



Department of **Energy, Mines,
Industry Regulation and Safety**
Consumer Protection

EXPLANATORY MEMORANDUM

Retirement Villages Amendment Bill 2024

RETIREMENT VILLAGES AMENDMENT BILL 2024

Overview of Bill

The Retirement Villages Amendment Bill 2024 (Bill) will implement the recommendations of the Decision Regulatory Impact Statement – *Stage Two of proposed reforms to Retirement Villages Legislation in Western Australia* (D-RIS) completed in January 2022. The D-RIS made 35 recommendations for reform including recommendations for a range of amendments to the *Retirement Villages Act 1992* (WA) (Act).

The provisions in the Bill provide for, among other things, the following:

- Inclusion of new disclosure requirements to provide for earlier, clearer disclosure of type of tenure offered, availability of facilities and services and the costs of entering, living in and leaving a village. These amendments will include a requirement for the publication of information about community arrangements at the village to make it easier for prospective residents to compare the features of villages.
- Establishment of a public database administered by the Department of Energy, Mines, Industry Regulation and Safety (DEMIRS) - Consumer Protection Division (Consumer Protection) to provide prospective residents with information about retirement village living generally and a capacity to compare the features of villages online.
- A new statutory time limit of 12 months after a resident's departure from a village for payment of exit entitlements, with a corresponding requirement for buy-back of strata and community titled properties within 12 months of a resident's departure.
- A capacity for a resident who enters aged care to request assistance from the operator with the cost of daily accommodation payments until such time as the former resident's exit entitlement is paid.
- Clarification of the obligations of operators and residents to pay for capital works in a village including:
 - definitions for capital maintenance and capital replacement that will be supported by new guidance materials;
 - introduction of requirements for operators to prepare capital works plans and to maintain a capital maintenance fund; and
 - enhanced budgeting and financial reporting obligations for operators, with new enforcement provisions.
- New restrictions on the ability of operators to require a resident to contribute to the costs of reinstatement and renovation of a unit on departure from a retirement village, supported by a requirement for preparation of a condition report on commencement of occupation, and on departure.

- New processes facilitating change and redevelopment of villages to ensure that residents are consulted, and that their approval is sought where appropriate as follows:
 - for modifications that do not result in the temporary or permanent closure of a village, agreement of residents will be required through endorsement of the proposal by special resolution, with a right of appeal to the State Administrative Tribunal (SAT) if residents do not consent; and
 - for proposals that require the temporary or permanent closure of the village, SAT approval will be required, and additional requirements can be imposed by SAT to protect the interests of residents.
- SAT will also have the power to order the Registrar of Land Titles to amend a village memorial where an approved development proposal requires land to be excised from the village.

A clause-by-clause commentary of the Bill is as follows:

Part 1 – Preliminary

Clause 1 Short Title

This clause provides for the short title of the *Retirement Villages Amendment Act 2024* (WA) (Bill).

Clause 2 Commencement

This clause provides that Part 1 will commence on Royal Assent and that Part 2 (Division 2) and Part 4 will commence on the day after assent.

The remaining sections will commence on a day fixed by proclamation and different days may be fixed for different provisions.

Part 2 Division 2 and Part 4 contains technical amendments to terminology and drafting and consequential amendments to the *Rates and Charges (Rebates and Deferments) Act 1992* that need to be in place prior to the commencement of the operative provisions in the Bill, but that do not, of themselves have any material impact.

The remaining provisions will be proclaimed at a date to be determined following drafting of supporting regulations and consultation with stakeholders as to required preparation time.

Operators will be provided with a 12-month transition period prior to commencement of new exit entitlement payment and buy-back provisions to allow them to accumulate sufficient funds to comply with their obligations.

Commencement of the provisions that give rise to new disclosure obligations will also be delayed for around 12 months to permit supporting regulations to be drafted and operators to prepare new documentation.

Upon commencement the majority of amended requirements will apply to both existing and new retirement village contracts.

Part 2 – Retirement Villages Act 1992 amended

Division 1 – Main amendments

Clause 3 Act amended

This clause provides that Part 2 Division 1 amends the *Retirement Villages Act 1992*.

Clause 4 Section 3 amended

Section 3 of the Act contains definitions of terms used.

Clause 4 amends section 3 of the Act by adding the following new definitions that are required to support amendments in the Bill:

- “administer” a retirement village includes to manage or operate the village. The definition supports the change of terminology from “administering body” to “operator” but does not alter the range of entities required to comply with current obligations of administering bodies under the Act.
- “amenity” includes facility. This definition ensures that where the term “amenity” is used it includes any physical land, building or other structure used for, or in connection with, the provision of health, recreation or entertainment services to residents.
- “authorised deposit-taking institution” is defined for the purposes of provisions in the Bill that require any deposit paid by a prospective resident to be secured while a development is in progress and is defined with reference to the definition in the Commonwealth *Banking Act 1959*. It is a body corporate that is authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia.
- “community arrangements statement” is defined as a statement under section 14B. Section 14B(1) provides that it is a statement providing information about services, amenities and residential premises in a retirement village. The section also provides details about the requirement to provide and publish a community arrangements statement.
- “exit entitlement” is money payable by an operator under a residence contract when a resident departs a village. The term replaces reference to “refund of premium”, recognising that the resident’s contract may provide for the entitlement to be calculated on the basis of a contribution paid by an incoming resident rather than being a refund of all, or a portion of, the resident’s ingoing contribution.
- “ingoing contribution” is defined as the payment made by a person in contemplation of entry to a village. It replaces the existing term “premium” with a new term that recognises that in some village models the payment may be made to an outgoing resident rather than to the operator. It is a lump sum payment made on or prior to entering the village and is not intended to include regular recurrent payments or levies paid as a contribution to operating or maintenance costs while living in a village.
- “judicial member” is defined for the purposes of new provisions that permit a judicial member of the State Administrative Tribunal to make orders in respect of retirement village land that would formerly have been made by the Supreme Court. A judicial member of SAT must be a judge of the Supreme Court or the District Court.

- “permanently vacated” is defined in new subsection 3(1A) which is added by subclause (5). If the residence contract requires that the resident provide notice of the intention to vacate, the in order for a resident to have permanently vacated retirement village premises, the resident (or someone else on behalf of the resident) must have provided at least 28 days’ notice in writing (if the residence contract requires written notice of termination) and provided the operator with vacant possession of the premises. If there is no such requirement in the contract, the unit will be permanently vacated when vacant possession is provided to the operator. Vacant possession will require removal of all of the property of the residents from the property and the return to the operator of keys and other access devices.
- “prospective resident information statement” is defined as a statement under section 14C. A prospective resident information statement is prepared for a person who has expressed an interest in purchase of retirement village premises and provides key information about costs and obligations that will apply to purchasing, living in, and leaving the premises under a proposed contract.
- “special resolution” is the way in which residents of a retirement village provide approval in new provisions in the Act. The requirements for a special resolution are set out in new section 41F which provides minimum requirements for a quorum to be satisfied as well as a vote of 75 percent of participants in favour of the resolution.

Clause 4 also amends the following definitions in section 3:

- The amendment to the definition of “retirement village scheme” replaces the term “premium” with “ingoing contribution” and updates the drafting of that part of the definition to reflect current conventions.
- The definition of “service contract” is amended so that it clearly covers all contracts for provision of services and amenities to residents within a village. This is distinguished from the “residence contract”, with an unchanged definition, that is the contract that gives rise to a right to occupy premises in the village. This distinction is necessary, because in some village models, the resident purchases freehold title to a village unit from an outgoing resident under the residence contract and enters into a service contract with the village operator. In other cases, the residence contract and service contract are both with the operator and may be contained in one document.

Clause 5 Section 5 amended

Section 5 of the Act deals with its application. Subsection (2) provides that it does not apply to an aged care facility in a retirement village that is operated by the administering body of the village. Clause 5 deletes section 5(2) and replaces it with a new provision that provides that the Act does not apply to any residential premises in a retirement village that are used to provide residential care, regardless of who operates that facility.

As the Commonwealth is currently considering major changes to legislation governing the provision and funding of aged care, the provision has been drafted to include residential care as defined by the current Commonwealth legislation, but if this definition changes it will also permit aged care provided pursuant to a different Act or section to be prescribed by regulation.

Clause 6 Section 6 amended

This clause amends section 6 by deleting references to subsections 23(4) and 24(6). These subsections were transitional provisions in the Act relating to existing contractual provisions about liability for recurrent charges. They are no longer required and have not been reproduced in the replacement provisions.

Clause 7 Section 8 amended

Section 8 of the Act provides for functions of the Commissioner. This clause amends section 8 of the Act by adding an additional function – to keep a register of retirement villages. This supports later provisions that will detail requirements for the Commissioner to keep and publish information provided by retirement village operators.

Clause 8 Section 13 amended

Section 13 of the Act sets out requirements for residence contracts, including, at section 13(2), the documents that must be provided to a person who is intending to enter into a contract. Clause 8(1) amends section 13(2) by deleting the requirement to provide the current prescribed disclosure statement and replacing it with a requirement for the operator to provide current versions of the two new disclosure documents – the community arrangements statement (which will provide information about the village, its amenities and services), and the prospective resident information statement (which will provide key financial information relevant to the prospective resident's contract). This will streamline contract requirements for operators while ensuring that residents get clear information about key aspects of the contract.

Clause 8(2) will add a new provision, which will reduce unnecessary administration by providing that, where a prospective resident signs

more than one contract with the operator, disclosure documents will only be required when the first contract is signed unless there has been a material change in the content.

Clause 8(3) deletes existing sections 13(4) and 13(5) and replaces them with new provisions that make current provisions in respect of warranties and inconsistent representations that apply to a disclosure statement under existing section 13(2)(a) applicable to the new disclosure documents. The penalty in section 13(5) is unchanged. The provisions have also been updated to comply with current drafting conventions.

Clause 9 Section 13A inserted

Clause 9 inserts new section 13A to provide that, where a village is sold to a new operator, a residence contract with the original operator can be enforced against the new operator. This will ensure that the rights of residents are enforceable over time as villages change hands.

Clause 10 Section 14A amended

Section 14A provides a head of power for regulations to be made to prescribe provisions or matters that must be included in residence contracts.

The village operator is not a party to the residence contract in some current retirement village business models. This means that the power, as currently drafted, does not allow regulations to be made in respect of associated ongoing management contracts with the operator when the residence contract is with a third party. This will be the case where, for example, an incoming resident purchases a freehold titled property from an outgoing resident.

The amendments in clause 10 will provide a power for regulations to be made in respect of the content of both residence contracts and service contracts, collectively defined as “village contracts” for the purposes of the section.

Clause 10 includes a definition of “village contract” and replaces the current references to “residence contract” in the section to “village contract”.

Section 14A(2) is amended by clause 10(2) to make it clear that the regulations can apply to all village contracts, whether they are with a prospective or existing resident.

Clause 11 Sections 14B to 14D inserted

Clause 11 inserts new provisions that will give rise to an obligation for operators to produce and provide a series of new disclosure documents for prospective residents. The documents will better

inform prospective residents as they consider village life, choose a village, enter into a contract, and move into their village accommodation.

New section 14B will require an operator to develop and publish a community arrangements statement. The statement will provide information about the village, its services and amenities, which is common, or available, to all village residents.

Section 14B(2) will provide that the regulations will prescribe the information that is to be included in a community arrangements statement, while the form in which the information is presented will be approved by the Commissioner.

Section 14B(3) will require an operator to publish the community arrangements statement on the village website. Regulations will provide for alternative methods of publication if the village does not have a website – but only a small number of villages have been identified where that is currently the case. Other provisions in the Bill will require a current community arrangements statement to be provided to the Commissioner for publication on the retirement villages register operated by the Department of Energy, Mines, Industry Regulation and Safety.

There will also be a requirement, at 14B(3) for the operator to update the statement on the website within 14 days if community arrangements change.

New section 14B(4) will require an operator to provide a community arrangements statement to a person within seven days of receiving a request, unless the operator has reasonable grounds to believe that the request is vexatious (14B(5)).

A penalty of \$20 000 for an individual, or \$100 000 for a corporation, will apply if an operator fails to publish or provide a statement in accordance with the requirements of the section.

New section 14C will require an operator to provide a prospective resident information statement to a prospective resident on request. This is in addition to the requirement under section 13 to provide a current statement with the contract documents.

The prospective resident information statement will provide key information about the contractual obligations and statutory rights of a resident, including financial obligations, once the resident has expressed interest in purchasing a specific unit, or the right to occupy a specific unit. The resident is required to provide the operator with sufficient information to permit the operator to prepare and provide key information about the associated costs for that person.

Section 14C(1) will require the prospective resident information statement to provide a summary of the costs associated with entering, living in, and leaving the village and the rights and obligations that arise as a result of entering into the contract.

Section 14C(2) will provide that the regulations will prescribe the information that is to be included in a prospective resident information statement, while the form in which the information is presented will be approved by the Commissioner.

Section 14C(3) will provide that the operator has 7 days from the date of request for the document, or seven days from when any information requested by the operator to permit preparation of the statement has been provided, to give a person a prospective resident information statement.

A penalty of \$20 000 for an individual, or \$100 000 for a corporation, will apply if an operator fails to publish or provide a statement in accordance with the requirements of the section.

New section 14D will introduce a requirement for an operator to provide a new resident with a property condition report when the resident moves into accommodation in a village. This will support provisions in other parts of the Bill that will deal with the obligation of a resident to reinstate premises on departure.

Section 14D(1) will require an operator to prepare a condition report within 7 days of a resident moving into premises and to provide 2 copies of the report to the resident. A penalty of \$5 000 for an individual, or \$20 000 for a corporation, will apply where the operator does not comply with the requirement.

If the resident disagrees with anything in the report, the resident will have 7 days to report the disagreement to the operator. If the resident does not respond within 7 days, they will be taken to accept the content of the report as provided.

Section 14D(4) provides that on departure of a resident from a village the operator must inspect the premises and prepare another condition report. A penalty of \$5 000 for an individual, or \$20 000 for a corporation, will apply where the operator does not comply with the requirement.

The resident is entitled to be present for the inspection (section 14D(5)) and must be provided with a copy of the report. The report will then be used to assist the parties to determine what work is required to return the unit to the condition it was in when the resident moved in (excepting fair wear and tear over that time).

Regulations will prescribe the information that must be included in a property condition report (section 14D(6)). Guidelines will be provided by DEMIRS to assist the parties to determine what constitutes fair wear and tear.

Clause 12 Section 14 amended

Section 14 of the Act provides for a cooling off period of 7 working days after the date of the contract. During that time a prospective resident can withdraw from the contract without penalty.

As a retirement village residence contract may take the form of a contract for the exchange of a freehold title property, Clause 12 amends section 14 by adding a new provision at 14(3) to make it clear that the cooling off period under the Act does not affect any entitlement that a party might have to rescind a contract for the sale of land under the *Sale of Land Act 1970*.

Clause 13 Section 15 amended

Clause 13 amends section 15(2) by replacing the reference to a repayment of a “premium” with a reference to “payment of an exit entitlement” to reflect the changes to terminology and definitions provided for in section 3.

Clause 14 Section 15A inserted

This clause adds a new provision that will permit a judicial member of the State Administrative Tribunal to amend a retirement village memorial by removing part of the land covered from the memorial.

Section 15(8) currently provides that the Registrar of Titles may remove a memorial entirely if no part of the land to which the memorial relates is used, or proposed to be used, as a retirement village.

A memorial may cover more than one parcel of land (described in the land registration scheme as a ‘lot’) and it is not currently possible for the Registrar of Titles to remove a memorial from one lot while a retirement village continues to operate on another parcel that is covered by the same memorial, even if the remaining lot or lots have separate certificates of title.

The new provision will facilitate village development by permitting an operator to apply to SAT for removal of the memorial from part of the land while a retirement village continues to operate on another part of the land, provided that the value of the remaining memorialised landholding is sufficient to protect the rights of the residents to payment of their exit entitlements in accordance with the charge that arises under section 20.

Section 15A(1) provides a power for an owner of land used for a retirement village to apply to SAT for an order directing the Registrar of titles to remove a retirement village memorial from a lot, while the same memorial continues to apply to other lots that are used for the purposes of operation of a retirement village.

This situation may arise where a memorial was placed over a parcel of land prior to subdivision, with the lot in question never having been used as part of the village, or where a lot has been part of a retirement village in the past but is no longer used for that purpose as a result of a redevelopment of the village facilities.

Section 15A(2) will permit the application to be made separately (as would be the case where the lot in question has never been part of the village or is part of a redevelopment proposal that has been

approved by residents), or at the same time as an application for approval of a modification if the operator is seeking SAT approval to excise the land from the village for sale or redevelopment.

Section 15A(5) provides for the order to take effect when the owner files a copy of the order and a valid application for removal of the memorial with the Registrar of Titles, or on a date specified by SAT in the order, whichever occurs later. The effect is that the order cannot take effect until lodged with Landgate – but SAT may provide for it to take effect at a later date.

Section 15A(6) will provide that an order can only be made by a judicial member of SAT, or a Tribunal that includes a judicial member. A judicial member of SAT is a judge of the Supreme or District Court.

Clause 15 Section 17 amended

Section 17 of the Act provides security of tenure for retirement village residents who do not own a freehold title to the premises they occupy by providing that a residence contract can only be terminated in limited, specified circumstances.

As SAT will have a new power to terminate a retirement village scheme under new section 22, an additional basis for termination of a contract where a termination order has been made has been added at new section 17(1)(da) to cover that situation.

Clause 15(2) makes a consequential amendment required by the renumbering.

Clause 15(3) makes an additional amendment, to specify that the prohibition on termination does not apply to short term residential tenancies in a retirement village (periodic tenancies or tenancies with a fixed term not exceeding 12 months). A short-term tenancy can be terminated in accordance with the terms of the tenancy agreement.

Clause 16 Section 18 amended

Section 18 protects the ingoing contribution paid by a prospective resident by requiring it to be held in a trust account until such time as the resident enters into occupation of the retirement village unit or is entitled to occupy the unit.

Clause 49 provides that references to “administering body” in section 18 are to be replaced with “operator”.

Clause 16(1) expands the definition of ‘operator’ to include a developer or other person involved in a development of a village. This ensures that the resident’s upfront payment or payments are held in a trust account regardless of whether the payment is made to the operator, or to another person connected with a village development such as a developer, lawyer or real estate agent.

Clause 16(2) updates terminology used in the section by replacing the old term “premium” with the new term “ingoing contribution”.

Clause 16(3) deletes sections 18(2) and 18(3), which allowed an operator to apply for an exemption from the requirement to hold ingoing contributions in trust, and updates terminology in section 18(2A).

Clauses 16(4) and 16(5) updates terminology in sections 18(4) and 18(5) by replacing the old term “administering body” with “operator”, “premium” with the new term “ingoing contribution” and by referring to payment by a “person” rather than a “prospective resident”.

Clause 17 Section 19 amended

Section 19 deals with the contractual rights of residents. Clause 17(1) deletes current section 19(1) and replaces it with a new provision to clarify that, where an operator enters into a service contract, the contract is enforceable against any subsequent operator. The equivalent provision is made in respect of residence contracts in new section 13A.

Clause 17(2) amends the terminology in section 19(2) to reflect the new, broader, definition of “service contract”.

Clause 17(3) deletes sections 19(3) to 19(5) relating to the refund of premiums. These provisions have been replaced with new, more comprehensive, requirements for the payment of exit entitlements in new section 29.

Clause 17(4) amends section 19(6) to reflect the fact that the obligation to repay a resident’s premium has been replaced by an obligation to pay an exit entitlement. The exit entitlement may be, but will not necessarily be, a refund of the ingoing contribution.

Clause 17(5) deletes section 19(7). This section clarifies the scope of a “service” in sub-section 2 and is no longer required because of the alteration of the revised definition of “service contract”.

Clause 18 Section 20 amended

Section 20 creates a statutory charge over retirement village land to secure the entitlement of residents to payment of an exit entitlement on departure from the village.

Clause 18(1) updates the terminology in section 20(1) to replace references to “premium” with references to “exit entitlement”.

Clause 18(2) deletes sections 20(3) and (4) to replace them with a simpler, plain English version. There is no material change to the way in which the priority of charges is determined – priority of the resident’s charge is determined by the date of lodgement of the retirement village memorial and is subject to any other change that was registered on the land at the date of registration of the retirement village memorial.

Clause 19 Section 21 amended

Section 21 deals with enforcement of charges.

Clause 19 does not make any material change to the provision, it updates the terminology in section 21(1), 21(2)(a) and 21(3)(d) to replace references to “premium” with references to “exit entitlement”.

Clause 20 Sections 21A and 21B inserted

Clause 20 adds new provisions to the Act in respect of conduct requirements for operators and residents and village budgets.

Section 21A provides a head of power that permits regulations to be made to prescribe professional standards for operators and their employees and conduct requirements for operators, village employees and residents.

Section 21A(1) provides a definition of “administering body” that ensures that the regulations made pursuant to the section can cover conduct by operators and their employees, agents and contractors.

Section 21A(2) provides a head of power for regulations to be made for:

- conduct rules for operators and residents;
- requirements for operator professionalism, training and competency; and
- consequences and remedies for contravention of the requirements of these regulations.

Section 21A(3) provides detail about issues that can be covered by the conduct requirements. As the purpose of the Act is to regulate the operation of retirement villages and provide for the rights of residents, the issues identified in section 21A(3) focus on the professionalism, training requirements and competency of operators, as high standards in these areas are likely to positively impact the management and operation of villages.

The regulations may also put into place conduct requirements for residents in their dealings with operators, staff and other residents and guests to manage potential issues with mistreatment of village staff and conflict between residents.

The regulations will provide for penalties for failure to comply with conduct requirements where that is appropriate.

In addition, section 21A, provides a power for regulations to be made to permit a party to apply to SAT for orders to enforce conduct requirements by ordering a party to take, or to refrain from taking a specific action. A breach of the SAT order would then be able to be enforced by SAT.

Section 21A(5) provides that the capacity for regulations to be made under this section in respect of conduct of marketing activities does not affect regulations made in respect of advertising and marketing

under the head of power under section 82(3). Regulations under section 82(3) relate to the content of marketing materials, while those under this section will deal with how marketing activities are conducted.

Section 21B will provide a head of power for regulations to be made to prescribe requirements for operators for preparation of annual budgets and financial statements, and for other financial matters such as auditing of accounts and provision of information about village insurance policies to residents.

These are not new requirements, being currently covered in the Code of Practice made under the Fair Trading (Retirement Villages Code) Regulations 2022 (the Code) but will be moved into regulations made under the Act.

Regulations may cover the following items which are currently provided for in the Code:

- budget preparation – including a timetable for preparation of the annual budget and required content;
- processes for authorising the expenditure of funds;
- what financial statements and other documents must be prepared for the purposes of appropriate financial accountability, and what those documents must contain;
- how and when financial documents are to be provided to residents; and
- reconciliation, assurance and auditing of accounts.

Two additional items will be added to the list of matters that may be covered by regulations in connection with village financial affairs:

- requirements for the operator to consult with residents prior to the preparation of a draft annual budget; and
- requirements for the operator to provide information about the cost and coverage of village insurance policies to residents as part of the provision of financial information.

Section 21B(2) provides that the list of items in that section about which regulations may be made does not limit the regulation making power under section 21B(1) to those items. Regulations may be made with respect to other additional matters that properly come within the scope of the power described at section 21B(1).

Clause 21 Section 22 amended

Section 22 provides that an active retirement village scheme, where any person admitted to occupation of premises under the scheme remains in occupation, cannot be terminated without the approval of the Supreme Court.

Clause 21(1) amends section 22 by extending the definition of “terminate”, so that approval is required for both a temporary and a permanent closure of a village.

Clause 21(2) replaces the requirement for approval for closure by the Supreme Court with a requirement for approval by the SAT. To ensure effective legal scrutiny however, the order must be made by a judicial member (or a panel including a judicial member), who will be a judge of the Supreme Court or the District Court of WA (Clause 21(4) adding new section 22(5)).

The current requirement for the Commissioner to be a party to the proceedings is retained, with a minor amendment at clause 21(3) to replace the reference to the Supreme Court with a reference to SAT.

Clause 21(4) adds new requirements in section 22(3) for an operator seeking approval for the termination of a retirement village scheme to:

- Prepare and provide to residents a termination plan to provide information about the plan. A form for presentation of the information will be approved by the Commissioner, information required to be contained in the plan will be prescribed. It is intended that a plan will describe the details of the proposed redevelopment, the timeline, the impact on residents, and the way in which the operator proposes to support residents in the transition to alternative accommodation arrangements.
- Hold a meeting of residents to discuss the plan and to give residents the opportunity to ask questions about the proposal and the plan. Residents will have a least one month after receipt of the plan to consider the implications prior to the meeting being held.
- Take all reasonable steps to assist each resident to obtain alternative accommodation that is of reasonable standard, acceptable to the resident, and of no greater cost.

All of these preconditions must be met before an operator can apply for an order for the scheme to be terminated.

New section 23(4) will provide for powers for the SAT to:

- fix a date for vacation of premises in the village by residents, as an order is to be made in respect of 'each resident' it is possible that different dates could be set for different residents in the context of a staged redevelopment; and
- make additional orders requiring the operator to compensate a resident for costs associated with a relocation or loss of contractual rights.

Clause 22 Sections 23 and 24 deleted

This clause deletes sections 23 and 24 of the Act.

Section 23 deals with obligations of residents for the payment of recurrent charges after departure from a village, and new provisions in that regard are in new section 28 which is inserted by clause 23.

Section 24 deals with the deduction of recurrent charges from a premium due to be repaid to a former resident. New provisions are in new section 30 which is inserted by clause 23.

Clause 23 Parts 3A to 3D

New Part 3A – Leaving a retirement village adds provisions about the rights and liabilities of parties in respect of reinstatement and renovation of the premises and liability for recurrent charges, resale of the premises or of the right to occupy the premises and payment of exit entitlements.

New **Division 1** consists of sections 26 to 28.

Section 26 provides that the term “resident” includes both a current and a former resident when used in Part 3A, and also in sections 20 and 21 which deal with charges and enforcement of charges of residents over village land so may relate to the rights of former residents.

Section 27 deals with the obligations of residents to reinstate or renovate premises on departure.

Section 27(1) provides definitions of:

“reinstatement” which refers to returning premises to the same condition that they were in when the resident moved in, fair wear and tear excepted; and

“renovation” which is any additional improvement in excess of reinstatement.

These replace the term “refurbishment” which is currently used in the Code. The term is also regularly used in retirement village contracts to describe the obligation of the resident to return the property to a “reasonable” condition but does not set an objective standard of what is required or reasonable, leading to disputes.

Section 27(1) also defines “capital gain” as any increase between the ingoing contribution of the departing resident, and the ingoing contribution of the incoming resident. This definition is required because the obligation of a departing resident to contribute to renovation costs will be dependent on the departing resident receiving a share of any increase in value attributable to the renovation work.

Sections 27(2) and 27(3) provide that a resident must reinstate the premises on departure from a village, with the condition on entry to be determined by the incoming property condition report if the resident has accepted, or did not respond and was deemed to accept, the condition report.

Section 27(4) provides that the operator may require a resident to pay for the cost of reinstatement if the resident does not leave the premises in the required condition and the residence contract includes a provision requiring the resident to pay for reinstatement.

The cost of reinstatement must be agreed by the parties or determined by SAT.

Sections 27(5) and 27(6) provide that a departing resident can only be required to contribute to the cost of renovation of the premises if *all* of the following conditions are satisfied:

- The operator prepares a renovation plan and the departing resident agrees to the plan. The renovation plan must contain prescribed information and it is intended that this will include a description of the work and a proposed quote for the cost of the work. The agreement must be made on or after the date of the resident's departure from the village. It will not be possible to accurately assess the requirement for, and cost of, renovation work in sufficient detail to allow the parties to reach an informed agreement until the resident is ready to vacate the premises.
- The renovation is undertaken in accordance with the plan.
- The residence contract provides for any capital gain to be shared by the operator and the resident, and the share of capital gain to be paid to the departing resident is at least proportional to the share that the departing resident is to contribute to the cost of the renovation. Reference to costs of renovation being 'paid' by the resident does not prevent the operator from paying the costs upfront and, with the agreement of the departing resident, recovering the costs of the resident's share of the renovation cost from the proceeds of resale of the residence right.

New section 27(7) provides that it is an offence for an operator to demand payment for reinstatement or renovation that is not in accordance with this section. A maximum penalty of \$20 000 for an individual or \$100 000 for a corporation applies for an offence under section 27(7).

New section 27(8) provides a power for an operator or a resident to apply to the SAT for a determination of the amount that a departing resident is required to pay for reinstatement or renovation in the event of a dispute.

The provisions of section 28(1) are largely consistent with the provisions that were in deleted section 23. It provides that the resident is required to continue to pay recurrent charges until:

- an incoming resident becomes liable to pay the charges at the premises;
- the prescribed date (regulations currently provide for a period of three months after permanent vacation for most residents with a lease or licence interest in the property);
- the date that the operator must pay an exit entitlement or complete a buy-back of the property;
- the date agreed by the parties; or
- the date in the residence contract.

The new provisions differ from those in deleted section 23 in that they provide for a maximum period for payment of recurrent charges for the owner of a freehold titled retirement village unit. For those residents, obligation to pay recurrent charges will now cease at the date that the operator is required to complete a buy-back.

Section 28(2) is consistent with deleted sections 23(5) and (6) and provides that the operator must cover the costs of recurrent charges once the liability of the departing resident ceases – the operator must not increase recurrent charges for other residents in order to fund recurrent charges for a vacant property. A maximum penalty of \$20 000 for an individual or \$100 000 for a corporation applies for a breach of this provision.

Division 2 – Exit entitlements

Division 2 adds new sections 29 to 31 regarding payment of exit entitlements and aged care payments.

New section 29(1) provides that an operator must pay an exit entitlement to a departing resident on the earliest of the following dates:

- the date provided for in the residence contract;
- seven days after an incoming resident enters into occupation of the premises;
- the date agreed by the operator and the departing resident;
- the date that is 12 months after the resident permanently vacates the premises; or
- where a residence contract is terminated by the SAT, 10 days after that day set by the SAT order as the day on which the resident is to vacate the premises.

Failure to pay the exit entitlement in accordance with the requirements of the section is an offence with a maximum penalty of \$20 000 for an individual and \$100 000 for a corporation. In addition, the former resident can take action to recover the amount owing under section 29(5).

Section 29(2) provides that a departing resident may agree to extend the time for payment of the exit entitlement but may subsequently revoke that agreement. If a resident agrees to extend the period, section 29(1)(b) provides that the exit entitlement must be paid by the date on which the agreed extended period ends, or three months after the date of revocation, whichever is earlier.

Section 29(3) provides that, at the same time that the exit entitlement is paid, the operator must provide the former resident with a statement showing how the exit entitlement has been calculated.

Failure to comply with the requirement to provide a statement is an offence with a maximum penalty of \$20 000 for an individual or \$100 000 for a corporation.

Section 29(4) provides reference to a mechanism (at new section 37) for valuation of a retirement village unit for the purpose of calculating

an exit entitlement. In some retirement village residence contracts, the resident is entitled to some or all of the capital gain on the sale of the retirement village unit, or of the right to occupy the unit. In that case, exit entitlement is calculated with reference to the price paid by the incoming resident. If the operator is required to pay an exit entitlement prior to resale of the unit, a valuation will be required to calculate the exit entitlement unless the parties can reach agreement on the resale value.

Section 29(5) provides a mechanism for a resident to take action for recovery of the money owing as a debt if the exit entitlement is not paid by the operator in accordance with the requirements of these provisions.

Section 29(6) recognises that extensions and exemptions are available under new Division 4 and provides that subsection (1) does not apply in that case.

Section 30 deals with the election of a resident to pay for recurrent charges arising after the resident's departure from the village by way of a deduction from the resident's exit entitlement. If the resident elects to do so, the operator may require interest to be paid if the residence contract provides for that. The new section is not materially different from the provision it replaces (deleted section 24) but has been redrafted to improve plain English readability and adopt current drafting conventions.

Section 31 adds a new provision to the Act to provide for a departing resident who is entitled to payment of an exit entitlement to require the operator to contribute to the cost of alternative accommodation in aged care until such time as the exit entitlement is paid.

Section 31(1) provides a head of power for regulations to be made about the requirement for operators to contribute to the costs of aged care from an unpaid exit entitlement at the request of a former resident who moves to aged care.

Approval processes for the provision of, and entry to aged care, and options for payment for accommodation and care, are currently included in the *Commonwealth Aged Care Quality and Safety Act 2018* and the *Commonwealth Aged Care Act 1997* and its schedules.

These Acts, and the arrangements prescribed by the Acts, are currently under review by the Commonwealth. For that reason, while the Act will be amended to provide a head of power that will give rise to an expectation that an operator can be required to contribute to the cost of aged care on behalf of a resident while the resident has an unpaid retirement village exit entitlement, details of the interaction between the obligation of the former resident to pay for aged care and the obligation of an operator to contribute to that cost, will be prescribed by supporting regulations to ensure consistency between the two legislative schemes and to ensure that consistency can be maintained whenever the Commonwealth legislation is amended.

Section 31(2) provides that, without limiting the regulation making power at 31(1), regulations may make provision about:

- A resident's entitlement to make a request for payments.
- How the request for assistance with aged care payments is to be made, including the information and evidence required to be included in an application.
- The requirement for an operator to comply with a request for a contribution to aged care costs, including how and when payments are required to be made.
- Persons to whom payments can be made.

The identification of items to be addressed by regulation in section 31(2) does not limit the power under section 31(1) for regulations to be made in relation to other relevant matters.

Division 3 – Buybacks

Buyback provisions will apply where the resident owns a freehold interest in a retirement village unit, or an interest that results from the purchase of shares in a company or in retirement village land rather than occupying the premises on a lease or licence. In these cases, a departing resident will sell the premises, or shares that give rise to a right to occupy the premises, to a third party who will make a payment directly to the departing resident.

No exit entitlement is payable by the operator, but the operator will generally retain control of the sale process as a result of conditions included in a related service contract with the operator.

New section 32(1) describes the types of residential premises that are covered by the Division. This references the range of ways in which a right to occupy premises can arise as a result of the operation of the definition of retirement village scheme in section 3, but excluding a tenancy agreement, lease or licence – as an ongoing contribution in those cases will give rise to an exit entitlement with obligations to pay the exit entitlement covered in Division 2.

Section 32(1) describes the Division as applying to:

- Residential premises a right to occupation of which is conferred by ownership of shares. These are sometimes described as “company title” or “purple title” schemes, with the resident purchasing shares in a company or in land that give rise to a right to occupy a defined unit in the village while the resident owns the shares.
- Residential premises purchased from an operator subject to a right or option to repurchase. In this instance, the resident will purchase a freehold title in a “green title”, or strata or community title scheme, which will be resold when the resident departs the village – with the operator entitled to repurchase the unit.
- Residential premises purchased subject to conditions restricting the subsequent disposal of the premises. These are arrangements where the resident has purchased a

freehold titled unit in a “green title”, strata title or community title scheme from the operator or from a departing resident. The resident also has contractual obligations through the residence contract or a service contract that restrict the right of resale and give the operator a degree of control about matters such as refurbishment or renovation obligations prior to resale, resale price or approval of a prospective purchaser.

- Prescribed residential premises. This mirrors a power to prescribe additional arrangements that mirrors the power in the definition of retirement village scheme in section 3 and is required because of the evolving nature of ownership models used in the sector.

Section 33 provides that, if this Division applies to the premises, an operator must complete a buyback of premises from a departing resident within the time required by the Division, which will usually be 12 months, if the premises have not been resold in that time. This will require the operator to both enter into a contract to purchase the resident’s interest, and complete the purchase, within that time.

A maximum penalty of \$20 000 for an individual or \$100 000 for a corporation will apply for a failure to comply with the requirement.

Section 33(2) provides that section 33(1) does not apply if the interest has been sold to another person, or if an extension or exemption is in force under Division 4. A defence of “reasonable excuse” applies to a failure to comply with this obligation. The operator will have a reasonable excuse if there is a relevant exemption or extension in place granted by the Commissioner, if SAT has made an order allowing an extended period for compliance, or if a contract of sale cannot be completed as a result of an act or omission by the former resident. The circumstances listed in section 33(3) do not provide an exhaustive list and other matters may be taken into account by a court. Whether there is a reasonable excuse in other circumstances will be a matter for the court to determine.

Section 34 describes requirements for a buyback arrangement:

Section 34(1) provides that the operator must comply with the timing requirements set out in section 35. Section 35 requires the operator to enter into a contract in sufficient time to complete the purchase within 12 months of the resident’s permanent departure from a village.

Section 36 sets out requirements for the content of a buyback contract. Section 36(1) provides a head of power for regulations to be made to prescribe terms that must, or must not, be included in a buyback contract.

Section 36(2) provides that the contract must:

- be in the form approved by the Commissioner,
- include any term required by the regulations and not include a term prohibited by the regulations, and

- otherwise be in terms agreed by the parties or determined by the SAT.

The section provides a head of power for other requirements to be prescribed, and for either party to apply to the SAT for an order to determine the terms of a buyback contract.

In most instances, as the buyback will involve the transfer of freehold title to land, it is expected that a standard form contract for the sale of land would be used. There will be a power however for regulations to amend the requirements for the content to reflect the requirements of the Act.

Division 4 – Miscellaneous

Division 4 includes a range of provisions supporting the new exit entitlement and buyback provisions.

If an operator is to pay an exit entitlement under Division 2 or complete a buyback under Division 3, it may be necessary for the exit entitlement or purchase price to be determined before the interest is sold to an incoming resident at market value.

Section 37 provides a mechanism for determining the value of the resident's interest for the purposes of requirements in Division 2 and 3. Section 37(1) provides that the value is to be agreed by the operator and the resident, and, in the absence of agreement within a time prescribed by the regulations, will be determined by a licensed valuer.

As the calculation of value for a retirement village unit takes into account some different matters to a valuation of residential property more generally, there is a requirement at section 37(2) that the valuer selected must have appropriate experience, and must not have a connection with the village, or with either party to the transaction, that could be reasonably expected to impact on the ability of the valuer to provide an independent assessment of value. Section 37(3) provides that, in the absence of agreement between the parties on a suitable person to undertake the valuation, a valuer is to be appointed by the Commissioner, with either party able to appeal the decision of the Commissioner to the SAT (section 37(4)).

As a time limit for agreement under section 37(1) is to be prescribed, and it may be necessary to provide additional detail of the valuation process, a head of power has been included at section 37(4) for regulations to be made.

Section 37(6) will provide that the cost of a valuation is to be shared equally between the operator and the departing resident.

Section 38 provides a power for the Commissioner to extend the period for payment of exit entitlements or aged care payments and completion of buybacks. This power is necessary to protect other residents within a village from the risk of financial failure of an otherwise viable operator as a result of the exit entitlement payment or buyback obligations and to ensure that an operator is not

penalised if a delay in resale of a resident's interest is a result of unreasonable delay by the resident in completion of the resale process. Application to the Commissioner at first instance, rather than to the SAT, provides a mechanism for consideration of the circumstances which ensures quick consideration and is easily accessible for both parties and low cost.

Section 38(1) provides that an operator may apply to the Commissioner for an extension of up to 12 months in the time required for payment of an exit entitlement or completion of a buyback.

When granting an extension, the Commissioner may place conditions on the extension (38(4)). Section 38(2) provides that, when granting an extension, the Commissioner must set a later date for completion of the requirement. The date may subsequently be brought forward by the Commissioner by notice in writing to the operator if the operator fails to comply with conditions. A failure by the operator to pay the exit entitlement or complete the buyback by that date will be punishable by a maximum fine of \$20 000 for an individual or \$100 000 for a corporation (section 38(3)).

Sections 38(4), (5) and (6) deal with the imposition of conditions on an extension granted by the Commissioner. Conditions may be imposed, including conditions requiring part payment of the entitlement, payment by instalments and payment of interest on any outstanding balance due to the resident. The time for payment can be brought forward by the Commissioner if the operator does not comply with any conditions.

Section 38(6) provides that a failure to comply with conditions is an offence with a maximum penalty of a fine of \$20 000 for an individual or \$100 000 for a corporation.

Section 38(7) provides that the Commissioner may approve only one extension of up to 12 months in respect of a residence contract and must be satisfied that exceptional circumstances exist that make it unreasonable to require the operator to comply with the timeframes in Division 2 and 3. The Commissioner may consider any matters that he or she regards as relevant, and is not restricted to considering the issues set out in section 38(5).

Section 38(8) sets out issues that the Commissioner must consider in deciding whether to grant an extension, or impose or vary any conditions, including:

- the capacity of the operator to comply with the requirement,
- the impact of a decision to grant an extension;
- whether the operator or the resident has engaged in conduct that has delayed resale of the resident's interest; and
- the content of any submission made by the parties.

The Commissioner may consider other relevant issues, and regulations may be made to prescribe other matters that the Commissioner must consider.

Sections 38(9) and 38(10) will provide that either party can appeal to the SAT for review of a decision by the Commissioner to grant, or refuse to grant, an extension or to impose or vary conditions, or bring forward the completion date where an extension had been granted, as applicable. Current section 44 of the Act permits the SAT to extend or reduce that time for the doing of anything under the Act. This would permit an operator to also apply to the SAT for an extension as an alternative to applying to the Commissioner, or if an additional extension is required beyond the 12 months that can be granted by the Commissioner.

Section 39(1) permits the Commissioner to exempt an operator from the requirement to comply with the exit entitlement and buyback requirements in Divisions 2 and 3 for a period of up to five years.

When granting an exemption, the Commissioner may place conditions on the exemption (39(4)). Section 39(2) provides that, when granting an exemption, the Commissioner must set a later date or dates for compliance with any requirements that would otherwise have arisen during the period that the exemption applies. The later date may subsequently be brought forward by the Commissioner by notice in writing to the operator if the operator fails to comply with any conditions.

A penalty of a fine of \$20 000 for an individual or \$100 000 for a corporation will apply where the operator does not comply with the dates set by the Commissioner.

Sections 39(4) and (5) deal with the imposition of conditions on an exemption. Conditions may be imposed. The end date of the extension can be brought forward by the Commissioner if the operator does not comply with any conditions.

Section 39(5) provides that a failure to comply with conditions is an offence with a maximum penalty of a fine of \$20 000 for an individual or \$100 000 for a corporation.

Section 39(6) provides that the Commissioner must consider the public interest in determining whether to grant an exemption and can only grant an exemption if satisfied that it is in the public interest to do so.

Other matters that the Commissioner must consider when deciding whether to grant an exemption, or to impose or vary conditions, are set out in section 39(7). An exemption, rather than an extension, may be appropriate where the characteristics of the village and its contractual arrangements, rather than the circumstances around an individual residence contract, make it difficult for the operator to comply with the requirements of Divisions 2 and 3 on a longer-term basis and the matters for consideration by the Commissioner reflect that difference – focusing on the size, character and management structure of the village.

The listing of matters that the Commissioner must consider at section 39(7) does not prevent the Commissioner from considering other relevant matters.

Section 39(8) and 39(9) provide that either party may apply to the SAT for a review of the Commissioner's decision to grant or refuse an exemption, or to impose conditions or bring forward the end date of an exemption on the grounds that the operator has failed to comply with conditions.

Section 40 sets out rights of residents when an operator fails to comply with the obligation to pay an exit entitlement in the required time or complete a buyback in accordance with the requirements of the Act. The resident may apply to the SAT for an order requiring the operator to comply, including an order requiring an amount due to the former resident to be paid by a specified date.

The SAT has the power to make an order sought by a resident, regardless of any action taken against the operator at the instigation of the Commissioner for a breach of the Act.

New Part 3B deals with responsibility for capital items in a retirement village.

Part 3B will not apply in some strata titled (and also potentially, although there are no such villages currently operating, community titled) villages, because all capital items will be either owned and maintained by individual residents, or will be property of the strata company, and maintained and managed by the strata company in accordance with the requirements of strata titles legislation. In that case, there will be no capital items requiring maintenance or replacement under this legislation.

Most villages, including those that operate on a lease or licence basis and some strata titled villages where community facilities are located on a lot owned by the operator, will have village capital items which are owned, managed, and maintained by the operator. These provisions will deal with capital works required to maintain that village property.

New section 41 will define terms used in Part 3B.

"capital item" is defined as any building, structure, plant equipment or infrastructure forming part of a retirement village or used in the management or operation of a village with the exception of:

- anything owned by a resident;
- common property of a strata or community titled complex;
- contents, fittings and fixtures in a resident's unit provided for the exclusive use of that resident and required under a residence contract to be maintained by the resident.

"capital maintenance" is work carried out for the purpose of repairing or maintaining a capital item. Regulations may be made to provide that an item is not capital maintenance.

“capital replacement” is work carried out to replace a capital item with another item. It does not include anything that comes under the definition of capital maintenance. Regulations may be made to provide that an item is, or is not, capital replacement.

New section 41A(1) will require an operator to maintain all capital items in a village in a reasonable condition. What is reasonable in the circumstances will take into account the age and prospective life of the item, and what contributions residents have made towards the costs of maintenance.

A maximum fine of \$20 000 for an individual and \$100 000 for a corporation will apply for a breach of the section.

Section 41A(2) will provide that an operator may replace a capital item if it is not practical to maintain it. Residents may prefer to continue to maintain the item to minimise costs in the short term, but it may not be financially viable to maintain an aging item over the longer term.

Section 41A(3) and 41A(4) set out obligations for an operator to attend to repair or replacement of a capital item within a reasonable time of becoming aware of the need for capital works, and for a resident to notify the operator of a requirement for capital works in the resident’s premises. A fine of \$20 000 for an individual and \$100 000 for a corporation applies where an operator fails to attend to capital works as required by section 41A(3).

New section 41B will require the operator of a village to prepare and maintain a capital works plan identifying future capital maintenance and replacement requirements. A maximum penalty of a fine of \$20 000 for an individual and \$100 000 for a corporation will apply for a breach of the obligation to keep a plan set out at section 41B(1).

Section 41B(2) provides a head of power for regulations to be made in respect of the capital works plan. Section 41B(3) sets out a list of matters that may be included in a capital works plan. The list of matters set out in section 41B(3) is not intended to be exhaustive.

Those items included in section 41B(3) are:

- The preparation, content, duration and requirement to revise a plan for capital maintenance and capital replacement.
- Requirements for consulting and informing residents about the plan.
- Information that is to be included in the plan including information about projected costs of the planned capital works including frequency and increases in costs.
- Those capital items that are required (or not required) to be covered by the plan.

Section 41B(4) clarifies that the requirement to prepare a plan does not apply to a village that has no capital items. As noted above, some strata villages may have no capital items.

Section 41C deals with funding for capital maintenance. It requires every operator to maintain a dedicated fund for capital maintenance. An operator can determine how much money needs to be held in the fund for capital maintenance by referring to the maintenance items identified in the village capital works plan.

Section 41C(3) requires the operator to pay the following amounts into the capital maintenance fund:

- Any amount of recurrent charges that the annual budget of the village provides are to be set aside for capital maintenance.
- Any other amount that a resident is required to pay for capital maintenance, such as a levy imposed for a specific maintenance purpose (such as a painting fund).
- Any contribution a resident is required to make under a residence contract to a maintenance fund on entry to, or exit from, a village.
- Any interest received from investment of the fund.

The requirement for the operator to deposit these payments into the maintenance fund does not prevent the operator from putting money raised by the operator from other sources, such as deferred management fees, into the fund.

The capital maintenance fund cannot be used for any purpose apart from capital maintenance of the village (section 41C(4)).

Section 41C(5) clarifies that the requirement to have a capital maintenance fund does not apply to a village that has no capital items. As noted above, some strata villages may have no capital items.

A maximum penalty of a fine of \$20 000 for an individual or \$100 000 for a corporation will apply where an operator:

- does not maintain a capital maintenance fund (41C(1));
- does not hold the fund in a deposit with a body corporate that is authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia (41C(2));
- uses money from a capital maintenance fund otherwise than for capital maintenance (41C(3)); or
- does not pay the funds identified in 41C(3) into the capital maintenance fund.

Section 41D deals with responsibility for capital replacement.

It provides that an operator cannot set aside any portion of recurrent charges or impose special levies or other fees or charges on residents to cover costs of capital replacement. It does not prevent an operator from putting a portion of an entry or departure fee paid under the contract as a capital works contribution into a capital replacement fund provided that the resident's contract makes provision for that. The residents' contributions for capital replacement made in this way must, however, be held separately to

the capital maintenance fund. Transitional provisions will be put in place to assist existing villages that currently use one fund for maintenance and replacement to manage the transition to the new requirements.

A maximum fine of \$20 000 for an individual and \$100 000 for a corporation will apply for a breach of the section.

New section 41E(1) will provide a power for the residents of a retirement village or the Commissioner to apply to the SAT for an order that funds held in the capital maintenance fund are excessive, or insufficient, having regard to the operator's obligations to maintain capital items in the village, and the maintenance requirements identified in the village capital works plan.

An application by residents must be endorsed by residents by a special resolution (41E(2)).

If the SAT makes an order that the amount held in the capital maintenance fund is excessive it may order the excess to be paid to residents and determine the proportions in which the payments will be made.

If the SAT finds that insufficient funds are held in the capital maintenance fund, the operator can be directed to rectify the deficiency and an order may specify a date by which the deficiency is to be rectified.

New Part 3C deals with resident participation in the running of a retirement village.

Section 41F(1) provides a head of power for regulations to be made about residents' meetings. Requirements for meetings are currently in the Code, and the new sections will provide a mechanism for these to be moved into regulations, rather than making any material change to the current meeting provisions.

Section 41F(2) sets out the matters that may be covered by regulations, but does not prevent additional matters being included in the regulations. The items identified in section 41F(2) are the items currently covered by the Code and are:

- functions of meetings;
- circumstances in which meetings can or must be held;
- the notice that must be provided to residents;
- meeting procedure;
- quorum requirements;
- requirements for attendance and voting, including use of proxies;
- any requirements in relation to special resolutions in addition to the requirements in section 41F.

As the Act includes provisions that require an operator proposal to be approved by a special resolution of members, for example

sections 41E(2) and 41N, new provisions will be inserted to provide detail of the requirements for a valid special resolution of residents.

New section 41G provides that passing of a special resolution requires:

- Presence of a quorum at the meeting (either in person or by remote communication or proxy). Section 41G(2) provides a requirement for
 - a majority of residents to be present in a village with less than 10 occupied units; or
 - otherwise 5 residents or 30 percent of residents – whichever is greater.

Most villages will require 30 percent of residents to be present to establish a quorum.

- 75 percent of residents present (either in person or by remote communication or proxy), entitled to vote, and participating in the vote voting in favour of the resolution.

These provisions replicate the requirements that are currently included in the Code.

Section 41H will add requirements in respect of residents' committees to the Act.

Section 41H(1) provides that a village may have, but is not required to have, a residents' committee. The committee may be established by an election conducted by the residents, and its function is to liaise with the operator with regard to village management issues affecting residents. Membership of the committee is only open to residents of the village (41H(5)).

If the residents do not elect a committee, the administering body may conduct an election if asked to do so by residents.

Section 41H(4) provides that a village may only have one residents' committee at any time. If more than one body claims to be the legitimate residents' committee, the operator, any resident, or the Commissioner may apply to the SAT for an order determining which body is the committee for the village (section 41H(7)).

Section 41H(6) provides that a residents' committee may be, but is not required to be, and incorporated association. The residents may determine whether there is any benefit from incorporation in view of the proposed activities of the committee.

Section 41H(8) provides that each member is to hold office for one year following election to the committee but may be re-elected. A committee member can be removed by a special resolution of residents.

Section 41H(10) provides a head of power for regulations to be made about functions and procedures for residents committees. Subject to the requirement to comply with the Act and with any regulations

made pursuant to section 41H(10), a residents committee may decide its own procedures (41H(9)).

New Part 3D deals with processes that will apply to modification of a retirement village and will balance the rights of residents to be consulted about changes that impact their village and lifestyle on a day-to-day basis with mechanisms that ensure that operators can maintain and develop a village and ensure that it remains financially viable over the longer term.

New section 41I(1) provides definitions of terms used in the Part. A “modification” is defined to include a redevelopment which involves a change to the land or buildings that comprise the village and any change to services and amenities provided to residents.

As there is often disagreement between operators and residents as to the potential impact on residents of proposed changes in a village, the scope of modifications covered is very broad, the approval process, which requires resident consultation and approval of residents or the SAT, will apply to all changes in the village that have the potential to impact on the cost or experience of village life for residents apart from those changes that are specifically prescribed (section 41K) or exempted by exceptions identified in sections 41L and 41M.

Section 41I(1)(c) provides a head of power for additional items to be prescribed as modifications for the purposes of the approval requirements in this Part.

Section 41J prohibits unauthorised modifications in a retirement village. An operator will not be permitted to carry out a modification unless the modification comes under one of the exceptions at sections 41K, 41L or 41M or is approved by residents or the SAT under section 41N.

A penalty of a maximum fine of \$20 000 for an individual or \$100 000 for a corporation will apply for a contravention.

The approval process will *not* apply in any of the following situations:

- The modification is a prescribed modification (section 41K).
- All residents were aware of the proposed development/change when they entered into a contract to live in the village (section 41L).
- The change does not involve either a reduction in the range or quality of amenities or services available to residents or the imposition of any additional cost to residents (section 41M).

In other cases, the modification will require approval under section 41N. The approval process in section 41N will not apply to proposals to close a village. Section 22 (to be amended by clause 21 of the Bill) deals with the approval requirement for the temporary or permanent closure of a village. It does, however, apply to redevelopment proposals that require a resident or residents to relocate within a village.

New section 41N(2) will require the operator to provide residents with a modification plan in a form approved by the Commissioner and including prescribed information. The modification plan will provide residents with sufficient information to allow them to consider the proposal and to vote on the proposal at a meeting of residents in accordance with the requirement of new section 41N(3). New section 41O provides that if the residents do not approve the proposal, the operator can seek an order from the SAT approving the modification plan.

Section 41N(4) provides that, if a proposed modification requires a resident to vacate premises in the village, in addition to consent of residents by special resolution, the consent of that resident is required. In that situation, the operator would be expected to make alternative accommodation in the village of an acceptable standard available to the resident to secure the resident's approval. If the affected resident does not consent, section 41O(4) permits the operator to seek an order from the SAT declaring that the resident's failure to approve is unreasonable which will permit the operator to proceed with the development without that consent.

Where the SAT declares that a resident has unreasonably refused to vacate premises to permit a redevelopment, the SAT must fix a date for the resident to vacate and may make additional orders to compensate the resident for the cost of relocation or for a loss of rights under the residence contract (section 41O(5)).

Section 41O(3) provides that the SAT may approve a modification plan with amendments, in which case the modification must be carried out with those amendments.

Section 41P provides that a resident who believes that an operator has carried out a modification without complying with the approval requirements can apply to the SAT for an order that the administering body remedy the contravention. The SAT has a broad power under the section to make orders requiring the operator to take specific action to remedy the contravention.

If a development proposal requires a memorial to be amended because a parcel of land is being excised from the village and put to another use, section 41Q provides that an application can be made to the SAT for amendment of the memorial under section 15A when the SAT approval is sought for the modification.

Clause 24 Section 41R inserted

This clause inserts new section 41R dealing with dispute resolution.

Section 41R(1) inserts a head of power for regulations to be made in respect of dispute resolution. This covers disputes between a resident and the operator (or the operator's employees and contractors) and disputes between residents at a village. The regulations will make provision for a dispute resolution procedure.

Detailed requirements that are currently in the Code will be moved into the regulations with several additional provisions to be included as described below.

Section 41R(3) will give the Commissioner the power to appoint a mediator, and section 41R(4) will provide the Commissioner with the power to compel a party to a dispute to attend mediation.

If a person fails to comply with a requirement by the Commissioner to attend mediation, a maximum fine of \$5 000 will apply for an individual or \$25 000 for a corporation.

Section 41R(6) provides a new requirement for parties to participate in a mediation in good faith.

Section 41R(7) provides a head of power for regulations to be made about mediations. Clauses 31 to 33 of the Code currently contain provisions in relation to mediation which will be moved into the regulations without any material changes.

Clause 25 Section 42 deleted

Section 42 provides a discretion for SAT to decline to deal with an application if the Tribunal is of the view that other more appropriate mechanisms for resolution are available.

Clause 25 deletes that provision. This power is not required, as the *State Administrative Tribunal Act 2004* provides, at section 50, that the Tribunal may, at any time, strike out a proceeding on the basis that it would more appropriately be dealt with elsewhere.

Clause 26 Section 52 deleted

Section 52 places limits on the orders that may be made by the SAT. Specifically, it provides that the SAT cannot make orders that are inconsistent with an applicable code or a residence contract.

Clause 26 deletes this provision.

Restrictions will not be required in respect of provisions in the Code, as relevant parts of the Code are being moved into regulations.

As new provisions in the Act will apply to existing contracts and, subject to the contents of transition arrangements, may override terms in the contracts, the restriction in respect of inconsistency with contracts will also be removed.

The amended Act, and the *State Administrative Tribunal Act 2004* provide for a range of powers that can be exercised by SAT and for any restrictions that apply to those powers, and it is not necessary for any additional restrictions to be applied in this Division.

Clause 27 Section 57A amended

Clause 27 deletes section 57A(3). This provision defines 'special resolution' and is no longer required because more detailed

provisions in respect of special resolutions have been added to the Act by clause 23 at new section 41G.

Clause 28 Sections 78 and 78A inserted

Clause 28 adds new sections 78 and 78A which provide for the Commissioner to keep a register of retirement villages.

Section 78 will require operators to provide the Commissioner with information about the village in approved form. The required information, which will be used to compile a register, will include:

- The name and address of the village.
- The number of residential units in the village.
- The type of tenure offered in residence contracts at the village, which is described in section 78(1)(c) on the basis of the possible types of tenure included in the definition of retirement village scheme in section 3 of the Act.
- The memorial number for the village.
- A current community arrangements statement.

There will be a power at section 78(1) for additional information to be prescribed.

The operator will be required to provide the information within 14 days of the establishment of a village, and within 14 days of any change to the information, or any change to community arrangements at the village.

Section 78A(1) requires the Commissioner to use information supplied by operators under section 78 to compile and maintain a register of retirement villages.

The register will be a resource for residents, potential residents, and their friends, families and advisers – allowing them to source information about the sector, and about specific villages. Sections 78A(2) and (3) will assist by permitting the Commissioner to determine how the register is kept, to make the content publicly available, and to publish information about community arrangements at registered villages.

Clause 29 Section 79 amended

Section 79 provides that section 39 of the Criminal Code (which provides for criminal liability of officers of a body corporate) applies to a range of offences under the Act as listed in the table included in the section. Section 39 of the Criminal Code provides for liability where an officer does not take all reasonable steps to prevent the commission of an offence. The table currently includes a broad range of offences under the Act, reflecting the fact that, in most instances, directors of the corporation and managers of a village are likely to be in a position to directly influence or participate in the commission of an offence.

Clause 29 amends the table in section 79 to include the new offences that will be created as a result of the amendments, with the exception of an offence under new section 41R(4) (failure to comply with a direction to attend mediation) which will only be committed directly by the person served with the notice.

Clause 30 Section 82 amended

Section 82 of the Act provides a head of power to permit the Governor to make regulations that are necessary or convenient to carry out or give effect to the terms of the Act. Section 82(2) provides a list of matters that may be the subject of regulations under the section. Clause 30 adds new section 82(2)(d) to the Act. This subclause permits regulations to be made in respect of the advertising and marketing of retirement villages. This will permit requirements about the contents of advertising and marketing materials to be tailored to address the range of marketing materials produced by a village. In some forms of advertising, the capacity to include disclosure will be limited, while in other instances, it will be reasonable to require the operator to provide additional information, or information about how to source additional information, to ensure that the content of advertising is not misleading for consumers.

Division 2 – Other amendments

Clause 31 Act amended

This clause provides that Part 2 Division 2 amends the *Retirement Villages Act 1992*. As a result of the operation of clause 2, this Division comes into effect on the day after assent day. It makes transitional, consequential and drafting amendments to the Act that are not directly related to the operative amendments included in the Bill and do not materially impact the current operation of the Act for operators or residents.

Clause 32 Section 1 amended

This clause amends section 1 to reflect current drafting convention, it does not make any material change to the provision.

Clause 33 Section 3 amended

Definitions in section 3 are amended by the deletion of the term “administering body” and its replacement with the term “operator”. The term operator is clearer, preferred by industry and residents and more consistent with terminology used in other jurisdictions and in retirement village contracts. There is no material change to the range of entities included in the definition.

The definition of “retirement village scheme” is amended by removing that part of the definition that applies the same definition where the

word “scheme” is used alone, correcting an error in the current drafting.

The following additional definitions are inserted:

“approved form” is a form approved by the Commissioner under section 8(2). Clause 33 amends section 8 to include this as a function of the Commissioner.

“Tribunal” means the State Administrative Tribunal. This definition provides for consistent use of terminology through the Act when referring to the SAT.

Clause 34 Section 8 amended

Clause 34 will add new section 8(2) providing a power for the Commissioner to approve forms for use under the Act.

Clause 35 Section 9 amended

Clause 35 replaces the term ‘notwithstanding’ in section 9(6) with ‘despite’ to modernise drafting in line with current practice and provide consistency in terminology through the Act.

Clause 36 Section 13 amended

Clause 36 replaces the term ‘will be’ in section 13(4) with ‘is’ to modernise drafting in line with current practice and provide consistency in terminology through the Act.

Clause 37 Section 15 amended

Clause 37 updates terminology relating to memorialisation of retirement villages land in section 15 of the Act to provide for consistency through the section, and with the new parts added to that section, in how retirement village land is described.

Clause 38 Section 18 amended

Clause 38 replaces the term ‘will be’ in section 18(4)(b) with ‘is’ to modernise drafting in line with current practice and provide consistency in terminology through the Act.

Clause 39 Section 19 amended

Clause 39 makes an amendment to the terminology used in section 19(6) to ensure that the way retirement village land is referred to is consistent throughout the Act.

Clause 40 Section 21 amended

Clause 40 amends section 21 to replace references to enforcement to reflect current drafting convention.

Clause 41 Section 22 amended

Clause 41 replaces the term 'will be' in section 22(2) with 'is' to modernise drafting in line with current practice and provide consistency in terminology through the Act.

Clause 42 Section 44 amended

Clause 40 replaces the term 'notwithstanding' in section 44(1) with 'despite' to modernise drafting in line with current practice and provide consistency in terminology through the Act.

Clause 43 Section 57A amended

Clause 43 amends section 57A to update the terminology to reflect current drafting practice and provide consistency with language used in new provisions.

Clause 44 Section 60 amended

Clause 44 amends section 60(2) to update the terminology to reflect current drafting practice and provide consistency with language used in new provisions.

Clause 45 Section 75A amended

Clause 45 makes amendments to the terminology used in section 75A to ensure that the way retirement village land is referred to is consistent throughout the Act.

Clause 46 Section 77C amended

Clause 46 updates existing terminology in the Act by replacing the current reference to "form approved by the Commissioner" with "approved form", this is consistent with the terminology that will be used in new provisions in the Act.

Clause 47 Section 77 amended

Clause 47 updates terminology replacing "may not" with "cannot" in section 77 for consistency with new provisions in the Act.

Clause 48 Schedule 1 Division 3 inserted

Schedule 1 of the Act includes a range of savings and transitional arrangements that were included in the original Act as passed, or that were added in an amendment Act in 2012.

Clause 48 adds a range of additional transitional provisions as Schedule 1 Division 3 that will come into effect on assent.

- New schedule 1 clause 6 will add a definition of “amending Act” for the purposes of Division 3, being the *Retirement Villages Amendment Act 2024*.
- New schedule 1 clause 7 will provide a power for the Governor to make regulations to deal with transitional matters where no sufficient provision has been made in the Act.
- New schedule 1 clause 8 will provide that a reference to “administering body” will be taken to be a reference to an “operator” in regulations, the Code and any other written instrument or document (including a village contract). References in the Act will be updated, but this provision will avoid any inconsistency in other existing instruments.
- Section 6(2) of the Act provides that a provision in the Act does not apply to existing contracts. New schedule 1 clause 9 will provide that section 6(2) of the Act does not have any application to amendments made by the Bill. The amendments in the Bill will therefore apply to existing contracts unless regulations provide otherwise.
- New schedule 1 clause 10 provides that the amendments in the Bill do not, however, have any application in court or tribunal proceedings commenced before the amendment comes into effect.

Clause 49 Various reference to “administering body” amended

Clause 49 includes two tables setting out provisions and headings in the Act where terminology will be updated to replace the term “administering authority” with “operator”.

The term operator is clearer, preferred by industry and residents and more consistent with terminology used in other jurisdictions and in retirement village contracts. There is no material change to the range of entities included in the definition.

Clause 50 Various reference to gender amended

Clause 50 includes a table setting out a range of amendments to provisions in the Act that will replace gendered references with gender neutral terminology. This will update the provisions in the Act to reflect current drafting practice, as well as providing consistency with new provisions that are being inserted into the Act.

Clause 51 Various penalties amended

Clause 51 includes a table setting out a range of amendments to penalty provisions in the Act. The changes do not materially alter existing penalties but update the provisions in the Act to reflect current drafting practice, as well as providing consistency in drafting style with new provisions that are being inserted into the Act.

Clause 52 Various references to proceedings amended

Clause 52 includes a table setting out a range of amendments that will replace dated terminology in relation to the conduct of proceedings with more modern terms and provide for consistency in how the terminology is used through the Act, including in new provisions. “Institute” is replaced with “commence”, “brought” with “commenced” and “the proceeding” with “proceedings”.

Clause 53 Various reference to “shall” amended

Clause 53 includes a table that sets out a range of provisions that will be amended by replacing the term “shall” with a plain English equivalent consistent with current drafting practice.

In most instances “shall” will be replaced with “must”. Depending on the context, other more modern, plain English alternatives are used in some instances.

Clause 54 Various references to the State Administrative Tribunal amended

Clause 54 includes two tables setting out provisions and headings in the Act where terminology will be updated to replace the term “State Administrative Tribunal” with “Tribunal”.

This will provide consistent use of terminology through the Act and is supported by the insertion of a definition of “tribunal” at section 3 of the Act.

Clause 55 Various reference to “where” amended

Clause 55 includes a table identifying seven provisions in the Act where the term “where” will be replaced by “if”. These amendments update the provisions in the Act to reflect current drafting practice, as well as providing consistency with new provisions that are being inserted into the Act.

Part 3 – *Duties Act 2008* amended

Clause 56 Act amended

This clause provides that Part 3 amends the *Duties Act 2008 (WA)*.

Clause 57 Section 112 amended

Section 112 of the *Duties Act 2008 (WA)* is in Chapter 2 Part 6 of that Act, which deals with exemptions from Transfer Duty. Section 112 deals with a range of transactions under other legislation that are exempt.

This amendment will create an additional exemption for compulsory buyback transactions under the Part 3A of the Act, to ensure that

operators who are required to buyback freehold property in a retirement village for the purpose of subsequent re-sale to a new resident are not liable for duty on the transaction.

Part 4 – *Rates and Charges (Rebates and Deferments) Act 1992* amended

Clause 58 Act amended

This clause provides that Part 4 amends the *Rates and Charges (Rebates and Deferments) Act 1992*.

Clause 59 Section 29A amended

This clause makes a minor consequential amendment to the *Rates and Charges (Rebates and Deferments) Act 1992* to replace a reference to “administering body” of a retirement village in that legislation with “operator” to reflect the change in terminology in the Act.