



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

CONSULTATION

DISCUSSION PAPER

REVIEW OF THE TERMS OF THE FAIR TRADING (RETIREMENT VILLAGES INTERIM CODE) REGULATIONS 2013

June 2013



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Prepared by the Department of Commerce
June 2013

Guidelines for submissions

The Government is interested in receiving your feedback on the terms that are proposed for a revised retirement villages code of practice. In accordance with sections 44, 45, and 46 of the *Fair Trading Act 2010* (FTA), the terms of the current Fair Trading (Retirement Villages Interim Code) Regulations 2013 (2013 Interim Code) are being reviewed so that a revised code, the proposed Fair Trading (Retirement Villages Code) Regulations 2013 (2013 Code), can be gazetted. It is at this stage intended that a revised Code be gazetted before the provisions of the current 2013 Interim Code expire on 30 September 2013. A copy of the 2013 Interim Code may be downloaded from the State Law Publisher website at:

http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_13040_homepage.html

Please note that the Department of Commerce (the Department) has already conducted extensive consultation on the Code during the preparation of the *Statutory Review of Retirement Villages Legislation Final Report* (Nov 2010), the *Retirement Villages Amendment Act 2012*, and associated Regulations. The Department is therefore seeking stakeholder responses on specific issues raised in this paper and whether there might be any unanticipated adverse consequences in implementing the reforms proposed. When responding to questions contained in this paper, please include the question number alongside your response. An on-line submission form is also available on the Department's website at www.commerce.wa.gov.au/consultations to assist you in providing your comments.

Written comments, queries and submissions should be forwarded no later than close of business, **Monday, 15 July 2013**. Please provide your comments to the Director, Legislation and Policy, Consumer Protection Division, Department of Commerce, Locked Bag 14, Cloisters Square, Perth, WA 6850, or by email to consultations@commerce.wa.gov.au.

After the consultation period concludes, all responses received may be publicly available on the Department's website. Please note that because your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name remain confidential, please indicate that in your submission. As submissions made in response to this paper will be subject to freedom of information requests, please do not include any personal or other information that you do not wish to become available to the public.

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Disclaimer:

Although every care has been taken to ensure accuracy in the preparation of this paper, the information has been produced as general guidance for persons wishing to make submissions to the review. The contents of the paper do not constitute legal advice or legal information and they do not constitute Government policy. This paper should not be used as a substitute for a related Act or professional advice.

Review of the terms of the Fair Trading (Retirement Villages Interim Code) Regulations 2013

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1. EXECUTIVE SUMMARY

Retirement villages in Western Australia are currently regulated by the:

- *Retirement Villages Act 1992* (RV Act);
- Retirement Villages Regulations 1992 (Regulations); and
- Fair Trading (Retirement Villages Interim Code) Regulations 2013 (2013 Interim Code).

The 2013 Interim Code continues the provisions of the Fair Trading (Retirement Villages Code) Regulations 2009 (2009 Code) made under the *Fair Trading Act 2010* (FTA). Additional regulatory requirements will commence after the *Retirement Villages Amendment Act 2012* (Amendment Act)¹ is proclaimed and the associated amending regulations are gazetted later in 2013.

The Code contains essential consumer protection provisions which are mandatory and an important component of the legislative framework for the regulation of the retirement village industry. The Code promotes good business and management practices and fair trading principles in the retirement village industry and covers the rights and obligations of village administrators (administering bodies) and residents in relation to pre-contractual disclosure requirements, residence contracts, village operational and financial management, consultation, decision making and dispute resolution.

It is proposed that a revised code (the proposed 2013 Code) amend the provisions of the current 2013 Interim Code which expires on 30 September 2013. It is intended that, whilst retaining the majority of the existing provisions, the revised Code will introduce reforms as discussed in part 3 of this discussion paper and summarised in Appendix 4.1.

This discussion paper has been prepared in compliance with sections 44, 45, and 46 of the FTA which regulate the processes for Code consultation, review and renewal. Comment is sought from affected parties on the proposed reforms to ensure that they address the identified problems and, as far as possible, are well supported.

A final draft Code will be submitted to the Minister for Commerce, the Hon Michael Mischin MLC, for approval once the consultation process has been completed and all stakeholder comments have been considered.

As there will be further amendments to the RV Act, further amendments to the Code will follow. This is likely to commence in 2014 and consultation on those amendments will occur at that time.

¹ The Amendment Act passed through Parliament on 23 October 2012 and gained assent on 5 November 2012. The Amendment Act has not yet commenced and will do so on a date to be proclaimed. Various sections of the Amendment Act require regulations to be drafted and gazetted, before they can commence.

2. INTRODUCTION

2.1 Purpose of the review

The purpose of this review is to obtain your comment on proposed reforms to be contained in the revised 2013 Code. The current 2013 Interim Code expires on 30 September 2013. Consultation to develop the *Statutory Review of Retirement Villages Legislation Final Report* (Nov 2010) (final report), the *Retirement Villages Amendment Act 2012* (Amendment Act), and associated amending regulations has identified various Code related issues.²

This review therefore aims to obtain feedback around four major triggers for reform, these being:

- the relevant recommendations in the final report which affect Code provisions;
- a number of possible amendments to the Code identified since the tabling of the final report;
- transferring Code clauses to the Regulations; and
- a number of amendments which are required as consequential to the passage of the Amendment Act.

Further review to the Code will occur once further legislative amendments are made to the RV Act in line with the remaining recommendations contained in the final report.

2.2 Context of the review

2.2.1 Code review and renewal process

The Code review and renewal process is regulated by the FTA. Sections 45 and 52 of the FTA provide that a code has a three year life span and that it will lapse after this period unless it is reviewed and renewed. Section 44 of the FTA requires such a review to include consultation with and submissions from persons and organisations that are likely to be affected by the terms of the code, including principal organisations representing suppliers and consumers. Section 46 of the FTA allows for an interim code, with life span of no longer than six months, in circumstances where the process required by section 44 has not been completed.

The Code was developed in conjunction with the RV Act and first came into being in 1993 under the 1987 FTA. The 1993 Code remained largely unaltered until significant changes were made in 2003 with administering bodies being required to comply with new requirements relating to:

- amenities and services;
- refunds of entry premiums;
- maintenance, repair, refurbishment and reserve funds;

² The Department has received considerable comment on Code related issues in 2012 and 2013 at consultation meetings with a working group comprising representatives from the Western Australian Retirement Villages Residents Association (WARVRA), the Retirement Living Council (RLC), formerly the Retirement Villages Association (RVA), and Aged and Community Services WA (ACSWA).

- village operating budgets, quarterly operating income and expenditure statements, and operating budget surpluses;
- marketing of residential premises;
- residents' committees, meetings, voting rights;
- residents' rules; and
- residents' rights to information, dispute resolution, and decision making procedures.

Between 2003 and 2009 the Code was reviewed as required by the FTA, but only minimal changes were made. The provisions of the 2009 Code were reviewed as part of the overall review of retirement villages legislation which culminated in the final report of the review being tabled in Parliament on 18 November 2010. Recommended changes to the 2009 Code could not be made before its expiry date due to the need to first amend the RV Act and associated regulations. The provisions of the 2009 Code have been continued by two interim codes, the latest of which will expire on 30 September 2013.

The proposed revised Code 2013 will remain under the FTA until recommendation 81 of the final report can be implemented in the second stage of RV Act amendments. This will result in the legislative framework being restructured so that the Code can be made under the RV Act and all components regulating retirement villages can be contained within a single legislative framework.

2.2.2 Background to the retirement village sector

The retirement village industry in WA comprises villages that are privately run and operated on a commercial 'for-profit' basis, as well as the majority which are 'not-for-profit' villages. Churches, charities, faith based organisations, local authorities, specific interest groups and membership based special interest associations make up the not-for-profit sector. Data obtained from the Seniors' Housing Centre in December 2012 indicates that there were a total of 215 retirement villages and 14,812 units of retirement village accommodation in WA. Villages operated by the for-profit sector on a commercial basis represent approximately 30 per cent of the industry and villages operated by the non-for-profit sector, approximately 70 per cent. Some of the villages operated by the not-for-profit sector are run on a commercial basis.

Although the not-for-profit sector operates a larger number of villages, the number of living units in these villages is approximately 53 per cent of units in the market, indicating that villages in the not-for-profit sector tend to be smaller on average than those in the for-profit sector. The total resident population living in retirement villages in WA is estimated at about 20,000 persons.

Key features of a retirement village include restricting entry to people 55 years of age and over, offering shared amenities and services that residents may not be able to afford or maintain individually, such as a swimming pool, a bowling green and club house facilities, and offering a secure community. People in a retirement village are required to live independently and while aged care services may be provided on the same site, they are not linked to retirement village services. Aged care facilities and services are regulated by the Commonwealth *Aged Care Act 1997* (Aged Care Act).

Residents are able to choose from a number of different schemes that exist in the market and each of these provides different ownership and occupancy rights. The basis of the right to reside is the contract signed between the resident and the village owner or administering body, prior to entry.

Some contracts are in the form of a licence or lease, some allow the resident to purchase the premises outright as a strata title unit, and a small proportion acquire ownership through “purple title” arrangements which enable the resident to buy an undivided share of the village as a co-owner.³

Another distinguishing feature of a retirement village is the “premium” which must be paid to the village owner or administering body.⁴ A premium is in effect an upfront interest free loan which serves as a payment for the right to be admitted and live in the village.

Various contractual agreements exist for the refund of the premium when a resident leaves a village. The premium repayment to the outgoing resident is typically based on the incoming resident’s premium (that is the sale or releasing price) with deductions made for an exit fee (also known as a deferred management fee) at the end of the resident’s occupancy.

³ Retirement villages in WA in which people buy shares and become co-owners are established on purple titles and are often referred to as purple title villages.

⁴ The Amendment Act amends the definition of “premium”, so that once the Amendment Act commences, **premium** will mean a payment (including a gift) made to the administering body of a retirement village in consideration for, or in contemplation of, admission of the person by or on whose behalf the payment was made as a resident in a retirement village (including any such payment made for the purchase of residential premises in a retirement village or for the purchase, issue or assignment of shares conferring a right to occupy any such residential premises), but does not include-

- (a) any such payment excluded by regulation from the ambit of this definition; or
- (b) a levy or recurrent charges.

3. PROPOSED CODE REFORMS

Reforms to the Code are proposed in response to four major triggers:

- (1) **Final report recommendations:** amendments that will implement recommendations 4, 40, 41, 43, 54, 61, 62, 64, and 68 of the final report. These relate to aged care facilities; village budgets; budget surpluses, auditing of accounts; capital maintenance; residents' committees; consultation with residents; voting procedures; and dispute resolution.⁵
- (2) **Amendments identified since the tabling of the final report:**
 - procedural matters for special resolution meetings, including:
 - a proposal to introduce "ordinary" resolutions into the Code;
 - issues relating to management involvement in special resolution meetings of residents; and
 - clarifying the meaning of "special resolution";
 - issues related to the refurbishment of residential premises when residents have permanently vacated their unit; and
 - the notice period relating to the termination of a retirement village contract.
- (3) **Transferring Code clauses to the regulations:**
 - deleting clause 3.1 of the Code which deals with residence contracts as all pre-contractual disclosure documents which must be given to prospective residents before entering into a residence contract are intended to be prescribed under section 13(2)(e) of the RV Act; and
 - deleting various clauses in division 4 of the Code which refer to required inclusions in residence contracts as these clauses are intended to be remade as regulations under new section 14A, inserted by the Amendment Act.
- (4) **Consequential amendments:** amendments to the Code which are consequential to the passage of the Amendment Act, including:
 - definitions in the Amendment Act of the terms "levy", "premium" and "service contract". The revised definitions will be reflected in the grey boxed area at clause 1.1 of the Code;
 - the increased disclosure period for considering contracts will be reproduced in clause 3.2 of the Code which deals with service contracts; and
 - the increased cooling off period after signing the contract will be reproduced in the grey boxed area following clause 4.1(2) of the Code.

⁵ Please note that recommendation 56 which deals with the issue of urgent repairs was originally proposed to be contained in the revised code but will now be progressed by Regulations under new section 14A, inserted by the Amendment Act.

Recommendation 56 states that *the legislation be amended to allow residents who do not own their units to carry out urgent repairs, after having given the operator a reasonable opportunity to carry out the work, and require that residents select a contractor from an approved list displayed in a prominent place by the administering body and be able to seek reimbursement of costs from the administering body.*

The Regulations will require that residence contracts must state the residents' rights and obligations in respect to urgent repairs to their residential premises.

3.1 Amendments resulting from recommendations in the final report

3.1.1 Aged care facilities (recommendation 4)

The final report recommended that the legislation be amended to require that:

- *the statement relating to aged care facilities, that is prescribed in the Code, be replaced with a statement redrafted into simpler terms; and*
- *in addition to inclusion in promotional material, this statement be incorporated into the key terms summary and the residence contract.*⁶

Issues

The findings of the final report questioned the effectiveness of the existing statement relating to aged care. It found that despite the requirement for the statement to be included in any promotional and sales material, many prospective residents are under the impression that they will have automatic access to any on-site aged care facilities in the retirement village. In the marketing of villages, there was anecdotal evidence that some village operators give prospective residents the impression that they will have automatic access to these facilities.

In order to better ensure that prospective residents understand that they do not have guaranteed rights of access to aged care facilities and services, the final report recommended a number of changes, including the redraft of the statement relating to aged care facilities. These changes are intended to reinforce the fact that becoming a resident in a village that has on-site aged care facilities does not guarantee entry to these facilities. In relation to redrafting the statement into simpler terms, considerable feedback was received at meetings with a working group being consulted on the Regulations arising from the Amendment Act. Working group discussions agreed that a redrafted statement should make it clear that the administering body of a retirement village cannot guarantee a place in any residential aged care facility or the provision of any community care programs, as these are Commonwealth funded and allocated. The working group also commented that the statement should be reworded so that it clarifies that it is the resident's responsibility to access alternative aged care accommodation, not the village operator's.

For this purpose, the statement should include details of the Commonwealth agency to contact to obtain further information about residential aged care services, or other available community, aged care and support services.

⁶ Please note that the first part of recommendation 4 proposing that the aged care statement be redrafted can be implemented by Code changes. The second part of recommendation 4, which relates to the statement being incorporated into the residence contract, is to be achieved through the Regulations arising from new section 14A, inserted by the Amendment Act. This is possible because section 14A Regulations have the power to prescribe provisions and matters that must or must not be contained in residence contracts. The second part of recommendation 4 also intends that the aged care statement be contained in a key terms summary disclosure statement. The current disclosure requirements are those contained in Form 1 of the Regulations. Expanding the disclosure requirements to include a key terms summary requires a further amendment to the RV Act, and this will be achieved in the next stage of RV Act amendments.

Working group representatives also commented that in promoting a village, the operator should make it clear that transfer to an on-site aged care facility cannot be guaranteed and that providing placement priority is outside of the control of the village operator because aged care facilities are built and administered under the control of the Commonwealth Aged Care Act. Working group members also pointed out that some operators run a retirement village and an aged care facility on the same site as two separate businesses under different financial models. Although operators generally make every effort to assist residents to transfer to an aged care facility and to organise community care services, residents should not assume that operators have a contractual or a legal obligation to assist or be responsible for providing or accessing alternative accommodation when the resident can no longer live independently.

The statement below seeks to clearly inform the prospective resident, use simple plain language, and briefly explain the legal basis related to admission to Commonwealth funded aged care facilities and services, and that these facilities and services are not covered by WA laws. A recent similar statement in the standard form village contract drafted by the New South Wales Office of Fair Trading has also been taken into consideration in the drafting of the statement below.

Proposed change to the Code

To implement the first part of recommendation 4, it is proposed that clause 2.5 of the 2013 Interim Code be amended to replace the current statement relating to aged care facilities with the redrafted statement below. The current statement in clause 2.5 of the 2013 Interim Code is as follows:

You should be aware that current Commonwealth policy guidelines on admission to Commonwealth funded residential aged care facilities require places to be allocated on a “needs” basis. It is not possible for an organisation providing services for older people to guarantee admission to Commonwealth funded residential aged care facilities.

The revised statement proposed for the 2013 Code is as follows:

The administering body of a retirement village cannot guarantee:

- that you will be allocated a place in, or have an automatic right of transfer to, any Commonwealth funded residential aged care facility; or
- that a proposed residential aged care facility will be constructed by the administering body, or that an existing residential aged care facility will continue to be available; or
- that you are eligible to receive Commonwealth funded community care services.

Your entry to residential aged care facilities, or your eligibility to receive aged care support services, is subject to availability and to you meeting the eligibility requirements set by Commonwealth Government laws, which are administered by the Commonwealth Government. Aged care facilities and services are not covered by the *Retirement Villages Act 1992* (Western Australia).

For further information about accessing these facilities and services, contact the Commonwealth Respite and Carelink Centre on 1800 052 222 (free call).

Currently clause 2.5 of the 2013 Interim Code requires that the statement relating to aged care be in 16-point type and boxed. It is proposed to retain this format requirement in promotional and sales material, the residence contract, and the key terms summary disclosure document.

As noted, the Regulations under new section 14A will prescribe that the redrafted statement be contained in residence contracts in the same format as that required by the proposed Code 2013.

At a later stage the RV Act will require that the redrafted statement must be contained in key terms summary disclosure documents, and this will be implemented once further amendments to the RV Act allow for this additional level of disclosure.

Question

1. Do you have any comments about the proposal to implement recommendation 4 of the final report, regarding the statement relating to aged care facilities?

3.1.2 Village budgets (recommendation 40)

The final report recommended that the legislation be amended to require that: *if called upon, a village operator must demonstrate to residents that reasonable steps have been taken to minimise increases in village operating costs.*

Issues

There are provisions in the current 2013 Interim Code that place financial management obligations on the administering body.⁷ Although there are a considerable number of financial protections in the current Code, WA legislation does not provide for residents to approve the village budget. The final report commented that residents should nevertheless be able to trust that, except in exceptional circumstances, expenditure will generally marry with the budget predictions on which they have been consulted. The final report concluded that residents should be confident that reasonable steps have been taken to minimise increases in village operating costs and recommended that a village operator should be required to demonstrate this if called upon by residents.⁸

A possible option to achieve this could be to explicitly require that explanations be made available to residents on request, especially where significant variations between actual costs and expenditure and budgeted predictions exist.

It seems reasonable that at all times in the budget process, and especially if the budget falls into deficit, the village operator should be accountable by being required to provide explanations, free of charge, if called upon by a resident.

The current Code, whilst requiring that quarterly financial statements show actual against projected operating costs, income and expenditure does not explicitly require the provision of any explanation to residents where expenditure exceeds that which is proposed in the budget.

⁷ Key financial management obligations include requirements that the administering body:

- manage the village in a prudent, efficient and economical manner (clause 5.2 (1)(a));
- comply with any reasonable request made by a resident for information on a specific administrative or operating budget matter (clause 5.2(3));
- display and make available on request a copy of the proposed operating budget for the next financial year of the retirement village (clause 5.3(1)(a));
- provide information used in the preparation of the proposed operating budget (clause 5.3(1)(b));
- provide residents with quarterly operating income and expenditure statements showing actual operating costs, income and expenditure against projections, and payments made to and from and amounts standing to the credit of any reserve funds of the village (clause 5.4(1)); and
- provide residents with a written presentation of the financial position of the retirement village at the end of the previous financial year (clause 5.5).

⁸ Note that recommendation 35 of the final report has been implemented by new section 57A, inserted by the Amendment Act, which gives residents the right to appeal to the State Administrative Tribunal if a dispute arises between the residents and the administering body regarding an increase in recurrent charges or the imposition of a levy, if the appeal is agreed to by a special resolution of residents.

The current Code's clause 5.2 requires the administering body to provide prudential, efficient and economical management of the retirement village; to establish appropriate procedures for consulting with residents and providing residents with access to management information; and to comply with any reasonable request by a resident for information on a specific administrative or operating budget matter. Clause 5.2 references consultation and access to management information on "administrative and operating financial arrangements", including any plans for expansion of, or substantial alteration to, the village, and proposals for the upgrading of buildings, fixtures or fittings where the residents are financing either the whole or a part of the capital or ongoing costs of the works. These costs would be financed at least partly from a reserve fund, if there was one in the village.

Clause 5.2 appears sufficiently broad in its current requirements that, if requested by a resident, the administering body would be required to explain the reasons for any major variations between the actual operating costs, income and expenditure in the financial statements of the village, including costs of works funded from reserve funds, compared to any projections of these costs.

Clause 5.3 refers to the administering body's obligations in relation to providing access to the operating budget of the village and information used in the preparation of the proposed budget, including information explaining proposed fee changes or changes to the provision or availability of amenities or services.

Clause 5.4(1)(a) and (b) similarly require the administering body to provide residents with quarterly operating statements that show details of the retirement village's actual operating costs, income and expenditure against projections of the same; and payments made to and from, and amounts standing to the credit of, any reserve funds for the village.

Clause 5.5 requires the administering body to provide residents with annual account statements which show the operating financial position of the retirement village as at the end of the previous financial year.

An explicit requirement to provide an explanation about the quarterly financial statements, if requested, exists in Queensland's retirement villages legislation. Section 112(4)(b) of the *Retirement Villages Act 1999* (Qld) provides that a village operator must provide, on request from the residents' committee, a document explaining any increase in expenditure involved in the provision of general services that varies from the budget.

Proposed change to the Code

It is proposed that clauses 5.2, 5.3, 5.4 and 5.5 of the 2013 Interim Code be amended to implement recommendation 40, to require the administering body to demonstrate that reasonable steps have been taken to minimise any increases in the costs of operating the village, including the costs of reserve fund works.

Although it is not intended that clauses 5.2 to 5.5 should be amended to prescribe exactly what steps village operators should take to minimise increases in village operating costs, it is intended that these clauses be amended to add a statement which reflects the wording of recommendation 40, that is to require the administering body to demonstrate, if called upon, that “reasonable” steps have been made to minimise increases in village operating costs, including due to expenditures from the operating budget and expenditures from reserve funds.

After the commencement of the Amendment Act’s new section 57A, residents of a village may collectively appeal to the SAT after passing a special resolution to do so, if a dispute arises between the residents of a village and the administering body, regarding an increase in recurrent charges or the imposition of a levy.

The SAT will be empowered to hear such disputes and make such orders as it considers appropriate - which may include alternative strategies for the provision of amenities and services for example, by discontinuing certain services or engaging a cheaper service provider.

Since it may not be clear as to what “reasonable” means in this context, it is proposed that the Code provide examples of what may constitute “reasonable steps” and that this explanation be added as boxed and shaded guidelines in the proposed 2013 Code at the end of clause 5.5.⁹

The proposed guidelines are as follows:

<p>“Reasonable” steps may include those that are fair and appropriate in the circumstances and reflect commercially best efforts, for example:</p> <ul style="list-style-type: none">• obtaining at least 2 quotes for the purchase of goods or services;• using alternative, more cost effective ways to obtain a similar or equivalent outcome;• controlling labour costs; and/or• postponing non-essential expenditure.

It is also proposed that clauses 5.2 to 5.5 be amended to clarify that, if requested by a resident, the administering body must explain the reasons for any significant variations between the actual operating costs, income and expenditure in the financial statements of the village, including costs of works funded from reserve funds, compared to any projections of these costs, and that this information should be provided free of charge.

It is further proposed that clause 5.2(3) be amended so that a resident is entitled to take copies of the documents that they inspect.

⁹ The practice of adding clarifying information is provided for under clause 4(2) of the Code and is used in a similar way in other parts of the Code to add clarity and to assist readers of the Code. Clause 4(2) of the Code states that boxed and shaded paragraphs in the Code are not part of the Code and are included only to assist readers of the Code.

For ease of understanding the financial reporting obligations of administering bodies, it is also proposed that the following amendments be made to achieve consistency and to clarify the meaning of clauses 5.2 to 5.5 as follows:

- Clause 5.2(3) be amended to be consistent with clause 5.2(2) to state:
The administering body must comply with any reasonable request made by a resident for information on a specific matter relating to the administrative or operating financial arrangements in a retirement village, and make available for inspection any documents that might reasonably be expected to be material to that request.
- Clause 5.4 and clause 5.5 be amended to refer to “quarterly statements” and “annual statements” respectively.
- Clauses 5.2 to 5.5 be amended to include a reference to reserve funds, where appropriate, so that it is clear that any financial information that is provided to residents includes information about the income and expenditure of any reserve fund and its opening and closing balances.

Questions

2. Do you have any comments about the proposals to implement recommendation 40 of the final report regarding minimising increases in village operating costs, including the costs of reserve fund works?
3. Do you support the suggestion to add guidelines in the Code explaining what might constitute “reasonable” steps to minimise village operating costs, or do you have any other suggestions that could be included in the guidelines?

3.1.3 Budget surpluses (recommendation 41)

The final report recommended that the legislation be amended to require that: *any budget surplus be carried forward and applied to the village in which the surplus arose.*

Issue

Clause 5.6 of the Code specifies how budget surpluses must be applied by stating that:

the administering body must apply any surplus in the operating budget of a retirement village towards the future operating expenses of that village, except where –

- (a) the residence contract provides otherwise; or*
- (b) the residents, by special resolution, approve the application of the whole or a part of the budget surplus to any other purpose or purposes that is, or are, generally of benefit to the residents of that village.*

The final report stated that contracts should not be able to override the general provision of the Code in regard to the application of budget surpluses but was silent on whether residents should continue to have the right to make a decision, by special resolution, about the application of a budget surplus in their village.

Proposed change to the Code

It is proposed to amend clause 5.6(a) of the 2013 Interim Code to delete the words “the residence contract provides otherwise; or”. The intent of the Code is to empower residents as much as possible in decisions that affect their daily lives in the village and therefore it is proposed that subclause (b) of clause 5.6 be retained to continue to enable residents, by special resolution, to approve the application of the whole or a part of the budget surplus to any other purpose or purposes that is, or are, generally of benefit to the residents of that village.

Question

4. Do you have any comments about the proposal to implement recommendation 41 of the final report regarding budget surplus and to continue to allow residents, by special resolution, to decide on alternative ways to apply the budget surplus to the benefit of residents of a village?

3.1.4 Auditing of accounts (recommendation 43)

The final report recommended that the legislation be amended to require that:

- *all operating costs accounts and reserve funds or similar accounts of retirement villages be audited by an independent auditor on an annual basis;*
- *such audited statements continue to be provided to residents at the annual general meeting;*
- *the above provisions be waived if, at the previous annual budget meeting, the residents decide by special resolution to dispense with this requirement;*
- *the option remain that at a later time residents, by special resolution, may resolve to require the operating costs accounts and reserve funds or similar accounts of the village to be audited; and in such cases the audited accounts are to be provided to residents at the next annual general meeting, and on request to a residents' committee or individual resident prior to the next annual general meeting; and*
- *the cost of the audit be allocated according to provisions in the residence contract.*

Issues

The provisions within the 2013 Interim Code relating to quarterly and annual financial statements of the retirement village provide relatively sound reporting requirements to residents as to the financial performance and position of the village. The Code, however, does not require annual financial statements of the village's accounts to be audited by an independent auditor, unless the residents agree by special resolution to request an audit.

While the Code empowers residents to request that village accounts be audited, this must be done by special resolution. The final report found that the current "opt in" approach to auditing places considerable responsibility upon the residents to ensure accountability in the financial management of their village. In addition, it is likely that some residents are not aware of their right to collectively request an audit and do not avail themselves of this right.

Discussions at a recent meeting of the working group indicated continued support for the final report recommendation, which proposed a change to an "opt out" approach so that auditing of village accounts would be mandatory, but residents would be able to decide by special resolution that an audit should not be conducted.

Working group members stated that it is commercial best practice to audit village accounts. It was pointed out that those operators who manage on-site aged care facilities and services must conduct mandatory audits under Commonwealth aged care legislation and that these audits are normally conducted in conjunction with the audit of the retirement village accounts. The Western Australian Retirement Villages Residents' Association (WARVRA), representing the interests of residents, also indicated that residents are generally in favour of the village accounts being audited annually.

There may be situations, however, where residents are confident in the financial management of the village and may not wish to incur the expense of an audit. In such circumstances residents could “opt out” and dispense with the auditing requirements.

This decision would be made by special resolution of residents who could decide to opt back in to requiring an audit at any time, as outlined in the fourth dot point of recommendation 43 above.

Alternative suggestions proposed at the working group meeting were:

- mandatory audits with an exemption for “small” villages with operating costs below a specified threshold; or
- mandatory audits with an exemption for “small” villages with operating costs below a specified threshold and where the residents agree by special resolution that an audit is not required.

A requirement similar to the second option above is found in section 119A of the *Retirement Villages Act 1999* (NSW) which provides that an audit of the retirement village accounts is not required if the recurrent charges do not exceed \$50,000 (or other prescribed amount), if the residents have consented to not requiring an audit, and the operator has provided a statement that the operator will be able to meet its liabilities to the village as and when they fall due in the financial year immediately following.

The working group also considered whether a registered company auditor should be required to undertake the audit, or whether any suitably qualified person could be engaged. Given the shortage of registered company auditors in Western Australia, it was suggested that a member of a professional accounting body holding a public practice certificate should be acceptable.

In view of the increasing size and financial strength of many retirement villages, it appears that there is general support for the proposal that village accounts be audited by an independent auditor on an annual basis, that such audited statements be provided to the residents at the annual general meeting, and to the residents’ committee and individual residents on request, unless at the previous annual budget meeting the residents decide by special resolution to dispense with the audit requirement.

The audited accounts would include details of the income and expenditure of the village, including the income and expenditure of any special funds, such as reserve, capital replacement or maintenance funds, as well as the opening and closing balances of such funds. Other special funds to be audited would include those of a strata council in strata titled villages. The provision for mandatory auditing would also need to be consistent with the information and financial provisions of clauses 5.2, 5.3, 5.4 and 5.5 of the 2013 Interim Code where the administering body’s obligations in regard to village financial arrangements, operating budgets, quarterly operating statements and annual accounts are set out.

Although mandatory auditing of accounts is recognized as an additional village operating cost generally payable by residents, auditing provides residents with an independent assessment of the accounts of the retirement village.

Although there will not be any regulation as to who should bear the cost of auditing the village's annual financial statements, there will be a regulation made under new section 14A, requiring residence contracts to state who will bear the cost of the audit. This is in line with the fifth dot point of recommendation 43 of the final report, which included that "the cost of the audit be allocated according to provisions in the residence contract".

It is envisaged that in most cases this cost is passed on to residents. Sections 118 and 119 of the *Retirement Villages Act 1999* (NSW) impose specific requirements on the part of the operator if the audit fees are to be paid by the residents.¹⁰

Proposed change to the Code

It is proposed that recommendation 43 of the final report be implemented by amendments to clause 5.5 of the current 2013 Interim Code so that:

- all operating costs accounts and reserve funds or similar accounts of retirement villages must be audited by an independent auditor (being a member of a professional accounting body holding a public practice certificate or a registered company auditor) on an annual basis;
- such audited statements continue to be provided to residents at the annual general meeting;
- the residents may decide by special resolution at an annual budget meeting to "opt out" and not require an audit; and may subsequently decide by special resolution at an annual budget meeting to opt back in to requiring an audit; and
- the cost of the audit be allocated according to provisions in the residence contract.

Provisions will be modelled on sections 118 and 119 of the NSW Retirement Villages Act.

Question

5. Do you have any comments about the proposals to implement recommendation 43 of the final report regarding mandatory auditing?

¹⁰ Section 118(2) *Retirement Villages Act 1999* (NSW) states:

If the audit fees are to be paid by the residents of the village:

- (a) *the fees must be itemised in the proposed annual budget (if any), and*
- (b) *the item must include the name of the auditor to be appointed, and*
- (c) *the residents' consent to that appointment is required in the same way that it is required under section 114 (1)–(7) for the expenditure of the fees concerned, but only if the auditor to be appointed did not audit the accounts for the previous financial year.*

Section 119 requires that the audited accounts be provided to the residents' committee (or to each resident in the absence of a residents' committee) within four months after the end of a financial year. The audited accounts must include details of the income and expenditure of the village, including details of any special funds, such as reserve, capital replacement or maintenance funds. Other special funds to be audited include those of a strata council in strata titled villages.

3.1.5 Capital maintenance (recommendation 54)

The final report recommended that:

clauses 5.2 to 5.5 of the Code be amended as necessary to specify that the requirements for an administering body to consult with and provide financial information to residents apply to a reserve fund and any other fund or account established for purposes that include the maintenance, repair, replacement and renovation of the village (including replacement of capital items).

Issues

The final report found that there is confusion among residents about the differences between maintenance and repairs that are to be funded out of village operating funds and those that are funded from a reserve fund. Transparency in the village operating budgets, quarterly operating statements and annual accounts (which include details of any reserve funds) should enable residents to clearly track the income and expenditure that relates to the various funds for maintenance and repair work paid for by residents.

The proposed amendments are intended to clarify the current obligations of administering bodies to provide transparency in regard to village operating statements, including income, expenditure and balances of any reserve funds.

The amendments also intend to clarify residents' current rights to be consulted, and informed about, the administrative and operating financial arrangements of the village, which includes the provision of financial information about any reserve fund established for purposes that include accumulating funds to meet the costs of repairs, replacements, maintenance and renovation within the village.

Proposed change to the Code

It is proposed that the following clauses in the 2013 Interim Code be changed as follows:

- amend clause 5.2 to clarify that the requirements for an administering body to consult with and provide financial information to residents also apply to a reserve fund and any other fund or account established for purposes that include meeting the costs of repairs, replacements, maintenance and renovation within the village;
- amend clause 5.4 to clarify that the quarterly operating statements required to be provided to the residents also apply to reserve funds and any other funds or special accounts established for purposes that include meeting the costs of repairs, replacements, maintenance and renovation within the village;
- amend clause 5.5 to clarify that the presentation of the annual accounts of the village should include reserve funds and any other funds or special accounts established for purposes that include meeting the costs of repairs, replacements, maintenance and renovation within the village; and
- amend clause 5.5 to require that the village annual accounts should clearly differentiate between costs for items that are being funded out of the village operating budget and those that are being funded from a reserve fund.

Question

6. Do you have any comments about the proposals to implement recommendation 54 of the final report to clarify the Code's current requirements in clauses 5.2 to 5.5?

It is intended that these clauses should clearly state that the administering body's obligation to consult with residents and provide them with access to management information on the administrative and operating financial arrangements of the village, and report quarterly and annually, also applies to a reserve fund and any other fund or account established for purposes that include the maintenance, repair, replacement and renovation of the village (including replacement of capital items).

3.1.6 Residents' committees (recommendation 61)

The final report recommended:

that the Code be amended with respect to residents' committees established under section 5.10 to:

- *require an administering body to establish appropriate procedures to consult with a residents' committee on matters relating to the committee's function, including responding to issues raised by a residents' committee on behalf of residents;*
- *clarify that committee members do not incur any personal liability for acts done in the exercise of their duties; and*
- *provide that residents may appoint an incorporated association to undertake the statutory function of a residents' committee established under the Code on the following basis:*
 - *by agreement of the majority of residents by special resolution in accordance with the Code;*
 - *upon such agreement, the powers and function of the residents' committee would be conferred to the incorporated association;*
 - *the residents (by special resolution) would be able at any time to remove the function and powers of a residents' committee that had been conferred to an incorporated residents' association;*
 - *the objects of the incorporated association would be conditional in providing for the association to either carry out the function of a residents' committee, where agreed by the majority of residents by special resolution, or be divested of this function if residents agreed otherwise;*
 - *membership of the association must be open to all residents and only residents of the village;*
 - *incorporated associations that are to undertake the function of a residents' committee under the Code would not be able to charge more than \$1.00 subscription fee for membership of the association, but the association may charge fees of members for their participation in other association activities, such as social activities;*
 - *provisions in the association's rules regarding the length of time in office and election of committee members are to mirror the provisions applying to residents' committees under the Code; and*
 - *an appropriate mechanism be developed by which incoming residents are informed about their right to join an incorporated association that has been appointed to undertake the function of a residents' committee under the Code.*

Issues

During the course of consultations in the review, residents expressed concern that they may incur personal liability for acts done in the exercise of their duties when serving on a residents' committee and requested that the committee be incorporated under the *Associations Incorporation Act 1987* (WA) (AI Act), to protect them from personal liability.

However, no liability attaches to residents' committee members - residents are not in a position to incur personal liability in carrying out their duties on a residents' committee.

The only function of a residents' committee, if one exists in a retirement village, is to consult with the administering body on behalf of residents about the day-to-day running of the retirement village and any issues or proposals raised by residents. Accordingly, the final report stated that there was no need for residents to establish incorporated associations merely for the purpose of protecting committee members from incurring personal liability.¹¹

It is important to note that committee members of incorporated associations are subject to obligations under the AI Act. In particular, a committee member may commit an offence where the member fails to take all reasonable steps to secure compliance by the association with its obligations under the AI Act.¹² These additional obligations should be borne in mind by residents wishing to establish incorporated associations to undertake the function of a residents' committee.

The residents' decision to establish an incorporated association to undertake the functions of a residents' committee will introduce a potential liability for association committee members, which would not otherwise exist for an ordinary residents' committee. It would therefore seem unwise (and unnecessary) for residents to establish an incorporated association *simply* for the purposes of exercising the function of a residents' committee. If, however, residents are already using, or intend to use an incorporated association for other functions, such as social functions, then the vesting of the functions of the residents' committee in the incorporated association would not create any additional liabilities for association committee members (as those liabilities under section 42 of the AI Act will already apply to those residents who form part of the association's management committee).

The final report clarified that a residents' committee is simply a vehicle for residents to communicate with the administering body in regards to decisions to be made about the retirement village and not a decision making body in itself. The decisions of residents by special resolution in the Code at residents' meetings called by the administering body are taken by all residents of the village who choose to attend the meeting at which the special resolution may be passed.

Not all decisions of village residents are required to be passed by a special resolution. There may be other decisions (for example, to establish a social committee), that are made by village residents, for which a special resolution is not required. A residents' committee, where one has been established in the village, may of its own volition call a meeting of village residents, for these various other purposes.

¹¹ The AI Act provides at section 12: Liability of officers, trustees and members
(1) An officer, trustee or a member of an incorporated association is not by reason only of his being such an officer, trustee or member liable in respect of the liabilities of the association.
(2) Subsection (1) does not apply in respect of liabilities incurred by or on behalf of the association prior to incorporation.

¹² See the AI Act section 42: Responsibility of Committee Members

A residents' committee has the following powers under the Code:

- to decide its own procedures, and form subcommittees and decide their procedures (clause 5.10(4));
- to request the administering body to call a meeting (clause 5.11(1)(d)); and
- to call a meeting of residents (clause 5.11(3)).

It is clear that residents may wish to establish an incorporated association in order to plan and organise social and educational functions. If such an incorporated association is established, there may be practical benefits in using this association to also carry out the function of a residents' committee.

In some villages there may only be a small core of people that are either willing or able to serve on a residents' committee to speak on behalf of residents and consult with management about day to day matters that affect the residents. It may therefore be convenient to have one body of residents to organise many aspects of residents' communal lives and interests. In its submissions to the statutory review, WARVRA, representing the interests of residents, proposed that in such circumstances, there should be one single body within the village which is entrusted with all aspects of village life that affect residents, and that this body should be able to be an incorporated association.

Recommendation 61 of the final report suggested that residents be allowed to appoint an incorporated association to carry out the functions of a residents' committee under certain conditions which preserve the statutory functions of that committee.

Where an incorporated association is appointed, it is the committee of the incorporated association which would carry out the functions of the residents' committee.

As noted in the final report, a key concern is to ensure that the residents' rights of representation by the residents' committee are maintained when the residents appoint an incorporated association to undertake this function. In particular:

- the appointment of the incorporated association to carry out the functions of the residents' committee must be made by a special resolution of the residents of the retirement village, as defined under clause 5.1 of the Code;
- the only powers and functions of that residents' committee that the incorporated association will be able to exercise are those contained in the Code for residents' committees. The incorporated association will be able to exercise other powers and functions as determined by its members, however, its powers and functions as a residents' committee will be restricted by the Code;
- the residents may at any time by special resolution rescind the appointment of the incorporated association as the residents' committee;¹³

¹³ This is a special resolution of retirement village residents under the Code.

- membership of the association must be open to *all* residents and *only* residents of the village. This will preserve the right of all residents to vote in elections of the members of the residents' committee (which will also be the committee members of the incorporated association) and ensures that non-residents are unable to vote in such elections;
- incorporated associations that are to undertake the function of a residents' committee under the Code would not be able to charge more than a nominal subscription fee of \$1.00 for membership of the association¹⁴. This ensures there is no financial barrier to residents to becoming members of the association;
- the association is free, however, to charge fees to members for their participation in other association activities, such as social activities;
- provisions in the association's rules for the election of committee members and the passing of special resolutions are to reflect the intent of the relevant provisions applying under the Code. These would include the requirement for annual elections of members of the association's committee, the ability for association members to remove an elected committee member at any time by special resolution of members, the quorum of association members required to attend and vote on a special resolution of the association, and the voting rights currently applying in the village; and
- an appropriate mechanism is to be developed by which incoming residents are informed about their right to join the incorporated association. This aims to ensure that new residents to the village are made aware as soon as possible about the existence of the incorporated association, its role as a residents' committee and how they may join the association. Possible mechanisms by which incoming residents could be informed about their right to join the incorporated association are through the existing provisions under section 13(2) of the RV Act which provides for pre-contractual disclosure, or through the residence rules.

Residents' committees exist for the purpose of facilitating consultation and communication between residents and the administering body. In exercising this statutory function under the Code, an appointed incorporated association would need to be representative of all residents in the village.

The requirements outlined above are intended to ensure that this occurs. In particular, the association would not be able to exclude residents from being members of the association. Equally, it is expected that administering bodies would consult and communicate with such incorporated associations in the same way that they would with ordinary residents' committees.

Where residents decide by special resolution to vest the functions of their residents' committee in an incorporated association, the administering body would be required to recognise the incorporated association as the body vested with the function of the residents' committee under clause 5.10(5) of the Code and to establish appropriate procedures to consult genuinely with the management committee of that association. This is because the vesting of the functions of the residents' committee in an incorporated association is primarily a change of form, not of substance.

¹⁴ Parent teacher associations provide the same membership fee.

Special resolutions of village residents under the RV Act and Code

Regardless of whether an incorporated association undertakes the function of the residents' committee in a retirement village, all decisions to be made by resolution of village residents under the RV Act or the Code (except decisions removing a member of the residents' committee, discussed below), will still be made by village residents who attend and vote at residents' meetings called under clause 5.11 of the Code. Residents do not have to be members of the incorporated association in order to attend and vote at these meetings.

In particular, special resolutions of retirement village residents, on the various matters provided for in the Code and in new section 57A of the RV Act, would still be required to be passed by residents who choose to attend and vote in favour, at a meeting of which all village residents have received notice from the administering body in accordance with clause 5.11 of the Code, including any resident who is not a member of the incorporated association.

The calling of meetings at which a special resolution may be passed, and the passing of special resolutions of village residents for the purposes of the Code, would be unaffected by whether an incorporated association is vested with the functions of a residents' committee (except removing an elected member of the residents' committee, as treated below).

Removal of an elected member of a residents' committee

The 2013 Interim Code clause 5.10 provides that retirement village residents may by special resolution remove an elected member of the residents' committee, at any time. This capacity is important in the event that a committee member loses the support of residents.

If the Code is amended as proposed by recommendation 61 of the final report, then the way that decisions are made as to the membership of a residents' committee will differ, depending upon whether an incorporated association is undertaking the functions of the residents' committee.

- If no incorporated association has been appointed to undertake the functions of the residents' committee, then decisions regarding the election of committee members will be made by all village residents.
- If an incorporated association has been appointed to undertake the functions of the residents' committee, then decisions regarding the election of resident committee members will be decisions regarding the election of the association's management committee, and thus will only be made by the members of the association.

If an incorporated association undertook the functions of a residents committee, and some village residents were not members of the association, then:

- a particular member of that association's elected committee could not be removed by special resolution of village residents; and
- any village resident who was not a member of the association, would not be entitled to vote directly for the association's committee members.

However, a special resolution could still be passed by the village residents in accordance with the Code at any time, removing the functions of the residents' committee that had been vested in the incorporated association.

Proposed change to the Code

It is proposed that clause 5.10 of the 2013 Interim Code be amended in line with recommendation 61 to:

- clarify that members of a residents' committee do not incur any personal liability for acts done in the exercise of their duties;
- state that village residents may by special resolution under the Code, appoint an incorporated association to undertake the statutory function of a residents' committee, and that the appointment be made on the conditions as outlined in recommendation 61;
- clarify that irrespective of whether an incorporated association has been appointed to carry out the functions of a residents' committee, a special resolution of retirement village residents where provided for in the RV Act and Code, retains its current meaning as defined in the Code. (For example, a special resolution of village residents for the various purposes set out in the Act and Code will still be made by all village residents who attend and vote at residents' meetings called under clause 5.11 of the Code, and residents do not have to be members of the incorporated association in order to attend and vote at these meetings);
- require membership to the association be open to all residents, and only residents of the village;
- require that provisions in the association's rules regarding the length of time in office and election and removal of management committee members, and the passing of special resolutions, are to reflect the intent of the relevant provisions of the Code;
- require the administering body, through pre-contractual disclosure or through the residence rules, to inform residents about the existence of the incorporated association, its role, and the residents' right to join the association; and
- require the administering body to establish appropriate procedures to consult genuinely with a residents' committee, or an incorporated association where the functions of the residents' committee have been vested in that body.

Question

7. Do you have any comments about the proposals to implement recommendation 61 of the final report to give residents the right to vest the function of their residents' committee to an association?

3.1.7 Consultation with residents (recommendation 62)

The final report recommended:

that the Code be amended to clearly emphasise the intention of the Code, in relation to the duty of administering bodies to consult genuinely with residents.

Issues

The intent and spirit of the Code is for genuine consultation between residents and the administering body and is implied in numerous clauses of the Code. Relevant clauses of the Code which relate to consultation between the administering body and residents and the provision of information to residents are provided in Appendix 4.2.

Clauses 5.2(1)(b) and (c), for example, require the administering body to establish appropriate procedures:

- for consulting with residents on the future planning and budgeting of the retirement village and other proposed change to the administrative or operating financial arrangements of the village; and
- to provide the residents with access to management information relating to the administrative or operating financial arrangements of the retirement village.

The administrative and operating arrangements to which these requirements apply, include but are not limited to:

- amenities or services provided or made available to residents where any change may involve either increased costs to residents or the reduction or loss of an amenity or service;
- the operating budget for each financial year of the retirement village;
- any plans for the expansion of, or for substantial alterations to, the retirement village;
- proposals for the upgrading of buildings, fixtures or fittings where the residents are financing either the whole or a part of the capital or ongoing costs of the work; and
- the establishment of, or changes to, the residence rules.

A further example is provided by clause 5.9(3), which requires the administering body to consult with the residents prior to making, changing or revoking the residence rules covering the rights and obligations of village residents and with which the residents must comply, and residents are permitted, by special resolution and with the agreement of the administering body, to change or revoke these rules.

The administering body should ensure that genuine consultation has been carried out with all residents, on village matters affecting their day to day lives in the village.

Genuine consultation should apply irrespective of any consultative groups, or the form of any such groups, set up within the retirement village, whether they be a residents' committee, an incorporated association, a strata council, an advisory committee, a liaison committee, or some other form of representative group.

Breaches of administering bodies' obligations to consult with residents can be dealt with by the Commissioner, who can apply to the State Administrative Tribunal (SAT) for an order for the administering body to cease contravening the Code. Failure to consult in circumstances where the Code specifically requires consultation could have serious consequences. Failure to comply with an order of the SAT can incur a fine of up to \$50,000.

Because the term "genuine consultation" may not be well understood by village operators or residents, a solution could be to:

- place a boxed and shaded guideline in the Code that provides practical examples of "genuine consultation"; and
- to amend the objectives of the Code at clause 1.4 to reference the concept of "genuine" consultation.

In addition, recommendation 34 of the final report intended that the Code be supported by means of industry and resident education, and proposed that the Department continue to work with industry and residents' representative bodies in developing further guidelines and procedures for appropriate and effective consultation.

Proposed change to the Code

It is proposed that in order to implement recommendation 62:

- clause 1.4(e) of the 2013 Interim Code be amended to state that the objectives of the Code are to facilitate genuine consultation between the administering body and the residents on the management of a retirement village; and
- guidelines in a grey boxed area, as outlined below, be provided at the end of clause 1.4 to provide practical examples of what might constitute genuine consultation, and to clarify that the term "consultation" means "genuine consultation" throughout the Code.

The term "consultation" means "genuine consultation" throughout the Code.

Practical examples of genuine consultation include:

- communicating and sharing relevant information with residents, including providing written information to residents where appropriate;
- referring for residents' consideration, village matters that affect the residents in their day to day life in the village and giving residents the opportunity to express their views;
- genuinely listening to and taking into consideration residents' views, comments and concerns, and responding in a timely fashion regarding issues raised by residents or residents' committees;
- providing explanations for major variations between actual expenditure and budgeted amounts;
- giving residents good reasons why their requests can or cannot be carried out, and providing information that dispels concerns and misinformation; and
- taking genuine steps, wherever possible or feasible, to implement residents' requests and suggestions for the common good of the residents.

Questions

8. Do you have any comments about the proposals to implement recommendation 62 of the final report regarding genuine consultation with residents?
9. Do you have any suggestions about anything else that should be contained in the guidelines at the end of clause 1.4 of the Code?
10. With reference to Appendix 4.2, does the Code sufficiently cover the areas in which administering bodies must consult with residents and provide information to residents, e.g. financial planning and budgeting; provision of administrative and financial information; day-to-day running of the village; residents' rules; and any issues or proposals raised by residents?

3.1.8 Voting procedures (recommendation 64)

The final report recommended that the legislation be amended to require that: *where more than one eligible voter present at a meeting calls for, or supports, a written secret ballot in respect of a particular matter, then the vote must be undertaken in this manner.*

Issue

Having the right to vote anonymously is important to many retirement village residents and is seen as a safeguard against intimidation or pressure by fellow residents or village management into voting in a particular way.

Anonymous voting could apply to any meeting of residents, including meetings to elect members of a residents' committee under clause 5.10 of the Code, and meetings called by residents' committees or administering bodies under clause 5.11 of the Code. Anonymous voting is considered especially important for those meetings where a special resolution is to be passed by residents in accordance with clause 5.1(2) of the Code.

It is not always practicable or efficient to automatically require an anonymous vote on all issues. Therefore the final report recommended that where more than one eligible voter present at a meeting calls for, or supports, a written secret ballot, the vote must be undertaken this way.

Proposed change to the Code

It is proposed that clause 5.11 of the 2013 Interim Code be amended by inserting a sub-clause which provides for the implementation of recommendation 64.

The proposed sub-clause at 5.11 would state that where more than one eligible voter present at a meeting calls for, a written secret ballot in respect of a particular matter, then the vote must be undertaken in this manner and in a way that the secret ballot can be counted without identifying the way each eligible voter has voted.

Questions

11. Do you have any comments about the proposal to implement recommendation 64 of the final report regarding voting procedures and a secret ballot?
12. Should a similar provision for secret ballot be included in clause 5.10(1)(a) where residents who meet to elect a residents' committee also have the right to vote by secret ballot?

3.1.9 Dispute resolution (recommendation 68)

The final report recommended that:

the Code be amended to require that where the administering body must nominate a suitable person or body to deal with a dispute, that person or body must be acceptable to all parties to the dispute.

Issue

Currently, disputing parties in a retirement village must make some attempt to resolve disputes via a village dispute resolution process. The Code currently requires the administering body to nominate a suitable person or body to deal with the dispute. This can be problematic, particularly where there is a dispute between residents and the administering body. The most significant problem is that there is no certainty to the disputing resident that the dispute will be dealt with in an impartial or unbiased manner. Residents are effectively asked to have faith in a dispute resolution process that may be potentially biased.

The implementation of recommendation 68 of the final report should help to alleviate this problem so that the suitable person or body nominated by the administering body must be acceptable to all parties to the dispute. In working group discussions on this issue working group representatives agreed with this proposal and stated that it is important that the independent person should have good mediation skills. It should be noted that the Consumer Protection Division of the Department of Commerce has a well-established role in the conciliation of disputes and the resolution of complaints.

Proposed change to the Code

It is proposed that clause 6.2(1)(a) of the 2013 Interim Code be amended to implement recommendation 68. The amended clause would state that where a dispute occurs in a retirement village, the administering body must nominate a suitable person or body to deal with the dispute that is acceptable to all parties to the dispute.

It is further proposed that the amended clause may clarify that where a suitable person acceptable to all parties cannot be agreed upon, either party may approach:

- the Department of Commerce for assistance in conciliating the dispute; or
- the residents' committee of the village to suggest a person to mediate the dispute.

The Code may further be amended to state that where there is a cost of mediation, the cost will be borne equally by the parties to the dispute.

Question

13. Do you have any comments about the proposals to implement recommendation 68 of the final report regarding dispute resolution?

3.2 Amendments proposed since the tabling of the final report

Potential reforms that have been identified since the tabling of the final report include issues relating to special resolution¹⁵ meetings and refurbishment issues.¹⁶ An issue relating to the termination of a residence contract has also been identified.

3.2.1 Special resolution meetings

Several procedural issues relating to special resolution meetings have been raised since the tabling of the final report and these are:

- Issue 1: Whether ordinary resolutions should replace special resolutions in some circumstances when residents vote to make changes.
- Issue 2: Whether a residents' committee should be able to call a special resolution meeting.
- Issue 3: Whether the administering body should be able to be excluded from attending a special resolution meeting.
- Issue 4: Whether the meaning of the term "special resolution" should be clarified in the Code.

Issue 1: Should ordinary resolutions replace special resolutions?

A key issue is whether an ordinary resolution, which would provide for a voting threshold of more than 50 per cent of residents agreeing to a proposal at a meeting convened by the administering body or perhaps by the residents themselves, should either replace special resolutions, or be introduced into the Code in addition to special resolutions.

¹⁵ Definition of special resolution: Clause 5.1(1) of the Code states that *special resolution means a resolution passed at a meeting of residents called by the administering body in accordance with subclause 5.1(2).*

Subclause 5.1(2) states that to pass a special resolution –

- (a) *The residents must have been given written notice of the meeting under clause 5.11;*
- (b) *There must be a quorum present (whether in person or by proxy) of*
 - i. *A minimum of 5 residents entitled to vote on the resolution or 30% of the number of residents entitled to vote on the resolution (whichever is the greater) or*
 - ii. *If the retirement village has fewer than 10 occupied residential premises, a majority of residents entitled to vote; and*
- (c) *The resolution must be carried by at least 75% of the number of residents who are present (whether in person or by proxy) and entitled to vote and vote.*

For example, in a village of 100 residents who each have a single vote, a minimum of 30 residents would be required to attend the meeting or vote by proxy, and 75% of those voting would have to vote in favour, so a minimum of 22.5 votes would be required to carry the special resolution. As half a vote is not possible a minimum of 23 votes would be required. Similarly in a village of 50 residents, a quorum of 15 residents must attend the meeting and 12 residents vote in favour.

¹⁶ Refurbishment work is not currently defined in the RV Act or the Code. Refurbishment work generally references work required to clean, repair and/or restore residential premises, so that the premises are ready for viewing by prospective residents who may be interested in moving into the village. Refurbishment work is usually organised by the administering body at the former resident's expense.

Currently the Code is silent on the concept of ordinary resolutions. It does not prescribe matters that may be decided by residents by ordinary resolution, nor prescribe any requirements for the passing of ordinary resolutions, and imposes no restrictions on the passing of ordinary resolutions at meetings convened by the residents' committee or by the administering body.

In the Parliamentary debates during the passage of the Amendment Act, the Hon Lynn MacLaren MLC, proposed an amendment that ordinary resolutions be introduced to make it easier for residents to take a dispute to the SAT regarding excessive or unwarranted increases in recurrent charges.¹⁷

The proposal was not supported as it was recognised during the Parliamentary debates that important matters that have a significant impact on residents and the operations of a village should be passed by a vote of a substantial number of residents, as currently required in the definition of special resolution.

Various matters on which residents must make decisions by special resolution are prescribed in the Code. The Code currently allows residents to pass special resolutions to vary the following important matters of village operation, which have financial or other impacts on all residents:

- approve the application of any budget surplus in the village, to purposes generally of benefit to the residents of that village (clause 5.6). Surpluses are otherwise required to be applied to the future operating expenses of the village, unless the residence contract provides otherwise.¹⁸ A special resolution to apply the surplus to another purpose would remove an opportunity to reduce the future recurrent charges of all residents;
- vary or revoke the residence rules, which cover the rights and obligations of village residents and with which each resident must comply (clause 5.9). Such changes also require the agreement of the administering body, which must not be unreasonably withheld;
- remove an elected member of the residents' committee (clause 5.10) during their one-year term;
- vary the dispute resolution processes prescribed in the Code (clause 6.2). Such variations also require the agreement of the administering body, which must not be unreasonably withheld; and
- require that the accounts of the village financial operating position, presented to residents at the annual general meeting, be independently audited by a registered company auditor (clause 5.5). Such audits may cost around \$3,000 and this cost is normally passed on to all residents through increased recurrent charges.¹⁹

¹⁷ Hansard 20 September 2012, p6241b-6248a.

¹⁸ See proposed change to the Code at chapter 3.1.3 on page 13.

¹⁹ Note that the proposed change to clause 5.5 of the Code in chapter 3.1.4 on page 14 will make auditing of village operating accounts mandatory and will enable residents by special resolution to opt out of an audit.

In addition, new section 57A inserted by the Amendment Act clarifies that residents may collectively, if agreed by special resolution, appeal to the SAT if a dispute arises between the residents and the administering body regarding an increase in recurrent charges or the imposition of a levy. This is a significant decision which Parliament agreed should be made by special resolution rather than by ordinary resolution.

A new ability for residents to refer the functions of a residents' committee to an incorporated residents' association by special resolution is a further reform proposed to be included in the revised Code (see chapter 3.1.6 of this paper). Again, this is a decision which should be made by a significant number of residents. If these matters were to be varied by ordinary resolution, then in a village of 100 residents, if the current provisions of a meeting quorum are to be retained, a minimum of 15 residents who are entitled to vote and vote on an issue, would have the capacity to determine the outcome affecting the majority of residents. Based on a village of 100 residents, the current special resolution provision would require a minimum of 23 residents (which is just under a quarter) to vote in favour.

The current Code provisions also provide additional protections to residents around notice requirements for a special resolution meeting and rights to require a meeting, discussed below. The final report considered whether the requirements for passing a special resolution should be altered. Recommendation 65 of the final report was "*that the status quo remain in respect to the quorum and number of votes required to pass a special resolution*". It is currently proposed that this recommendation be retained, as:

- issues that require a special resolution vote are those that have a significant impact on the resident body as a whole;
- lowering the voting threshold and reducing the number of residents required to pass a special resolution, from 75 per cent of those voting to an ordinary majority of 51 per cent of those voting could be to the detriment of residents because a dominant minority of residents may force a decision on important matters that may not necessarily be in the interests of residents as a whole;
- although the legislation does not allow for the passing of an ordinary resolution by residents on significant issues prescribed by the Code and the Amendment Act, residents are not prohibited from passing ordinary resolutions on a variety of other matters in meetings called by a residents' committee or by the administering body; and
- if ordinary resolutions replace special resolutions in all or some circumstances, this could lessen the protections currently provided to residents through the current provisions of the Code and the administering body's obligations in regard to meetings of residents.

Proposed change to the Code

It is proposed that there be no change to the Code's requirements as to the quorum and number of votes required to pass a special resolution.

Question

14. Do you agree that the current provisions of the Code, regarding the quorum and number of votes required to pass a special resolution, should be retained?

Issue 2: Should a residents' committee be able to call a special resolution meeting?

Issue 2 is whether residents' committees should be able to call a special resolution meeting, or whether responsibilities around the calling of special resolution meetings should remain with the administering body.

Clauses 5.1(1) and 5.11 of the Code currently outline the responsibilities of administering bodies in relation to convening special resolution meetings.

WARVRA, representing the interests of residents, proposes that a residents' committee should have the ability to convene a special resolution meeting in those villages which have established such a body, and that residents' committees should follow up on decisions of residents from the meeting and attend to other notification requirements as required in clause 5.11 of the Code.

The situations in which a special resolution meeting must be called are outlined under Issue 1 above. WARVRA considers that these situations are either matters of concern to residents only and so there is no need for the administering body to be involved, or matters of dispute with the administering body where it could be inhibiting to the residents taking action for the administering body to be involved in calling or running the meeting.

The Code currently provides that the administering body must do several things to ensure that special resolution meetings are conducted fairly. The administering body:

- must hold a meeting at which a special resolution may be passed, within 20 days of receiving a request to do so, unless a later date is agreed to by the requesting party. The request may come from either the residents' committee, or, if the village has more than 10 occupied premises, a minimum of 5 residents or 10 per cent of the residents whichever is the greater; or, if the village has less than 10 occupied premises, by a majority of residents;²⁰
- must give all at least 10 working days written notice of a meeting at which a special resolution may be passed (or two working days in extraordinary or urgent circumstances). The notice must set out the time and place of the meeting, and the business to be transacted at the meeting, including any resolution that is to be put as a special resolution. All residents therefore receive a copy of the draft special resolution and 10 days written notice of the meeting at which the special resolution will be considered and voted on; and
- must within two working days of the meeting, give written notice to all residents of any special resolution passed.

These obligations are placed on the administering body as it:

- has the resources to ensure that procedures are conducted;
- has the information required to contact all residents;
- is a permanent entity within the village; and
- is generally affected by the outcomes of the special resolution.

²⁰ This means that in a village of 100 residents, the administering body must call a special resolution meeting if requested to do so by 10 residents; and in a village of 50 residents, must call a special resolution meeting if requested to do so by five residents.

Residents' committees may or may not exist within a village and may or may not have the skills or resources to ensure that special resolution meetings are convened and reported on as required. The current provisions can operate in all villages, whereas WARVRA's proposal for residents' committees to convene meetings would only operate where a residents' committee existed.

The requirement that the administering body must hold a meeting at which a special resolution may be passed, within 20 days of a request, is an important provision of the Code. Equally importantly, the Code provides that residents of a village in which a residents' committee is established, may bypass that residents' committee and require the administering body to call a meeting at which a special resolution may be passed. Generally, retaining the capacity to by-pass a residents' committee is important because it ensures that residents within a village have a voice if the residents' committee loses the support of residents.

Most special resolution matters affect the administering body and all residents. There are only two matters where the administering body may have a reduced interest in the outcome of a special resolution meeting. These are:

- where the residents vote to remove a residents' committee member; and
- the proposal outlined at chapter 3.1.6 above, that the residents may by special resolution transfer the functions of a residents' committee to a residents' association.

It is arguable that residents' committees could convene special resolution meetings on these issues without the administering body. However, for the other matters the administering body ought to participate as it is also affected by the outcome of the special resolution. Applying variable requirements for the calling of special resolution meetings, according to the issue to be voted on, would introduce unnecessary complexity to the Code.

A residents' committee of its own volition may currently call a meeting of residents of the village for any purpose, other than a purpose for which the Code or the residence contract requires the administering body to call the meeting.

Proposed change to the Code

It is proposed to retain the existing requirements for the administering body to convene a special resolution meeting under clauses 5.1(1) and 5.11 of the Code.

Question

15. Do you agree that the administering body's current responsibilities, in convening special resolution meetings of residents, should be retained?

Issue 3: Should the administering body be excluded from attending a special resolution meeting

Clauses 5.1(1) and 5.11 of the Code are currently silent on whether the administering body may or may not attend a special resolution meeting.

WARVRA proposes that the administering body should be able to be excluded from attending special resolution meetings as residents may not feel able to speak or vote freely if the administering body is present.

As most special resolution meetings affect the administering body as well as residents, it is an issue of natural justice that the administering body should be able to explain its position and discuss options to resolve problems, at the meeting at which a special resolution vote is to be taken. The administering body is likely to have information that is relevant to discussions and would assist residents to make informed decisions.

It may be suggested that a representative of the administering body must be present at the time of voting on the special resolution, in order to ensure that the proper process for conducting a special resolution vote is followed. However, this consideration:

- is reduced by the proposed new ability for votes to be taken by secret ballot and later counted; and
- is properly a matter that the chairperson of the meeting is responsible for.

A possible alternative is contained in the provisions of section 132(4) of the *Retirement Villages Act 1999* (Qld) which excludes the administering body from being present at special resolution meetings after they have addressed the meeting and when residents are voting to pass a special resolution, unless residents invite the administering body to remain. Queensland's legislation does not clarify the process by which residents decide to invite the administering body to remain at the meeting.

However, WARVRA's concerns may be largely addressed by the proposed secret ballot provisions outlined at chapter 3.1.8 above, which assist to safeguard residents against intimidation.

Residents are also able to meet at any time and it is possible for a residents' committee to call a meeting of all residents, before a special resolution meeting and without the presence of the administering body, to discuss matters.

Proposed change to the Code

It is proposed to amend clauses 5.1(1) and 5.11 of the Code to clarify that the administering body has the right to attend a special resolution meeting and address the residents, and may remain at the meeting while the residents vote, unless requested by residents to leave the meeting.

Question

16. Do you have any comments about the proposal to amend the Code to clarify the administering body's right to attend a special resolution meeting of residents?
17. How should a request by residents, that the administering body leave the meeting, be decided upon by residents?

Issue 4: Definition of special resolution

WARVRA has questioned the precise meaning of the term “special resolution”. New section 57A(3) of the RV Act, inserted by the Amendment Act, defines special resolution as follows:

Special resolution means a resolution passed at a meeting of the residents of a retirement village that is held in accordance with the requirements in an applicable code for passing a special resolution.

This is consistent with the definition in Clause 5.1(1) of the Code which states that special resolution means a resolution passed at a meeting of residents called by the administering body in accordance with subclause 5.1(2).

WARVRA has commented that the definition of special resolution in the Code is deficient as it actually says nothing about what a special resolution really is and why it is used in some instances.

It is acknowledged that residents and administering bodies should have a clear understanding of the meaning of special resolution and the circumstances in which a special resolution meeting must be called.

Proposed change to the Code

It is proposed that the definition of special resolution be clarified by means of a grey boxed area, as allowed by clause 4(2) of the Code, and be inserted after clause 5.1(2)(c) as follows:

A special resolution is a decision made by a vote of a quorum of residents on important and significant issues which directly affect the financial or general wellbeing of all the residents in a village.

The administering body must call a meeting at which a special resolution may be passed, in accordance with subclause 5.1(2) of the Code, which requires a quorum of residents to be present (either in person or by proxy), and 75 per cent of those residents to vote for the resolution.

Clause 5.11 of the Code requires the administering body to call the meeting within 20 days of being requested to do so, and to give at least 10 days written notice of the meeting (except in urgent or exceptional circumstances, when two working days written notice may be given).

Matters that must be decided by a special resolution vote of residents are prescribed in various clauses of the Code and in the *Retirement Villages Act 1992* and are:

- approving the application of any budget surplus in the village, to other purposes generally of benefit to the residents of that village (clause 5.6);
- varying or revoking the residence rules, which cover the rights and obligations of village residents and with which each resident must comply (clause 5.9);
- removing an elected member of the residents’ committee during their one-year term (clause 5.10);
- varying the dispute resolution processes prescribed in the Code (clause 6.2);

- vesting the functions of a residents' committee in an incorporated association²¹;
- agreeing by special resolution that residents may collectively appeal to the SAT if a dispute arises between the residents and the administering body regarding an increase in recurrent charges or the imposition of a levy. (*Retirement Villages Act 1992* section 57A); and
- agreeing by special resolution that residents may opt out of (rather than into) the requirement that the financial accounts of the village, presented to residents at the annual general meeting, be independently audited (proposed amended clause 5.5)²²,.

Question

18. Do you have any further suggestions as to how the meaning of the term "special resolution" may be clarified in the Code?

²¹ Clause 5.10 of the Code regarding residents' committees and associations (recommendation 61) is proposed to be amended in the revised Code, as discussed in chapter 3.1.6 above.

²² The proposal for mandatory auditing is discussed in chapter 3.1.4 above.

3.2.2 Refurbishment issues

It is general practice in the for-profit sector of the retirement village industry that when a resident permanently vacates their village unit, it is refurbished to bring it to a marketable condition for resale, generally at the resident's expense. Resolution of refurbishment issues is important because, for example, in lease-for-life villages, it is only after the lease on the residential premises is on-sold that the resident is able to receive a refund of the premium, less any deductions which may include a deduction for refurbishment costs.

The 2013 Interim Code at clause 5.8(1) requires that, where a resident permanently vacates their premises and is required under the residence contract to pay for the cost of any repair or refurbishment of those premises, the administering body must:

- (a) before commencing any repair or refurbishment work, give the resident (or their representative) written notice of the claim against the resident for the work, and an estimated cost of the work; and
- (b) before accepting or making any demand for payment for the work, complete the work and give the resident a fully itemised account for the final cost of the work.

Clause 5.8(2) currently enables the resident to apply to the SAT for an order in relation to a claim made by the administering body under 5.8(1), if the resident is of the opinion that:

- (a) before the work was carried out, the residential premises were in a condition required by the residence contract; or
- (b) the cost of the work is excessive.

A number of issues in relation to the refurbishment provisions in the 2013 Interim Code have been raised since the tabling of the final report and the passing of the Amendment Act. These are:

- when the refurbishment work is to be commenced and completed;
- the ability for the resident to negotiate with the administering body prior to refurbishment commencing; and
- appeals to the SAT on various matters.

These issues also relate to recommendation 77 of the final report, which originally recommended that the Department may conciliate in matters where:

- residents, or their personal representative, believe that the proposed refurbishment works are not warranted; and/or
- the estimated cost of the proposed works is excessive; and/or
- the estimated time to complete the works is excessive.

It should be noted that the Department already has the power to conciliate on all these matters. These issues may be more properly addressed in the Code.

Regarding the issue of when refurbishment work is to be commenced and completed, there are currently no obligations on the administering body to provide the resident with an estimate of when the refurbishment work is to be commenced or completed, or to commence or complete the work within a reasonable timeframe.

Regarding the ability for the resident to negotiate prior to refurbishment commencing, the Joint Standing Committee on Delegated Legislation (JSCDL) raised concerns following the making of the 2012 Interim Code, that clause 5.8 does not expressly provide a resident with an opportunity to query or negotiate as to whether the work is necessary or whether the estimated cost of the work is excessive, and that a resident's only right is to take the matter to the SAT after the event.

In this regard, the Department understands that many administering bodies do in practise consult and negotiate with an outgoing resident (or their representative) as to the necessity and cost of proposed refurbishment works, prior to those works commencing. In addition, the current clause 5.8 appears unclear – it appears to partly envisage the resident making application to the SAT on the “claim” provided by the administering body as to the cost of the work, before the work commences.

It is therefore proposed that, in response to the JSCDL's concerns, the current Code requires amendment to:

- expressly provide a resident with the right to query and negotiate with the administering body as to the necessity, estimated time of commencement and completion, and cost of the work; and
- clarify that a resident may appeal to the SAT under the current clause 5.8(2) as to a claim made by the administering body for refurbishment work, either before or after the work is commenced or completed.

Regarding appeals to the SAT, the current provisions in the Code limit residents' ability to appeal to the SAT, to situations where the resident (or their representative) is of the opinion that before the work was carried out, the residential premises were in a condition required by the residence contract, or that the cost of the work is excessive. Appeals to the SAT are not currently provided on the grounds that the estimated or actual time for commencement and completion of the work is excessive, or that the work was unwarranted.

Some of the Code's requirements around refurbishment may be moved to regulations under new section 14A of the RV Act, which was inserted by the Amendment Act 2012. Some further changes to the current arrangements for refurbishment could occur as part of this process.

Proposed change to the Code

In addressing the issues outlined above, it is proposed that clause 5.8 of the Code be amended:

- so that, before commencing the refurbishment work, the administering body must provide the resident with:
 - a written itemised estimate of the work (including the cost of the work) that the administering body claims the resident is liable to pay for under the contract; and
 - an estimate of when the work is to be commenced and completed;
- to expressly allow outgoing residents reasonable opportunity to query or negotiate with the administering body as to the necessity, proposed timing of commencement and completion, and cost of the refurbishment work with the administering body, before the work is carried out;

- to clarify and extend the jurisdiction of the SAT, so that the resident (or their representative) may apply to the SAT before or after the commencement or completion of the work, where they are of the opinion that:
 - the estimate of when the work is to be commenced and completed, or the actual time being taken to commence or complete the work, is unreasonable; or
 - the estimated or final cost of the work is excessive; or
 - in respect to the whole or part of the estimated work or the completed work, the residential premises were in a condition required by the residence contract at the time the resident permanently vacated the premises;
- the information below be contained in a grey boxed area after clause 5.8 to assist residents to understand their rights in settling a dispute regarding refurbishment:

Negotiating refurbishment work

The resident, or their representative, has the opportunity to query and negotiate with the administering body, as to the extent and cost of the proposed refurbishment work, and the estimated time for its commencement and completion, before the work is commenced.

These rights can be exercised where the resident believes that the refurbishment work is unwarranted, or is not required by the residence contract, or that the estimated cost of the work is excessive, or that the estimated or actual time for commencement or completion of the work is unreasonable.

If a resident and the administering body are unable to resolve a dispute regarding refurbishment, the Department of Commerce may conciliate on any retirement village dispute under section 8(1)(d) of the *Retirement Villages Act 1992* (RV Act). The resident (or their representative) also has the option to take the matter to the State Administrative Tribunal (SAT).

Please note, however, that the SAT has:

- the power, under section 42 of the RV Act, to decline any application if it considers that the matter in dispute could be adequately dealt with under any applicable Code or residence rules, or by negotiation by the Department of Commerce; and
- additional powers under its own enabling legislation to dismiss the application or refer the matter to mediation.

Question

19. Do you have any comments about the proposals to change the Code in relation to refurbishment?

3.2.3 Termination of residence contracts

Issue

Clause 7.1(1) of the Code currently states:

7.1 Notice of intention to terminate

- (1) *Unless otherwise provided in the residence contract, the administering body of a retirement village must give a resident at least 10 working days written notice of its intention to apply to the State Administrative Tribunal for an order to terminate a residence contract under the Retirement Villages Act 1992 section 58 or 59.*

It would seem to be fair for all residents to receive reasonable notice of the intention of an administering body to apply to the SAT to terminate a residence contract under section 58 or 59 of the RV Act. For this reason, and on the basis that 10 working days is considered to be a reasonable minimum period of notice, it has been suggested that clause 7.1 of the Code should not be subject to any contrary provision in a residence contract which may provide for a lesser notice period.

Proposed change to the Code

It is proposed to amend clause 7.1(1) to delete the words “unless otherwise provided for in the residence contract” at the beginning of the clause.

Question

20. Do you have any comments about the proposal that it be mandatory for the administering body to provide at least 10 working days’ notice to the resident, of the administering body’s intention to apply to the SAT for an order to terminate a residence contract?

3.3 Transferring code clauses to the regulations

Several amendments to the 2013 Interim Code result from:

- deleting clause 3.1 of the Code as all pre-contractual disclosure documents which must be given to prospective residents before entering into a residence contract will be prescribed under section 13(2)(e) of the RV Act; and
- deleting various clauses in division 4 of the Code which refer to required inclusions in residence contracts; these clauses will be remade as regulations under new section 14A of the RV Act.

3.3.1 Pre-contractual disclosure: clause 3.1 of the Code

Clause 3.1 of the Code requires a number of documents to be given to prospective residents before entering into a residence contract. These disclosure documents are in addition to the pre-contractual disclosure documents required to be given to prospective residents under section 13(2) of the RV Act.²³

Proposed change to the Code

It is proposed that clause 3.1 be deleted from the Code and remade in the Regulations under section 13(2)(e) of the RV Act.

As well as specifying disclosure documents under one provision, the advantage of transferring the requirements from the Code to the Regulations is that the Regulations allow for a direct penalty for non-compliance. It is important that residents receive all the required pre-contractual disclosure documents because the cooling off period will not commence until all the documents have been provided to the resident, who may, after further consideration, wish to withdraw from the contract.

3.3.2 Residence contracts: division 4 clauses of the Code

New section 14A of the RV Act states that the Regulations may provide for provisions or matters that must be included, or provisions or matters that must not be included, in residence contracts or in residence contracts of a specified kind. The maximum penalty for entering a contract to which the regulations apply (after the commencement of the regulations), in contravention of those regulations, is \$20,000.

²³ s13(2) *Retirement Villages Act 1992* (WA) requires that:
At least 10 working days before a person enters into a residence contract, the owner shall cause to be given to that person —

- (a) a statement in the prescribed form completed and signed by the owner containing the information required by the regulations;
- (b) a notice in the prescribed form of the person's rights under this section and section 14;
- (c) a copy of the residence rules;
- (d) a copy of any applicable code; and
- (e) any other prescribed documents.

Penalty: \$20,000.

This section also includes two deeming provisions which provide that:

- if a residence contract does not include a clause in the terms required by the regulations, the contract will be taken to include the clause in those terms; and
- if a residence contract includes a clause or matter that is prohibited by the regulations, the contract is void to the extent of the clause or matter. This means that that clause or matter in the contract is void and unenforceable.

These deeming provisions will provide relevant residents with the full benefit of the provisions contained in the regulations, irrespective of the written terms of their contracts, or when those contracts were entered into.²⁴

To ensure that residents of a retirement village benefit from the full protection provided by the new section 14A, particularly the deeming provisions, the various clauses in division 4 of the Code, which set out information to be included in residence contracts, are to be removed from the Code and remade as Regulations under section 14A.

This will also facilitate more timely and effective enforcement, and thereby have a more immediate impact on the behaviour of an administering body that is not complying with these requirements. Compliance with the Code involves a two stage process whereby the Commissioner must first apply to the SAT for an order. The SAT then may make orders including that:

- the administering body cease contravening the Code; and/or
- the administering body rectify any consequence of that contravention.

An administering body that fails to comply with an order made by the SAT commits an offence that is then prosecutable through the courts. (The maximum penalty for breaching an order of the SAT is \$50,000).

In contrast, there is a direct penalty for entering a contract which contravenes the regulations made under new section 14A, and this both:

- provides an incentive for an administering body to ensure their contracts comply with the requirements of the regulations in the first place; and
- provides for immediate prosecution proceedings to be commenced through the courts in the case of non-compliance.

It is further expected that provision may be made for the issuing of infringement notices for breaches of the requirements of any regulation made under section 14A, which would mean that immediate on-the-spot fines could be issued against an offending administering body.

²⁴ Section 14A provides that the regulations themselves will stipulate whether they apply to contracts signed after those regulations commence, or contracts signed both before and after those regulations commence. All contracts to which the regulations apply, will receive the benefit of the deeming provisions.

Proposed change to the Code

It is proposed that all clauses in division 4 of the 2013 Interim Code, that refer to the requirements of a residence contract, be deleted from the Code and remade in the Regulations arising from new section 14A of the Act. These clauses to be deleted are:

- Clause 4.1(1)** A residence contract must be written in clear, concise and plain language and be printed in a size not less than 12 point type.
- Clause 4.1(2)** A residence contract must include a statement where the resident acknowledges that he/she has had the opportunity to take independent advice on the contract.
- Clause 4.2** A residence contract must disclose the legal basis of occupancy (e.g. lease or licence), the type of occupancy (e.g. self-care or serviced unit), and the period of occupancy.
- Clause 4.3** In relation to a proposed village or a village under construction, a residence contract must provide particulars about the residential premises (e.g. the location, floor plan, dimensions and fixtures, fittings and furnishings) and the communal property.
- Clause 4.4** A residence contract must state the amenities that are to be provided or made available to the resident, including any charges or conditions that apply to their availability and the basis for the future determination of the cost of providing the amenities.
- Clause 4.6** A residence contract must state particulars of the premium or rent payable by the resident to secure the residential premises and the premium refund entitlement of the resident, including the method of calculation of the refund.
- Clause 4.7** A residence contract must state the items of the village operating costs to which the resident must contribute, including the basis for the future determination of these costs, the ongoing costs the resident will be liable for on permanently vacating their premises and who is responsible for the costs of maintaining the premises in a reasonable state of repair.
- Clause 4.8** A residence contract must include details of any reserve fund established for the purpose of meeting the costs of repairs, replacements, maintenance and renovations within the village, including the method of calculation used to determine any contribution that the resident must pay.

- Clause 4.9** A residence contract must include information regarding the transfer or relocation of the resident to other premises within the village, including the circumstances under which this can be done and the financial implications.
- Clause 4.10** A residence contract must set out the manner in which a resident may terminate a residence contract, including who is responsible for ongoing village operating costs during a period of vacancy, and the fees payable on termination.
- Clause 4.11(1)** A residence contract must draw the resident's attention to the existence of the Code and the Act.
- Clause 4.11(2)(a)** A residence contract must clearly disclose the right of the resident to be consulted on, and have access to information about the administrative and operating financial arrangements of the village.
- Clause 4.11(2)(b)** A residence contract must clearly disclose the right of the resident to have a dispute dealt with by the various means provided for in the Act and the Code.

Question

21. Do you have any comments about the proposed transfer of clauses from the Code to the Regulations?

3.4 Consequential amendments

This section contains amendments to the 2013 Interim Code which are consequential to the passage of the Amendment Act, including new and amended definitions and new disclosure and cooling off timeframes.

3.4.1 Definitions

Issue

The Amendment Act amended section 3 of the RV Act to insert some additional definitions for terms used in the Act, including the terms “levy”, “premium” and “service contract”. These are terms which also appear in the Code.

Levy: the new definition of the term “levy” is as follows:

Levy means a single amount that the residents of a retirement village are required to pay to recover an unforeseen operating expense of the retirement village not provided for in the recurrent charges.

The new definition of “levy” recognises circumstances where an unforeseen operating expense within the village warrants village residents paying a single amount to cover that expense. A “levy” is contrasted with “recurrent charges” that are paid by residents to cover the day to day operating expenses of a village over a financial year. The definition is relevant to new section 57A of the RV Act which empowers residents to collectively take a dispute to the SAT in relation to increases in recurrent charges or the imposition of a levy payable by residents.

Premium: The definition of “premium” was amended to exclude “a levy”, for consistency with its exclusion of “recurrent charges”.

The new definition of the term “premium” is as follows:

Premium means a payment (including a gift) made to the administering body of a retirement village in consideration for, or in contemplation of, admission of the person by or on whose behalf the payment was made as a resident in a retirement village (including any such payment made for the purchase of residential premises in a retirement village or for the purchase, issue or assignment of shares conferring a right to occupy any such residential premises) but does not include —

- (a) any such payment excluded by regulation from the ambit of this definition;*
- or*
- (b) a levy or recurrent charges.*

Service contract: paragraph (g) of the definition of “service contract” was amended to clarify that in addition to “recreation services” a service contract may provide “recreation services or amenities or entertainment services or amenities”. Paragraph (g) previously referred only to “recreation services”. This clarification relates to disputes on service contract matters that can be heard by the SAT under section 56 of the Act.

The remainder of the definition of “service contract” in the current Code, will be unaffected by the amendment.

The new definition of the term “service contract” is as follows:

Service contract means a contract between an administering body or former administering body of a retirement village and a resident for the provision to the resident of —

- (a) hostel care; or*
- (b) infirmary care; or*
- (c) medical or nursing services; or*
- (d) meals; or*
- (e) administrative and management services; or*
- (f) maintenance and repair services; or*
- (g) recreation services or amenities or entertainment services or amenities; or*
- (h) any other services,*

and any collateral agreement or document relating to the provision of any such service.

It is important to note in the context of the definition of “service contract” that clause 1.2 of the Code provides that the Code does not apply to the administering body or a resident of a retirement village in so far as the administering body is an approved provider within the meaning of the Aged Care Act in relation to the residential premises used by the resident, and provides the resident with residential care, in respect of which the administering body is eligible for a residential care subsidy. In this regard, the Code reflects section 5(2) of the RV Act.

Change to the Code

The grey boxed area at clause 1.1 of the Code will be amended to reflect the Amendment Act’s changes to the RV Act’s section 3 definitions of “levy”, “premium” and “service contract”.

3.4.2 Disclosure and cooling off periods

Disclosure period

The Amendment Act increased the disclosure period in section 13(2) of the RV Act, which sets out certain rules relating to residence contracts and ensures that prior to signing a residence contract prospective residents receive important information about the retirement village. The information is intended to assist prospective residents to make informed decisions on whether a particular village will meet his/her needs and expectations. Section 13(2) of the RV Act was amended to increase the time within which such information must be provided from 5 to 10 working days. This increased disclosure period must be reproduced in the Code.

Section 13 was also amended to insert an additional subsection (4A) to provide that a fee or charge must not be imposed in relation to the provision of information or documents under sections 13(2) or 13(3). A penalty of \$5,000 will apply to a contravention of section 13(4A). Information about this provision and penalty in the Amendment Act could be reproduced in the Code.

Change to the Code

Clause 3.2 of the Code which deals with service contracts will be amended to change the disclosure period from 5 to 10 working days.

Cooling off period

Section 14 of the Act provides a cooling off period within which a prospective resident can rescind the residence contract. The Amendment Act increased the cooling-off period, as outlined below:

- where the pre-contractual documents have been given to the prospective resident within the required period under section 13(2) of the RV Act, the cooling off period increases from 5 to 7 working days after entry into the residence contract; and
- where section 13(2) of the RV Act has not been complied with, the cooling-off period increases from 10 to 17 working days after the date on which the documents are given to the prospective resident.

The amendments to section 14(1) of the RV Act complement the amendments to section 13(2) of the RV Act, and recognise that residence contracts are complex documents that prospective residents need time to review, and if necessary, seek independent legal and financial advice on. When considered together, the periods specified in sections 13(2) and 14(1) of the RV Act ensure that all prospective residents have at least 17 working days within which to review relevant documentation before being contractually bound to take up residency within the village.

Change to the Code

The above information regarding the increased cooling off period will be replicated in the Code in the grey boxed area which appears under the heading “*Residence contract cooling off period*” after clause 4.1(2) of the Code.

Questions

This section has been included for your information and no further feedback is required.

4. APPENDICES

APPENDIX 4.1 SUMMARY OF PROPOSED AMENDMENTS

4.1.1 Final report recommendations:

The following proposed amendments to the Code arise from recommendations in the final report:

Aged care facilities (recommendation 4)

That the legislation be amended to:

- replace the statement relating to aged care facilities, that is prescribed in the Code, with a statement redrafted into simpler terms; and
- require that, in addition to inclusion in promotional material, this statement be incorporated into the key terms summary and the residence contract.

The proposed statement is to be contained in the Regulations as well as in the Code to enable residence contracts to contain the statement.

Village budgets (recommendation 40)

That the legislation be amended to require that, if called upon, a village operator must demonstrate to residents that reasonable steps have been taken to minimise increases in village operating costs.

Budget Surplus (recommendation 41)

That the legislation be amended to require that any budget surplus be carried forward and applied to the village in which the surplus arose.

Auditing of accounts (recommendation 43)

That clause 5.5 of the current 2013 Interim Code be amended to require that:

- all operating costs accounts and reserve funds or similar accounts of retirement villages be audited by an independent auditor on an annual basis;
- such audited statements continue to be provided to residents at the annual general meeting;
- the above provisions be waived if, at the previous annual budget meeting, the residents decide by special resolution to dispense with this requirement;
- the option remain that at a later time residents, by special resolution, may resolve to require the operating costs accounts and reserve funds or similar accounts of the village to be audited; and in such cases the audited accounts are to be provided to residents at the next annual general meeting, and on request to a residents' committee or individual resident prior to the next annual general meeting; and
- the cost of the audit be allocated according to provisions in the residence contract.

Capital maintenance (recommendation 54)

That clauses 5.2 to 5.5 of the Code be amended as necessary to specify that the requirements for an administering body to consult with and provide financial information to residents apply to a reserve fund and any other fund or account established for purposes that include the maintenance, repair, replacement and renovation of the village (including replacement of capital items).

Residents' committees and associations (recommendation 61)

Amendments to enable residents to vest the functions of the residents' committee in an association formed under the *Associations Incorporation Act 1987*.

Consultation with residents (recommendation 62)

That the Code also be amended to clearly emphasise the intention of the Code, in relation to the duty of administering bodies to consult genuinely with residents.

Voting procedures (recommendation 64)

That the legislation be amended to provide that where more than one eligible voter present at a meeting calls for, or supports, a written secret ballot in respect of a particular matter, then the vote must be undertaken in this manner.

Dispute resolution (recommendation 68)

That the Code be amended to require that where the administering body must nominate a suitable person or body to deal with a dispute, that person or body must be acceptable to all parties to the dispute.

4.1.2 Matters raised subsequent to the tabling of the final report

The following issues have been raised subsequent to the tabling of the final report:

Special resolution issues

Special resolution – issues around:

- introducing “ordinary resolutions”;
- the calling and conduct of meetings;
- exclusion of management; and
- the definition of “special resolution”.

It is proposed that:

- there be no change to the Code's requirements as to the quorum and number of votes required to pass a special resolution;
- the existing requirements for the administering body to convene a special resolution meeting under clauses 5.1(1) and 5.11 of the Code be retained;
- the Code clarify that the administering body has the right to attend a special resolution meeting and address the residents, and may remain at the meeting while the residents vote, unless requested by residents to leave the meeting; and
- the Code clarify the definition of special resolution.

Refurbishment issues

In response to concerns raised by the Joint Standing Committee on Delegated Legislation, and in recommendation 77 of the final report, it is proposed that the Code be amended:

- so that, before commencing the refurbishment work, the administering body must provide the resident with:
 - a written itemised estimate of the work (including the cost of the work) that the administering body claims the resident is liable to pay for under the contract; and
 - an estimate of when the work is to be commenced and completed;
- to expressly allow outgoing residents reasonable opportunity to query or negotiate with the administering body as to the necessity, proposed timing of commencement and completion, and cost of the refurbishment work with the administering body, before the work is carried out;

- to clarify and extend the jurisdiction of the SAT, so that the resident (or their representative) may apply to the SAT before or after the commencement or completion of the work, where they are of the opinion that:
 - the estimate of when the work is to be commenced and completed, or the actual time being taken to commence or complete the work, is unreasonable; or
 - the estimated or final cost of the work is excessive; or
 - in respect to the whole or part of the estimated work or the completed work, the residential premises were in a condition required by the residence contract at the time the resident permanently vacated the premises; and
- certain information be contained in a grey boxed area after clause 5.8(2) to assist residents to understand their rights in settling a dispute regarding refurbishment.

Termination of residence contracts

It is proposed to amend clause 7.1(1) to delete the words “unless otherwise provided for in the residence contract” at the beginning of the clause so that the Code is not subject to any contrary provision in a residence contract which may allow the administering body to provide a lesser notice period than 10 working days of intention to apply to the SAT for an order to terminate a residence contract.

4.1.3 Clauses to be deleted from the Code

Clause	Description
Clause 3.1	<p>This clause requires a number of disclosure documents to be given to a prospective resident prior to entering into a residence.</p> <p>This clause will be deleted from the Code. The disclosure documents will be prescribed in the Regulations under section 13(2)(e) of the RV Act which deals with pre-contractual disclosure provisions. The Regulations will provide for the increased disclosure period from 5 to 10 working days.</p>
Division 4	The following clauses contained in division 4 of the Code are to be deleted and remade as Regulations under new section 14A of the Act.
Clause 4.1(1)	A residence contract must be written in clear, concise and plain language and to be printed in a size not less than 12 point type.
Clause 4.1(2)	A residence contract must include a statement where the resident acknowledges that he/she has had the opportunity to take independent advice on the contract.
Clause 4.2	A residence contract must disclose the legal basis of occupancy (e.g. lease or licence), the type of occupancy (e.g. self-care or serviced unit), and the period of occupancy.

Clause	Description
Clause 4.3	In relation to a proposed village or a village under construction, a residence contract must provide particulars about the residential premises (e.g. the location, floor plan, dimensions and fixtures, fittings and furnishings) and the communal property.
Clause 4.4	A residence contract must state the amenities that are to be provided or made available to the resident, including any charges or conditions that apply to their availability and the basis for the future determination of the cost of providing the amenities.
Clause 4.6	A residence contract must state particulars of the premium or rent payable by the resident to secure the residential premises and the premium refund entitlement of the resident, including the method of calculation of the refund.
Clause 4.7	A residence contract must state the items of the village operating costs to which the resident must contribute, including the basis for the future determination of these costs, the ongoing costs the resident will be liable for on permanently vacating their premises and who is responsible for the costs of maintaining the premises in a reasonable state of repair.
Clause 4.8	A residence contract must include details of any reserve fund established for the purpose of meeting the costs of repairs, replacements, maintenance and renovations within the village, including the method of calculation used to determine any contribution that the resident must pay.
Clause 4.9	A residence contract must include information regarding the transfer or relocation of the resident to other premises within the village, including the circumstances under which this can be done and the financial implications.
Clause 4.10	A residence contract must set out the manner in which a resident may terminate a residence contract, including who is responsible for ongoing village operating costs during a period of vacancy, and the fees payable on termination.
Clause 4.11(1)	A residence contract must draw the resident's attention to the existence of the Code and the Act.
Clause 4.11(2)(a)	A residence contract must clearly disclose the right of the resident to be consulted on, and have access to information about the administrative and operating financial arrangements of the village.
Clause 4.11(2)(b)	A residence contract must clearly disclose the right of the resident to have a dispute dealt with by the various means provided for in the Act and the Code.

4.1.4 Matters consequential to the *Retirement Villages Amendment Act 2012*

The following reforms will be duplicated in the new revised code.

Definitions

Definition of the terms “levy”, “premium”, and “service contract”.

Disclosure and cooling off periods

The disclosure period under clause 3.2 of the Code which deals with service contracts will be increased from 5 to 10 working days. The cooling off period in the grey boxed area of the Code after clause 4.1(2) will be increased from 5 to 7 working days, or from 10 to 17 working days where section 13(2) of the RV Act has not been complied with.

4.1.5 Amendments not included in the revised Code

The following final report recommendations that can be implemented by changes to the Code will not be included in the Code at this stage because they rely on further amendments to the RV Act.

Structure of the legislation (recommendation 81)

That the legislation be restructured to comprise the Act, the Regulations and a Code made under the *Retirement Villages Act 1992* so that all components regulating retirement villages are contained within a single legislative package.

Service contract (recommendation 20)

That the legislation be amended to remove, where appropriate, any reference to a “service contract”.

APPENDIX 4.2 RELEVANT CODE CLAUSES RELATING TO CONSULTATION AND PROVISION OF INFORMATION TO RESIDENTS

The following clauses of the 2013 Interim Code refer to the obligations of administering bodies regarding consultation and provision of information to residents, and are relevant to this Discussion Paper:

1.4 Objectives of the Code

The objectives of the Code are to —

- (e) facilitate consultation between the administering body and the residents on the management of a retirement village;

4.11 Residence contract to refer to this Code and the *Retirement Villages Act 1992*

- (2) The residence contract must clearly disclose the right of the resident to —
 - (a) be consulted on, and have access to information about, administrative and operating financial arrangements of the retirement village, as provided for under clause 5.2 of this Code;

5.1 Interpretation

- (1) In this Division —
 - personal representative** includes a resident's attorney, guardian, executor, administrator or trustee in bankruptcy;
 - registered company auditor** means a person registered as an auditor, or taken to be registered as an auditor, under the *Corporations Act 2001* of the Commonwealth;
 - special resolution** means a resolution passed at a meeting of residents called by the administering body in accordance with subclause (2).
- (2) To pass a special resolution —
 - (a) the residents must have been given written notice of the meeting under clause 5.11; and
 - (b) there must be a quorum present (whether in person or by proxy) of —
 - (i) a minimum of 5 residents entitled to vote on the resolution or 30% of the number of residents entitled to vote on the resolution (whichever is the greater); or
 - (ii) if the retirement village has fewer than 10 occupied residential premises, a majority of residents entitled to vote;
 - and
 - (c) the resolution must be carried by at least 75 per cent of the number of residents who are present (whether in person or by proxy) and entitled to vote and vote.

5.2 Management procedures and resident consultation

- (1) The administering body of a retirement village must —
 - (a) provide prudential, efficient and economical management of the retirement village, having regard to the terms and conditions of the residence contract and any related contracts; and
 - (b) establish appropriate procedures for consulting with residents on the future planning and budgeting of the retirement village and any other proposed change to the administrative or operating financial arrangements of the village; and
 - (c) establish appropriate procedures to provide the residents with access to management information relating to the administrative or operating financial arrangements of the retirement village.
- (2) The administrative or operating financial arrangements of a retirement village to which subclause (1)(b) and (c) apply, include but are not limited to —
 - (a) amenities or services provided or made available to the residents where any change may involve either increased costs to residents or the reduction or loss of an amenity or service; and
 - (b) the operating budget for each financial year of the retirement village (see clause 5.3); and
 - (c) any plans for the expansion of, or for substantial alterations to, the retirement village; and
 - (d) proposals for the upgrading of buildings, fixtures or fittings where the residents are financing either the whole or a part of the capital or ongoing costs of the work; and
 - (e) the establishment of, or changes to, the residence rules (see clause 5.9).
- (3) The administering body must comply with any reasonable request made by a resident for information on a specific administrative or operating budget matter, and make available for inspection any documents that might reasonably be expected to be material to that request.
- (4) The administering body must respond to a request made under subclause (3) within 10 working days, and in the case of any refusal or inability to comply with that request, give reasons in writing.

5.3 Village operating budget

- (1) No later than one month before the end of each financial year of a retirement village, the administering body must display the following documentation (budget documents) in a central location in the retirement village and make the documentation available to each resident on request —
 - (a) a proposed operating budget for the next financial year of the retirement village;
 - (b) the operating budget information used in the preparation of the proposed 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.
- (2) The administering body must give each resident written notice when the budget documents are available.

- (3) The proposed operating budget must be presented in a consistent format from one financial year to the next and include —
 - (a) the amount of village operating costs or charges payable by residents during the year; and
 - (b) any other forms of income which are used to meet village operating costs; and
 - (c) all proposed categories of expenditure (without grouping together unlike categories); and
 - (d) the net of GST amount for any budget item that is a GST-taxable supply for which the administering body is entitled to an input tax credit; and
 - (e) the method or calculation used to apportion any expenditure item that is an apportionment of a total expenditure of more than one retirement village administered by the same administering body; and
 - (f) the total proposed expenditure for the year; and
 - (g) the expected surplus or deficit for the year.
- (4) The administering body may, but is not required to, use the proposed operating budget form set out in Appendix 2.
- (5) Where the administering body administers more than one retirement village, the administering body must provide separate budget documents for each village.
- (6) The operating budget for the next financial year must not be finalised until —
 - (a) each resident has been given a minimum of 10 working days after service of the notice under subclause (2) to consider the proposed budget; and
 - (b) the administering body has held a meeting of the residents as required under clause 5.11(1)(b).

5.4 Quarterly operating income and expenditure statements

- (1) For each quarter of a financial year of a retirement village and no later than one month after the end of each such quarter, the administering body must provide operating income and expenditure statements (operating statements) to the residents that show details of —
 - (a) the retirement village's actual operating costs, income and expenditure against projections of the same; and
 - (b) payments made to and from, and the amounts standing to the credit of, any reserve funds for the retirement village.
- (2) The administering body may, but is not required to, use the form of operating statements set out in Appendix 3 and 4.
- (3) Where the administering body administers more than one retirement village, the administering body must provide separate operating statements for each village.
- (4) The administering body must —
 - (a) display the operating statements in a central location in the retirement village; and
 - (b) make the operating statements available to each resident on request.

5.5 Annual accounts

- (1) At the annual general meeting called under clause 5.11(1)(a), the administering body must provide the residents with a clear written presentation of the operating financial position of the retirement village as at the end of the previous financial year, including —
 - (a) if the accounts of income and expenditure for that year have been independently audited by a registered company auditor, copies of the audited accounts; or
 - (b) if the accounts have not been so audited, copies of the actual accounts of income and expenditure for that year.
- (2) If the accounts provided to the residents under subclause (1) have not been independently audited by a registered company auditor, the residents may request that the accounts be so audited, if agreed by a special resolution.
- (3) Where a request for an independent audit of the accounts has been made under subclause (2), the administering body must —
 - (a) arrange for the accounts to be so audited as soon as practicable; and
 - (b) provide a copy of the audited accounts to a resident on request.

5.6 Budget surplus

The administering body must apply any surplus in the operating budget of a retirement village towards the future operating expenses of that village, except where —

- (a) the residence contract provides otherwise; or
- (b) the residents, by a special resolution, approve the application of the whole or a part of the budget surplus to any other purpose or purposes that is, or are, generally of benefit to the residents of that retirement village.

5.8 Repair and refurbishment of residential premises

- (1) Where a resident permanently vacates the residential premises and is required under the residence contract to pay for the cost of any repair or refurbishment of those premises, the administering body must —
 - (a) before the commencement of any repair or refurbishment work (the work), give the resident or the resident's personal representative —
 - (i) written notice of the claim against the resident for the work; and
 - (ii) an estimated cost of the work; and
 - (b) before accepting or making any demand for payment for the work —
 - (i) complete the work; and
 - (ii) give the resident, or the resident's personal representative, a fully itemised account for the final cost of the work.
- (2) The resident, or the resident's personal representative, may apply to the State Administrative Tribunal for an order in relation to a claim made by the administering body under subclause (1), if the person is of the opinion that —
 - (a) before the work was carried out, the residential premises were in a condition required by the residence contract; or
 - (b) the cost of the work is excessive.

5.9 Residence rules

- (1) The administering body must establish a set of residence rules covering the rights and obligations of the residents of the retirement village.
- (2) The residence rules must be clear and consistent with this Code and the *Retirement Villages Act 1992*.
- (3) The administering body must consult with the residents of all occupied residential premises, if any, prior to making, changing or revoking the residence rules.
- (4) The residents may, by special resolution and with the agreement of the administering body, change or revoke the residence rules.
- (5) The administering body must not unreasonably withhold agreement to a special resolution passed by the residents under subclause (4).
- (6) Each resident of a retirement village must comply with the residence rules.

5.10 Residents' committee

- (1) The residents of a retirement village may establish a residents' committee by an election conducted —
 - (a) among themselves; or
 - (b) in the absence of an election held under paragraph (a), by the administering body if requested by —
 - (i) a minimum of 5 residents or 10 per cent of the residents, whichever is the greater; or
 - (ii) if the village has fewer than 10 occupied residential premises, residents from a majority of the occupied residential premises.
- (2) Only one residents' committee (regardless of its name) may be established in the retirement village for the purposes of subclause (5), and only a resident of the village may be a member of the committee.
- (3) A member of the residents' committee —
 - (a) holds office for not more than one year, but may be re-elected; and
 - (b) may be removed at any time, by a special resolution.
- (4) The residents' committee may —
 - (a) decide its own procedures; and
 - (b) form subcommittees and decide a subcommittee's procedures.
- (5) The function of the residents' committee is to consult with the administering body on behalf of the residents about the day-to-day running of the retirement village and any issues or proposals raised by the residents.
- (6) Nothing in this clause prevents the residents of the retirement village from establishing other committees or bodies of residents for other purposes.

5.11 Residents' meetings

- (1) The administering body of a retirement village —
 - (a) must hold an annual general meeting of the residents within 5 months after the end of each financial year of the retirement village; and
 - (b) must hold an annual budget meeting of the residents before the end of each financial year, at which the business to be transacted shall be limited to dealing with matters relating to the final budget proposals for the next financial year of the retirement village; and
 - (c) may call a meeting of the residents at any time if it is reasonable to do so; and
 - (d) must call a meeting of the residents on the reasonable request of a residents' committee established under clause 5.10; and
 - (e) must call a meeting of the residents if requested to do so by —
 - (i) a minimum of 5 residents or 10% of the residents, whichever is the greater; or
 - (ii) if the retirement village has fewer than 10 occupied residential premises, residents from a majority of the occupied residential premises.
- (2) Where the administering body administers more than one retirement village, the administering body must hold meetings under subclause (1)(a) and (b) for each village.
- (3) Where a residents' committee has been established in the retirement village under clause 5.10, the committee may of its own volition call a meeting of the residents of the village for any purpose, other than a purpose for which this Code or the residence contract requires the administering body to call a meeting.
- (4) Where a request for a meeting of the residents is made under subclause (1)(d) or (e), the administering body must hold the meeting within 20 working days of the request being made, or at a later date if agreed to by the residents' committee referred to in subclause (1)(d) or the majority of the residents referred to in subclause (1)(e), as the case may be.
- (5) Subject to subclause (6), the administering body or the residents' committee, as the case may be, must give each resident at least 10 working days written notice of a meeting called under subclause (1) or (3).
- (6) In extraordinary or urgent circumstances, the administering body may call a meeting of the residents by giving each resident written notice of the meeting that is reasonable in the circumstances but not less than 2 working days.
- (7) A notice given under subclause (5) or (6) must set out —
 - (a) the time and place of the meeting; and
 - (b) the business to be transacted at the meeting, including any resolution that is to be put as a special resolution.
- (8) The administering body must within 2 working days after a meeting of the residents give written notice to all the residents of any special resolution passed at the meeting.

- (9) Unless otherwise provided in the residence contract, if 2 or more residents occupy the same residential premises in the retirement village, each of them may vote at a meeting of the residents on any matter that requires, or provides for, a vote of the residents.
- (10) A meeting of the residents must not be held simultaneously with a meeting held under another law, such as a meeting held under the Strata Titles Act 1985 if the retirement village is comprised in a strata plan or survey-strata plan registered under that Act.

Term	Definitions and synonymous or related term
Act	<i>Retirement Villages Act 1992 (RV Act)</i>
Administering body	Village administrator, village manager, operator, owner, proprietor
Aged care	Residential aged care for older people who can no longer live at home due to illness, disability, bereavement: administered by the Commonwealth in accordance with the Commonwealth's <i>Aged Care Act 1997</i> .
Amendment Act	<i>Retirement Villages Amendment Act 2012</i> (gained assent on 5 November 2012)
Association	An incorporated association under the <i>Incorporated Associations Act 1987</i>
Code	Fair Trading (Retirement Villages Code) Regulations 2013: this is subsidiary legislation currently under the <i>Fair Trading Act 2010 (FTA)</i>
Commissioner	Commissioner for Consumer Protection, Department of Commerce, Consumer Protection Division
Department	Department of Commerce
Exit fee	Deferred management fee (DMF); deferred fee; deferred facilities fee
Final report	Final report of the Statutory Review of Retirement Villages Legislation (Nov. 2010)
Interim Code	A code made under section 46 of the FTA with a maximum life span of six months
Lease-for-Life	A lengthy lease, for example set at 49 years, to cover the resident's remaining life in the retirement village
Operating costs	Outgoings; variable outgoings; ongoing fees
Premium	Interest free loan; entry contribution; ingoing sum
Recurrent charge	Ongoing charge; ongoing fee

Term	Definitions and synonymous or related term
Refurbishment	Refurbishment work is not currently defined in the RV Act or the Code. Refurbishment work generally references work required to clean, repair and/or restore residential premises, so that the premises are ready for viewing by prospective residents who may be interested in moving into the village. Refurbishment work is usually organized by the administering body at the former resident's expense
Regulations	Retirement Villages Regulations 1992: subsidiary legislation under the RV Act
Reserve fund	Sinking fund or other fund for capital purposes
Residents' committee	A committee elected by residents under clause 5.10 of the Code whose function is to consult with the administering body on behalf of the residents about the day-to-day running of the retirement village and any issues or proposals raised by the residents
Special resolution	A vote passed by 75 per cent of a quorum of residents attending a meeting according to clauses 5.1(1) and (2) of the Code
Working group	Working group established by the Department of Commerce in October 2012 to consult with representative stakeholders - comprising the Retirement Living Committee of the Property Council of Australia (RLC), Aged and Community Services Western Australia (ACSWA), Western Australian Retirement Villages Residents' Association (WARVRA) and the Department