

Amendments to the Retirement Villages Act 1999 & Retirement Villages Regulation 2009

Emil Ford & Co – Lawyers

9267 9800

lawyers@emilford.com.au

www.emilford.com.au

The amendments to the Retirement Villages Act 1999 & and a whole new Regulation took effect on 1st March 2010 after having been in the pipeline since 2006. It is important to note that the new legislation applies to all existing village contracts with a few minor exceptions that are set out in the transitional provisions [Schedule 4.16].

It might be helpful to briefly mention the context in which the changes take place.

What is a retirement village?

The Act provides a comprehensive scheme for the operation and management of retirement villages in New South Wales. A retirement village is defined as a complex containing residential premises that are occupied by retired persons who have entered into village contracts with the operator of the complex. Although the Act refers to “retired persons” those words refer to persons who are at least 55 or who have retired from full time employment.

Financial structure of retirement village contracts

The most common financial arrangement under which a resident goes into a retirement village is what is known as a loan/lease contract. Under this model the resident makes a loan to the village, which the Act calls an “ingoining contribution”. The village holds the ingoining contribution interest free until the resident leaves the village or dies. The ingoining contribution might typically be anything from \$100,000 to \$3 million. While the resident is in occupation, the village charges a levy which the Act calls a “recurrent charge”. When the resident leaves the village or dies, the operator normally deducts what is called a “departure fee”, which is an agreed percentage of either the ingoining contribution which the resident originally paid, or a percentage of the ingoining contribution being paid by the next person to occupy the premises. In the early days of retirement villages, what is now called a departure fee was called a Deferred Management Fee or a DMF. I mention this because you still hear people in the industry referring to DMFs instead of departure fees.

And finally, many villages also pay to the departing resident a share of the capital gain.

Changes in Definitions

There are a few interesting changes in the definitions in the Act.

Optional services

The village may provide the resident with two kinds of services. One kind of service is those which are provided to all residents, “general services”, such as gardening and general maintenance, and these are included in the recurrent charges. A second kind of service was previously called “personal services” but with the amended Act are now called “optional services”. These are services which the resident has a choice to use or not, such as food, bus trips and cleaning.

Registered interest holder

The old Act had a few different meanings for “owner” which applied in different situations under the Act. Now, a person who was previously called an “owner” in any of its forms is a “registered interest holder”. This is a person who owns a strata lot or community title or shares in a company title unit or, and this is the most common, a person whose contract is in the form of a registered long-term lease that includes a provision that entitles the person to at least 50% of any capital gain”.

If a person is a registered interest holder there are different financial consequences for them compared with owners who aren’t registered interest holders. These financial consequences relate to the ingoing contribution, levies and departure fee.

Ingoing contribution refund

Because a resident who is a registered interest holder gets at least 50% of the capital gain, the village is not required to refund the resident’s ingoing contribution until a new resident occupies the premises or signs a village contract [Section 180]. This can often take some time. However, a resident who is not a registered interest holder is entitled to have the ingoing contribution refunded no later than six months after delivering up vacant possession to the operator.

It is probably relevant to mention at this point a situation which arises from time to time. A typical village contract provides for a departure fee of, say, 3% of the ingoing contribution each year up to a maximum of 10 years, making a maximum payment of 30%. When the registered interest holder leaves, an operator then offers a contract to the next resident which provides for a maximum payment of 40%. This may have an effect on the amount of the ingoing contribution that the next resident is prepared to pay, because the maximum departure fee to be deducted will be 40% rather than 30%. Section 180 has added a provision enabling the former occupant to apply to the Tribunal for relief where the conduct of the operator “has unfairly had a negative financial impact on the former occupant”. Examples given by section 180 include entering into a village contract with a subsequent resident that contains terms that:

- 6 (a) *are substantially different from those contained in the village contract to which the former occupant was a party, and*
- (b) *will have a negative financial impact on the former occupant to the benefit of the operator.*

So, villages must be careful in changing the terms of a contract if it will affect the value of the new ingoing contract.

Recurrent charges

Under the old Act an outgoing resident who was an “owner” continued to be liable to pay recurrent charges until a new resident occupied the premises or signed a village contract. Under the new Act the resident who is a registered interest holder pays recurrent charges for the period up to 42 days after they permanently vacate the premises and after that the resident and the operator share recurrent charges in the same proportion as they “would share any capital gain” if there was one [Section 152(3)].

If the resident is not a registered interest holder the liability to pay recurrent charges ceases 42 days after the resident has permanently vacated the premises. Before the amendments they had to pay for 6 months.

Departure fee

There is no change in relation to the period when the departure fee can be calculated after the resident permanently vacates the premises. A registered interest holder pays for the period until a new resident occupies the premises or signs a village contract [Section 159]. A person who is not a registered interest holder pays no longer than six months after they permanently vacate the premises[Section 160].

An interesting issue arises if a resident dies before the lease is registered. The definition “registered interest holder” says that the person must have a “registered” lease. For strata and community title owners the Act does not say they must be a “registered owner” of a strata lot but simply be the owner of a lot. So the Act draws a distinction between being just an owner and being a registered owner. Normally, a dealing such as a lease or transfer can be registered after a lessee dies, but. In one case the court allowed a transfer to be registered 40 years after it was signed. But if the Act says that the person must be a “registered interest holder” and it makes a distinction between owners who have a registered interest and those who don't, presumably it means that the distinction is to have some significance. So, if a lease is not registered when the resident dies they cannot be a “registered interest holder”, as the Act requires. On the face of it their estate would be able to require payment of the ingoing contribution no later than six months after death, after which time calculation of the

departure fee would cease, and also they would not have to pay recurrent charges after the first 42 days.

Capital gain

There was some confusion under the old Act as to what “capital gain” meant. In the case of *Hayes v Fernbank Developments P/L (2006) NSWCTTT 394* the village contract said that the resident was entitled to 50% of the capital gain but that she had to pay a small amount of costs to the village. The Consumer Trader and Tenancy Tribunal held that if you deduct the departing resident's ingoing contribution from the new resident's ingoing contribution you get an initial amount of capital gain. That is clear. But if you then deduct costs of any kind from that figure, the resident necessarily receives less than 50% of the capital gain. In that case it meant that the resident was not an owner and her liability to pay recurrent charges ceased 6 months after she ceased to be a resident. The Tribunal ordered that she be given a refund of over \$21,000 of the recurrent charges which had been deducted for the period after the 6 months expired. The new Act overcomes the effect of the *Fernbank* case by taking out of the calculation any fees and charges payable by the resident in relation to the termination of the lease.

Issues Before Entering the Contract

Disclosure Statement

Section 18 of the Act requires the operator of a village to give a disclosure statement to a prospective resident. Village operators thought that the form of the disclosure statement was unnecessarily complex to give to a person who is just making a general enquiry about the village. Accordingly, the new Act introduced what is called a “general enquiry document” which is to be given to a person within 14 days after the village becomes aware that the person is a prospective resident. The purpose of the general enquiry document is to “give a basic explanation of the residential premises, services and facilities that are available within a village”. The full disclosure statement gives details of specific premises in the village and has to be given to a prospective resident when they show an interest in particular premises within the village. The Regulation has not yet prescribed the form of the general enquiry document, so we are still waiting to see what it will look like.

Condition report

The operator of a village must complete a condition report for the premises, except where the resident will be a registered interest holder. It must be prepared in the presence of the resident and before the resident takes occupation of the premises. It must be completed and provided to the prospective resident:

- (a) *at least 14 days before the resident enters into a village contract, or*
- (b) *if the premises are still being constructed, at least 14 days before the prospective resident occupies the premises.*

Previously, the regulation said that the resident must only be given “sufficient time” to examine the report and suggest changes to it. Now the Regulation says that the resident must have 14 days to examine the report and suggest changes to it.

Some operators or their lawyers ask residents to sign a village contract where substantial work is still to be done to the premises, on the basis that the condition report will be provided at a later date. We recommend to clients that unless the work is cosmetic the condition report be completed before they sign the contract so that they will see and record the actual condition of the premises.

While the Act says that the operator does not have to provide a condition report if the resident will be a registered interest holder, we advise residents to always ask for one so that there is no doubt as to the condition of the premises when they move in.

The amendment requiring the resident to have 14 days to examine the report is the only change to the condition report in the Regulation.

Costs of preparation of village contracts

There is a change to the amount of legal costs that a resident can be asked to pay on entering into a village contract. The Act provides [Section 31] that the legal and other expenses incurred by the operator in connection with the preparation of a village contract are shared equally between the operator and the resident, but subject to any maximum amount prescribed by the Regulation. For the first time the Regulation [Regulation 13] provides a maximum amount payable by the resident, which is \$200. When you consider that previously the share of legal costs that villages passed on to residents was something between \$500 and \$1,250, most village operators are now going to face increased legal bills for the preparation of village contracts. The resident is still required to pay the registration fee. Many lawyers for villages include in their tax invoices items such as the mortgagee’s costs, and the operator’s out of pocket expenses such as law agents fees to lodge the lease at the Land and Property Management Authority. The Act does not permit these payments as they are clearly not part of the cost of preparing the village contract.

Interest

Until now, there has been no common practice of residents paying ingoing contributions by instalments. This may change now that an amendment to Section 43 permits a village to charge interest on ingoing contributions which are payable by instalments. The interest rate is capped at the rate prescribed by the Regulation, which is the rate in the Civil Procedure Act 2005 [Regulation 28]. This now provides some flexibility for operators and residents. Residents can now enter into a village contract without paying the whole of the ingoing contribution where they otherwise would have to wait until their house was sold.

Issues After Signing the Contract

Settling in

The new Act provides that a person can terminate the contract before the "end of a settling in period". The new Section 44A says that the settling-in period ends basically 90 days after the resident occupies the premises, or is entitled to.

If the resident terminates the contract in the settling in period the resident has to pay certain amounts to the operator. These are:

- (a) *the reasonable costs incurred in doing any alterations to the unit at the resident's request [Regulation 50],*
- (b) *fair market rent for the period they were in occupation*
- (c) *the cost of any repairs for damage beyond fair wear and tear [Section 44B(1)(b)],*
- (d) *a reasonable administration fee not exceeding \$200[Section 44B(1)(c), Section 44B(4) and Regulation 50].*

Fixtures

A new Section 41A clarifies the resident's right in relation to fixtures. The section states that a resident may add, remove, or alter fixtures or fittings or make renovations to the premises with the written consent of the operator. The operator may impose reasonable conditions to its consent, including a requirement that the premises be returned to the same condition as they were in immediately before the consent was given. As usual, if the operator unreasonably withholds consent the resident may apply to the Consumer Trader and Tenancy Tribunal for appropriate orders.

Safety matters

There is now a specific obligation on the operator to ensure that the village generally is reasonably safe [Section 58A. The obligation includes preparing written safety and emergency procedures, taking reasonable steps to ensure that all residents and staff are familiar with the procedures, undertaking safety inspections and preparing safety reports. These reports must be made available to the Residents' Committee.

There is also an obligation to take reasonable steps to ensure that emergency and home care service personnel have unimpeded vehicular access to the premises at all times of the day and night and that all relevant parties are consulted and kept informed about any arrangements made to ensure that the access is available. It is important to note that the operator can be penalised for not complying with these requirements.

Issues Regarding the Residents' Committee

I'm sure we have all come across organisations where a person gets control of the committee and can't be removed. The Act now provides that a person must not hold the same office on the Residents' Committee for more than three consecutive years unless the village has less than 20 residents or the annual budget of the retirement village is less than \$50,000. However, the Commissioner for Fair Trading has power to write to a Residents' Committee and object to a person holding the same office on the Committee for more than 3 consecutive years. Presumably this is to deal with known troublemakers. [Section 70A and Regulation 53].

Proxies

Another change is in relation to proxies. Previously a resident could hold five proxies for a meeting of the residents committee. This has been reduced to 2 proxies so it is now less likely that a resident, or group of residents can take control of a meeting

Annual management meeting

There is a new provision requiring the operator to hold an annual management meeting for residents not more than four months after the end of each financial year. The purpose of the meeting is to enable residents to ask questions of the operator and the operator is required to provide reasonable answers to the questions. Regulation 35 sets out in detail matters that must be included in the agenda for the meeting. Some of these matters are:

- (a) *a report on any expenditure in the previous financial year that was a variation from items in the approved annual budget*
- (b) *the future plans for the village, including any proposed improvements,*
- (c) *the management of the village, including any change or proposed change to the management arrangements,*
- (d) *safety issues,*
- (e) *any proposed maintenance plans,*
- (f) *any changes to the proposed annual budget that do not require the residents' consent,*
- (g) *any proposals to undertake capital works that have not been notified in the annual budget,*
- (h) *any proposed changes to the level of service provided to residents of the village,*

There must be time for questions, including questions from the floor.

However the operator is not required to answer questions about obvious matters such as the personal affairs of the operator or its employees and contractors, or matters unrelated to the

operation of the village, or matters concerning individual sales or contracts that are not in the public domain [Regulation 36].

Capital Maintenance and Replacement [Sections 92 - 101]

The issue that probably caused most disputes under the old Act was whether the operator or the residents paid for the maintenance and replacement of capital items in the village. Whether or not something is a capital item is important because the cost of replacing capital items falls on operators, not residents. There have long been disagreements between operators and residents as to whether or not certain items are capital items. The Act defines “item of capital” firstly as buildings, infrastructure, plant, machinery and equipment used in the operation of the village. These are the obvious things found outside the residential premises. Then for those things inside the resident’s unit the definition includes:

- (i) *fixtures [for example, bench tops, built-in cupboards and wardrobes, floor coverings, hot water systems and stoves],*
- (ii) *fittings [for example, light fittings, taps and sanitary fittings],*
- (iii) *furnishings [for example, curtains and blinds],*
- (iv) *non-fixed items [for example, whitegoods, portable air conditioners, fans, tables and chairs]*

[Regulation 4].

Capital replacement

Sections 92 and 97(3) require the operator to bear the cost of capital replacement of all the items of capital in the village except those owned by the residents. The cost of replacing capital items cannot be passed on to residents through recurrent charges. The Act includes in the definition items that would arguably not be regarded as capital items. Curtains are included in the definition of items of capital, however, there was one case where a distinction was made by the Tribunal between curtains and curtain liners. Curtains were items of capital which the operator had to replace, the liners were not.

Under the old Act there was a capital replacement fund where an operator could allocate ingoing contributions or departure fees (which were the operator’s money for the purpose of financing depreciation and capital replacement. This has now been abolished.

Capital maintenance

Under the old Act the operator could fund capital replacement and depreciation in the village from recurrent charges in some circumstances. Now the operator must replace all capital items that can no longer be repaired. No exceptions any more.

Because the operator bears all the cost of replacing capital items, but the residents can be required to contribute to the cost of maintaining capital items, the distinction between maintaining and replacing capital items can be significant.

The Act defines “Capital maintenance” as “work carried out for the purpose of repairing or maintaining an item of capital”. This definition of capital maintenance was to have been extended by Regulation 5(1)(a) to include work such as that done to prevent deterioration of an item, such as painting, replacement of non-fixed items - such as a bus - and replacement of component parts of an item. However, Regulation 5(1)(a) was repealed on 25 February 2010.

Section 92 requires the operator to maintain each item of capital in a reasonable condition having regard to the age and prospective life of the item. From a practical point of view this means that the operator has to maintain everything that does not belong to the residents. If it is not practical to maintain the item, the operator may replace it. The repealed regulation attempted to give some explanation of the definition "repairing or maintaining an item of capital". Now the definition is all we have to go on. Cases in the Tribunal have accepted that painting is capital maintenance so that should still be allowed in the budget.

Capital works fund

The operator can fund capital maintenance from recurrent charges if the residents approve the annual budget with those items in it. If there are items in an approved annual budget which are intended to be set aside to fund capital maintenance in later years, the operator has to put those funds into what is called a capital works fund [Section 99]. Although the fund is called a “capital works” fund the fund can only be used to meet the cost of capital maintenance. The money in the capital works fund can also be distributed to the residents if the residents consent. A distribution to residents might be made where the budgeted amount for maintenance exceeded the actual cost and there are excess monies in the capital works fund.

Capital Maintenance to be Included in Proposed Annual Budget

Section 97 provides that the operator may fund the cost of capital maintenance from the capital works fund or from recurrent charges. However the operator may not use the capital works fund or recurrent charges for, among other things, the cost of refurbishment of vacant premises.

Recurrent charges

Section 105A now enables an operator to increase recurrent charges by CPI if a village contract provides that the recurrent charges can be varied otherwise than in accordance with a fixed formula. This makes the process of fixing recurrent charges much simpler. You don't have to go through the process of having a proposed budget and meetings to discuss and approve it. The operator simply gives a notice to the residents in a prescribed form and the

change takes effect 14 days later. Time will tell whether any budget can be held to CPI where some expenses increase by much more than that.

If the operator proposes to use any recurrent charges or any part of the capital works fund to fund capital maintenance the operator must, in the proposed annual budget:

- (a) *list each item of capital maintenance that is proposed to be carried out, and*
- (b) *specify the expected cost of each, and*
- (c) *include, in respect of each item, any quotes that the operator has obtained, and*
- (d) *include provision for urgent capital maintenance.*

Operator not to sell items of capital to residents

Section 93 of both the old Act and the amended Act says, generally, that the operator does not have to bear the cost of replacing or maintaining any item of capital that is owned by the resident. If the resident buys and installs an item of capital, the operator has no obligation to maintain or repair that item.

Under the old Act some village contracts deemed certain fixtures and items to be transferred to the resident when they signed the contract. When the contract came to an end, the fixtures and items were then deemed to be transferred back to the operator. The idea was that if a village contract said that certain items became the property of the resident then the operator did not have to maintain them. The new Act provides [Section 101] that the operator must not sell or transfer to a resident any item of capital for which the operator is responsible, and that such a provision in a village contract is unenforceable.

It is probably relevant to mention here that if a resident installs, say, an air conditioner and then abandons it when they leave, the air conditioner becomes the property of the operator and the operator then has the obligation to maintain it. Some operators say that the air conditioner belongs to the new resident, but this cannot be the case. It belongs to the operator and the operator must maintain and replace it.

Some Issues Concerning Budgets

Terminology

There is some change in terminology regarding budgets. What were previously called the “statement of proposed expenditure” and “statement of approved expenditure” are now the “proposed annual budget” and the “approved annual budget”. This brings them into line with normal terminology.

Contingencies

The Act now allows for contingencies. However, Section 115A and Regulation 20 together say that the proposed annual budget may provide for a maximum amount of \$100 for contingencies.

Variation of expenditure between line items permitted

Section 116 allows the operator to vary expenditure between line items in the approved annual budget provided that the variation does not reduce the level of services and does not cause the total expenditure provided for by the budget to be exceeded.

Residents consent to not receiving proposed annual budget or having accounts audited

If the total recurrent charges that are to be collected in the budget do not exceed \$50,000, residents can waive both the right to receive the proposed annual budget [Section 112] and the right to have accounts audited [Section 119A].

Surplus in the annual accounts

Under the old Act any surplus or deficit in the annual accounts were to be carried over to the next financial year. The new Act slightly changes how surpluses are dealt with. The surplus is to be carried over unless the residents consent to a proposal for spending the surplus or the residents consent to a proposal to distribute any part of the surplus to the residents. The distribution is to be in equal shares [Section 120B], so presumably married couples would get twice what singles get.

Deficits

Section 120C provides that deficits in the annual accounts at the end of a year, are now to be borne wholly by the operator. However Regulation 33 provides for some exceptions. The operator may carry forward a deficit to a subsequent financial year to the extent that the deficit is caused by:

- (a) *urgent maintenance*
- (b) *an increase in the cost of the following:*
 - (i) *utilities(other than telephone),*
 - (ii) *statutory charges including rates and taxes,*
 - (iii) *wages and salaries increased under an award or an industrial agreement,*
 - (iv) *workers compensation and public liability insurance.*

Charge Over Land

Previously, if a resident did not hold strata title, company title or a registered lease, the ingoing contribution they paid to the operator was not protected against creditors of the operator. This was a problem for some proposed residents and their financial and legal advisers. The Act now provides [Sections 182A 182I] that if a resident who is not a registered

interest holder pays an ingoing contribution, and the refund to which they are entitled exceeds \$10,000 [Regulation 56], the land on which the village is built is subject to a charge in their favour to secure their entitlement. The charge takes effect if a court orders that the village be wound up and sold (other than as a going concern) . In that case they are entitled to be paid from the proceeds of sale after payment of the costs of sale and any mortgagee's entitlements.