

Passed by both Houses



New South Wales

Retirement Villages Amendment Bill 2020

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

Clerk of the Parliaments

Legislative Council
2020



New South Wales

Retirement Villages Amendment Bill 2020

Act No _____, 2020

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.

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 the purposes of the payment of recurrent charges under 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 in relation to the premises under section 182AC—the date on which the operator pays the resident the amount required under the order.

[4] Section 129(2)(g1)

Insert after section 129(2)(g)—

- (g1) if an exit entitlement order is made by the Secretary in relation to the premises under section 182AC—on the date on which the operator pays the resident the amount required under the order, or

[5] Section 152 Recurrent charges in respect of general services: registered interest holders

Omit “Subject to subsection (3), the former” from section 152(2).

Insert instead “The former”.

[6] Section 152(2)

Insert “whichever occurs first” after “ceases on”.

[7] Section 152(2)(e) and (f)

Insert at the end of section 152(2)(d)—

, or

- (e) if the former occupant is a person referred to in section 7(1)(c)—the date that is 42 days after the date on which the former occupant permanently vacated the premises, including by returning to the operator all keys to the premises, or
- (f) if the contract between the former occupant and the operator provides for a cessation of the liability—the date provided in the contract.

[8] Section 152(2)

Omit “whichever date occurs first, unless the contract between the former occupant and the operator provides for an earlier cessation of that liability.”

[9] Section 152(3)

Omit the subsection. Insert instead—

- (3) The operator of the retirement village must not increase the recurrent charges payable by the residents of the retirement village as a result of any liability that may be incurred by the operator once the former occupant’s liability to pay recurrent charges ceases under subsection (2), unless the regulations otherwise provide.

[10] Section 157 Payment of departure fee

Omit section 157(3) and (4). Insert instead—

- (3) However, if the former occupant is, or was, a registered interest holder in respect of residential premises in the retirement village, the departure fee is payable out of—
- (a) the proceeds of the sale of the residential premises, or
 - (b) the former occupant’s exit entitlement within the meaning of Part 10AA.
- (4) A departure fee is to be deducted from—
- (a) the amount of the refund of the ingoing contribution payable to the former occupant as specified in the relevant village contract, or
 - (b) for a former occupant who is, or was, a registered interest holder in respect of the premises—
 - (i) the proceeds of the sale payable to the former occupant as specified in the relevant village contract, or
 - (ii) the agreed valuation of the premises within the meaning of Part 10AA, or
 - (iii) the amount payable by the operator as an accommodation payment on behalf of the former occupant under section 182AG, if any.

[11] 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 the Secretary makes an exit entitlement order for the former occupant under section 182AC.

[12] Section 180(2)

Omit “50 penalty units”.

Insert instead “100 penalty units for a corporation or 50 penalty units for an individual”.

[13] 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, a former occupant is required to pay to an approved provider of an 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, for an exit entitlement in Division 2, 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 182AI.

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—

- (a) following the sale of the premises, or
- (b) for Division 2—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 182AJ(3) applies.

prescribed component of an exit entitlement means the component or proportion of an exit entitlement prescribed by the regulations.

registered interest holder means a person referred to in section 7(1)(c).

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—
 - (a) is, or was, a registered interest holder in respect of the premises, and
 - (b) has not been paid any part of the former occupant's exit entitlement by way of an accommodation payment under section 182AG.
- (2) However, this section applies to a former occupant who has been paid any part of the former occupant's exit entitlement by way of an accommodation payment under section 182AG only if the former occupant's residential

- premises have not sold within 2 years after the date on which the former occupant first entered the aged care facility to which the payment relates.
- (3) A former occupant may, if the residential premises are not sold within the prescribed period, apply to the Secretary for an order directing the operator of the retirement village to pay the exit entitlement to the former occupant (an ***exit entitlement order***).
 - (4) The prescribed period commences 40 days after the following, whichever occurs first—
 - (a) the date the former occupant's premises are first advertised for sale,
 - (b) the date the former occupant permanently vacates the premises, including by returning to the operator all keys to the premises,
 - (c) if the former occupant does not intend to move out of the premises while the premises are for sale—the date the former occupant gives written notice to the operator of that fact.
 - (5) Subsection (4) does not apply to a former occupant referred to in subsection (2).
 - (6) A former occupant may apply for an exit entitlement order only if the agreed valuation for the exit entitlement was calculated at least 30 days before making the application.
 - (7) An application is to be made in a form approved by the Secretary.
 - (8) A former occupant may not apply for an exit entitlement order for the same residential premises more than once in the prescribed period.
 - (9) In this section—

prescribed period means—

 - (a) the period prescribed by the regulations, or
 - (b) a longer period approved by the Secretary under section 182AE, or
 - (c) for a former occupant referred to in subsection (2)—2 years from the date on which the former occupant enters into an aged care facility after permanently vacating the residential premises.

182AC Secretary may make exit entitlement order

- (1) The Secretary may make an exit entitlement order for a former occupant of residential premises who applies to the Secretary under section 182AB.
- (2) However, the Secretary must not make an exit entitlement order if the Secretary is satisfied by the operator to whom the application relates that the operator has not unreasonably delayed the sale of the residential premises.
- (3) The regulations may make provision for the matters that the Secretary must consider when determining whether or not an operator of a retirement village has unreasonably delayed the sale of residential premises.
- (4) In determining whether or not to make an exit entitlement order, the Secretary must take into account submissions made to the Secretary by the former occupant and the operator, if any.
- (5) If the Secretary refuses to make an exit entitlement order, the Secretary must give the operator and the former occupant written notice of the decision and the reasons for the decision.
- (6) An exit entitlement order must be served on the operator and the former occupant as soon as reasonably practicable.

- (7) 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 it 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 for the purposes of paragraph (a) of the definition of *prescribed period* in section 182AB(9).
- (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 only if 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 not make an application under this section for the same residential premises 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 if—
 - (a) the former occupant has entered an aged care facility after permanently vacating the premises, or proposes to enter an aged care facility, and
 - (b) the former occupant has not received a part of the prescribed component of the former occupant's exit entitlement, and
 - (c) the premises have not been sold.
- (2) A former occupant may request the operator of a retirement village to make one or more accommodation payments on behalf of the former occupant from the prescribed component of the former occupant's exit entitlement.
- (3) A request is to be made in a form approved by the Secretary.
- (4) A former occupant's request to an operator must include the following information—
 - (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 entered or proposes to enter the facility,
 - (c) the amount of each accommodation payment,
 - (d) other information prescribed by the regulations.

182AG Operator must make accommodation payments if requested

- (1) An operator of a retirement village who is requested to make an accommodation payment on behalf of a former occupant under section 182AF 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) The operator must make the first accommodation payment—
 - (a) for a former occupant who proposes to enter an aged care facility—at least 28 days before the date on which the former occupant proposes to enter the aged care facility, or
 - (b) for a former occupant who has entered an aged care facility—within 28 days after the former occupant's request under section 182AF.
- (3) However, an operator is not required to make an accommodation payment on behalf of a former occupant—
 - (a) if the former occupant becomes entitled to a payment under 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 paid 85% of the prescribed component of the former occupant's exit entitlement, or
 - (e) for a former occupant who proposed 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.

- (4) An operator who is not required to make an accommodation payment on behalf of a former occupant under subsection (3) must give written notice to—
 - (a) the former occupant, and
 - (b) if the operator has previously made an accommodation payment to the approved provider of an aged care facility on behalf of the former occupant—the approved provider.
- (5) The regulations may make provision for the following—
 - (a) the keeping of records by an operator who makes an accommodation payment,
 - (b) the provision of information by an operator to a former occupant in relation to the payment of an accommodation payment.
- (6) An operator must not, unless the Tribunal makes an order under section 182AH, fail to make an accommodation payment required under this section.
Maximum penalty—100 penalty units for a corporation or 50 penalty units for an individual.

182AH Tribunal may make orders about accommodation payments

- (1) An operator of a retirement village who is requested by a former occupant to make an accommodation payment under section 182AF may apply to the Tribunal for an order—
 - (a) to extend the time in which the operator is required to make the first accommodation payment, or
 - (b) to exempt the operator from the requirement to make an accommodation payment.
- (2) An application is to be made within 28 days after the former occupant's request under section 182AF.
- (3) The Tribunal may make an order only if satisfied that making an accommodation payment would impose a significant financial burden on the operator.

Division 4 Miscellaneous

182AI 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 for the purposes of Division 2 must have the value determined by an independent valuer under this section.
- (2) The independent valuer—
 - (a) must have appropriate experience or expertise, 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 determine the value of the residential premises 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 the 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 independent valuer's determination in equal shares.

182AJ 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.
- (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.
- Note.** Section 180 deals with payments to certain former occupants of residential premises following the sale of the premises.
- (3) If a former occupant dies before the whole of the exit entitlement is paid to the former occupant under this Part, the operator must pay the remainder of the exit entitlement to the executor or administrator of the former occupant's estate.

182AK Tribunal may make orders about prescribed components

- (1) This section applies to a former occupant—
- (a) to whom section 182AF applies, and
 - (b) who is of the opinion that the prescribed component of the former occupant's exit entitlement was not calculated in accordance with this Act or the relevant village contract.
- (2) A former occupant may apply to the Tribunal for an order to—
- (a) require the operator of a retirement village to recalculate the amount of the prescribed component in accordance with the directions of the Tribunal, and
 - (b) pay an additional amount, if any, due to the former occupant as a result of the recalculation.
- (3) The Tribunal may—
- (a) make an order under this section if satisfied that the prescribed component of an exit entitlement was not calculated in accordance with this Act or the relevant village contract, and
 - (b) order the payment of interest on the additional amount, if any, at the rate prescribed by the regulations if the Tribunal considers it appropriate.

182AL 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 approve or refuse to approve a longer period under section 182AE.

[14] 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).

[15] 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

Application of amendments

- (1) An amendment made by the amending Act extends to a village contract that was in force immediately before the commencement of the amendment, except as provided by this clause.
- (2) The amendments to section 152 made by the amending Act do not apply to a former occupant of residential premises in a retirement village until the beginning of the first financial year for the retirement village commencing on or after 1 July 2021.
- (3) If relevant residential premises are for sale immediately before the commencement of section 182AB, as inserted by the amending Act, the prescribed period is taken to commence on—
 - (a) the date on which the section commences, or
 - (b) if the former occupant does not intend to move out of the premises while the premises are for the sale—the date, on or after the commencement of the section, on which the former occupant gives written notice to the operator of that fact.
- (4) 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.
- (5) In this clause—

amending Act means the *Retirement Villages Amendment Act 2020*.

relevant residential premises means residential premises of a former occupant to whom section 182AB, as inserted by the amending Act, applies.

Payment of recurrent charges during prescribed period

- (1) This clause applies to a former occupant of residential premises in a retirement village who is—
 - (a) a registered interest holder in respect of the premises, and
 - (b) liable to pay a *recurrent charges payment*, being recurrent charges payable in relation to general services under section 152 after the former occupant has permanently vacated the residential premises.
- (2) A former occupant to whom this clause applies may request an operator of the retirement village make a recurrent charges payment from the prescribed component of the former occupant's exit entitlement.
- (3) A request must—
 - (a) be made in a form approved by the Secretary, and
 - (b) include the information prescribed by the regulations.
- (4) An operator to whom a request is made must make the recurrent charges payment from the prescribed component of the former occupant's exit entitlement within 14 days after the request is first made.
- (5) However, an operator is not required to make a recurrent charges payment from the prescribed component of the former occupant's exit entitlement if—
 - (a) the former occupant ceases to be liable to pay the recurrent charge under section 152, or
 - (b) the former occupant makes a written request to the operator to cease making the recurrent charges payment from the prescribed component of the former occupant's exit entitlement.
- (6) To avoid doubt—
 - (a) an operator must pay any part of the former occupant's exit entitlement that is not paid towards a recurrent charges payment to the former occupant in accordance with section 180, and
 - (b) a former occupant to whom this clause applies is not prevented from applying for an exit entitlement order after 1 July 2021 merely because of this clause.
- (7) This clause ceases to have effect at the beginning of 1 July 2021.
- (8) In this clause—

exit entitlement and *prescribed component* have the same meanings as in Part 10AA of the Act.

prescribed period means the period commencing on the commencement of Schedule 1[13] to the *Retirement Villages Amendment Act 2020* and ending on 30 June 2021.

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.