when a corporation was involuntarily wound up under the Corporations Act are prohibited. There is also provision for regulations to prescribe persons to whom section 76 will apply. A penalty of \$20,000 applies to a contravention of these prohibitions.

It is also an offence under section 76(4) to employ or engage a prohibited person who will in any way be directly or indirectly concerned in the administration of the village, and a penalty of \$20,000 applies to a contravention of section 76(4).

The legislation includes a defence against the contraventions, in cases where the prohibited person holds an exemption certificate from the Commissioner, issued under section 77C.

The words “directly or indirectly concerned in the administration of the village” are intended to capture the range and variety of corporate structures that can apply with retirement villages. For example, it may be that a person on the board of a company that owns the retirement village is a prohibited person. Whether that person will require an exemption certificate will depend on the decisions that the board makes in relation to the administration of the retirement village and the level of influence the person has in relation to the decisions of the board.

Alternatively, it may be that the person is not in any way directly or indirectly concerned in the administration of the village because the board does not make such decisions, or the board’s policy covering such issues, requires the person to absent him/herself from any decisions relating to the retirement village.

**Section 77A: Limitation of period for which section 76 applies to certain persons**

Section 77A provides a limitation period for persons prohibited under section 76. The period is 5 years from the happening of a specified event. That is:

- in relation to section 76(1)(b), the period is 5 years from the time of the person's conviction; or if the conviction results in a term of imprisonment, from the time of the person's release from custody;
- in relation to section 76(1)(c) the period is 5 years from the time of the person's disqualification from managing corporations; and
- in relation to section 76(1)(d) the period is 5 years from the corporation's involuntary winding up.

**Section 77B: Offences by persons involved in administration of retirement village**

Section 77B is an additional offence provision for employees or contractors who are in any way directly or indirectly concerned in the administration of a retirement village and who subsequently become a prohibited person. Under section 77B such a person must provide information on being a prohibited person under section 76, to their employer or the person who engaged them, within 14 days of becoming prohibited. Contravening section 77B could result in a fine of up to \$20,000. There is also an offence relating to the provision of false or misleading information under this section which may also be subject to a fine of \$20,000.

**Section 77C: Commissioner may grant exemption certificates**

Section 77C recognises that there may be circumstances in which a person should be allowed to continue as the administering body or as a person involved in the administration of the village despite being prohibited under section 76. Section 77C provides the Commissioner with the capacity to grant an exemption on the basis that neither the wellbeing nor financial interests of residents within the village will be at risk if the prohibited person continues their role in administering the village. Exemption certificates may be granted subject to conditions and limitations specified in the certificate and may be revoked by written notice.

Similarly, if a person holding an exemption certificate becomes a person to whom section 76 applies again – the exemption certificate will be immediately cancelled. There is a requirement to return exemption certificates that have been revoked or cancelled to the Commissioner within 14 days, and a penalty of \$20,000 applies if the exemption certificate is not so returned.

**Clause 18      Section 80 amended**

Clause 18 amends section 80 of the Act to increase the time for bringing proceedings for offences against the Act, from 2 years to 3 years from the date of the alleged offence.

**Clause 19      Section 82 amended**

Currently regulations made under the Act may create an offence that is subject to a maximum penalty of \$500. Clause 19 amends section 82(3) to increase the maximum fine to \$5,000.

**Clause 20      Schedule 1 Division 1 heading inserted**

Clause 20 inserts a new subheading in Schedule 1, to turn the existing Schedule into Division 1. This is consequential to the amendments in clause 21 which insert Division 2 in Schedule 1 containing additional transitional provisions.

**Clause 21      Schedule 1 Division 2 inserted**

Clause 21 inserts Division 2 of Schedule 1.

Clause 4 in Division 2 of Schedule 1 deems persons who are prohibited when sections 76 and 77A to 77C commence, to have been granted an exemption certificate for a period of six months from the commencement of those sections. Such persons may within that six month period, apply under section 77C for an exemption certificate, and the exemption certificate that is taken to have been granted under Clause 4 of Division 2 of Schedule 1 will continue in effect until the application under section 77C is determined, at which time it will be cancelled.

There is an additional obligation on employees and contractors who are directly or indirectly concerned in the administration of a retirement village to inform the person by whom they were employed or engaged, within 14 days of the commencement of sections 76 and 77A to 77C, that section 76 applies to them and that they are a prohibited person. A penalty of \$20,000 applies for a contravention of this requirement.

Clause 5 in Division 2 of Schedule 1 provides for the making of transitional regulations in relation to a matter that is of a transitional, savings or application nature in connection with amendments made to the Act by the amending Act.

There is also provision so that transitional regulations may modify the operation of section 6(2) in respect of any matter specified in the Regulations. Any transitional regulations must however be made within 12 months of the day on which section 21 of the amending Act commences.

Transitional regulations may provide that a state of affairs is to be taken to have existed or not on and from a particular day (the operative day) that is earlier than the day on which the Regulations are published in the *Gazette*, provided that the day is not earlier than the day on which section 21 of the amending Act commences. Should such a provision be included in transitional regulations, it will not operate to prejudicially affect the rights of any person (other than the State or an authority of the State) existing before Gazettal or to impose liabilities on any person in relation to anything done or not before the day of Gazettal of the regulations.