

1999

THE LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

FAIR TRADING ACT 1992

FAIR TRADING REGULATIONS (AMENDMENT)

Subordinate Law No. 27 of 1999

EXPLANATORY MEMORANDUM

Circulated by the authority of  
Gary Humphries MLA  
MINISTER FOR JUSTICE AND COMMUNITY SAFETY

## **FAIR TRADING REGULATIONS (AMENDMENT)**

**Subordinate Law No. 27 of 1999**

### **PURPOSE**

The intention of this amendment is to have the *Fair Trading Regulations* ("the Principal Regulations") prescribe the *Retirement Villages Industry Code of Practice* ("the Code") as a code of practice under section 34 of the *Fair Trading Act 1992* ("the Act").

### **BACKGROUND**

The Director of Consumer Affairs has submitted the Code to the Minister in accordance with section 33 of the Act and the Minister has approved the Code without amendment.

### **DETAILS OF AMENDMENT**

Regulation 4 of the Principal Regulations is amended by adding a reference to the Code so as to prescribe it as a code of practice under section 34 of the Act.

The Code and accompanying explanatory notes are contained appear as an Attachment to this memorandum.

### **FINANCIAL IMPLICATIONS**

Costs associated with the Code will generally be borne by market participants. While some administration and compliance costs will be incurred by the ACT Consumer Affairs Bureau, these costs are to be met within existing programs.

***Attachment to Explanatory Memorandum  
to Fair Trading Regulations***



AUSTRALIAN CAPITAL TERRITORY

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***Fair Trading Act 1992***

**Retirement Villages Industry  
CODE OF PRACTICE**

This Code is certified as a true and correct copy of that approved by the Minister in accordance with section 34 of the *Fair Trading Act 1992*.

**Gary Humphries** MLA  
Minister for Justice and Community Safety

Dated: 13/10/99

## CONTENTS

|                                                                                                     |           |
|-----------------------------------------------------------------------------------------------------|-----------|
| <b>PART 1 - PRELIMINARY .....</b>                                                                   | <b>1</b>  |
| DIVISION 1 - INTERPRETATION AND APPLICATION .....                                                   | 1         |
| <i>Interpretation</i> .....                                                                         | 1         |
| <i>Agreement and voting rights</i> .....                                                            | 2         |
| <i>Application of the Code</i> .....                                                                | 3         |
| <i>Administration</i> .....                                                                         | 3         |
| DIVISION 2 - OBJECTIVES OF THE CODE .....                                                           | 3         |
| <i>Objectives</i> .....                                                                             | 3         |
| <i>General Principles</i> .....                                                                     | 4         |
| <b>PART 2 - RIGHTS AND RESPONSIBILITIES OF RESIDENTS AND MANAGEMENT .....</b>                       | <b>5</b>  |
| DIVISION 1 - BASIC RIGHTS AND RESPONSIBILITIES .....                                                | 5         |
| <i>Resident Privacy</i> .....                                                                       | 5         |
| <i>Autonomy over personal and financial affairs</i> .....                                           | 5         |
| <i>Sound management</i> .....                                                                       | 5         |
| <i>A Resident's right to membership of organisations</i> .....                                      | 5         |
| <i>Management to facilitate resale</i> .....                                                        | 5         |
| DIVISION 2 - RESIDENT INPUT TO VILLAGE MANAGEMENT .....                                             | 6         |
| <i>General principles guiding retirement village management</i> .....                               | 6         |
| <i>Structures for resident input</i> .....                                                          | 6         |
| <i>Resident input into budget</i> .....                                                             | 7         |
| <i>Village rules</i> .....                                                                          | 8         |
| <b>PART 3 - DISCLOSURE IN ADVERTISING AND SALES PROMOTION .....</b>                                 | <b>8</b>  |
| <i>Disclosure in advertising and sales promotion</i> .....                                          | 8         |
| <i>Prospective resident entitled to detailed information and proposed contract in advance</i> ..... | 8         |
| <i>Information to be provided by management to every prospective resident</i> .....                 | 8         |
| <i>A resident's obligation to obtain information</i> .....                                          | 10        |
| <i>Development consent</i> .....                                                                    | 10        |
| <i>Aged care facilities</i> .....                                                                   | 11        |
| <i>Proposed facilities and services</i> .....                                                       | 12        |
| <b>PART 4 - CONTENT OF CONTRACTS .....</b>                                                          | <b>12</b> |
| <i>General requirements</i> .....                                                                   | 12        |
| <i>Cooling-off period</i> .....                                                                     | 12        |
| <i>Matters to be included in residence contract</i> .....                                           | 13        |
| <i>Accommodation plans and details</i> .....                                                        | 13        |
| <i>Refund entitlements</i> .....                                                                    | 14        |
| <i>Termination by management</i> .....                                                              | 14        |
| <i>Termination by residents</i> .....                                                               | 14        |
| <i>Retirement Village Industry Code of Practice</i> .....                                           | 15        |
| <b>PART 5 — DISPUTE RESOLUTION .....</b>                                                            | <b>15</b> |
| DIVISION 1 - COSTS .....                                                                            | 15        |
| <i>Costs of Dispute Resolution</i> .....                                                            | 15        |

|                                                                            |    |
|----------------------------------------------------------------------------|----|
| DIVISION 2 - RESOLUTION OF DISPUTES WITHIN THE VILLAGE .....               | 16 |
| <i>Disputes Committee</i> .....                                            | 16 |
| <i>Applications to Disputes Committee</i> .....                            | 16 |
| DIVISION 3 - TERMINATION BY MANAGEMENT.....                                | 17 |
| <i>Termination of a resident's right to occupy</i> .....                   | 17 |
| <i>Notice of management's intention make an application</i> .....          | 18 |
| <i>Applications before the Contract Referee</i> .....                      | 18 |
| <i>Decision of the Contract Referee</i> .....                              | 18 |
| <i>Effect of decision to terminate resident's right to occupy</i> .....    | 19 |
| DIVISION 4 - RESOLUTION OF BUDGET IMPASSE.....                             | 19 |
| <i>Budget Impasse</i> .....                                                | 19 |
| <i>Applications before the Budget Referee</i> .....                        | 19 |
| <i>Decision of the Budget Referee</i> .....                                | 19 |
| PART 6 - CODE ADMINISTRATION COMMITTEE.....                                | 20 |
| <i>Code Administration Committee</i> .....                                 | 20 |
| <i>Code Administration Committee to appoint Independent Referees</i> ..... | 22 |
| PART 7 - TRANSITIONAL PROVISIONS.....                                      | 22 |
| <i>Transitional Application</i> .....                                      | 22 |
| <i>Transitional Arrangements</i> .....                                     | 23 |
| PART 8 - MISCELLANEOUS PROVISIONS.....                                     | 23 |
| <i>Code Handbook</i> .....                                                 | 23 |
| SCHEDULE A - INFORMATION TO BE PROVIDED IN WRITING BY MANAGEMENT .....     | 24 |
| SCHEDULE B - RESIDENT'S CHECKLIST.....                                     | 25 |

## PART 1 - PRELIMINARY

### *Division 1 - Interpretation and application*

#### Interpretation

1. In this Code, unless the contrary intention appears:

**"Budget Referee"** means the independent referee appointed by the Director for the purposes of Division 4 of Part 5 of the Code;

**"Contract Referee"** means the independent referee appointed by the Director for the purposes of Division 3 of Part 5 of the Code;

**"Development Application"** means an application for approval of a development under the *Land (Planning and Environment) Act 1991*;

**"Director"** means the Director of Consumer Affairs for the Australian Capital Territory or his or her nominee;

**"Disputes Committee"** means the Committee established under Division 2 of Part 5 of the Code;

**"management"** in relation to a retirement village, means the person by whom, or on whose behalf, the retirement village is administered and includes a person (other than a resident) who owns land within the village;

**"residence contract"** means a contract, agreement, scheme or arrangement by which a person obtains or maintains the right to occupy residential premises in a retirement village, and includes:

- (a) a lease;
- (b) a licence to occupy;
- (c) a right conferred by shares;
- (d) a management agreement; or
- (e) an agreement for sale, or a conveyance, of property that is subject to the Unit Titles Act;

**"resident"** means a person who occupies residential premises in a retirement village under a residence contract;

**"residential premises"** means any premises or part of premises (including any land occupied with the premises) used or intended to be used as a place of residence;

**"resident funded"** means residential care funded by the resident and not subsidised;

**"retirement village"** means an existing or proposed complex, or part of a complex, comprising residential premises (other than residential aged care facilities covered by the Commonwealth *Aged Care Act 1997*) predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons;

**"Unit Titles Act "** means the *Unit Titles Act 1970*;

**"village rules"** means the rules with which residents of a retirement village are expected to comply by management, and includes any regulations (to which the residents are subject) in force under the Unit Titles Act; and

**"working day"** means a day other than a Saturday, Sunday or public holiday.

### **Agreement and voting rights**

2. (1) In this Code, unless the contrary intention appears, "agree" means reach agreement by simple majority of votes cast by residents in accordance with this clause.

(2) Before any vote is taken, management shall ensure that residents receive appropriate notice, having regard to the circumstances of the village, including:

- (a) the number of residents; and
- (b) the urgency of the issue to be determined.

(3) Only one vote may be exercised per residential premises, regardless of the number of residents occupying it.

(4) Where a matter is put to a vote:

- (a) the vote count is made on votes cast by those present in person or by proxy;
- (b) there is no casting vote;
- (c) subject to the Unit Titles Act and the village rules, a quorum shall be constituted by three residents present in person; and

- (d) the outcome of the vote binds all residents, notwithstanding that a resident may not have voted.

(5) Where the budget is the subject of the vote, agreement can only be reached in relation to the budget as a whole; individual components of the budget cannot be separated for the purposes of the vote.

### **Application of the Code**

3. (1) Subject to Part 7, the provisions of the Code are mandatory and apply to all, including the Crown, who promote, develop, sell or manage retirement villages or are residents of retirement villages in the Australian Capital Territory.

(2) No contract, scheme, agreement or arrangement shall operate to exclude any obligation imposed, or right granted, under this Code and where a provision of a residence contract is inconsistent with a provision of the Code, the residence contract shall be read as though the relevant provision of the Code is included in the contract.

(3) Subject to subclause (5), a residence contract in force at the time of the commencement of the Code shall continue to apply, but after the end of the period of six months after the Code commences, any provisions of the Code shall prevail over any inconsistent provisions of the residence contract and the contract shall be read as though the relevant provisions of the Code were included in the contract.

(4) In relation to retirement villages that are subject to the Unit Titles Act, the Code is intended to supplement that existing regulatory scheme by providing further regulation that is specifically relevant to retirement villages.

(5) Notwithstanding any other provisions in this Code, subclauses 11(2)(b), 24(1), 28(3), 29(3) and 30(5) do not apply in respect of residence contracts in force at the time of the commencement of the Code.

### **Administration**

4. The Code shall be administered by the Director.

## ***Division 2 - Objectives of the Code***

### **Objectives**

5. The objectives of the Code are to:

- (a) promote fair trading practices in the provision of retirement villages and related services;



- (b) ensure that the well-being, rights and interests of residents, together with the rights and interests of management are given due consideration;
- (c) ensure appropriate standards of conduct are maintained in retirement villages;
- (d) promote confidence in the retirement village industry by ensuring that services are provided in an ethical and professional manner and recognising the value of residents actively participating in decision-making process which affect them;
- (e) ensure the disclosure of all relevant information, including contractual documentation, to persons who are considering entering retirement villages,;
- (f) ensure the preservation of a resident's right of privacy and autonomy over his or her own personal and financial affairs, including his or her own property, and clarify the rights and obligations of residents and management;
- (g) enable resident input, where desired by residents, into the management of retirement villages; and
- (h) establish appropriate dispute resolution mechanisms.

### **General Principles**

6. The general principles guiding all those involved in the management and provision of retirement villages and related services are that:

- (a) the freedom of decision and action of each resident must be recognised and given due consideration in the relationship between a resident and the management of a retirement village;
- (b) the relationship of a resident with his or her family and past and present community is important and must be recognised. This recognition must take account of the cultural, religious and linguistic background of the resident;
- (c) a resident must be treated fairly, and not be subjected to abuse or exploitation;
- (d) a resident has the right to autonomy over his or her, personal and financial affairs, including his or her own property; and
- (e) management must not engage in any harsh or oppressive conduct.

## **PART 2 - RIGHTS AND RESPONSIBILITIES OF RESIDENTS AND MANAGEMENT**

### ***Division 1 - Basic Rights and Responsibilities***

#### **Resident Privacy**

7. (1) A resident has a basic right to privacy in personal accommodation which must be respected by management and other residents.

(2) Management and residents have the responsibility of facilitating a resident's quiet enjoyment of both their personal accommodation and any communal amenities.

#### **Autonomy over personal and financial affairs**

8. (1) A resident has a right to autonomy over his or her own personal and financial affairs, including his or her own property.

(2) A resident shall be given access to any personal file created about him or her by the management of a retirement village.

#### **Sound management**

9. (1) Residents, management and their representatives must recognise the basic need for the management of the retirement village to be conducted in a cost effective and financially prudent manner.

(2) Management must ensure that all financial accounts for the retirement village have been prepared in accordance with recognised accounting standards.

#### **A Resident's right to membership of organisations**

10. Management must not restrict the right of a resident to participate in any organisation of retirement village residents.

#### **Management to facilitate resale**

11. (1) Where a resident wishes to sell property that is subject to the Unit Titles Act, management shall, to the extent that management has the power to affect the sale of property, endeavour to facilitate the sale occurring as expeditiously as practicable, having regard to the following factors:

- (a) the resident's preferred timeframe for the completion of the sale; and
- (b) any substantial or extraordinary effect that the timing of the sale, or the sale price, may reasonably be expected to have on the value of other property within the village, having regard to market conditions.

(2) Where a resident wishes to sell property that is subject to the Unit Titles Act and management has the exclusive right to sell the property on behalf of the resident:

- (a) management shall not engage in a market practice that favours the sale of a unit owned by management over the sale of the unit owned by the resident; and
- (b) any exclusive right by management to sell the property shall cease if that property is not sold within 12 months of management receiving the resident's written notice of intention to sell.

## ***Division 2 - Resident Input to Village Management***

### **General principles guiding retirement village management**

12. The management structures established in a retirement village must be directed to ensuring that the following principles are adhered to:

- (a) resident input into the management of the retirement village is to be facilitated;
- (b) the freedom of decision and action of residents is to be restricted as little as possible; and
- (c) every resident is entitled to choose the extent to which the resident participates in the affairs of the retirement village.

### **Structures for resident input**

13. (1) Management must, in consultation with residents, create appropriate structures for resident input and must consult with residents if it proposes to change those structures.

(2) Such structures must allow for:

- (a) management to present to residents the budget for the operation of the village for the following financial year and facilitate resident input into that budget in accordance with clause 14;

- (b) an annual meeting of residents at which residents:
  - (i) shall be given the opportunity to consider and agree upon the budget for the following financial year; and
  - (ii) may discuss and decide the matters in subclause 15(2) of the Code;
- (c) residents to have input into and agree to any change to services or facilities which may involve increased costs to residents;
- (d) residents to have input into and agree to any change to services or facilities which may lead to loss of amenity by the residents;
- (e) residents to have input into and agree to proposals for the upgrading of buildings, fixtures or fittings where the residents are financing either the whole, or part, of the capital or recurrent costs of the work; and
- (f) residents to be provided with the audited accounts of the village against budget within four months of the end of each financial year.

#### **Resident input into budget**

14. (1) Management must supply residents with information on financial performance in the current financial year together with a draft budget for the coming financial year within a reasonable time prior to the beginning of the coming financial year.

(2) The draft budget should contain at least the following:

- (a) sufficient information to explain any increase in fees or charges;
- (b) information about the cost of services;
- (c) information about the special purpose dispute resolution charge levied in accordance with clause 32;
- (d) a general maintenance workplan; and
- (e) where appropriate, details of any upgrading or expansion of facilities and changes or additions to existing services.

(3) The final budget must be developed out of consultations between management and residents.

(4) Management must, as far as practicable, operate the village on the basis of the last agreed budget until any proposed budget has been agreed to by the residents of the village or a Budget Referee.

### **Village rules**

15. (1) A retirement village shall have a set of village rules.
- (2) Residents must have input into and agree to the content of village rules and any subsequent amendment of, or addition to, the village rules.
- (3) The village rules must accord with the general principles stated in clause 6 and must not purport to derogate from any rights or obligations provided for under the Code.

## **PART 3 - DISCLOSURE IN ADVERTISING AND SALES PROMOTION**

### **Disclosure in advertising and sales promotion**

16. All advertising, promotional or sales material provided by the management of a retirement village about the village, whether in written or oral form must be:

- (a) written in clear, concise and plain language;
- (b) truthful, accurate and not misleading or deceptive;
- (c) consistent with the provisions of this Code; and
- (d) consistent with the *Fair Trading Act 1992* and the Unit Titles Act.

### **Prospective resident entitled to detailed information and proposed contract in advance**

17. (1) Management shall provide a prospective resident with detailed information, as required by clause 18, and a residence contract shall not be signed prior to five working days after that information has been provided, unless otherwise agreed by both parties in writing.

(2) Management shall provide a copy of the proposed residence contract to a prospective resident and the contract shall not be signed prior to five working days after the contract has been provided, unless otherwise agreed by both parties in writing.

### **Information to be provided by management to every prospective resident**

18. (1) Management must make the following information available to every prospective resident of the retirement village:

- (a) a list of all fees and charges payable by the resident to enter the village;
- (b) a list of all periodical charges or fees payable by the resident, including:
  - (i) a clear outline of the method used to calculate those charges or fees and the method used to determine any variation; and
  - (ii) if different methods are used to calculate fees and charges for different services, items or entitlements, a list of those methods;
- (c) a clear description of when each fee or charge is payable by the resident and what penalties, if any, will be imposed if the resident fails to pay his or her fees or charges when due;
- (d) a description of each of the services (including any personal care services and unit title services) provided for those fees;
- (e) a list of any additional or optional personal care or other services which are available to residents, a description of the party providing such services and, if available, the price for each service as indicated by the service provider;
- (f) where a service is to be provided by management or an independent agency on behalf of management, details of any potential restrictions on access to the service, such as eligibility requirements or waiting lists;
- (g) where a village offers a range of accommodation, such as self-care and hostel (low care) places, details of the costs and arrangements associated with moving to and living in the alternative accommodation, including any on-going fees and charges related to the vacant residential premises;
- (h) if the village is
  - (i) already operating: a detailed budget relating to the operation of the retirement village (including information regarding the future maintenance of the village) for the current financial year; and
  - (ii) still under construction: a projected budget;
- (i) if there are circumstances in which the operating budget of the retirement village may be used to fund facilities outside the village, a statement that:
  - (i) identifies those facilities; and

- (ii) details the extent to which the operating budget can be used for that purpose, including any limits on the amount of such funding.
- (j) written information as required by Schedule A to the Code;
- (k) a copy of the checklist set out in Schedule B to the Code; and
- (l) a copy of the village rules (including articles of the body corporate under the Unit Titles Act) applicable to the retirement village.

(2) Management must also make available to every prospective resident of the retirement village a clear explanation of the refund entitlement, if any, of a resident, if the residence contract is terminated, including the following:

- (a) any fees or commissions charged by management on termination of a contract;
- (b) details of the method used to calculate any such fees or commissions and any refund entitlement; and
- (c) sufficient details to enable a prospective resident to forecast the likely return due after approximately 1, 2, 5 and 10 years.

(3) The information must provide sufficient detail to allow a comparison to be made between the financial packages offered by different retirement villages.

(4) In the case of a property subject to the Unit Titles Act, management shall provide the owner of such property with a copy of the management agreement within five working days of a request by the owner.

### **A resident's obligation to obtain information**

19. Residents should:

- (a) inform themselves about the residence contract and any other contracts relating to their residence in the retirement village; and
- (b) consider obtaining independent legal advice before signing any documents.

### **Development consent**

20. (1) No sales promotion of a retirement village shall be undertaken unless a lease of Territory Land has been granted in respect of the village site and the lease contains a clause which permits the proposed development.

(2) Subclause (1) does not preclude the carrying out of a market survey prior to any sales promotion.

(3) If a Development Application must be approved before a retirement village:

- (a) can be built or operated; or
- (b) can engage in further development of its operations or premises,

a resident or a potential resident shall be entitled to a full refund of any consideration paid under a residence contract, in relation to the retirement village or the further development as the case may be, if that Development Application is not approved.

(4) Where a Development Application must be approved before a retirement village:

- (a) can be built or operated; or
- (b) can engage in further development of its operations or premises,

any sales promotion in relation to that retirement village shall identify the nature of the approval required and specify that a resident or potential resident is entitled to a full refund of the consideration specified in subclause (3) should that Development Application not be approved.

(5) Where a condition of an approved development includes a requirement that the developer provide certain services for the life of the development, that requirement must be disclosed to the prospective resident.

### **Aged care facilities**

21. (1) If any promotional material or sales material provided by the management of a retirement village contains any reference to residential aged care facilities, the following requirements must be satisfied:

- (a) before such facilities are promoted as being available or associated with a retirement village any relevant approvals must be obtained from the relevant Territory or Commonwealth government department;
- (b) the promotional or sales material provided must contain the following words:

"You should be aware that access to residential aged care facilities is subject to your being assessed as eligible to receive residential care under the Commonwealth *Aged Care Act 1997* and a place for you cannot be guaranteed".



(2) Paragraph (1)(b) does not apply to material provided in relation to residential care facilities that are fully resident-funded.

### **Proposed facilities and services**

22. If any promotional or sales material gives rise to a reasonable expectation that certain facilities or services will be provided in relation to the village, the material must include a statement of any conditions on which the realisation of any of those facilities or services depends and state any proposed time-frames.

## **PART 4 - CONTENT OF CONTRACTS**

### **General requirements**

23. A residence contract must:

- (a) be written in clear, concise and plain language and must not contain misleading or deceptive statements;
- (b) fully disclose all of the arrangements which will apply in relation to a resident's occupation of the retirement village; and
- (c) fully disclose the legal basis of occupancy and the type and length of tenure secured by the resident;
- (d) be consistent with the provisions of the Code; and
- (e) be consistent with the provisions of all relevant legislation, including the *Fair Trading Act 1992* and the *Unit Titles Act*.

### **Cooling-off period**

24. (1) A residence contract must provide for a "cooling-off" period commencing the day after the contract is signed and ending at the expiration of the number of working days (being not less than five) specified in the contract.

(2) During the cooling-off period, a resident may withdraw from the residence contract without loss or penalty by giving notice in writing to management or its agent.

(3) The resident waives the cooling-off period if he or she takes up occupation of the premises during the cooling-off period.

### **Matters to be included in residence contract**

25. A residence contract must provide for all matters in respect of which management is required to provide information to a prospective resident under clause 18.

### **Non-party Residents**

26. (1) For the purposes of this Part, a "non-party resident" means a resident who is not a party to a residence contract.

(2) A residence contract must specify the circumstances, if any, in which a resident may permit a non-party resident to reside in his or her residential premises.

(3) Where, under a residence contract, a non-party resident may occupy residential premises, the residence contract must provide detailed information on the rights and responsibilities of the non-party resident, including provision regarding the rights of the non-party resident in the case where the resident:

- (a) has his or her right to occupy the residential premises terminated in accordance with Division 3 of Part 5;
- (b) dies or abandons the premises; or
- (c) terminates the residence contract.

(4) Where a non-party resident may occupy residential premises under a residence contract, subject to any contrary provision in that contract, the non-party resident shall comply with the village rules and the provisions of Part 5 of this Code apply to any dispute which may arise in relation to the application of those rules.

(5) Subject to subclause (4), management or a non-party resident may seek the assistance of the Director to enforce, under section 36 of the *Fair Trading Act 1992*, any relevant provisions of the residence contract under which that person is permitted to reside in residential premises.

### **Accommodation plans and details**

27. (1) The residence contract documents must include or be accompanied by:

- (a) plans showing the location, floor area and significant dimensions of the accommodation;
- (b) plans showing the location, floor areas and other features of any separate carport, garage, storage areas or other area allocated to the resident; and
- (c) plans showing the development boundaries in which self-care units are located.

(2) The fixtures, fittings and furnishings which are to be provided must be listed in the contract documents.

(3) Any items for which maintenance will be the resident's responsibility, or which are not covered by maintenance fees payable by the resident, must be so identified.

### **Refund entitlements**

28. (1) If the residence contract provides for a refund, it must set out in full the method of calculation of the refund, the time for its payment and any relevant conditions on its payment.

(2) If there is to be no refund, the contract must specify that fact.

(3) Any refund entitlement which is calculated according to the period of occupancy must be calculated on a daily basis.

### **Termination by management**

29. (1) The residence contract must contain:

- (a) an explanation of management's ability to terminate the resident's right to occupy residential premises (and, consequently, the residence contract) in accordance with Division 3 of Part 5 of the Code; and
- (b) a statement to the effect that a purported termination by management has no effect unless a decision allowing the termination has been obtained from a Contract Referee.

(2) Where a deferred fee or other charge is payable by a resident on departure, sale, or other termination of a residence contract, the amount of the fee or charge, or the basis for its determination, must be clearly set out in the residence contract.

(3) Any fee or charge that is subject to subclause (2) is to be calculated on a daily basis.

### **Termination by residents**

30. (1) The residence contract shall specify all the circumstances in which the residence contract may be terminated by the resident.

(2) The residence contract shall address the rights and obligations of management, residents and any non-party residents in the case where a resident dies or abandons the premises.

(3) The maximum notice of intention to terminate a contract that may be required of a resident is one month's written notice.

(4) If the residence contract is terminated by the resident, any refund, and any other money due under the contract, must be paid to that resident within the time required by this clause.

(5) Subject to subclause (6), the payment of the refund and other money must be made as soon as practicable but no later than six months after the former resident vacates the premises or any shorter time required by the contract.

(6) The payment of the refund and other money must not in any circumstances be made later than 14 days after the next resident takes up occupation of the premises.

### **Retirement Village Industry Code of Practice**

31. (1) Management must specifically draw to the resident's attention the existence of this Code before the resident signs the residence contract.

(2) The residence contract must:

- (a) refer to the rights of residents to have disputes dealt with by the dispute resolution mechanisms established under this Code and the availability of mediation; and
- (b) draw the resident's attention to the provisions of this Code relating to the involvement of residents in management.

## **PART 5 — DISPUTE RESOLUTION**

### ***Division 1 - Costs***

#### **Costs of Dispute Resolution**

32. (1) The costs of establishing and maintaining the dispute resolution processes under this Part of the Code shall be met from a special purpose dispute resolution fund raised by an annual fee levied on residents.

(2) All other costs shall be borne by the party incurring them.

## ***Division 2 - Resolution Of Disputes Within The Village***

### **Disputes Committee**

33. (1) Management is required to establish a standing Disputes Committee to hear disputes that arise within a retirement village.

(2) The Disputes Committee is to have three members:

- (a) one person appointed by residents;
- (b) one person appointed by management; and
- (c) a chair appointed by agreement between the resident and management appointees.

(3) The residents and management of the retirement village must agree upon and establish a charter for the Disputes Committee that specifies, but is not limited to, the following:

- (a) the process to be followed by the Committee in determining disputes;
- (b) the length of appointments of members of the Committee; and
- (c) whether disputes are determined by majority or by unanimous decision.

(4) The charter for the Disputes Committee must be consistent with the dispute resolution processes of this Part.

(5) A member of a Disputes Committee shall not be liable for anything done or omitted to be done in good faith in or in connection with the exercise or purported exercise of any duties conferred on him or her under this Code.

### **Applications to Disputes Committee**

34. (1) Where a dispute arises within the charter of the Disputes Committee, a resident, a group of residents or management may apply to the Disputes Committee to have the matter heard.

(2) The Disputes Committee shall meet as soon as practicable after being notified of a dispute and shall, subject to subclause (3), decide the dispute in accordance with its charter.

(3) Where the nature of the dispute or any other circumstances of the case make it inappropriate or undesirable for the dispute to be determined by the Disputes Committee, the Disputes Committee shall decline to determine the matter and refer the dispute to mediation.

(4) Where the Disputes Committee determines a dispute, it shall advise the parties, in writing, of its decision within 30 days of receiving notice of the dispute.

(5) Where the Disputes Committee decides the dispute or the matter has been successfully resolved by mediation, all parties shall be bound by the Committee's decision or the mediation agreement and take all reasonable steps to put it into effect within a reasonable period of time.

### ***Division 3 - Termination By Management***

#### **Termination of a resident's right to occupy**

35. (1) A resident's right to occupy residential premises shall only be terminated by management in accordance with this Division.

(2) Management shall give the resident 14 days written notice, in accordance with clause 36, of its intention to make an application to the Contract Referee for a decision to allow the termination.

(3) Management may lodge with the Director a written application, to be determined by the Contract Referee, for termination of the resident's right to occupy residential premises on any of the following grounds:

- (a) that the resident's physical or mental health is such as to make the residential premises unsuitable for occupation by the resident;
- (b) that the resident has breached the residence contract or village rules and has failed to rectify the breach;
- (c) that the resident has intentionally or recklessly caused or permitted, or is likely to intentionally or recklessly cause or permit, serious damage to the residential premises or injury to the management, an employee of management or another resident; or
- (d) that the management would, in the special circumstances of the application, suffer undue hardship if the resident's right to occupy was not terminated.

(4) The Director shall, within 14 days of an application being lodged, appoint a Contract Referee from the panel of eligible persons appointed under Clause 44 to hear the application and refer it to him or her.

### **Notice of management's intention make an application**

36. (1) A notice of intention to make an application under clause 35 must:

- (a) clearly set out the grounds for the application;
- (b) clearly state that the resident's right to occupy residential premises cannot be terminated without the decision of a Contract Referee under clause 38 of the Code to allow the termination; and
- (c) refer to the relevant provisions of the Code.

(2) Where termination is being sought because of a breach of the residence contract or village rules, a notice of intention to terminate given by the management must specify the breach.

### **Applications before the Contract Referee**

37. (1) The Contract Referee may determine the procedure to be followed in determining an application made by management under clause 35.

(2) In considering the application, the Contract Referee is not bound by the rules of evidence but may inform him or herself on any matter relevant to the application in such manner as is reasonable and appropriate.

(3) The Contract Referee shall conduct the hearing of the application with as little formality and technicality, and with as much expedition, as is reasonably possible.

(4) In considering the application the Contract Referee is bound by the rules of natural justice.

### **Decision of the Contract Referee**

38. (1) After considering an application made by management under clause 35, the Contract Referee shall decide whether or not it is reasonable to allow the termination of the resident's right to occupy residential premises by management.

(2) Where the Contract Referee decides the application, he or she shall prepare a written statement of reasons for the decision and provide it to the Director for distribution to the parties.

(3) Where the Contract Referee decides an application, all parties shall be bound by the Contract Referee's decision and take all reasonable steps to put the decision into effect.

### **Effect of decision to terminate resident's right to occupy**

39. Where management has initiated the termination of a resident's right to occupy residential premises and the Contract Referee has allowed that termination under clause 38, the residence contract is terminated and management must pay the resident any money to which the resident is entitled under the contract within one month of the termination or within 14 days of the next resident taking occupation, whichever happens first.

## ***Division 4 - Resolution Of Budget Impasse***

### **Budget Impasse**

40. (1) Where residents and management cannot agree to a final budget, management shall refer the budget to a Budget Referee by lodging a written application with the Director.

(2) The Director shall, within 14 days of an application being lodged, appoint a Budget Referee from the panel of eligible persons appointed under clause 44 and refer the budget to him or her.

### **Applications before the Budget Referee**

41. (1) The Budget Referee may determine the procedure to be followed in determining an application.

(2) In considering the referral, the Budget Referee is not bound by the rules of evidence but may inform him or herself on any matter relevant to the referral in such manner as is reasonable and appropriate.

(3) The Budget Referee shall conduct the hearing of a referral with as little formality and technicality, and with as much expedition, as is reasonably possible.

(4) In considering the referral, the Budget Referee is bound by the rules of natural justice.

### **Decision of the Budget Referee**

42. (1) The Budget Referee shall determine whether or not the budget is reasonable in all circumstances having regard to the objectives of the Code.



(2) The Budget Referee may:

- (a) approve a budget with or without amendments proposed by residents or management; or
- (b) refer the budget back to residents and management with his or her recommendations.

(3) Where residents and management still cannot agree to a budget that has been referred back to them, the Budget Referee may approve the budget without any amendment or with any amendment that he or she considers reasonable having regard to all circumstances and the objectives of the Code.

(4) Where the Budget Referee approves the budget, he or she shall prepare a written statement of reasons for the decision and provide it to the Director for distribution to the parties.

## **PART 6 - CODE ADMINISTRATION COMMITTEE**

### **Code Administration Committee**

43. (1) There shall be a Code Administration Committee which shall consist of:

- (a) the Director;
- (b) a representative of the retirement village industry appointed by the Director;
- (c) a representative of residents of retirement villages appointed by the Director; and
- (d) such other people as the Director considers necessary for the Code Administration Committee to carry out its functions.

(2) The Chairperson of the Code Administration Committee shall be the Director.

(3) Each member of the Code Administration Committee shall be appointed for a period of two years and shall be eligible for reappointment.

(4) The Code Administration Committee shall meet at least twice each year but may meet more frequently as required.

(5) The Consumer Affairs Bureau shall provide secretariat services to the Code Administration Committee and shall facilitate the supply of appropriate information to the Committee to allow it to perform its functions under this Part.

(6) The Code Administration Committee shall:

- (a) monitor compliance with the Code;
- (b) monitor the operation and administration of the dispute resolution processes created under the Code; and
- (c) advise the Director on policy and procedures to promote the Code within the industry and its recognition by residents.

(7) The Code Administration Committee shall, within three months after the end of each financial year, submit a report to the Minister that shall:

- (a) identify any industry specific problems and recommend changes to inappropriate practices;
- (b) review the effectiveness of the Code and recommend amendments where appropriate;
- (c) provide details of the number of applications lodged under Divisions 3 and 4 of Part 5 of the Code and outline the outcomes of those applications; and
- (d) provide details of the number of principals found to be in breach of the Code and the nature of those breaches.

(8) A member, or former member, of the Code Administration Committee shall not be liable for anything done or omitted to be done in good faith in or in connection with the exercise or purported exercise of any duties conferred on him or her under this Code.

(9) A member, or former member of a Code Administration Committee shall not disclose any confidential or sensitive information acquired by him or her as a consequence of his or her position.

(10) The appointment of a member of the Code Administration Committee is not invalidated, and shall not be called into question, by reason of a defect or irregularity in, or in connection with, the appointment of the member.

(11) Where a member of the Code Administration Committee fails to attend two consecutive meetings of the Committee, without its leave, his or her appointment shall be deemed to have expired and the Director shall appoint a person in the outgoing member's place in accordance with subclause (1).

### **Code Administration Committee to appoint Independent Referees**

44. (1) The Code Administration Committee shall, subject to this clause, appoint:

- (a) a panel of eligible persons to serve as Contract Referees for the purposes of Division 3 Part 5 of the Code; and
- (b) a panel of eligible persons to serve as Budget Referees for the purposes of Division 4 of Part 5 of the Code.

(2) A person shall only be appointed to the panel referred to in paragraph (1)(a) if he or she has been admitted to practise as a barrister or solicitor of an Australian Superior Court for at least five years.

(3) A person shall only be appointed to the panel referred to in paragraph (1)(b) if he or she has been practising as an accountant for at least five years with relevant qualifications from the Institute of Chartered Accountants, the Australian Society of Certified Practising Accountants or the National Institute of Accountants.

(4) The appointment of a person to a panel under subclause (1) is not invalidated, and shall not be called into question, by reason of a defect or irregularity in, or in connection with, the appointment of that person.

(5) Neither a Contract Referee nor a Budget Referee shall be liable for anything done or omitted to be done in good faith in, or in connection with, the exercise or purported exercise of any duties conferred on him or her under this Code.

(6) Where a member of the Code Administration Committee has an interest which could conflict, or appear to conflict, with the proper appointment of a person under this clause, the member shall advise the Committee and the Director of the interest and take no further part in the appointment.

## **PART 7 - TRANSITIONAL PROVISIONS**

### **Transitional Application**

45. (1) Subject to this Part, a person to whom the Code applies shall, for the first six months after the Code commences, comply with all the provisions of the Code to the extent that the person is reasonably capable of complying.

(2) After the end of that period, all persons to whom the Code applies shall comply with the provisions of the Code.

### **Transitional Arrangements**

46. (1) Management shall, within the first six months of the commencement of the Code, provide all residents with written information as required by Schedule A to the Code.

(2) Until such time as the special purpose dispute resolution fund has been established under clause 32, management shall incur the costs of establishing and maintaining the dispute resolution processes under Part 5 of the Code.

(3) Management and residents shall take any monies paid in accordance with subclause (2) into account when considering the next budget of the retirement village.

## **PART 8 - MISCELLANEOUS PROVISIONS**

### **Code Handbook**

47. The Director may authorise the publication of a handbook that assists management and residents in their understanding of this Code.

## **SCHEDULE A - INFORMATION TO BE PROVIDED IN WRITING BY MANAGEMENT**

In accordance with clause 18 and clause 46, management must provide a resident, or prospective resident, with information, in writing, detailing the following:

1. Whether a prospective resident is required to supply a medical certificate or report to certify the resident's ability to live independently;
2. Whether a resident is required to provide documentation of his or her medical condition and medications and which persons shall have access to such documentation;
3. Any restrictions on a resident using the unit or village facilities, including restrictions in relation to:
  - (a) having someone else live with the resident;
  - (b) having visitors, including overnight or short stay guests;
  - (c) car parking; and
  - (d) pets;
4. Any variation to the living arrangements or fees, charges or commissions payable by a resident in the case where the number of occupants of that unit changes (eg, where the resident's spouse moves out of the unit to an aged care facility).
5. The arrangements that exist for residents to participate in the management of the village and the making of the village rules;
6. The Disputes Committee charter of the village;
7. Whether a resident is protected against a loss of rights should the village be sold to another organisation or otherwise cease to operate;
8. Any provision that has been, or may reasonably be expected to be made for infrequent items of expenditure such as long term maintenance, major repairs to buildings and capital replacement items;
9. In the case of a unit subject to the Unit Titles Act, whether there are any restrictions on the resident on the sale of his or her unit;
10. The management, including any trustees appointed with responsibilities in relation to the village; and
11. The background and relevant experience of the retirement village's senior management.

## SCHEDULE B - RESIDENT'S CHECKLIST

The following is a list of questions that you should read through carefully and consider before deciding to enter any retirement village.

If, after reading through the list, you are uncertain as to any aspects of the village, or its suitability for you, you should seek further advice.

1. Have I fully discussed my decision to enter a retirement village with my family, friends or advisers?
2. If I am considering moving to a retirement village because the housework, gardening and general maintenance has become too much, have I fully considered other options? (For example, obtaining home help or handy person help, or moving to a smaller unit in the same neighbourhood.)
3. Have I received adequate information about the retirement village I have chosen? Have I shown the documents to my solicitor? Am I satisfied that I fully understand the contract that I am signing?
4. Do I know that the lifestyle of the village (including social activities and religion) will suit me? Have I spoken to any residents of the village?
5. What type of public, private or village transport is there and where and when is it available to residents?
6. Will the village and my unit be readily accessible if I become disabled and need a wheelchair or walking aid? What alternatives do I have if I become too frail to live alone?
7. Will I need access to an interpreter or any special facilities that cater for disabled residents? Is access to these facilities available at the village?
8. Does the village provide an emergency call system and other facilities especially designed for the residents? Do these meet my present and likely future needs?
9. Have I looked at a number of villages to compare the facilities and financial arrangements?
10. If the unit is still under construction, do I have a say in the design, construction, finishing or furnishing of the unit? If the unit is already constructed, do I have any right to alter existing fixtures or fittings or to add new fixtures and fittings?
11. Can I afford to live in the village I have chosen and what are the financial consequences for me if I do not like living in the village and wish to move out?
12. Do I understand that recouping my refund, or realising any equity that I have, may be delayed pending resale, re-leasing or re-licensing the property? Does my contract outline when any refund is due to me after I leave?
13. Am I aware of the rights and responsibilities I have under the Retirement Villages Industry Code of Practice?

*Attachment to Explanatory Memorandum  
to Fair Trading Regulations*



AUSTRALIAN CAPITAL TERRITORY

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*Fair Trading Act 1992*

**Retirement Villages Industry  
CODE OF PRACTICE**

**Explanatory Notes**

## **PART 1- PRELIMINARY**

### **Division 1 - Interpretation and Application**

#### **Clause 1 - Interpretation**

Clause 1 sets out definitions of terms used in the Code.

The definition of "management" is cast broadly to recognise the different management structures that exist in villages. Management usually refer to the person or body responsible for administering the village on a day-to-day basis. However, where more than one person or body is responsible, obligations apply to all.

The definition of "residence contract" is intended to capture the agreement that gives the resident the right to occupy premises or remain in occupation of the premises. An agreement may be evidenced by more than one document and should be considered to include any ancillary documents.

The definition of "retirement village" recognises that a village complex may contain a nursing home, hostel or other facilities which are regulated by the Commonwealth's *Aged Care Act 1997*. The Code is not intended to apply to residential aged care facilities governed by that Act.

#### **Clause 2 - Agreement and Voting Rights**

Clause 2 provides a definition for "agree" for the purposes of the Code. Subclause 2(1) provides that such agreement is by simple majority of votes cast in accordance with this clause.

While villages are generally left to establish their own procedures for input into village management, clause 2 is intended to establish some minimum requirements for voting procedures. These minimum requirements cannot be abrogated by management or residents.

Subclause 2(2) requires management to ensure that residents are given appropriate notice of a vote being taken. What amounts to "appropriate notice" should be determined by reference to what is reasonable in the circumstances. For administrative convenience, paragraph 2(4)(a) facilitates voting by proxy.

Subclause 2(3) establishes that voting rights attach to residential premises, regardless of the number of residents who actually occupy them.

Paragraph 2(4)(b) clarifies that there is no casting vote; where equal votes for and against are cast, there is no simple majority and no "agreement".



Paragraph 2(4)(c) specifies a minimum quorum for a vote count. While a default quorum of three residents has been set, it is anticipated that each village will address the need to set a quorum requirement in the village rules. In the case of villages regulated by the *Unit Titles Act*, there are overriding quorum requirements in that Act.

Paragraph 2(4)(d) makes it clear that all residents are bound by the outcome of a vote, whether or not they exercised their right to vote.

Subclause 2(5) is intended to ensure that residents vote on the budget as a whole and do not vote on some budget items with the consideration of other items being deferred.

### **Clause 3 - Application of the Code**

Subclause 3(1) sets out the application of the Code.

Subclause 3(2) reinforces the mandatory nature of the Code and prevent parties contracting out of their rights and obligations under the Code and ensures that the provisions of a residence contract are consistent with the relevant provisions of the Code.

It is intended that subclause 3(2) will prevent the practice by management of obtaining an *irrevocable* proxy from a resident in relation to the exercise of a right granted under the Code. However, the subclause is not intended to prevent management holding a *revocable* proxy as it is recognised that a proxy system may be convenient for management in some circumstances and for those residents who generally do not wish to trouble themselves with the administration of the village.

Subclause 3(3) makes it clear that, subject to the matters covered by subclause 3(5), the Code applies to residence contracts in force at the time of the commencement of the Code. In particular, residents and managements have a period of six months after the Code commences within which to re-negotiate, if necessary, provisions of the residence contracts to comply with the Code in the future.

Subclause 3(4) is intended to recognise the situation that some retirement villages are subject to the *Unit Titles Act 1970*. It is intended that, as far as possible, the Code should prescribe the same rights and responsibilities for all villages in the ACT, regardless of the arrangement through which the resident obtains the right to occupy the premises.

However, the Code is not intended to operate in a manner inconsistent with the *Unit Titles Act* and is drafted in recognition of paragraph 36(1)(d) of that Act which places a general obligation on a management corporation to "comply with any requirement made by or under any law in force in the Territory".

Subclause 3(5) is intended to prevent the application of subclauses 11(2)(b), 24(1), 28(3), 29(3) and 30(5) to contracts entered into before the Code commenced.

#### **Clause 4 - Administration**

While the Code Administration Committee has specific administrative functions under the Code, clause 4 makes the Director responsible for the administration of the Code.

#### **Division 2 - Objectives of the Code**

##### **Clause 5 - Objectives**

Clause 5 sets out the overall objectives of the Code.

##### **Clause 6 - General Principles**

Clause 6 provides general principles intended to guide those involved in the management of a retirement village. These principles are equally applicable to residents when providing input to the management of a village.

## **PART 2 - RIGHTS AND RESPONSIBILITIES OF RESIDENTS AND MANAGEMENT**

#### **Division 1 - Basic Rights and Responsibilities**

##### **Clause 7 - Resident Privacy**

Clause 7 is intended to set out the fundamental rights of a resident to privacy and quiet enjoyment of his or her accommodation. These rights must be respected and facilitated by management and other residents alike.

##### **Clause 8 - Autonomy Over Personal and Financial Affairs**

Subclause 8(1) is intended to recognise that a resident retains the same right to autonomy over his or her personal and financial affairs as any other member of the wider community.

Subclause 8(2) is intended to place an obligation on management to allow a resident access to any personal file relating to that resident.

##### **Clause 9 - Sound Management**

Subclause 9(1) is intended to ensure that management recognises the importance of conducting the village in a cost effective and financially prudent manner given that it raises funds by levying fees on residents who seek value for money from the contribution they make.

Similarly subclause 9(1) is intended to ensure that residents recognise the importance of conducting the village in a cost effective and financially prudent manner when providing input to management issues such as budgets.

##### **Clause 10 - Resident's Right to Membership of Organisations**

Clause 10 is intended to prevent management restricting the membership of a residents' organisation.

### **Clause 11 - Management to Facilitate Resale**

Subclause 11(1) is intended to place an obligation on management to facilitate a resident's sale of property that is subject to the *Unit Titles Act* to the extent that management has the power to do so. In some cases, management will have fettered the resident's ability to sell the unit, for example, through the imposition of a condition reserving the right for management to refuse a buyer in certain circumstances.

Management is under an obligation to facilitate the sale occurring as expeditiously as practicable as it is recognised that the outgoing resident will typically be reliant on the proceeds of the sale to establish residence elsewhere.

Paragraph 11(1)(b) recognises that the sale price obtained by an outgoing resident is likely to affect the value of other property in the village and that such effect will depend on prevailing market conditions.

Where it is unlikely that the particular sale price will have a substantially negative impact on the value of other property, or where it is desired that a sale occur during a low market period and an upturn in the market cannot be expected for some time, it may be unreasonable in these circumstances for management to impede the sale.

Subparagraph 11(2) is intended to address issues that may arise where management has the exclusive right to sell an outgoing resident's unit:

- Paragraph 11(2)(a) deals with the potential conflict of interest that may arise where management is marketing an outgoing resident's unit along side one of its own.
- Paragraph 11(2)(b) is intended to limit the duration of management's exclusive right to sell the property to 12 months from the resident's written notice of intention to sell.

However, paragraph 11(2)(b) is not intended to affect any right management may have approve the suitability or eligibility of a person to whom premises may be sold and, in accordance with subclause 3(5), the requirement in subclause 11(2)(b)) does not apply to residence contracts entered into before the Code commences.

## **Division 2 - Resident Input to Village Management**

### **Clause 12 - General Principles Guiding Retirement Village Management**

Clause 12 is intended to establish general principles that should be reflected in the management structures of a retirement village. In addition, management and residents should have regard to their responsibilities under this Part and the general guiding principles in clause 5 when designing structures for resident input or village rules.

Paragraph 12(c) is intended to recognise that, while the Code provides each resident with the right to participate in the affairs of the village, not all residents wish to trouble themselves with its administration. As noted above, it may be convenient for management to hold revocable proxies on behalf of such residents.

### **Clause 13 - Structures for Resident Input**

Under subclause 13(1), management must consult with current residents and establish structures for resident input into management. What is an appropriate structure will depend on the circumstances of the village. In some villages it may be appropriate to have a residents' representative or residents' committee that operates as an intermediary between residents and management.

Under paragraph 13(2)(a) management must present budget information to residents and facilitate resident input. While clause 14 requires certain budget information be supplied by management, the structure established under paragraph 13(2)(a) may include, for example, a meeting at which management gives a presentation in relation to that information.

Under subparagraph 13(2)(b)(i), an annual meeting must be held at which residents will decide whether to agree or not agree to the budget. "Agreement" in this regard is defined in clause 2. If residents do not agree to the entire budget at this meeting, a budget impasse occurs and Division 4 of Part 5 deals with this situation.

To reduce the likelihood of an impasse occurring, management should ensure that the structures for resident input and the supply of information allow for management and residents to workshop the budget before the decision on whether to agree to the budget is taken.

Paragraphs 13(2)(c) and 13(2)(d) require resident input and agreement to changes in services or facilities that result in an increased cost to residents or a loss of amenity by residents.

Paragraph 13(2)(e) is intended to ensure that residents have input and agree to proposals for the upgrading of facilities where residents are responsible for any of the funding for such proposal.

Paragraph 13(2)(f) - accounts for this purpose may be included in consolidated accounts for the entire village complex.

### **Clause 14 - Resident Input into Budget**

Under subclause 14(1), management is required to provide residents with information concerning current performance against budget as this information will be relevant to the resident's assessment of the draft budget for the coming financial year.

Subclause 14(2) sets out the minimum requirements for the content of the draft budget. Information about the special purpose dispute resolution charge given under paragraph 14(2)(c) should include details of any contribution management has made under the transitional arrangements established by clause 46.

Under subclause 14(3), it is intended that management and residents workshop the budget in accordance with the structures established under subclause 13(1) before resident agreement to the budget is sought.

Subclause 14(4) recognises that the operation of the village must continue notwithstanding that an impasse has occurred between residents and management concerning agreement to the budget. As any impasse can be expected to be resolved quickly by the Budget Referee under the provisions of Division 4 of Part 5, there should not be any long period during which this provision will have effect, particularly if the vote on the budget for the forthcoming financial year occurs well before the beginning of that year. In such a case, management is required to operate, as far as is possible, on the basis of the previous budget agreed by residents.

#### **Clause 15 -Village Rules**

Clause 15 requires that a set of village rules be established in each village. These rules must be agreed to by residents in accordance with clause 2. While structures established under subclause 13(1) may address resident input into the rules and amendment to the rules, there is a minimum requirement in subparagraph 13(2)(b)(ii) that such matters be discussed at an annual meeting.

The content of village rules can be expected to vary from village to village but would be expected to address common issues such as what pets may be kept by residents, what notice should be given to management of the resident's absence for extended periods, whether alterations may be made to units and what contingencies should be made for a medical emergency or the supply of medicine.

## **PART 3 - DISCLOSURE IN ADVERTISING AND SALES PROMOTION**

#### **Clause 16 - Disclosure in Advertising and Sales Promotion**

Clause 16 sets out management's general obligations in relation to the disclosure of information concerning the retirement village. Such information includes all promotional and advertising material and the information contained in the residence contract and any ancillary documents.

#### **Clause 17 - Disclosure in Advertising and Sales Promotion**

Clause 17 is intended to ensure that a prospective resident is given a reasonable opportunity to consider the terms of the proposed contract, assess the suitability of the village and make such enquiries or obtain such advice as necessary for the resident to be properly informed about the contract and the village.

**Clause 18 - Information to be Provided by Management to Every Prospective Resident**

Clause 18 requires management to provide a prospective resident with certain detailed information concerning the village. A prospective resident would be expected to be someone who is making a genuine enquiry about the village with the intention of assessing its suitability rather than someone making only a casual enquiry.

Paragraph 18(1)(i) is intended to alert a prospective resident to the circumstances, if any, in which residents may fund facilities outside the village. While the Code does not prohibit the practice of using the operating budget to fund outside facilities (for example, the subsidising of a hostel located in the village complex), the Code places an obligation on management to disclose whether or not, and to what extent, this may occur.

If a budget impasse results from a dispute over management's use of the operating budget to fund an outside facility, the terms of this disclosure will be relevant to the decision of a Budget Referee who, in accordance with clause 42, will need to consider the reasonableness of the budget in all the circumstances. Where a full and clear disclosure has been made to residents before entering the village, the inclusion of budget items consistent with the disclosure is likely to be considered reasonable in the circumstances.

Subclause 18(2) is intended to ensure that a prospective resident has a clear understanding of his or her entitlement to a refund, if any, should the residence contract be terminated.

- Under paragraph 18(2)(a), management is specifically required to identify any fees or charges that may affect the refund entitlement.
- Under paragraph 18(2)(b), management is required to disclose details of the method used to calculate the refund entitlement and any fees identified in paragraph 18(2)(a). The calculation of the refund or fee may be regulated under clause 28 or 29.
- Under paragraph 18(2)(c), management must provide sufficient information for the resident to make his or her own forecast of the likely return. In this regard, the resident may seek appropriate advice.

**Clause 19 - A Resident's Obligation to Obtain Information**

Clause 19 is intended to ensure that residents take appropriate steps to properly inform themselves about contracts they enter in relation to the village.

**Clause 20 - Development Consent**

Subclause 20(1) is intended to prevent any person undertaking sales promotion of a village unless the Territory Plan allows the proposed development.

Subclauses 20(3) and 20(4) are intended to deal with the situation where a resident or potential resident makes a payment, under a residence contract, that relates to a village or further development of a village and the provision of such facility is contingent on a Development Application being approved.

Subclause 20(3) is intended to provide that if the Development Application is not approved, the resident is entitled to a full refund of that payment. Subclause 20(4) is intended to place an obligation on management to disclose the need for such approval and to alert the resident to his or her right to the refund should the approval not be obtained.

**Clause 21 - Aged Care Facilities**

This clause recognises that a village may contain some facilities regulated by the Code in addition to aged care facilities which are governed by the Commonwealth's *Aged Care Act*.

Subclause 21(1) places disclosure requirements on management in respect of promotional material or sales material that is provided in relation to residential aged care facilities. In developing the Code, these disclosure requirements were considered important to ensure that the resident or potential resident obtain a clear understanding of the availability of residential aged care facilities in the village complex. Paragraph 21(1)(b) is intended to alert residents to the fact that management cannot guarantee entry to facilities regulated by the *Aged Care Act*.

**Clause 22 - Proposed Facilities and Services**

Clause 22 ensures that where promotional materials allude to proposed facilities or services being provided in the village, any conditions governing the provision of those facilities or services are clearly disclosed, including proposed timeframes.

This clause is intended to prevent a resident entering a village with unrealistic expectations of proposed facilities or services.

## **PART 4 - CONTENT OF CONTRACTS**

**Clause 23 - General Requirements**

Clause 23 is intended to reinforce several fundamental requirements that management must comply with in promoting a village.

Paragraph 23(c) is intended to ensure that the contract clearly specify the legal basis of the right to occupy and the type and length of tenure. It is acknowledged that the legal basis of that right and the financial arrangements that secure it may vary significantly between villages.

**Clause 24 - Cooling-Off Period**

Subclause 24(1) requires a residence contract to provide for a "cooling-off" period in the terms specified in this clause.

For the purposes of subclause 24(3), it is intended that the right is waived on *actual* occupation rather than *constructed* occupation. The resident may not waive his or her right to withdraw from the contract by merely moving his or her possessions into the premises.

**Clause 25 - Matters to be Included in Residence Contract**

Clause 25 prescribes the minimum content of a residence contract.

**Clause 26 - Non-Party Residents**

Subclause 26(1) defines a "non-party resident" for the purposes of this Part as a person who lives in premises in a village but he or she is not a party to the residence contract which relate to those premises.

Subclause 26(2) requires that a residence contract to state the circumstances in which the non-party resident may occupy the premises.

Subclause 26(3) is intended to ensure that, where a residence contract allows a non-party resident to reside in residential premises, the rights and responsibilities of the non-party resident are addressed in the residence contract. Specifically, the contract must address the position of the non-party resident where the residence contract is terminated or the resident that is party to the contract dies or abandons the premises.

Subclause 26 (4) binds the non-party resident to the village rules and the dispute resolution process of Part 5 of the Code.

Subclause 26 (5) recognises that, while there is no privity of contract between a non-party resident and management, the provisions of the residence contract which relate to a non-party resident may be enforced by the Director of Consumer Affairs under section 36 of the *Fair Trading Act 1992*.

**Clause 27 - Accommodation Plans and Details**

Subclause 27(1) is intended to ensure that the resident obtains a clear understanding of which parts of the village have been allocated to the resident for his or her personal use.



Paragraph 27(1)(c) is intended to ensure that the resident obtains a clear understanding of the development boundaries of self care units so that the resident can identify the areas to which his or her maintenance fees and other responsibilities relate.

#### **Clause 28 - Information About Refund Entitlements**

Subclause 28(1) requires that the residence contract clearly specify all accommodation charges and the resident's right to a refund, if any, of such charges on termination.

If a refund is due on termination, the contract must, in accordance with subclause 28(1), explain the method of calculating the entitlement. Where there is no right to a refund, the contract must make that clear in accordance with subclause 28(2).

Under subclause 28(3), where the refund is calculated according to the period of occupancy must be calculated in a daily basis. Note that, in accordance with subclause 3(5), the requirement in subclause 28(3) does not apply to residence contracts entered into before the Code commences.

#### **Clause 29 - Termination by Management**

Subclause 29(1) is intended to ensure that the Code provides exclusive grounds for management to terminate the resident's right to occupy premises and that management must follow a specified procedure to seek termination in accordance with the Code.

Subclause 29(2) requires that the residence contract clearly specify any charges and fees payable by the resident on termination or the method of their calculation.

Subclause 29(3) requires that any fee or charge payable on termination is calculated on a daily basis. Note that, in accordance with subclause 3(5), the requirement in subclause 29(3) does not apply to residence contracts entered into before the Code commences.

#### **Clause 30 - Termination by Residents**

Subclause 30(1) requires that the residence contract specify the grounds upon which the contract may be terminated by the resident.

Subclause 30(2) requires, among other things, the residence contract to specify the circumstances in which the resident shall be taken to have abandoned the premises.

Where the resident terminates the contract, subsection 30(4) requires management to pay to the resident all monies that he or she is entitled to under the contract within the timeframe specified in this clause. This timeframe strikes a balance between the interests of the outgoing resident and the interests of management. Generally, the outgoing resident needs to receive his or her money quickly to establish another place of residency while management may need time to rearrange village finances to allow for a large outgoing of funds.

In accordance with subclause 30(5), it is intended that management make all payments as soon as practicable, as determined by reference to the circumstances of the particular village.

While it is recognised that a large refund may strain the village's cash flow, particularly where the termination was unforeseen, it may be appropriate for management to make the payments in instalments.

While every effort must be made by management to make the payment as soon as practicable, subclause 30(5) requires that payment must be made no later than 6 months after the former resident vacates the premises but, where the residence contract specifies a shorter time, no later than that time.

Subclause 30(6) requires management to make the payment within 14 days of an incoming resident taking up occupation of the unit. This requirement overrides any deadline for payment that would result from the application of subclause 30(5) unless that deadline would result in an earlier payment..

Note that, in accordance with subclause 3(5), the requirement in subclause 30(5) does not apply to residence contracts entered into before the Code commences.

#### **Clause 31 - Retirement Villages Industry Code of Practice**

Clause 31 is intended to ensure that residents are aware of the Code and are alerted to certain rights they enjoy under it.

## **PART 5 - DISPUTE RESOLUTION**

### **Division 1 - Costs**

#### **Clause 32 - Costs of Dispute Resolution**

Clause 32 establishes the funding arrangements for dispute resolution under this Part.

Under subclause 32(1), a special purpose dispute resolution fund is to be established to meet the costs of establishing and maintaining the dispute resolution process, including payment of the Budget Referee and Contract Referee. The fund is a separate budget item under paragraph 14(2)(c) and may be used only for this purpose.

Under subclause 32(2), parties are otherwise required to meet their own costs. For example, where allowed by the Disputes Charter, a party may obtain legal representation at their own expense. The intention is that all residents should contribute to the establishment and maintenance of the dispute resolution mechanism but beyond that, each resident should pay to use it.

## **Division 2- Resolution of Disputes Within the Village**

Division 2 is intended establish an "in-house" dispute resolution system that is informal and inexpensive. Nothing in the Code prevents a person from pursuing a matter through the Courts, however, a Court is likely to have regard to the availability of the dispute resolution process under the Code.

### **Clause 33 - Disputes Committee**

Clause 33 establishes a standing Disputes Committee to hear disputes in accordance with this Division.

Subclause 33(2) sets out the membership of this Committee, which is intended to possess an appreciation for the viewpoints of both management and residents while remaining impartial.

Under subclause 33(3), a village must develop a set of procedures for dealing with disputes. While the subclause specifies certain matters that must be addressed in the Disputes Charter, it may also address other matters such as the choice of venue for dispute resolution, the representation of parties by other persons, whether there should be an application fee, the length of appointments to the Committee and whether back up Committee members are available.

Subclause 33(4) is intended to prevent the development of a charter that is outside the scheme of the Code. The Committee should be considered to be bound by the rules of natural justice, as are the Contract and Budget Referees.

Subclause 33(5) is intended to indemnify committee members from liability where they act in good faith in the purported exercise of their functions under the Code.

### **Clause 34 - Applications to Disputes Committee**

Subclause 34(1) requires that an application be made to the Committee. The Charter may specify the content of this application and who it is to receive it on the Committee's behalf.

Subclause 34(2) is intended to ensure that applications are dealt with promptly and in accordance with the Disputes Charter.

Subclause 34(3) allows the Committee to decline to hear an application where the circumstances of the case make it inappropriate or undesirable for the Committee to hear it. If this occurs, the Committee must refer the matter to mediation. However, it is recognised that mediation is a voluntary process for the parties to a dispute.

Subclause 34(4) sets the time limit of 30 days for the resolution of a dispute and requires the Committee to provide the parties with a written statement of reasons for its decision.

Subclause 34(5) makes it a breach of the Code for a party to fail to comply with the Committee's decision or a mediation agreement. Such a breach may be addressed by the Director using his or her enforcement powers under Part 3 of the *Fair Trading Act 1992*.

### **Division 3 - Termination by Management**

#### **Clause 35 - Termination of a Resident's Right to Occupy**

Under subclause 35(1) provides that the resident's right to occupy residential premises may only be terminated in accordance with this Division.

Under subclause 35(2), management must give the resident 14 days notice in accordance with clause 36 before making an application under subclause 35(3).

Subclause 35(3) is intended to provide the four exclusive grounds for termination by management.

Under the ground specified in paragraph 35(3)(b), the resident must have been given a reasonable opportunity to rectify the breach of the village rules or residence contract.

Paragraph 35(3)(d) is intended to establish a ground of undue hardship. It is not intended that this ground could be established by the mere demonstration that management would suffer some hardship, rather it must be demonstrated that the hardship is so excessive or unwarranted that termination of the resident's right to occupy is justified by the special circumstances of the particular case.

Under subclause 35(4), the Director has 14 days to appoint, from the panel established under paragraph 44(1)(a), a person to act as the Contract Referee in relation to the particular application and refer that application to him or her.

#### **Clause 36 - Notice of Management's Intention to Make an Application**

Under paragraph 36(1)(a), management must identify which of the grounds specified in subclause 35(3) grounds form the basis of its application.

If management seeks to rely on the ground specified in paragraph 35(3)(b), under subclause 36(2), management must describe in sufficient detail the circumstances giving rise to the breach.

#### **Clause 37 - Applications Before the Contract Referee**

Subclause 37(1) gives the Budget Referee the discretion to determine the procedure to be followed in determining the application, subject to other requirements of the clause. Under this subclause, the Contract Referee may allow management to amend its application, provided that the process followed is not detrimental to the resident. The Contract Referee may decide whether or not to allow parties to have legal representatives present.

## Explanatory Notes to the Retirement Villages Industry Code of Practice

Subclauses 37(2) and 37(3) are intended to minimise technicality and formality and ensure that an application is dealt with promptly. Subclause 37(4) provides the necessary safeguard that the Budget Referee employ a procedure that follows the rules of natural justice.

### **Clause 38 - Decision of the Contract Referee**

Subclause 38(1): it is intended that the Contract Referee will only allow the termination where he or she is satisfied that, in the circumstances, it is reasonable to do so.

For example, while management may be able to establish that the resident has breached the village rules and cannot rectify the breach, the Contract Referee may find that it is unreasonable to allow management to terminate the contract on the basis that the breach was of a trivial nature.

In accordance with subclause 38(3), all parties are bound by the decision and must take reasonable steps to put the decision of the Contract Referee into effect. Where a party fails to do so, the Director may exercise his or her powers under section 36 of the *Fair Trading Act 1992*.

### **Clause 39 - Effect of Decision to Terminate Resident's Right to Occupy**

Where the Contract Referee allows management's application to terminate the resident's right to occupy, the residence contract is also terminated. Management must then pay the outgoing resident all monies that the resident is entitled to under the contract within one month of the date of termination or within 14 days of an incoming resident taking up occupancy, whichever would result in the earliest payment.

## **Division 4 - Resolution of Budget Impasse**

### **Clause 40 - Budget Impasse**

Where a budget impasse occurs at the meeting required under subparagraph 13(2)(b)(i), subclause 40(1) requires that management lodge a written application with the Director for a Budget Referee to make a decision on the budget.

Subclause 40(2) sets a time limit for the Director to appoint a Budget Referee and refer the matter for decision. The Director must appoint the Budget Referee from the pool of persons selected by the Code Administration Committee under clause 44.

### **Clause 41 - Applications Before the Budget Referee**

Clause 41 describes the process to be followed by the Budget Referee in determining an application made under subclause 40(1).

Subclause 41(1) gives the Budget Referee the discretion to determine the procedure to be followed in determining the application, subject to other requirements of the clause.

Subclauses 41(2) and 41(3) are intended to minimise technicality and formality and ensure that an application is dealt with promptly. Subclause 41(4) provides the necessary safeguard that the Budget Referee employ a procedure that follows the rules of natural justice.

#### **Clause 42 - Decision of the Budget Referee**

Subclause 42(1) requires the Budget Referee to assess the reasonableness of the budget.

Having regard to the criteria set out in Subclause 42(1), the Budget Referee may approve the budget with or without amendments under paragraph 42(2)(a). Such amendments may be proposed by residents or management but how (and at what stage of the proceedings) such proposal is made, will be determined by the Budget Referee in accordance with clause 41.

Alternately, the Budget Referee may refer the budget back to residents and management with his or her recommendations under paragraph 42(2)(b). At this point, the parties have an opportunity to amend the budget in the light of these recommendations and residents have another opportunity to reconsider whether to agree to the budget.

If agreement is reached, then the impasse is removed and the budget may be implemented. If the budget is not agreed to within a reasonable time, the Budget Referee may, under subclause 42(3), approve the budget in terms that he or she considers reasonable having regard to the criteria in subclause 42(1). The budget can then be implemented in accordance with subclause 14(4).

Should the budget be approved under paragraph 42(2)(a) or subclause 43(3), the Budget Referee must prepare a statement of reasons to be provided to the Director to distribute to the parties.

## **PART 6 - Code Administration Committee**

#### **Clause 43 - Code Administration Committee**

Clause 43 establishes a Code Administration Committee which is intended to oversee the implementation, development and further review of the Code.

Subclause 43(1) sets out the membership of the Committee. The Director is the Chairperson of the Committee (under subclause 43(2)) and must appoint to the Committee a representative of management and a representative of residents under paragraphs 43(1)(b) and 43(1)(c) respectively. In each case, the representative may be a member of a representative association.

## Explanatory Notes to the Retirement Villages Industry Code of Practice

In addition to these minimum appointments, the Director may, under paragraph 43(1)(d), make further appointments to facilitate the Committee carrying out its functions. Such appointments may be made, for example, where additional expertise or representation is considered necessary.

While there is a minimum requirement under subclause 43(4) that the Committee meet at least twice a year, it is envisaged that more frequent meetings will be required, particularly in the initial stages of the Code's implementation.

Subclauses 43(6) and 43(7) describe the general functions of the Committee. To facilitate the performance of these functions, the Consumer Affairs Bureau is to provide appropriate information to the Committee under subclause 43(5), though the Committee need not limit itself to this information.

Subclause 43(8) is intended to indemnify Committee members from liability where they act in good faith in the purported exercise of their functions under the Code.

Subclause 43(9) is intended to ensure that any sensitive or confidential information obtained by a person as a member of the Committee will remain confidential even where that person has ceased to be a member.

Subclause 43(10) is intended to prevent acts of the Committee being called into question by reason of some defect in the appointment of a member.

### **Clause 44 - Code Administration Committee to Appoint Independent Referees**

Under subclause 44(1), the Committee will appoint the persons who are eligible to serve as Contract or Budget Referees under the Code.

While the Director may, under subclause 35(4), appoint a person to act as the Contract Referee in relation to a particular application under 35, the Director is bound to make the appointment from the panel of eligible persons established by the Committee under paragraph 44(1)(a).

Subclauses 44(2) and 44(3) are intended to ensure that Contract and Budget Referees possess certain minimum qualifications.

Subclause 44(4) is intended to prevent acts of a Contract or Budget Referee being called into question by reason of some defect in the appointment of that Referee.

Subclause 44(5) is intended to indemnify Referees from liability where they act in good faith in the purported exercise of their functions under the Code.

Subclause 44(6) is intended to prevent Committee members bringing any apparent conflict of interest to the appointment of persons under clause 44.

## **PART 7 - Transitional Provisions**

The Code is intended to apply to residence contracts in force at the time of the commencement of the Code, but is not intended to affect those contracts in so far as they relate to events which have occurred and information which has been supplied prior to the commencement of the Code.

### **Clause 45 - Transitional Application**

Clause 45 recognises that many of the requirements of the Code cannot be complied with immediately and that residents and management will need time to reorganise their affairs in order to comply with the Code. For this reason, subclause 45(1) provides that, for the first six months after the Code commences, those regulated by the Code need only comply with it to the extent to which they are reasonably capable of complying. However, after this six month transitional period has expired, all provisions of the Code will be mandatory [see subclause 45(2)].

### **Clause 46 - Transitional Arrangements**

Subclauses 46(2) and 46(3) provide an interim funding mechanism for dispute resolution under the Code. Until the special purpose dispute resolution fund is established under subclause 32(1), subclause 46(2) requires management meet the costs of establishing and maintaining the dispute resolution processes of the Code. In accordance with subclause 32(2), all other costs are borne by the party incurring them.

Subclause 46(3) is intended to allow management to recoup monies paid under subclause 46(2) when the next budget is proposed. That is, the special purpose dispute resolution charge proposed in the next budget should account for any monies paid under subclause 46(2) as well as the forecasted need for that budget period.

## **PART 8 - Miscellaneous Provisions**

### **Clause 47 - Code Handbook**

Clause 47 allows the Director to authorise the publication of a handbook to assist management and residents in their understanding of this Code.