Retirement Villages Amendment Bill 2006

Explanatory Notes

General Outline

Reasons for the Bill

Background

The *Retirement Villages Amendment Bill 2006* (the Bill) amends the *Retirement Villages Act 1999* (the Act). In summary, the Bill clarifies the rights and obligations of residents and operators, makes the operator's budget decisions more transparent and accountable, streamlines access to the dispute resolution process and offers greater certainty as to the resident's financial liability.

The Act, which commenced on 1 July 2000, regulates the retirement village industry. In Queensland, the industry is comprised of more than 250 registered retirement village schemes which provide for the accommodation, social and recreational needs of persons fifty-five years and over.

In return for paying an ingoing contribution and entering into a residence contract, persons obtain a right to reside in the village and receive services. Depending on the terms of their contract, a resident may acquire freehold title to the unit or be granted a lease or licence over the unit.

During their occupancy, residents pay ongoing general services charges which are used to maintain the village capital items and cover recurrent village expenses. The acquisition and replacement of capital items is funded by the operator. Among the key initiatives of the Act were the creation of the maintenance reserve fund and the capital replacement fund, which afforded increased accountability in dealing with village expenditure.

Upon leaving the village, the unit is reinstated to facilitate its re-sale, and the proceeds of this sale fund the payment of an exit entitlement to the

resident and an exit fee to the operator. The exit fee represents the operator's profit.

Review of the Act

When the Act was introduced, the then Minister gave an undertaking to review the effectiveness of the Act after its first year of operation.

The review of the Act commenced in September 2001. Over 150 submissions were received, and after the key issues were discussed by a Ministerial reference group, a series of detailed issues papers were developed and consulted on. A draft Bill was released on 23 February 2005, and over 80 submissions were received. As a result of discussion and negotiation with resident and industry representatives, amendments were made to address the issues arising from the draft Bill.

Policy Objectives of the Bill

The key policy objectives of the Bill are to regulate and promote fair trading practices in the operation of retirement villages. The Bill achieves this in the following ways:

- Consumer protection has been added as one of the main objects of the Act;
- Voting rights have been clarified, particularly for residents unable to attend a meeting, and access to the dispute resolution tribunal will be made easier for residents who are too elderly or intimidated to pursue this process themselves;
- Operators will have to involve residents in the village budget-setting process, make greater disclosure of financial information, and follow stricter guidelines for increasing fees and charges;
- The work involved in reinstating a unit has been clarified to focus more on ensuring a swift re-sale, and residents' liability to pay fees and charges after vacation will cease if their vacated unit remains unsold after nine months;
- A spouse or relative living with the resident, but not a party to the residence contract, has been given some limited rights to continue living in the unit should the resident die or vacate the unit;
- The requirements in relation to the residence contract and public information document, which detail the rights and obligations of the residents and operator, have been tightened;

- The drafting of the Act has been re-visited to ensure it adequately regulates those villages where the residents own the freehold title to their units, and to recognise the role of the body corporate in such villages; and
- Where appropriate, legislative changes have been made to residence contracts entered into prior to the Act to bring them in line with post-Act contracts.

The Bill is considered to be a reasonable and appropriate way of achieving the objectives. It provides adequate certainty for residents as to their financial and other obligations, and transparency, consistency and accountability with regards to the operators' budgeting decisions.

Compliance with Fundamental Legislative Principles

Four of the proposed amendments will have retrospective effect. The amendments are retrospective because they apply to, and therefore change, all contracts on foot. However the amendments only operate prospectively because they will not affect residents who vacate before the amendments commence, nor will they affect rights as they existed prior to the commencement of the Act.

Under the first such amendment, if a unit remains unsold at nine months from vacation, the resident's liability to continue paying general services charges ceases, regardless of any contractual provision to the contrary.

For contracts entered into after the Act commenced, the operator's exit fee must be calculated as at the date when the resident vacates their unit. Presently, for pre-Act contracts the calculation date is whenever the vacated unit is sold, which may result in a higher exit fee. However, the Bill prescribes the exit fee calculation date for pre-Act contracts will be brought in line with the calculation date for post-Act contracts.

After vacation, a unit must be reinstated, and the Act presently prescribes different reinstatement standards for pre-Act contracts and post-Act contracts. The Bill replaces these different standards with a new reinstatement standard to apply regardless of when contracts commenced. A timeframe (30 days) is provided for when the resident and operator must agree on the reinstatement work to be done for a post-Act contract, but there is no similar timeframe for a pre-Act contract. The prescribed post-Act timeframe will be applied to pre-Act contracts under the Bill.

Operators are opposed to these amendments, on the basis that it may reduce their expected profit. Balanced against this is the certainty which the

amendments will afford residents, particularly in terms of their post-vacation liability. As most units are sold within six months, it is unlikely that the first two proposed amendments will have major impacts on operators. Operators raised no particular issue with the last two proposed amendments, but continue to oppose retrospectivity in principle.

Estimated Cost for Government Implementation

It is not expected that the proposed amendments will create any additional costs in administering the Act. A comprehensive education package is being developed by the Office of Fair Trading in consultation with the industry to ensure maximum consumer and industry awareness of the changes introduced by the Bill.

Consultation

The proposed Bill is generally supported. Consultation feedback was provided by the Association of Residents of Queensland Retirement Villages, Aged Care Queensland Incorporated, the Queensland Law Society's Elder Law Section, and individual residents and operators.

The retirement village industry is increasingly being categorised as partisan, with many residents holding a strong distrust of operators in regard to their financial decisions, and many operators believing residents have unrealistic expectations as to how the cost of running a village can be funded. As such, there are few aspects of the Bill which have received unqualified support from both residents and operators, although most stakeholders acknowledge the compromises made by both residents and operators in arriving at amendments which are relevant and workable.

One important aspect of the Bill which has been shaped by such negotiation with, and compromise between, the stakeholders are the amendments which introduce greater transparency and accountability in the operator's financial decision-making processes. Residents will be given a role in the annual budget-setting process for the maintenance reserve and capital replacement fund and in relation to general services charges, including the right to inspect draft budgets and meet with the operator to discuss these. The operator will also be required to provide explanatory information showing why quarterly expenditure has exceeded budgeted amounts.

Residents have welcomed these changes, and although still believe the operator retains too much discretion in deciding fees and charges, they accept that a resident power of veto over budgets would not be viable in a business environment. Operators have noted the added administrative costs these amendments will create for them, but are relieved that their ability to make the necessary financial decisions, even tough ones if needed for the overall good of the village, has remained mostly intact.

However one issue which remains highly contentious between the stakeholders are those amendments that bring the terms of pre-Act contracts into line with post-Act contracts. Early in the review it was identified that residents faced a high degree of uncertainty as to what their financial obligations and entitlements were after vacating their unit, particularly where the unit takes a long time to re-sell, and these amendments are an attempt to redress this.

Residents praised the imposition of a cap on the accrual of general services charges at nine months from vacation, but believe it should have been set at three or six months from vacation. Most units are sold well within six months, and a cap at nine months will assist those residents whose units, usually because they are inherently less marketable, take a longer-than-usual time to re-sell. Whilst operators did not take any strong objection to the cap in principle, they oppose it applying to residence contracts already on foot. The units which take longest to sell are usually the older ones presently occupied under contracts, and therefore the cap needed to apply to existing contracts to have a significant effect.

Similarly, the re-setting of the exit fee calculation date for pre-Act contracts has been supported by residents but opposed by operators. If a unit takes a long time to re-sell, the percentage used to calculate the operator's exit fee may increase to the next annual increment under a pre-Act contract, whereas under a post-Act contract the percentage as at the date of vacation must be used. The amendment will increase consistency across all contracts, thereby providing more certainty for residents under pre-Act contracts as to how much exit fee they are liable to pay. This "retrospectivity" is critical to the amendment, not just because the only relevant contracts are those which are already on foot, but also because the units which take longest to re-sell are usually those under pre-Act contracts.

Operators believe these two amendments may decrease their expected profit margins. Firstly, the general services charges cap will make the operator liable to pay these charges after nine months until the unit is re-sold. Secondly, the operator may lose any increase in the exit fee which

they may have anticipated under a pre-Act contract as a result of the unit probably being re-sold after the next percentage increment point is reached. Aged Care Queensland Incorporated undertook to demonstrate how these amendments would cause substantial detriment to operators, however the financial data eventually received failed to prove that any such detriment was likely.

Notes On Provisions

Part 1 – Preliminary

Clause 1 sets out the short title for the Bill.

Clause 2 provides when the amendments in the Bill will commence.

Those amendments which impose additional budgeting requirements for the maintenance reserve fund and the capital replacement fund, or require a budget to be adopted for general services charges, or impose new requirements in relation to quarterly financial statements will all commence on 1 January 2007. Doing so will provide adequate lead-in time for operators in which to implement these changes.

Those amendments which create new restrictions on insurance excesses will commence on a date fixed by proclamation. This is because these changes must be timed so as to commence with related amendments to the *Retirement Villages Regulation 2000*.

All other amendments commence on assent.

Clause 3 states that the Bill amends the *Retirement Villages Act 1999*.

Clause 4 re-states the objects of the Act and divides these into main objects and other objects. The first main object of the Act is to promote fair trading practices in operating retirement villages. In recognition of the many resident safeguards which go to the core of the Act, this first main object has also been expanded to include the promotion of consumer protection in operating retirement villages. The second main object of the Act is to encourage the continued growth and viability of the retirement village industry.

Clause 5 recognises that where ancillary contracts (including loan agreements and leases) are entered into, the residence contract may actually consist of more than one contract.

The clause also confirms that a residence contract may be based upon a freehold interest in a unit. A residence contract must restrict the way the right to reside in the unit is disposed of, and in the case of a freehold interest the clause allows the restriction to be found in the contract for sale of that interest, rather than in the residence contract itself.

Clause 6 omits the existing definitions of "general services" and "personal services". As these definitions are referred to in various sections of the Act, they have been moved to the Dictionary in the Schedule.

Clause 7 re-states the existing definition of a "public information document" to clarify that this document can not be generic, but instead must provide details about the particular retirement village to which the document relates.

Clause 8 re-states and adds to the existing definition of an "exit fee".

Firstly, the clause clarifies that an exit fee is capable of either being paid to the operator or (where the proceeds from re-sale of the right to reside are directly received by the operator) credited to the operator's account.

Exit fees are usually calculated as a percentage of the re-sale proceeds, and this percentage continues to increase during the resident's occupation. Presently the Act provides that for contracts entered into after the Act commenced, the percentage to be applied is the percentage as at the date of vacation of the unit, whereas for contracts entered into before the Act commenced, this percentage may continue to increase after vacation up to the time of re-sale. The clause will change the percentage applicable for existing residence contracts to also be the percentage as at the date of vacation. This amendment will apply retrospectively but operate prospectively – that is, it will alter contracts already entered into, but not where the resident has vacated prior to the amendment commencing. The clause clarifies that this change applies despite anything to the contrary in an existing residence contract.

The Bill allows the spouse or relative of a resident, residing in the unit but not a party to the residence contract, to have a limited right to continue living in the unit for up to three months after the death or vacation of the resident. In this situation, the clause permits the operator to calculate the exit fee using the percentage applicable as at the day the spouse or relative vacates the unit or as at the end of the three-month period, whichever is sooner.

It is not uncommon for someone (often the freehold owner of a unit) to enter into the residence contract so that another person, such as a parent, may reside in the unit. The person in the unit is considered the “resident” and is liable under the Act to pay the exit fee, despite the re-sale proceeds of the right to reside going to the person who entered into the contract. The clause extends the meaning of “resident” in such circumstances to capture the person who entered into the residence contract, and inserts an illustrative example.

Clause 9 clarifies that an exit entitlement is capable of either being paid to the resident or (where the proceeds from re-sale of the right to reside are directly received by the resident, such as where a freehold interest in the unit is involved) credited to the resident’s account.

As noted above, it is not uncommon for someone to enter into the residence contract so that another person, such as a parent, may reside in the unit. The person in the unit is considered the “resident” and is entitled under the Act to receive the exit entitlement, despite the original ingoing contribution having been paid by the person who entered into the contract. The clause extends the meaning of “resident” in such circumstances to capture the person who entered into the residence contract.

Clause 10 clarifies that a resident’s maintenance reserve fund contribution is not a percentage of their general services charges (as use of the word “proportion” in the Act implies), but is instead only a part (that is, a component) of those charges.

Clause 11 clarifies that a retirement village dispute includes a dispute arising from the operator’s failure to comply with a requirement of the Act. There are numerous instances in the Act where no penalty is provided for an operator’s non-compliance with a requirement, and the clause also clarifies that whether or not there is a penalty makes no difference to whether non-compliance gives rise to a retirement village dispute.

The clause also inserts a note, to the effect that where the Act imposes a requirement on the operator but no penalty is provided for non-compliance, a means of enforcing such a requirement is by pursuing the dispute resolution process under the Act.

The clause also clarifies that a former resident (that is, a resident who has vacated their unit but has not been paid out their exit entitlement) may still avail themself of the dispute resolution process.

Clause 12 names the chief executive’s written refusal to register a retirement village scheme as a “decision notice”. Presently under the Act,

the chief executive is only (specifically) empowered to decide as to registration, but the Bill now empowers the chief executive to decide as to deregistration of a scheme. Therefore the existing term "decision notice" needed to be defined to distinguish it from the new, other decision notice relating to deregistration.

Clause 13 provides for a new process for deregistering a retirement village scheme. This process mirrors the registration process, but may only be activated when the chief executive reasonably believes the scheme is no longer operating. The chief executive issues a notice, stating the grounds for this belief, and the scheme is deregistered 30 days from the operator receiving that notice. As the chief executive would be unlikely to commence this process without first conducting a full investigation, no "show cause" step has been prescribed.

Clause 14 provides a right of appeal against the chief executive's decision to deregister a retirement village scheme.

Clause 15 allows a period of 28 days for lodging an appeal against the chief executive's decision to deregister a retirement village scheme.

Clause 16 requires the operator to make written disclosure of any inaccuracy in a public information document to a person who either intends signing a residence contract or has signed and the cooling-off period has not yet expired. Failure to make the disclosure is an offence, but the operator has a defence in the case of a person who has already signed the contract if there was a reasonable excuse for not making the disclosure before the end of the cooling-off period. The most likely "reasonable excuse" would be that there was insufficient time between when the operator became aware of the inaccuracy and when the cooling-off period ended, however the clause then requires the operator to make the disclosure as soon as possible thereafter.

The clause also requires the operator to amend the public information document as soon as possible after becoming aware of the inaccuracy.

Clause 17 re-states, more simply and in a more positive manner, the existing section dealing with what happens if a provision in a public information document is inconsistent with the residence contract or the Act. Where there is an inconsistency between the public information document and the residence contract, the provision in either document which is more beneficial to the resident will prevail, and where there is an inconsistency between the public information document and the Act, the Act will prevail.

Clause 18 outlines an additional requirement where a person signs a residence contract. In addition to providing the person with a copy of both the signed residence contract and the public information document, the operator will now be required to ensure those documents are bound together. However as under the Act presently, the operator need not provide a copy of the public information document to the person if one has already been provided.

Residence contracts often incorporate ancillary contracts (including loan or lease agreements), and the clause provides that where such ancillary contracts are to be executed after signing the residence contract, unsigned copies of these ancillary contracts are to be included in the bound copy of the residence contract and public information document.

Clause 19 requires the residence contract to include more specific information about the residence contract cooling-off periods. Where the cooling-off period commences when the residence contract is signed, the contract must state the day that cooling-off period ends. Where the cooling-off period commences upon the happening of a later event (such as the potential resident selling their house) or another contract being entered into, that later event or other contract must be stated in the residence contract.

Clause 20 requires the operator to give written notice to a person who has signed a residence contract about the date when the cooling-off period for the contract ends. The requirement applies where the cooling-off period commences upon the happening of a later event or another contract being entered into, and that later event then occurs or the other contract is executed. The operator is also required to give written notice to the person of the date when the later event happened or the other contract was entered into.

Clause 21 removes the present requirement for an ingoing contribution to be held on trust until settlement of the residence contract if the ingoing contribution is received after settlement of the residence contract. In such cases, the ingoing contribution is paid directly to the person entitled to receive it (usually the operator), or if the person who received the ingoing contribution is also the person entitled to it, that person may simply keep it.

Clause 22 removes the option for an operator not to provide a resident with an estimate of their exit entitlement because the operator has a “reasonable excuse” for not doing so. As only an estimate is required, there is no good reason for the operator not being able to provide this.

Clause 23 expands on the existing definition for "termination date" to cover the situation where a spouse or relative, pursuant to other provisions of the Bill, has a right to reside in the unit for up to three months after the death or vacation of the resident. In limited circumstances, the spouse or relative may also enter into a new residence contract over the unit by giving notice to the operator before the end of the three-month period of an intention to do so. In such a case, the termination date is the day during that three-month period when this notice is given.

The clause provides that reference in Division 5 of the Act to a "former resident" will be taken to include the holder of the freehold title, unless the residence contract states otherwise. The division is concerned with re-selling the right to reside, and the "former resident" is charged with making decisions in relation to this. However where the freehold title to a unit is held by a person other than the actual resident of the unit, it is usually the freehold title holder who will make these re-sale decisions.

The clause re-states, more simply, when Division 5 of the Act applies. Presently under the Act, the division applies if (i) the resident's right to reside is terminated, (ii) the operator has control over re-selling the unit, and (iii) the residence contract does not include provisions equivalent to those in the division. The clause re-states the first pre-condition only, as the remaining two are irrelevant (re-sale can only ever occur with the operator's acquiescence, and the requirements of the Act will always overrule anything in the residence contract), although for completeness the underlying message of the third pre-condition (that the division overrules any contrary term in a residence contract) is also stated.

Clause 23 also re-states and adds to the requirements for reinstating a unit after vacation.

Firstly, a timeframe within which a resident and the operator must negotiate on the reinstatement work needed will be prescribed for existing (that is pre-Act) residence contracts. This timeframe will be the same as that already applicable to post-Act residence contracts, being 30 days after termination of the contract. This amendment will apply retrospectively but operate prospectively – that is, it will alter contracts already entered into, but not where the resident has vacated prior to the amendment commencing.

The Act presently provides that if the resident and the operator can not agree on the reinstatement work, the operator must obtain an itemised quote, from a qualified and appropriate tradesperson, and the quote must be obtained within 14 days. The clause re-states this requirement but also allows the resident to also obtain their own quote for the work. The clause

also tidies up the timeframe within which the quote(s) must be provided, specifying 44 days after terminating the contract (that is, the initial 30 day negotiation period plus the following 14 days presently allowed to obtain the quote).

The clause clarifies that if the parties can not agree on the reinstatement work even after quotes are obtained, this qualifies as a retirement village dispute.

As noted above, the Bill allows the spouse or relative of a resident, residing in the unit but not a party to the residence contract, to have a limited right to continue living in the unit for up to three months after the death or vacation of the resident. In certain circumstances, the spouse or relative may enter into a new residence contract over the unit, and the clause provides that such in a case the reinstatement requirements apply as if that spouse or relative were the resident. In practice, this means the spouse or relative must negotiate with the operator as to what reinstatement work is needed.

Of course in usual circumstances the unit is vacant when the reinstatement work is done, however if the spouse or relative remains in the unit and then enters into a new residence contract for the unit, the reinstatement will need to be effected whilst the spouse or relative is in situ. The clause therefore requires the operator to complete the reinstatement work in such a situation with as little inconvenience to the spouse or relative as is reasonably possible.

Clause 24 re-states the definition of “vacation date”. As noted above, the Bill allows the spouse or relative of a resident, residing in the unit but not a party to the residence contract, to have a limited right to continue living in the unit for up to three months after the death or vacation of the resident. The clause provides that in ordinary circumstances, the vacation date will continue to be when the resident vacates the unit, but where a spouse or relative remains in the unit, the vacation date will be when their limited right to continue living in the unit ends.

The clause also clarifies that the time within which reinstatement work must be completed also applies to a spouse or relative intending to enter into a new residence contract over the unit.

Clause 25 clarifies that the cost of reinstatement work under a freehold residence contract includes labour and materials.

Clause 26 re-states and adds to the existing provision dealing with liability for reinstatement under a leasehold or licence residence contract.

Presently in a lease or licence situation, the cost of reinstatement must be paid by the operator under a post-Act residence contract, and by the resident and the operator, in the same proportion as they share the re-sale proceeds on the right to reside in the unit, under an existing (that is, pre-Act) residence contract. However this general rule is subject to anything to the contrary in the residence contract, and in all cases the resident is liable for accelerated wear or deliberate damage to the unit. The clause re-states these rules, but then provides that they now only apply to residence contracts entered into before the amendment commences.

The clause also clarifies that in working out the sharing of reinstatement costs, the "proportion" to be used is the way in which the resident and operator share the amount of the ingoing contribution paid by the incoming resident (which is a more accurate way of describing the re-sale proceeds of the right to reside). As the resident's share will end up being less once any outstanding fees and charges are deducted, the clause provides that the "gross" ingoing contribution must be used in calculating this proportion.

The clause then provides that for all residence contracts entered into after the amendment commences, the operator will be solely liable for the cost of reinstatement, but there are two exceptions to this. Firstly, accelerated wear and deliberate damage will continue to be paid for by the resident. Secondly, where the resident and the operator are to share the capital gain on the sale of the right to reside, they also share reinstatement costs in the same proportion.

In keeping with reinstatement costs for freehold interests as discussed above, the clause clarifies that reinstatement costs under lease and licence residence contracts are for both labour and materials.

Clause 27 reduces the time within which the operator must pay the exit entitlement to an outgoing resident from 28 days to 14 days. The clause also clarifies that this period begins to run from the settlement date of the residence contract, which is then defined.

Clause 28 corrects a typographical error in the heading of the existing section.

Clause 29 clarifies how the costs of selling a unit are to be shared between a resident and the operator. The section presently provides that these costs are to be shared in the same proportion as the resident and operator share the "sale proceeds of the right to reside in the unit on its sale". In keeping with the sharing of reinstatement costs as discussed above, the clause provides that it is actually the sharing of the gross ingoing contribution that must be used in calculating the proportion.

Clause 30 requires a valuer engaged by the operator to declare any connection to, or agreement with, the operator which may call into question the independence of any valuation given.

Clause 30 also gives the spouse or relative of a resident, who is not a party to the resident's residence contract, a right to remain in the unit after the death or vacation of the resident. For simplicity, only the term "relative" is used in the clause (and other affected clauses in the Bill) because it is defined in the Dictionary in the Schedule to include "spouse".

The spouse or relative will have a right to reside in the unit for three months if the following four pre-conditions are met. Firstly, the resident's residence contract must be terminated. Secondly, the spouse or relative must have been living in the unit when the resident died or vacated. Thirdly, the spouse or relative must have lived in the unit for at least the six months immediately before the death or vacation. Fourthly, the spouse or relative must agree in writing to be bound by the terms of the resident's residence contract whilst the spouse or relative remains in the unit.

During the three months, the spouse or relative has all the same rights and liabilities that the resident had.

The clause also gives the spouse or relative, under certain circumstances, the right to a first option to enter into a new residence contract over the unit. The operator must enter into a residence contract with the spouse or relative before the end of the three months if the following four pre-conditions are met. Firstly, the resident had a leasehold or licence interest in the unit. Secondly, the resident's residence contract did not give any other person a right to reside in the unit. Thirdly, the spouse or relative meets the village eligibility criteria. Fourthly, at least 14 days before the end of the three-month period, the spouse or relative advises the operator that they want to enter into a residence contract for the unit.

The residence contract with the spouse or relative must be on the same terms as would be offered to any other potential resident. As discussed above, reinstatement of the unit will need to be done whilst the resident is in situ, and this may affect the type of reinstatement which the spouse or relative and the operator agree to. Accordingly, the clause allows the "usual" terms of a residence contract offered to the spouse or relative to be adjusted to reflect any unique reinstatement arrangement.

Finally, the clause clarifies that regardless of the new rights which allow the spouse or relative of a resident to remain in the unit, that resident's residence contract still terminates on the resident's death.

Clause 31 re-states the existing requirement for the "public information document" to be in the approved form, but also clarifies that this document must relate to a particular retirement village (that is, the public information document must not be generic).

Clause 32 requires the "accommodation information" in a public information document to not only provide details of village insurance but also the amount of any insurance excess.

Clause 33 requires the "accommodation information" in a public information document to not only provide details of any future facilities but also when it is anticipated that charges in relation to such future facilities will begin to be levied.

Clause 34 removes the requirement for details of any "village based dispute resolution panel" to be included in the "dispute resolution information" in a public information document. Such a panel is not provided for in the Act, and would not fit within the prescribed three-step resolution process under the Act.

Clause 35 requires the public information document to be provided to a potential resident before any contracts ancillary to the residence contract (such as loan or lease agreements) are entered into. This is in addition to the present requirement for the operator to provide the public information document to a prospective resident before the residence contract itself is entered into.

Clause 36 re-states the present rule that the operator is solely liable for the cost of capital improvements at the village. The clause then details the requirements applicable where the operator is requested to make additional capital improvements.

Firstly, the clause re-states that if a resident under a lease or licence residence contract requests that a capital improvement be made, and the operator agrees to this, the resident is solely liable for the cost of the improvement. Similarly, the clause re-states that if the residents committee request that a capital improvement be made, and the operator agrees to this, all the residents in the village at that time are jointly liable for the cost of the improvement. In this latter situation, the clause has removed the "several" liability of the residents which is presently prescribed in the Act.

To ensure residents are more informed before requesting a capital improvement, the clause allows a resident or the residents committee (depending on who made the request) to seek quotes for the improvement from the operator. The operator must obtain at least two quotes unless it is not practicable to obtain more than one, and to provide copies or

summaries of the quotes. Where a resident made the request, the resident is liable for the reasonable costs of obtaining the quotes, and where the residents committee made the request, all residents are liable for such costs.

There may be up-front or establishment costs associated with the capital improvement, and the clause allows the operator to require payment of the improvement before it is made. The operator is also required to hold such payments in trust, only use those funds for the capital improvement, and refund any balance after the improvement is paid for.

The Bill ceases a resident's liability to continue paying general services charges at nine months from vacation, and accordingly the clause also ceases a resident's liability in relation to requested capital improvements at that time. The operator then becomes responsible for that resident's share of the liability.

Clause 37 permits a full quantity surveyor's report (in relation to budgeting for the capital replacement fund) to only be obtained in 2009 and every third year following, and in any other year when substantial changes have been made to the village. In any year in which substantial changes have necessitated a full report, the operator does not need to obtain a further full report if one were due that same year. In years when a full report is not required, an update of a previous full report is to be prepared.

The clause also clarifies that to comply with the present requirement for the operator to "have regard" to the quantity surveyor's report, the operator must endeavour to implement the report recommendations in the context of the objects of the Act and any relevant circumstances apparently not considered by the quantity surveyor.

Clause 38 allows the residents to become involved in setting the annual budget for the capital replacement fund. The residents committee may make a written request for the operator to provide a copy of the draft budget 14 days before the beginning of the financial year, and to attend a meeting of residents before the beginning of the financial year to discuss that draft budget. The residents' written notice to the operator about the meeting must be given at least 28 days before the beginning of the financial year, and the operator is required to comply with the notice.

Clause 39 permits a full quantity surveyor's report (in relation to budgeting for the maintenance reserve fund) to be obtained only in 2009 and every third year following, and in any other year when substantial changes have been made to the village. In any year in which substantial changes have necessitated a full report, the operator does not need to obtain a further full

report if one were due that same year. In years when a full report is not required, an update of a previous full report is to be prepared.

The clause also clarifies that to comply with the present requirement for the operator to “have regard” to the quantity surveyor’s report, the operator must endeavour to implement the report recommendations in the context of the objects of the Act and any relevant circumstances apparently not considered by the quantity surveyor.

Clause 40 allows the residents to become involved in setting the annual budget for the maintenance reserve fund. The residents committee may make a written request for the operator to provide a copy of the draft budget 14 days before the beginning of the financial year, and to attend a meeting of residents before the beginning of the financial year to discuss that draft budget. The residents’ written notice to the operator about the meeting must be given at least 28 days before the beginning of the financial year, and the operator is required to comply with the notice.

The clause also clarifies that any end-of-year surplus or deficit is to be carried forward and taken into account by the operator in budgeting for general services charges in the following year.

Clause 41 outlines how long an operator is allowed to continue charging a resident for personal services after the resident leaves the village. Presently the only restriction on the operator is that charges can not continue more than 28 days after vacation.

The clause (by referring to other sections in the Act) provides that charges for personal services can not be continued after (i) one month where the resident gives standard notice, or (ii) 14 days where the resident gives notice because the village is not registered, or (iii) 14 days where the operator gives notice due to the resident’s dangerous behaviour, or (iv) two months where the operator gives notice because the resident has materially breached the residence contract, abandoned their unit or been assessed as no longer medically fit to live in the village.

It is not uncommon for residents to remain in their units beyond the period of notice given, and so the clause also provides that where a resident is given an extension of time, personal services may not be charged more than 14 days after that latter time.

The original restriction also remains, however the no-more-than 28 days period is the default timeframe where the resident dies (and therefore no notice has been given).

Clause 42 requires the operator to adopt a budget for general services charges, which allows raising an amount to cover general services for the year ahead and fixes the contribution to cover this amount.

The residents committee may make a written request for the operator to provide a copy of the draft budget 14 days before the beginning of the financial year, and to attend a meeting of residents before the beginning of the financial year to discuss that draft budget. The residents' written notice must be given at least 28 days before the beginning of the financial year, and the operator is required to comply with the notice.

The clause also clarifies that any end-of-year surplus or deficit is to be carried forward and taken into account by the operator in budgeting for general services charges in the following year.

Clause 43 prohibits the operator from using general services charges to recoup costs awarded against the operator by the tribunal.

Clause 44 simplifies and expands upon a resident's liability for general services charges after vacating their unit. Some of the confusing differences between existing pre-Act and post-Act residence contracts have been removed. All residents will only be responsible for their share of general services charges until the unit is re-sold or the tribunal orders their exit entitlement to be paid.

Further, the liability of all residents to continue paying the general services charges will cease when the unit is re-sold or a period of nine months elapses from vacation, whichever occurs first. This amendment will apply retrospectively but operate prospectively – that is, it will affect contracts already entered into, but not where the resident has vacated prior to the amendment commencing.

The present ability of the operator to accrue general services charges payable after 90 days as a book debt will continue for both existing and post-Act residence contracts, however in view of the new nine month absolute cap on liability, the clause removes the day when the unit is re-sold as being the accrual end-point.

For post-Act contracts, after 90 days from vacation the resident and the operator will share the responsibility to continue paying the general services charges in the same proportion as they will share the "sale proceeds of the right to reside in the unit on its sale". The clause does not change this rule, however in keeping with the sharing of reinstatement and selling costs as discussed above, the clause provides that it is actually the sharing of the gross ingoing contribution that must be used in calculating the proportion.

Clause 45 clarifies that when a resident's liability to continue paying general services charges after vacation ceases (as a result of the above nine-month cap), the operator must pay the resident's share of general services charges until the unit is re-sold. This share includes the part of the resident's general services charges which is the resident's contribution to the maintenance reserve fund.

The clause also corrects a minor typographical error ("resident" to "residence").

Clause 46 clarifies how general services charges may be increased. The concept of the "total of general services charges" is introduced, meaning the sum of all general services charges for the year except charges for general services which have increased above CPI due to a special resolution of residents or which fall within the list in s.107.

The total of general services charges must not be increased above the CPI percentage for the year – in other words, the CPI percentage increase is applied to the total of general services charges instead of calculating CPI percentage increases for individual general services charges. The total of general services charges, as increased as a whole by applying the CPI, is then added to general services charges which have validly been increased above CPI to give a grand total of general services charges for the year (which must then, as discussed above, be adjusted by any surplus or deficit arising from the previous year's maintenance reserve fund or general services charges).

The clause also defines the term "CPI percentage increase" to mean (in the case of a July 1 to June 30 financial year) the increase between the CPI for the January to March quarter in the first year and the CPI for the January to March quarter in the following year.

Clause 47 includes insurance excesses paid in the list of general services charge which (like insurance itself) may be increased above the CPI percentage increase for a year.

Clause 48 requires the operator to consider more cost-effective alternatives before increasing a general services charge.

Clause 49 outlines the process for new services to be approved by residents. To ensure residents are more informed before agreeing to a new service, the clause requires the operator to obtain at least two quotes unless it is not practicable to obtain more than one, and to provide copies or summaries of the quotes. The residents are liable for the reasonable costs of obtaining the quotes. If a capital improvement is required in order for

the service to be provided, the clause enables the operator to seek a special resolution of residents under s.90 to approve this.

The clause also prohibits the operator charging residents for the service before it is actually supplied.

The Act presently provides that a special resolution is not required if the new service was proposed in a public information document. The clause will clarify that no special resolution is required if each of the residents in the village received the public information document in which the new service was proposed. The clause also clarifies that where (as above) the operator introduces a service as a more cost-effective alternative to one already supplied, the replacement service is not to be considered a "new service".

Clause 50 clarifies that insurance may be taken out subject to an excess. The clause restricts the amount of an excess which may be taken out by the operator without resident approval (the amount of $2,000 will be stated in the *Retirement Villages Regulation 2000* so that it may be updated as needed). The clause also allows the residents to approve an excess above this amount, but not more than 1% of the insured value of the village.

The restrictions on insurance excesses do not apply to public liability insurance.

Clause 51 re-states and adds to the requirement to provide a quarterly financial statement to a resident upon request. The clause clarifies that, in addition to showing the income and expenditure of the capital replacement fund and the maintenance reserve fund, the statement must list the expenditure involved in providing each general service.

The clause also requires the operator, at the request of the residents committee, to provide the residents committee with a document that explains (i) the expenditure involved in providing each service, and (ii) any increase in the expenditure involved in providing each general service that varies from the expected expenditure for that general service in the general services charges budget. The purpose of this document, and of the revised requirements for the quarterly statements, is to illustrate the overall cost of supplying particular general services rather than drill down to the fluctuations in the cost of individual items of expenditure.

Clause 52 re-states and adds to the requirement to provide an annual financial statement to a resident upon request. The clause clarifies that, in addition to showing the income and expenditure of the capital replacement fund and the maintenance reserve fund, the statement must list the

expenditure involved in providing each general service. These changes mirror those above in relation to the quarterly financial statements.

Clause 53 enables model classification rules to be enacted by regulation. These rules will classify items of expenditure as either capital or maintenance-related, or as a general services charge. The operator must comply with the rules.

The rules may also identify other items of expenditure which the operator must devise their own classifications for.

Clause 54 clarifies when an operator may attend a meeting of the residents committee. The operator may attend a meeting and address it if invited to the meeting by the residents committee. After addressing the meeting, the operator must leave unless invited by the residents committee to remain.

Clause 55 requires the residents committee to keep minutes of its meetings. The particulars of the minutes are listed, and the minutes must be presented at the following meeting for confirmation. Upon request, residents are entitled to view the minutes. The minutes must be kept by the residents committee, but go to the operator for safekeeping if the committee is dissolved.

Clause 56 removes the right of an operator to attend a meeting of residents where by-laws are being voted on. However the operator's right to attend such meetings is now covered by the following clause dealing with general meetings of residents.

Clause 57 clarifies when an operator may attend a meeting of residents. If the meeting is called by the operator, the operator has an unfettered right to attend. If the meeting is called by the residents committee for the purpose of a special resolution, the operator may attend but must leave after addressing the meeting and after the vote, unless invited by the residents committee to remain. If the meeting is called by the residents committee for any other purpose, the operator may attend if invited by the residents committee, but must leave after addressing the meeting unless invited by the residents committee to remain.

The usual (14-day) notice required to be given to residents for calling a meeting of residents may be reduced to two days in extraordinary or urgent circumstances. The clause narrows this by removing the vague "extraordinary" circumstances as justifying less-than-usual notice, and also defining "urgent" circumstances.

Clause 58 changes the heading of Part 7, Division 4 to recognise that the division now deals with voting more generally.

Clause 59 clarifies resident voting rights at meetings of residents. A one vote per unit system is prescribed, although residents may by special resolution agree to a one vote per person system.

The Bill ceases a resident's liability to continue paying their general services charges at nine months from vacation (unless the unit has been sold earlier), and the clause provides that in such circumstances the resident's right to vote also ceases at that time.

The clause clarifies that a resident may cast their vote personally, through a person appointed by the resident as their power of attorney, or by another resident of the village to whom the resident has given their proxy vote. The clause then re-states the present position that a proxy vote may only be given in respect of one meeting.

Clause 60 removes the option for a resident to request the chief executive make an application to the tribunal on the resident's behalf.

However the clause then enables a number of residents of a village who have the same, or very similar, dispute to apply jointly to the tribunal. Disputes under the *Manufactured Homes (Residential Parks) Act 2003* are also heard before the Commercial and Consumer Tribunal (although in a separate jurisdiction), and the proposed new section mirrors s.141 of that Act.

The clause also allows a resident to be represented by someone else before the tribunal. The tribunal (pursuant to s.76 of the *Commercial and Consumer Tribunal Act 2003*) has discretion to allow representation by a person other than the resident, including a lawyer, but this discretion is subject to any restriction contained in an empowering Act, such as the *Retirement Villages Act 1999*. The persons allowed under the clause to represent a resident are (i) another resident of the same village who is not a lawyer, (ii) a relative (defined narrowly in the Dictionary in the Schedule, but including spouse) who is not a lawyer, or (iii) a lawyer or another person, but only with leave of the tribunal.

In practice, the clause is meant to instruct the tribunal to allow a resident to be represented as-of-right by another resident of that village or by a relative (as narrowly defined). However, the clause should also instruct the tribunal that representation by a lawyer (including a lawyer who is otherwise another resident of the village or a relative) or any other person is still within the discretion of the tribunal to allow.

Clause 61 clarifies that the general orders of the tribunal also apply to applications concerning certain specified serious and urgent matters,

including threats of removal from the village, being supplied false or misleading documents and failure to be paid an exit entitlement.

Clause 62 inserts a new sub-heading. To accommodate the transitional provisions arising from the Bill, the existing transitional provisions will be placed under what is now Division 1 of Part 15.

Clause 63 inserts new transitional provisions arising from the Bill, placed under what is now Division 2 of Part 15.

The clause provides that in circumstances where, prior to the commencement of the amendments to s.15, a resident has vacated their unit but not yet paid the exit fee, the pre-amendment method of calculating the exit fee will continue.

The clause provides that in circumstances where a residence contract is signed prior to the commencement of the new s.36(3) and the cooling-off period has also not ended at this time, the operator is not required to give notice of any inaccuracy in the public information document before the end of that cooling-off period. However the operator must still disclose the inaccuracy as soon as possible after becoming aware of it.

The clause provides that in circumstances where the cooling-off period under a signed residence contract commences on the happening of a later event or another contract being entered into, and that event happens or contract is entered into after commencement of the new s.45A(2), the operator is not required to notify the potential resident of the date when the cooling-off period ends or the date when the later event occurred or the other contract was entered into.

The clause provides that in circumstances where a residence contract is terminated prior to the commencement of the amendments to sections 56 to 59, and the reinstatement work to be done has also not been determined or agreed upon at this time, the pre-amendment method of determining what reinstatement work is to be done and when it will be done will continue.

The clause clarifies that a budget adopted for the 2006/2007 financial year is unaffected by the new budget requirements.

The clause provides that in circumstances where, prior to the commencement of the amendments to s.104, a resident has vacated their unit but the right to reside has not yet been re-sold, the pre-amendment method of working out the general services charges fee will continue.

The clause provides that in circumstances where, prior to the commencement of the amendments to s.110, the operator has taken out a contract of insurance subject to an excess greater than the maximum which

these amendments would allow, this will not contravene the amended s.110. However the operator must ensure the excess does comply with the amended s.110 once this contract of insurance ends or is renewed or renegotiated.

Clause 64 clarifies certain definitions and adds new definitions.

The clause adds a first-time definition for the term “2006 Amendment Act”.

The clause adds a first-time definition for the term “accelerated wear”. The definition recognises that any use of a capital item will result in wear and tear, but that accelerated wear is only made out if this wear and tear has occurred faster than expected, and therefore in effect contrary to the operator’s reasonable forward-planning for replacement of that capital item.

The clause clarifies the existing definition for the term “capital improvement”. The present definition refers only to the rulings of the Commissioner for Taxation dealing with capital improvement. The new definition provides a general meaning of the term, and allows the taxation rulings to be used to expand upon this. However because the rulings are not specifically designed to be compatible with the Act, any ruling which is inconsistent with the general meaning in the definition may not be referred to.

The clause adds a first-time definition for the term “day to day maintenance”.

The clause adds a first-time definition for the terms “decision notice” and “deregistration notice”, which simply refer to the meanings given for these terms in s.28 and s.28A respectively.

The clause clarifies the existing definition for the term “excluded contract”. An excluded contract is a contract for accommodation where the resident receives care that is at least equivalent to the standard of care prescribed for aged care facilities under the Commonwealth *Aged Care Act 1997*, and the clause simply re-states this more clearly.

The clause re-locates the existing definition of “general services” (in s.12) into the Dictionary.

The clause adds a first-time definition for the term “gross ingoing contribution”, being the ingoing contribution before any deductions are made from it.

The clause clarifies the existing definition for the term "maintenance". The present definition refers only to the rulings of the Commissioner for Taxation dealing with maintenance. The new definition provides a general meaning of the term, and allows the taxation rulings to be used to expand upon this. However because the rulings are not specifically designed to be compatible with the Act, any ruling which is inconsistent with the general meaning in the definition may not be referred to.

The clause re-locates the existing definition of "personal services" (in s.12) into the Dictionary.

The clause clarifies the existing definition for the term "reinstatement" (in s.58), and re-locates it into the Dictionary. Presently, for an existing residence contract, the reinstatement work must reinstate the unit to a marketable condition having regard to the age of the unit and the village, and to the general condition of comparable units in the village, and for a post-Act residence contract, the reinstatement work must reinstate the unit as nearly as practicable to its condition at the start of the resident's occupancy. The clause amalgamates these two standards, which basically both required the unit to be returned to a marketable condition. This amendment will apply retrospectively but operate prospectively – that is, it will alter contracts already entered into, but not where the resident has vacated prior to the amendment commencing.

The clause adds a first-time definition for the term "relative". The meaning given is narrower than the ordinary usage of the word (as it covers only immediate family members), although it also includes a spouse.

The clause clarifies the existing definition for the term "repairs". The present definition refers only to the rulings of the Commissioner for Taxation dealing with repairs. The new definition provides a general meaning of the term, and allows the taxation rulings to be used to expand upon this. However because the rulings are not specifically designed to be compatible with the Act, any ruling which is inconsistent with the general meaning in the definition may not be referred to.

The clause clarifies the existing definition for the term "replacement". The present definition refers only to the rulings of the Commissioner for Taxation dealing with replacement. The new definition provides a general meaning of the term, and allows the taxation rulings to be used to expand upon this. However because the rulings are not specifically designed to be compatible with the Act, any ruling which is inconsistent with the general meaning in the definition may not be referred to.

The clause clarifies the existing definition for the term “capital items”. The first part of the definition refers to capital items as being, for example, buildings and structures other than items that are a “resident’s contracted responsibility”, and the clause simply re-states this more clearly. The second part of the definition provides that capital items include all plant, machinery and equipment used in the operation of the village, and the clause clarifies that where such items are owned by a body corporate at the village, they are not capital items.

Finally, the clause clarifies the existing definition for the term “special resolution”. The Bill extends the persons who may now hold a resident’s proxy vote beyond other residents, and so the definition now refers to three-quarters of “persons” voting personally “or by proxy” as being required, as opposed to the previously stated requirement of a three-quarters majority of residents voting personally. The reference to a “majority” of this three-quarters being required has also been removed, as this was confusing and ultimately superfluous.

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