



WARVRA

Western Australian Retirement Villages Residents Association Inc

**A Guide
to the
WA Retirement Villages Legislation**

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Topic 1

The Legislative Framework

The first legislation to regulate retirement villages was enacted in 1992. It was very basic and has been amended many times since.

The Act included a requirement for a statutory review after 10 years which was finally commenced in 2006. The Final Report on the Statutory Review was tabled in November 2010 with 100 recommendations for amendments and matters to be considered further.

The Government felt this was too much all at once and divided the recommendations into two groups. An Amendment Act was passed in 2012 to implement some of the recommendations and a second Amendment Bill is now under preparation though not expected to be enacted for two or more years. It took nearly 4 years to complete the amendments to the Regulations consequent upon the first Amendment Act.

The Code, full title *Code of Fair Practice for Retirement Villages*, is made under the provisions of the *Fair Trading Act 2010*. The first Code was issued in 2003 and was re-enacted every 3 years until a new Code was proclaimed in 2015 following the Statutory Review.

What the Legislation Contains

1. The Retirement Villages Act

The foundation of the legislation for retirement villages is the *Retirement Villages Act 1992*.

Part 1 of the Act contains definitions of the terms used in the Act and all other legislation unless extra definitions are added.

Note: These can be important.

Part 2 of the Act deals with administration and gives powers to a Commissioner – the Commissioner for Consumer Protection, an executive officer of the Department of Mines, Industrial Relations and Safety is designated to exercise these powers.

Note: The Commissioner's powers of investigation under the Fair Trading Act apply to this Act.

Part 3 of the Act sets out the rights and obligations of residents, owners and administering bodies – including the need for a written residence contract, placing a memorial on the land restricting its use to a retirement village until no part of the land is any longer being used as a retirement village, how a residence contract is terminated and binds any further owner of the land.

Notes: s. 14A provides for Regulations that prescribe what must or must not be included in contracts – see r. 7A – 7L.

s. 23 deals with recurrent charges payable by former residents (caps) – detail is in r. 9.

s. 25 provides for Regulations prescribing matters for which payment by residents may not be required.

Part 4 of the Act deals with “resolution of disputes” and includes the powers of the State Administrative Tribunal in regard to retirement villages. [Note: The State Administrative Tribunal has taken over the powers of the former Retirement Villages Tribunal.]

Note: s.57A is important – it gives residents the right to seek, by a special resolution, an order from the State Administrative Tribunal when there is a dispute over an increase in recurrent charges or a levy has been imposed.

Part 5A introduces the concept of a “statutory manager” when necessary to protect the well-being or financial interests of residents. Introduced to deal with the situation where an Administering Body or village owner goes bankrupt.

Part 5 contains a number of miscellaneous provisions including those persons who are not to be involved in the administration of retirement villages.

2. The Retirement Villages Regulations

The Act is supplemented by the *Retirement Villages Regulations 1992* which spell out how some of the provisions of the Act are to be carried out.

These are the regulations to note

r. 4-6 Information to be given before a residence contract is entered into. Includes the obligation to provide Form 1 or Form 1A (pre-contract disclosure). The undertakings given here under the owner’s signature must be complied with.

r.7A-7H Matters that must be included in a residence contract.

r.7I-7L Matters that must **not** be included in a residence contract.

r.9 Time caps on the payment of recurrent charges by residents who have permanently vacated. Note there are four requirements and **all** must be complied with.

r.11 Matters for which Administering Body must not require payment.

3. The Retirement Villages Code

The Act is further supplemented by a code of fair practice made under the Fair Trading Act and commonly referred to as “The Code”.

The Code deals with operational matters in a retirement village and outlines responsibilities of owners and administering bodies and the rights of residents. The important sections are:

- cl. 3-5 General principles, objectives of the Code and residents’ rights – significant if the AB is overly intrusive or patronising. Note also the content of the shaded box on what “consultation” means.
- cl. 15 Special resolutions, note the content of the shaded box which summarises the situations in which a special resolution is required.
- cl. 16 Management procedures and resident consultation - note again what consultation means.
- cl. 17-20 Budgets and financial statements (for both operating and reserve funds) and procedures relating to an operating surplus.
- cl. 22 Refurbishment of residential units – aimed at preventing Administering Bodies charging departing residents for work that is an upgrade or renovation.
- cl. 23 Residence rules – are required – note rights of residents to be consulted and for Administering Body agreement to a proposal for change not to be withheld unreasonably.
- cl.24 Residents Committees are a right of the residents but no one other than a resident can be a member. Members can only hold office for a year at a time but can be re-elected ad infinitum!
- cl. 25 An incorporated association whose committee fulfils the role of Residents Committee – can be established by special resolution but its rules must conform with the Code.
- cl. 26 Residents Meetings. There are two meetings required to be called by the Administering Body (and nobody else) for the budget and accounts. Other meetings of residents may be called by the Administering Body and the Residents Committee. Always remember, that these are meetings of residents and the meeting controls its chairperson and minutes – some Administering Bodies think this their right.
- cl. 27 Proxy voting. Proxy voting is permitted and cannot be denied. It was introduced to allow for residents being absent (cruising around the world) and for families and others to represent residents who are not entirely able.
- cl. 28 Secret ballots. This has been added to the Code in great detail because

some residents feel intimidated by their neighbours or the village management. Only 2 residents need to ask for a secret ballot and it must be taken. Suggest to Residents Committees that they are prepared for a secret ballot by always having some blank ballot papers available.

cl. 29-33 Dispute resolution processes – this section is aimed at providing ways of resolving disputes simply and inexpensively. If these processes fail, then recourse to the Law always remains a possibility. However, residents should remember that they have to continue living in the village after a dispute is dealt with!

cl. 34 Termination of residence contracts can only be done by the State Administrative Tribunal. This section sets out the processes to be followed if an application for termination is made, including the right to remain in the residential premises until the Tribunal has made its determination. This is one of the major benefits to residents of being in a village operating under the *Retirement Villages Act*.

Topic 2

General Rights of Residents

It has become necessary because of the heavy handed administration of some village operators for the Code to specify the rights of residents. The important information is contained in cl. 3-5 of the Code.

These statements are general in nature and are in addition to any specific rights in other parts of the Code or Legislation (such as the rights in cl. 16 for information and consultation on management issues).

1. General Principles (cl. 3)

- Both the well-being and interests of residents **and** the rights of administering bodies must be given due consideration. One of the hard parts of advising residents is to have to tell them sometimes that they are being unreasonable.
- Residents' freedom to decide and act must be restricted as little as possible – even when we think they have got it wrong.
- Relationships outside the village must be respected – administering bodies are usually ok with this but some residents are not so thoughtful.
- Residents must be treated fairly and not be subject to abuse or exploitation.

2. Objectives of the Code (cl. 4)

The Code does not exist to give unfettered rights to residents nor to restrict the administering bodies. Rather it seeks fairness and respect of mutual rights. In particular, the Code deals with:

- sales and marketing processes and full and open disclosure.
- contracts for amenities and services in villages to contain full details of what is to be provided and what cannot be removed without consultation or agreement.
- management of the Village to involve consultation (refer again to the shaded box here including the expectation that proper reasons for decisions will be given in writing).

3. Resident's Rights (cl. 5)

- The right to privacy in the residential premises.
- The right to quiet enjoyment of the residential premises and communal amenities.
- The right to complete autonomy over a resident's own property and personal and financial affairs.

Topic 3

Basis of Tenure

Retirement villages, whether for-profit or not-for-profit, specify the tenure or legal title under which people over 55 years of age can buy into a village. The common forms of tenure are leasehold (often referred to as lease-for-life), loan-and-licence, purple title and strata title (freehold). Much less common are company title and trust deeds. Note too, that plans are underway to introduce “community title” law in Western Australia.

Leasehold

Commonly in a leasehold situation, an incoming resident pays an entry contribution close to the market value of the unit in return for which they are given a long term lease on that unit and the right to use the common facilities. They pay for the upkeep of the common facilities, which remain the property of the developer/operator, on a continuing basis through a regular fee or levy. It is important to note that a lease does not amount to ownership of the unit or part of the property but it is registered on the title deeds of the village and gives some security should the village be sold.

On termination of the lease, the outgoing resident or beneficiaries will be entitled to a lease termination payment that may be higher than the in-going amount due to capital growth. Against this sum, deferred management and/or refurbishment fees (‘exit fees’) are charged. With other charges, depending on the length of time in residence, exit fees can amount to 30 or 40%, or even more, of the resale value of the unit.

Some leases, however, are “non-participating”. This means the outgoing resident or beneficiaries will not share in the capital gain or loss. The amount of their original payment, less deferred management and/or refurbishment fees, is repaid without regard to current market value.

Another form of lease is the prepaid or periodic rental lease, by which a resident pays in advance a period of rent, usually some years of rent. If the lease is terminated before the stipulated years are up, a refund will be paid for the time remaining. Residents with this kind of lease pay a fortnightly or monthly instalment, which includes rent and a service fee. The rent is usually calculated in line with Government pensions and rent assistance payments. Entry to villages offering this form of lease may be subject to a means test.

One advantage of leasehold tenure is that there is no stamp duty. This reduces the ingoing cost to the resident. However legal fees may be higher and, as a rule, the lease cannot be used to secure a loan as the resident does not receive title to the property.

Loan-and-Licence-Lease

The loan and licence arrangement involves the organisation or developer offering the resident the right to live in a village, subject to the resident making an interest-free loan to the organisation or developer. In return, the resident is given a licence to occupy a unit within the village, together with the right to share in the use of village

facilities and amenities.

The licence comes to an end on the death of the resident or when the resident leaves the village, for example, to go to an aged care facility. When a licence comes to an end, there is usually a refund of the “loan” to the resident or beneficiary but the amount repayable is usually substantially reduced by the retention of part of the loan amount, which is sometimes called a “donation”.

This scheme does not require the payment of stamp duty. By its very nature, it does not give any share of capital gains to the departing resident or their estate.

Purple Title (Tenancy in Common)

This title is named after the colour previously used on the Certificate of Title compared to the green which was used on a freehold land title. Only a few villages in Western Australia operate under purple title.

In this format, each resident purchases an equal undivided share or “purple title” in the whole retirement village and holds a Certificate of Title for that share. This means that every co-owner would have an equal interest in every unit in the village. A resident in this type of village would enter into an agreement whereby all of the co-owners grant to the resident the right to exclusive use of one of the units in the village. In this way, each can occupy a residence to the exclusion of the other co-owners of the village. They do not own the unit but they do own a share in the whole property. Some residents in this kind of scheme do not understand that they do not own their unit. Also, as a rule, it is not possible to secure a bank loan against this form of tenure.

Strata Title Schemes

Residents with Strata Title to their units are considered to be owners and have a separate certificate of title.

In a strata title scheme, a resident owns their “lot” and may either share as tenants-in-common in the ownership of the common property (that is the community facilities and amenities) or enter into a residency deed with the village operator which grants rights to the use of common facilities and limits the rights of resale.

When the developer of a strata-titled village has sold the last unit, it is possible for them to leave and for the village residents to then manage the village, but this arrangement is uncommon. In practice, most developers have an option to re-purchase or on-sell the unit when a resident leaves.

Under the residence contract, the strata lot proprietors usually agree to the appointment of the Village developer as the strata manager and may grant the manager other powers that could be exercised by the lot proprietors in other strata title developments.

There may be some complexity for residents because such developments come under both Strata Title and Retirement Village Legislation. Its advantage lies in that the

resident has the security of owning their own unit and the title can be used, if needed, as security in raising finance.

Topic 4

What's in or not in Contracts

There have been rules about the matters to be included or not included in residence contracts contained in the Code for many years (the old Division 4 of the Code). They have now been moved to the Regulations and are r. 7A - 7L (which gives more direct powers of enforcement) pursuant to the new s. 14A of the Act. There is a fine of \$20,000 provided for under the Act if a contract does not comply with any Regulation made under s. 14A (1) of the Act.

Matters that must be included

Most of this is what you would expect – general information and requirements now referenced to an individual(s).

Some important areas to note

1. If a service or amenity or fixture or chattel is to be provided after the resident has entered into occupation, there must be a statement of the latest date by which the service or amenity or fixture or chattel is to be provided or made available or if the provision is dependent on the happening of an event, a description of the event. (7A item 13; 7B item 7; 7C item 2; 7E item 2.)
2. A communal amenity (swimming pool, bowling green) or a communal service (emergency call system, gardening) cannot be varied (including removal or change or addition) unless the residents of the village, by special resolution, consent to the variation. (7C item 4; 7E item 3.)
3. If the residence contract relates to residential premises in an existing retirement village, a warranty that the residential premises will be in a reasonable condition when the resident takes possession. (7A item 14.)
4. The residence contract must include a provision that the resident may apply to the administering body for approval to add or remove a fixture or chattel (called an “alteration”) and that the administering body must:
 - (a) not unreasonably withhold approval of the alteration;
 - (b) if not approved, give reasons in writing no later than 10 days after the decision is made. (7G item 4)
5. The residence contract must provide for the resident to arrange urgent repairs at the village's cost under certain conditions. (7H)

Matters that must NOT be included

1. A residence contract must not include a provision that requires a resident to give a power of attorney to another person except under certain very limited circumstances. (7L)

2. A residence contract must not include a provision that allows for the contract to be varied without the consent of the resident. (7J (1))
3. A residence contract must not include a provision which requires a resident to contribute to the costs of any maintenance, report, replacement or renovation of the premises that would exceed or be inconsistent with the requirements in relation to refurbishment work set out in the Code. (7K (1))
4. A residence contract must not include a provision for any exit fee based on the time of occupation to be calculated on any other basis than a pro-rata daily basis. (7K (3))

Matters that apply to all contracts whenever executed

1. The provisions relating to altering communal amenities and communal services. (7C item 4; 7E item 3).
2. The provisions relating to urgent repairs. (7H)
3. All of the provisions relating to matters which must NOT be included. (7I, 7J and 7K)

Note: it is not necessary to amend existing contracts to include these sections – the written law overrides the contract and these provisions are “deemed” to be included.

Topic 5

Pre-Contract Disclosure

Before signing a residence contract, the potential residence must be provided with the following documents by the owner:

- (a) “The information statement for prospective resident” in the prescribed form (Form 1 or Form 1A [for a short term residence contract, less than 12 months] see Schedule 1 of the Regulations) signed by the owner.
- (b) A notice of a potential resident’s rights under ss. 13 and 14 of the Act (Form 2, see Schedule 1 of the Regulations).
- (c) A copy of the residence rules.
- (d) A copy of any applicable code (current version of the Retirement Villages Code).
- (e) Any other prescribed documents.

There is a penalty of \$20,000 for not complying with s. 13(2) of the Act.

Sadly, many residents will not have read or understood their contract(s) and these documents or will have forgotten what they read as their use is infrequent. Residents will often need to be reminded to go back and read what they agreed to when signing up for village residence.

These matters will all have been dealt with prior to the resident entering the village and we will not normally be involved in giving any advice on them.

However, there may be value in referring back to Form 1 (or its more recent variation called Form 1A). We are not aware of any litigation based specifically on a failure to adhere to undertakings given in Form 1 but the information and undertakings given in Form 1 should be able to be relied upon and it is significant that the legislation requires it to be signed by the owner or the owner’s representative. Promises of the future provision of village communal amenities or services now need to be contained in the residence contract (r. 7B and 7C) whereas in some old contracts they may occur only in the Form 1 information statement.

Items in Form 1 of importance might include:

- who pays the various insurances;
- arrangements and costs for marketing or selling the premises or lease;
- communal services and communal amenities; and
- refund entitlements.

Topic 6

Disputes and appeals to the State Administrative Tribunal

An important part of the retirement villages' legislation is the inclusion of dispute resolution processes.

The Code (cl. 29-33) deals with a "retirement village dispute" which means a dispute that occurs in a retirement village between a resident and the administering body of a retirement village, or between residents of a retirement village, but does **NOT** include a dispute that may be determined by the State Administrative Tribunal under the *Retirement Villages Act 1992*.

Disputes that fall within the jurisdiction of the State Administrative Tribunal (SAT) are dealt with in ss. 42-70 of the Act.

Retirement village disputes

There are many issues that arise in a Retirement Village that might lead to a dispute and typically include:

- The management and maintenance of the village;
- Fees and charges associated with running the village;
- Refurbishment of units and communal areas;
- Provision or removal of promised facilities or services; and
- The activities of other residents.

Before attempting to provide any assistance on a matter of dispute, it is necessary to:

- Clearly establish the facts.
- Check the residence contract or the Village Scheme to confirm there has been a breach.
- Check the village rules to see if they have been breached.
- Check the Retirement Villages Act and Regulations or the Retirement Villages Code to see if any of their provisions have been breached.

Step 1

After these checks, the first step should be to approach the other person/party to the dispute and try to resolve the issue.

It is obvious that people can get very upset when they are in dispute with another party and it is important to keep calm, whether with management or with another resident, because the complainant will need to be able to continue living in the village after the dispute has been resolved.

Residents don't always feel comfortable in raising issues directly with the administering body for fear of intimidation, confrontation or retaliation. In such cases, it could be advisable to contact the Residents Committee to see if they would

take the matter up. WARVRA and the Seniors Housing Centre might also be used.

Step 2

If none of these attempts are successful, then the next step is to invoke an in-village dispute resolution process.

The Code outlines this process in Division 6, cl 29-33. There may also be a Dispute Resolution Process set out in the contract or in the residence rules. If so, it should not be inconsistent with the one in the Code.

The administering body of the village must nominate a suitable person or body to deal with the dispute and this person or body must be acceptable to all parties.

The process outlined in the Code is as follows:

- The complainant must give notice in writing to the other party stating the matters in dispute and calling on them to rectify or otherwise attempt to settle these matters.
- The other party must respond within 10 working days after service of the notice and give reasons in writing if they reject any of the dispute/complaint matters.
- The parties and the person appointed to deal with the dispute will then meet in the retirement village or in a mutually agreed venue within 20 working days of receipt of the notice or at such later agreed date.
- Prior to this meeting the parties must exchange all documents and information that might reasonably be expected to be material to the resolution of the matters in dispute.
- If the matter is resolved, you are at liberty to tell others about it but what you cannot do is repeat anything that was said by the other party, what they may or may not have done, or disclose what was contained in any of the material the other party produced without that party's agreement.
- If the matter is not resolved by this process, the administering body must advise the parties of available avenues for further review of the matters that are still in dispute.

Step 3

The Code provides that any party to a dispute may apply to the Commissioner for Consumer Protection to have a matter referred to mediation. There is a prescribed form for this application but it can only be obtained by personal application to the Consumer Protection Division of the Department of Mines, Industrial Relations and Safety. The Commissioner, under certain circumstances, may decline to accept the application. (The process for this is also set out in Division 6 of the Code.) Remember that a party to a dispute cannot be compelled to attend mediation.

It is important to note that the Commissioner will want to know if attempts have been made within the village, such as under steps 1 and 2 above, to resolve the dispute or, if not, why not, before accepting an application.

General breaches of the Code

If the matter of concern relates to the administering body breaching the Retirement Villages Act or the Code, it is appropriate to lodge a formal complaint with Consumer Protection Division of the Department of Mines, Industrial Relations and Safety. The complaint is supposed to be made on a prescribed form – it can be done online or the form can be downloaded from the Consumer Protection website:

(http://www.commerce.wa.gov.au/ConsumerProtection/Content/Consumers/Complaints/Making_a_formal_complaint.html)

However, we have found that a letter to the Commissioner for Consumer Protection is adequate.

Either process will result in either the Investigations Branch or the Compliance and Conciliation Branch of the Property Services Directorate in the Consumer Protection Division beginning an investigation which could lead to prosecution if your complaint is upheld. Such investigations can be protracted but are an inexpensive way of proceeding.

Applications to the State Administrative Tribunal

The SAT can only deal with retirement village matters where it has “jurisdiction”, that is the Act or Regulations have given the SAT power to hear and determine applications on such matters.

The most extensive area of jurisdiction of SAT in relation to retirement villages relates to the termination of residence contracts. Be aware and remind residents and others that residents cannot be put out of a village unless the SAT issues an order. Otherwise, this is not something to become involved in. (Refer to the shaded box after Code cl. 34 for a good summary of the SAT’s powers in this area).

There are some new sections of the Act that have increased the power of SAT in regard to retirement villages.

- s. 55 of the Act now permits applications to the SAT if there is a dispute as to residence contract’s compliance with the r. 7A – 7L (matters that must be or must not be included in a residence contract).
- s. 56 of the Act permits applications to the SAT if there is a dispute in regard to a service contract or a proposal to vary or cancel the terms of a service contract.
- s. 57A of the Act allows the residents of a village to determine by special resolution to make an application to the Tribunal if there is a dispute regarding an increase in recurrent charges or the imposition of a levy.

If it has the jurisdiction, the SAT may determine the matter and issue orders.

Topic 7

Residents Committees

What does the Code say about Residents Committees? Refer to cl. 24

1. It is the right of the residents to establish a Residents Committee. The Administering Body (AB) does not have to give permission.
2. The function of the Residents Committee is to consult with the AB on the day-to-day running of the village and on any issues or proposals raised by the residents. There will be some other matters relating to resident activities on which the Residents Committee will be a decision making body.
3. There can only be one Residents Committee in a village. It is helpful then to think of other resident based committees such as a Social or Finance Committee as sub-committees of the Residents Committee.
4. Only residents can be members of a Residents Committee. Any committee which has members who represent the AB cannot be called a Residents Committee.
5. Members of a Residents Committee may only be elected for a one year term. However they are eligible for re-election without any restriction of the number of years they serve on the Committee.
6. Members of the Residents Committee may be removed by a special resolution approved by the residents, not by the Committee itself.

How is a Residents Committee established? Code cl. 24(2)

The Code sets out three ways by which a Residents Committee may be established:

- (a) By an election conducted among the residents. This is probably the best way to make it clear that it is resident initiative and activity. A small group of residents needs to take the initiative to call the meeting and organise the agenda etc. Have the notice to the residents signed by the group (aim for at least 10 people). At the meeting, seek agreement to form a residents committee, agree on the number of members and arrange an election.
- (b) By an election conducted by the Administering Body (AB) on the request of at least 5 residents or 10% of the residents whichever is the greater number. This might be a useful way to go if the residents are not up to organising the process, but if that is the case, could they then run a residents committee? This situation could lead to the AB having a major influence on the residents committee which may lead to later problems.
- (c) By forming an incorporated residents association and carrying a special resolution that declares the committee of the association to also be the residents committee. See later notes about residents associations.

WARVRA has developed a number of resources to assist in the successful operation of residents committees including:

- Guidelines for Residents Committee members “How to make your Committee work”.
- Sample agendas/minutes.
- Setting up sub-committees.
- Rules or constitutions.

These can be found on the WARVRA web-site.

Topic 8

Residents Meetings

The statutory meetings

The Code identifies some meetings that are **required** to be held and which are **required** to be called by the Administering Body (AB). It is convenient to call these “the statutory meetings”.

There are two statutory meetings:

- (a) The so-called annual meeting of the residents, to be held within 5 months of the end of the financial year, “at which the business to be transacted must be limited to dealing with matters relating to the presentation of the financial statements and the auditor’s report (if any) for the retirement village.” (Code cl. 26 (1)(a)). Suggest you call this “the accounts presentation meeting” which immediately explains its purpose.
- (b) An annual budget meeting of the residents, held before the end of each financial year, “at which the business to be transacted must be limited to dealing with matters relating to the presentation of the final budget proposals for the retirement village for the next financial year.” (Code cl. 26 (1)(b)).

Two comments about these statutory meetings:

1. These are meetings of the residents. If the residents are able to do so, the meeting should be run as a special general meeting with the usual chairperson of residents meetings presiding and the usual minute taker of residents meetings responsible for taking and producing the minutes of the meeting. WARVRA will seek to have this point included in the Code at the time of the next review.
2. While the Code says of both statutory meetings that the business is limited to the accounts or budget respectively, in practice this is not usually so. For many villages, these meetings are the only occasions when the residents meet the AB and can ask questions about and discuss the management and operation of the village. This right should not be denied. WARVRA will be seeking to have these two clauses amended when next the Code is being reviewed.

Other meetings of residents (“Residents General Meetings”)

The AB must convene a general meeting of residents if requested to do so by:

- (a) the residents committee; or
- (b) a minimum of 5 residents or 10% of the residents whichever is the greater.

The AB may convene a general meeting of the residents at any time it determines.

An addition to the 2015 Code is a clear statement that the residents committee may, on its own volition and without any involvement of the AB, convene a general meeting of residents for any purpose other than the statutory purposes above. (Code cl. 26(3)). The AB cannot prevent or restrict the residents committee from doing this. (Code cl. 26(4)).

While not mentioned in the Code, normal meeting procedures would also permit a residents general meeting to determine when the next such meeting will be held or to determine a schedule for future meetings (such as last Friday of each quarter).

Note:

1. All residents meetings require 10 working days (2 weeks) notice except in special or extraordinary circumstances when a minimum of 2 days' notice is required. (Code cl. 26(6) and (7)).
2. All residents may vote at a residents general meeting unless the residence contract provides otherwise (such as only one vote per residence). (Code cl. 26(12)).
3. If more than one resident or proxy at a meeting calls for or supports a secret ballot on any matter, then the vote must be taken by a secret ballot. (Code 28(1)). Encourage chairpersons to be prepared at all times with sets of blank ballot papers.

Participation by administering bodies in residents meetings

The Code seems to assume that AB's will be present at residents meetings, usually in the form of the Village Manager. In most situations, this is actually desirable: immediate communication between residents and AB takes place and the AB hears the actual debate and decision and does not have to rely on someone's interpretation of what occurred in the meeting.

However, there are some situations in which the relationship between AB and residents is not good and other situations where residents feel that the AB is exercising too much power over residents meetings and yet other situations where residents feel that the AB may act against any resident that is critical of it so much so that residents do not feel free to speak openly.

The Code, in cl. 26(16), provides that at a meeting dealing with a special resolution the AB "may remain at the meeting unless the residents decide by a majority [50% +1] that the AB must leave the meeting."

Code cll. 26(15) and (16) seem to establish the principle that the AB may be present at a residents meeting and may be heard on any matter to be decided at a residents meeting but can be asked by the meeting to leave. We have earlier made the point that all residents meetings, whoever has called them and for whatever purpose they have been called, are ultimately **residents** meetings and that the meeting has the power to determine which non-residents can be present and when a non-resident should leave

the meeting.

Proxy Voting

A resident may, by notice in writing, appoint a proxy to vote for the resident at a residents special or general meeting. (Code cl. 27(2)). The right to use a proxy is considered an important provision for retirement villages where some residents are not so able or are absent from the village for significant periods of time.

A proxy notice

1. may be, but is not required to be, in the form provided in Appendix 2 of the Code. (Code cl. 27(6))
2. must be in writing (Code cl. 27(2)).
3. is valid for one specified meeting only. (Code cl. 27(4))
4. must be given to the chairman before any vote is taken at the meeting to which it applies (effectively before the meeting commences). (Code cl. 27(3)).

A proxy may not be a close associate of the AB unless that person is a relative of a resident.

No one can be a proxy of more than 5 voting residents.

Topic 9

Residents Associations

An “association” is “a group of people organized for a joint purpose” (Oxford Online Dictionary). To be an association does not require any more preliminary action or organisation than coming together and recognising the group as existing for some purpose (great or small).

By this definition, the residents of a village are an association immediately they come together for a joint purpose, such as electing representatives to form a “residents committee” as provided for in the Code.

However, most associations find it helpful to have an agreed structure and pre-determined procedures. These can be reduced to writing and are usually called a “constitution” or “rules”.

Some associations want to go even further and become “incorporated”, a process whereby they make use of procedures established by the government to become a legal person with liability limited to the assets of the association. See later for notes on this topic as it applies to retirement villages.

Some villages have procedures for residents meetings and residents committees included in their residence contracts or village rules. If these work satisfactorily, then there is little to be gained by changing them. Some of these, however, provide for more AB involvement in resident activities than is appropriate and the creation of resident-determined processes is justified.

Establishing a residents association

Follow a process similar to establishing a residents committee:

- Call a meeting – might be done by residents committee or AB or even a group of residents (10% or so). Two weeks’ notice, with an agenda and proposals in detail.
- Prepare a draft constitution (see below for content), to be considered at the meeting, allowing for amendments, adoption after amendments by at least a 75% majority along with a motion to formally establish the association.
- Elect a new committee either then or soon after.

WARVRA has available a recommended draft constitution and copies of constitutions from a number of villages that can be used as models in the development of a village constitution. You could use the list of minimal requirements for an incorporated residents association in Code cl. 25(2) as a check list to make sure the constitution does not include provisions that are contrary to the Code.

The model we recommend uses a residents general meeting (how often can vary) as the foundation from which other provisions flow. So, it then proceeds to provide for special general meetings and for the election of a residents committee (number of members can vary) and the election of office-bearers (these can either be elected by

the residents or elected by the committee from among its members). We recommend election of committee members by an all-village ballot (not just those at a meeting) and we recommend that nominations for the committee close a week before the general meeting and no nominations received from the floor (these are almost always not thought out and can lead to problems).

To clarify the status of the Residents Association committee, the meeting of residents should approve, as a special resolution, a motion that declares that the committee of the residents association will exercise the role of the residents committee provided for in Code cl. 24.

Special provisions for an incorporated residents association

Note: WARVRA does not recommend that residents associations become incorporated. There was a time in the past where it was felt that an incorporated residents association or residents committee would give added status to the association or committee and aid it in any dispute with the AB. This has not been shown to be so – neither the Department of Mines, Industrial Relations and Safety’s Consumer Protection Division nor the State Administrative Tribunal give any special status to incorporated bodies.

The advantages of incorporation are that it is needed to seek a liquor licence and it does enable successful applicants to received larger grants from Lotterywest. The disadvantages are that the association has to comply with the added requirements of the *Associations Incorporation Act* including the form and content of the rules (constitution of the association) leading to a much longer and more complex document and reporting to the Commissioner.

However, if an association desires to become incorporated or is already incorporated, the Code sets out a number of requirements that must be included if the committee of the association is to be recognised as the residents committee of the village. Most of these requirements, found in Code cl. 25, are to ensure that the rules (constitution of the association) are in conformity with the general rules in the Code for residents meetings and residents committees.

Topic 10

Budgets and Accounts

General management procedures

It is critical that all parties involved in retirement villages familiarise themselves with Code c. 16 which sets out the basic management procedures and the requirements for resident consultation. Most problems arise because these general provisions are not complied with.

The administering body of a retirement village must:

1. provide prudent, efficient and economical management of the retirement village.
2. establish procedures for consulting with residents on the future planning and budgeting of the village and any proposed changes to the operating financial arrangements of the village.
3. establish procedures to provide residents to management information relating to the operating financial arrangements of the village.
4. establish procedures for consulting with residents on the day-to-day running of the village and any issues or proposals raised by the residents.
5. establish procedures for consulting with the residents committee.
6. comply with any reasonable request made by a resident for information on a specific financial arrangement or for information about the steps taken to minimise increases in village operating costs and the costs of reserve fund works.
7. make available to be inspected or copied any document reasonably expected to be material to that request. Such requests must be responded to within 10 working days or reasons given in writing for any refusal or inability to comply with that request.

Budgets

The requirements for a budget are set out in Code cl. 17

1. Not later than one month before the end of each financial year (that usually means before the end of May), the AB must display in a central location in the village and make available to each resident on request:
 - (a) a proposed operating budget and a proposed reserve fund budget (if the residents or former residents are required to contribute to a reserve fund) for the next financial year; and
 - (b) the information used in the preparation of the proposed operating and reserve fund budget that might reasonably be expected to be made available to a resident, including but not limited to:
 - (i) relevant accounts of actual expenditure; and
 - (ii) information explaining proposed fee changes or changes to the provision or availability of amenities or services.

The AB must advise all residents with written notice when the budget documents are available (or deliver a copy of the budget documents to each residence).

2. The budgets must be presented in consistent formats from one year to the next.
3. The budgets must include the line items listed in cl. 17(3) for operating budgets and cl. 17(4) for reserve fund budgets.
4. Additional line items, headings and sub-totals relevant to understanding the budget of a particular village may be included.
5. A budget must include notes disclosing:

- (a) the method by which the amount of recurrent charges payable by residents is calculated. Something similar the following:

First, the estimated expenditures for the coming year are calculated using past experience and market information.

Second, from the total expenditure non-resident income (rents, interest etc.) is deducted.

Third, the balance remaining is the amount that needs to be raised by resident contributions.

The resident contribution will be calculated in accordance with the residence contract and may be:

- shared equally among all residences; or
- shared differentially among all residences taking into account the number of occupants in a residential unit; or
- shared differentially among all residences taking into account the size (floor area) of the residence; or
- some other system described in the residence contract.

- (b) the method by which any recurrent charge payable by the administering body for residents who have permanently vacated the village and have reached the time when their payments are capped is calculated. ***[Note that this does not apply to strata or purple title villages].***

- (c) separate amounts for the auditor's remuneration for audit and non-audit services to the village.

- (d) for line items apportioned between the village and another body (e.g., on site residential care facility):
 - (i) the method used to apportion the expenses; and
 - (ii) material items of expense contained in this line item that have not otherwise been disclosed.

- (e) in regard to management and administration fees other than those

disclosed under (d) above:

- (i) the method of calculation; and
 - (ii) separate disclosure of material items of expenses within the management and administration fees that have not otherwise been disclosed. **See appendix 2**
- (f) any other information needed to help residents understanding of the proposed budget.
5. Separate budgets must be provided for every village administered by the administering body.

Financial statements

1. Quarterly accounts must be available within one month after the end of the quarter. The accounts must cross reference back to the line items in the budget and must contain notes disclosing particular matters that are relevant the residents' understanding of the accounts and the reasons for any variations of 10% or more between actual and budgeted expenditure.
2. Annual accounts must be presented within 5 months of the end of the financial year. These accounts, too, must cross reference back to the line items in the budget and must contain notes disclosing particular matters that are relevant the residents' understanding of the accounts and the reasons for any variations of 10% or more between actual and budgeted expenditure. In addition, these accounts must disclose the opening balance and the closing balance of the accumulated surplus or deficit at the beginning and end of the financial year and must be audited.

Audit

The residents may resolve by special resolution at the annual meeting (accounts presentation) **(and at that meeting only)** that the accounts for the year in which the resolution is made are not required to be audited.

Topic 11

Exiting the Village

Most queries on this topic come from the families of former residents who are deceased or who have gone into residential aged care. And most of those queries are about the exit fee (however named). Families are often completely unaware of the existence of such fees and are often quite angry about it as it is going to diminish the amounts they had expected to receive by way of inheritance.

We do have some residents who decide to sell out for one reason or another who will have uncertainties as to what is to happen. The best advice in most cases is to tell them to read their residence contract.

There have, however, been some new provisions added to the Code and these apply to all residence contracts.

Marketing of residential premises

Code cl. 21 provides that where the resident is required to pay any part of the costs incurred by the AB in marketing the residential premises, then the AB must:

- (a) take all reasonable steps to enable the premises to be placed on the market expeditiously; and
- (b) provide the resident or the resident's personal representative with a monthly written marketing report.

Refurbishment of residential premises

Code cl. 22 has a new definition of "refurbishment work". "Refurbishment work" now means maintenance, repair, replacement or renovation work carried out in respect of residential premises to return the residential premises to a reasonable condition.

There is a process to be followed in cl. 22(2) and rights of appeal to the State Administrative Tribunal in cl. 22(3).

Some important information is contained the pre-contract information statement (Form 1)

Some of the questions in Form 1 are directly relevant to costs when exiting the village.

- Question 7 deals with exit fees and other exit related matters.
- Question 8 deals with arrangements for marketing, re-leasing or selling the residential premises. In particular, note that this question deals with who handles the marketing process which may not be divulged elsewhere.

Recurrent charges payable after the resident permanently vacates

s. 23 of the Act, inserted as part of the 2012 amendments, introduced a cap on the period of time that non-owner residents (that excludes strata and purple title villages)

are required to continue paying recurrent charges.

The time caps are 3 months for any contract made after 1 April 2014 and 6 months for any contract made before that time.

“Permanently vacated” means that:

- (a) if required by the contract, the AB has been given notice of the former resident’s intention to vacate (remember, that period of notice cannot exceed one month (r. 7J(2)); **and**
- (b) the goods and chattels of the former resident have been removed from the residential premises; **and**
- (c) the former resident has ceased to reside in the residential premises; **and**
- (d) the right to exclusively occupy the residential premises has been given up as signified by returning the keys to the residential premises to the AB.

Note that all four of these conditions must be met.

Some administering bodies are very rigid in applying these new rules (they have to meet any recurrent charges forgone under these rules). To assist former residents or their legal personal representatives in complying with “permanently vacated” procedures we have prepared work sheet (available on the WARVRA web page) for you to document your actions.

Always encourage residents to complete an enduring power of attorney (to deal with their property if they become unable to do themselves) and encourage members to have an up-to-date will.

r.9 deals with variations to these general arrangements in the case of death at any point.

Topic 12

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