2012
Retirement Villages Amendment Bill

EXPLANATORY MEMORANDUM

Department of Commerce
Government of Western Australia
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 are established; and
- provide cost effective mechanisms for the resolution of disputes.

Section 6(2) of the Act limits the contract’s application to:

- contracts entered into after 10 July 1992; and
- contracts to which the Bill’s provisions will apply.

The provisions only apply to contracts that were 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:

- entered into before the Bill’s provisions apply;
- made at less than arm’s length to protect the interests of the administrator or the administrator’s associates.

Contracts to which the Bill’s provisions will apply:

- must contain certain fees and charges;
- must contain a minimum period of residence;
- must contain a mechanism for a statutory manager to be appointed in circumstances where the welfare or financial interests of residents may be at risk;
- enable regulations to be made specifying matters and clauses that must or must not be included in residence contracts;
- enable regulations to be made specifying the procedures 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 specifying the procedures for the resolution of disputes;
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- outline the rights and obligations of residents, owners and administering bodies;
- determine how residence contracts and retirement village schemes are established; and
- provide cost effective mechanisms for the resolution of disputes.

Legislation 2010 (final report) (tabled in the Parliament on 18 November 2010) in the final report of the Statutory Review of Retirement Villages Legislation 2010 (the final report) to implement some key reforms in Retirement Villages Act 1992 (the Act) amends the

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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. 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".

The definition of "premium" is amended to exclude "a levy", for consistency with the current exclusion of "recurrent charges". 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".
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) to include a statutory manager (and agent or employee) who may be appointed under section 75B.

Clause 6 amends section 11 to include a statutory manager (and agent or employee) who may be appointed under section 75B.

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.

A consequential amendment has also been made to section 6(1) to remove a reference to section 75A(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 of duties or the discharge 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 in respect of the performance or discharge of functions of a statutory manager.
Clause 7

Section 13 amended

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 14A 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).

Section 14A inserted

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. Residence contracts of a specified kind recognises the differences between residence contracts generally, others.

Some regulations will apply to residence contracts generally, others will apply to leasehold or strata title residence contracts for a specified period. The difference between residence contracts of a specified kind, residence contracts generally, others.

Clause 8 makes under section 14A(1) a provision to provide that regulations or specified provisions of regulations in relation to specified provisions or matters that must or must not be included in residence contracts of a specified kind will apply only to residence contracts entered into after the regulations come into force. Some of the prescribed provisions or matters will apply to residence contracts entered into before the regulations come into force.

Section 14A: Residence contracts to comply with prescribed requirements

Clause 8 amended

Section 14A inserted

Clause 8(4A)

A penalty of $20,000 will apply to a contravention of section 14A or 13(2) of the Act or to the provision of information or documents under section 13(2) of the Act that are false or misleading in relation to a regulated matter.

 Clause 8(2) amends section 13 to insert an additional subsection (4A) explaining in relation to clause 9 below the amendment is also relevant to the amendments to section 13.

This amendment is also relevant to the amendments to section 13.

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 leasehold or strata title residence contracts for a specified period.

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 these will be taken to be included in a residence contract 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 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 period specified in section 13(2), the cooling-off period increases from 5 to 7 working days after the date of delivery of the documents.

The new provision recognizes that residence contracts are complex documents that prospective residents need time to review, and if necessary seek independent advice on.

The cooling-off period will expire when the prospective resident has taken up residency within the village. The new provision to section 14(1) complements the amendments to section 13(2) and recognizes that residence contracts are complex documents that prospective residents need time to review, and if necessary seek independent advice on.

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when they leave the village.

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, unless they have sold their unit.

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

The regulations will provide when a former resident's liability to pay recurrent charges ceases in accordance with the contract.

Section 23 will only apply to former residents who cease to occupy a residential premises after the section commences and who do not have any proprietary interest in the village. This will ensure there is no shortfall in monies available for paying the village's operating expenses, the administering body will also be prohibited from recovering the recurrent charges.

Penalties of $20,000 will apply to a contravention of the prohibition. The prohibition is not however intended to prevent an administrator of a village taking any action to cover any additional costs by, for example, increasing recurrent charges or by imposing an additional fee or charge. Where the regulations do not cover any additional costs, the administrator may use any other means available to cover the village's operating expenses.
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 administering body that receives notice of an election to defer the recurrent charges in relation to any deferred recurrent charges, on the written agreement of the former resident, is empowered to defer the recurrent charges. Provision is made for interest at the prescribed rate, of an amount calculated on the amount deferred. 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, the administrator or executor will need to address concerns raised by industry about matters that are beyond their control that can delay the remarketing of a former resident’s property and beyond any period by which the former resident has been required to pay the recurrent charges.

There is a provision that regulations made under section 23(3) will apply to non-owner residents only on the written agreement of the former resident. It is anticipated that regulations will need to:

- address concerns raised by industry about matters that are beyond their control that can delay the remarketing or sale of the former resident’s property;
- specify the period after which a former resident’s liability to pay recurrent charges ceases.

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

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. 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 the flexibility to keep paying the recurrent charges when they are able to do so, or to stop paying them if there is difficulty in doing so.

Provision is made for interest at the prescribed rate, of an amount calculated on the amount deferred. The specified period will not start until those matters which are beyond the control of an administering body have been addressed.

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 recurrent charges. This will be done in accordance with the regulations made for the purposes of section 23(3) and the recurrent charges made for the purposes of section 23. The section is intended 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, regardless of whether a former resident had a contract prior to the commencement of the section.
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 regulations under existing Part 5 or under new sections 56(4) or 57A(4). This amendment provides that section 25(1) will not apply to an order made under new sections 56(4) or 57A(4) of new Part 5 or an order made under new section 56A(4). Where a matter is prescribed, an administering body may make an order that are inconsistent with a residence contract. The SAT may make such orders in relation to such a matter.

Section 52 amends the SAT’s capacity to make orders so that it cannot make orders under existing section 52(1) so that prohibited charges cannot be collected under existing regulations.

Clause 12 amends section 12 so that it may make orders 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(3) or 57A(4), or new Part 5A; or an order made under new section 56A(4). This amendment provides that section 25(1) will not apply to an order made under new sections 56A(4). Where a matter is prescribed, an administering body may make an order that are inconsistent with a residence contract. The SAT may make such orders in relation to such a matter.

The purpose of section 52 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 52(1).

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(3) or 57A(4), or new Part 5A; or an order made under new section 56A(4). Where a matter is prescribed, an administering body may make an order that are inconsistent with a residence contract. The SAT may make such orders in relation to such a matter.
Clause 13

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.

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 under the Act. The SAT may 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 specified information or documents, does not limit the right of a party to apply to the SAT under section 35 of the SAT Act for an order to produce any relevant document or material. Similarly, the authority of the SAT to order that a person provisionally provide information or documents in relation to the SAT may not limit the right of a party to apply to the SAT under section 38 of the SAT Act for an order to provide specified information or documents or to join additional persons as parties to the proceedings. The SAT may also make orders that apply to other residence contracts, including residence contracts of another retirement village, if the SAT is of the opinion that the order it intends making may be relevant to other residence contracts.

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, 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 specified information or documents, does not limit the right of a party to apply to the SAT under section 35 of the SAT Act for an order to produce any relevant document or material. Similarly, the authority of the SAT to order that a person provisionally provide information or documents in relation to the SAT may not limit the right of a party to apply to the SAT under section 38 of the SAT Act for an order to provide specified information or documents or to join additional persons as parties to the proceedings. The SAT may also make orders that apply to other residence contracts, including residence contracts of another retirement village, if the SAT is of the opinion that the order it intends making may be relevant to other residence contracts.
 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 services or amenities as defined in section 3 of the Act.

Clause 14 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 relating to another retirement village), it will be able to require the administering body of a retirement village in relation to any residence contract, or any person, to provide specified information or documents in relation to any residence contract.

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.

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 relating to another retirement village), it will be able to require the administering body of a retirement village in relation to any residence contract, or any 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 another person as a party to the proceedings, join the administering body or other person as a party to the proceedings. Clause 14 also amends 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 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.

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 SAT may make such orders as it considers appropriate which may include alternative strategies for the provision of amenities and services to residents regardless of their contract. 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 SAT may make such orders as it considers appropriate which may include alternative strategies for the provision of amenities and services to residents regardless of their contract.

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 to residents regardless of their contract.
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;
- all the functions other than specified functions of the administering body; or
- 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 retirement village (section 75B(5)(b));
- or

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Section 75C: powers of statutory manager

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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 will be a party to any proceeding to make an application under section 75B. The Commissioner will use an administrative process to identify the appropriate person, and obtain 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.

An order under section 75B will specify a period of effect and the conditions that will apply to the appointment.

The administering body has contravened, or is contravening, elsewhere in circumstances where the functions need to be broader than those provided in the original order.

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 the SAT can respond to changes in circumstances.

Section 75E: Proposed statutory manager must consent to appointment

A statutory manager cannot be required to give an undertaking as to damages in making an application to have a statutory manager appointed (section 75C).

Section 75F: Variation and revocation of orders

Section 75F reflects the process by which a statutory manager may be appointed. 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 75G: Proposed statutory manager must consent to appointment

The statutory manager's consent is required to be given in accordance with 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 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 "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 or private recreational or communal residential facilities", clause 1.5 deals with residents' basic rights, including that the administering body must respect the residents' rights to "peace and quiet", and that the Code must be read in conjunction with the prescribed provisions of any applicable code.

In assessing the wellbeing or financial interests of residents, the SAT must have regard to the prescribed provisions of any applicable code.

Section 75H: Variation and revocation of orders

Section 75H 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 the SAT can respond to changes in circumstances.

An order under section 75B will specify a period of effect and the conditions that will apply to the appointment.

The administering body has contravened, or is contravening, elsewhere in circumstances where the functions need to be broader than those provided in the original order.

Section 75I: Proposed statutory manager must consent to appointment

A statutory manager cannot be required to give an undertaking as to damages in making an application to have a statutory manager appointed (section 75C).

Section 75J: Variation and revocation of orders

Section 75J reflects the process by which a statutory manager may be appointed. 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 75K: Proposed statutory manager must consent to appointment

The statutory manager's consent is required to be given in accordance with the prescribed provisions of any applicable code, such as clauses 1.3 and 1.5 of the Code. Clause 1.3 sets out 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 "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 or private recreational or communal residential facilities", clause 1.5 deals with residents' basic rights, including that the administering body must respect the residents' rights to "peace and quiet", and that the Code must be read in conjunction with the prescribed provisions of any applicable code.

In assessing the wellbeing or financial interests of residents, the SAT must have regard to the prescribed provisions of any applicable code.

Section 75L: Variation and revocation of orders

Section 75L 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 the SAT can respond to changes in circumstances.
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;
- 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 regulations made for the purposes of the Act and the regulations made for the purposes of the Act and will be valid and effective for the purposes of any function, 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 effective for the purposes of the Act and the regulations made for the purposes of the Act.

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 administrator will be able to perform the regulatory functions separately, and the statutory manager will be able to perform the statutory functions separately.

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 administrator is a party and which relates to the performance of that function.

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 regulations made for the purposes of the Act.

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 effective for the purposes of the Act and the regulations made for the purposes of the Act;
- 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 effective for the purposes of the Act and the regulations made for the purposes of the Act.

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 effective for the purposes of the Act and the regulations made for the purposes of the Act.
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.

The administering body will also be prohibited from hindering or obstructing the statutory manager in performing the functions that have been conferred on it. By providing such assistance as the statutory manager reasonably requires, 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.

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. The SAT must specify the matters that are to be the subject of the statutory manager's report and the period within which the report is to be prepared and submitted.

This provision recognises that there may be circumstances in which the SAT is satisfied that a statutory manager needs to be appointed.

Explanatory memorandum

Retirement Villages Amendment Bill 2012
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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 the village because the person is not in any way directly or indirectly concerned in the administration of the village.

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 by being in any way 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. 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 an offence under section 76(4) to employ or engage a prohibited person who will in any way directly or indirectly be concerned in the administration of the village. 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 village.

Alternatively, it may be that the person is not in any way directly or indirectly concerned in the administration of the village because the person is not in any way directly or indirectly concerned in the administration of the 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.

Similarly, if a person holding an exemption certificate becomes a prohibited person, exemption certificates may be granted subject to conditions and limitations specified in the certificate and may be revoked by a written notice.

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 prohibited under section 76. Section 77B provides that a person involved in the administration of the village must provide information on being a prohibited person under section 76, to their employer or 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 up to $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 a retirement village despite being prohibited. 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 put 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 a written notice. Similarly, if a person holding an exemption certificate becomes a prohibited person 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 certificate is not so returned.

Explanatory memorandum
Retirement Villages Amendment Bill 2012
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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 provide for the making of transitional regulations in relation to a matter that is a matter of the making of transitional regulations in connection with amendments made to the Act by the Retirement Villages Amendment Act.

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 under sections 76 and 77A to 77C of the Act to have been granted an exemption certificate for a period of six months from the commencement of those sections. Persons who are prohibited under sections 76 and 77A to 77C of the Act to have been granted an exemption certificate within six months from the commencement of those sections must provide to the person by whom they were employed or engaged details of the person to whom they were granted an exemption certificate and the period of time for which they were granted an exemption certificate.

Clause 5 in Division 2 of Schedule 1 provides for the making of transitional regulations in relation to a matter that is a matter of the making of transitional regulations in connection with amendments made to the Act by the Retirement Villages Amendment Act.

Clause 12
Schedule 2 inserted
Clause 12 inserts Schedule 2.

Clause 17
Schedule 1 Division 1 heading inserted
Clause 17 inserts a new subheading in Schedule 1.

Clause 18
Section 82 amended
Currently regulations made under the Act may create an offence that is subject to a maximum penalty of $500. Clause 18 amends section 82 of the Act to increase the maximum penalty to $5,000.

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 of the Act to increase the maximum penalty to $5,000.

Clause 20
Schedule 1 Division 1 heading inserted
Clause 20 inserts a new subheading in Schedule 1, to provide for the making of transitional regulations in relation to a matter that is a matter of the making of transitional regulations in connection with amendments made to the Act by the Retirement Villages Amendment Act.

Clause 21
Schedule 1 Division 2 inserted
Clause 21 inserts Division 2 of Schedule 1.
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 impose liabilities on any person in relation to anything done or not done before the day of Gazette. It will not prejudicially affect the rights of any person (other than the State or an authority of the State) existing before Gazette or to impose liabilities on any person in relation to anything done or not done before the day of Gazette.