



**RETIREMENT VILLAGES RESIDENTS ASSOCIATION INC**

**RESPONSE TO NSW DEPARTMENT OF CUSTOMER SERVICE'S  
CONSULTATION PAPER ON  
ASSET MANAGEMENT PLANS**

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## **About RVRA**

The Retirement Village Residents Association NSW is the only organisation specifically dedicated to representing the interests of residents in retirement villages in the State of NSW. It has more than 6000 members across NSW.

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## Executive Summary

RVRA supports the proposal to implement legislation to ensure greater transparency and accountability around the purchasing of assets and subsequent maintenance and replacement costs for items of capital in retirement villages in NSW. However, we believe that the current proposed provisions fall short of providing residents with sufficient insight into the treatment of such costs. We also have reservations about the \$1,000 floor level. Most electrical items provided in residences are below this. It needs to be recognised that the leases on those residences are fixed for long periods and there needs to be recognition of the technical and functional obsolescence of those electrical items.

***We address the three principal questions posed against these reservations and in the context of the overall proposed legislation.***

We support the requirement to maintain a 10 - year asset management plan by operators and the 3 year forward view of estimates of planned expenditure.

This support is subject to the following comments:

- 1. Residents should be given the right to contest provisions of the plan and any major changes to forward estimates with a need for their consent.*
- 2. The plan should be a rolling 10 - year plan for each village of the operator and take into account specific circumstances of the location and other characteristics of each village (for example seaside vs country locations).*
- 3. It should include provisions for further development in the village – where relevant.*
- 4. The plan should be prepared or certified by a Quantity Surveyor independent of the Operator and reviewed every (3) years by a QS – (costs to be shared between residents and operator?)*
- 5. The plan must include estimated provisions/outlook for the need for major infrastructure repairs or replacement over the longer life of such assets – for example roads, stormwater drains, sewer/septic etc. It needs to be remembered that not all villages tap into a town sewerage treatment system - some country villages have separate sewerage treatment plants. There needs to be some definition as to what constitutes repair and replacement of these assets. Replacement of roads, drainage etc should not be for residents' costs. Minor repairs (say up to a cumulative cap to be determined) could be for residents' cost.*
- 6. Items of capital still within a defect liability period should still be part of the asset management plan when ownership is transferred to the operator.*
- 7. The plan should feed into a separate and ring-fenced Capital Works Fund allocation within the village budget provided annually to residents for approval – it should be separate from the Operating Expenses budget –and should need specific, separate approval from residents in all circumstances.*
- 8. The forward-looking estimates for the two years following the budgeted period needs to be only for information and the hope of avoiding “bill shock” and in no way deemed to be an implicit approval of such expenditure by residents.*
- 9. There should not be permitted “budget line” swapping which would permit capital works funding budget to be used for other items of expenditure without specific, separate, resident approval.*

10. *The regulations need to be clear as to the requirement of an increase of 25% in maintenance costs being communicated to residents. Is it in respect of each item of capital equipment or the total amount of all items of capital? In either case there needs to be actual consultation with residents and a need for specific, separate, approval by them.*

**RVRA would support**

- a. legislation making it obligatory for Operators to maintain a Capital Works Fund – however called- to ensure clarity about residents’ contributions to capital works maintenance and/or repair.*
- b. greater involvement of NSW Fair Trading in mediating and/or rendering decisions on disputes between residents and operators over the plan and its contents.*
- c. Using the Commissioner of Taxation’s effective life recommendations to determine life of assets.*
- d. A legislative stipulation for the replacement of assets – to be the earlier of within one year of its effective life or when 75% of accumulated costs of maintenance/repairs being reached.  
A specific review trigger, which will ensure timely decision-making is essential.*

## Introduction

We welcome the opportunity to respond to the NSW Department of Customer Service's consultation paper on asset management plans for retirement villages, published September 2020. We regard the intended legislation as a further welcome step in the enhancement of protection of residents' rights in these villages.

Our comments are meant to seek more certainty and clarity around the proposed initiative for asset management plans. The main thrust is to ensure that there is a greater say by residents in both the formulation of the plan and its ongoing review.

We would note that the proposed legislation is very much aimed at those villages and operators having capital works funds which are funded from recurrent charges. This is not necessarily the case in all villages – some villages have “long term maintenance expenses” or similar, included as a line item in the operating budget for the year. We will refer to this later in our submission.

### The three questions

Our responses to the three principal questions posed in the Consultation Paper are not to be read in isolation but against the background of the further comments made in this response. That said, our responses are as follows:

#### 1. Notification of 25% increase in costs

As regards the requirement for the operator to give notice to the residents of an increase of 25% or more in the maintenance costs (and we assume that this increase relates to an item of capital and not to the cumulative cost of all items- proposed Reg 26F needs to be altered to make this clearer) ***we believe that such an increase should be the subject of consultation and specific, separate, consent from residents.*** We assume that increases in costs less than 25% would be caught in any case by the three-year forward-looking estimates (but, for the avoidance of doubt, the operator should also be obliged to inform residents of an increase of 10% or more in costs in any one year which would cause the total costs to exceed the budgeted total costs including the 10% provision for urgent repairs (s.98(2)(d)).

#### 2. Three year forward estimates

***We believe the forward-looking estimates for the 2 years after the budgeted period is a welcome and appropriate method*** to ensure residents are well-informed and to avoid “bill shock”. However, this estimate should only be for information – and not lead to being an implied consent to future years expenditure.

#### 3. Test for replacement

***We consider that the test for replacement should be -***

***“The earlier to occur of the item being within one year of its effective life (unless otherwise agreed between residents and operator, “effective life” being determined by reference to the ATO Commissioner’s determination of effective life for that item of capital) or when the***

***accumulated costs of maintenance/repair of the item exceed 75% of the original cost of that item. The rate of depreciation of any asset should be based on the prime cost method of depreciation unless otherwise agreed between residents and operator.”***

*A specific review trigger, which will ensure timely decision-making, is essential.*

*We would note that the proposed Reg 26D(4)(a) requires the “proposed replacement date” – this should line up with Reg 26E(2)(g) as to the effective life, or any difference explained to residents.*

## **Detailed Comments**

Resident input into the plan.

We believe that there needs to be more than a presentation of the plan to residents of a village. There needs to be actual consultation and “buy-in” from residents.

***Residents should have the right to contest provisions of the plan and any major changes to forward estimates.***

Even if full consultation is conducted on the plan, the annual budget for capital works should always be presented to residents for a specific, separate, vote on approval or not.

The best way to convince residents of the solidity of the plan and estimates, in our view, is to have the ***original plan developed by a Quantity Surveyor independent of the Operator.*** This would provide residents with two levels of comfort. Firstly, that the plan is objectively applicable to that village and, secondly, that the estimated costs of maintenance, repair etc. are realistic. Whilst we believe that the larger operators may have the competence and capacity to develop a plan, we are not convinced that this applies to all operators. The requirement should therefore be applicable across the board.

Likewise, we believe that residents will be wishing to ensure that the plan is “a living plan” and that expenditures forecast are as realistic as possible. ***In that regard we believe that there needs to be a regular re-certification of the plan by an independent QS.*** If this was adopted the residents should also be required to meet half the cost of subsequent reviews - but not for the original establishment of the plan.

### Notification of 25% increase in costs

With regard to the requirement for the operator to give notice to the residents of an increase of 25% or more in the maintenance costs (and we assume that this increase relates to an item of capital and not to the cumulative cost of all items - proposed Reg 26F to make this clearer) ***we believe that such an increase should be the subject of consultation and specific, separate, consent from residents.*** We assume that increases in costs less than 25% would be caught in any case by the three-year forward-looking estimates (but, for the avoidance of doubt, the operator should also be obliged to inform residents of an increase of 10% or more in costs in any one year which would cause the total costs to exceed the budgeted total costs including the 10% provision for urgent repairs (s.98(2)(d)).

## The Plan

We agree in principle with the idea of establishing a 10-year plan for asset management maintenance and repairs for retirement villages. This was a major recommendation in the Greiner Review and the proposed legislation is very welcome.

The plan should relate to **each separate village** and not be established on the basis of a group of villages. This is necessary in our view because each village has its own identity and characteristics – which may very well impact on the timing and/or nature of maintenance. For example, standard versus sub-standard construction; corrosion of metal and timber being likely to be significantly different between a coastal location and a rural location – as a couple of examples.

**The 10-year plan should be a living plan.** In other words, it should be a rolling plan extending out for a rolling 10-year period and not just relate to a situation of an established village and a particular point in time. (The proposed Reg 26B seems to define the plan as a plan for a fixed term of 10 years). There should be included provisions for future development if envisaged and how such costs will impact existing and future residents.

**We do agree that the Commissioner of Taxations principles of “effective life” are a reasonable basis for establishing the plan.** At least it is a common ground formula. We also believe that the prime cost method of depreciation should be applicable in the absence of another agreement between operator and residents.

As regards the floor for including a capital item in the plan we would prefer it to be **\$500** – bearing in mind that there will likely be pooling of items of such value in any village register (stoves etc.) which should ease the formulaic burden on operator accounting.

**In addition, whilst outside the scope or period of the asset management plan, there needs to be a separate identification by operators (and communicated to residents) of longer term expenditures required for major infrastructure items – such as roads, paths, driveways etc..**

In order for a fair and impartial impost on residents there needs to be a longer term plan for such repairs etc. in order that costs are borne by all residents – both existing and future – in the form of an appropriate sinking fund.

**As previously mentioned, the plan should be prepared (or certified) by a Quantity Surveyor independent of the operator at the cost of the operator. Furthermore, the plan should be reviewed regularly (say, every three years) by a QS – the costs to be shared equally between operator and residents.**

## Budgets

The Capital Works annual budget should be **completely separate** from the operating budget for each village – and require specific, separate, resident approval in all circumstances – even if no planned recurrent charges increase from one year to the next and irrespective of CPI factors.

There should be no scope for swapping budget line items so that the capital works budget may be used for operating expenses. In the event that a capital works budget is not fully utilised in any one year the surplus should be required to be placed in a ***ring-fenced capital works fund***. ***In this respect s. 112(3)(b) of the Act should be used to avoid any doubt about this.***

As such a fund could be controlled by the operator, there should be;

- *Regular accounting of the use of the fund*
- *Assurance that the operator is solvent – directors’ declaration of solvency, or*
- *Control of the fund being shared between operator and residents committee, or*
- *Establishment of a trust account structure*

**NOTE: RVRA will be promoting the use of Trust accounts and/or fidelity funds in the future to ensure residents’ monies are protected in the event of insolvency, fraud etc.**

**Three year forward estimates.**

***We believe the forward-looking estimates for the 2 years after the budgeted period is a welcome and appropriate method*** to ensure residents are well-informed and to avoid “bill shock”.

However, this estimate should only be for information – and not lead to being an implied consent to future years expenditure.

Replacement of capital items

Under the proposed Regulations, the operator has the right to define the “effective life” of an item of capital. We believe an a priori reference to the ATO Commissioner’s determination of effective life is more appropriate. We are in favour of a formulaic approach as described in the consultation paper. However, we are also cognisant that limits set could in certain circumstances operate against the interests of the residents.

***Therefore, we consider that the test for replacement should be -***

***“The earlier to occur of the item being within one year of its effective life (unless otherwise agreed between residents and operator, “effective life’ being determined by reference to the ATO Commissioner’s determination of effective life for that item of capital) or when the accumulated costs of maintenance/repair of the item exceed 75% of the original cost of that item. The rate of depreciation of any asset should be based on the prime cost method of depreciation unless otherwise agreed between residents and operator.”***

***A specific review trigger, which will ensure timely decision-making, is essential.***

We would note that the proposed Reg 26D(4)(a) requires the “proposed replacement date” – this should line up with Reg 26E(2)(g) as to the effective life, or any difference explained to residents.



## Further Comments

1. The RVRA believes that there should be a statutory obligation on operators to account separately for a capital works fund for each village – such fund to be available for consultation and comment of residents.
2. We would appreciate a greater involvement of NSW Fair Trading in mediating and resolving disputes between residents and operators under legislation relating to retirement villages in NSW. The cost to the resident in always required to go to NCAT in disputes is prohibitive financially, emotionally, and physically for elderly residents (average age of residents in retirement villages is 81 years). Given that NSW Fair Trading is responsible for the legislation, then it should be interpreting the legislation at first instance for the purpose of dispute resolution. NCAT should be only used as an appellate court.
3. The RVRA is concerned that the depth of consultation on the issue of asset management plans to date has been inadequate and requires further consideration before the necessary regulation is promulgated. The issues are complex and should not, in the association's view, be rushed. The amendments (to enable the regulation to be made) to the Retirement Villages Act 1999 should be allowed to proceed to the Parliament, but more consultation is need before the Draft Regulation is finalised.