# Draft Retirement Villages Regulations 2009 - ACS Submission

Thank you for the opportunity to respond to the draft Retirement Villages Regulations 2009 which was released 7 October 2009.

Aged & Community Services Association of NSW & ACT (ACS) is the leading peak organisation for not-for-profit retirement living, community and residential aged care providers. ACS represents 300 organisations in NSW and the ACT providing over 1,700 services to more than 100,000 people. ACS member providers range in size from large multi-site organisations to small rural and regional stand alone providers. Over 400 retirement villages are represented across NSW and the ACT.

All ACS members were invited to forward their comments. This submission is therefore a compilation from various discussions and comments received from ACS Housing and Retirement Living Advisory Committee, the ACS Board and various ACS members.

**GENERAL COMMENTS**

Retirement villages are fully resident-funded. In terms of the financial arrangements, what is at argument here is how the resident pays – i.e. from the transparency of the regular annual budget or by way of increased deferred management fees or ingoing contributions. The current situation is that the present cohort of residents has contracts which specify the amount of deferred maintenance to which an operator has access and, except by renegotiating the agreements, those amounts remain fixed for the duration of the residency. There are therefore no additional funds available to cope with proposed changes which are in effect retrospective.

The proposed changes in the Regulation break the commitment by the Minister to the three peak organisations to reinstate the status quo on capital vs maintenance when the 50% split proposal was dropped.

We recommend an implementation date in early 2010 such as 1 February 2010. This would allow time for operators to develop documentation and processes in accordance with the Amendment Act and Regulations.

**SPECIFIC COMMENTS** (note that an alternative position for item 1 is given on page 5)

| Item | Clause | Impact / Recommendation |
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| 1.* | Clause 4 Capital Maintenance | This definition is neither easily understood nor would be easily implemented. It needs to be redrafted. The definition should not list matters as being included in or excluded from the definition and should not refer to percentages. A |

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| | | conceptual description is preferred of what is intended by the term 'capital maintenance' and that the definition should provide as much certainty as possible.<br><br>**Recommend: Replace Clause 4 with the following:**<br>**4. Capital maintenance**<br>**For purposes of the definition of capital maintenance in section 4(1) of the Act:**<br><br>**(a) the following are prescribed as being capital maintenance:**<br><br>**(i) work done to remedy or make good defects in, damage to, or deterioration of or to prevent damage to, or deterioration of an item of capital and which contemplates the continued existence of an item of capital, or**<br><br>**(ii) replacement of:**<br><br>**(A) non-fixed items of capital, or**<br><br>**(B) a component of an item of capital which is necessary for the proper operation of an item of capital, and**<br><br>**(b) the following are prescribed as not being capital maintenance:**<br><br>**(i) work done to substantially improve an item of capital beyond its original condition, or**<br><br>**(ii) subject to clause 4(a)(ii), work done to maintain or repair an item of capital where it would be more cost effective to replace the item of capital.** |
| 2. | Clause 9<br><br>Definition of resident | "Definition of 'resident' has opened up the difficult question of de facto relationships and mere consensual occupation in villages. It also opens up the issue of interrogating the terms of a departed residents' will including the judgment call of what is meant by 'directly or indirectly' and therefore potential disputes of having to remove 'occupants' where beneficiaries are seeking to claim a return of an ingoing contribution.<br><br>Invariably, relationships that arise in a village will not be properly or even at all addressed in residents' wills.<br><br>The effect of the amendments has the potential to bring liabilities to persons who are not named as parties to the contract." *(Gadens, 30 September 2009)*<br><br>**Recommend: Remove this definition.** |
| 3. | Clause 20<br><br>Contingency of 4% or CPI, whichever is greater | Budget allocations for contingencies should be limited to zero, or perhaps a nominal amount such as $100, but that this should not apply to increases in statutory charges, such as council rates, utilities and certain other 'pass throughs' where prices generally increase annually, but the amount of the increase is usually not known until after the budget has been determined. It was suggested that the QLD legislation could provide some guidance. Section 107 of the QLD Act allows for residents to pay for increases in rates, taxes and statutory charges, award wages and insurance premiums.<br><br>**Recommendation: Limit the amount a proposed annual budget may allocate for contingencies to $100** |

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| 4. | New clause for new section 120(C)<br><br>Making good of deficit – excluded items | This item follows on from item 3. Note that if the Minister accepts only a limited number of concessions here, then there must be a higher level of contingency in clause 20.<br><br>**Recommendation: Enable a deficit to be funded from recurrent charges to the extent that it is comprised solely of increases in statutory charges including council rates, utilities costs including electricity, water and gas costs, award wages, public liability and workers compensation insurance premiums, and the maintenance component of urgent works during the year as stipulated in Section 92(2) of the Act. Prescribe a regulation under the new section 120C(3) to enable a deficit that results from the specified cost increases to be able to be funded from recurrent charges.** |
| 5. | Clause 26(a)<br><br>Fee for membership | Membership of professional associations benefits residents.<br><br>Membership provides residents and the wider community with greater confidence that the village is built on a responsible and ethical foundation, with commitment to continuous improvement and best practice. This in turn enhances the value of residents' units and boosts their marketability.<br><br>**Recommend: Remove clause 26(a)** |
| 6. | Clause 17 (2)<br><br>Clause 26 (e) (f)<br><br>Matters not to be financed by way of recurrent charges (clause 26) and included in budget (clause 17) | It is administratively unworkable to set up systems to measure, record, and allocate management and admin costs to individual villages. Common functions such as HR, IT and OHS work for good governance and security of assets and benefit all. The cost of additional accounting measures would most likely work against residents.<br><br>See attached case studies.<br><br>Management/administration fees and head office costs could be combined and be able to be funded from recurrent charges as far as they relate to the operation of the village, and that the budget include a breakdown of the goods and services to which they relate.<br><br>**Recommendation:**<br><br>• **Remove the words "actual" and "and the cost of each of those goods or services" in clause 17(2);**<br><br>• **Combine clauses 26(e) and 26(f) by removing clause 26(f) and removing two occurrences of the word "directly" in clause 26(e).** |
| 7. | Clause 51<br><br>Access to residential premises in village | The requirement to give the resident 2 days notice to install a smoke alarm is not safe as it doesn't allow the operator to meet its obligations under the Building Code of Australia and the Environmental Planning and Assessment Act 2000 Regulation's Annual Fire Safety Statements. These stipulate that the operator must provide these items to ensure safety of residents which the two days notice does not provide for.<br><br>**Recommend: Remove "but only if 2 days notice has been given to the resident".** |
| 8. | Section 203(4) Exempt specified village contracts or class of contract from any provision of the Act | No regulation has been prescribed in the draft.<br><br>The Amendment Act has replaced Division 2 and Division 3 of the current Act. This included Section 94 which had allowed operators to fund capital replacement and depreciation, non-fixed items, an item of capital that the village does not already possess under certain circumstances through recurrent charges under certain circumstances. This particularly assisted small villages with little or no in-going contributions. The Amendment Act threatens the financial viability of these villages. It is not uncommon particularly in regional |

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| | | NSW for small villages to have been set up as social need housing with contracts on $10,000 or $20,000 or no ingoing contributions.<br><br>See attached case study.<br><br>**Recommend: Add regulation clause to exempt village contracts with $70,000 or less ingoing contributions from Sections 120B (dispersal of surpluses) and Section 97(3)(c) (depreciation not to be funded from recurrent charges)** (and possibly other Sections of the Amendment Act after further consideration). |

**COMMENTS – MINOR ISSUES**

| Item | Clause | Impact / Recommendation |
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| 9. | Clauses 22, 23 and 24<br><br>"14 point bold Arial font" | This is restrictive.<br><br>An operator may want to increase the font size above 14 points to accommodate people who cannot see easily and maybe use a different font type. If this occurred the operator would be in breach of the Regulations.<br><br>**Recommend: Remove "14 point bold Arial font" where it appears.** |
| 10. | Clause 23<br><br>Notice of variation—no fixed formula and not exceeding CPI | Drafting errors.<br><br>"For the purposes of section 105A (4) (c) of the Act, a notice of variation of recurrent charges given under section 106" – 106 should be **"105A".**<br><br>(c)(i) "this variation does not require your consent as it is less than the increase in the CPI" - should be **"not exceeding".** |
| 11. | All Clauses with $ amounts | **Index to CPI increase.** |

Yours sincerely,

Jill Pretty, CEO
Aged & Community Services Association NSW & ACT
4 November 2009

* **ALTERNATE POSITION FOR ITEM 1**

This alternative is recommended if NSW Fair Trading does not accept Item 1 above.

| Item | Clause | Impact / Recommendation |
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| 1. | Clause 4<br><br>Capital Maintenance | **<u>Clause 4(1)(a)(iv) - no more than 10% of the cost of the whole item:</u>**<br>This clause would result in increased costs to both residents and operators.<br>**Recommend: Remove clause 4(1)(a)(iv)**<br><br>**<u>Clause 4(1)(b)(i) painting external surfaces as not capital maintenance:</u>**<br>For a property to hold value, external painting is equally as important as internal painting. And there may be disputes around definition - are hallways outside premises internal or external?<br><br>Under the current Act, there have been a couple of CTTT decisions that recognises painting as a necessary act of maintenance. The Tribunal has had regard to the legislation and also the Taxation Schedules (in relation to depreciation) and decided that nothing supports the argument that the external painting falls within the categories of 'capital replacement' or depreciation of fixed items.<br><br>*(a)Hunt v Kurrajong Villages P/L [2006] NSWCTT 125(3 March 2006)*<br>*(b)Arton Retirement Villages(Newcastle)P/L t/a Jenny McLeod RV v Allen, Twaddle & Vass [2001] NSWRT 77 (6 April 2001)*<br>*(c)Vandepeer v Glenaeon Retirement Village P/L [2003] NSWSTTT 312 ( 24 March 2003)*<br><br>**Recommend: Remove clause 4(1)(b)(i)**<br><br>**<u>Clause 4(1)(b)(ii) repair item no more than twice in 12 months:</u>**<br>An item could reasonably be repaired more than twice in a 12 month period. For example, a car could reasonably be repaired more than twice in a 12 month period. An air conditioner may well have two or more different faults occur at different times during the year and require capital maintenance. An elevator for warranty reasons could require more than two services per year. If this was the case then the DMF would need to increase to help offset the costs associated with these items. Costs then to some degree become hidden and the residents are still indirectly paying for repairs.<br><br>**Recommend: Remove clause 4(1)(b)(ii)**<br><br>**<u>Clause 4(1)(b)(iii) work required by law:</u>**<br>Most if not all things done in a village are done to comply with one law or another. This is putting further restriction on the operator and will mean the DMF will need to increase to recover the cost. How do you define what is meant to be done? You could say everything we do in maintenance is of OHS& IM reason. So this will mean everything that requires maintenance will be excluded as capital maintenance?<br><br>**Recommend: Remove clause 4(1)(b)(iii)**<br><br>**<u>Clause 4(2)(a)(b)(c)(d) maintenance that increases value or life:</u>**<br>Almost any maintenance will increase an item's value, expected life, working order or advantage.<br><br>**Recommend: Remove clauses 4(2)(a), (b), (c), (d)** |

**Clause 17 (2) and Clause 26 (e) (f)**
**Case Study of large organisation**

A large church based not-for-profit charity has a revenue of well over $100 million. It operates two large retirement villages that together contribute less than 4% of total revenue. Activities (including these villages) are extensively supported by a broad Head Office infrastructure that covers all significant functional areas (including but not limited to accounting and billing, payroll, human resources, workplace safety, IT, legal, procurement, treasury, taxation compliance, maintenance and building issues).

For many years all of the organisation's activities including Village budgets have been charged an administration fee of 4%. For one village with over 200 residents this allocation totals $62,000 in the 09/10 budget on operating revenue of $1.5 million.

The proposed requirement is that the operator will have to show "the actual cost of goods and services" (Section 17) - to which administration fees relate. The question is how will we be able to quantify the real or actual value of the services provided by HO – the cost not only of wages, but associated office accommodation and services costs – for each HO functional department ? The other related requirement is that the operator can only recover head office costs "directly associated with providing services to village residents" (section 26 (e)). By their nature the HO services provided to the village are often indirect, but no less valuable to the village because of that.

Because of this Head Office support, the Village Manager's role (and remuneration package) is significantly less than for an independent free-standing village of comparable size that does not have HO support. As well, the benefit of belonging to a much larger parent organisation gives access to significant cost benefits on many purchased items (information technology, motor vehicles, insurances, food, and maintenance contracts, being just some examples). These are also indirect but real benefits to the village.

There is no doubt that if our villages are required in the future to independently provide the services currently provided out of HO, the cost to residents will be significantly greater, and if reasonable HO costs are not recoverable by way of recurrent charges, that may be the way such villages will have to operate in the future.

**Clause 17 (2) and Clause 26 (e) (f) Section 203(4)**
**Case Study of small organisation**

We are a small provider in a regional centre NSW with 44 independent living units. In recent years we have been issuing new agreements as residential tenancy agreements in order to exit from the provisions of retirement village legislation. However, we still have 22 units under retirement village contracts and in many cases some of the occupants have only provided very small or no ingoing contributions. Of those under retirement village contracts there are 11 who have paid an ingoing contribution and 11 who have paid no ingoing contribution. The average ingoing contribution value for these 22 units is $16,431.

The fact that our units could not attract an ingoing contribution was one of the reasons to transfer to residential tenancy agreements. This would also ultimately allow the organisation to phase out occupancy and consider future alternatives for redevelopment or sale of the property once all occupants were on residential tenancy agreements.

Despite this the provisions of the new legislation it will still apply to those residents with retirement village contracts and the impact is adverse for the management of the facility and for the residents. Each issue is discussed below:

- Section 26 (e) and (f) and 17 (2) impose compliance burdens and effects the financial viability of our facility. Under previous regulations the formula and method for determining administration fees could be determined and attached by way of a note and the power was with residents to vote on this matter. Now if detailed costs are to be provided then there are compliance issues associated for working this out. The approach of the new regulations seems to be that detailed time and motion studies will be required to cost the 'services directly related' and this approach implies that if it is not directly related then it must not be an expense associated with recurrent charges. For those operators who have access to large ingoing contributions then this can be accommodated by increased contributions to cover head office costs that do not directly relate to the service or cannot be detailed to sufficiently to comply with requirements of 17(2). In our case we are unfairly burdened by this as we do not have access to a large income stream form ingoing contributions. This income stream is declining all the time and ultimately means that other services within the organisation such as funding from capital funds from residential aged care must meet head office costs. This is not a usual commercial practice for profit or not for profit organisations.

  The only recommendation I have for this is that there should be no change in this regard as residents have the power to vote on the budget and either accept or reject the budget. It should be sufficient that deficits are borne by the operator particularly where the operator is not for profit and the goal has been to provide housing to meet a social need.

- Section 94 (1) of the legislation provided that capital replacement could be funded from recurrent charges where no ingoing contribution was paid. From my reading of the amendments Division 2 Section 92 – 99 there is no longer any provision to do this. While there is provision to fund capital maintenance and create a long term fund this does not cover capital replacement. Given that many of our residents did not pay ingoing contributions then this means that we will be unable to carry out capital replacement unless it is subsidised from those few residents who paid a contribution. This is not sufficient to manage all capital replacement in an old facility.