



Information sheet: Retirement Villages Regulation 2009 (NSW)

The *Retirement Villages Regulation 2009* (NSW) was released on 18 December 2009. The new Regulation will come into force on 1 March 2010, along with the changes to the *Retirement Villages Act 1999* (NSW) that will be made by the *Retirement Villages Amendment Act 2008* (NSW).

Some of the more significant provisions of the new Regulation are set out below.

Capital Maintenance (Clause 5)

The following are prescribed as capital maintenance:

- work done to prevent or repair defects in, damage to, or deterioration of, an item of capital;
- replacement of a non fixed item of capital;
- replacement of a component of an item of capital that is necessary for the proper operation of an item of capital.

The following are prescribed as not being capital maintenance:

- work done to substantially improve an item of capital beyond its original condition; or
- work done to maintain or repair an item of capital in circumstances where it would have been more cost effective to replace the item of capital.

While the new Regulation does not once and for all resolve the difficulties that operators face in distinguishing between capital maintenance (usually resident funded) and capital replacement (usually operator funded), in our view the relatively simple provisions in clause 5 of the final Regulation provide a great deal more clarity than the more complex provisions that appeared in the draft Regulation.

Amount payable for legal and other expenses (Clause 13)

The contribution that the resident may be required to make to legal and other expenses incurred by the operator in connection with the preparation of a village contract is capped at \$200.

Limit on contingencies in annual budget (Clause 20)

The Regulation provides that the maximum amount that an operator may allocate in the proposed annual budget for contingencies is \$100.

Matters not to be financed by way of recurrent charges (Clause 26)

The following must not be financed by way of recurrent charges:

- fees for membership of industrial or professional associations,
- overseas travel by the operator of the retirement village or the operator's agent or employees,
- any costs associated with marketing vacant units within a retirement village, including such costs that may have been included in wages or salaries,
- payroll tax unless the wages paid by the operator in respect of operating the retirement village are more than the threshold amount within the meaning of Schedule 1 to the Payroll Tax Act 2007 (NSW), or the residents of the retirement village have consented to the financing of payroll tax by way of recurrent charges and the residents before 1 March 2010 and have continued to consent to such financing of payroll tax;
- costs associated with the operator's head office or management or administration fees unless the costs or fees are associated with providing services to residents of the retirement village.

Operators of multiple villages will no doubt appreciate that they will be able to use recurrent charges to fund the cost of payroll tax in certain circumstances, and also to fund head office costs that are not necessarily directly associated with the operation of a particular village. Operators who propose to rely on the consent of residents to fund payroll tax expenses by way of recurrent charges will need to ensure that they have that consent in place before 1 March 2010.

Making good a deficit (Clause 33)

The general rule under the amended Act is that an operator must make good a deficit and is not entitled to carry forward a deficit to the subsequent financial year. However, the Regulation provides that an operator may carry forward a deficit to a subsequent financial year to the extent that the deficit has arisen as a result of:

- maintenance (but not replacement) of an item of capital in circumstances where the maintenance was for the purposes of rectifying any of the matters set out in section 92 (2) (a)–(k) of the Act, or
- an increase in the cost of the utilities (other than telephone), statutory charges including rates and taxes, wages and salaries increased under an award or an industrial agreement, or workers compensation and public liability insurance.

The capacity of operators to be able to carry forward deficits in these circumstances should assist operators in managing budgets given that they will not be able to allocate significant amounts for contingencies (see clause 20 above).

Liability of former occupant if village contract terminated during settling-in period (Clause 50(2))

The administration fee that an operator may charge a resident in the event that the resident

terminates the village contract during the new 90 day settling in period is capped at \$200.