

NEW SOUTH WALES
DRAFT GOVERNMENT BILL

Retirement Villages Amendment Bill 2020

Explanatory note

Overview of Bill

The object of this Bill is to amend the *Retirement Villages Act 1999* (the *principal Act*) as follows—

- (a) to enable the Secretary of the Department of Customer Service to make an order requiring an operator of a retirement village to pay a resident of the retirement village the amount that the resident will be entitled to once the resident's residential premises in the retirement village are sold (the *exit entitlement*) in certain circumstances where the premises have not yet been sold,
- (b) to require an operator of a retirement village to pay a resident's exit entitlement directly to an aged care facility in which the resident resides or proposes to reside as payment for the accommodation in the facility, instead of paying the exit entitlement to the resident, in certain circumstances where the premises in the retirement village have not yet been sold,
- (c) to provide that a former resident of residential premises in a retirement village is not required to pay recurrent charges to the operator of a retirement village once 42 days have passed since the former resident permanently vacated the premises,
- (d) to make other minor and consequential amendments.

The Bill also makes a minor amendment to an uncommenced provision in the *Retirement Villages Amendment Act 2018* that relates to asset management plans prepared by operators of retirement villages.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Retirement Villages Act 1999 No 81

Preliminary amendments

Schedule 1[7] inserts proposed Part 10AA into the principal Act, comprising proposed sections 182AA–182AJ. **Proposed section 182AA** sets out the definitions used in proposed Part 10AA.

Exit entitlement orders

Proposed section 182AB provides that a former resident in a retirement village (the *former occupant*) may apply to the Secretary of the Department of Customer Service (the *Secretary*) for an order directing the operator of the retirement village (the *operator*) to pay the former occupant's exit entitlement (an *exit entitlement order*).

A former occupant may apply for an exit entitlement order only if an agreed valuation has been calculated or determined. An *agreed valuation* means an estimate of the value of a former occupant's residential premises in a retirement village calculated by agreement between the former occupant and the operator or determined by an independent valuer.

Proposed section 182AH provides that, if a former occupant and an operator cannot agree on an estimate of the value of the former occupant's premises, the value must be determined by an independent valuer.

Proposed section 182AC provides that the Secretary may make an exit entitlement order, but only if satisfied that the operator unreasonably delayed the sale of the residential premises. It is an offence for an operator to fail to comply with an exit entitlement order with a maximum penalty of \$11,000 for a corporation or \$5,500 for an individual.

Proposed section 182AD provides for the contents of an exit entitlement order.

Proposed section 182AE provides that the Secretary may, in certain circumstances and on application by an operator, approve a longer period after which a former occupant is able to apply to the Secretary for an exit entitlement order.

Payments to aged care facilities

Proposed section 182AF provides that a former occupant may request an operator to make an accommodation payment to the aged care facility in which the former occupant resides or proposes to reside on behalf of the former occupant, in circumstances where the former occupant's premises at the retirement village are not yet sold. A former occupant may make a request only if an agreed valuation has been calculated or determined. An operator must make the accommodation payment if the operator is satisfied that the former occupant would suffer significant financial hardship were the former occupant required to make the payment.

Proposed section 182AG provides that an operator who is required to make an accommodation payment on behalf of a former occupant must make the payment to the approved provider of the aged care facility in which the former occupant resides or proposes to reside. It is an offence for an operator to fail to make a required accommodation payment with a maximum penalty of \$11,000 for a corporation or \$5,500 for an individual.

Other amendments

Proposed section 182AI clarifies that payment by the operator of the whole or part of the exit entitlement, or of an accommodation payment, is taken to form part of the exit entitlement payable to the former occupant.

Proposed section 182AJ provides that certain decisions made for the purposes of proposed Part 10AA of the principal Act may be administratively reviewed under the *Administrative Decisions Review Act 1997*.

Schedule 1[2] makes further provision for when a person who is a registered interest holder in relation to residential premises in a retirement village is taken to have permanently vacated the premises.

Schedule 1[4] provides that the liability of a former occupant who is a registered interest holder to pay certain recurrent charges that arise after the former occupant permanently vacates residential premises ceases on the date that is 42 days after the former occupant permanently vacates the premises.

Schedule 1[6] increases the maximum penalty for an operator who fails to make a payment to a former occupant following the sale of residential premises within the required period. The maximum penalty for the offence will be \$11,000 for a corporation or \$5,500 for an individual.

Schedule 1[8] provides that the Secretary may issue guidelines for compliance with proposed Part 10AA of the principal Act and other related matters.

Schedule 1[9] provides that the proposed amendments apply to certain existing village contracts.

Schedule 1[1], [3] and [5] make consequential amendments.

Schedule 2 Amendment of Retirement Villages Amendment Act 2018 No 77

Schedule 2 provides that the regulations may make provision for or with respect to the items of capital for which an asset management plan must be prepared by an operator.

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Retirement Villages Amendment Bill 2020

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public consultation draft

NEW SOUTH WALES
DRAFT GOVERNMENT BILL

Retirement Villages Amendment Bill 2020

No , 2020

A Bill for

An Act to amend the *Retirement Villages Act 1999* to make further provision about exit entitlements payable to residents by operators of retirement villages; and for other purposes.

public consultation draft

Retirement Villages Amendment Bill 2020 [NSW]

The Legislature of New South Wales enacts—

1 Name of Act

This Act is the *Retirement Villages Amendment Act 2020*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Retirement Villages Act 1999 No 81

[1] Section 4 Definitions

Insert “, except in Part 10AA,” after “includes” in the definition of *former occupant* in section 4(1).

[2] Section 8 “Permanent vacation” of residential premises

Omit “the person dies or moves out of the premises.” from section 8(d). Insert instead—

- (i) the person dies or moves out of the premises, or
- (ii) for section 152—the person moves out of the premises or the executor or administrator of the person’s estate delivers up vacant possession of the person’s residential premises to the operator of the retirement village following the person’s death.

[3] Section 129 How and when residence right or contract is terminated

Omit “only on the completion of the sale of the premises.” from section 129(1).

Insert instead—

on whichever occurs first—

- (a) the completion of the sale of the premises, or
- (b) if an exit entitlement order is made by the Secretary under section 182AC—the date on which the operator of the retirement village pays the former occupant the amount required under the order, or
- (c) if an operator is required to make an accommodation payment on behalf of a former occupant under section 182AG—the date on which the operator makes the first payment.

[4] Section 152

Omit the section. Insert instead—

152 Recurrent charges for general services—registered interest holders

- (1) This section applies to a former occupant of residential premises in a retirement village who is a registered interest holder in respect of the premises.
- (2) The former occupant’s liability to pay recurrent charges for general services that arise after the former occupant permanently vacated the residential premises ceases on whichever of the following dates occurs first—
 - (a) the date on which the operator of the retirement village enters into—
 - (i) a village contract with an incoming resident for the premises, or
 - (ii) a residential tenancy agreement with an incoming tenant for the premises,
 - (b) the date on which a person takes up residence in the premises with the consent of the operator,
 - (c) the date that is 42 days after the date on which the former occupant permanently vacated the premises,
 - (d) if the operator buys the premises from the former occupant—the date on which contracts for the purchase are exchanged,
 - (e) if the former occupant is a person referred to in section 7(1)(c)—

- (i) if the Tribunal terminated the residence contract—the date on which the former occupant permanently vacated the premises, or
 - (ii) if the former occupant permanently vacated the premises after receiving notice of the operator’s intention to apply to the Tribunal for an order terminating the residence contract—the date on which the former occupant permanently vacated the premises,
 - (f) if the contract between the former occupant and the operator provides for a cessation of the liability—the date provided in the contract.
- (3) The former occupant’s liability to pay recurrent charges for general services that arise after the former occupant has permanently vacated the residential premises is to be met by the former occupant.

[5] Section 180 Payments to former occupants who were registered interest holders

Insert after section 180(1)—

- (1A) However, this section does not apply to a former occupant of residential premises in a retirement village who is, or was, a registered interest holder in respect of the premises if—
- (a) the Secretary has made an exit entitlement order for the former occupant under section 182AC, or
 - (b) the operator of the retirement village has made an accommodation payment on behalf of the former occupant under section 182AG.

[6] Section 180(2)

Omit the penalty. Insert instead—

Maximum penalty—100 penalty units for a corporation or 50 penalty units for an individual.

[7] Part 10AA

Insert after Part 10—

Part 10AA Payments if certain residential premises not sold

Division 1 Preliminary

182AA Definitions

In this Part—

accommodation agreement means an accommodation agreement between an approved provider and a former occupant within the meaning of the *Aged Care Act 1997* of the Commonwealth.

accommodation payment means a daily accommodation payment within the meaning of the *Aged Care Act 1997* of the Commonwealth that, under an accommodation agreement, the former occupant is required to pay to the approved provider of the aged care facility in which the former occupant resides or proposes to reside.

aged care facility means a building or part of a building used or intended to be used for the provision of residential care, within the meaning of the *Aged Care Act 1997* of the Commonwealth, by an approved provider under that Act.

agreed valuation, in relation to an exit entitlement, means an estimate of the value of a former occupant’s residential premises calculated by—

- (a) agreement between the former occupant and the operator of the retirement village, or
- (b) if the former occupant and the operator cannot agree—a determination by an independent valuer under section 182AH.

exit entitlement, for a former occupant of residential premises in a retirement village who is, or was, a registered interest holder in respect of the premises, means the amount that would be required to be paid by an operator of the retirement village to the former occupant under the Act and the former occupant's village contract if the premises were sold for the agreed valuation.

exit entitlement order—see section 182AB.

former occupant includes a resident who is a registered interest holder in respect of residential premises in a retirement village, but does not include an executor or administrator of the estate of a former occupant unless section 182AI(3) applies.

Division 2 Exit entitlement orders

182AB Former occupant may apply for payment of exit entitlement

- (1) This section applies to a former occupant of residential premises in a retirement village who is, or was, a registered interest holder in respect of the premises.
- (2) A former occupant may apply to the Secretary for an order directing the operator of a retirement village to pay the exit entitlement to the former occupant (an **exit entitlement order**) if the residential premises are not sold within—
 - (a) the period prescribed by the regulations, or
 - (b) a longer period approved by the Secretary under section 182AE.
- (3) The period referred to in subsection (2) commences 7 days after the residential premises are first advertised for sale.
- (4) A former occupant may apply for an exit entitlement order only if the agreed valuation was calculated at least 30 days before making the application.
- (5) An application is to be made in a form approved by the Secretary.

182AC Secretary may make exit entitlement order

- (1) The Secretary may make an exit entitlement order for a former occupant of residential premises who has applied to the Secretary under this Division.
- (2) However, the Secretary is not to make an exit entitlement order if the Secretary is satisfied by the operator to whom the order relates that the operator has not unreasonably delayed the sale of the residential premises.
- (3) In determining whether or not to make an exit entitlement order, the Secretary must take into account submissions made to the Secretary by the applicant and the operator, if any.
- (4) If the Secretary refuses to make an exit entitlement order, the Secretary must give the operator and the applicant written notice of the decision and the reasons for the decision.
- (5) An exit entitlement order must be served on the operator and the applicant as soon as reasonably practicable.
- (6) An operator must comply with the exit entitlement order.

Maximum penalty—100 penalty units for a corporation or 50 penalty units for an individual.

182AD Content of exit entitlement orders

- (1) An exit entitlement order must be in a form approved by the Secretary and contain the following information—
 - (a) the exit entitlement that the operator is required to pay to the former occupant,
 - (b) how the exit entitlement must be paid, including whether the amount is to be paid as a lump sum or by instalments,
 - (c) the date by which the exit entitlement must be paid, not being earlier than 30 days after the order is served on the operator,
 - (d) the reasons for the making of the order,
 - (e) that failure to comply with the order is an offence with a maximum penalty of 100 penalty units for a corporation or 50 penalty units for an individual,
 - (f) other information prescribed by the regulations.
- (2) An exit entitlement order may be unconditional or subject to conditions.
- (3) Without limiting subsection (2), an exit entitlement order may be subject to a condition that requires the operator to notify the Secretary when the order has been complied with.

182AE Secretary may extend period before exit entitlement order may be made

- (1) The Secretary may, on application by an operator of a retirement village, approve a period longer than the period prescribed by the regulations under section 182AB(2)(a).
- (2) An application is to be made in a form approved by the Secretary.
- (3) The operator must give written notice to the former occupant of residential premises to whom the application relates within 7 days of making the application.

Maximum penalty—100 penalty units for a corporation or 50 penalty units for an individual.
- (4) The Secretary may approve a longer period under this section only if the Secretary is satisfied by the operator that the operator has not unreasonably delayed the sale of the residential premises to which the application relates.
- (5) In determining whether or not to approve a longer period, the Secretary must take into account submissions made to the Secretary by the former occupant, if any.
- (6) If the Secretary approves a longer period, the Secretary must, as soon as reasonably practicable, notify the former occupant of the longer period.
- (7) An operator may make an application under this section for the same residential premises no more than once in a 12 month period.

Division 3 Aged care facility payments

182AF Former occupant may request operator to make accommodation payments

- (1) This section applies to a former occupant of residential premises in a retirement village who is, or was, a registered interest holder in respect of the premises who—
 - (a) has entered an aged care facility after permanently vacating the residential premises, or proposes to enter an aged care facility, and
 - (b) has not received the former occupant's exit entitlement.
- (2) A former occupant to whom this section applies may request the operator of a retirement village to make an accommodation payment on behalf of the former occupant.
- (3) A request under this section is to be made in a form approved by the Secretary.
- (4) A former occupant may make a request under this section only if the agreed valuation has been calculated.
- (5) A former occupant who makes a request under this section must provide the following information to the operator—
 - (a) the name of the aged care facility that the former occupant has entered or proposes to enter,
 - (b) the date on which the former occupant has entered, or proposes to enter, the facility,
 - (c) the amount of the accommodation payment,
 - (d) other information prescribed by the regulations.
- (6) An operator must make an accommodation payment on behalf of the former occupant if the operator believes on reasonable grounds that the former occupant would suffer significant financial hardship were the former occupant required to make the payment.
- (7) The regulations may prescribe other circumstances in which an operator to whom a request is made must make an accommodation payment.

182AG Operator must make accommodation payments if requested

- (1) An operator of a retirement village who is required to make an accommodation payment on behalf of a former occupant under this Division must make the accommodation payment to the approved provider of the aged care facility in which the former occupant resides or proposes to reside.
- (2) An operator is not required to make an accommodation payment on behalf of a former occupant—
 - (a) if the former occupant becomes entitled to an exit entitlement in accordance with section 180 because the residential premises are sold, or
 - (b) if the former occupant requests the operator to cease making the payment, or
 - (c) if the former occupant dies, or
 - (d) if the operator has already paid 85% of the exit entitlement, or
 - (e) for a former occupant who proposes to reside in an aged care facility— if the former occupant does not enter the aged care facility, or
 - (f) in other circumstances prescribed by the regulations.

- (3) An operator who ceases making an accommodation payment on behalf of a former occupant must give written notice to the former occupant and the approved provider of an aged care facility to which the operator was making the payment.
- (4) The regulations may make provision for or with respect to the keeping of records by an operator who makes an accommodation payment under this section.
- (5) An operator must not fail to make a payment required under this section.
Maximum penalty—100 penalty units for a corporation or 50 penalty units for an individual.

Division 4 Miscellaneous

182AH Independent valuer to determine value of residential premises if no agreement

- (1) A former occupant and an operator of a retirement village who cannot agree on an estimate of the value of the former occupant's residential premises must have the amount determined by an independent valuer under this section.
- (2) The independent valuer—
 - (a) must have appropriate experience or expertise to give valuations, and
 - (b) must not have a pecuniary or other interest that could be reasonably regarded as capable of affecting the independent valuer's ability to give the valuation in good faith.
- (3) The independent valuer is to be appointed by—
 - (a) agreement between the former occupant and the operator, or
 - (b) if the former occupant and the operator cannot agree—the President of the New South Wales division of the Australian Property Institute.
- (4) The determination by the independent valuer of an estimated value of the former occupant's residential premises must—
 - (a) be in writing, and
 - (b) contain detailed reasons for the determination, and
 - (c) specify the matters to which the independent valuer had regard for the purposes of making the determination.
- (5) The independent valuer must give the former occupant and the operator a copy of the determination.
- (6) The former occupant and the operator are to pay the costs of the valuation by the independent valuer under this section in equal shares.

182AI Certain payments taken to be payment of exit entitlement

- (1) To avoid doubt, the following payments by an operator of a retirement village are taken to be payments of part of the exit entitlement payable to a former occupant of residential premises—
 - (a) the payment of the whole or part of an exit entitlement under an exit entitlement order,
 - (b) the payment of an accommodation payment under Division 3.
- (2) An operator must pay the former occupant any part of the exit entitlement that is not paid—
 - (a) to the former occupant under an exit entitlement order, or

- (b) to an approved provider of an aged care facility as an accommodation payment under Division 3.
- (3) To avoid doubt, if a former occupant dies before the whole of the exit entitlement is paid to the former occupant under this Part, the operator must instead make the payment to the executor or administrator of the former occupant's estate.

182AJ Review by Tribunal

A person aggrieved by any of the following decisions may apply to the Tribunal for an administrative review under the *Administrative Decisions Review Act 1997*—

- (a) a decision of the Secretary to make or refuse to make an exit entitlement order,
- (b) a decision of the Secretary to extend or refuse to extend the period for the purposes of section 182AE,
- (c) a decision of an operator of a retirement village to refuse to make an accommodation payment on behalf of a former occupant of residential premises.

[8] Section 189B Secretary may issue guidelines for compliance with certain provisions

Insert after section 189B(1)(e)—

- (f) section 129 (How and when residence right or contract is terminated),
- (g) section 152 (Recurrent charges for general services—registered interest holders),
- (h) Part 10AA (Payments if certain residential premises not sold).

[9] Schedule 4 Savings, transitional and other provisions

Insert at the end of the Schedule, with appropriate Part and clause numbering—

Part Provisions consequent on enactment of Retirement Villages Amendment Act 2020

Existing contracts

- (1) An amendment made by the *Retirement Villages Amendment Act 2020* (the *amending Act*) extends to a village contract that was in force immediately before the commencement of the amendment, except as provided by subclauses (2) and (3).
- (2) Part 10AA, Division 2, as inserted by the amending Act, does not apply to a former occupant's residential premises in a retirement village if, immediately before the commencement of the Division, the premises was advertised for sale.
- (3) Part 10AA, Division 3, as inserted by the amending Act, does not apply to a former occupant of residential premises in a retirement village who, immediately before the commencement of the Division, has entered an aged care facility after permanently vacating the premises.

Schedule 2 Amendment of Retirement Villages Amendment Act 2018 No 77

Schedule 1 Amendment of Retirement Villages Act 1999 No 81

Insert at the end of proposed section 101A(2)(b)(iv) in Schedule 1[11]—

, and

- (c) the items of capital for which an asset management plan must be prepared.