Retirement Villages Amendment Bill.

Second Reading

The Hon. IAN MACDONALD (Minister for Agriculture and Fisheries) [8.50 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate the second reading speech in *Hansard*.

Leave granted.

This bill introduces reforms to the regulation of the retirement village industry in New South Wales.

Retirement villages play an important role in the housing choices for our seniors. They enable retirees to live with people of a similar age group in a safe community environment, enjoying a range of facilities and activities. There are more than 700 retirement villages currently operating in New South Wales, accommodating around 40,000 residents. That's approximately 3 per cent of the New South Wales aged population.

This figure is expected to climb as the baby boomers reach retirement age and are attracted to the lifestyle offered by retirement villages. It is important the legislation keeps pace with developments in the industry and continues to provide adequate protection for consumers and clarity and certainty for village operators.

The Government introduced the Retirement Villages Act in 1999 following extensive consultation and a review of the regulatory environment at the time, which consisted mainly of an industry code of practice. The Act represented the most significant reform to the regulation of the industry since retirement villages first began in New South Wales in the 1950s.

Certain reforms to update and improve the Act are now being proposed for introduction. The main purpose of the bill is to address a number of legislative interpretations in recent judicial decisions and to bring forward the statutory review of the Act.

I turn now to the specific detail of the bill.

The bill aims to bring forward the statutory review of the Act. Currently, under section 208, a review of the Act is required to be undertaken five years from the date of assent. The Act was assented to on 3 December 1999, meaning that the review would not be scheduled at this stage until the first half of 2005.

Since becoming Minister I have met with a wide range of interest groups involved with the retirement village industry. Many are happy that the Act was introduced and the substantial improvements to the industry which have occurred since 1999. However, changes are now required to provide greater protection to residents and those contemplating moving into a retirement village. It is argued that there are certain unfair and inequitable practices within the industry that should be further addressed. The complexity of contracts, the standard of village management, excessive fee increases and who should be responsible for the cost of repairs are some of the more frequent issues raised by consumers.

All those involved in the industry agree that it would be beneficial for the review to be brought forward. Bringing the review forward would provide residents, village operators and other interested parties the opportunity to comment on the legislation as soon as possible.

The Government intends to amend the Act to bring forward the review to commence upon assent being given to this package of amendments. A report on the outcome of the review is to be tabled within 12 months from this date.

Another measure contained in the bill is designed to overcome a potential anomaly with the legislation. Within the retirement village industry there is a small number of villages that operate on a leasehold basis, where residents enter into a lease for 99 years or 199 years which is registered on the title of the property. In some villages, when the resident dies or vacates, the existing lease is surrendered and a new lease entered into with the incoming resident. However, at other villages the contract gives the resident the right to assign the remaining portion of the lease to the new resident.

A problem has been identified with those residents with assignable leases. Under the current legislation when a resident dies or moves out the contract of the resident is terminated. The concern is that termination of the contract may nullify assignment rights as it is argued that there is nothing left to assign.

Usually, under the terms of such a contract, payment to the outgoing resident or to their estate is dependent on the assignment of the lease. If the lease cannot be assigned there is a potential for residents in these situations to lose significant amounts of money. Termination of the contract also means that the resident could have their interest removed from the title of the property. This could jeopardise the important protection afforded by the registration of the resident's interest.

The Government is proposing to amend the legislation to clarify this issue. The amendment will make it clear that a resident who has a lease with a right to assign can continue to exercise that right. Such a contract will no longer be terminated on death or vacation of a residence but continue on until the end of the original lease. Only the outgoing resident's right to occupy the premises will terminate upon the assignment of the lease. The existing powers of the Consumer, Trader and Tenancy Tribunal to terminate an assignable lease in certain situations will not be affected by this amendment.

The amendment does not give any greater rights to residents in respect to assignment. It does not mean that other residents who have contracts under which they have no right to assign will be able to do so.
This proposal has relevance to only a relatively small sector of the industry. In a practical sense leases have continued to be assigned since the Act began but there has been doubt as to the legality of this practice. The amendment the Government is now proposing will remove any uncertainty and restore the original intention of the parties when entering into an assignable lease.

The Government is also seeking to clarify the rights of residents who own their premises within the village to let or sublet following a decision of the Supreme Court. The court decision may jeopardise this important right.

Under the Act, residents who are owners are given the right to let or sublet the premises on a temporary basis for up to three years. Units in retirement villages can be difficult to sell. Being able to rent out the unit allows the former resident, or their estate, to receive rent to help pay ongoing costs until the unit is sold. This measure assists in expanding the supply of suitable and affordable rental housing for seniors.

However, in the Supreme Court an operator challenged the right of an estate to sublet the premises on the basis that it had not delivered up vacant possession and handed the keys back to the operator. The estate argued that returning the keys would remove its ability to provide possession to their tenant. They needed the keys in order to sublet. The court found in favour of the operator.

It is important to note that the court itself, in making the decision, commented that it had come to the conclusion with reluctance, as the interpretation contended for by the defendants was one that more generally accords with the policy and intent of the legislation.

The Government intends to amend the Act to restore the original intent of the provision. The bill will make it clear that a resident, a former resident or the estate of a deceased resident can let or sublet without first having to hand back possession to the operator.

The amendment will change the definition of "permanently vacated" to ensure that all residents who are owners under the Act permanently vacate upon the death of the resident or when they move out. Delivering up possession to the operator and handing back the keys will no longer be required in these circumstances.

This will ensure that residents who are owners, and the estates of such residents, will continue to be able to exercise their intended right to let or sublet the premises.

The bill addresses another issue raised by consumer groups following another judicial decision. It relates to the circumstances in which an operator may seek the consent of residents to amend the statement of approved expenditure, commonly known as the budget, agreed upon before the start of each financial year at each village.

Under the current Act an amendment may only be sought if unforeseen requirements for expenditure arise. This was meant to give operators some leeway if unique or exceptional circumstances arose which could not have been reasonably foreseen when the expenditure statement was being put together. For example, if the award rates for village staff change unexpectedly there may be insufficient funds in the wages budget.

An overly broad definition was applied in the tribunal as to what constitutes unforeseen circumstances. The tribunal found that if an individual operator simply underestimated the cost of certain items or forgot about the need for expenditure in certain areas, an amendment to the expenditure statement could be approved by the tribunal against the wishes of a resident. This was even if a prudent operator would have been reasonably expected to foresee the expenditure need. Some of the 'unforeseen' expenditure related to stockpiling parts, pay increases, extra stationery, accountancy fees and additional painting costs. The case was further compounded by the fact that the operator in question did not even seek the consent of residents to the changes first. They just spent the extra money, which created a larger budget deficit and sought the approval of the tribunal once the year was over. This is not how it is meant to be. The current legislative provisions were designed to provide residents with transparency and accountability and to curb the inclination of some operators to overspend on discretionary items.

The Government proposes to amend the legislation to restore the original intention of the Act of an accountable process. The bill will ensure that the consent of residents is sought for any proposed variation in an approved expenditure statement. If the residents agree with the need for the change then it can be implemented. If the residents do not consent then the operator will be required to either accept the decision or appeal to the tribunal. In considering such an application the tribunal will be able to overrule the decision of the residents only if it is satisfied that there is an urgent need for the extra expenditure and that it was not reasonably foreseeable.

The bill will also address a degree of uncertainty and confusion as to which residents are 'owners'. The Act distinguishes between residents who are owners and those who are non-owners in a number of key areas. Caps apply on how long ongoing charges can be levied on a non-owner and the timing of refund payments. Residents who are owners have the right to set the asking price and appoint a selling agent of their choosing.

It is important that the line between non-owners and owners be clear and unambiguous. To be entirely accurate such a determination would require a detailed examination of the provisions of an individual resident's contract by a legal practitioner. This is a costly and time-consuming exercise which most residents do not undertake. They often accept the view of the operator as to which category they fall into, which may not be correct. A resident who mistakenly acts as a non-owner misses out on setting the asking price and appointing an outside agent. Likewise, a resident who mistakenly acts as an owner may have their refund unnecessarily delayed by many months.

Most residents of retirement villages have a simple licence or rental agreement, where the operator retains ownership of all the village property. Outgoing residents of these villages commonly get back only the amount of money they paid upon entry, less certain fees and charges and without any interest. Regardless of how long they reside in the village the outgoing residents receive little or none of any capital gains. There is no justification to classify such residents as owners. The bill will remove the current definition of 'owner' in section 150 (1) and replace it with a new one. The new definition will clarify which residents are non-owners and which are owners. A resident will remain an owner if they have purchased the premises, such as in a strata scheme or company title village. If they have not, four conditions will need to be met before the resident will be considered to be an owner.

Firstly, the residence contract will need to be in to the form of a lease. Secondly, the lease will need to be for a period of at least 50 years or in the form of a lifetime lease. It is common within the retirement village industry for such leases to be for 99 years or 199 years. Thirdly, the lease will need to be registered on the title under the provisions of the Real Property Act 1900. Fourthly, the lease will need to contain a provision entitling the resident to 50 per cent or more of any capital gains. This percentage is a minimum standard within the leasehold sector of the industry. If any of these requirements are not met the resident will be considered not to be an owner.

The bill also proposes to reduce the period during which a resident who passes away or moves out remains liable to pay recurrent charges for personal services. 'Personal services' are those optional services provided to a resident on an individual basis and includes the provision of meals, laundry services and the cleaning of the resident's premises.

Residents of retirement villages who receive personal services commonly pay for the services as part of their overall weekly, fortnightly or monthly payment to the operator. Due to the high cost of providing personal services those who receive them pay considerably more in charges than residents of self-care units. It is not uncommon for residents receiving personal services to pay up to $2,000 per month or more. Under the current Act charges for personal services must cease no later than 28 days after the resident has died or moved out.

Many operators, particularly those in the not-for-profit sector, already have a practice of not billing residents who move out or pass away for personal services. These operators agree that charging residents, or the estates of deceased residents, for personal services which are no longer being supplied or received is an unfair and unjust practice. The Government agrees with this position.

The Government intends to amend the Act to provide that in a situation where a resident has passed away or moved out all charges for personal services cease immediately. That is, from the date the resident moves out or from when the operator is notified of the resident's death. This amendment will remove a financial burden from those residents who leave or the estates of deceased residents.

As Australia's five million baby boomers reach retirement age and are attracted to the lifestyle offered by retirement villages more people will be affected by this legislation. With an evolving industry it is important that we ensure our legislative framework continues to meet its aims of protecting some of the most vulnerable members of our community.

The Retirement Villages Amendment Bill 2004 introduces reforms to enhance protection for consumers who live in retirement villages and provide greater clarity and certainty in the legislation. The five specific changes to the Act being proposed are important reforms and will be of benefit to both operators and residents. Bringing the review forward will enable any other issues in the industry to be considered as soon as possible. I commend the bill to the House.