

13 March 2025

Policy and Delivery, NSW Fair Trading  
NSW Department of Customer Service  
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PARRAMATTA NSW 2150

Via email: [RVRegulationRemake@customerservice.nsw.gov.au](mailto:RVRegulationRemake@customerservice.nsw.gov.au)

Dear Sir/Madam,

### **Retirement Villages Regulation 2025**

On behalf of the New South Wales Division of the Property Council and the Retirement Living Council, we welcome the opportunity to provide feedback on the draft Retirement Villages Regulation 2025.

New South Wales is experiencing a dramatic demographic shift, propelled by an ageing population. Over the next 15 years, the number of people aged over 75 in NSW is expected to increase by a staggering 74.1 per cent, from 673,085 to 1,171,623.

These changes will have far-reaching implications for the state's socio-economic outlook, including increased demand for healthcare, social services and aged care services. The value proposition of age-friendly retirement communities will become increasingly relevant and critical, as will the need for an adaptive and robust regulatory framework to guide them.

We note the significant reform agenda that has been undertaken by the government since the 2017 *Greiner Inquiry* into the retirement villages sector, and we appreciate the collaborative approach to regulation and reform that NSW Fair Trading have taken to date.

We believe this continued collaborative approach to reform can result in a regulatory framework that both enhances protections for residents, while ensuring the long-term viability of the retirement living sector that provides safe, secure and age-friendly housing for older Australians.

### **About the Retirement Living Council and Property Council**

The Retirement Living Council (RLC) is Australia's leading peak body representing the retirement living sector, championing policies that support more investment in age-friendly communities.

As Australia's pre-eminent industry voice, the RLC champions the growth and sustainability of retirement living, affordable housing options for senior Australians, advocating for fair and balanced regulation, ensuring best practices, providing strong industry leadership, and showcasing excellence.

The RLC works collaboratively with governments across the country to deliver increased consumer protections, strengthened industry standards, resulting in better regulation for older Australians and operators alike.

Similarly, the Property Council is the leading advocate for Australia's property industry, the New South Wales economy's largest sector and employer.



The Property Council's members own and/or operate hundreds of retirement living communities in New South Wales. These members are a diverse mix of companies with small, medium, and large village portfolios across Sydney and regional New South Wales, and include not-for-profit operators, commercial for-profit operators, listed and private companies and church and charitable operators.

The following submission outlines our response to the questions raised in the Regulatory Impact Statement (RIS).

### **5.1 Part 1 Preliminary (section 1 – 9)**

*1. Are pharmaceutical services appropriately captured by shopping assistance? If not, please explain.*

Shopping assistance is not defined but could be widely interpreted to include pharmaceutical services, although this could be unlikely. This section should consider that the definition of shopping assistance should be changed to expressly include pharmaceutical services.

*2. What other (if any) services should be prescribed as optional services in the Regulation? Please explain why.*

Optional services can differ widely across villages, a simplification of optional services would be helpful.

It is important to understand that 'optional services' as provided for in the legislation differs to purely 'user pays services' (or a service provided on a fee for service basis as referenced above). There are several operators who make 'optional services' available as part of the 'general services' of the village and which are funded through recurrent charges payable by residents (i.e., villages provide the services to all residents with no requirement to 'opt-in' or request the service or pay any additional amounts).

For example, a weekly clean may be included as a service included for all residents. While it would be a general service on the basis that it is provided to all residents, the definition of optional service in the Act currently specifies cleaning of residential premises as an example of an optional service (even though it is not actually 'optional' in the ordinary sense given it is provided to all residents).

The important distinction in those circumstances is that the number of recurrent charges attributable to that optional service:

- ceases immediately when the resident permanently vacates (rather than continuing for 42 days); and
- is not required to be paid by the resident if they are absent from the village for more than 28 days.

Based on the rationale set out above, it may be appropriate to amend the current definition of 'optional services' in the Act to refer to 'personal services', given the type of services and examples currently provided in the legislation reference to services a type which the resident personally benefits. Any recurrent charges attributable to those 'personal services' are not payable in the instances outlined above as the resident is no longer receiving any personal benefit from the services where they vacate or are absent for an extended period.

'Optional services' can then be reframed in the legislation to more closely reflect the ordinary meaning of the word 'optional', with those services to be purely optional things residents may choose to take up and pay a fee on a user pays basis.



The definition of 'general services' should be amended to recognise that different parts of a village may include services for all or a part of a village only – e.g., a serviced apartment block may include certain services not provided to independent living units. The definition currently refers to general services being provided to all residents of a village, but those in a serviced apartment block will receive extra services like cleaning and meals which are not optional.

### ***5.2 Part 2 Representations and information about retirement villages (section 10-14)***

*3. Do you support the form of the General Inquiry Document and Disclosure Statement being prescribed by publication in the Gazette? Please explain your answer.*

Operators should be made aware when the forms are updated or replaced. A process should be embedded that provides for notification of such change and/or publication.

While we believe the documents should be prescribed, we would argue that they should not be prescribed by publication in the Gazette on the basis that searching through published Gazettes is a more complex and involved process than simply looking up the Regulations. There is also greater risk that outdated documentation will be in circulation throughout the industry.

Having a single 'source of truth' by having those documents prescribed in the Regulations is the most straightforward approach and, given how often these documents are used by operators, reduces the risk of outdated documents being used.

*4. Do you support the inclusion of the holding deposit in the Disclosure Statement? Please explain your answer.*

In circumstances where there is a single amount across the village, including this in the Disclosure Statement would be acceptable.

If the holding deposit is negotiated from unit-to-unit in a village, then it should be considered that the negotiated amount is confidential and should not be disclosed.

### ***5.3 Part 4 Meetings (section 21-23)***

*5. Do you support the form of the Appointment of Proxy being prescribed by publication in the Gazette? Please explain your answer.*

While we believe the documents should be prescribed, we would argue that they should not be prescribed by publication in the Gazette on the basis that searching through published Gazettes is a more complex and involved process than simply looking up the Regulations. There is also greater risk that outdated documentation will be in circulation throughout the industry.

Having a single 'source of truth' by having those documents prescribed in the Regulations is the most straightforward approach and, given how often these documents are used by operators, reduces the risk of outdated documents being used.

### ***Other feedback on meetings***

Proposed Clause 21(c)(i) provides for the agenda for annual management meeting to include plans to sell the village or part of the village. The reference to plans is non-descriptive, and it may be commercially inappropriate to disclose this information. Section 41 of the Act already requires a meeting of residents to be informed where a new operator is to be appointed, which is usually following a sale. Recommend removal of this item from the agenda, recognising this would occur at the point of appointing a new operator.



Similarly, the reference to including plans for expansion, where it involves purchasing adjoining land, is potentially problematic if those plans are commercial in confidence.

#### **5.4 Part 5 Financial management (sections 24-42)**

*6. Do you agree that more guidance from NSW Fair Trading about the operation of section 34 of the proposed Regulation will assist operators and residents? If no, please explain your answer.*

Yes, further guidance on the operation of section 34 would be beneficial.

*7. Please provide any other comments you have about this matter.*

#### **Other comments on expenditure**

We would welcome Expenditure Guidelines for NSW, similar to those available in Queensland.

We appreciate that guidance can be beneficial when new provisions are introduced. However, we also note that there have been issues where guidance given by Regulators in other states has caused confusion and has conflicted with legal advice about the operation of the legislation and regulations, which has caused difficulty dealing with residents, family members and lawyers acting for them. As such, the Department should allow for a detailed consultation and feedback process from industry to ensure that any guidance/guidelines that may be proposed/introduced by the Department are consistent with the legislative and operational framework in which that guidance would operate.

#### **Asset Management Plan (AMP) requirements**

*8. What other information (if any) should operators record for major items of capital on the asset register? Please explain.*

We welcome the simplification of reporting proposed in the Regulation remake whilst also acknowledging that most operators would continue to record the make, model and serial number (where possible) of capital assets in determining the remaining effective life.

#### **Other feedback**

We acknowledge that government has gone some way to addressing industry concerns around simplification, ease of use and ease of implementation of asset management plans.

We welcome changes that reduce the collection and reporting of information as existing arrangements are onerous and do not achieve the objective of providing meaningful information to assist informed decision making by operators and residents.

*9. Do you support requiring operators to record the 'remaining effective life of an item' instead of the 'effective life of an item'? Please explain your answer.*

We support the proposal to require operators to record the 'remaining effective life of an item' instead of the 'effective life of an item' as this is consistent with best practice asset management reporting. It is important to note that operators choosing to pursue this option should not, in accordance with proposed clause 35(3), be required to provide a report prepared exclusively by an independent quantity surveyor. This is because quantity surveyors are typically experts in tax depreciation but are not necessarily experienced in estimating the effective remaining life of assets.

The proposed clause 35(3) materially alters clause 26C(1)(a) in the current Regulation, which rather than a report simply requires a written opinion of the same matters and allows for that opinion to be provided by either "...the auditor or an independent qualified quantity surveyor...".



While the existing provision contributes to unnecessary costs, the proposed cl 35 (3) will likely add to the cost of AMP reporting, especially if an operator does not require the actual services provided by a quantity surveyor.

To reduce potential costs, or to even eliminate this cost imposition, alternative options are to:

- (a) Allow operators to make a declaration in accordance with the *Oaths Act 1900*. This option carries the potential of criminal penalties for false declarations; or
- (b) Allow for a for an independent ISO 55001 certified Asset Management specialist to provide a written opinion/attestation, with the discretion to choose that party left with the operator, subject to SAT review and the professional liability of the third-party.

A less preferred option, but one that is better than the proposed wording is to mirror the current clause 26C (1)(a) that allows for the auditor or an independent qualified quantity surveyor to provide a written opinion.

It is important to note that the remaining effective life of an item may also change over time in circumstances where some repairs or other works may extend the remaining effective life.

#### ***Maintenance related information***

*10. How often have you discussed capital maintenance and replacement for items with an operator or resident due to the accumulated costs of repairs for an item being more than 90% of the item's purchase price? Please provide any data or examples to support your response.*

This has only really been discussed in any level of detail in complicated Tribunal budget/expenditure disputes.

*11. Do you support removing the requirement for operators to keep information about accumulated costs for each capital item? Please explain your answer.*

If the remaining effective life methodology is used, the cost of repairs relative to the purchase price is not a relevant indicator of effective remaining life.

When an operator chooses the tax method for determining the remaining effective life of a major capital item it is relevant to continue recording information about accumulated costs of maintenance, as there is no correlation between this highly general financial methodology and the actual or likely life of an asset in a specific village setting.

*12. Please provide any other comments you have about this matter.*

In relation to capital maintenance more generally and the use of money from a capital works fund (CWF) to fund those works, the proposed new Regulation 40 amends the current Regulation 28 in a way that may result in misunderstandings as to how CWF money may be used and the processes to be followed by operators and residents.

By way of summary, section 99(5) of the Act provides that an operator cannot use money in the CWF except:

- to meet the cost of capital maintenance (s99(5)(a)) (Maintenance Purpose);
- to distribute the money to residents in certain circumstances (s99(5)(b)) (Distribution Purpose); or
- as prescribed in the Regulations (s99(5)(c)).

For the purposes of section 99(5)(c) of the Act, the current Regulation 28 clearly specifies that money held in a CWF can be used for any further purpose (i.e. a purpose in addition to a Maintenance Purpose or a Distribution Purpose) in circumstances where:

- residents provide their consent by special resolution; and
- the purpose is not prohibited under the Act.

This is made clear in the current Regulation 28 through the inclusion of the words: "... (other than a purpose set out in section 99 (5)(a) or (b) of the Act)..."

The proposed Regulation 40 has removed those words and now refers to the money in a CWF being used "for a specific purpose" if residents provide their consent by special resolution and the purpose is not prohibited under the Act. It is not clear from the draft Regulations what "a specific purpose" is referring to and, as such, there is a risk that the proposed new Regulation 40 may be interpreted to mean that an operator is required to obtain consent of the residents by way of a special resolution each time it seeks to use funds from the CWF, even if the operator proposes to use those funds for a Maintenance Purpose or a Distribution Purpose.

In our view, this can be rectified by amending the proposed Regulation 40 as follows (highlighted wording to be inserted):

*'The operator of a retirement village may also use money from the capital works fund for a specific purpose (other than a purpose set out in section 99(5)(a) or (b) of the Act) if -'*

#### ***Replacing the 3-year capital maintenance report with a 1-year report***

*13. Do you support having an annual capital maintenance report instead of a 3-year capital maintenance report? Please explain why or why not.*

While a one-year capital maintenance report is a sensible way to simplify reporting to assist residents with budget deliberations, the draft proposal is not practical.

Including a three-year capital maintenance forecast (including a description of the type of capital maintenance proposed and the estimated cost of the capital maintenance) in the one-year report will result in a lengthy and overly detailed report that does not easily enable residents and operators to focus on discussions about expenditure priorities.

A one-year capital maintenance report should focus solely on the preventative maintenance tasks planned over the next financial year. A list with this detail will give residents the opportunity to properly scrutinise proposals and to ask questions about specific assets that are on, or off, the list.

*14. What other information (if any) should the proposed annual capital maintenance report include? Please explain why.*

As detailed the annual capital maintenance report should be specifically focused on matters immediately pertaining to budget deliberations. Complicating this report with additional information, which would otherwise be included in the AMP, or through request to the operator, will not assist residents to focus on proposed expenditure to ensure value-for-money outcomes.

*15. Please provide any other comments you have about this matter.*

#### ***Allowing operators to choose between tax-ruling assessment or self-assessment of 'effective life'***

*16. Do you support operators being able to estimate the effective life for a major item of capital? Please explain your answer.*



Yes. The proposal to allow operators to choose either an estimate, or the current taxation ruling standard to determine the effective life of major items of capital is sensible and ensures much better alignment between the legislation and best-practice asset management, as detailed in ISO 55001.

*17. Do you support operators having to keep information about how they have estimated the effective life of an item, demonstrate that their estimate is reasonable and provide residents with this information if requested? Please explain your answer.*

To ensure consistency and resident trust in the process, operators should demonstrate an alignment between the methodology used for the estimate with the approach outlined in the International Infrastructure Management Manual (IIMM), which is published by the Institute of Public Works Engineering Australia (IPWEA). IPWEA developed the IIMM in accordance with ISO 55000 standards.

The condition-based assessment of remaining effective life for an asset should be transparent and accurate, making sure the reported data can be used to ensure assets are maintained in a safe and functional condition, and that there is funding for the effective maintenance and replacement of assets.

Applying a consistent and accurate methodology for estimation is paramount, given the diversity and range of retirement villages in NSW. It is in the best interest of operators to assess asset condition in a manner that mitigates the risk of resident disputes.

To ensure confidence in the assessment, an appropriate safeguard could be adding a requirement in the draft regulations for attestation (whether by a third-party or in accordance with the *Oaths Act 1900*) that the methodology used for estimation is consistent with the approach outline in the IIMM.

To reduce costs and unnecessary administrative burdens an operator should not be limited in choosing who provides the attestation – noting there is a range of professionals who could provide attestation.

*18. Please provide any other comments you have about this matter.*

#### **5.5 Part 7 Applications to Tribunal and orders (section 49 – 53)**

*19. Do you support removing the provision that the Tribunal may make differential orders? Please explain your answer.*

The RIS refers to section 58 of the *Civil and Administrative Tribunal Act 2013* as the basis for removing the provision.

That section provides that the Tribunal can impose conditions when making an order, not that different parties to the proceedings can have different orders made in relation to the same matter. We recommend that Reg 38 should remain in its current form.

#### **5.6 Part 8 Relevant village information (section 54 – 56)**

*20. Do you support allowing NSW Fair Trading to exchange relevant village information with the Ageing and Disability Commission noting this will only occur in accordance with privacy laws? Please explain your answer.*

Support in principle for NSW Fair Trading to exchange relevant information with the Ageing and Disability Commission as that is largely in disclosure documents or on the portal already.

#### **5.7 Part 9 Miscellaneous (section 57-67)**



*21. Do you support the Termination Notice being prescribed by publication in the Gazette to ensure it can be kept up to date more easily? Please explain your answer.*

We do not support the form being a prescribed form. Instead, we recommend that minimum requirements/prescribed provisions are introduced.

The forms are usually very cold, technical documents given to family at time of sadness and experience supports the use of more user-friendly documents.

If the Termination Notice is to be in a prescribed form (rather than allowing for prescribed information), that form should be prescribed in the Regulations rather than in the Gazette (for the reasons outlined in response to questions 3 and 5 above).

Prescribed information would be more suitable/appropriate than a prescribed form. For example, where an operator seeks to undertake a redevelopment of their village, 12 months' notice of termination is required to be provided. This requires the current prescribed form to be used at a point which is more than 12 months before termination, noting that the current prescribed form is not appropriate in those circumstances and changes need to be made to that form in any case. It may even be suitable to have different prescribed information to be included depending on the basis of the termination.

#### **5.8 Relevant Village Information- Schedule 5**

*22. Do you support the changes to the definitions of Relevant Village Information? Please explain your answer.*

Largely support as the proposed changes are acceptable and support simplification. However, we question the benefit in removing the requirement to provide details of the entity that owns the land where the landowner and the operator differ (particularly where the owner of land in a village is also an operator for the purposes of the Act).

#### **5.9 Provisions relating to consent of residents- Schedule 6**

*23. Are the current voting procedures sufficient? If not, please explain your answer.*

Yes. Also note that electronic/online voting procedures are not contemplated in the regulation and suggest that this method should be explored for future adoption.

*24. Would you support no longer requiring Returning Officers to initial written ballots? Please explain your answer.*

Do not support – it is important for all parties that the current system remain to avoid debate regarding vote tampering, etc. This also reduces the likelihood of dispute (particularly in a contentious matter) where it is clear the returning officer has considered and counted all the votes.

*25. How often does your retirement village use written ballots to decide items requiring general consent? Please provide details.*

Some Property Council members use written ballots on almost all occasions. When consent is required (regardless of general or special resolution), voting usually occurs by both postal and written ballot.

*26. Would you support the use of postal voting to approve general consent items? Please explain your answer.*

Yes, particularly to increase resident participation as some residents can be hesitant to attend meetings or vote against particular items. This is particularly important in circumstances where, for example, there may be a contentious matter and there may be coercion between residents to vote in a particular way.

#### **5.10 Penalty Notice Offences – Schedule 8**

*27. Do you support making the following rules of conduct offence provisions: (a) Section 8, which requires operators to develop a strategy for preventing elder abuse.*

Yes. Operators are required to develop and implement an Elder Abuse Prevention Strategy and so are comfortable with this being an offence provision. But this should not go further (i.e. to penalise operators who are unable to successfully implement the plan and prevent elder abuse) given the inherent difficulties of identifying and preventing elder abuse (particularly financial elder abuse).

*(b) Section 18, which requires operators to keep records of conflicts of interest.*

Industry agrees that operators should maintain a register and have policies/procedures in place to handle conflicts of interest. However, do not agree that operators should be required to disclose conflicts to residents. Some arrangements in place are private and need not be disclosed, and would require sharing quite private information with residents (for example, if a staff member has a family member living in a community).

*(c) Section 20, which requires that operators must not discourage residents from making complaints or pursuing internal disputes.*

Support for this.

#### **5.11 Other**

*28. Are the dispute resolution processes available to retirement village residents who have a dispute with an operator adequate? Please explain your answer.*

Yes. Current provisions provide flexibility which allow operators to manage and resolve disputes in a similar manner as in other states.

*29. What could improve how operators and residents resolve disputes in retirement villages? Please explain your answer.*

Current dispute resolution framework provides for an operator to recommend mediation; and where the dispute involves differing views regarding the Act/Regulation interpretation it is important for both parties to have the matter determined by the Tribunal to enable the parties to have direction and move on.

Specific provisions or guidance mechanisms about resident-to-resident disputes could be considered, to help residents resolve their own disputes as these tend to go around in circles without resolution and cause disruption to other residents and the community. Often these are matters that the operator cannot resolve or should not become involved in.

A number of disputes would also be quashed early on in circumstances where residents (and, probably more relevantly, residents committee members) are educated in relation to their rights and responsibilities in a similar manner to that imposed on village staff under the Rules of Conduct. This would go a long way to reducing the number of misunderstandings as to where responsibilities and obligations sit under the Act.

### Conclusion

We thank you for the opportunity to provide a submission to this review. If you have any questions about this submission, please contact NSW Deputy Executive Director Anita Hugo at [ahugo@propertycouncil.com.au](mailto:ahugo@propertycouncil.com.au)

Yours sincerely,



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