

Regulatory Impact Statement

Retirement Villages Regulation 2009

A Regulation under the
Retirement Villages Act 1999



**Fair
Trading**

October 2009

Send submissions to:
Retirement Villages Regulation 2009
Fair Trading Policy Division
Department of Services, Technology and Administration
PO Box 972
PARRAMATTA NSW 2124

Fax: (02) 9338 8990
E-mail: policy@services.nsw.gov.au

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Additional copies of this regulatory impact statement and the proposed Regulation can be downloaded from the Fair Trading website at www.fairtrading.nsw.gov.au or by calling Fair Trading on (02) 9338 8925.

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1. INTRODUCTION

1.1 Title and proponent of the proposed Regulation

The Retirement Villages Regulation 2009 has been developed by NSW Fair Trading and is proposed by the Minister for Fair Trading, the Hon. Virginia Judge, MP.

1.2 Why is the Regulation being made?

The *Subordinate Legislation Act 1989* provides for the automatic repeal of regulations after they have been in force for five years, unless the regulation is remade or the repeal is postponed. The *Retirement Villages Regulation 2000* was due to be repealed or remade on 1 September 2005. This action was postponed while the *Retirement Villages Act 1999* was under review. Following the review, the *Retirement Villages Amendment Act 2008* was passed by Parliament in December 2008. It is now proposed to remake the Regulation incorporating changes that are needed to enable the amendments in the Amendment Act to come into effect.¹

1.3 Status of the proposed Regulation

The proposed Regulation is only a draft at this stage. This regulatory impact statement is being released along with the draft Regulation so that the retirement village industry, consumers and other interested people and organisations can consider the proposed requirements and submit comments and suggestions. The draft Regulation may be amended to take into account the suggestions made in submissions. The Regulation will then be published on the NSW Legislation website (www.legislation.nsw.gov.au) and will commence at the same time as the *Retirement Villages Amendment Act 2008*, expected to be before the end of 2009.

1.4 What is the purpose of this regulatory impact statement?

The Subordinate Legislation Act controls the making of regulations in NSW. This Act aims to reduce unnecessary regulation by government. It requires that a regulatory impact statement be prepared and public consultation be undertaken before a new regulation can be made.

The regulatory impact statement explains the purpose of the Regulation, weighs up the economic and social aspects, and considers other possible options to meet the aims of the proposed Regulation. The regulatory impact statement must demonstrate that the proposed Regulation is the option which brings, on balance, the greatest overall benefit to the public.

The regulatory impact statement procedure aims to ensure that:

- the proposed Regulation is the most efficient and effective way of achieving the policy objectives; and
- the Regulation imposes minimal costs on the community or produces an outcome where the expected benefits outweigh the expected costs.

The regulatory impact statement must:

- state the objectives of the proposed Regulation and the reasons for them;
- identify any alternative options by which those objectives might be achieved;
- assess the costs and benefits of each alternative - this assessment must consider the alternative of not taking any action;
- assess which of the alternatives will bring about the greatest net benefit or the least net cost to the community; and
- outline the consultation program to be undertaken.

¹ Table 2, in section 7 of this regulatory impact statement, lists the key differences between the proposed Regulation and the current Retirement Villages Regulation 2002.

The impact of a proposed regulation is generally expressed in terms of:

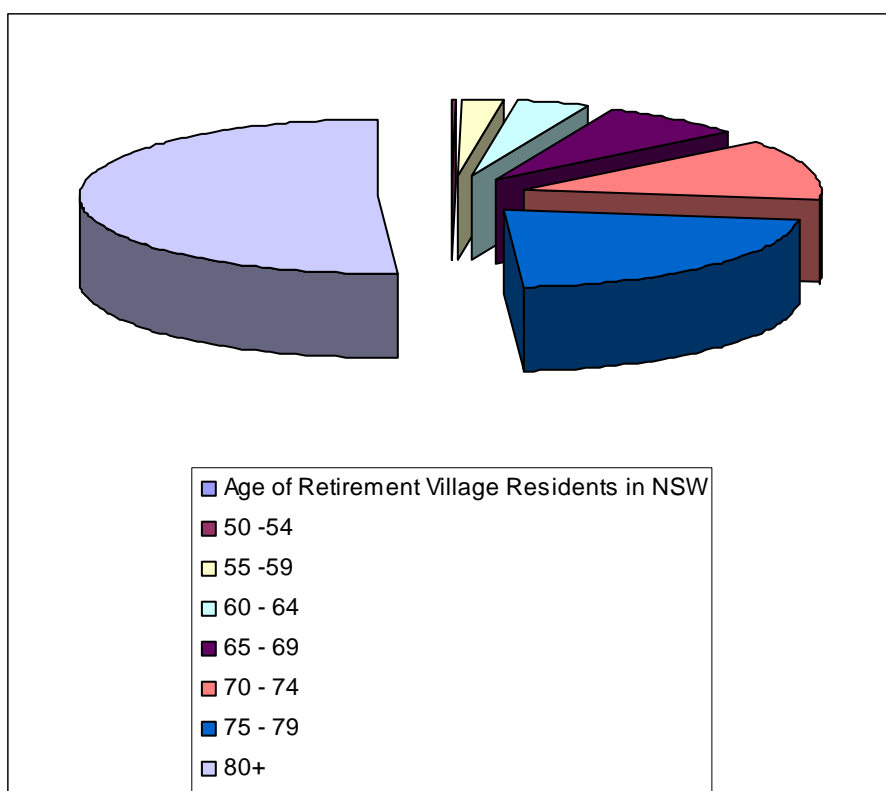
- 'cost-benefit' analysis of the options, where the costs and benefits flowing from the proposed Regulation can be measured in monetary terms; or
- 'cost effectiveness' analysis, where the benefits of the proposed Regulation cannot readily be expressed in monetary terms.

2. BACKGROUND

2.1 Profile of the industry and consumers

Retirement villages are residential complexes predominantly occupied by people who are aged over 55 years or who have retired from full-time employment. The majority of residents are aged in their seventies and eighties, with more than 80% of residents being women. Residents may choose to live independently in self-contained premises or in serviced premises with the provision of assistance.

Age of retirement village residents in New South Wales



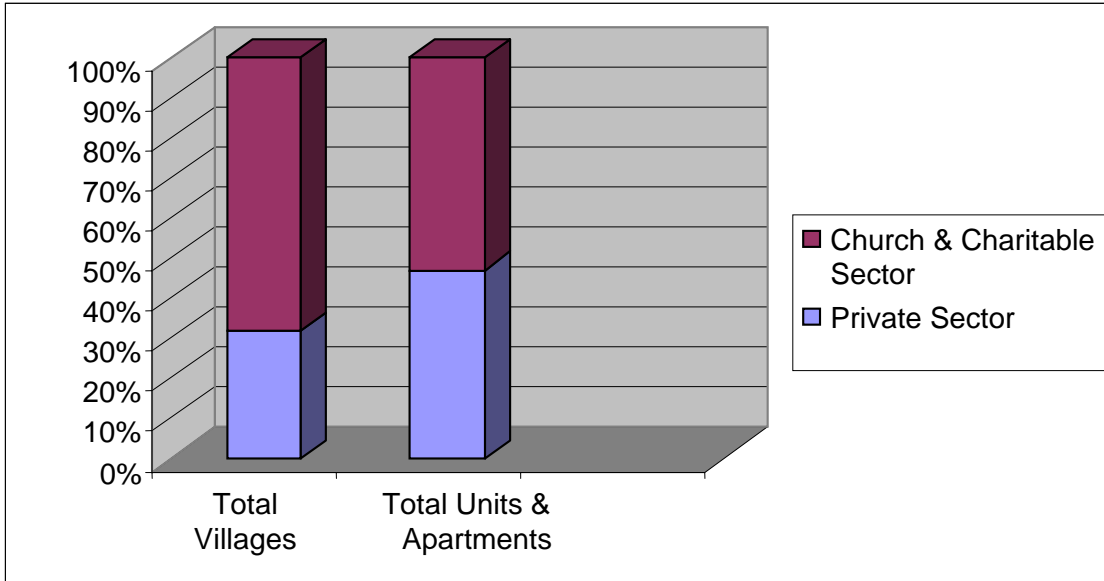
Age	50 - 54	55 - 59	60 - 64	65 - 69	70 - 74	75 - 79	80+
% of Residents	0.3%	2.1%	4.1%	7.6%	12.9%	22.0%	51.1%

Source: ABS 2006 Census

There are approximately 591 retirement villages across New South Wales, housing more than 36,000 residents. While some villages are run by sole operators, the majority of operators run multiple villages across New South Wales and interstate. Villages range in size, with some having over five hundred residents and others having less than a dozen. The larger villages have full time paid staff, while the smaller villages are often run by local citizens on a voluntary basis.

Villages are run by a variety of church, charitable and community groups on a 'not-for-profit' basis or by commercial enterprises for profit.

Retirement Village Ownership in New South Wales

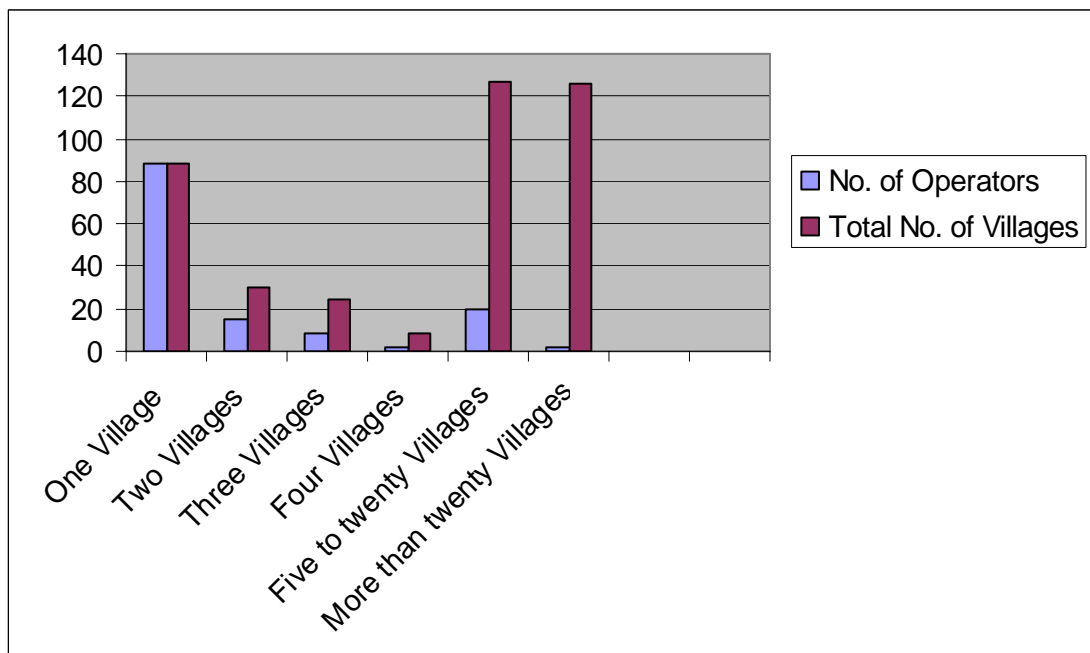


	Private Sector	Church & Charitable Sector	TOTAL
Total Villages	189	402	591
Total Units & Apartments	16925	19085	36010

Source: Retirement Village Association (NSW & ACT) Ltd Industry Snapshot as at 30.6.2009

The table below provides a breakdown in the number of not for profit retirement villages and operators in New South Wales.

Number of not-for-profit retirement villages and operators in New South Wales



Portfolio size	No. of Operators	Total No. of Villages
One village	88	88
Two villages	15	30
Three villages	8	24
Four villages	2	8
Five to 20 villages	20	127
More than 20 villages	2	126
TOTAL	135	403

Source: *Aged and Community Services Association (NSW & ACT) Industry Profile as at 5.5.2008*

Residents of a retirement village must enter into a contract with the operator of the complex, to occupy the premises and receive services. Commonly such contracts are in the form of a licence or lease, but some villages allow residents to purchase the premises outright, for example, under strata title. The village contract or lease sets out the costs the resident agrees to pay and their entitlements, including matters such as ingoing contributions, capital works costs, recurrent charges, departure fees and capital gains.

2.2 History of retirement villages regulation in New South Wales

The *Retirement Villages Act* was introduced in 1989. This Act focused mainly on the role of the Residential Tenancies Tribunal in retirement village disputes. The Retirement Village Industry Code of Practice Regulation 1995 commenced on 31 August 1995. This was a mandatory code of practice made under the *Fair Trading Act 1987*. The Code contained general principles to guide those involved in the retirement village industry. Emphasis was placed on information disclosure, termination of contracts, village management and dispute resolution.

Following a detailed review and extensive consultation, the Government introduced the *Retirement Villages Act 1999* and Retirement Villages Regulation 2000. The new Act and regulations replaced the former Act and Code of Practice.

The objects of the *Retirement Villages Act 1999* are:

- (a) to set out particular rights and obligations of residents and operators of retirement villages;
- (b) to facilitate the disclosure of information to prospective residents of retirement villages,
- (c) to require contracts between residents and operators of retirement villages to contain full details of the rights and obligations of the parties;
- (d) to facilitate resident input, where desired by residents, into the management of retirement villages; and
- (e) to establish appropriate mechanisms for the resolution of certain disputes between residents and operators of retirement villages.

A statutory review of the Act commenced in 2004. An issues paper was released for public consultation on 20 September 2004 and the final report of the review was submitted to the Minister in March 2005 with 50 recommendations. An exposure draft of the *Retirement Villages Amendment Bill*, making a range of amendments to the Retirement Villages Act, was tabled in the NSW Parliament on 23 November 2006 and released for consultation. The Bill was passed by Parliament on 4 December 2008 and received assent on 10 December 2008. The amendments have not yet commenced, as regulations are required to be made to enable certain provisions of the Amendment Act to operate. It is proposed that the amendments to the Act and the new Regulation will commence together in late 2009.

Copies of the Act, the Amendment Act and current Regulation can be viewed or downloaded from the NSW Legislation web site at: <http://www.legislation.nsw.gov.au>. A copy of the proposed Retirement Villages Regulation 2009 is at appendix A of this regulatory impact statement.

3. OBJECTIVES OF THE PROPOSED REGULATION

The primary purpose of the proposed Retirement Villages Regulation 2009 is to ensure that the Retirement Villages Act can operate effectively and efficiently to achieve its objectives. The draft Regulation prescribes a number of matters that are necessary to support the operation of the Act.

The objectives of the Regulation are:

- to ensure retirement village residents and operators are aware of their rights and obligations;
- to support harmonious community living and facilitate resident participation in village life;
- redress imbalance in market power between residents and operators.

4. OPTIONS TO ACHIEVE OBJECTIVES

Three options for achieving the above objectives are considered in this regulatory impact statement:

Option 1:
Do nothing

This option would result in the current Regulation lapsing on 1 September 2010 and the *Retirement Villages Act 1999* would be left to operate without any accompanying regulation unless other action were taken. Some of the amendments introduced by the Amendment Act may not be able to operate effectively.

Option 2:
Remake the current Regulation with no amendment

This option would enable the *Retirement Villages Act 1999* to operate with the Regulation to provide the required administrative detail for the operation of the existing Act. However, the Regulation would not incorporate the necessary changes to support the changes made by the Retirement Villages Amendment Act and some of those provisions may not be able to operate effectively.

Option 3:
Make the proposed Regulation, including new provisions to support the changes made by the Retirement Villages Amendment Act

This option would enable the *Retirement Villages Act 1999*, incorporating the changes made by the *Retirement Villages Amendment Act 2008*, to operate effectively. **This is the preferred option.**

5. CRITERIA USED TO ASSESS THE REGULATORY OPTIONS

The following criteria, which relate to the objectives of the proposed Regulation, are used in the evaluation of the above options:

1. The extent to which the Regulation supports the regulatory objectives outlined above in part 3 of this regulatory impact statement.
2. The cost effectiveness of each option, in terms of costs and benefits to consumers, industry, government and the community.

This assessment does not consider matters that are provided for in the Act and Amendment Act, as these have already been determined by Parliament. This regulatory impact statement assesses only the effectiveness of the proposed Regulation in supporting the operation of the Act and amendments.

6. REGULATORY FRAMEWORK

The proposed Regulation provides the administrative detail to enable the intent of the Act and amendments to be implemented. The scope of any regulation is limited by the regulation making powers provided under the enabling legislation. The regulation making powers of the Act and the scope of the proposed Regulation are summarised in Table 1 below.²

Table 1: Regulation making power of the *Retirement Villages Act 1999* (incorporating the uncommenced amendments contained in the *Retirement Villages Amendment Act 2008*) and scope of the proposed Regulation

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
Expand on definition of 'capital maintenance' and exclude works from definition	4	Prescribes a range of matters that are considered to be capital maintenance and also provides for a range of matters that are considered not to be capital maintenance.	4
Expand on definition of 'general services'	4	None prescribed	-
Prescribe additional items as 'item of capital' and prescribe exclusions	4	Prescribes an 'item of capital' to include fixtures, fittings, furnishings and non-fixed items	5
Prescribe other persons or class of persons as 'operator' and prescribe exclusions	4	Prescribes a person engaged by a community, strata or company title scheme who enters into contracts with village residents	6
Expand on definition of 'optional services'	4	Prescribes provision of meals, laundry and home cleaning	7
Expand on definition of 'residence right'	4	None prescribed	-
Expand on definition of 'resident'	4	Prescribes a spouse or de facto partner as a resident while living in the village	8
Expand on definition of 'village contract'	4	None prescribed	-
Expand on definition of 'retirement village' and exclude premises from definition	5	Excludes places where services are provided under the Disability Services Act 1993 & Community Welfare Act 1987	9
Exclude payments from definition of 'ingoing contribution'	6	None prescribed	-
Prohibit operators from distributing prescribed promotional material	17(5A)	Prescribes that certain matters such as estimation of the future size of the village	10

² In this table, the provisions of the legislation are paraphrased. For the exact wording, refer to the Act and the Amendment Act on the NSW Legislation web site and to the draft Regulation at Appendix A to this regulatory impact statement.

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
		are not to be included in written promotional material	
Prescribe form of and information to be included in general inquiry document	18(2)	None Prescribed	-
Prescribe form of and information to be included in disclosure document	18(3A)	Prescribes that the disclosure statement must be in the form and contain the information set out in Part 1 of Schedule 1	11 Part 1 of Sched. 1
Prescribe different forms and information for enquiry/disclosure documents for different classes of documents or circumstances	18(3B)	None prescribed	-
Prescribe additional documents the operator must have available for inspection	20(1)(k)	Prescribes <ul style="list-style-type: none"> ▪ court/tribunal decisions/orders; ▪ waiting list policy; ▪ company title scheme constitution and rules; ▪ community land scheme management statement, agreement and AGM minutes; ▪ strata scheme by-laws, management agreement and AGM minutes; ▪ village contracts listed in clause 10 of Part 1 of Schedule 1. 	12
Prescribe an alternative to the \$200 limit for waiting list fees	21(1)(a)	None prescribed	-
Prescribe additional means for deposits to be kept in trust	23(3)(e)	None prescribed	-
Prescribe interest rate for overdue refund where residence has been occupied without a contract	24(4)(b)	Prescribes rate of interest as half the rate prescribed under section 101 of <i>Civil Procedure Act 2005</i> with respect to payment of interest on a judgement debt ³	28
Prescribe maximum amount payable by resident for expenses incurred by operator in preparation of village contract	31(3)	Prescribes the maximum amount payable as \$200	13
Prescribe form of and how to complete condition report	38(2)	Prescribes form of condition report in Part 2 of Schedule 1. Prescribes that the condition report must be: <ul style="list-style-type: none"> ▪ completed by the operator, an employee or agent in conjunction with an inspection of the premises; ▪ completed in presence of prospective resident; ▪ completed to the best of the operator's, agent's or employee's knowledge; ▪ completed before the resident occupies the premises; ▪ be signed by the operator, agent or employee and also by the resident if they agree to it. <p>The resident must be given time to examine the report and suggest changes.</p> <p>Approximate dates may be included.</p>	14
To prescribe a time frame to complete condition report and provide to resident	38(2A)	Prescribes condition report to be completed and provided to resident at least 14 days before the operator and prospective resident enter into a village contract or, if premises are still being constructed, 14 days before the resident occupies the premises	14

³ Prescribed in Schedule 5 of the Uniform Civil Procedure Rules 2005, currently 9%

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
Prescribe renovations, additions, alterations for which operator consent is not required	41A(7)(b)	Prescribes consent is not required for renovations, additions, or alterations to premises owned by the resident under a strata, community or company title scheme	48
Prescribe matters to be included and excluded from a village contract	42(1)	Prescribes that: <ul style="list-style-type: none"> ▪ matters to be included in a village contract are set out in Schedule 2; ▪ matters to be excluded in a village contract are set out in Schedule 3; ▪ an additional matter may be included if it does not conflict with the above; <p>1. the prescribed matters do not apply to contracts in strata or community schemes, unless the operator is the vendor.</p>	15 Sched. 2 Sched. 3
Prescribe a standard form for village contracts, and addition, omission, or variation of clauses in standard contracts	43(1)	None prescribed	-
Prescribe an interest rate on unpaid portion of contribution paid by instalments	43(8)(b)	Prescribes half the rate prescribed under s101 of the <i>Civil Procedure Act 2005</i> with respect to payment of interest on an unpaid judgement	28
Prescribe additional amounts payable by former occupant where contract terminated in settling-in period	44B(1)(d)	Prescribes the former occupant is liable to pay costs incurred in adding, removing or altering fixtures or fittings or renovations to the unit at the resident's request	49
Prescribe maximum administration fee payable by a former occupant if contract terminated during settling-in period	44B(4)	Prescribes \$200 as the maximum administration fee that may be charged	49
Prescribe additional amounts refundable to former occupant where contract terminated in settling-in period	44C(d)	None prescribed	-
Prescribe additional amounts not payable by former occupant where contract terminated in settling-in period	44E(f)	None prescribed	-
Prescribe additional matters village rules may relate to	46(2)(i)	Village rules may relate to: <ul style="list-style-type: none"> ▪ security in the village; ▪ external appearance of residents' premises 	16
Prescribe model village rules	48	None prescribed Note: It is proposed that the model rules will be in a form approved by the Director-General and made available on the Fair Trading website.	-
Prescribe other actions an operator must take to ensure that the village generally is reasonably safe, including: <ul style="list-style-type: none"> ▪ the form of written safety and emergency procedures; ▪ conduct of safety inspections; ▪ manner and form of safety inspection report; ▪ period the safety inspection report is to remain on the notice board. 	58A(2)(e)	Prescribes display of safety inspection report on notice board for at least one month	50
Prescribe additional circumstances in which operator may enter residential premises in the village	67(2)(g)	Prescribes that an operator or authorised person may enter residential premises with 2 days notice to: <ul style="list-style-type: none"> ▪ install a smoke alarm; or ▪ change batteries in a smoke alarm. 	51
Prescribe procedures for Residents Committees and sub-committees	70(5)	None prescribed	-
Provide exceptions to enable persons to hold same position in Residents Committee after 3 years	70A(1)	Prescribes that the same person may hold same office on Committee for more than 3 consecutive years if village has less than	52

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
		20 residents or the annual budget is less than \$50,000, or both. However, this is not permitted if the Director-General has an objection to any person or a particular person holding the same office over 3 years.	
Provide for the election, functions and procedure of Residents Committees and sub-committees	71(1)	None prescribed	-
Prescribe model rules that may be adopted by a Residents Committee	71(2)	None prescribed Note: It is proposed that the model rules will be in a form approved by the Director-General and made available on the Fair Trading website.	-
Prescribe matters that must be included in agenda for annual management meeting	72A(6)	Prescribes various items that must be included on the agenda	34
Prescribe matters about which an operator is not required to answer questions at annual management meeting	72B(3)(b)	Prescribes that the operator is not required to answer questions about personal affairs, matters not related to the operation of the village and matters related to individual sales or contracts that are not in the public domain. Does not prevent questions about the operator's financial viability.	35
To prescribe additional matters about which residents may meet, consider and vote	74(1)(c)	None prescribed	-
Prescribe additional persons a resident may appoint as proxy	77(1)(d)	Prescribes a friend may be appointed as a proxy of the resident. NB. A statute law (machinery) amendment to the Act is under consideration to make it clearer that a resident can appoint anyone they wish to as their proxy, other than the operator or a close associate of the operator.	36
Prescribe form and manner to appoint a person as the proxy of a resident	77(2)	Prescribes an appointment form in Part 3 of Schedule 1. Provides appointment is effective only if the completed form is given to the chairperson before the vote is taken.	36 Sched 1
Prescribe alternative number of proxies a person can hold	78(1)	None prescribed	-
Prescribe additional classes of capital items for which an operator of a retirement village is not responsible	92(1)(c)	None prescribed	-
Prescribe additional matters relating to capital that are urgent repairs	92(2)(k)	None prescribed	-
Prescribe additional things that an operator cannot fund from the capital works fund or recurrent charges	97(3)(e)	Prescribes anything under clause 4(1)(b) as not being capital maintenance is not authorised to be funded	29
Prescribe how a capital works fund may be held otherwise than in an account with an authorised deposit-taking institution	99(3)	Prescribes that if the village operator is a property trust or corporation constituted by an Act, the maintenance fund may be held in a fund administered by the trust or corporation	30
Prescribe other purposes for which an operator can use money from capital works fund	99(5)(c)	Prescribes that operator may use the money for any purpose, except those prohibited by the Act, but only if the residents have consented by special resolution and the money is not being used to fund matters specified in s 97 (3) of Act.	30
Prescribe minimum amount of public liability insurance	100(3)	Prescribes \$10 million	31

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
Provide exceptions to the prohibition on operator selling capital items, or passing responsibility for capital items to residents or prospective residents	101(1)	None prescribed	-
Prescribe other information to be included in notice to vary recurrent charges by fixed formula	105(2)(c)	Notice must include: <ul style="list-style-type: none"> ▪ resident's name; ▪ address of premises; ▪ a heading describing what the notice is about, in large, bold font; ▪ the fixed formula; ▪ a demonstration of how the new charges were calculated; ▪ notice must be dated and signed by the operator, agent or employee. 	22
Prescribe other information to be included in notice of variation in recurrent charges not by fixed formula and not exceeding CPI increase	105A(4)(c)	Notice must include: <ul style="list-style-type: none"> ▪ resident's name; ▪ address of premises; ▪ a heading describing what the notice is about, in large, bold font; ▪ statements about the variation not requiring residents' consent and the requirements of s105A of the Act; ▪ notice must be dated and signed by the operator, employee or agent 	23
Prescribe other information to be included in notice of variation of recurrent charges not by fixed formula and exceeding CPI increase	106(2)(e)	Notice must include: <ul style="list-style-type: none"> ▪ resident's name; ▪ address of premises; ▪ a heading describing what the notice is about, in large, bold font; ▪ statements about the requirements of s106 and s107 of the Act; ▪ notice must be signed and dated by the operator, agent or employee 	24
Prescribe time limit within which operator has to provide information about proposed variation in recurrent charges and information operator is not required to provide	107(6)	Prescribes that: <ul style="list-style-type: none"> ▪ information must be provided within 7 days of request; ▪ operator is not required to provide details about personal affairs, information unrelated to the operation of the village, sales information not in public domain and information which would breach privacy code or Privacy Principles 	25
Prescribe alternative time within which the operator of the village must supply proposed annual budget to residents	112(1)	None prescribed	-
Prescribe matters that must be dealt with in a proposed annual budget	112(3)(a)	Prescribes: <ul style="list-style-type: none"> ▪ recurrent charges; ▪ any fixed formula increases; ▪ method of calculating recurrent charges; ▪ total recurrent charges income; ▪ effect of expected surplus/deficit on village finances; ▪ all categories of expenditure; ▪ expenditure in each category; ▪ method of apportionment with other villages or businesses; ▪ method of apportioning between categories of residents; ▪ total proposed expenditure; ▪ expected surplus or deficit 	17
Prescribe matters that must not be financed by recurrent charges	112(3)(b)	Prescribes: <ul style="list-style-type: none"> ▪ membership fees for industrial or professional associations; ▪ overseas travel by operator, agent or employees; 	26

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
		<ul style="list-style-type: none"> ▪ marketing vacant premises; ▪ payroll tax unless it is solely attributable to the operation of the retirement village to which it is charged ▪ the operator's head office costs that do not directly arise from the operation of the village) unless the costs are for providing direct services to the residents; ▪ flat rate management or administration fees 	
Prescribe form the proposed annual budget is to take	112(3)(c)	Prescribes an optional model statement of proposed expenditure	18 Sched. 4
Prescribe additional information to be included in notice accompanying budget	112(4)(e)	<p>Prescribes that notice must include statements about:</p> <ul style="list-style-type: none"> ▪ requirement to provide budget under s112 and ability for budget to be cancelled and replaced; ▪ statements about provisions of s.114 re residents to meet, vote and advise operator on budget; ▪ statement about operator's requirements to provide information; ▪ statements about applying to Tribunal about budget; ▪ statement about effect of residents' approval or Tribunal order; ▪ statement that operator must not expend recurrent charges other than as per budget. 	19
Prescribe another amount (other than \$50,000) that the annual amount of recurrent charges must not exceed so that residents may consent to not receiving a proposed annual budget	112(7) 112(9)(b)	None prescribed	-
Prescribe additional orders the Tribunal may make about proposed budget	115(2)(i)	None prescribed	-
Limit the amount a proposed annual budget may allocate for contingencies	115A	Prescribes that the limit for contingencies is 4% of the total budget, or if the CPI index over the 12 months before the budget is more than that, then that greater amount.	20
Prescribe alternative to 28 day time period for operator to provide Residents Committee with quarterly accounts	118(3)	None prescribed	-
Prescribe alternative to 4 month time period for operator to provide the residents with copies of the audited accounts	119(1)	None prescribed	-
Prescribe additional matters to be included in audited accounts provided to residents	119(2)(c)	None prescribed	-
Prescribe how audited accounts are to be displayed on common property if there is no Residents Committee	119(7)(a)	Prescribes copy of audited accounts must be displayed on notice board in a common area of the village for at least one month, commencing no later than four months after end of financial year	32
Prescribe alternative to \$50,000 amount the recurrent charges cannot exceed for residents to be able to consent to not have accounts audited	119A(1)(a) 119A(5)(a)	None prescribed	-
Prescribe alternative to \$50,000 amount the recurrent charges cannot exceed for residents to be able to consent to not receive quarterly accounts	119B(1)(a) 119B(3)(a)	None prescribed	-
Prescribe circumstances in which an operator may increase or use recurrent charges to make good a deficit or carry forward a deficit	120C(3)	None prescribed	-

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
Prescribe how a resident may nominate other residents as their representative in a dispute before the Tribunal	122(2)	Prescribes that a resident may be nominated to represent other residents if: <ul style="list-style-type: none"> ▪ one or more other residents signs a statement to that effect; and ▪ the nominated person consents in writing 	38
Prescribe additional orders the Tribunal may make	128(1)(l)	Prescribes that the Tribunal may make an order that varies, sets aside or stays a previous order	40
Prescribe the form and time within which a notice of intention to seek a termination order is given	131(2)	Prescribes: <ul style="list-style-type: none"> ▪ form of notice; ▪ notice must be given at time of applying or up to 14 days earlier (except application under s.136 in relation to upgrade or change of use, which requires 12 months notice); ▪ if application not made within 14 days of notice, fresh notice must be given before applying. 	54 Part 4 Sched. 1
Prescribe how operator can sell or dispose of uncollected goods	147(1)(b)	Prescribes that operator can remove and dispose of perishable foodstuffs or goods that would be unsafe or unhealthy to store, immediately after contract is terminated or resident vacates.	43
		Prescribes that operator must leave other goods in premises or store securely for at least 30 days after sending notice or, if no address is known, after contract is terminated or resident vacates.	44
		Prescribes that: <ul style="list-style-type: none"> ▪ a person entitled to some/all of the goods can claim them before they are destroyed, sold or otherwise dealt with; ▪ operator must deliver up the goods, free of any charge (other than removal or storage charge), to a person entitled to claim them; ▪ operator can only charge removal and storage if value of remaining goods (if any) is not sufficient to cover costs. 	45
		Prescribes that: <ul style="list-style-type: none"> ▪ operator must send uncollected personal documents to the former resident or their executor or administrator or, if there is no address to send to, to the issuer where possible and otherwise retain for at least 6 months; ▪ other items worth less than \$100 can be given to charity or disposed of; ▪ operator must sell goods worth more than \$100 at public auction. 	46
Prescribes that: <ul style="list-style-type: none"> ▪ operator must make record of uncollected goods disposed of and retain for at least 2 years; ▪ operator must account to former resident, executor or administrator for balance of proceeds of after deducting costs of removal, storage and sale; ▪ if no forwarding address, balance of proceeds must be dealt with under Unclaimed Money Act. 	47		

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
Prescribe maximum rate of interest the operator may charge on recurrent charges owed by a former occupant	155(3)	Prescribes half the rate prescribed under section 101 <i>Civil Procedure Act 2005</i> in respect to interest payable on a judgement debt.	28
Declare amounts payable by a former occupant to be a departure fee	156(1)(b)	None prescribed	-
Prescribe costs included in and excluded from the 'costs of sale' of premises	170(4)	None prescribed	-
Prescribe interest rate payable on unpaid amounts due to former occupant who was a registered interest holder	180(4)(b) 180(5)(b)	Prescribes half the rate prescribed under s101 of the <i>Civil Procedure Act 2005</i> with respect to payment of interest on an unpaid judgement	28
Prescribe interest rate payable on unpaid amounts due to former occupant who was not a registered interest holder	181(7)(b) 181(8)(b)	Prescribes half the rate prescribed under s101 of the <i>Civil Procedure Act 2005</i> with respect to payment of interest on an unpaid judgement	28
Prescribe the amount a refund of the incoming contribution paid by a non registered interest holder must exceed for the statutory charge to apply	182A(1)(b)	Prescribes the amount of \$10,000	55
Prescribe penalty notice offences and penalty amounts	184(6)	Prescribes penalty notice offences, penalty amounts and short descriptions of offences in Schedule 6	56 Sched. 6
Prescribe how information connected with the administration or execution of the Act may be disclosed	200(e)	None prescribed	-
Prescribe additional methods for serving a notice or other document to a resident or operator	201(1)(c) 201(2)(c)	Prescribes that a notice, other than a termination notice, or other document may be: <ul style="list-style-type: none"> ▪ hand delivered to a resident's or operator's letterbox; ▪ sent by fax or other electronic means; ▪ given to the Protective Commissioner or a guardian; ▪ to a receiver, manager or administrator (in place of the operator) if one has been appointed to the village 	57
Provides a general power to make regulations consistent with the Act in respect to any matter required or permitted to be prescribed, or necessary or convenient to be prescribed to carry out or give effect to the Act, including: <ul style="list-style-type: none"> ▪ the manner and time within which an application may be made to the Tribunal; ▪ applications to the Tribunal by the Residents Committee on behalf of one or more residents; ▪ the other party or parties to applications to the Tribunal by the operator 	203(1)-(2)	Prescribes: <ul style="list-style-type: none"> ▪ time limits for applications to the Tribunal under specified sections of the Act; ▪ that there is no time limit for any section not listed in the schedule. 	37
		Prescribes that the Residents Committee may apply: <ul style="list-style-type: none"> ▪ on behalf of specific resident/s at their request; ▪ on behalf of all residents, if the residents consent at a meeting; ▪ any resident can request to be excluded from the application. 	38
		Prescribes that the Tribunal may order that specified resident/s or all residents are the other parties to an application by the operator.	39
		Prescribes that the Tribunal may make different orders in relation to different residents or groups of residents.	41
Exempt specified village contracts or class of contract from any provision of the Act	203(4)	None prescribed	-
Prescribe when and how a written ballot is to be conducted	Sched. 1, cl.3	Prescribes procedures for special resolutions and postal ballots	58 Sched. 7

Regulation making power provided by the Act, as amended	Section	Scope of the proposed Regulation	Clause
Prescribe how to elect a resident to report result of vote to operator where there is no Residents Committee	Sched. 1, cl. 4	None prescribed	-
Prescribe savings or transitional regulations consequent on the enactment of the <i>Retirement Villages Act 1999</i> , the <i>Retirement Villages Amendment Act 2004</i> and the <i>Retirement Villages Amendment Act 2008</i> and that any such provision may take effect from the date of assent to the Act concerned or a later date	Sched. 4, cl. 1	Clause 21 prescribes that section 114(8) of the Act does not apply in respect of the first annual budget (except if the recurrent charges were determined by fixed formula). General transitional provision that any act, matter or thing that was in effect under the 2002 Regulation immediately before its repeal, continues to have effect under the proposed Regulation	21 59
Prescribe that a savings or transitional provision has effect despite any specified provision of the Act	Sched. 4, cl.1A	None prescribed	-
Prescribe an amendment in the <i>Retirement Villages Amendment Act 2008</i> as not applying to a contract in force prior to commencement of the amendment	Sched. 4, cl.16	None prescribed	-
Prescribe expenditure or circumstances resulting in, or contributing to, an outstanding deficit in respect of which an operator is prevented from making a proposal that the residents make good all or part of the deficit	Sched. 4, cl.20(5)	Prescribes that an operator is prevented from making a proposal that residents make good all or part of an outstanding deficit (i.e., one that existed before 23 November 2006) unless the deficit or relevant part of the deficit resulted from a request by the residents for an additional item of capital or service.	33
Prescribe a date later than 23 November 2011 after which an operator may apply to the Tribunal in regard to making good of a deficit that occurred before 23 November 2006	Sched. 4, cl.21(1) & (3)	None prescribed	-

7. SUMMARY OF MAIN DIFFERENCES BETWEEN CURRENT AND PROPOSED REGULATION

The proposed Regulation remakes the current Retirement Villages Regulation 2002 incorporating a number of changes to improve on existing provisions and support the implementation of the *Retirement Villages Amendment Act 2008*. A summary of the differences between the 2002 and proposed 2009 regulations is set out in table 2 below.

Table 2: Differences between current and proposed regulations

Current Retirement Villages Regulation 2002	Proposed Retirement Villages Regulation 2009	Reason for change
No regulation	Clause 4 prescribes various types of work as being <i>capital maintenance</i> and others as not being <i>capital maintenance</i> .	Disputes over what is capital maintenance, funded through recurrent charges, and what is not, was one of the major issues raised in the review of the Act. The proposed definition aims to clarify some of the common areas of dispute.
No regulation	Clause 7 prescribes meals, laundry services and home cleaning as <i>optional services</i> (the new term replacing the term <i>personal services</i>).	Section 3 of the Act currently includes a note giving these matters as examples of personal services. Prescribing these matters in the Regulation provides more certainty.
Clause 14 and Schedule 5 prescribe model village rules	No regulation	The model village rules have no legislative effect and prescribing them in the regulations reduces

Current Retirement Villages Regulation 2002	Proposed Retirement Villages Regulation 2009	Reason for change
		flexibility. The model rules will instead be in a form approved by the Director-General and included on the Fair Trading website in an easy to use format.
No regulation	For the purposes of section 31(3) of the Act, clause 13 prescribes a maximum amount of \$200 as payable by the resident for legal and other expenses incurred by the operator in preparing the village contract.	It was a recommendation of the review of the Act that a maximum amount of \$200 be set. Whilst the resident and operator share these costs, it is the operator who chooses what legal services are provided, and may choose to incur costs beyond what would be considered reasonable by the resident.
Clause 17 prescribes additional information that must be included in a notice of variation of recurrent charges <i>by fixed formula</i>	Clause 22 prescribes similar information, adds a new heading and removes statements about the operation of the legislation.	It was a recommendation of the review of the Act that these notices be simplified.
No regulation	Clause 23 prescribes additional information to be included in a notice to residents of an increase in recurrent charges not exceeding the CPI and requires inclusion of a statement that the variation does not require resident consent if the specified requirements of the legislation have been followed.	This clause is made under the new section 105A of the Act, inserted by the Amendment Act. The aim is to enable residents to easily verify that the requirements of the legislation have been followed.
Clause 18, made under the current section 106, prescribes information that must be included in a notice of variation of recurrent charges <i>other than by fixed formula</i>	Clause 24 prescribes similar information and statements to be included in a notice of variation of recurrent charges other than by fixed formula, where the increase exceeds the CPI, and adds a new heading.	The information prescribed in the proposed clause 24 is essentially the same as the current clause 18, but now only applies where the increase exceeds the CPI. This reflects the amendments to section 106 and insertion of section 105A into the Act.
No regulation	Clause 25(2), made under section 107(6)(b) of the Act (as inserted by the Amendment Act), prescribes information the operator is not required to give residents under section 107(4), relating to a proposed variation in recurrent charges.	Ensures an operator is not required to disclose personal or unrelated information or information which would breach privacy requirements.
Clause 20 prescribes certain costs as not able to be financed by recurrent charges: <ul style="list-style-type: none"> • professional membership fees • overseas travel • internal repainting of vacant units 	Clause 26 prescribes additional costs that must not be financed by recurrent charges: <ul style="list-style-type: none"> • marketing of vacant units • payroll tax that is not solely attributable to the operation of the village • the operator's head office costs that do not directly arise from the operation of the relevant retirement, unless for services to the village's residents • flat rate management or administration fees. 	The first two matters from the current clause 20 are brought forward in the proposed clause 26. Internal repainting of units is no longer prescribed in this provision, as it is dealt with in section 97 (as amended by the Amendment Act). The list of excluded matters has been expanded to exclude other expenses unrelated to the operation or administration of a village. This provision arises from recommendation 26 of the review of the Act.
Clause 22 prescribes statements that must be included in a notice accompanying statement of proposed expenditure.	The proposed clause 19 prescribes statements that must be included in a notice accompanying statement of proposed expenditure, with some changes to the current wording.	The wording of the prescribed statements has been modified to reflect changes to the Act made by the Amendment Act.
Clause 23 prescribes the	Clause 28 prescribes <i>half</i> the rate of interest	In consultation with stakeholders in

Current Retirement Villages Regulation 2002	Proposed Retirement Villages Regulation 2009	Reason for change
rate of interest payable on overdue recurrent charges as the rate under section 101 of the <i>Civil Procedure Act 2005</i> for interest on a judgement debt	prescribed under section 101 of the <i>Civil Procedure Act 2005</i> .	developing the draft Regulation, it was proposed that half the current rate would be appropriate because it now also applies to funds overdue to residents and residents' financial arrangements could be affected if the interest rate is too high.
Clause 25 prescribes circumstances in which the Residents Committee can apply to the Tribunal on behalf of residents	Clause 38(2) removes the requirement for a special resolution for the Residents Committee to apply to the Tribunal on behalf of all residents, and creates subclause (3) to prescribe that resident consent is to be obtained by a vote on the proposal by a show of hands.	A special resolution is not necessary, as any resident can request that they be excluded from the application.
<p>Clause 41 and Schedule 11 provide:</p> <ul style="list-style-type: none"> ▪ a majority vote of residents at a meeting can determine that a measure is to be decided by written ballot, and ▪ the method for conducting the written ballot in the meeting 	<p>Clause 58 and Schedule 7 prescribe requirements for conducting written ballots on <i>special resolutions</i>, including sending ballot papers to residents before a meeting, enabling a ballot to be lodged before the meeting (<i>postal vote</i>), counting votes and reporting on the results.</p> <p>Schedule 7 also remakes the current provision that enables residents to decide at a meeting that a matter should be determined by written ballot at the meeting, and prescribes more formalised procedures for conducting such ballots. However, this now applies only to a matter that does not require a special resolution – for special resolutions ballot papers must be sent in advance.</p>	<p>Schedule 1 of the Act has been amended by the Amendment Act to <i>require</i> a vote on a special resolution to be by written ballot, conducted in accordance with the procedures set out in the regulations (currently this is optional). Schedule 7 of the proposed Regulation prescribes the procedures.</p> <p>The Amendment Act removed some matters from Schedule 1 (Consent of residents) of the Act, and these are now prescribed in the proposed Schedule 7 so as to continue to provide for:</p> <ul style="list-style-type: none"> ▪ 21 days written notice to residents of a proposed special resolution, and ▪ requirements for a quorum. <p>The provisions for postal votes should make it possible for more residents to participate in votes on important matters that require a special resolution.</p> <p>The formalised requirements for ballots conducted in meetings on other types of resolutions aim to reduce the capacity for confusion and errors in recording and counting on votes and reporting on the result.</p>
Clause 11(7) provides that a prospective resident be given "sufficient time" to examine the premises condition report	Clause 14(8) prescribes a timeframe of 14 days for a prospective resident to consider the condition report.	Provides clarity and certainty for operators and prospective residents as to what is 'sufficient time'.
Clause 19 sets out ten matters that must be dealt with in a statement of proposed expenditure	Clause 17 prescribes the same matters, and adds that the annual budget must break down administration and management fees to show actual costs of individual goods and services.	The review of the Act recommended there be greater transparency and accountability in the management of village finances.
No regulation	Clause 21 is a transitional provision which prescribes that section 114(8) of the Act does not apply in respect of the first annual budget (except if the recurrent charges were determined by fixed formula).	Section 114(8), inserted by the Amendment Act, provides that resident consent to the proposed annual budget is not required if recurrent charges have not been varied or have been varied either by fixed formula or by less than the CPI.

Current Retirement Villages Regulation 2002	Proposed Retirement Villages Regulation 2009	Reason for change
		For the first budget cycle after the amendments take effect, the proposed clause 21 will enable residents to consider any major changes the operator may decide to make to the budget following the commencement of the Amendment Act.
No regulation	Clause 32 provides that if there if there is no Residents Committee, a copy of the audited accounts for the village must be displayed on a notice board in the common area for one calendar month, commencing no later than four months after the end of the financial year.	This flows from a recommendation of the review of the Act and ensures accounts are displayed so that residents will have the opportunity to see them. (NB The Act will continue to require the operator to give a copy of the accounts to any resident at their request.)
No regulation	In relation to a budget deficit outstanding since before 23 November 2006, clause 33 allows an operator to put a proposal to residents that they pay all or any part of the outstanding deficit that resulted from a request by residents for an additional item of capital or service.	<p>Under section 120C of the amended Act, operators are liable for budget deficits. Clause 20(5) of Schedule 4 is a transitional provision which allows an operator to put a proposal to residents that they make good a deficit that was outstanding before 23 November 2006 (the date the exposure draft Amendment Bill was released).</p> <p>The purpose of the proposed clause 33 of the Regulation is to limit the extent of any such proposal to deficits arising from expenditure requested by residents. The reasoning behind this clause is that operators have had three years since the release of the draft amendments in which they could have asked the residents to make good an outstanding deficit.</p> <p>These provisions arise from the review of the Act, which identified the carrying forward of deficits year after year as a major financial concern for residents. The proposed regulation supports the amendments to the Act which aim to make operators more financially prudent when setting budgets.</p>
No regulation	Clause 34 lists items that must be included in the agenda for the annual management meeting between the operator and residents.	The Amendment Act introduced the requirement for operators to hold an annual meeting with residents. The proposed regulation ensures that all relevant matters are discussed at the meeting.
No regulation	Clause 35 lists questions an operator is not required to answer at the annual meeting.	This clause ensures that only relevant matters are raised as questions at or before the meeting and that matters that may be affected by privacy laws are not required to be disclosed.
No regulation	Clause 36(1) enables a resident to appoint a friend as a proxy to represent them in meetings.	The redrafting of section 77 in the Amendment Act resulted in this category of person being omitted from the list of those who could be nominated as a proxy. The

Current Retirement Villages Regulation 2002	Proposed Retirement Villages Regulation 2009	Reason for change
		<p>proposed clause 36(1) ensures a resident can nominate any friend as their proxy, not just a resident of the same village.</p> <p>NB. A statute law (machinery) amendment to the Act is under consideration to make it clearer that a resident can appoint anyone they wish to as their proxy, other than the operator or a close associate of the operator. It is intended that the draft regulation will be revised to reflect this before it is published.</p>
No regulation	Clause 48 provides that a village resident who owns premises in a strata, community or company title scheme is not required to obtain the consent of the operator to renovate, add, remove or alter any fixtures or fittings in their residence.	This clarifies that the provisions introduced by the Amendment Act allowing residents to seek consent to renovate, add, remove or alter fixtures and fittings does not apply to those who own their premises.
No regulation	Clause 49 provides that a former resident who terminated their contract during the settling-in period is liable to pay the cost of any changes to fixtures or fittings or renovations to the unit that had been carried out at their request.	The proposed clause ensures operators do not unfairly bear the cost of work that had been done to the unit specifically for the former resident.
No regulation	Clause 50 provides for a safety inspection report to be placed on a noticeboard in the village for one calendar month.	The Amendment Act introduces a requirement for operators to carry out annual safety inspections and report on the findings. The requirement to display the report in a common area for a month will ensure the majority of residents will be able to view it. (NB The new section 58A also requires the report to be given to the Residents Committee if there is one).
No regulation	Clause 52 enables a person to hold the same office on the Residents Committee for more than 3 consecutive years if the village has less than 20 residents or the annual budget is \$50,000, unless the Director-General has lodged a written objection with the Residents Committee.	<p>The Amendment Act introduces section 70A which prevents a members of the Residents Committee from holding the same or equivalent office on the committee for more than 3 consecutive years, except as provided by the regulations. The proposed clause 52 provides an exception for small villages where there may not be enough residents to ensure regular turnover of office holders.</p> <p>The proposed ability for the Director-General to object will enable residents' concerns to be addressed in cases where it would be inappropriate for a person to continue to hold the same office for more than 3 years.</p>
No regulation	Clause 55 provides that an amount of \$10,000 is prescribed for the threshold for when a statutory charge is to be filed.	The Amendment Act introduced a statutory charge for certain village contracts where an ongoing contribution was paid. This provides that an amount of \$10,000 is the threshold for the Part to apply.

Current Retirement Villages Regulation 2002	Proposed Retirement Villages Regulation 2009	Reason for change
Clauses 35 and 36 and Schedule 8 prescribe the offences under the Act for which a penalty notice may be given, along with short descriptions of each offence and the penalty notice amount	Clause 56 and Schedule 6 prescribe additional offences for which a penalty notice may be issued and change some penalty notice amounts.	The Amendment Act introduces some new offences for which penalty notices are prescribed in the proposed Regulation. The penalty amounts are being made more consistent. Short descriptions of offences are no longer used in regulations.

8. IMPACT ASSESSMENT OF THE PROPOSED REGULATION

This part of the regulatory impact statement:

- discusses the provisions of the proposed Regulation;
- weighs up the costs and benefits of the proposed provisions and the alternative options; and
- assesses the overall impact of the proposed Regulation on the retirement village industry, residents, government and the general community.

8.1 Part 1 – Preliminary (clauses 1 – 9)

Objective

To provide for machinery matters enabling the legislation to be administered with clarity.

Overview of the provisions in Part 1

Part 1 – *Preliminary* – cites the title of the proposed Regulation (clause 1), specifies the proposed commencement date (clause 2) and defines or expands on certain terms and phrases as used in the legislation (clauses 3 to 9).

Clause 3 combines clauses 3 and 4 of the current Regulation and includes a general note regarding the statutory interpretation of ‘form’ from the *Interpretation Act 1987*. In the current Regulation this note is repeated each time a form is prescribed.

Clause 4 is prescribed under the definition of *capital maintenance* in section 4 of the Act (as amended). The definition enables the regulations to categorise specified work as being included in or excluded from the meaning of *capital maintenance* for the purposes of the legislation. Clause 4 prescribes the following as included in the meaning of capital maintenance:

- internal painting,
- maintenance and replacement of furniture and other non-fixed items in common and kitchen areas,
- maintenance or replacement of window coverings in common areas,
- replacement of a component in the course of maintaining a capital item if the replacement cost is up to 10% of the cost of replacing the whole item,

and the following as excluded from the meaning of capital maintenance:

- external painting,
- repair of a capital item if that item has already been repaired twice within the preceding 12 months,
- work required by law, such as complying with fire safety regulations,
- work on vacant residential premises,
- maintenance of a capital item costing more than 50 per cent of the cost of replacing the item,
- enhancement or improvement of a capital item or the village.

Clauses 5 (*item of capital*), 6 (*operator*), 8 (*resident*) and 9 (*retirement village*) are the same as clauses 5, 6, 7 and 8 in the current Regulation, and add further detail to the meaning of these terms as used in the Act and Regulation.

Clause 7 is new and expands on the definition of the term *optional services* in section 4(1) of the Act (as amended). Section 4(1) includes a note giving examples of *optional services* as the provision of meals, laundry services and the cleaning of a resident's unit. Clause 7 prescribes these examples as part of the definition of the term in order to provide legislative certainty.

Alternative options

There are no alternative options to clauses 1 to 3 as these are purely machinery provisions.

Alternatives to clauses 4, 5,6, 7, 8 and 9 would be to:

- not prescribe any expanded definitions for *capital maintenance*, *item of capital*, *operator*, *resident*, *optional services* or *retirement village*;
- prescribe additional matters for the purposes of these definitions.

No additional matters have been identified for inclusion in the definitions at this stage.

Assessment of costs and benefits

The provisions contained in clauses 1 to 3 are of a machinery nature and no costs arise from them. The definitions in clauses 4 to 9 help ensure the meaning of specific terms used in the legislation is clear.

The proposed clause 4 does not impose any costs, as the split between residents and operators in regard to funding of capital maintenance and capital replacement is established in the Act itself (see section 97, as amended). However, the distinction between the two is not always clear and disagreements over whether particular work is classified as maintenance or replacement are a significant cause of contention between residents and operators.

The purpose of clause 4 is to reduce the potential for disputes as to whether work is maintenance or replacement by expanding on the meaning of *capital maintenance*, which is defined in the Act as "works carried out for the purpose of repairing or maintaining an item of capital".

The funding split in the Act is based on the premise that the operator owns the capital items in the village and the residents use them. That is, work resulting from the residents' use of the items in the village is able to be funded by residents, and work which replaces, or significantly enhances the value of, the operator's property, or which would need to be done regardless of whether any residents lived in the village, should be paid for by the operator.

Another area of dispute arises when operators choose to continually repair items that are clearly beyond their useful life, when it would be cheaper and more practicable to replace them.

In attempting to provide greater clarity in these areas, clause 4 differentiates between items that need to be maintained due to their use by residents and work that would need to be done to maintain the value of the capital item regardless of whether residents were living in the village, such as external painting. Clause 4 also limits the number of repairs able to be carried out to the same item and charged to residents.

The same logic applies to the maintenance and replacement of non-fixed capital items. Under the Act currently, operators can charge residents for the replacement of non-fixed

capital items, on the basis that many non-fixed items require regular replacement because of their use by or for residents. The replacement of these types of items is therefore grouped with capital maintenance and is able to be funded from recurrent charges or the capital works fund. The proposed clause 4 clarifies that the replacement of furniture, window coverings and other non-fixed items in common and kitchen areas is deemed to be capital maintenance.

Clause 4 is considered to provide a net benefit, in that greater certainty about what is and is not capital maintenance should decrease disputes and reduce costs for residents, operators and government, as fewer matters would need to be taken to the Consumer Trader and Tenancy Tribunal for determination.

Clauses 5, 6, 7, 8 and 9 clarify the definitions already provided in the Act no costs arise from them. Prescribing the expanded definitions as proposed will provide clarity, legislative certainty and reduce potential disputes about the meanings of these terms and is considered to provide a net benefit.

8.2 Part 2 – Information about retirement villages (clauses 10-12)

Objective

To ensure that residents receive adequate and accurate information about their contractual and financial obligations and about the village.

Overview of the provisions in Part 2

The new sub-section 17(5A) of the Act enables the regulations to ban specified representations from being made in promotional material published or distributed by an operator. Clause 10 excludes a range of matters, including speculation about future capital gains or development or sale of the village.

Clause 11 and Schedule 1 of the proposed Regulation prescribe the form and content of the disclosure statement that must be given to prospective residents. The requirements are the same as the current clause 9 and Schedule 1.

Section 20 of the Act sets out a list of documents that must be made available for inspection by prospective residents and enables additional documents to be prescribed in the regulations. The proposed clause 12 prescribes relevant additional documents, and is the same as clause 10 of the current Regulation.

Alternative options

Alternatives to clause 10 would be to not prescribe any kinds representations as excluded from promotional material, or to prescribe different or additional matters. No other matters have been identified at this stage. Not prescribing anything would mean section 17(5A) of the Act would have no effect, and operators could continue to include speculative information in promotional material. Inclusion of potentially misleading information of this kind can lead to prospective residents making inappropriate financial decisions.

Alternatives to clause 11 and Schedule 1 include not prescribing pre-contractual disclosure requirements, prescribing different requirements or prescribing a streamlined, two-step disclosure process as recommended by the review of the Act. The review supported retaining disclosure requirements, as they are of significant benefit to residents in making the major financial decision to buy into a village. No alternative requirements have been identified at this stage. A separate project is underway to implement a streamlined, two stage disclosure process in mid 2010. In the interim, to avoid unnecessary confusion and

cost to residents and operators, it is proposed to remake the requirements of the current Regulation.

Alternatives to clause 12 would be to not prescribe any additional documents to be made available for inspection by prospective residents or to prescribe more or fewer or different documents. No alternative or additional documents have been identified at this stage, however this will be further considered in the implementation of more streamlined disclosure requirements next year.

Assessment of costs and benefits

In prohibiting the publishing or distribution of written material containing speculative projections of future returns, ownership, access to aged care or possible recurrent charges, clause 10 imposes no costs and provides significant benefits to consumers, by enabling better long-term financial decision making by residents. Operators who currently include this kind of information in their promotional material may incur some costs in changing the information. The benefits to residents are considered to outweigh these costs.

The industry incurs significant costs in complying with the pre-contractual disclosure requirements. However, submissions to the review of the Act from residents and operators alike agreed that some form of pre-contractual disclosure should be retained, in recognition of the need for prospective residents and their legal representatives and families to have sufficient information to make an informed choice.

The review found that the disclosure of information to prospective residents could be made more effective and efficient and proposed having a shorter, more general disclosure statement for initial enquiries during the 'shopping around' stage, followed by a more detailed and specific disclosure statement once interest is shown in a particular unit. It is anticipated this will save operators time and money and help prospective residents to focus on the relevant information at the different stages of the decision making process.

In the process of drafting the Regulation, the Victorian counterpart to the Minister for Fair Trading invited New South Wales to participate in a project with Victoria for the development of consistent disclosure documents and prescribed contract terms. The Minister agreed this approach would result in a superior outcome for prospective residents and significant cost savings for operators who have villages in both jurisdictions. Consequently, it is proposed that the Regulation will be amended in 2010 to implement the new harmonised requirements once they have been developed. Industry, residents and other interested persons will be consulted as part of this project.

The proposed Regulation, which retains the current disclosure requirements in Schedule 1, is considered the most appropriate option in the interim.

Clause 12 also imposes costs on operators, by requiring them to have an extensive list of documents available for inspection by prospective residents, although this is mitigated by fact that the information only needs to be made available for inspection – copies do not need to be provided. On the other hand, the availability of these documents benefits prospective residents who wish to inform themselves on issues which may impact on them should they decide to take up residence in a village. Ensuring that residents are fully informed of circumstances affecting residence in the village also benefits operators. The more informed a resident is about the circumstances of a village before moving in the less likely it is that disputes will arise over unforeseen matters, enabling the village to operate in a more efficient and cost effective manner. It is considered that the Regulation balances the need for prospective residents to be fully informed with the costs to operators of providing the information.

8.3 Part 3 – Village contracts and village rules (clauses 13-16)

Objective

To ensure retirement village residents and operators are aware of their rights and obligations, reduce the incidence of disputes about the condition of premises and support harmonious community living.

Overview of the provisions in Part 3

Section 31 of the Act provides for legal and other expenses incurred by the operator in connection with the preparation of a village contract to be shared equally by the operator and resident, but also enables the regulations to prescribe a maximum amount payable by the resident. The proposed clause 13 prescribes a maximum of \$200 as the amount payable by a resident for legal and other expenses incurred by the operator in connection with the preparation of a village contract. If the cost is less than \$400, the resident will still pay a maximum of half the amount, not \$200.

Clause 14 and Part 2 of Schedule 1 of the proposed Regulation prescribe the form of the premises condition report and how it must be completed. The requirements, with one exception, are the same as those in clause 11 and Schedule 2 of the current Regulation and are made under section 38 of the Act. Section 38 requires that the condition report be in the form prescribed by the regulations and be completed in accordance with the regulations. Section 38 was amended by the Amendment Act to allow the regulations to additionally prescribe the time within which the condition report must be completed and provided to the prospective resident. Accordingly, the proposed clause requires this to occur at least 14 days before the contract is signed or, if the premises are still being constructed, 14 days before the resident occupies the premises.

Clause 15 and Schedule 2 and Schedule 3 prescribe matters that must be included in and matters prohibited from being included in village contracts. These are the same as the matters currently prescribed in clause 12 and Schedules 3 and 4 of the current Regulation.

Section 46 of the Act lists matters that may be the subject of village rules, and allows for additional matters to be prescribed. The proposed clause 16 prescribes two additional matters, relating to security in the village and the external appearance of residents' premises. Clause 16 is the same as clause 13 in the current Regulation.

Alternative options

Alternatives to clause 13 would be to not prescribe a maximum amount, or to prescribe a lower or higher amount. During the review of the Act however, it was found that \$200 represented a reasonable amount for residents to contribute to the costs of preparing the contract.

An alternative for clause 14 and Part 2 of Schedule 1 would be to prescribe a different form and procedures for completing condition reports. However, no alternative proposals have been identified during consultation on the drafting of the proposed Regulation. Section 38 of the Act requires that the condition report be completed in accordance with the prescribed form and procedures. Not making a regulation under section 38 is therefore not a viable option, as the condition report provisions of the Act would be inoperable. Alternatives to the proposed 14 day time period for the prospective resident to consider the report include prescribing a shorter or longer different time frame, or no time frame, in which case residents would continue to be required to be given "sufficient time". The proposed 14 day period has been suggested as sufficient to enable a prospective resident who does not live near the village to make the necessary travel arrangements. A longer time frame might increase the possibility of inaccuracies in the report, in the event that anything should occur to change the condition of the premises during that time.

Alternatives to clause 15 and Schedule 2 and Schedule 3 include not prescribing matters to be included in or excluded from village contracts, prescribing different matters, prescribing mandatory terms for inclusion in contracts, or prescribing full standard contracts. Prescribing full contracts is considered to be too inflexible for both residents and operators and could stifle innovation in the industry. Given the range of different types of villages and financial models, prescribing a standard contract for each type of potential arrangement would be very costly and difficult, if not impossible, for government to develop. Confusion could arise as to which form of standard contract to use in various scenarios that do not quite fit the standard, with the potential for costly legal disputes.

The review of the Act recommended that the regulations should prescribe standard terms that must be included in every contract. This recommendation was based on the finding that residents are often significantly disadvantaged because of the complexity and length of some village contracts. Prospective residents sometimes incur very high legal costs when obtaining advice about the contract, or forego seeking proper advice because it is unaffordable. In some cases, important financial and legal information are obscured in complex provisions and legal jargon or in the fine print. As a result, residents may subsequently be faced with unexpected costs or find themselves subject to onerous requirements. A separate project is underway to develop mandatory standard contract terms for introduction in mid 2010. In the interim, to avoid unnecessary confusion and cost to residents and operators, it is proposed to remake the requirements of the current Regulation.

The alternative option of not prescribing any matters to be included and excluded from village contracts would provide more flexibility, but would result in contracts even lengthier and more complex than the contracts currently in use.

Alternatives to clause 16 would be to not prescribe any extra matters for which village rules may be made, or to prescribe other matters as able to be dealt with in the rules. As the inclusion of these matters in a village's rules are optional, the proposed provisions and the alternatives do not impose any costs.

Assessment of costs and benefits

By setting a \$200 cap on the amount residents can be asked to pay towards preparation of their contract, clause 13 provides significant benefits to residents, who will no longer be able to be charged large amounts for the preparation of what is usually a pro-forma contract form. In one case brought to the attention of the review, a resident was charged \$2,000. This represented only half the cost of the work, as the operator is required by section 31 of the Act to pay an equal share. Prescribing the \$200 cap will impose higher costs on operators in cases where the actual cost of preparing the contract is higher than \$400. However, the amount expended by the operator is largely within their control and prescribing the cap should act as an incentive to keep costs down. The benefits of the proposed clause are considered to outweigh the costs.

The requirements for condition reports prescribed under clause 14 benefit residents and operators alike, by reducing the likelihood of disputes about the condition the premises were in when the resident entered the village. The condition report is required to be prepared in the presence of the resident (or their representative) and they have 14 days in which to examine the report and suggest changes. The report thereby provides an agreed record which can be relied upon in resolving disputes between the operator and resident and in the Tribunal. This saves both parties the cost of gathering other types of evidence of the premises' original condition, such as photographs or an independent inspection report. Prescribing a standard form of report saves operators the costs of developing their own form. The new 14 day period for the resident to consider the report removes

uncertainty arising from the current clause 11 about what is a “sufficient time” period, thus reducing the potential for disputes about this.

In relation to the proposed clause 15, it is considered that requiring all village contracts to provide for certain matters, and exclude certain other matters, assists in ensuring that the rights and responsibilities of the operator and resident are clearly stated, including the rights and responsibilities stipulated by the Act, thereby helping to reduce disputes and the associated costs. It also helps to ensure that terms that seek to void residents’ rights are not able to be included in contracts. Excluding certain matters assists in preventing disputes over practices which have long been considered to be unfair and costly to residents or infringe on their privacy and freedom of choice.

It is considered that the regulation provides the most appropriate means, at this time, of achieving these objectives. There may be costs for operators in ensuring their contracts meet the legislative requirements. However, these costs would be incurred only occasionally when pro-forma contracts are being developed for the village and are offset by the \$200 contribution each resident can be asked to make. The potential costs and disadvantage to residents of not prescribing the proposed requirements is considered to outweigh the occasional costs to operators, especially where residents might enter into onerous agreements that they do not fully understand. Not making the proposed provisions would be expected to lead to an increase in disputes over contract terms and conditions, resulting in higher costs to government, industry and consumers.

The proposed clause 16 sets out two matters which are optional for inclusion in the village rules. The proposed provision therefore does not impose any costs and does not limit other matters being included. The benefits are that operators and residents can be certain that the listed items are legitimate matters for inclusion in the rules.

8.4 Part 4 – Financial management – Division 1 – Annual budget (clauses 17–21)

Objective

To ensure residents receive adequate information about the proposed annual budget, are aware of the consent process (where applicable) and that expenditure does not vary significantly from what was included in the budget.

Overview of the provisions in Part 4, Division 1

Section 112 of the Act establishes the requirement for operators to supply each resident with a proposed annual budget 60 days before the commencement of the financial year. Section 112(3) enables the regulations to provide for:

- matters which must be dealt with in a proposed budget; and
- the form of the proposed annual budget.

The proposed budget must be accompanied by a notice to residents containing information about the requirements for residents’ consent, explaining the reasons for any changes in expenditure and containing any other information prescribed under section 112(4)(e).

Clause 17(1) of the proposed Regulation lists matters that must be dealt with in the proposed annual budget. The list is the same as that contained in clause 19 of the current Regulation and includes matters such as the amount of recurrent charges and how they were calculated. The proposed clause 17(2) is a new provision which states that any administration or management fees included in the budget must be broken down to show the itemised costs of the goods and services to be provided.

Clause 18 and Schedule 4 prescribe a model form of the proposed annual budget which may be, but is not required to be, used by an operator. These provisions are essentially the same as clause 21 and Schedule 6 of the current Regulation.

Clause 19 prescribes additional information to be included in the notice accompanying the proposed budget, including statements about providing additional information to the Residents Committee, minor variations in expenditure and between line items, and the requirements for residents' consent (where applicable). Clause 19 is based on clause 22 of the current Regulation with some differences to reflect the changes to the Act relating to residents' consent to the proposed budget.

The new section 115A of the Act will enable the regulations to limit the amount a proposed budget can allocate for contingencies. Clause 20 is a new provision which proposes a limit of:

- 4 per cent of the total budget; or
- if the increase in the CPI over the past 12 months exceeded 4 per cent, that greater amount.

Clause 21 is a transitional provision relating to the first annual budget following the commencement of the *Retirement Villages Amendment Act 2008*. The proposed clause provides that section 114(8) of the Act does not apply in respect of the first annual budget unless the recurrent charges were determined by fixed formula. Section 114(8), inserted by the Amendment Act, provides that resident consent to the proposed annual budget is not required if recurrent charges have not been varied, or have been varied either by fixed formula or by less than the CPI. The transitional provision ensures that the requirement to seek residents' consent will extend to the first budget after the amendments take effect, even though the recurrent charges were not varied, or were increased by less than the CPI.

Alternative options

Alternatives to clauses 17 and 19 would be to not prescribe the matters that must be included in a proposed annual budget or in the notice accompanying the budget. Alternatively, different matters could be included, or clause 19 could continue to provide for the matters in clause 22 of the current Regulation.

An alternative to clause 18 would be to not prescribe a model budget. This would remove the benefits of having the model form without reducing any compliance costs, given that use of the model budget is not mandatory.

An alternative to clause 20 would be to not prescribe a limit on contingencies in the budget, or to prescribe a higher or lower limit. Preliminary consultation on this issue elicited a wide range of opinions and the proposed percentages in clause 20 have been included in the draft Regulation for discussion and consultation. So far, there has been no compelling argument put forward for any particular alternative.

The alternative to clause 21 would be to not provide for the transitional arrangement. This would mean that, starting from the first budget cycle after the amendments to the Act commence, residents' consent would not be required if the recurrent charges do not increase or increase by less than the CPI.

Assessment of costs and benefits

Clauses 17 and 19 benefit residents by requiring transparency about what is included in the village budget, thereby enabling residents to monitor expenditure and encouraging greater accountability by operators. These were significant concerns raised by residents in

the review of the Act. The detail of the expenditure provided for in the budget is known to the operator, and no costs arise would from including the information in the budget given to residents. The compliance cost for operators from clause 19 is considered to be low, as it simply requires a short document setting out the basic budget consent process and the essential rights and responsibilities of residents.

Clause 19 has been simplified in comparison to clause 22 in the current Regulation, by omitting information which just restated requirements of the Act. Whilst this can be quite useful to inform residents about unfamiliar procedures, the budget process is well established and residents go through the process every year.

The use of the model budget prescribed under clause 18 is not mandatory, and therefore imposes no costs. Using the model budget potentially reduces operators' costs by removing the need to develop their own form of budget. The clear layout of the model budget ensures all items of importance to residents are listed, makes it easier for residents to consider the proposed expenditure and may therefore facilitate the consent process and reduce disputes.

In preliminary consultation during the development of the draft Regulation, operators and residents had definite opinions on whether any limit on the amount able to be allocated for contingencies should be prescribed and, if prescribed, what the limit should be. Research into budgets for endeavours that involve several parties indicated that the inclusion of a limit on contingencies would be appropriate. The limit of 4 per cent or the CPI increase over the past year (if greater than 4%) that has been proposed in the draft Regulation is considered fair and equitable. Prescribing the limit as a percentage of the budget recognises that a fixed amount would be inappropriate for the larger or smaller budgets.

Placing a limit on contingencies does not, in itself, impose any costs. However if an operator was unable to keep spending within the approved budget, they would be responsible for the resulting deficit. While a potential cost to the operator, this is a benefit to residents and the village as a whole as it encourages good financial management and prudence. Knowing that the amount allocated for contingencies cannot be exceeded provides certainty for residents, who are responsible for funding the approved budget.

The transitional provision in clause 21 is related to the similar provision in clause 27. Both clauses were included to address concerns raised by the Retirement Village Residents Association about possibly significant budgetary changes arising from the implementation of the Amendment Act. The Association argued that the consent of residents to the budget and recurrent charges should continue for the first budget cycle following the amendments, even if the charges do not increase by more than the CPI. The provision benefits residents by enabling them to consider and vote on any major changes the operator may decide to make to the budget in response to the amendments to the Act.

The removal of the requirement for residents' consent for proposed budgets in some circumstances will reduce costs for operators, and the proposed clause 21 means a year's delay in realising these savings. However, delaying these cost savings for one budget cycle will reduce the potential for disputes and enable residents to consider whether any areas of expense within the budget have increased even though the overall budget may not have significantly increased (due to the cost savings measures introduced by the amendments).

8.5 Part 4 – Financial management – Division 2 – Recurrent charges (clauses 22–27)

Objective

To ensure:

- that residents receive adequate information about proposed recurrent charges and are aware of the consent process (where applicable); and
- that recurrent charges are not used to pay for matters unrelated to the operation of the village.

Overview of provisions of Part 4, Division 2

If a village contract provides a *fixed formula* for increasing recurrent charges, section 105 of the Act requires the operator of the village to give at least 14 days written notice to the resident specifying the amount of the new charges, the date from which they are payable and other information prescribed by the regulations. The proposed clause 22 - based on the current clause 17 - prescribes that the notice must include the resident's name and the address of the premises. The proposed clause adds a new heading and removes statements about the operation of the legislation.

Clause 23 sets out additional information that must be included in a notice of variation of recurrent charges where there is *no fixed formula* and the increase *does not exceed the increase in the CPI* since the charges were last increased. The main purpose of the proposed clause is to require the notice to include statements about the relevant requirements of the Act. Clauses 23 and 24 are based on clause 18 of the current Regulation, which prescribes the additional information to be included in a notice of variation of recurrent charges where there is *no fixed formula* and the increase *exceeds the increase in the CPI* since the last increase. Both clauses add new headings to the notices to ensure residents know what type of notice they are being given.

Clause 25 prescribes a period of 7 days within which an operator must provide information requested by residents about a variation to recurrent charges (under section 107(4) of the Act). The proposed clause also prescribes information the operator is not required to give residents, such as personal and confidential information. This ensures an operator is not required to disclose personal or unrelated information or information which would breach privacy requirements.

The proposed clause 26, made under section 112 of the Act, prescribes that the following matters that cannot be financed by recurrent charges:

- professional membership fees,
- overseas travel by the operator, their agent or employees,
- marketing of vacant units,
- payroll tax that is not solely attributable to the operation of the village,
- the operator's head office costs that do not directly arise from the operation of the relevant retirement, unless for services to the village's residents,
- flat rate management or administration fees.

The first two items are brought forward from clause 20 of the current Regulation and the rest are new and aim to exclude expenses that are unrelated to the operation or administration of a village. This provision implements recommendation 26 of the review of the Act.

Clause 27 is a transitional provision relating to the first annual budget following the commencement of the *Retirement Villages Amendment Act 2008*. The consent of the residents of a village will need to be obtained to a variation in recurrent charges in the first budget cycle of the village even if those charges do not increase by more than the CPI (except where the village contract provides for recurrent charges to be varied in accordance with a fixed formula).

Alternative options

As an alternative, clause 22 could continue to prescribe all the same provisions as the current clause 17, rather than simplifying the notice as proposed. Alternatives to clauses 23 and 24 would be to not prescribe additional matters that must be included in notices of variation of recurrent charges, or to prescribe additional or different matters.

An alternative to clause 25(1) would be to not prescribe a time limit for the operator to provide information to the Residents Committee about a variation in recurrent charges, or to prescribe a shorter or longer time limit. Alternatives to clause 25(2) would be to not prescribe information the operator does not have to give to the Residents Committee, or to prescribe different information.

The alternatives to clause 26 would be to not prescribe any matters as not able to be financed through recurrent charges, or to prescribe different matters. Considerable consideration was given to this issue and residents and operators groups were consulted in the development of the proposed clause. A number of the prescribed matters were identified in the review of the Act as being appropriate for exclusion.

The alternative to clause 27 would be to not prescribe the transitional provision. Under this option, the requirement to seek residents' consent where recurrent charges are increasing (otherwise than by fixed formula) by less than the CPI would be removed as soon as the Amendment Act commences, rather than being delayed for a year.

Assessment of costs and benefits of proposed clauses

Clauses 22, 23 and 24 require operators to include additional information in notices of variation of recurrent charges. Although this may result in the notices being a little longer than they would otherwise be, the cost impact on operators is estimated as minimal. The prescribed information requirements are considered to benefit residents by ensuring they are informed of their rights about consenting to recurrent charges increases. The alternative of not prescribing these matters would save little in compliance costs, as the requirement to give the basic notice is contained in the Act itself. The proposed clause 22 (notice of an increase by fixed formula) simplifies the current form of notice to increase its clarity and remove unnecessary information. This change is considered to be cost neutral as it would result in negligible savings for operators. Costs for residents could increase if they were not provided with the prescribed information, for example, if they are uncertain of their rights and responsibilities in terms of considering proposed variations to recurrent charges and proposed expenditure.

The proposed clause 25 supports a finding of the review of the Act that residents should be able to inspect relevant financial documents before consenting to the budget detailing how their recurrent charges will be spent. The review noted that the timing of the supply of information is critical in achieving financial accountability. Accordingly, clause 25(1) requires information requested by residents under section 107(4) of the Act to be provided within 7 days. This benefits residents by ensuring they have sufficient time to consider the documents within the 30 day time limit for making a decision on the budget, outweighing the minor cost to operators of providing the information. Operators have previously indicated that the proposed requirement accords with current practice in well managed

villages. Prescribing a shorter time limit could make it difficult for operators to comply. Prescribing a longer period might leave residents with insufficient time to consider the information before voting on the budget. The need for operators to provide the information is established by the Act, and the time frame set by the Regulation does not impose any additional costs on operators.

Clause 25(2) responds to concerns raised by operators during the review that increased financial information disclosure could infringe commercial confidentiality and the privacy rights of individual residents, for example, where the accounts include information about personal services provided. The information prescribed as not required to be disclosed is the same as the information exempted from being provided to residents at the annual management meeting (see clause 35). The exclusions are prescribed so as to ensure that operators are not obliged to provide information that has no relationship to the running of the village or for which there are privacy or confidentiality issues.

Clause 26 implements a recommendation of the review of the Act that expenses unrelated to the operation or administration of a village (such as management fees) be prohibited from inclusion in a village budget. That is, residents should only pay through the recurrent charges for the actual cost of running their village. The proposed clause 26 accordingly excludes several matters that do not relate to the operation or administration of the village.

Two exclusions are brought forward from clause 20 of the current Regulation, namely, membership fees of professional and industrial associations and overseas travel by the operator, their agent or employees. Clause 26 additionally excludes costs associated with running the operator's head office, unless the costs are directly associated with providing services to residents of the village, and costs associated with marketing vacant units. It is also proposed to exclude flat rate management or administration fees and payroll tax that is not solely attributable to the operation of the village.

Prescribing the proposed exclusions increases costs for operators, as it means they will finance these items from the funds raised from residents' ingoing and outgoing fees or other sources. Costs for residents will be reduced by the corresponding amount, as the items will not be financed from recurrent charges.

The main benefit of clause 26 is that it allows the recurrent charges saved to be spent on other services which directly benefit residents (such as more staff and services). It could alternatively reduce pressure for recurrent charges to rise if the cost of other items were to rise, or new charges were to be introduced. It also ensures that residents are not paying for matters from which they receive no benefit, such as repainting of vacant units or overseas trips by the operator. One cost of clause 26 is that residents may pay for these matters indirectly through charges paid upon entry or departure. This would lead to a loss of transparency if the items were no longer shown in the village budget or accounts.

The alternative option of not prescribing clause 26 would mean that all of the listed matters could be financed from recurrent charges. It would then be up to the residents as a group to refuse consent, if they disagree with the proposed expenditure. If the operator still wanted to use recurrent charges for these items they would need to apply to the Tribunal and it would be a matter for the Tribunal to determine if the services were needed at the village.

As the issue of charging payroll tax through recurrent charges has been the subject of two Tribunal decisions and there are currently further applications in the Tribunal about this matter, the proposed regulation provides a significant potential cost saving to government, the industry and consumers in particular. By providing clarity about the funding of payroll tax, the Regulation should result in a reduction in Tribunal hearing applications.

The transitional provision in clause 27 is related to the similar provision in clause 21 and similar costs and benefits arise. Refer to the discussion of clause 21 on page 28 of this regulatory impact statement.

Payroll tax – Discussion

During the drafting of the Regulation, the question arose as to whether recurrent charges should be used to pay for the operator's payroll tax obligations. Given that the threshold above which a business is required to start paying payroll tax is \$638,000 per annum, the majority of retirement villages would not attract payroll tax through their own operation alone. When a payroll tax obligation arises because the operator runs multiple enterprises and exceeds the threshold as a result, individual villages are generally asked to pay a proportion of the tax bill.

There has been no compelling argument made against the idea that it would be appropriate for recurrent charges to be used to finance payroll tax if wages for the village itself attract the tax. Consequently, clause 26 clarifies that recurrent charges can be used to fund payroll tax that is solely attributable to the operation of the village.

The basis of this argument hinges on two main questions. Firstly, which matters are appropriate to be financed by recurrent charges and which should be financed from other money earned by operators, including ingoing contributions and departure fees paid by residents. Secondly, on the basis that it is appropriate to fund management and administrative services from the recurrent charges, what matters are reasonably included in these charges and to what extent should the general business costs of the operator be borne by the residents of individual villages.

In order to properly evaluate this situation it is necessary to examine what the legislation says about the functions of recurrent charges. The Act provides that recurrent charges are "Any amount (including rent) payable under a village contract, on a recurrent basis, by a resident of a retirement village". Recurrent charges are used to pay for *general* and *personal* services. *Personal services* are specific to each resident in terms of the particular additional services they have agreed to receive and pay for through their recurrent charges. Commonly, these include meals, laundry and home cleaning services.

General services are defined in the Act as "services provided, or made available, by or on behalf of the operator, to all residents of a retirement village, and includes such services as may be prescribed by the regulations for the purposes of this definition" (section 4). A note included in the provision gives examples of general services as management and administration services and gardening and general maintenance.

There is no indication in the Minister's Second Reading speeches for the *Retirement Villages Act 1999* or the *Retirement Villages Amendment Act 2004*, or in the 'Agreed to in Principle' speech for the *Retirement Villages Amendment Act 2008*, as to what residents should be paying for through their recurrent charges. However, it would be fair to say that there is enough direction in the Act to indicate that the administrative and management costs of the village can be funded through the recurrent charges. The next question is whether payroll tax, which is not directly generated by the village itself but is the result of the operator having other businesses, should be considered part of the administrative and management costs of that village.

There have been two main legal cases about the charging of payroll tax through recurrent charges in NSW. These were both Consumer, Trader and Tenancy Tribunal decisions and therefore cannot be used as precedents, but the decision making process is informative. There were some notable differences in these cases and their outcomes.

The first case was *Milstern Retirement Services P/L v Lindfield Manor Retirement [2005] NSWCTTT 749 (9 November 2005)*. The second case was *Australian Retirement Homes*

No. (2) Pty Ltd v Minkara Retirement Village Residents Committee [2008] NSWCTTT RV 08/41351 (30 April 2009). In the Milstern case the Tribunal concluded that it was not appropriate to fund payroll tax through recurrent charges because the tax was the result of the operator's other business interests and the wages resulting from those businesses. Therefore it was *not an expense reasonably incurred in operating the village in the 2004 year.* The Minkara case concluded that it was appropriate for recurrent charges to fund the village's portion of the operator's payroll tax, as it was charge related to the village's wages and salaries.

Submissions were made by the Retirement Villages Residents Association and the Retirement Villages Association (the peak operator association for profit making villages) before drafting instructions were prepared for the Regulation. Not surprisingly, these submissions respectively argued strongly for and against excluding payroll tax costs from the recurrent charges. However, neither submission provided a compelling case as to whether or not funding the village's proportion of the operator's payroll tax obligations through the recurrent charges is an administrative and management cost of running that particular village.

It is considered that an operator's decision to operate as a conglomerate and centralise functions of their businesses and consequently attract payroll tax is not the responsibility of the residents of individual retirement villages and not within their control. On this basis, it is proposed that the recurrent charges should not be used to finance the village's portion of the operator's payroll tax, if the village itself does not attract the tax through its own operation. The operator should decide whether operating in this manner, with the resulting payroll tax, is the best model for their business and the most cost effective way of operation. This decision may not be made efficiently if someone else is liable to pay the additional costs.

8.6 Part 4 – Financial management – Division 3 – Other (clauses 28–33)

Objective

To promote financial accountability and prudent management of capital works funds and protect the village assets.

Overview of provisions of Part 4 – Division 3

Clause 28 prescribes the rate of interest payable on unpaid amounts under certain sections of the Act. The rate is prescribed as half the rate prescribed under section 101 of the *Civil Procedure Act 2005* with respect to the payment of interest on a judgement debt. Schedule 5 of the Uniform Civil Procedure Rules 2005, currently prescribes a rate of 9%.

Section 97(3) of the Act (as amended) lists several matters that cannot be funded from recurrent charges or the capital works fund, and enables the regulations to prescribe additional matters. Clause 29 of the proposed Regulation provides that anything prescribed in clause 4(1)(b) as not being capital maintenance is not authorised to be funded from the capital works fund or recurrent charges.

Clause 30 provides that if the operator of a village is a property trust or other corporation constituted by an Act, money in the capital works fund may be held in any fund administered by the property trust or corporation. Section 99(5) of the Act provides that the operator may use money from the capital works fund only for the cost of capital maintenance, to distribute to the residents, or as prescribed by the regulations. Clause 30 prescribes that money from the capital works fund may be used for any other purpose if

the residents in the village have consented by special resolution and the money for that is not used for a matter prohibited under section 97(3) of the Act.

Clause 31 prescribes that the minimum amount of public liability insurance the operator of a village is required to obtain is cover of \$10,000,000, the same as clause 15 of the current Regulation.

Clause 32 provides that if there is no Residents Committee for the village, copies of audited accounts must be displayed on a notice board in a common area of the village for at least one month, commencing no later than four months after the end of the financial year to which the accounts relate.

Clause 33 provides that an operator is prevented from making a proposal that residents make good the whole or any part of an outstanding deficit (i.e., one that existed before 23 November 2006) unless the deficit or relevant part of the deficit resulted from a request by the residents for an additional item of capital or service. This applies to a deficit that accrued on or before the end of a financial year of the village occurring most recently before 23 November 2006.

Alternative options

One alternative to clause 28 would be to not prescribe an interest rate. This is not supported, as it would remove the incentive to make payments promptly. Other alternatives would be to prescribe a specific rate of interest (which would have the disadvantage of needing to be amended from time to time), or to prescribe an alternative variable rate of interest which is lower (such as the Sydney CPI) or higher (such as the full interest rate under the Civil Procedure Act) than the rate proposed in the regulation.

An alternative to clause 29 would be to not make the proposed provision. This would reduce clarity in determining matters that cannot be funded from the capital works fund or recurrent charges. Alternatives to clause 30 would be to only allow capital works funds to be held in an account with an authorised deposit taking institution and/or not allow the capital works fund to be used for any other purpose, even if the residents wish to do so. These alternatives would reduce flexibility to no apparent benefit.

An alternative to clause 31 would be to not prescribe a minimum amount for public liability insurance, or to prescribe a lower or higher amount. Alternative options to clause 32 would be to provide for the audited accounts to be displayed in a different location, or to require it to be displayed for a shorter or longer period.

Alternatives to clause 33 would be to provide no exceptions, or to provide additional or different exceptions for asking residents to fund any part of a deficit outstanding since 23 November 2006. However, it is not considered fair to require an operator to fund the proportion of a deficit that was accrued as a result of residents requesting an additional item of capital or service at a time when operators were not aware that they would be made responsible for deficits.

Assessment of costs and benefits

A number of provisions of the Act enable an operator to charge a resident interest on unpaid amounts. Under some of the amendments, the operator will also be required to pay interest to a resident, for example on an overdue refund. Clause 23 of the current Regulation prescribes that the applicable rate of interest on overdue recurrent charges is the rate prescribed under section 101 of the *Civil Procedure Act 2005* for a judgement debt. In consultation with stakeholders in developing the draft Regulation, it was proposed that half this rate would be appropriate because it now also applies to funds overdue to

residents and residents' pensions or other financial arrangements could be affected if the interest rate is too high.

Prescribing an interest rate payable on overdue amounts ensures that operators and residents are compensated for overdue payments and acts as an incentive to make payments on time. Clause 28 imposes potential costs on both operators and residents, however these can be avoided by making payments by the due date. Prescribing a lower or higher amount of interest are possible alternative options, but it was considered that the proposed rate will provide enough incentive to residents and operators to make payments on time, and without creating undue problems for residents on fixed incomes. Prescribing a fixed rate of interest and not linking it to a variable rate would mean that general rates of interest and changes in the cost of living would have to be monitored and the Regulation amended from time to time to change the interest rate, a time consuming and costly exercise for government.

Clause 29 is a procedural matter included for clarity and no costs arise from it. By providing greater clarity as to what can be funded from the capital works fund or recurrent charges, the provision reduces potential disputes and the associated costs for residents, operators, government and the community.

Clause 30 provides flexibility in investing and expending money in the capital works fund without imposing any costs. The restrictions on expenditure protects residents' funds from being used inappropriately or against the intent of the legislation.

The requirement for public liability insurance is established by the Act which provides that the minimum amount of insurance may be prescribed. During consultation on the drafting of the regulations, no case was made to change the \$10 million cover currently required to be held by operators. Public liability insurance is a necessary cost for a business such as a retirement village and, whilst it imposes a cost to operators, it also provides protection for operators from claims and legal suits as a result of people being harmed within the retirement village.

The Amendment Act introduced an amendment to ensure that residents whose village does not have a Residents Committee can view the audited accounts, without requiring the operator to provide a copy to each resident. Clause 32 provides for the accounts to be displayed in a common and easily accessible area, being on a notice board in a common area of the village for at least one calendar month. These provisions reduce red tape for operators and the costs of supplying copies of the accounts to each resident, some of whom may not be interested in receiving a copy. The availability of the accounts on the notice board makes it less likely that individual residents will ask the operator for copies.

No specific costs arise from the proposed clause 33. The review of the Act found that it was unfair for residents to be liable for operating deficits. Residents have no direct control over the level of fees and charges set, the amount of staff employed and wages paid, contract payments for the provision of services and maintenance, the filling of vacant units and other matters which affect financial performance. Such matters are the responsibility of village management. If an operator underestimates the costs involved in running the village or allows expenditure to blow out, it is only fair and reasonable that they be liable for the consequences. Consequently it was determined that operators should be responsible for deficits and the Amendment Act provided for this. However the transitional provisions of the Amendment Act enable the regulations to provide for an exception enabling an operator to ask residents to make good deficits outstanding since before 23 November 2006. The intention of the exception prescribed in clause 33 is to minimise the potential for operators to unfairly be responsible for making good a deficit incurred at the request of the residents.

8.7 Part 5 – Meetings (clauses 34–36)

Objective

To support harmonious community living and facilitate resident participation in village life.

Overview of provisions in Part 5

Clause 34 prescribes matters which must be included in the agenda for the annual management meeting between the residents and operator.

Clause 35 lists information an operator is not required to disclose at an annual management meeting. An operator is not required to answer questions about personal affairs of the operator or their employee or agent, matters unrelated to the operation of the village, or private contractual matters. Clause 35 also makes it clear that residents are not prevented from asking about the operator's solvency or financial viability.

Clause 36 makes it clear that a resident may appoint any friend as their proxy, prescribes a proxy appointment form in Schedule 1 and requires the form to be given to the chairperson of the meeting at which the proxy is to be used and before any votes are taken. Clause 36 is essentially the same as clause 37 in the current Regulation.

Alternative options

Alternative options for clauses 34 to 36 would be to:

- not prescribe any matters that must be included on the agenda of the annual management meeting and allow the operator to determine the agenda;
- prescribe different matters to be included on the agenda;
- not exclude any questions from being asked at the annual meeting, or exclude additional or different matters.

Assessment of costs and benefits

The amendments to the Act introduce a new requirement for operators to conduct an annual meeting with residents, to facilitate resident input into village management matters and promote better communication. The new section 72A allows the regulations to prescribe matters that must be included in the meeting agenda. The review recommended that operators should be required to report on the financial position of the village, plans for the coming year, such as major capital works, known staff changes and any proposed changes to services and facilities, as well as answer reasonable questions submitted by residents prior to or at the meeting. Section 72B allows the regulations to prescribe matters about which an operator is not obliged to provide an answer.

Requiring operators to include specific matters on the agenda does not pose any specific costs but enables the intent of the legislation to be achieved by ensuring that all relevant matters concerning the management and the operation of the village are canvassed at the meeting. The Act, as amended, already requires that operators answer any reasonable questions put to them before or at the meeting.

In order to focus the meeting on matters that directly relate to the management and operation of the village, clause 35 ensures that the efforts of the operator are not wasted on irrelevant or inappropriate questions. No costs arise from this regulation.

Clause 36 prescribes procedural matters and no costs arise from them.

8.8 Part 6 – Applications to Tribunal and orders (clauses 37–41)

Objective

To facilitate resolution of disputes between operators and residents and support harmonious community living.

Overview of provisions of Part 6

Clause 37 and Schedule 5 prescribe time limits for certain applications to the Tribunal. Under any other section of the Act, an application may be made at any time.

Clause 38 sets out the procedure for the Residents Committee to obtain consent to apply to the Tribunal on behalf of the residents. Consent is able to be given by show of hands at a meeting. A resident who does not wish to be a party to the proceedings can notify the Committee in writing.

Clause 39 provides that the Tribunal may determine who is the other party to the application made by the operator.

Clause 40 provides that the Tribunal may make an order that varies, sets aside or stays a previous order of the Tribunal that is in force under the Act.

Clause 41 provides for different orders to be made in relation to different residents in a joint application or where 2 or more residents are the other parties to an application made by the operator.

Clauses 37, 39, 40 and 41 are the same as clauses 24, 26, 27 and 28 in the current Regulation. Clause 38 is based on clause 25 of the current Regulation with a change to provide that residents will no longer have to pass a special resolution to consent to the Residents Committee applying to the Tribunal on behalf of the residents. Instead consent can be obtained by a show of hands.

Alternative options

Other regulatory options include:

- increasing or decreasing the time periods for applying to the Tribunal, or removing or adding to the prescribed time periods; and
- continuing to provide for consent to a joint application to be by special resolution.

Assessment of costs and benefits

These provisions of Regulation provide two main benefits. In relation to certain disputes the Regulation requires an application to the Tribunal to be lodged within a short space of time, thereby removing the potential for disputes to fester and cause ongoing disharmony between the parties. Secondly, the Regulation imposes time limits for applications on certain matters after a resident vacates the village. This should ensure that disputes are settled while evidence still exists and the matter is still fresh in the minds of the parties involved.

Without these time limits, any application to the Tribunal could be made at any time. The benefit of this would be that applications are not dismissed simply because they were lodged outside of the time limit. However, the *Consumer, Trader and Tenancy Tribunal Act 2001* provides the Tribunal with the power to extend the period for lodging applications in appropriate circumstances. Having no time limits could lead to situations where, for instance, a party seeks to terminate a contract years after an alleged breach.

These regulations provide appropriate procedural requirements for the making of applications to the Tribunal and for the Tribunal to make certain orders or determinations on parties to proceedings, without imposing any specific costs.

8.9 Part 7 – Uncollected goods (clauses 42-47)

Objective

To make provision for an operator to dispose of a former resident's uncollected goods and personal documents upon termination of a resident's contract or vacation of the premises.

- to ensure retirement village residents and operators are aware of their rights and obligations;
- to support harmonious community living and facilitate resident participation in village life;
- redress imbalance in market power between residents and operators.

Overview of provisions of Part 7

Clause 42 clarifies that any additions made by, or fixtures belonging to, and not removed by a former resident are not to be regarded as uncollected goods.

Clause 43 provides for an operator to dispose of perishable and unsafe or goods left in the premises by a former resident.

Clause 44 requires an operator to securely store other uncollected goods or leave them in the premises or store them in a secure place, for at least 30 days after the operator has sent the former resident a notice under section 147 (2) of the Act. If there is no forwarding address for the former resident the uncollected goods must be stored for at least 30 days after the former resident vacated the premises following termination by the Tribunal, or the date on which the residence contract was terminated.

Clause 45 sets out procedures enabling the goods to be claimed by a person who is entitled to possession of the goods and provides for when the operator may charge for removal and storage costs.

Clause 46 provides for how an operator must dispose of uncollected goods, including personal documents, after the 30 day storage period has expired. Any item worth \$100 or more must be sold by public auction.

Clause 47 provides for record keeping and accounting by the operator for all uncollected goods disposed after storage and for dealing with the balance of the proceeds of sale of the goods after the deduction of reasonable costs.

The proposed clauses 42, 44, 45, 46 and 47 are the same as clauses 29, 31, 32, 33, and 34 of the current Regulation. Clause 43 is based on clause 30 of the current Regulation with changes to provide that perishable foodstuffs or goods that are unsafe or unhealthy to store can be removed immediately after the termination of the contract or the former resident vacates the premises rather than after 3 days. This change was based on similar amendments being considered to the residential tenancy laws to address health and safety issues.

Alternative options

An alternative option would be to not provide for the manner of storage, disposal or claiming of uncollected goods. This would mean that an operator would have to apply to the Tribunal for an order every time a resident left something behind, including insignificant items such as pot plants. This would impose costs on operators in applying and attending hearings, and increase costs to government by requiring the Tribunal to deal with such applications.

Other alternative options include prescribing different time periods or monetary amounts. Reducing the \$100 limit would mean that an operator's costs might not be recoverable, while increasing the limit would see items of some value simply given away. Reducing the 30 day period would reduce the chances of a former resident recovering their goods, while increasing the period would impose more storage costs on an operator which may not be recoverable.

Assessment of costs and benefits

No issues arose about the uncollected goods provisions in the review of the Act or in consultation with stakeholders prior to the drafting of the Regulation. These provisions establish a clear, fair and practical method for dealing with goods left behind by a resident without unduly hindering an operator from clearing vacated premises to enable a new resident to move in.

An appropriate period is allowed during which a former resident can retrieve items inadvertently left behind and, whilst requiring operators to store goods for 30 days imposes costs, these costs are significantly less than the costs associated with a Tribunal hearing or legal action by the former resident for loss of their goods. By allowing operators to sell goods and deduct from the proceeds of the sale the cost of the removal, storage and sale of the goods, these costs would, in most cases, be recoverable.

The Regulation provides the most cost effective balance between the need to ensure former residents are able to recover items left behind and minimising costs on operators.

8.9 Part 8 – Miscellaneous (clauses 48- 60)

Objective

The objective of Part 8 is to:

- prescribe matters that are necessary or convenient to support the effective and efficient operation of the Act;
- to ensure the village is safe;
- ensure retirement village residents and operators are aware of their rights and obligations;
- support harmonious community living and facilitate resident participation in village life;
- provide for effective enforcement of the legislative requirements.
- redress imbalance in market power between residents and operators.

Overview of provisions of Part 8

Clause 48 enables renovations and alteration of fixtures and fittings by a resident in without the operator's consent if the resident owns the premises under a strata, community or company title scheme.

Clause 49 provides for a former occupant who terminated their contract during the settling-in period to be liable for costs incurred in adding, removing or altering any fixtures or fittings, and any renovations made to the unit at the resident's specific request. Clause 49 also prescribes \$200 as the maximum administration fee that may be charged.

Clause 50 requires the operator to display the annual safety inspection report on the notice board for at least one month.

Clause 51 enables an operator to enter residential premises in a village to install a smoke alarm and replace a battery in a smoke alarm if 2 days notice has been given to the resident.

Clause 52 allows a person to hold the same office on the Residents Committee for more than 3 consecutive years if the village has less than 20 residents or the village's annual budget is less than \$50,000 (or both). However, this does not apply if the Director-General has objected in writing to any person or a particular person holding the same office for more than 3 years on a Residents Committee.

Clause 53 enables a resident to be nominated as a representative of 2 or more residents in a dispute with the operator, provided the residents sign written statements. This clause is the same as clause 38 in the current Regulation.

Clause 54 prescribes a termination notice form in Schedule 1 and enables notice to be given up to 14 days before or when applying to the Tribunal, and allows a fresh application to be made to restart the 14 day period. This is the same as clause 39 in the current Regulation.

Clause 55 prescribes a \$10,000 threshold in the value of a resident's refund entitlement, above which a charge for the protection of the resident's ingoing contributions is created under Part 10A, in particular section 182A(1)(b), of the amended Act. NB These provisions apply to residents who are not registered interest holders, that is, they do not own their premises or have a registered long-term lease.

Clause 56 and Schedule 6 prescribe penalty notices for a range of offences arising under the Act and Regulation, including penalty amounts.

Clause 57 provides for the service of documents generally (other than a termination notice) as able to be given to an operator or a resident by hand delivery to their letterbox or by facsimile or other electronic means. However, a notice (including a termination notice) or other document required to be given to a resident who is a protected person or who has a guardian is to be given to the NSW Trustee and Guardian or the guardian as appropriate or. For a notice required to be given to an operator in respect of whom a receiver, or a receiver and manager or an administrator has been appointed, service is to be to those persons as appropriate. Clause 57 is the same as clause 40 in the current Regulation.

Clause 58 provides that a vote that requires a special resolution must be by a written ballot conducted in accordance with Schedule 7 of the Regulation. Clause 58 and Schedule 7 remake the provisions of clause 41 and schedule 11 of the current Regulation as well as providing for a new system of postal voting for special resolutions.

Clause 59 is a general savings provision. Clause 60 repeals the Retirement Villages Regulation 2000 and the Retirement Villages Transitional Regulation 2000.

Alternative options

An alternative would be to not prescribe clause 48, however this could result in disputes and applications needing to be made to the Tribunal as a result of confusion about when consent of operators is required to make alterations and additions. Another alternative would be to prescribe additional circumstances in which the consent of the operator is not required for a resident to add or remove fixtures or fittings.

An alternative to clause 49 would be to not make the former occupant responsible for any the proposed costs. However this would not be fair or equitable if they had requested that certain work be undertaken at the operator's expense and then the operator was not able to ask them to pay for that work.

An alternative to clause 50 would be to have no specific period of time for the display of the safety inspection report on the notice board. Other alternatives would be to require it to be displayed for a shorter or longer period of time.

The alternative to clause 51 would be to not prescribe this additional circumstance to enable an operator to enter residential premises, or to prescribe other circumstances in which the operator or another person can enter the resident's premises.

An alternative to clause 52 would be to not allow the proposed exception to the 3 year limit on holding the same office on the Residents Committee, or to allow other exceptions. However to require all small villages to adhere to the 3 year cap may result in some villages not having a Residents Committee at all because there are no other residents able to take on these roles.

An alternative to clause 53 would be to not provide any requirements, or to provide other requirements, for how 2 or more residents can nominate another resident to represent them in a dispute with the operator.

An alternative to clause 54 would be to not prescribe a form for termination notices or the 14 day time limit for giving the notice before a Tribunal application, however this would render section 131 of the Act inoperable. Other options would be to prescribe a different form or different time frame.

An alternative to clause 55 would be to prescribe a lower or higher amount above which the statutory charge provisions in the Act, as amended, would apply.

Alternative options to the proposed penalty notice requirements of clause 56 would be to add or remove offences that may be dealt with by way of penalty notice. However, generally speaking, penalty notices are only used for offences of a minor or technical nature, or where the breach is considered to be self-evident or detection of the offence does not require detailed investigation. There do not appear to be any other offences in the legislation that fall in these categories. Reducing the list of offences would, in turn, reduce the benefits gained from being able to deal with minor offences away from the courts.

Other alternatives would be to increase or decrease the amounts of the penalty notices. However, the proposed penalties applicable to penalty notices are already significantly lower than the maximum penalty that could be imposed if the matter was taken to court. This is designed to act as an incentive to accept the notice and recognises the savings in enforcement costs if the offender accepts rather than opting to defend the matter in court. Increasing the amount would reduce this incentive and may result in offenders taking their chances of getting a smaller penalty through the courts. Reducing the amount of penalties further would undermine the deterrent factor and lead to possible claims that an offender got off too lightly. However, where any breach has resulted in serious detriment to

residents, prosecution through the Local Court remains the preferred action, despite the existence of a penalty notice provision.

Having no regulation would mean that all offences would need to be prosecuted in the courts, removing the administrative benefits and cost savings associated with penalty notices. Little or no action may be taken on minor breaches.

An alternative to clause 57 would be to have no specific requirements about serving notices. However, this could result in notices going to inappropriate people or not being delivered, leading to potential disputes and misunderstandings. Other alternatives would be to prescribe different requirements or more prescriptive requirements for the service of notices, in particular the use of email could be prescribed as an alternative for the service of notices.

An alternative to clause 58 would be to not provide for how a special resolution is to be made, how a written ballot can be held or to allow for postal voting for special resolutions. However, as the Act requires that any written ballot must be conducted in accordance with the regulations, having no regulation would mean that all votes would be determined by a show of hands. This would remove the benefits of written ballots discussed below.

Another option would be to specify by regulation those matters where a written ballot would be compulsory. These matters could include:

- all financial matters dealt with in Part 7 of the Act; or
- certain individual sections of the Act requiring the consent of residents.

Prescribing matters further matters requiring a written ballot would mean there is proof of a vote in the event of a dispute arising. It would however, take away the freedom of residents to decide for themselves if a written ballot is needed on an issue by issue basis.

Assessment of costs and benefits of proposed clauses

Clause 48 clarifies that a resident who owns their premises under a strata, community or company title scheme does not need to seek the permission of the operator to add or remove fixtures or fittings to their own property. This clause has been included in the draft Regulation for clarity and to pre-empt any confusion about the operation of section 41A of the Act, as amended, which would otherwise require the operator's consent to be obtained. This regulation is a clarifying provision and no costs arise from it. Not making this regulation could result in disputes and matters needing to be taken to the Tribunal for resolution, which would result in costs to government, operators and residents.

Clause 49 supports the operation of the new settling-in provisions in Division 2 of Part 5 of the amended Act. Many submissions to the review of the Act raised concerns that operators were signing-up prospective residents who were clearly unsuited to independent living in a retirement village. Such individuals often move out after a very short period as they are too frail to care for themselves. In such cases, operators may profit from being able to keep large non-refundable donations. Some other residents may move into a retirement village, and move out within a matter of weeks as they realise that they are not suited to retirement village life. Such a brief stay can cost them tens of thousands of dollars.

Consequently the Amendment Act introduced a settling-in period of 90 days during which any resident who permanently vacates in that time would only be liable to pay fair market rent for their period of occupation and any reasonable administration fee set out in the contract, or as prescribed. The outgoing resident would not be liable for refurbishment costs, marketing costs, recurrent charges or other costs as prescribed in the regulations.

This regulation making power recognised that there could be circumstances where the former resident should be responsible for other costs.

As a result of consultation with stakeholders prior to the drafting of the Regulation, it is proposed that the former occupant be responsible for any costs incurred in adding, removing or altering any fixtures or fittings or any renovations that were made to the residence at their specific request. This clause ensures that operators are not subject to unfair costs as a result of the implementation of the 90 day settling-in period. The clause does impose these costs on the former occupant, but this is considered fair as the cost were incurred at their request.

Clause 50 ensures that the safety inspection report is displayed for a reasonable period of time, thereby allowing residents ample opportunity to view the report. The period of one calendar month is the same period of time for which the auditors report is required to be displayed and is considered to be an adequate period to enable residents to view the report. This clause does not impose any costs.

Clause 51 ensures that operators can enter a residential premises to install a legally required smoke alarm or replace the batteries. It is the same as clause 36A in the current Regulation and retains the requirement that residents be provided with 2 days notice. This clause ensures that an operator or another person can enter a resident's premises, with appropriate notice, to carry out an important safety function. The clause benefits operators and residents alike. There would be increased costs for government, operators and residents if operators had to go to the Tribunal for an order to allow entry.

Clause 52, by prescribing an alternative to the 3 year cap on holding the same office on the Residents Committee, provides flexibility for very small villages where they may be insufficient residents to enable a 3 yearly turnover of office holders. The proposal to allow the Director-General to lodge an objection in the case of a specific village or resident ensures the cap can be re-imposed where appropriate, for example if there have been complaints about the committee being dominated by one or two individuals driving personal agendas which do not always reflect the concerns or interests of the majority of residents and who are returned year after year in uncontested ballots. The proposed clause addresses concerns raised by stakeholders in preliminary consultation before the drafting of the Regulation. There are no costs associated with this clause.

Clause 53, requiring a resident's representative in a dispute to be appointed in writing, is purely procedural and no costs arise from it. It benefits residents by ensuring a person cannot purport to represent their interests without their approval.

Clause 54 prescribes a standard form for the notice of termination in Schedule 1 and specifies the time period in which an application to the Tribunal must be made after the notice has been given. The requirement to use a standard form reduces costs for operators and residents as they do not have to prepare their own notice. It also increases clarity and improves the Tribunal process by ensuring that the resident is fully informed of the process and that the operator is aware of the full reasons why the resident is seeking termination. The cost of dispute resolution is reduced as there is less likelihood of an error being made in giving notice.

The proposed \$10,000 threshold in clause 55 was proposed in consultation with stakeholders prior to the drafting of the Regulation. The new Part 10A of the Act, which protects ingoing contributions paid by residents who are not registered interest holders, will apply to any refund exceeding the prescribed threshold. The statutory charge provisions in the Act implement recommendation 39 of the review of the Act, which proposed that a statutory charge, modelled on provisions in place in other States, be introduced to provide greater protection against the potential loss of refund entitlements by residents who have

no registered proprietary interest in the property. A regulation making power was included in the new section 182A, recognising that the statutory charge provisions does not need to apply where the amount concerned is relatively low.

The amount of \$10,000 is a significant amount of money, particularly for a resident who is relying on a pension and it is considered all residents who are entitled to receive this amount or more should have the benefits of the protections provided by the statutory charge.

The review of the Act recognised that many private operators were concerned that the statutory charge could limit the amount of money financial institutions are willing to lend to fund new developments or village expansions. This could have severe cost implications for operators. However, Victoria, Queensland and Western Australia have had a statutory charge system in place for some time and there is no evidence of the charge having had a significant negative impact on the industry in those states. Indeed, such a system encourages closer financial scrutiny by lending institutions of the viability of a proposed development which should reduce the likelihood of future village closures.

Consequently setting the threshold for which the statutory charge will apply at \$10,000 would have minimal cost implications for operators and will provide greater security for residents.

Clause 56, which provides for penalty notice offences, is the same as clause 35 in the current Regulation. It establishes those offences in the legislation for which a penalty notice can be issued and the amount of those penalty notices.

The use of penalty notices allows offenders to have a breach dealt with without the need to attend court if they so choose. It does not take away a person's right to have the matter determined by a court. Payment of the penalty under the notice means that no further action is taken in respect of the offence. A system of penalty notices saves the regulator, the courts and operators the costs and time associated with prosecuting offences. It ensures that offenders who commit minor offences are penalised proportionately. Penalty notices also remove the trauma and anxiety associated with being a witness in a prosecution, particularly given that such witnesses are likely to be older persons.

Allowing offences to be dealt with by way of a penalty notice reduces costs for operators by enabling them to have a breach dealt with, without the need to attend court if they so choose. However, a breach which resulted in serious detriment to residents would not be appropriate for the issue of a penalty notice and the matter could still be taken to court.

Clause 57, relating to service of notices, ensures that the appropriate person to act on a notice receives the notice. The proposed clause removes the potential for a resident who is a protected person, or who has had a guardian appointed, to be confused or worried by receiving a notice. The service requirements help to avoid disputes that could arise if a notice is disregarded or not redirected without delay. In addition, the provisions of this clause recognise that, in many instances, the operator, or an employee or agent of the operator, has an office at the retirement village and consequently notices can be hand delivered.

Consequently the clause, as drafted, is considered the most effective option that ensures appropriate people receive the notices required by the Act, and provides residents and operators with a broad choice of suitable service methods to best suit their individual circumstances. Allowing notices to be delivered by hand to a letterbox saves operators and residents postage costs associated and removes the need to allow extra time for postal delivery and reduces the potential for disputes if notices are lost in the post. In relation to bulk notices (e.g. annual budgets) the Regulation ensures that an operator who

elects to serve such notices personally can leave the notice in a resident's letterbox if the resident is not at home. This would save the operator from having to go away and return to serve the notice in person or post notices to those residents who are not home at that time. In the absence of the proposed clause, most notices, particularly from an operator, would be served by post, reducing the cost and administrative benefits associated with personal delivery.

Allowing notices to be served by facsimile transmission provides another cost effective and fast alternative method of service and provides those who elect this method with proof of service. Whilst it is recognised that retirement village residents may not have access to fax facilities this may change over time. Not having this alternative would reduce choice and flexibility and could result in extra costs associated with postage of notices.

Another cost effective method of service might be the use of email, or electronic post, however the technical difficulties sometimes associated with this method of service may result in notices not being received. At this stage, it has been determined that potential problems associated with notices not being received would outweigh the benefits of the costs savings made by transmitting notices in this way.

Clause 58 and Schedule 7, limit flexibility for the residents of each village to determine their own needs regarding written ballots, but this is outweighed by significant benefits arising from having clear procedures that reduce uncertainty in counting, enable more residents to participate in voting (by allowing postal votes), give residents a private vote and reduce the potential for disputed outcomes. The 50% majority vote required to support a proposal for a ballot (other than for a special resolution) will ensure that written ballots will not be conducted unnecessarily. Written ballots allow residents to exercise a private vote without the pressure that can be associated with a public show of hands. Written ballots may be beneficial if the vote is close or a potentially divisive issue is to be voted upon.

During the review of the Act submissions raised concerns about the procedures for voting by residents on matters requiring their consent under the Act. It was noted that attendance at meetings can be low, meaning that those who participate in a vote may not represent the views of the majority of residents. It was also claimed that some residents can be intimidated by the more outspoken residents during the usual voting method of a show of hands. Accordingly, it was proposed that a system of postal voting be introduced for matters that require special resolution. This would allow residents who are not able to attend meetings but wish to vote can do so. These postal votes would be included in the assessment of whether there is a quorum for the vote.

Clause 58 and Schedule 7 impose administrative costs associated with conducting a postal ballot and, depending on the village, these costs could be borne by residents or operators. However the proposed requirements for written ballots and the new requirements for postal ballots should have significant benefits for residents voting on general and special resolutions.

Clauses 59 and 60 have the same effect as clauses 42 and 43 in the current Regulation with relevant changes to repealed legislation and to accommodate modern drafting style for savings provisions. These are machinery provisions and no costs arise from them.

8.1 Overall impact of Option 3 – the proposed Regulation

The proposed Retirement Villages Regulation 2009 has been developed to replace the current Retirement Villages Regulation 2000 which is due to be automatically repealed on 1 September 2010. The proposed Regulation will continue to provide the administrative detail required to support the operation of the *Retirement Villages Act 1999*, incorporating

the amendments made by the *Retirement Villages Amendment Act 2008*. Table 2 in Section 7 of this regulatory impact statement provides a brief overview of the differences between the current and proposed regulations.

Impact on consumers.

Under this option, consumers would continue to benefit from the consumer protection mechanisms of the regulatory scheme and benefit additionally from the enhancements made by the proposed Regulation which will support the operation of the Act and implementation of the reforms contained in the Amendment Act. Beneficial matters in the proposed Regulation include:

- providing a threshold amount for ingoing contributions for when a statutory charge will apply; ensuring that residents who own their property under company, community or strata title do not have to obtain the operator's consent when they wish to add or remove fixtures or fittings;
- providing an agenda for the annual meeting;
- providing for matters that cannot be charged through recurrent charges; and
- providing a maximum amount residents can be charged for legal and other expenses incurred by an operator in preparing a contract.

Other matters like prescribing limits on contingencies in annual budgets and greater clarity as to what is capital maintenance and what is not, would reduce costs for residents and engender a more harmonious living environment and significantly reduce the number of disputes.

Impact on industry

The proposed Regulation imposes some administrative costs on operators which largely arise from:

- prescribing maximum charges for residents for legal and other costs associated with the preparation of a village contract;
- limiting the amount of contingencies in an annual budget; and
- having specific requirements for the display of safety and auditor reports.

Some operators may have to restructure the source of their funding as a result of the proposed limitations as to the matters able to be funded through recurrent charges. However, operators will benefit from having further clarity as to what constitutes capital maintenance and repair, which should reduce the number of disputes and Tribunal hearings on these matters. Operators' will have their costs reduced or receive other benefits as the result of the following proposed provisions of the Regulation:

- reducing the notice requirements for annual budgets and variations in recurrent charges;
- the prohibition on certain questions being asked at annual meetings;
- allowing operators to propose that residents make good part or all of an outstanding deficit prior to 23 November 2006 if the deficit or a relevant part of the deficit was the result of a request by residents for goods or services; and
- ensuring that operators can charge former occupants who terminated their contract under the settling in provisions for costs incurred in carrying out work at their request.

Impact on government

The Government incurs costs in administering the legislation, arising mostly from responding to complaints and disputes between residents and operators as well as carrying out compliance checks on operators and providing educational material. The proposed Regulation provides greater clarity and transparency in the responsibilities and rights of residents and operators and therefore these functions should be greatly improved and the costs to government reduced.

Conclusion

Option 3 - the proposed Regulation:

- meets the regulatory objectives;
- provides high financial and intangible benefits to consumers, retirement village operators and government ; and
- results in medium level costs to operators and the government and low costs to the community generally.

Option 3 is the most cost effective option and would enable the Act to continue to operate effectively, incorporating the amendments in the Amendment Act, and to achieve its objectives. This is the preferred option.

9. IMPACT ANALYSIS OF THE ALTERNATIVES TO THE REGULATION

9.1 Option 1: Do nothing

The “Do Nothing” option would allow the Retirement Villages Regulation 2000 to lapse on 1 September 2010 without being remade. Regulations necessary to support for certain provisions of the Amendment Act would not be implemented, which means some of the reforms would not operate effectively or at all, including the statutory charge to protect residents’ ingoing contributions. While the 1999 Act would still operate, a number of provisions would be unworkable and the objectives of the Act could not be achieved. It would not be possible to give effect to the intention of the Act without some further action by the Government, such as amending the Act. Enshrining the proposed requirements of the Regulation in the Act would reduce the capacity to amend the requirements quickly to respond to problems which may arise for retirement village residents or to address changes in retirement industry practices.

Conclusion

Option 1 – Do nothing

- fails to meet the regulatory objectives; and
- involves a high financial and intangible cost to the consumer, industry government and the community generally.

Option 1 is not supported.

9.2 Option 2: Remake the current Regulation with no amendment

This option involves remaking the Regulation in its current form, without including the important changes proposed under Option 3.

Impact on consumers

Consumers would continue to benefit from the consumer protection mechanisms of the current Regulation. However, they would not have the benefit of the provisions in the proposed Regulation, in particular those amendments which allow certain reforms contained in the 2008 Amendment Act to commence, as outlined under option 3 above.

Impact on retirement village operators

Operators would continue to benefit from residents having to comply with certain requirements in the current Regulation and from being able to apply to the Tribunal for orders to resolve disputes. However, they would not have the benefit of other provisions in the proposed Regulation, in particular those amendments which allow certain reforms contained in the 2008 Amendment Act to commence, as outlined under option 3 above.

Impact on Government

NSW Fair Trading would continue to incur costs in administering the legislation. However the government would not benefit from the amendments in the proposed Regulation, in particular those regulations which will assist in reducing disputes between operators and residents and which should reduce the cost of administering the Tribunal and taking enforcement action.

Option 2 - Remake the current Regulation with no amendment:

- fails to meet the regulatory objectives; and
- involves higher financial and intangible costs to the consumer, industry government and the community generally; and
- fails to achieve potential costs savings and dispute reduction achievable by the changes proposed in the draft Regulation under option 3.

Option 2 is not supported.

10. CONCLUSIONS

Table 9 provides a summary of the overall assessment of the three options, as drawn from the discussions in the previous sections.

Table 9 Summary of overall assessment of the options

Options	Compliance with Assessment Criteria					
	Benefit	Cost	Awareness of rights and obligations	Redress imbalance in market power	Support harmonious village communities	Overall efficiency
1. Do Nothing	Low	Medium	Low	Low	Low	Low
2. Make the proposed Regulation with no amendment	Medium-High	Low-Medium	Medium-High	Medium-High	Medium-High	Medium-High
3. Proposed Regulation	High	Medium	High	High	High	High

11. CONSULTATION

Individuals and organisations are being invited to comment on the proposed Regulation in the following ways:

- publication of a notice in a state wide newspaper;

- publication of a notice in the NSW Government Gazette; and
- publication of a notice on the Fair Trading website

Invitations to comment will be sent to key stakeholder groups including:

- The Retirement Village Residents Association Inc
- The Retirement Village Association NSW & ACT Inc
- The Aged and Community Services Association NSW & ACT Inc
- The NSW Law Society
- The Aged Care Rights Service
- Department of Ageing, Disability and Home Care
- The Australian Consumers Association
- The Australian Nursing Homes and Extended Care Association (NSW)
- The Combined Pensioners and Superannuants Association of NSW Inc
- The Council on the Ageing
- The Department of Health and Ageing (Commonwealth)
- NSW Department of Planning
- Consumer, Trader and Tenancy Tribunal
- The NSW Legal Aid Commission
- Housing NSW
- NSW Department of Lands