

South Australia



RETIREMENT VILLAGES (MISCELLANEOUS) AMENDMENT ACT 1994

No. 12 of 1994

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ELIZABETHAE II REGINAE

A.D. 1994

No. 12 of 1994

An Act to amend the Retirement Villages Act 1987.

[Assented to 5 May 1994]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Retirement Villages (Miscellaneous) Amendment Act 1994*.

(2) The *Retirement Villages Act 1987* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Amendment of s. 3—Interpretation

3. Section 3 of the principal Act is amended by inserting "whom" after "the person by" in the definition of "administering authority".

Amendment of s. 4—Application of this Act

4. Section 4 of the principal Act is amended by striking out paragraph (b) of subsection (1) and substituting the following paragraph:

- (b) this Act binds the Crown in right of this State and (so far as the legislative power of the State permits) the Crown in any other capacity, but not so as to impose criminal liability on the Crown.

Amendment of s. 6—Creation of residence rights

5. Section 6 of the principal Act is amended—

- (a) by inserting "and comply with the requirements prescribed by the regulations" after "in writing" in subsection (1);

(b) by inserting after subsection (6) the following subsection:

(7) A residence contract may be enforced against the administering authority, for the time being, of the retirement village.

Amendment of s. 7— Termination of residence rights

6. Section 7 of the principal Act is amended—

(a) by striking out from subsection (2) "The rights" and substituting "Subject to subsection (2a), the rights";

(b) by inserting after subsection (2) the following subsections:

(2a) A contract cannot limit or qualify the right of a resident to terminate a residence contract during his or her settling-in period.

(2b) If a resident terminates a right of occupation during his or her settling-in period (even if he or she then continues to reside in the retirement village after the end of that period), the resident is liable to pay—

(a) fair market rent in respect of his or her period of occupation of a unit, less any amount paid by the resident for services that would otherwise be included in the assessment of fair market rent;

and

(b) other amounts (if any) payable under a contract between the administering authority and the resident.

(2c) An amount payable by a resident under subsection (2b) may be deducted from any refund of premium due to the resident.

(2d) No provision in a contract between the administering authority and the resident can have the effect of making the resident liable to pay an amount by way of a penalty if he or she terminates a right of occupation during his or her settling-in period (and any such provision is void to the extent that it would have such an effect).;

(c) by striking out subsection (5);

(d) by inserting after subsection (7) the following subsection:

(7a) An order under subsection (7) may be enforced by a bailiff of the Tribunal in the same manner as an order for the possession of premises under the *Residential Tenancies Act 1978* (and, for that purpose a bailiff may, in particular, exercise the powers of a bailiff under section 83 of that Act).;

(e) by inserting after subsection (8) the following subsection:

(9) For the purposes of this section, a resident's settling-in period is—

(a) the period ending 90 days after the day on which the resident first occupies a unit in the retirement village, or 180 days after the day of settlement on the unit, whichever first occurs;

or

(b) such longer period as may be specified in an agreement between the administering authority and the resident.

Insertion of s. 9a

7. The following section is inserted after section 9 of the principal Act:

Absence from retirement village

9a. (1) Where a resident is absent from a retirement village for a continuous period of at least 28 days, the resident is not liable to pay, in respect of a period of absence after those 28 days, any amount in respect of any personal service that the retirement village (or the administering authority) ceases to provide to the resident because of his or her absence from the retirement village.

(2) Where a resident ceases to reside in a retirement village in circumstances in which there is no reasonable prospect of the resident returning to reside in the retirement village—

(a) the resident ceases to be liable to pay any amount (other than an amount that has already accrued) in respect of any personal service that the retirement village (or the administering authority) ceases to provide to the resident after he or she leaves the retirement village;

and

(b) if the resident is entitled to the repayment (in whole or in part) of a premium, the resident is not liable to pay any amount in respect of charges that may accrue after he or she has ceased to reside in the retirement village until the premium is repaid (but the administering authority may then, at the time of repayment, deduct from the premium any amount payable by the resident).

(3) In this section—

“personal service” means a service provided to a resident individually (rather than to residents generally).

Amendment of s. 10— Meetings of residents**8. Section 10 of the principal Act is amended—**

(a) by striking out from subsection (2) "in relation to which accounts are to be presented under this section" and substituting "that applies in relation to the retirement village";

(b) by inserting after subsection (2) the following subsection:

(2a) A meeting convened under subsection (1)(b) must be chaired by a representative of the administering authority who is authorised to speak on behalf of the administering authority and to give responses to questions put at the meeting in accordance with the requirements of this section.;

(c) by striking out subsections (5) to (8) (inclusive) and substituting the following subsections:

(5) A notice for an annual meeting under subsection (4) must be accompanied by—

(a) in relation to the retirement village—

(i) a statement of income received from residents, and expenditure of that income, for the previous financial year;

(ii) a statement of estimates of income from residents, and expenditure of that income, for the current financial year;

(iii) a statement of estimates of income (from any source), and expenditure, for the current financial year in respect of any contingency, sinking or other reserve fund or account established for the purposes of capital replacement or improvements, irregular long-term maintenance, or other similar items;

and

(iv) such other information as the regulations may require;

and

(b) an invitation to residents to submit—

(i) written questions to the administering authority at least seven days before the date of the meeting;

and

(ii) other questions at the meeting.

(6) The administering authority must ensure—

(a) that information provided under subsection (5)(a) complies with any standard or principle prescribed by the regulations;

and

(b) that any resident is afforded, on request, a reasonable opportunity to inspect, depending on how the administering authority prepares its accounts—

(i) a balance sheet (with appropriate notes) for the retirement village;

or

(ii) a balance sheet (with appropriate notes) for the administering authority,

as at the end of the previous financial year.

(7) The administering authority must ensure—

(a) that residents have a reasonable opportunity to put questions to the administering authority or its representative at a meeting of residents convened by the administering authority;

and

(b) that questions submitted in writing under subsection (5)(b), or asked at a meeting, are answered—

(i) if possible—in reasonable detail at the relevant meeting;

or

(ii) to the extent that compliance with subparagraph (i) is not possible—as soon as is reasonably practicable after the meeting by the presentation of detailed written answers.

(8) Nothing in this section requires an administering authority, or the representative of an administering authority, to answer an unreasonable question.

(8a) Recurrent charges cannot be increased beyond a level shown to be reasonable in view of the accounts for the previous year, and the estimates for the current financial year, as explained at a meeting of residents under this section.;

(d) by inserting after subsection (10) the following subsection:

(10a) The administering authority of a retirement village must, for the purposes of this section, establish a financial year that is to apply (on a yearly basis) in relation to the retirement village.

Insertion of s. 10aa

9. The following section is inserted after section 10 of the principal Act:

Meeting with new administering authority

10aa. (1) It will be a term of every agreement that will result in a change in the administering authority of a retirement village (including a change by virtue of the sale of an interest in the land within the village) that, before the change is effected, the person who is to be the new administering authority will convene a meeting of residents under this section at which the person (or his or her representative) will—

(a) present a report on any changes that are proposed for the retirement village (including any proposal to change a charge, fee or levy payable by residents), and his or her plans for the future management and operation of the retirement village;

and

(b) answer any reasonable question put by a resident.

(2) A meeting will be convened by sending to each resident, at least seven days before the date of the meeting, a written notice setting out—

(a) the time and place of the meeting;

and

(b) the reason for the meeting.

(3) If a change in an administering authority of a retirement village is effected by an agreement without compliance with the term referred to in subsection (1), the person who is the new administering authority is guilty of an offence.

Penalty: Division 5 fine.

Amendment of s. 13— Residents' committees

10. Section 13 of the principal Act is amended by inserting after subsection (6) the following subsections:

(7) An administering authority must not—

(a) discourage or prevent the appointment of a committee under this section;

or

(b) obstruct a committee in the performance of its functions.

Penalty: Division 7 fine.

(8) An administering authority must, on the reasonable request of a residents' committee, meet with, or ensure that a representative of the administering authority who is authorised to speak on behalf of the administering authority meets with, the members of the committee, or a representative (or representatives) of the committee.

Penalty: Division 7 fine.

(9) The members of a residents' committee, or a representative (or representatives) of a residents' committee, must, on the reasonable request of an administering authority, meet with the administering authority, or a representative of the administering authority.

(10) If a contravention of subsection (9) occurs, each member of the residents' committee who is in default is guilty of an offence.

Penalty: Division 7 fine

Substitution of s. 14

11. Section 14 of the principal Act is repealed and the following section is substituted:

Tribunal may resolve disputes

14. (1) A party to a dispute between an administering authority and a resident of a retirement village may apply to the Tribunal for resolution of the matters in dispute.

(2) On an application under subsection (1)—

- (a) if the Tribunal finds that a party to the dispute has breached, or failed to comply with, a residence contract or service contract, the Tribunal may—
- (i) by such order as it considers appropriate in the circumstances, restrain the breach of the contract or require action in performance of the contract;
 - (ii) order the payment of an amount payable under the contract;
 - (iii) order the payment of compensation for loss or injury, other than personal injury, caused by a breach of the contract or a failure to comply with the contract;
- (b) if the Tribunal finds that a party to the dispute has breached, or failed to comply with, a provision of this Act, the Tribunal may—

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- (i) by such order as it considers appropriate in the circumstances, restrain a breach of this Act or require action to comply with this Act or, in relation to an administering authority, require the administering authority to vary or reverse a decision or the effect of an act of the administering authority;
- (ii) order a party to the dispute to refrain from future action of a kind specified in the order;
- (iii) order the payment of compensation for loss or injury, other than personal injury, caused by a breach of this Act or a failure to comply with this Act;
- (c) if the Tribunal finds that the administering authority has acted in a harsh or unconscionable manner, the Tribunal may, by such order as it considers appropriate in the circumstances—
- (i) require the administering authority to vary or reverse a decision or the effect of an act of the administering authority;
- (ii) avoid *ab initio*, or modify, terms or conditions of an agreement between the administering authority and the resident;
- (iii) require the administering authority to repay to the resident any amount paid by the resident in pursuance of a term or condition of an agreement (that has been avoided or modified by the Tribunal);
- (d) if the dispute relates to the repayment of a premium, or a part of a premium—the Tribunal may determine the amount that is repayable, and make orders as to payment.
- (3) If—
- (a) the Tribunal is unwilling to make an order under subsection (2), or before or during the course of proceedings it appears to the Tribunal that it would be preferable to endeavour to resolve the matters in dispute by arbitration;
- or
- (b) the parties to a dispute indicate to the Tribunal that they wish to resolve the matters in dispute by arbitration,

the Tribunal may, with the express consent of the parties (which may not be subsequently withdrawn), proceed to deal with the dispute by arbitration.

(4) Where the Tribunal is dealing with a dispute by arbitration, the Tribunal may determine any question that arises for determination in the course of the proceedings by reference to considerations of general justice and fairness.

(5) The Tribunal may, at the end of an arbitration, give such directions as the Tribunal thinks fit to resolve the dispute, or make any order to determine the dispute.

(6) The Tribunal may decline to entertain an application under this section if—

(a) it appears to the Tribunal that the matter could be adequately dealt with under rules for the resolution of disputes established by the administering authority of the retirement village;

(b) the Tribunal considers that it would be more appropriate for proceedings to be taken in a court, or in another tribunal constituted by law;

or

(c) the Tribunal considers that it is appropriate for some other reason to decline to proceed with the application.

(7) The Tribunal should, in deciding whether it should decline to entertain an application under this section, take into account—

(a) the issues raised by the application;

(b) the seriousness of the matter;

(c) the relief sought;

(d) if the application relates to the repayment of a premium or a portion of a premium—the amount in dispute;

(e) whether difficult or complicated questions of law may arise in the proceedings;

(f) the extent to which a court, or another tribunal, could resolve all matters in dispute between the parties more efficiently or effectively,

and may take into account such other matters (whether similar or dissimilar to those referred to above) as the Tribunal thinks fit.

(8) The Tribunal may make an order under this section notwithstanding that it provides a remedy in the nature of an injunction or order for specific performance in circumstances in which such remedy would not otherwise be available.

(9) The Tribunal may make ancillary or incidental orders for the purposes of proceedings under this section.

(10) If a person fails, without reasonable excuse, to comply with an order or direction of the Tribunal, other than an order for the payment of an amount, the person is guilty of an offence.

Penalty: Division 7 fine.

(11) If an order is made by the Tribunal requiring a person to pay an amount to another person, the order is enforceable in the same manner as a similar order under the *Residential Tenancies Act 1978*.

(12) A dispute as to the repayment of a premium or a portion of a premium may also be brought before a court competent to hear and determine a claim founded on contract for the amount in dispute.

(13) This section does not derogate from—

- (a) the other provisions of this Act that relate to applications to the Tribunal;
- (b) the other provisions of this Act that relate to the ability to resolve matters in dispute by conciliation;
- (c) the jurisdiction of a court, or of another tribunal constituted by law.

(14) In this section—

“resident” of a retirement village includes a former resident of a retirement village.

Amendment of s. 19— Non-compliance may be excused by the Tribunal

12. Section 19 of the principal Act is amended—

- (a) by striking out from subsection (1) “Supreme Court” and substituting “Tribunal”;
- (b) by striking out from subsection (2) “Supreme Court” and substituting “Tribunal”.

Substitution of s. 21

13. Section 21 of the principal Act is repealed and the following sections are substituted:

Contract to avoid Act

21. An agreement or arrangement that is inconsistent with a provision of this Act or purports to exclude, modify or restrict the operation of this Act, or a right conferred by or under this Act is (except where such inconsistency, exclusion, modification or restriction is expressly permitted by this Act) to that extent void and of no effect.

Codes of conduct

21a. (1) The regulations may prescribe codes of conduct to be observed by administering authorities.

(2) It will be a term of a residence contract that the administering authority will observe any code of conduct (subject to any agreement between the administering authority and the resident that, pursuant to a power contained in the code of conduct, provides for the exclusion or modification of a provision of the code of conduct in the circumstances of the particular case).

(3) If an administering authority breaches a code of conduct, the administering authority is, in addition to any civil remedy that may be available against the administering authority, liable to a division 7 fine as if the administering authority had breached the regulations.

Amendment of s. 23— Regulations

14. Section 23 of the principal Act is amended by inserting after paragraph (ba) of subsection (2) the following paragraph:

(bb) make provision in relation to the form or content of residence contracts;.

Insertion of schedule 3

15. The following schedule is inserted after schedule 2 of the principal Act:

**SCHEDULE 3
PROCEEDINGS BEFORE THE TRIBUNAL**

Application of schedule

1. Subject to any variation or exclusion prescribed by the regulations, this schedule applies to proceedings before the Tribunal under this Act.

Constitution of Tribunal

2. (1) The Tribunal will, in respect of any proceedings, be constituted by one or more members of the Tribunal at the direction of the President of the Tribunal.

(2) The Tribunal must hear and determine proceedings under this Act wherever practicable within 14 days after they are instituted and, where that is not practicable, as expeditiously as possible.

Application to vary or set aside order

3. (1) A person who is or was a party to proceedings before the Tribunal may apply to the Tribunal for an order varying or setting aside an order, decision or direction made or given in those proceedings.

(2) An application under subclause (1) must be made within three months of the making or giving of the order, decision or direction.

Application to Tribunal

4. (1) An application under this Act to the Tribunal must—

(a) be made in writing and, if a form is prescribed by the regulations, comply with that form;

(b) contain the prescribed particulars (or such particulars as may be required by a prescribed form);

and

(c) be accompanied by the prescribed fee (if any).

(2) Before the Tribunal proceeds to hear an application it must first—

- (a) give the applicant notice in writing setting out the time and place at which it will hear the application; and
- (b) give to any other party—
 - (i) notice in writing setting out the time and place at which it will hear the application; and
 - (ii) such notice of the nature of the application as it thinks fit.

Proceedings of Tribunals

5. (1) For the purpose of any proceedings, the Tribunal may—

- (a) by summons signed by a member, registrar or deputy registrar of the Tribunal, require the attendance before the Tribunal of any person;
- (b) by summons signed by a member, registrar or deputy registrar of the Tribunal, require the production of books, papers or documents;
- (c) inspect books, papers or documents produced before it, retain them for such reasonable period as it thinks fit, and make copies of any of them, or of any of their contents;
- (d) require a person appearing before the Tribunal to make an oath or affirmation that he or she will truly answer any relevant questions put to him or her by the Tribunal or a person appearing before the Tribunal;
- (e) require a person appearing before the Tribunal (whether he or she has been summoned to appear or not) to answer any relevant questions put to him or her by the Tribunal or a person appearing before the Tribunal.

(2) If a person—

- (a) fails without reasonable excuse to comply with the requirements of a summons served on him or her under subclause (1);
- (b) refuses or fails to comply with a requirement of the Tribunal under subclause (1);

or

- (c) misbehaves before the Tribunal, wilfully insults the Tribunal or interrupts the proceedings of the Tribunal,

the person is guilty of an offence.

Penalty: Division 8 fine.

- (3) In any proceedings the Tribunal may—
- (a) hear the application in such manner as the Tribunal considers best suited to that purpose;
 - (b) decline to entertain the application if it considers that the application is frivolous or involves a trivial matter or amount;
 - (c) decline to entertain the application, or adjourn the hearing, until the fulfilment of conditions fixed by the Tribunal with a view to promoting the settlement or resolution of matters in dispute between the parties;
 - (d) proceed to hear and determine the application in the absence of a party;
 - (e) extend any period prescribed by or under this Act within which an application or other step in respect of proceedings must be made or taken (even if that period has expired);
 - (f) vary or set aside an order or decision where the Tribunal considers there are proper grounds for doing so;
 - (g) adjourn the hearing to a specified time or place or to a time and place to be fixed;
 - (h) allow the amendment of the application;
 - (i) hear the application jointly with another application;
 - (j) receive in evidence any transcript of evidence in proceedings before a court and draw any conclusion of fact that it considers proper;
 - (k) adopt, as in its discretion it considers proper, any findings, decision or judgment of a court that may be relevant to the proceedings;
- and
- (l) generally give all such directions and do all such things as it thinks necessary or expedient in the proceedings.

(4) In any proceedings the Tribunal is not bound by the rules of evidence but may inform itself on any matter relating to the proceedings in such manner as it thinks fit.

Presentation of cases before Tribunal

6. (1) Except as provided in this clause, a party to proceedings before the Tribunal under this Act must present his or her own case and not be represented or assisted in the presentation of the case by another person.

(2) A party to proceedings before the Tribunal may be represented by an agent or assisted by an agent in the presentation of his or her case if the Tribunal is satisfied that—

(a) the party is unable to appear personally or conduct the proceedings properly himself or herself;

and

(b) no other party will be unfairly disadvantaged by the fact that the agent is allowed so to act.

(3) All or any of the parties to any proceedings before the Tribunal may be represented by legal practitioners—

(a) if all the parties agree and the Tribunal is satisfied that any party who is not so represented will not be unfairly disadvantaged;

(b) if one of the parties is a legally qualified person;

(c) if the proceedings involve an amount which exceeds \$50 000 or such other amount as is prescribed instead by regulation;

or

(d) if the Tribunal gives leave for such representation.

(4) If a party applies for leave permitting representation by a legal practitioner under subclause (3)(d), it must be granted if the Tribunal is satisfied—

(a) that the granting of leave is likely to reduce costs or shorten the proceedings;

or

(b) that the applicant would, if leave were not granted, be unfairly disadvantaged.

(5) This clause does not prevent—

(a) a body corporate from being represented by an officer or employee of the body corporate (not being a legally qualified person) authorised to conduct the proceedings on its behalf (whether or not he or she is remunerated by the body corporate for representing it in the proceedings);

or

(b) a person from acting as an interpreter for a party provided that his or her fee does not exceed an amount fixed by the Tribunal at the hearing.

(6) A person must not demand or receive any fee or reward for representing or assisting a party to proceedings before the Tribunal unless—

(a) the person is a legal practitioner;

or

- (b) where the party is a body corporate, the person is an officer or employee of the body corporate representing it under subclause (5).

Penalty: Division 9 fine.

- (7) In this clause—

"agent" means a person who is not a legally qualified person;

"legally qualified person" means a legal practitioner, an articled law clerk, or a person who holds or has held legal qualifications under the laws of this State or any other place.

Settlement of proceedings

7. (1) If before or during the hearing of any proceedings it appears to the Tribunal either from the nature of the case or from the attitude of the parties that there is a reasonable possibility of matters in dispute between the parties being settled by conciliation, the person constituting the Tribunal may—

- (a) interview the parties in private (either with or without any person who may be representing any of them or assisting any of them in the presentation of his or her case);

and

- (b) endeavour to bring about a settlement of the proceedings on terms that are fair to all parties.

(2) Nothing said or done in the course of an attempt to settle proceedings under this clause may subsequently be given in evidence in proceedings before the Tribunal except by consent of all parties to the proceedings.

(3) The member of the Tribunal who attempts to settle proceedings under this clause is not disqualified from hearing or continuing to hear any proceedings in the matter.

(4) Where proceedings are settled under this clause, the Tribunal may embody the terms of the settlement in an order or direction of the Tribunal.

Costs

8. In proceedings under this Act the Tribunal must not award costs unless—

- (a) all parties to the proceedings were represented by legal practitioners;

or

- (b) the Tribunal is of the opinion that there are special circumstances justifying the award of costs.

Reservation of question of law

9. (1) The Tribunal may reserve a question of law for the decision of the Supreme Court, whose decision will be certified to and binding on the Tribunal.

(2) Any costs arising from the reservation of a question under this clause, including costs incurred by the parties to the proceedings, must be paid out of the General Revenue of the State and this Act, without any further appropriation, is sufficient authority for such payment.

Transitional provision

16. (1) The amendments made to the principal Act by sections 5(a) and 6 of this Act do not apply to a residence contract entered into before the commencement of this subsection.

(2) The amendments made to the principal Act by section 9 of this Act do not apply to an agreement that will result in a change in the administering authority of a retirement village entered into before the commencement of this subsection.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor