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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

RETIREMENT VILLAGES LEGISLATION AMENDMENT BILL 2018

EXPLANATORY STATEMENT

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RETIREMENT VILLAGES LEGISLATION AMENDMENT BILL 2018

This explanatory statement relates to the Retirement Villages Legislation Amendment Bill 2018 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not intended to be, a comprehensive description of the Bill. What is written about a provision is not to be taken to be an authoritative guide to the meaning of a provision, that being a task for the Courts.

OVERVIEW

Purpose of the Bill

The Bill implements a second tranche of recommendations which were made as a result of the 2015-16 review of the *Retirement Villages Act 2012* (the RVA Review). It will amend the *Civil Law (Sale of Residential Property) Act 2003*, the *Human Rights Commission Act 2005*, the *Retirement Villages Act 2012*, the *Retirement Villages Regulation 2013*, and the *Unit Titles (Management) Act 2011*. A summary of the amendments is outlined below.

Summary of amendments

The Bill amends the contract of sale requirements within the *Civil Law (Sale of Residential Property) Act 2003* applying to the sale of units in unit titled retirement villages. It does this by introducing a requirement for sellers to prepare a full contract of sale, only after a buyer for the property has been identified. This will reduce the cost burden on affected sellers as they will not be required to obtain multiple copies of the same report where the property has remained on the market for a lengthy period of time. The Bill introduces strict liability offences which reflect the offence construction and penalty unit level within the existing legislative scheme to retain high standards of consumer protection.

The Bill amends the *Human Rights Commission Act 2005* and the *Retirement Villages Act 2012* to introduce an optional conciliation process for residents of retirement villages seeking to resolve disputes with operators about service provision under the Retirement Villages Act 2012. Conciliated agreements, formed through participation in this process, will be deemed enforceable as if they were an order of the ACT Civil and Administrative Tribunal (ACAT).

The Bill makes a range of amendments to the Retirement Villages Act, *Retirement Villages Regulation 2013* and the *Unit Titles (Management) Act 2011* to streamline administrative and budget processes for unit-titled retirement villages. This responds to concerns raised during public consultation that unit-titled villages are impacted by administrative duplication, which creates ambiguity for operators and residents.

Under the Retirement Villages Act, operators of retirement villages must seek the consent of residents to certain actions which relate to the management of a village (including the terms of a proposed annual budget or an amendment to village rules). Residents indicate their consent by voting. This Bill amends the Retirement Villages Act to provide that where multiple persons reside in a unit, only one person may vote on matters which require the operator to obtain the consent of residents. This responds to concerns raised during public consultation about an inequitable distribution of voting rights between sole occupiers and multiple-occupants of units in retirement village. The Bill restores the default 'one vote per unit' voting model with operated under the Fair Trading (Retirement Villages Industry) Code of Practice 1999. Individual retirement villages may vote by special resolution to restore a voting model of 'one vote per person'.

Capital maintenance and capital replacement are complex issues which affect residents and operators of retirement villages. Residents fund capital maintenance through recurrent charges while capital replacement is the financial responsibility of an operator of a retirement village. Submissions were received during the RVA Review seeking clarification of these definitions. The Bill clarifies the definitions of capital item and capital replacement to provide that capital replacement does not include replacing part of a capital item. This responds to concerns raised during public consultation that where maintenance-specific equipment (such as screws, nuts and bolts) have been replaced during a repair process, the cost of these items have been charged differently to residents and operators across the ACT.

The Bill creates a guidelines-making power within the Retirement Villages Act which will allow the Minister to make provision about the classification of, including the distinction between, capital maintenance and capital replacement. Guidelines made in accordance with this power will be notifiable instruments.

The Bill also makes minor technical amendments to the Retirement Villages Act to align the timeframes that an operator must give notice to residents of an amendment to recurrent charges, made other than by fixed formula, with the provision of the proposed annual budget under section 159 of the Act; and to update the terminology within section 148 of the Act.

The Bill will commence by ministerial declaration. The Bill will automatically commence 12 months after the day after its notification day.

Human rights implications

The Bill supports human rights under the *Human Rights Act 2004* and all limitations on human rights can be justified as 'reasonable limits set by laws that can be demonstrably justified in a free and democratic society' as required by section 28 of the Act.

Right to equality before the law

Section 8 of the *Human Rights Act 2004* provides that ‘everyone has the right to equal and effective protection against discrimination on any ground’. The following amendments have been identified as posing potential limitations to the right to equality before the law.

Clause 21– Meeting of residents (section 112)

Clause 21 of the Bill engages with the right to equality before the law as it may be read as limiting an individual’s ability to participate in decision-making processes within their retirement village on the basis of their relationship status and/or accommodation choices. Clause 21 reinstates a default voting procedure within retirement villages that allocates votes by residences, rather than by residents.

Equal protection from discrimination is a subset of the principle of equality before the law. In considering the principle of equality, the High Court of Australia has recognised that the ‘doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment’.¹

Voting processes within retirement villages are used to indicate a resident’s consent to matters which may impact the operation of the village – such as amendments to village rules or proposed annual budgets. Clause 21 adopts a voting procedure within retirement villages that, by default, allocates votes by residences, rather than by residents. The purpose of this limitation is to manage concerns about procedural unfairness in retirement villages where recurrent charges are charged to a residence, rather than to a resident.

All residents of retirement villages pay recurrent charges to live in a retirement village. Recurrent charges are ‘an amount (including rent) payable under a village contract, on a recurrent basis, by a resident of a retirement village’.² These circumstances disproportionately allocated votes between sole occupiers and occupants of units with more than one resident. Adopting a default voting procedure of ‘one vote per unit’ restores the previous voting model which operated under the *Fair Trading (Retirement Villages Industry) Code of Practice 1999* and creates an equitable distribution of voting rights on the basis of financial contributions, for residents of retirement villages in the ACT.

Clause 21 may be read as limiting the right to equality before the law as it will, by default, restrict the ability of certain residents to participate in decision-making processes within their retirement village. Under this clause, villages have the ability to restore the voting model of ‘one vote per person’ where they deem it appropriate to do so, by passing a special resolution. This provides a necessary safeguard for

¹ *Kruger v the Commonwealth* (1997) 190 CLR 1, Toohey J at 94.

² *Retirement Villages Act 2012* (ACT) Dictionary (definition ‘recurrent charges’).

retirement villages which charge recurrent charges directly to individual residents, rather than residences – or for villages which charge recurrent charges to units with multiple occupants at a higher rate than sole occupiers. In these circumstances, restoring a ‘one vote per person’ voting model would ensure an equitable distribution of voting powers to residents, based on their financial contributions to the life of the village. The special resolution will last for the duration of the meeting. This safeguard provides the scope for individual villages to remove this limitation on the right to equality, where they deem that it is appropriate to do so.

No less restrictive means to achieve an equitable distribution of voting power in retirement villages have been identified. Clause 21 recognises that the majority of stakeholders support the restoration of the voting procedure model which was in place under the former Code of Practice. Restoring this voting model, which balances the voting power of sole occupiers with that of multiple-occupants of units, creates an equitable distribution of voting powers within the ACT’s retirement villages. The Bill also supports villages, and residents, to shape the decision-making process of their individual village to tailor voting procedures to ensure that they meet their needs.

Division 4.2B – Certain older people service complaints to ACAT

Part 3 of the Bill both limits and supports the right to equality before the law. It introduces an optional conciliation process to address disputes between residents and operators of retirement villages relating to a service which was provided by an operator of a retirement village under the *Retirement Villages Act 2012*. Part 3 may be read as limiting the right to equal protection of the law without distinction or discrimination of any kind under section 8 (3) of the *Human Rights Act 2004* because older persons, who are not residents of retirement villages, cannot access this opportunity for enforceable conciliation processes within the Human Rights Commission.

Part 3 has been introduced in response to national media coverage and community concerns about compliance and dispute resolution processes within retirement villages. Its inclusion does not reduce the protections currently available to older persons engaging with service providers in the ACT, as the Disability and Community Services Commissioner retains the jurisdiction to handle complaints relating to services provided to older people. If these complaints relate to experiences of discrimination, the *Human Rights Commission Act 2005* supports affected community members to access a similar enforceable conciliation outcome through the ACAT.

Part 3 supports the right to equality before the law by supporting older persons who reside in retirement villages to advocate against and actively respond to experiences of harm in a restorative way. Enabling enforceable conciliation outcomes provides older persons with a clear opportunity for redress when resolving disputes, as orders

of the ACAT are enforceable through action pursued in the Magistrates Court. The Government will explore opportunities to expand access to this enforceable conciliation process to all older person service complaints. Doing so will strengthen the protection of rights before the law for all older persons in the ACT.

Right to privacy and reputation

The Bill engages with the right to privacy and reputation under section 12(a) of the *Human Rights Act 2004*. Section 12(a) provides that ‘everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily’. Division 4.2B of the *Human Rights Commission Act 2005* may be read as engaging this right because section 53L provides that the Human Rights Commission must, after being asked by ACAT, give the ACAT any information or copies of documents in relation to a complaint referred to the ACAT under that division unless exclusionary criteria apply. This means that, under section 53L, the Human Rights Commission may be required to disclose to the ACAT personal information relating to a retirement villages complaint.

The *Human Rights Act 2004* protects individuals from arbitrary interferences with their privacy. In *Toonen v Australia*, the United Nations Human Rights Committee held that ‘the term arbitrary was meant to cover interferences which, under Australian law, would be covered by the concept of unreasonableness’.³ By requiring the Human Rights Commission to provide information relating to a retirement villages complaint to the ACAT once a referral to the Tribunal has been made, the Bill reduces the need for the complainant to consistently retell their story about their experience of harm which prompted the original complaint to the Human Rights Commission. This consequently the need for complainants to be impacted by duplicate administrative processes, as the ACAT is able to seek relevant information to progress the resolution of their complaint.

Under section 26 of the *ACT Civil and Administrative Tribunal Act 2008*, the ACAT may ‘inform itself in any way it considers appropriate in the circumstance’. ACAT also has subpoena powers which can be used to require a person to produce a stated document or other thing that is relevant to a hearing before it.⁴ Section 53L is consistent with the Territory Privacy Principle outlined in Schedule 1 of the *Information Privacy Act 2014* as the disclosure of personal information by the Human Rights Commission in accordance with this provision is authorised by law.⁵ The ACAT, as a Tribunal, may also order the disclosure of this information under section 41 of the *ACT Civil and Administrative Tribunal Act 2008*. As disclosures of personal information under section 53L are authorised by current law, any limitation that such

³ UN Doc CCPR/C/50/D/488/1992.

⁴ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s41(1)(a).

⁵ *Information Privacy Act 2014* (ACT) schedule 1, part 1.3.

a disclosure places on the right to privacy under the *Human Rights Act 2004* is justified.

Rights in criminal proceedings

The Bill includes two strict liability offences which may be seen as engaging the presumption of innocence until proven guilty, outlined in section 22 (1) of the *Human Rights Act 2004*. Section 22 (1) states that ‘everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law’. The offences apply to sellers of units in unit-titled retirement villages who fail to make ‘initial required documents’ and ‘later required documents’ available for prospective buyers to inspect in accordance with the required timeframes outlined in section 10A of the *Civil Law (Sale of Residential Property) Act 2003*.

Chapter 2 of the *Criminal Code 2002* applies to the strict liability offences set out within Clause 6 of the Bill.⁶ Chapter 2 outlines the general principles of criminal responsibility – including burdens of proof, defences, and fault elements – and defines terms used for offences to which the Criminal Code applies, such as conduct, intention, recklessness and strict liability.

Strict liability offences are more likely to arise in a regulatory context where reasons such as consumer protection and public safety, and the public interest in ensuring that regulatory schemes are complied with, require the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, by virtue of their professional involvement in a regulated field, to know what the requirements of the law are, the element of fault can reasonably be excluded.

Purchasing a residential property is likely to be one of the highest value investments that a person will make in their lifetime. Sales of residential properties are a regulated activity within the scope of the decision in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154, with such regulation designed to provide increased levels of consumer protection for all parties to the commercial transaction. Under the current legislative scheme, a strict liability offence applies where sellers of residential properties fail to have available all of the required documents about a property for inspection by a prospective buyer (or an agent of the prospective buyer) at all reasonable times when an offer to buy the property may be made to the seller. Provision of these due diligence documents, as a part of the contract of sale, supports a prospective buyer to make an informed decision about the purchase of their property.

Clause 6 of the Bill differentiates between ‘initial required documents’ and ‘later required documents’ which are necessary for the seller to provide as a part of the formation of a contract of sale. The Bill provides that it will be an offence for a seller of a unit in a unit-titled retirement village to fail to provide all initial required

⁶ *Criminal Code 2002* (ACT) s7.

documents for inspection by a prospective buyer (or buyer's agent) at all reasonable times where an offer to buy the property may be made to the seller. It is also an offence for the seller of a unit in a unit-titled retirement village to fail to provide all later required documents for inspection by a prospective buyer within the timeframes outlined within section 10A of the Act. The Bill extends the current regulatory framework to prioritise consumer protection for the sale of all types of residential properties within the ACT. Offences contained within clause 6 of the Bill are reflective of the offence construction and penalty unit levels within the current legislative scheme. Failure to apply strict liability offences to the sale of units in unit-titled retirement villages, would create additional vulnerabilities for older consumers.

Clause 6 of the Bill safeguards the right to a presumption of innocence until proven guilty by exempting certain conduct from the application of the strict liability offences. The offences will not apply in circumstances where a person has engaged a lawyer to prepare the proposed contract of sale for their property and the lawyer did not give the seller all the required documents to which the offence relates, and the seller believed on reasonable grounds that they had received all of the relevant required documents and had made those relevant documents available for inspection in accordance with section 10A of the Act. This exemption recognises that individuals should not be subjected to an assumption of guilt, and to subsequent criminal penalties, where they have been knowingly misled by legal practitioners who, as actors in a regulated field are expected to 'comply with and maintain a certain minimum standard of care for consumers'.⁷

The strict liability offences have been included within the Bill to provide an appropriate deterrent to non-compliance with regulatory measures which support consumer protection. These offences are an important element in ensuring the intent of the *Civil Law (Sale of Residential Property) Act 2003* which seeks to provide increased levels of consumer protection for both buyers and sellers of residential property.⁸

In developing the legislation, an assessment was made as to whether any less restrictive means were available to achieve the purpose of the Bill. No less restrictive means are available, as the offences are required to achieve the Government's intent of ensuring consumers are protected at all stages of the sales process for a residential property. As a strict liability offence exists within the current regulatory framework, a failure to apply strict liability offences to section 10A would increase the vulnerability of older consumers and represent a clear oversight in the administration of this consumer protection regime.

While the inclusion of strict liability limits the range of defences that may be available, a number of offences remain open to an accused, depending on the particular facts of each case. Section 23 of the Criminal Code provides that the

⁷ *R v Wholesale Travel Group Inc* (1991) 3 SCR 14 at 93.

⁸ Explanatory Statement, *Civil Law (Sale of Residential Property) Bill 2003 (ACT)* 2.

mistake of fact defence can be applied to strict liability offences, and that other defences may be available to an accused for a strict liability offence.

Any limitation the Bill places on the right to a presumption of innocence until proven guilty is reasonable and proportionate, noting the public interest benefit in ensuring that the consumer protection framework regulated by the *Civil Law (Sale of Residential Property) Act 2003* applies to all sales of residential property in the ACT.

Regulatory impact analysis

The Bill will not impose an appreciable cost on the community.

Climate change impacts

This Bill has no identified climate change impacts.

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Retirement Villages Legislation Amendment Bill 2018*.

Clause 2 Commencement

This clause provides that the Act will commence on a day nominated by the Minister in a commencement notice, within 12 months of the Act's notification day. The clause displaces section 79 of the *Legislation Act 2001* which automatically commences a postponed law within 6 months of the Act's notification day.

Clause 3 Legislation amended

This clause identifies that the legislation amended by the Bill is the:

- *Civil Law (Sale of Residential Property) Act 2003*
- *Human Rights Commission Act 2005*
- *Retirement Villages Act 2012*
- *Retirement Villages Regulation 2013*
- *Unit Titles (Management) Act 2011*

Clause 4 Definitions for pt 2

Section 7, new definition of units plan

This clause inserts a definition of 'units plan' to the *Civil Law (Sale of Residential Property) Act 2003* which provides a cross reference to section 7 of the *Unit Titles Act 2001*.

This definition is relevant to sections 9 and 10A of the *Civil Law (Sale of Residential Property) Act 2003* as, if a sale of a residential property relates to a unit, sellers must ensure that a copy of the registered units plan is available for inspection by a prospective buyer (or an agent of a prospective buyer) at all reasonable times when an offer to buy the property may be made to the seller.

Clause 5 Section 10 (1)

This clause provides that section 10 of the *Civil Law (Sale of Residential Property) Act 2003* will not apply to the sale of a unit in a retirement village that is subject to a units plan. These sales will be managed under Clause 6 of the Bill which differentiates between the due-diligence documents which must be provided at the initial stage of the development of a contract of sale of an affected unit, and which documents may be provided at a later stage.

Clause 6 New section 10A

Clause 6 creates a new framework which will manage the sales of units in retirement villages that are subject to units plans by allowing sellers to make available certain due diligence documents, required as a part of the contract of sale, to prospective buyers for inspection at a later stage in the property purchasing process.

This clause differentiates between *initial required documents* and *later required documents*. This requires sellers to ensure that prospective buyers can access a meaningful contract of sale, to allow them to conduct due diligence, at all stages of the property purchasing process. Classification of a document as a *later required document* may be due to the increased cost and difficulty for sellers in obtaining certain due-diligence documents.

For the purpose of section 10A of the *Civil Law (Sale of Residential Property) Act 2003* the reports classified as *initial required documents* or *later required documents* are the same reports which have been defined in section 9. Any difference between the descriptions of the reports in sections 9 and 10A relates only to the timeframe that the report was provided in and does not indicate a need to provide multiple or additional copies of the same report as a part of the contract of sale process.

Timeframes for the provision of these reports, particularly those relating to the pest inspection reports, the building and compliance inspection reports and the unit titled certificate have been amended to align with the later provision of documents under section 10A.

This clause further differentiates between the *initial required documents* and *later required documents* which must be provided for the sale of class A and class B units. Section 18 of the *Unit Titles Act 2001* defines class A units by reference to the floors, walls and ceilings of the building, and defines class B units by reference to boundaries which are unlimited in height. Sellers of class A units have been excluded from the requirement to provide certain required documents by virtue of their unit's classification. This aligns with the current requirements for required documents outlined in section 9 of the *Civil Law (Sale of Residential Property) Act 2003*.

Clause 6 includes two strict liability offences which are designed to prioritise consumer protection and reflect the current legislative regime. These offences apply to sellers of units in unit titled retirement villages who fail to make the *initial required documents* and *later required documents* required for the unit, available for inspection by a prospective buyer in the timeframes provided for within section 10A of the Act. Offences against this provision carry a maximum of ten penalty units and are strict liability offences. Applying these strict liability offences to the sales of units in unit titled retirement villages will ensure that the current consumer protection model, enforceable under section 10 of the *Civil Law (Sale of Residential Property) Act 2003*, applies to all sales of residential property in the ACT following passage of this legislation.

Clause 6 provides safeguards for sellers of units in unit-titled retirement villages by providing that the strict liability offences will not apply where the seller has been misled by a legal practitioner. This includes circumstances where the seller engaged a lawyer to prepare the contract of sale for the property, the lawyer did not give the seller all the relevant required documents for the sale of the property and the seller

believed on reasonable grounds that they had received all of the relevant required documents. In these circumstances, a seller who had made all of the relevant required that they had been given by the lawyer available for inspection by a prospective buyer in accordance with section 10A of the Act would not be liable for the offence. This provides additional protections for sellers against limitations of their right to a presumption of innocence until proven guilty under section 22 (1) of the *Human Rights Act 2004*.

Clause 7 Certain conditions to be included in contract

Section 11 of the *Civil Law (Sale of Residential Property) Act 2003* provides that a contract of sale for a property must include certain conditions. The purpose of this clause is to provide that a contract of sale for a property must include the initial required documents and the later required documents for the sale form part of the contract, where the property being sold is a unit in a unit-titled retirement village. This is a consequential amendment of clause 6 of the Bill, and has been made to ensure that buyers of all types of property in the ACT have the same levels of protection within the *Civil Law (Sale of Residential Property) Act 2003*.

Clause 8 Buyer to reimburse seller for costs of certain reports **Section 18 (1)**

This clause balances the burden of costs of conducting due diligence inquiries for a property by allowing a seller to recoup the cost of obtaining building and compliance inspection reports and pest inspection reports. This is a consequential amendment of clause 6 and ensures that a seller's right to reimbursement of certain reports will continue to apply to sales of units in unit-titled retirement villages.

Clause 9 Compensation to buyer for false report etc **Section 19 (1) (b)**

This clause provides a right to compensation for a buyer who has incurred losses or expenses as a result of receiving an energy efficiency rating statement, a building and compliance inspection report or a pest inspection report, as defined in section 9 and section 10A of the *Civil Law (Sale of Residential Property) Act 2003*, which was false or misleading in material particular or was prepared without the exercise of reasonable care and skill. The buyer may seek compensation from the person who prepared the report.

This is a consequential amendment of clause 6 and ensures that a buyer's right to compensation will continue to apply to sales of units in unit-titled retirement villages.

Clause 10 When may someone complain about a service for older people?

Section 41 (b) (iii)

This clause amends section 41 of the *Human Rights Commission Act 2005* to provide that a person can make a complaint to the Human Rights Commission (the Commission) about a service for older people, where the provider of the service has acted inconsistently with the *Retirement Villages Act 2012*. If a retirement village complaint is made to the Commission, the complainant will be able to access an enforceable conciliation process.

Clause 11 Commission's obligation to be prompt and efficient

New section 45(2)(da)

Section 45 of the *Human Rights Commission Act 2005*, provides that where a complaint is managed by the Commission, it must be dealt with promptly and efficiently.

This clause provides that if an older person service complaint is made about a service provided by an operator of a retirement village under the *Retirement Villages Act 2012*, and the Commission decides not to refer the complaint for conciliation, the Commission must advise the complainant in writing that the complaint will not be referred for conciliation and provide a 'retirement village referral statement' with this advice.

New section 88A of the *Human Rights Commission Act 2005* provides guidance about the contents of retirement village referral statements. This is discussed in relation to Clause 16 of the Bill.

Clause 12 Division 4.2B

Certain older people service complaints to ACAT

This clause inserts new division 4.2B, consisting of new sections 53F – 53O, into the *Human Rights Commission Act 2005*. Division 4.2B provides access to an enforceable conciliation process which can be used to manage complaints about services provided to older persons in accordance with the *Retirement Villages Act 2012*. This conciliation process is similar to the Commission's current processes for managing discrimination complaints under division 4.2A of the *Human Rights Commission Act 2005*.

New sections 53F and 53G provide that the conciliation process available under division 4.2B is only accessible where an older person service complaint relates to a service provided by the operator of a retirement village under the *Retirement Villages Act 2012*. These sections define the terms 'person complained about' and 'retirement village complaint' for the purpose of division 4.2B. A 'retirement village complaint' is defined as an older person service complaint that relates to a service provided by the operator of a retirement village under the *Retirement Villages Act 2012*.

Where a retirement village complaint is made to the Commission and the Commission decides not to refer the complaint for a conciliation process under division 4.2B they must provide a written statement to the complainant reflecting this advice and advising the complainant that they can seek to have the Commission refer the complaint to the ACAT within 60 days, or, after the 60 day period has elapsed, they may individually apply to the ACAT for the complaint to be heard (a retirement village referral statement). If these circumstances apply, the Commission must include a retirement village referral statement in its final report about the complaint. New section 53H provides that where the above circumstances apply, and the complainant requires the Commission to refer to the complaint to the ACAT within 60 days of receiving the statement, the Commission must refer the complaint to the ACAT and advise the parties to the matter, in writing, that the referral has been made. If the Commission refers a complaint to the ACAT under s53H, it must close the complaint in accordance with section 78 of the *Human Rights Commission Act 2005*.

If a complainant fails to have the complaint referred to the ACAT within 60 days of receiving a retirement village referral statement, new section 53I provides that they may make an application to the ACAT to have the complaint heard. The ACAT may grant this application where it is satisfied upon reasonable grounds that exceptional circumstances prevented the complainant from meeting the timeframes for referrals to the ACAT prescribed in section 53H. If the ACAT grants an application under section 53I, the complaint is considered to have been referred to the ACAT.

New sections 53J – 53N outline procedural processes to be followed where a complaint is referred to the ACAT. Section 53J provides that the Commission may apply to the ACAT to the complaint referred. If this application is granted, the parties to the complaint will be the complainant, the person complained about and the Commission. Section 53K provides that the ACAT has, and may exercise, the same jurisdiction as the Supreme Court, and all the powers and authority of the Supreme Court, in proceedings where relief is sought in relation to a contract between an operator of a retirement village and a resident of the village. Further details of ACAT's jurisdiction to manage retirement village disputes can be found in section 177 of the *Retirement Villages Act 2012*.

Section 53L provides guidance about the documents which the Commission can provide to the ACAT when it refers a complaint to the ACAT under division 4.2B. Certain documents, such as communications providing evidence of settlement negotiations, will be inadmissible before the ACAT in accordance with the *Evidence Act 2011*. Section 131(2) of the *Evidence Act 2011* provides further guidance about circumstances which would allow communications about settlement negotiations to be admitted before the ACAT. Consideration of this provision's impact on the right to privacy and reputation under the *Human Rights Act 2004* has been addressed above in the human rights analysis of this explanatory statement.

If a complaint is referred to the ACAT and it is satisfied that the person complained about has engaged in an unlawful act, new section 53M provides that the ACAT may make one or more orders in accordance with section 181 of the *Retirement Villages Act 2012*. In making these orders, new section 53N provides that division 4.2B does not place limitations on the amount of money that the ACAT may order be paid as a result of the order being made.

New section 53O provides that complainants are not required to make an attempt to resolve a complaint prior to making a retirement villages complaint under the *Human Rights Commission Act 2005*. This recognises that the conciliation process offered under division 4.2B is an optional process which can be utilised by residents of retirement villages at a time that is right for them.

Clause 13 Conciliated agreements

Section 62 (3) (b) and (4)

The purpose of this clause is to provide that if a retirement village complaint is resolved by conciliation processes conducted by the Commission, the agreement reached is deemed enforceable as if it were an order of the ACAT. This clause places an obligation on the Commission to provide a copy of the written agreement formed through the conciliation process (conciliation agreement) to the parties to the complaint and the ACAT.

Complainants may seek an order in the ACT Magistrates Court to enforce an order of the ACAT. Section 71 of the *ACT Civil and Administrative Tribunal Act 2008* provides guidance about the process to be followed to enforce orders which have been made by the ACAT. Rule 2015 of the *Court Procedures Rules 2006* provides further guidance about requirements of service before enforcement proceedings can be commenced within the ACT Magistrates Court. Upon filing in the Magistrates Court, the order is taken to be an enforceable order of the Court in which it is filed for the purposes of Part 2.18 of the *Court Procedures Rules 2006*, meaning that the Magistrates Court can make enforcement orders in the proceedings which include but are not limited to cost orders, arrest warrants and the seizure of property or goods.

Clause 14 When complaints can be closed

Section 78 (2)(d)

This clause amends the *Human Rights Commission Act 2005* to provide that the Commission must close retirement village complaints where the complaints have been referred to the ACAT.

Clause 15 New section 82A

This clause provides guidance about the contents of final reports made by the Commission, relating to retirement village complaints. All reports must include a retirement village referral statement, unless the complaint has been resolved by a conciliation process under division 4.2B. These requirements are in addition to the other requirements placed upon the Commission for a final report which are detailed within section 81 of the *Human Rights Commission Act 2005*.

Clause 16 New section 88A

This clause inserts a definition of 'retirement village referral statement' in to part 4 of the *Human Rights Commission Act 2005*. Retirement village referral statements must be provided to complainants, and included in final reports which close

complaints within the Commission, where the Commission had decided not to refer the complaint for conciliation under division 4.2B.

Retirement village referral statements must include the following:

- a statement to the effect that the Commission has closed the complaint;
- a statement advising that the complainant may ask the Commission to refer the complaint to the ACAT within 60 days of receiving this advice; and
- a statement advising that, if the 60 day period elapses, the complainant may apply to the ACAT under section 53I for the complaint to be heard.

Clause 17 Dictionary, new definitions

Clause 14 inserts relevant definitions for the purpose of the operation of division 4.2B in to the dictionary of the *Human Rights Commission Act 2005*. The terms defined are:

- operator;
- person complained about;
- retirement village complaint; and
- retirement village referral statement.

These definitions cross reference the section 7 of the *Retirement Villages Act 2012* (operator), division 4.2B of the *Human Rights Commission Act 2005* (person complained about, retirement village complaint) and part 4 of the *Human Rights Commission Act 2005* (retirement village referral statement).

Clause 18 Residents committees and organisations

Section 103 (1) and (2)

This clause amends the *Retirement Villages Act 2012* to provide that in unit-titled retirement villages, the resident's committee will be the executive committee of the owners corporation for the units plan. As the residents committee, this committee will have both the powers of a resident's committee prescribed under the *Retirement Villages Act 2012* and the powers of an executive committee under the *Unit Titles (Management) Act 2011*. This provision reduces administrative duplication for unit-titled retirement villages by supporting one committee to fill roles under both Acts.

Clause 19 New section 103 (11)

This clause inserts a definition of 'executive committee' in to section 103 of the *Retirement Villages Act 2012* which cross-references the *Unit Titles (Management) Act 2011*. This is a consequential amendment of Clause 18 of the Bill, which reduces administrative duplication for unit-titled retirement villages which are regulated by both the *Retirement Villages Act 2012* and the *Unit Titles (Management) Act 2011*.

Clause 20 Membership of residents committee

New section 104 (5)

Section 104 of the *Retirement Villages Act 2012* prescribes a three year term limit for office bearers of residents committees within retirement villages. This clause provides that the three year term limit for office bearers of residents committees does not apply for unit titled retirement villages.

This is a consequential amendment of Clause 18 of the Bill which provides that the executive committee of an owners corporation will be the residents committee of the unit-titled retirement village in accordance with the *Retirement Villages Act 2012*. The *Unit Titles (Management) Act 2011* does not prescribe a time limit for terms of service for members of an executive committee of an owners corporation.

Clause 21 Meetings of residents

Section 112 (3)

Under the *Retirement Villages Act 2012*, an operator of a retirement village must seek the consent of residents to a range of matters relating to the management of their village – including the proposed annual budget and any amendments to village rules. Residents provide consent by voting.

Voting procedures within villages have, historically, been managed differently. Under the *Fair Trading (Retirement Villages Industry) Code of Practice 1999*, votes were allocated on a unit-by-unit basis which provided for one vote per residential premises, regardless of the number of people living there. The *Retirement Villages Act 2012* allocates votes on a person-by-person basis, meaning that where two or more residents occupy the same residential premises, each of them may vote.

This clause provides that, as a default position, votes within retirement villages will be allocated on a unit-by-unit basis, restoring the voting procedure which operated under the former Code of Practice. The purpose of this provision is to promote equity for sole-occupiers of units in retirement villages and address concerns that sole-occupiers were limited in their ability to participate in village decision-making in villages where recurrent charges were charged to residents on a unit-by-unit basis.

In these circumstances, key stakeholders reported that sole-occupiers were making the same levels of financial contributions to the life of the retirement village than other residents, but received a voting right which was disproportionate to their financial contribution.

This clause allows villages to restore a voting procedure of ‘one vote per person’ in their individual community by passing a special resolution which consents to each resident of the same residential premises having a separate vote on a matter detailed within section 112 (1) of the *Retirement Villages Act 2012*. The special resolution will last for the duration of the meeting. This caters for a range of circumstances, including where operators charge recurrent charges to residents on an individual basis. Key stakeholders have identified that it would be inequitable, in these circumstances, for votes to be allocated to residents via a one vote per unit voting model.

Under schedule 1 of the *Retirement Villages Act 2012*, consent for a special resolution will be carried if it is passed by at least 75 per cent of the number of residents of the retirement village who participate in the ballot. Quorum requirements for special resolutions are outlined within schedule 4 of the *Retirement Villages Regulation 2013*.

Clause 22 Section 112(4)

This clause amends section 112(4) of the *Retirement Villages Act 2012* to provide that meetings of residents required under that legislation may be held simultaneously with a meeting that the residents are required to hold or participate in under other legislation.

The purpose of this clause is to reduce administrative duplication for unit-titled retirement villages, by reducing the amount of meetings they are required to hold to manage the operational requirements of the retirement village. Allowing residents to hold meetings at the same time under both the *Retirement Villages Act 2012* and the *Unit Titles (Management) Act 2011* reduces a regulatory burden on residents, as they will no longer need to attend as many meetings where duplicate information is provided.

This clause responds to concerns raised during the 2015-16 Review of the *Retirement Villages Act 2012* about procedural and administrative duplication which was disadvantaging residents of unit-titled retirement villages.

Clause 23 Proxies

Section 116 (3), note

Section 116 of the *Retirement Villages Act 2012* relates to the appointment of proxies. Residents may appoint a proxy to vote on their behalf as a part of decision-making processes within their village.

This clause omits a note which identifies that an appointment as a proxy made under the *Unit Titles (Management) Act* will not be effective for the purpose of appointment as a proxy under the *Retirement Villages Act 2012*. This is a consequential amendment of Clause 24, which provides that section 116 of the *Retirement Villages Act 2012* does not apply to unit-titled retirement villages.

Clause 24 New section 116 (7)

This clause provides that section 116 of the *Retirement Villages Act 2012* does not apply to unit-titled retirement village. The appointment of proxies in unit-titled retirement villages is managed in accordance with Schedule 3, section 3.26 of the *Unit Titles (Management) Act 2011*.

Clause 25 Certain limitations on proxies

New section 117 (4)

Section 117 of the *Retirement Villages Act 2012* places limitations on the appointments of proxies. This clause provides that the limitations on proxies under the *Retirement Villages Act 2012* do not apply to residents of a unit-titled retirement

village. The appointment of proxies in unit-titled retirement villages is managed in accordance with Schedule 3, section 3.26 of the *Unit Titles (Management) Act 2011*.

Clause 26 Definitions – div 7.2

Section 135 (1), definition of capital item, paragraph (a) (iii)

Capital maintenance and capital replacement were major issues in the 2015-16 review of the *Retirement Villages Act 2012*. Operators and residents of retirement villages raised concerns about the practical application of these terms, and sought additional clarity about their meaning. Definitions of capital maintenance and capital replacement are significant, as, under section 141 of the *Retirement Villages Act 2012*, residents of retirement villages fund capital maintenance of a capital item for which the operator of a retirement village is responsible for through their recurrent charges or the village's capital works fund, while capital replacement of a capital item is the financial responsibility of the operator.

This clause amends the definition of capital item to clarify that any part of a building or structure in the village, including any part of a building or structure in a community area, amenity area, service area or access area of the village is classified as a capital item for which the operator is responsible for under the *Retirement Villages Act 2012*. Other capital items include a building or structure in the village, plants, machinery or equipment used in the village's infrastructure, and any other item that is prescribed as a capital item by regulation.

Clause 27 Definitions – div 7.2

Section 135 (1), definition of capital replacement, paragraph (b)

This clause provides that the action of capital replacement does not include capital replacement, or replacing a part of a capital item. This clause responds to concerns raised in public consultation that maintenance-specific items such as screws, nuts and bolts, have been charged differently to operators and residents across the ACT.

For the purpose of this explanatory statement maintenance specific items have been defined by reference to the normal and everyday meaning of those terms. The Macquarie Dictionary defines maintenance as 'the act of maintaining, or the state of being maintained'.⁹ Maintenance may also involve 'the periodic repair of defects that are the result of normal wear and tear in operation'.¹⁰ Maintain is defined as 'to keep in existence or continuance', 'to preserve' or 'to retain'.¹¹ Read together with section 135 of the *Retirement Villages Act 2012*, maintenance specific items are items which are necessary to preserve an item, or to keep an item 'in existence or continuance'. Maintenance-specific items may be used in works relating to repairing, maintaining or replacing a capital item.

This clause provides that the replacement of a part of an item, such as a maintenance-specific item, does not constitute capital replacement unless the replacement of a part of a capital item constitutes a substantial improvement,

⁹ Macquarie Dictionary, *Macquarie Dictionary – Sixth Edition*, (2013: Macquarie Dictionary Publishers, Sydney) 891.

¹⁰ *W Thomas & Co Pty Ltd v Federal Commissioner of Taxation* (1965) 115 CLR 58, 72 per Windeyer J.

¹¹ Macquarie Dictionary, above n9, 891.

addition or alteration to that item. This means that, in most circumstances, the replacement of a part of a capital item will be the financial responsibility of the residents. However, depending on the facts of the case, there will be circumstances where the replacement of a part of a capital item is the financial responsibility of the operator. By recognising that the individual circumstances of a case will be relevant to determining whether an action is 'capital replacement' or 'capital maintenance' this amendment is consistent with current case law.¹²

Substantial improvements may be made to a capital item in a range of circumstances, including where replacing a part of that item restores its ability to function. This example was considered in the case of *Sakkara Investment Holding Pty Ltd v Residents Committee The Landings*, with the NSW Tribunal finding that in their view, the replacement of 'a power amplifier in a hi-fi system (made up of separate components) would be a capital replacement, even if the replacement component was exactly the same as the discarded component...noting that the hi-fi system would not work without a power amplifier...The item is properly characterised as an item of capital, not merely a component within a system'.¹³

This Bill introduces guideline making powers which will allow the Minister to issue detailed guidelines which address the distinction between capital replacement and capital replacement, as discussed below. These guidelines, in conjunction with the new definitions of *capital item* and *capital replacement* considered in this Bill will consider factual scenarios at a highly detailed level, providing the clarification on this issue that was requested in public consultation and the RVA Review.

Clause 28 New section 136A

This clause provides the Minister with the power to make guidelines which relate to the operation of division 7.2 of the *Retirement Villages Act 2012*. These guidelines may relate to the classification of, including the distinction between, capital maintenance and capital replacement. Guidelines made in accordance with section 136A will be a notifiable instrument.

Guidelines issued under section 136A will provide detailed guidance about specific examples of capital maintenance and replacement. The purpose of these guidelines is to support residents and operators to classify specific actions as capital replacement or capital maintenance.

Clause 29 Amendment of recurrent charges

Section 148 (2)(a)

Section 148 of the *Retirement Villages Act 2012* provides that a village contract may amend the recurrent charges payable by residence not more than once in a 12 month period. This clause provides that recurrent charges may be amended not

¹² *Dickins v Southern Cross Care (NSW & ACT) (Retirement Villages)* (2016) ACAT 13; *Pines Management (ACT) Pty Ltd v Eastick and Ors (Retirement Villages)* (2017) ACAT 109; *Alloura Waters Retirement Villages Residents Committee v Living Choice Australia Pty Ltd* (2014) NSWCATCD 68; *Carey Bay Retirement Village Residents Committee v Anglican Care (Retirement Villages)* (2011) NSWCTTT 497; *Smith v Sakkara Investment Holding Pty Ltd* (2011) CTTT 162; *Sakkara Investment Holding Pty Ltd v Residents Committee The Landings* (2017) NSWCATCD 29.

¹³ (2017) NSWCATCD 29, 326.

more than once in a financial year. The purpose of this clause is to align timing requirements and provide consistency throughout the *Retirement Villages Act 2012*.

Clause 30 Recurrent charges amended otherwise than by fixed formula

Section 150 (2)

The purpose of this clause is to align timeframes relating to budgets within the *Retirement Villages Act 2012*. This clause streamlines the timeframes required of operators to provide notice of an amendment to recurrent charges made otherwise than by fixed formula, to align with the time periods required for notice of the proposed annual budget under section 159 of the *Retirement Villages Act 2012*.

This clause reduces an administrative burden on operators and residents of retirement villages.

Clause 31 Proposed annual budget

New section 159 (3A)

This clause provides that operators of unit-titled retirement villages must provide a copy of the owners corporation's general fund budget to the residents of the retirement village at the same time that they provide a copy of the proposed annual budget for the village to the residents under section 159 of the *Retirement Villages Act 2012*.

The purpose of this clause is to align budgetary timeframes for unit-titled retirement villages. This reduces an administrative burden on operators and residents of unit-titled retirement villages.

Clause 32 Residents' consent to spending

New section 162 (8A)

This clause provides that operators of unit-titled retirement villages must seek the consent of residents to a proposed annual budget in accordance with section 162 of the *Retirement Villages Act 2012*. These requirements are additional to the requirements placed upon operators to seek the residents' approval to the terms of a general fund budget under section 75 of the *Unit Titles (Management) Act 2011*.

The purpose of this clause is to streamline budgetary processes for residents and operators of unit-titled retirement villages.

Clause 33 Section 175

This clause is a consequential amendment of Clause 12 of this Bill, which introduces an enforceable conciliation process for older person service complaints under the *Retirement Villages Act 2012* in to the *Human Rights Commission Act 2005*.

The purpose of this clause is to clarify that this conciliation process, available through the Commission, is an optional process that residents of retirement villages can choose to engage in at a time which is right for them. This clause provides that

residents are not required to attempt to resolve a dispute before making a complaint to the Commission.

This clause highlights that dispute resolution services are available for older persons within retirement villages to engage with at a time that is right for them.

Clause 34 Disputes between operator and resident – notice to dispute committee

Section 175B, note

This clause provides that complaints about services for older persons, including retirement village complaints made under division 4.2B of the *Human Rights Commission Act 2005* can be managed by the Disability and Community Services Commissioner within the Commission. This clause provides supplementary guidance which notes that conciliation agreements relating to retirement village complaints made under division 4.2B of the *Human Rights Commission Act 2005* will be enforceable as if they were an order of the ACAT.

Clause 35 Informal resolution of dispute

Section 178 (2), new note

The purpose of this clause is to provide additional guidance about the enforceable conciliation process which will be available to residents of retirement villages under division 4.2B of the *Human Rights Commission Act 2005*. This clause provides guidance that a resident is not required to use the dispute resolution procedures outlined within Part 8 of the *Retirement Villages Act 2012* before they are able to make a complaint to the Commission.

Clause 36 Special resolution – notice

Schedule 4, new section 4.8 (2A)

This clause amends Schedule 4, section 4.8 of the *Retirement Villages Regulation 2013*. Schedule 4, section 4.8 sets out the notice requirements if special resolutions are being put to a meeting of residents of the village.

Schedule 4, section 4.8 provides that if an action or measure requiring a special resolution is put to residents of the village, residents of the village must receive at least 21 days written notice.

This clause adds new section 4.8 (2A) which applies to special resolutions which are put for the purpose of restoring the voting for the meeting to one vote per person. This clause provides that if the special resolution is for a vote on s 112(3A) of the Act, at least 14 days written notice must be given to each resident of the village. This aligns the timeframe with the notice requirement for the annual management meeting in section 108 of the Retirement Villages Act, reducing the administrative burden for villages where residents wish to change the voting arrangements.

Clause 37 Special resolution – quorum

Schedule 4, section 4.10 (2)

This clause updates the quorum requirements for a special resolution detailed within the *Retirement Villages Regulation 2013* to include the guidance about the requirements for a quorum for unit-titled retirement villages. The purpose of this provision is to streamline the administrative requirements for unit-titled retirement villages, and provide recognition within the retirement villages legislation of the voting requirements for unit-titled villages. This clause responds to concerns raised in public consultation about the difficulties unit-titled retirement villages were experiencing reaching a quorum of voters to pass a special resolution.

Clause 38 General fund – budget

New section 75 (5)

The purpose of this clause is to align budgetary approval timeframes for unit-titled retirement villages. Unit-titled retirement villages may approve their proposed annual budget in accordance with section 159 of the *Retirement Villages Act 2012* which provides that an operator of a retirement village must give each resident a copy of the proposed annual budget for each financial year for the village on a day which is at least 30 days before the beginning of the financial year to which the budget relates, agreed to by the operator and residents, or if no day is agreed, at least 60 days before the beginning of the financial year to which the budget relates, or at a time which is prescribed by regulation.

Within 30 days of receiving a request to consent to a proposed annual budget (or an amended budget) the residents must meet, consider and vote on the budget, and then must advise the operator that they consent or do not consent to the proposed annual budget. A proposed annual budget will become an approved annual budget where the residents of the village consent to the spending as set out in the proposed budget, or the ACAT orders that the operator of the village is spending as itemised in the proposed annual budget. The timeframes outlined within section 159 of the *Retirement Villages Act 2012* allow a retirement village to approve their annual budget for a financial year, prior to the commencement of that financial year.

Clause 31 of this Bill requires that an operator of a unit-titled retirement village provide a copy of the general fund budget, required under section 75 of the *Unit Titles (Management) Act 2011* to the residents of a retirement village within the timeframe required for the provision of the proposed annual budget under the *Retirement Villages Act 2012* described above. Under section 75 (1) of the *Unit Titles (Management) Act 2011*, residents of unit-titled retirement villages can only approve their general fund budgets at an annual general meeting of the owners corporation which is held in the same financial year that the budget applies to. This creates an administrative burden for residents of retirement villages, who are unable to approve the terms of their proposed annual budget and their general fund budget at the same time.

This clause introduces an exemption to an owners corporation's general requirement to approve a general fund budget at an annual general meeting held in the same

financial year to which the budget relates, which will only apply to unit-titled retirement villages. Under this exemption, an owners corporation of a unit-titled retirement village will not be required to obtain approval for a general fund budget in the timeframe required under section 75 (1) if the budget has been provided to residents with the proposed annual budget under the *Retirement Villages Act 2012*, and the residents have consented to the spending as stated in the proposed budget in accordance with section 162 of the *Retirement Villages Act 2012*.

This is a consequential amendment of Clause 31 of the Bill and will streamline budgetary approval processes for unit-titled retirement villages.

Clause 39 Owners corporation may amend rules

New section 108 (2A)

The purpose of this clause is to provide the residents and operators of unit-titled retirement villages with the capacity to develop a single set of village rules for the purposes of the *Retirement Villages Act 2012* and the *Unit Titles (Management) Act 2011*. Under this provision, an owners corporation of a unit-titled retirement village may, by special resolution, amend its rules to make provision for a range of issues which are specific to retirement villages such as persons other than residents or employees of the village living in the village, the use and operation of services or facilities and security within the village. This is consistent with the subject matter of village rules provided for within section 78 of the *Retirement Villages Act 2012* and section 17 of the *Retirement Villages Regulation 2013*.

Clause 40 Notice of general meetings

Schedule 3, new section 3.6 (3)

The purpose of this clause is to streamline administrative requirements for unit-titled retirement villages. Schedule 3 of the *Unit Titles (Management) Act 2011* provides that notice of a general meeting must be given to each member of the corporation, and each mortgagee's representative (if any). It also provides a timeframe for giving notice of the general meeting.

This clause provides that, where the notice is for the annual general meeting of a unit-titled retirement village, the executive committee must give the notice in the timeframes provided for by section 159 (1) of the *Retirement Villages Act 2012* relating to the provision of a proposed annual budget. This simplifies administrative processes for unit-titled retirement villages.

Clause 41 Requirements for notice of general meetings

Schedule 3, new section 3.7 (3)(c)

The purpose of this clause is to streamline the administrative requirements for unit-titled retirement villages. This clause is a consequential amendment of Clause 38 and provides that where a notice of a general meeting is for an annual general meeting of a unit-titled retirement village, the notice must be accompanied by the proposed annual budget and the statements required under section 159 of the *Retirement Villages Act 2012*. This ensures that residents of retirement villages are

being provided with all relevant information to support their decision-making processes, at the same time, and reduces the need for residents and owners corporations to hold additional meetings where duplicate information is provided.

Clause 42 Quorum at a general meeting – Owners Corporation with 3 or more members

Schedule 3, section 3.9 (1) (a)

This clause is a consequential amendment of clause 36, which updates the requirements for quorum in unit-titled retirement villages. The clause responds to concerns raised during public consultation about the difficulties unit-titled retirement villages were experiencing in reaching quorum of voters.

Clause 43 Dictionary – new definition of retirement village

This clause inserts a new definition of retirement village in to the dictionary of the *Unit Titles (Management) Act 2011*. This is a consequential amendment of changes made by the Bill which streamline the administrative requirements of unit-titled retirement villages under the *Retirement Villages Act 2012* and the *Unit Titles (Management) Act 2011*. The definition of retirement village cross references section 10 of the *Retirement Villages Act 2012*.