

HEADS OF AGREEMENT

RETIREMENT VILLAGES LEGISLATION FACILITATION

1. PURPOSE OF HEADS OF AGREEMENT

As a result of community dissatisfaction with the second consultation draft *Retirement Villages Bill 1997*, a committee was established in August 1998 at the instigation of the Queensland Government which included representatives from all relevant stakeholder groups in the retirement villages industry to participate in a mediation process conducted by the Department of Justice at the Dispute Resolution Centre.

The purpose of the mediation was to:

- identify those issues in the draft Bill about which consensus between the various stakeholder groups had not been reached during the consultation process undertaken when the bill was released; and
- to fully discuss those issues with a view to the various stakeholder groups reaching consensus; and
- to report to the Minister on the issues on which consensus has been reached.

The purpose of this Heads of Agreement is to set out in a formal manner the outcome of the mediation process and, in particular, those issues about which consensus has been reached between all those participating in the mediation process. This is done on the understanding of all parties that any new legislation regulating retirement villages in Queensland will incorporate those issues.

2. ISSUES DISCUSSED BY THE COMMITTEE

The Committee, in its discussions dealt with the following:

- (a) capital replacement;
- (b) maintenance/services charges;
- (c) deferred exit fees;
- (d) resale of units;
- (e) dispute resolution; and
- (f) other issues.

The matters agreed upon by all members of the Committee in relation to the above is summarised in this Heads of Agreement.

3. CAPITAL REPLACEMENT AND THE CAPITAL REPLACEMENT SINKING FUND

3.1 The Committee discussed the following issues:

- items that are to be included within the expression 'capital replacement';
- who is to bear the cost of capital replacement required at a village; and
- method to ensure that sufficient funds are available when required to meet the capital replacement requirements of the village.

3.2 Definition of Capital Replacement

3.2.1 It was agreed that as a general principle the concept of capital replacement spending appearing in the *Body Corporate and Community Management Act 1997* be adopted - 'spending of a capital or non-recurrent nature (including the periodic renewal or replacement of major items of a capital nature and other spending that should be reasonably met from capital)' (refer section 100(2)(a), *Body Corporate and Community Management (Standard Module) Regulation 1997*).

3.2.2 The definition would result in expenditure to replace the following items being characterised as capital replacement spending:

- (a) all buildings and structures located in the village that are owned by the operator, including the community facilities and amenities and the interior (excluding those items of expenditure payable out of the Maintenance Reserve Fund or that are a resident's contracted responsibility) and exterior of all accommodation units;
- (b) all plant, machinery and equipment used in the operation of the village community services (eg. communal hot water and airconditioning services, kitchen and dining room equipment, community facility furnishings, gardening equipment, village bus/transportation services); and
- (c) all village infrastructure (eg. roadways, pathways, drainage, sewerage mains, landscaping, electrical distribution systems, water services and connections and distribution systems etc).

3.3 Responsibility for Capital Replacement

3.3.1 It was agreed that expenditure for capital replacement is to be the responsibility of the operator (on the basis that the operator is able to access funds available in a Capital Replacement Sinking Fund to be established and operated as outlined in 3.4) subject to the following exceptions:

- the operator is only responsible for capital replacement expenditure relating to items of capital owned by the operator and not those capital items owned by:

- any resident (including improvements made to units by residents in leasehold/licence villages and the entire unit/lot in freehold title villages); or
 - the body corporate in a freehold title village;
 - expenditure necessary due to deliberate or wilful damage or accelerated wear to the village assets (both internal and external to a unit) will be the relevant resident's responsibility; and
 - all existing contractual arrangements and practices requiring residents to be responsible for the cost of re-instatement or refurbishment of the interior of units will remain enforceable. In the case of residents entering a village after the commencement of the new legislation, unless otherwise specifically contracted, re-instatement or refurbishment is to be the operators responsibility in leasehold/licence villages and is to be paid out of the Capital Replacement Sinking Fund referred to in 3.4 (refer 6.5).
- 3.3.2 The operator may at its discretion replace capital items of plant, equipment and chattels by way of lease/rental/hire purchase arrangements. The lease/rental/hire purchase payments are able to be met out of the Capital Replacement Sinking Fund referred to in 3.4
- 3.3.3 Any items of capital replacement that are not to be the responsibility of the operator because they fall within one of the exceptions in 3.3.1 must be clearly set out in the Public Information Document.

3.4 Capital Replacement Sinking Fund

- 3.4.1 It was recognised by the Committee that as villages age in Queensland it is important that there is adequate provision for future capital replacement.
- 3.4.2 To meet this requirement it was agreed that for each village a Capital Replacement Sinking Fund be established that is reserved for capital replacement expenditure for which the operator is responsible (as set out in 3.3.1).
- 3.4.3 The Capital Replacement Sinking Fund will be established and operated as a trust fund.
- 3.4.4 In freehold title villages it will be necessary for 2 sinking funds to be maintained in relation to capital replacement at the village:
- the body corporate sinking fund maintained under the *Body Corporate and Community Management Act 1997* to cater for the capital replacement of the body corporate's common property comprised within the village; and
 - the Capital Replacement Sinking Fund established under the retirement villages legislation to cater for the capital replacement obligations of the operator.

3.4.5 The Capital Replacement Sinking Fund will comprise:

- that part of the balance in any existing sinking fund that the operator has in place for the village (but not any sinking fund pertaining to a body corporate in the case of a freehold title village) determined in the manner set out in 3.4.6. This balance is to be transferred into the Capital Replacement Sinking Fund.
- any amounts received under policies for insurance for destruction of items of a major capital nature;
- interest from the investment of the Capital Replacement Sinking Fund;

(refer section 100(3)(b) and (c), *Body Corporate and Community Management (Standard Module) Regulation 1997*).

- a sum equal to a fixed percentage (to be set in the manner set out in 3.4.6) of the 'Exit Capital Value' of the unit for each year that the relevant residence contract has been in existence ('Capital Replacement Sinking Fund Contribution'). The Capital Replacement Sinking Fund Contribution is to be paid by the operator into the Capital Replacement Sinking Fund upon the 're-sale' of a resident's unit pursuant to the resident departing the village. The 'Exit Capital Value' is the full capital value of the unit (ie value for which it would sell in the marketplace assuming the purchaser will participate in any future capital gain in the unit). This is regardless of whether the incoming resident has accepted some other limited capital gain participation option on offer by the operator because the amount required for capital replacement for each unit is the same irrespective of which option is selected by the incoming resident.

3.4.6 Upon commencement of the new legislation requiring establishment of the Capital Replacement Sinking Fund and the Maintenance Reserve Fund (referred to in 4.2), the balance in any existing sinking fund that the operator has in place for the village (excluding any body corporate sinking fund in a freehold village) will be apportioned between the Capital Replacement Sinking Fund and the Maintenance Reserve Fund in accordance with the following principles:

- if the village scheme has historically operated separate sinking funds for capital replacement on the one hand and maintenance on the other - the respective balances in each fund are simply to be transferred into the Capital Replacement Sinking Fund and the Maintenance Reserve Fund;
- if the village scheme has historically operated a single sinking fund into which contributions from services charges have been made:
 - where that single fund has been set aside for maintenance purposes only (and not capital replacement purposes as defined in this Heads of Agreement) under the terms of the

scheme documentation - the whole of the balance is to be transferred into the Maintenance Reserve Fund; and

- where the single fund has been set aside for both maintenance and capital replacement purposes as defined in this Heads of Agreement (as is most often the case in Queensland retirement villages) under the terms of the scheme documentation then the balance in the fund is to be apportioned between the Capital Replacement Sinking Fund and the Maintenance Reserve Fund in proportions that reflect the proportion that the quantity surveyor's assessment of the desired level for each fund bears to the total of those levels (ie in accordance with the respective projected needs of each fund).

- 3.4.7 The percentage of the 'Exit Capital Value' that is to be paid by the operator into the Capital Replacement Sinking Fund is to be established by each operator engaging a quantity surveyor to provide a written report about the expected capital replacement costs for the village (taking into account the amount in the Capital Replacement Sinking Fund after any existing sinking fund balance is paid into the fund). In cases where the existing fund falls short of requirements, the contribution would be set at a level necessary to build the fund up over a specified period of time in a similar way to the mechanism set out in Part 5 Division 2 of the second draft *Retirement Villages Bill 1997*.
- 3.4.8 If the operator levies an Exit Fee on termination of the residence contract, the Capital Replacement Sinking Fund Contribution will be automatically paid out of the Exit Fee into the Capital Replacement Sinking Fund at the time it is deducted from the outgoing resident's pay out. If no Exit Fee is levied, the operator will be required to contribute the Capital Replacement Sinking Fund Contribution from the incoming resident's incoming contribution or from other sources.
- 3.4.9 In the event that the quantity surveyor and/or the operator has underestimated the contribution to be made to the Capital Replacement Sinking Fund by the operator or the Capital Replacement Sinking Fund does not for any reason contain sufficient funds to cover any particular capital replacement spending then the burden of funding any shortfall will fall on the operator at the time the capital replacement expenditure is made.
- 3.4.10 The transition arrangements are to be that all existing contractual arrangements and practices in place at the commencement of the new legislation that require residents to pay a services charge that contains a component for capital replacement will continue and that component is thereafter to be paid into the Capital Replacement Sinking Fund. After commencement of the new legislation services charges payable by new residents are unable to contain any component for capital replacement.
- 3.4.11 In the Public Information Document for the retirement village scheme, the operator will be required to disclose:

- the percentage of the 'Exit Capital Value' of the unit that the Capital Replacement Sinking Fund Contribution represents;
- details of the quantity surveyor's report pursuant to which the percentage has been set (ie name of quantity surveyor, date of report etc);
- the level of funds held in the Capital Replacement Sinking Fund for the Village.

4. MAINTENANCE/SERVICES CHARGES AND THE MAINTENANCE RESERVE FUND

4.1 Maintenance/Services Charges - Definition and Responsibility

- 4.1.1 Residents will continue to pay a services charge during the term of their residence contract. As has traditionally been the case, the services charge is intended to cover the operator's costs of the day to day operation, management and maintenance of the village, including the provision of agreed services to the residents. In freehold title villages body corporate levies will also be payable by residents and these levies will continue to be regulated by the *Body Corporate and Community Management Act 1997* and not the retirement villages legislation.
- 4.1.2 Services charges will continue to be set in accordance with a budget projection and limited in accordance with movements in the Consumer Price Index (excluding increases in rates and other government charges and statutory increases in wages and salaries which are passed on in full to residents). In the event that services charges become inadequate to cover actual costs they can be increased by special resolution of residents at a general meeting as is presently provided in the second draft *Retirement Villages Bill 1997*.
- 4.1.3 In addition services charges for both existing and future residents will be able to be increased to accommodate the Maintenance Reserve contributions that are determined necessary in accordance with 4.2.
- 4.1.4 The method or methods used to apportion the village's total operating costs in determining the amount each resident is required to pay in services charges is to be determined by the operator. The method or methods adopted must be clearly stated in the Public Information Document.

4.2 Maintenance Reserve Fund

- 4.2.1 It is agreed that for each village a Maintenance Reserve Fund is to be established to cover repairs and maintenance of an infrequent, irregular or recurrent nature. Part of the services charges paid by residents are to be paid into the Maintenance Reserve Fund. This fund will not be available for capital replacement purposes.
- 4.2.2 The mechanism set out in Part 5 Division 2 of the second draft *Retirement Villages Bill 1997* is to be generally adopted in determining the level of the required Maintenance Reserve Fund in the village (ie by use of a quantity

surveyor) and the transitional arrangements to be applied to allow the fund to accumulate sufficient funds to meet the required level more specifically:

- Any shortfall required to bring the Maintenance Reserve Fund up to an appropriate level (as determined by the quantity surveyor) as at the time of commencement of the new legislation is to be the residents' responsibility. Residents are also to be responsible for maintaining the Maintenance Reserve at its appropriate level.
- The quantity surveyor is to determine the amount of contributions payable to the Maintenance Reserve Fund by the residents to make up any initial shortfall and reach the appropriate level within time periods similar to those specified in section 57 of the second draft *Retirement Villages Bill 1997*.
- If necessary, services charges payable by both existing and new residents are to increase by an amount sufficient to ensure that the Maintenance Reserve Fund is increased to and maintained at the correct level. Increases to services charges necessary to correct the Maintenance Reserve Fund and maintain contributions to the fund at necessary levels is an exception to the CPI capping of services charges.
- If, during the period before any shortfall in the Maintenance Reserve Fund is corrected by the residents, it becomes necessary for expenditure from the fund to exceed the balance in the fund, the operator is to contribute the shortfall necessary to meet the expenditure required on the basis that the amount contributed by the operator becomes an interest free loan by the operator to the Maintenance Reserve Fund that is repayable to the operator when sufficient funds are eventually contributed to the Maintenance Reserve Fund via resident contributions.

4.2.3 Operators must account to the residents in relation to the operation of the Maintenance Reserve Fund.

5. EXIT FEES

5.1 Definition

It was agreed to adopt the expression 'Exit Fee' in lieu of 'Deferred Management Fee' as the reference to 'management' is misleading of the true nature of the fee.

The fee is an amount payable by a resident to the operator under a residence contract upon the resident vacating the unit or pursuant to settlement of a right to reside in the unit to compensate the operator for its long term investment of capital and commitment to the ongoing management of the village. It is usually deducted from the sale price of the unit and is calculated in accordance with a formula to be disclosed in the residence contract and the Public Information Document.

5.2 Responsibility

- 5.2.1 It was agreed that no express controls on the level of exit fees be contained in the new legislation.
- 5.2.2 The method of calculation of the exit fee must be clearly disclosed in the Public Information Document and demonstrated by way of a standard format example.

6. RESALE OF UNITS

The Committee agreed as follows:

- 6.1 Within a specified number of days (being the number of days specified in the Public Information Document, or if the Public Information Document does not so specify, the number of days specified in the new legislation) after the resident gives notice of termination, the operator must agree with the resident in writing the 're-sale' value of the unit, or failing agreement, obtain a certificate from an agreed valuer as to the market value.
- 6.2 Within a specified number of days (being the number of days specified in the Public Information Document, or if the Public Information Document does not so specify, the number of days specified in the new legislation) after the resident gives notice of termination, the operator must agree with the resident what work is required to be undertaken to the unit in order to re-instate the unit to the condition or standard set out in 6.3, or failing agreement, obtain a certificate from a suitably qualified professional as to the work to be carried out in order to re-instate the unit to that condition.
- 6.3 The condition or standard to which the unit must be re-instated is as follows:
- 6.3.1 in the case of residence contracts in existence at the date of commencement of the new legislation - to the condition or standard specified in the residence contract or, where the residence contract does not contain a requirement for the unit to be re-instated, to a "marketable condition" taking into account commensurate units for sale in the village and the nature and location of the village scheme generally.
 - 6.3.2 in the case of residence contracts entered into after the commencement of the new legislation - to the condition or standard of the unit at the commencement of the resident's occupation of the unit.
- 6.4 The work to be undertaken to the unit is to be completed within 90 days of the resident giving the operator vacant possession of the unit or such longer period as may be agreed between the operator and the resident.
- 6.5 The cost of the re-instatement is to be borne as follows:
- 6.5.1 in the case of residence contracts in existence at the date of commencement of the new legislation -
 - in a freehold title scheme - by the resident;

- in a leasehold/licence scheme:
 - where the resident has caused accelerated wear to the unit's interior or wilfully or deliberately damaged the unit's interior - by the resident (to the extent of that wear or damage);
 - where the residence contract specifies that the re-instatement is to be at the cost of the resident - by the resident (to the extent specified in the residence contract);
 - in all other cases - shared between the operator (out of the Capital Replacement Sinking Fund) and the resident in proportion to the respective equity held by each party in the unit.

6.5.2 in the case of residence contracts entered into after the commencement of the new legislation -

- in a freehold title scheme - by the resident;
- in a leasehold/licence scheme:
 - where the resident has caused accelerated wear to the unit's interior or wilfully or deliberately damaged the unit's interior - by the resident (to the extent of that wear or damage);
 - where the residence contract specifies that the re-instatement is to be at the cost of the resident - by the resident (to the extent specified in the residence contract);
 - in all other cases - by the operator (out of the Capital Replacement Sinking Fund).

6.6 Residents are only entitled to receive their share of the sale proceeds when the unit is 'resold' and within 14 days of the incoming resident's incoming contribution being paid.

6.7 The resident continues to pay 'personal services charges' (as generally defined in the second draft *Retirement Villages Bill 1997*) for a maximum of 30 days after giving up vacant possession of the unit pursuant to a notice of termination.

6.8 In the case of residence contracts entered into after commencement of the new legislation, a resident may be required to pay 'general services charges' (as generally defined in the second draft *Retirement Villages Bill 1997*) for a maximum of 90 days only after giving up vacant possession of the unit pursuant to a notice of termination (or such longer period if it is agreed that a longer period is required to re-instate the unit for the purposes of resale). After 90 days, or such longer period as agreed has expired, the resident and the operator share responsibility for payment of the general services charges in proportion to the respective equity held by each party. The benchmark for determining each party's equity in the unit is the full capital value of the unit. This requirement will not apply to residence contracts in existence at the date of commencement of the new legislation - the provisions of existing contracts dealing with the timing of the ceasing of payment of general service charges will continue to apply.

- 6.9 The operator, on receiving notice of termination of the lease or at any time thereafter, can elect to pay out the resident the amount that would be due to the resident based on the agreed value, whereupon all contractual relations between the parties would be at an end. If an operator so elects the operator is not required to undertake the re-instatement of the unit referred to in 6.2, 6.3 and 6.4.
- 6.10 It was acknowledged that the operator is usually best qualified to market and sell the unit. Nevertheless, there should be provisions for residents to appoint external agents if the unit is not sold within 6 months.
- 6.11 In the Public Information Document the operator must set out:
- all units within the village that are then for sale and their respective sale prices. When the village has been developed in stages, the prices will include both new stock and resale stock; and
 - outline the re-sale process.
- 6.12 If the operator receives an offer to purchase a resale unit in writing, then such offer must be communicated to the resident or their executors for their consideration.
- 6.13 In the event that an outgoing resident wishes to accept an offer at less than the agreed resale value, any shortfall from the agreed resale value is to be deducted from the refund due to the resident. Similarly, where an operator wishes to accept an offer at less than the agreed resale value, the shortfall shall be deducted from the operator's share of the proceeds.
- 6.14 On listing the resale of the unit, it is an obligation of the operator to give a resident a report on the resident's request at the end of each month detailing all sales enquiries in relation to the sale of the unit, any offers to purchase received, progress of the marketing program, and details of all other units for sale in the village.
- 6.15 The agreed resale value of the unit is to be updated at the end of each 6 month period to reflect changes in the market. Failing agreement, the cost of providing the certificate of valuation shall be shared in the same way as payment of fees for vacant units (ie, in accordance with the equity of each payment and the unit being sold). Similarly, the costs of advertising, sales commission and other charges relating to the sale of the unit necessarily incurred are to be shared in accordance with the percentage of equity. However, if an outgoing resident wishes to employ the services of an agent to resell his or her vacant unit within 6 months of termination, any commissions incurred in that instance shall be the responsibility of the resident.
- 6.16 If an operator fails to comply with the "re-sale" process set out above in a material way then the relevant resident may refer this failure to the dispute resolution process referred to in 7 which will be empowered to order the operator to immediately pay to the resident the amount that would be due to the resident based on the agreed value, whereupon all contractual relations between the parties would be at an end (ie. immediate "buy-back" by operator). Except in the case of this operator default there is to be no compulsory "buy-back" requirement.

7. DISPUTE RESOLUTION

The Committee agreed as follows:

7.1 A system is to be implemented for resolution of disputes between:

- residents and other residents
- residents and operators; and
- residents and village managers,

which will override all dispute resolution procedures currently existing in village schemes and apply to all residents and operators in all villages from the date of commencement of the new legislation.

7.2 The dispute resolution system is envisaged to provide for three levels of dispute resolution:

- a mechanism internal to the village;
- a mediation process; and
- an adjudication process or tribunal hearing in that event that the dispute is not resolved during mediation.

8. OTHER ISSUES

8.1 Retrospectivity

The Committee agreed the following in relation to the extent to which the new legislation should operate retrospectively by over-riding existing contractual arrangements:

8.1.1 In relation to capital replacement, the Capital Replacement Sinking Fund, maintenance charges and the Maintenance Reserve Fund, the issues of retrospectivity and transitional arrangements are addressed in 3 and 4 above. In summary, the requirement to establish the Capital Replacement Sinking Fund and the Maintenance Reserve Fund is to apply in relation to all villages from the date of commencement of the new legislation but all existing contractual arrangements and practices in place at the commencement of the new legislation that require residents to pay a services charge that contains a component for capital replacement will continue (with that component thereafter being paid into the Capital Replacement Sinking Fund) (refer 3.4.10). Services charges payable by both existing and future residents may increase by an amount sufficient to ensure that the Maintenance Reserve Fund is increased to and maintained at the correct level (refer 4.2.2).

8.1.2 The new dispute resolution system referred to in 7 will apply to all residents in all villages from the date of commencement of the new legislation and will override all dispute resolution procedures currently existing in village schemes.

- 8.1.3 In relation to the resale process, the provisions of 6 are to apply to both existing and new residence contracts after commencement of the new legislation except where otherwise stated in 6 (eg. 6.8) and subject to the qualifications stated in 6.

8.2 Residents' Committee

- 8.2.1 Residents of a village may establish (by election conducted amongst themselves) a Residents' Committee but its establishment is not to be mandatory.
- 8.2.2 As is currently the position under the existing legislation, a Residents' Committee does not form part of the management structure of the village and has no decision making power in relation to management issues.
- 8.2.3 Where a Residents' Committee is established, the new legislation (or regulations) will regulate the method of operation of the committee to an appropriate extent.

8.3 Statutory Charge/Appointment of Trustee

The statutory charge should remain a requirement in non-freehold villages. In addition, the new legislation is to require as a condition of approval for a scheme that a trustee be appointed to receive all funds in relation to the sale of units in non-freehold villages that are the subject of a mortgage to a bank or other financial institution. The trustee's role will terminate once the bank or financial institution releases its mortgage.

8.4 Standard Form Public Information Document

- 8.4.1 A standard form Public Information Document (in a form specified in the new legislation or associated regulations) is to be a requirement of all existing and new retirement villages after commencement of the new legislation.
- 8.4.2 Operators are to be required to deliver the new standard form Public Information Document to prospective new residents of the villages only.
- 8.4.3 The information that is prescribed by the new legislation (or regulations) to be disclosed in the Public Information Document may, where appropriate, be disclosed in the form of a looseleaf insert in order to facilitate that information being updated regularly.
- 8.4.4 Retirement village residence contracts are not to be standardised.

8.5 Registration Process

The approval/registration process for new villages is to remain in its current form. Any form of automatic registration is opposed. An appropriate review of prospective operators and proposed scheme documentation should be undertaken as a pre-requisite to the granting of approval for operation of a village in order to protect residents and the reputation of the retirement village industry.