



30 June 2016

By email: [LSIC@parliament.vic.gov.au](mailto:LSIC@parliament.vic.gov.au)

The Secretary  
Legal and Social Issues Committee  
Parliament House, Spring Street  
East Melbourne VIC 3002

Dear Committee,

### **Parliamentary Inquiry into the Retirement Housing Sector**

The Consumer Action Law Centre (**Consumer Action**) is pleased to contribute to the Parliamentary Inquiry into Retirement Housing, which we believe speaks to a real and urgent need for more effective regulation, accessible dispute resolution and independent oversight in the retirement housing sector.

#### **Context**

Consumer protection in the housing sector is currently failing Victorian retirees. Retirement housing arrangements and contracts are complex and frequently place consumers at a disadvantage in the bargaining process. The commonly used Deferred Management Fee (**DMF**) business model is open to exploitation by operators, and often delivers extremely poor value. Depending on how it is applied, the DMF also means that consumers are unable to ascertain the true cost of the arrangement they are buying into. This makes informed consumer choice difficult, if not impossible.

The DMF model also contributes to common misconceptions around retirement housing, with many retirees operating under the false belief that they are buying a property—rather than a licence to reside in a property. Operators often play to this misconception through the sales and marketing process, who when challenged on the terms of the contract after the fact claim this is a lifestyle choice, not an investment decision.

Taken together, these factors lead to the conclusion that the DMF model must be reformed and regulated to prevent excessive price gouging, to provide greater clarity around pricing, and to ensure that older Victorians understand the arrangement they are entering into.

Once a retiree has chosen their living arrangement, ongoing costs are frequently unclear and open to unilateral determination by operators—with no need to justify the amounts they charge. This is partly due to the complex legislative and regulatory framework that applies to the sector, and often

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overlaps various forms of retirement housing. This in turn leads to long and complex contracts, which are difficult for consumers to understand and can result in extremely poor consumer outcomes.

Retirement village and residential park managers require very little training or qualifications beyond basic first aid, and sometimes operate with a minimum of oversight. Relationships between managers and residents frequently break down, leaving residents with little or no voice in the management of their living arrangements. Reports of disenfranchisement, isolation, and elder abuse are common.

If a retiree has a dispute with their manager or operator, seeking resolution of that dispute can be a lengthy, expensive and intimidating process. The Victorian Civil and Administrative Tribunal (**VCAT**) remains the primary forum for external dispute resolution of retirement housing disputes. VCAT determines matters through an adversarial, court-like process during which retirees are required to represent themselves, or seek leave for legal representation. While the complexity of retirement housing matters means that this will often be granted, the cost of such representation is often out of reach for retirees.

While VCAT is, in theory, appropriate for many forms of civil dispute, it is manifestly unsuited to hear disputes around retirement housing. The process itself is so difficult that many retirees simply do not engage with it, and their complaints go unheard and unresolved. A lack of listings at VCAT is not a robust indicator of the level of disputation in the sector. The reality is that a large number of older Victorians feel disempowered, disengaged and intimidated by the VCAT process. While Consumer Affairs Victoria (**CAV**) does have the power to conduct mediation or conciliation in retirement housing matters, it has no power to compel traders to participate in the process.<sup>1</sup> This leaves retirees with nowhere to go.

On that basis, we strongly advocate for the establishment of an independent, industry funded Retirement Housing Ombudsman (**RHO**) to hear and determine retirement housing disputes. The Financial Ombudsman Service (**FOS**), Telecommunications Industry Ombudsman (**TIO**) and the Energy and Water Ombudsman Victoria (**EWOV**) provide useful models on which to base a potential RHO. Such a service would provide free, accessible, informed and authoritative determination of retirement housing disputes—and would give Victoria's retirees the access to justice that they are currently sorely lacking.

It is well documented that Australia's population is ageing, and that the retirement housing sector will grow substantially over the coming years. To illustrate this point, we reproduce part of the Executive Summary to the Property Council of Australia (PCA) report *National Overview of the Retirement Village Sector*, published in October 2014. While the document is specifically concerned with retirement villages, the comments regarding demographics and the need for investment in new housing apply across the entire retirement housing sector—

*The dramatic increase in the number of Australians turning 65 over the next 20 years is now an established demographic fact. Treasury projects a doubling of the seniors' population by 2050, with an economically significant reduction in the ratio of taxpayers to retirees.*

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<sup>1</sup> <https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/our-role-scope-and-policies/conciliation-policy>

*To support this growth there needs to be a large corresponding increase in the amount of purpose-built housing, so that the 8.1 million Australians who will be over 65 by 2050 continue to have the choice, independence and autonomy that they expect and deserve.*

*Currently about 184,000 Australians live in retirement villages, or 5.7 per cent of the over 65 population. This penetration rate is projected to increase to 7.5 per cent in 2025.*

*The increased rate, combined with the increase in the seniors' population, means that there will be approximately 382,000 people wanting to live in a retirement village in 2025.*

*This is more than double the 184,000 residents currently calling a retirement village home. As such, a large amount of investment will be needed in the sector in coming years.*<sup>2</sup>

The cases that Consumer Action sees through its casework represent only a very small portion of the alleged problems in Victoria's retirement housing sector—these will grow exponentially if not addressed through prudent regulation and structural reform. Retirees represent a specific and often vulnerable consumer base, and require a targeted policy response to ensure they are adequately protected.

The need for dedicated regulation and oversight of the retirement housing sector has been acknowledged in other jurisdictions, and these provide useful models for Victoria. South Australia and New Zealand have particularly well developed administrative approaches to the regulation and oversight of retirement villages.

In New Zealand, retirement village legislation is administered by the Commission for Financial Capability, which is overseen by the Retirement Commissioner (appointed by the Minister of Commerce). The Commission monitors and reports on the sector, and also provides complaints handling and dispute resolution services through the appointment of dispute panels (panel members are appointed by the Commissioner).

Under the New Zealand *Retirement Villages Act 2003*, retirement villages are required to appoint a "statutory supervisor", who must be licensed by the Financial Markets Authority, under the *Financial Markets Supervisors Act 2011*. Statutory supervisors provide independent oversight, auditing and reporting on retirement village finances—and have the power to require operators to provide information relating to the village's financial position.

Statutory supervisors are required to exercise reasonable care and skill to ascertain that the financial position of the village, the security interests of the residents, and the management of the village are adequate.

In South Australia, retirement village legislation is administered by the Office of the Ageing. The South Australian government provides a range of resources for potential residents of retirement villages through their online portal "sa.gov.au", in an area of the site dedicated to seniors. This information is extensive and clearly explains the nature of retirement village arrangements, and the potential pitfalls—in addition to certain rights (such as a right to cool off) which South Australian retirees have under their Retirement Villages Act.

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<sup>2</sup> Property Council of Australia, *National Overview of the Retirement Village Sector*, October 2014. P i.

The SA Office of the Ageing also runs a dispute mediation service, and disputes are usually required to attempt mediation before proceeding to the Residential Tenancies Tribunal, a listing within the South Australian Civil and Administrative Tribunal (**SACAT**). Like New Zealand, South Australia has a statutory Code of Conduct for the retirement village sector, as does Western Australia.

While many of the above measures are targeted at retirement villages, there is no reason why similar principles could not be applied to the regulation and oversight of other forms of retirement housing—including residential parks and independent living units (**ILUs**).

## **Recommendations**

Consumer Action has formed clear views regarding the current consumer protection shortfalls in Victoria's retirement housing sector, and how the system may be reformed.

We recommend:

- A review of DMFs and a tightening of regulation as to how they are applied. DMFs should only ever be presented as a genuine choice for consumers, and must be shown to provide real value. As they currently operate, they can too easily be applied unfairly. If wrongly exploited by operators the impact of the DMF business model can be catastrophic for retirees.
- The establishment of a Retirement Housing Ombudsman (RHO) to hear and determine retirement housing disputes. This forum should be industry funded, free and easily accessible to retirees.
- A review of the *Retirement Villages Act 1986* and the development of clear guidelines to ensure greater clarity in contracting, and to enhance consumer understanding of the sector.
- The implementation of required training and qualifications for retirement housing managers and operators, which must be maintained on an ongoing basis.
- A statutory Code of Conduct, (or Codes), to cover all forms of retirement housing—expressed in plain English, to set and maintain industry standards. This should include a requirement for an effective internal dispute resolution mechanism.
- The establishment of “statutory supervisors” similar to those in New Zealand, to ensure that there is professional, independent oversight and ongoing auditing of retirement village and residential park finances.
- Consideration given to the establishment of a dedicated agency or commission to oversee and co-ordinate regulation of the retirement sector (including retirement housing), with an ongoing role in monitoring the sector. This could be done by expanding the current role of the Commissioner for Senior Victorians, or by establishing a new body.

Our views are outlined in more detail below.

## About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

### 1. Deferred Management Fees

Deferred Management Fees (**DMFs**), or Exit Fees, are a commonly used business model in the retirement housing sector.

DMFs were first used as a mechanism to enable retirees to buy a right to occupy a unit for 20-30% less than the unit's freehold market value. The owner could make the difference back on the sale of the unit, through the departing retirees accrued fee. Since they first appeared approximately thirty years ago, the DMF model has shifted and residents often now pay the full equivalent freehold value of the unit, in addition to the DMF.<sup>3</sup>

#### 1.1 The problem

This premium cost of retirement village and residential park living is generally justified by operators as a lifestyle choice, rather than an investment decision. Residents gain access to services, facilities and community through their choice to reside in a retirement village or similar community, and bear significant costs in order to do so. While the value proposition of this arrangement is questionable (and often appears to be illusory), the DMF model has become well entrenched in the industry.

It is arguable that a cultural value underlies the model—retirees are considered to no longer be at the 'asset accumulation' stage of their lives. Therefore, it is not considered predatory to structure deals in such a way that they will strip them of their net worth over time. The online resource, "*Find my retirement home.com.au*" sets out a page dedicated to explaining DMFs, through which the organisations founder and CEO Richard Andrews states:

*"...there is no denying that Deferred Fee schemes weigh heavily in favour of the village owner. Village owners and developers have invested many thousands of dollars with accountants and lawyers to design contracts that work within the appropriate state and federal laws, yet maximise the profit and tax outcomes for owner."<sup>4</sup>*

The DMF model has the effect of depriving retirees of the benefits of capital growth, reframing their expenditure on housing from an investment, to a payment for service and lifestyle.

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<sup>3</sup> <http://www.blog-findmyretirementhome.com.au/understanding-exit-fees/>

<sup>4</sup> <http://www.blog-findmyretirementhome.com.au/understanding-exit-fees/>

The generally one-sided nature of DMF arrangements, and the questionable value that they deliver, gives rise to the contention that DMFs may constitute an inherently unfair contract term—and this is a matter to which Consumer Action has given some consideration. Our current view is that DMFs, in theory, are not *necessarily* unfair. If the consumer has a genuine option to make an upfront purchase instead of entering into a DMF arrangement, or to opt for an ongoing rental arrangement instead—and if there are management services of genuine value provided in return for the DMF, then the model can work. That being said, in our view the practical operation of DMFs is *often* likely to be unfair, because the consumer has no genuine choice—and no real value is delivered in return for the fee paid. The vast majority of contract terms that impose DMFs that we have reviewed may be reasonably challenged as an unfair contract terms under the Australian Consumer Law.

Ultimately, whether a DMF constitutes a fair arrangement or not depends on the value that can be placed on living in the particular village, and the services and facilities that are made available to the resident. This value will be partly subjective, (some consumers will regard these factors as more important than others), and partly objective—depending on the proportion of profit the operators chooses to spend re-investing in the village, and in ensuring that promised services and facilities are delivered.

At the very least, it can be said that the DMF model is very open to exploitation, and is too often utilised as an arbitrary figure by operators to maximise profit without any real connection to the value offered to the consumer in return—essentially making it an exercise in price gouging. Too often, consumers are seen as ‘fair game’, because they are no longer in the ‘asset accumulation phase’ of their lives. This can lead to exploitation of a vulnerable consumer class, who are often experiencing a difficult time as they transition from full independence to a more controlled environment. That this form of exploitation has become the norm, or accepted business practice, does not mean that it is fair.

As Consumer Action’s CEO Gerard Brody stated in a Consumer Action press release dated 15 February 2016:

*‘People often enter these retirement complexes at times of great personal upheaval. They may be moving out of the family home, have lost their partner, or be suffering physically, so they’re not in a position to be reading and understanding pages and pages of complex contracts.’*

The potential for operators to exploit a retiree’s vulnerability to secure an unfair commercial arrangement through the DMF model should not be underestimated.

Putting the fundamental issue of fairness aside, DMFs are problematic in a number of other ways.

First, DMF arrangements deprive the consumer of the ability to compare various options based on cost, because the true cost of the DMF can only be known at the conclusion of the property’s sale. This is because DMFs typically operate as a proportion of the sale price of the unit. While projections can be made, these are variable and speculative. This leaves the consumer in a position where they cannot really know the cost of leaving their village until the time comes to do so. From a behavioural economics perspective, the relatively abstract and ‘distant’ nature of DMFs may also mean that they are not taken into account in the consumer’s decision making process as

much as they should be. The lack of certainty around cost also undermines competition, making it very difficult for consumers to objectively weigh up similar options.

Another problem is the degree of variance across the industry. DMFs can vary from 10% to upwards of 40% of the unit sale price, seemingly with little justification. As they stand, DMFs appear to provide operators with an arbitrary means by which to increase profitability—without any requirement to show the value the consumer is receiving in return. DMFs can also be unevenly applied over the course of the contract, and weighted to the operator's advantage. Again, quoting from *Find my retirement home.com.au*:

*Some village operators, particularly those with a short average length of stay, front-load the fee into the first few years of a resident's occupancy instead of averaging the fee equally over the accrual period. Under a 25 over 10 structure, a village operator might make the first year 8%, the second 5%, and every year thereafter 1.5%. This ensures that a resident in occupation for only three or so years ends up paying the majority of the deferred management fee.<sup>5</sup>*

DMFs can have the effect of trapping the consumer in a village that they may not wish to remain in, because the sum they will receive on sale of the unit will be too low to allow them to buy into an equivalent alternative, due to the increase in property prices over the time they have occupied that unit.

In situations where retirees may wish to move to be closer to their extended family, (who may have moved to another city), this can be extremely distressing, and leave retirees isolated and separated from family at a vulnerable time of their lives.

In January 2016, the Commissioner for Senior Victorians published a report titled *Ageing is everyone's business—a report on isolation and loneliness among senior Victorians* found:

*There is strong evidence in the literature that older people who are socially engaged are happier and healthier than those who are socially isolated, and that the socially engaged have better levels of health and wellbeing that, in turn, enable continued social activity. Consequently, policies and strategies that promote healthy and active ageing and age-friendly communities are key to addressing isolation and loneliness.<sup>6</sup>*

Finally, DMFs are problematic because their structure plays to the common misconception that retirees are *purchasing* a unit when they enter a retirement complex—rather than simply the right to occupy the unit for a period of time. Australia has traditionally had very high levels of home ownership—and the concept of long term leasing for older residents is not part of our cultural understanding. Rather, property is considered an investment class upon which most ordinary Australians have built their wealth. Retirees who enter into villages on a DMF basis generally do so having just sold their home, after a long period of home ownership.

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<sup>5</sup> <http://www.blog-findmyretirementhome.com.au/understanding-exit-fees/>

<sup>6</sup> Commissioner for Senior Victorians, *Ageing is everyone's business—a report on isolation and loneliness among senior Victorians*, January 2016, p. 21.

Taking these factors together (and taking into account the high sums involved in 'buying into' a village) it is not surprising that many retirees operate on the misconception that their purchase is an investment—simply the latest in what may have been a series of property investments over time, for most of their adult lives. The marketing and sales process often does little to dispel this misconception, failing to make clear that the retiree is usually transitioning to a new form of occupancy (essentially returning to being a tenant with a right to occupy, without any freehold title)<sup>7</sup> and this misunderstanding can lead to shock and despair at the conclusion of the contract.

As Consumer Action's CEO stated in the same press release quoted above,

*'We need to ensure people understand what they're signing up for and from the stories we've heard, many don't.'*

## **1.2 DMFs in practice**

Consumer Action has recently concluded a major case related to DMFs at a retirement park, and we describe the matter in detail below.

### **CASE STUDY**

#### ***Willow Lodge Village***

At the time of writing, Consumer Action represents 14 clients who live at the Willow Lodge Village in Bangholme, Victoria (**Willow Lodge**).

Willow Lodge is a retirement park regulated by the *Residential Tenancies Act 1997* (Vic). Willow Lodge has approximately 400 demountable homes and 600 residents.

Willow Lodge is owned and operated by Walter Elliott Holdings Pty Ltd (**Walter Elliott**). Walter Elliott is a prominent, mainstream provider of retirement housing and promotes itself as owning and operating 27 retirement housing properties throughout Australia, 3 of which are located in Victoria.<sup>8</sup> According to a 2014 market research report, Walter Elliott is the largest manufactured home estate operator in Queensland and a "leading developer of Over 50's lifestyle manufacturing parks."<sup>9</sup>

#### ***The litigation***

All 14 clients entered into site leases with Walter Elliott which contained a deferred management fee (**DMF**) term. The term calculated the DMF as 4% of the "park home sale price" for each year during which the client resided at Willow Lodge to a maximum of five (5) years (i.e. 20%).

<sup>7</sup> A small minority of retirement villages do offer freehold title, but even then, DMF's still accrue for those properties. For more, see: <http://www.retirementliving.org.au/wp-content/uploads/2015/03/National-overview-of-the-retirement-village-sector-Grant-Thornton.pdf>

<sup>8</sup> <http://www.palmlakeresort.com.au/property-guide/>

<sup>9</sup> Colliers International, *Manufactured Home Estates: Australian market overview*, November 2014, <http://www.caravanwa.com.au/wp-content/uploads/2015/12/Colliers-International-Australian-MHE-White-Paper-FINAL-VERSION.pdf>



In December 2014, our 14 clients commenced a group proceeding in the Victorian Civil and Administrative Tribunal (**VCAT**) in which they all claimed that the DMF was an unfair contract term,<sup>10</sup> operated as a penalty and was harsh and unconscionable.<sup>11</sup> Some of the clients also claimed that the fees were invalid due to non-compliance with the *Residential Tenancies Act 1997* (Vic)<sup>12</sup> and that Walter Elliott had engaged in unconscionable conduct.<sup>13</sup>

The proceeding was listed for a 5 week trial commencing on 18 July 2016.

In June 2016, the parties agreed to settle the proceeding on non-confidential terms. Settlement occurred 18 months after the initial VCAT application was lodged, and years after residents first raised concerns with their park owners.

### ***The settlement***

Six of the fourteen clients settled on the basis that their DMF will be completely waived, and all references to the DMF removed from their site leases.

Two of the clients settled on the basis that they will enter into a deed of variation, whereby their DMF was reduced from 20% over a five year period, to a flat 4% of the Park Home Sale Price.

The other six clients settled on the basis that they would enter into a deed of variation to calculate the DMF as 1.2% of the Park Home Sale Price for each year of occupation, up to a maximum of 10 years (i.e. a total of 12%). Those clients also received a \$3000 payment per household in consideration for personal stress and inconvenience suffered by them throughout the proceedings.

In addition, all of the clients settled on the basis that a rent review clause would be written into their lease agreement. The clause will require an independent valuer to determine the new rent on each market rent review date, by reference to market value of the home (but not taking into account an increase in market value as a result of capital expenditure by Walter Elliot during the previous term of the lease).

The rent review clause also requires Walter Elliott to commit DMF revenue to capital improvements to the park, and for that expenditure to be made following prior consultation with the park residents' committee. If requested, Walter Elliott must provide an itemised list of expenditure within 3 months from the end of the financial year to demonstrate that this requirement has been complied with.

### ***Elderly and vulnerable consumers as litigants***

Our 14 clients all have low levels of education and are either pensioners or low-income earners. The oldest client is 84 years old, and the youngest client is 50 years old but suffers from an acquired brain injury. Prior to this case, all had limited (if any) exposure to the legal system and none had engaged a lawyer in relation to a consumer law or commercial dispute.

<sup>10</sup> *Fair Trading Act 1999* (Vic) s 32W; *Australian Consumer Law* s 24

<sup>11</sup> *Residential Tenancies Act 1997* (Vic) ss 144A(3) and 206G(2)(a)

<sup>12</sup> *Residential Tenancies Act 1997* (Vic) s 206S

<sup>13</sup> *Fair Trading Act 1999* (Vic) s 8; *Australian Consumer Law* s 21

Elderly consumers are not well-equipped to deal with lengthy and adversarial litigation for two key reasons. Firstly, many are in declining health. In this case, after commencing the proceeding against Walter Elliott:

- One of our clients was admitted to hospital 8-10 times to treat a vascular condition with their hospital stay ranging from 2 days to 2 weeks per admission;
- One of our clients was treated for breast cancer and is waiting to move into a nursing home;
- One of our clients underwent bowel cancer treatment, including chemotherapy and radiation, and now uses a stomach bag;
- One of our clients suffered a heart attack and will require surgery for a heart bypass;
- One of our clients has a neurological condition and suffered from random and uncontrollable seizures throughout the litigation;
- One of our clients was hospitalised for two weeks due to a kidney infection;
- Five of our clients were the spouses and carers for the above clients.

A consumer's declining health will affect their ability to litigate their claim. If the proceeding is delayed, the consumer may be too unwell to continue their claim until completion. That is a unique prejudice which affects elderly consumers. In this case, the trial would have concluded 20 months after the proceeding was commenced. For elderly consumers, justice delayed is justice denied.

A second issue is that litigation is stressful. Had this matter proceeded to trial, our clients would have been cross-examined for several hours, potentially up to one day per client. That is particularly intimidating for elderly clients who suffer from medical conditions. An ombudsman scheme which allows consumers to make written submissions and appear by teleconference is a more appropriate forum for elderly consumers.

### ***Access to Justice***

Without legal representation, many elderly consumers are unable to challenge the fees charged by retirement operators in a Court or Tribunal. The evidentiary onus on a consumer to prove their claim is significantly higher at a Court or Tribunal than at an ombudsman scheme.

In this proceeding, the parties and/or their legal representatives were required to attend direction hearings, 2 full day mediations/compulsory conferences, and respond to and appear at 3 interlocutory applications on a variety of issues. Our clients filed 30 witness statements spanning approximately 800 pages (including attachments). Both parties were ordered to make discovery and discovered 319 categories of documents. An elderly consumer could not have litigated this claim without legal representation.

## **Costs**

Retirement housing disputes are complex and hard fought. As such, prosecuting these claims are expensive and out of reach for many elderly consumers. This proceeding was set down for a 5 week trial. Appearing at the trial alone would have cost approximately \$200,000 to \$300,000 for legal fees and disbursements including fees for two barristers, a team of 3-5 lawyers to assist with the trial, an expert witness to give evidence, and the fees for court transcripts.

Taking into account the 18 months of litigation prior to trial, an elderly pensioner could not afford to pay for a lawyer to pursue their legal rights in VCAT or a Court. This has significant consequences for elderly consumers being able to access justice.

### **1.3 The solution**

Consumer Action has formed the view that DMFs should be regulated to ensure they operate fairly, and are less open to exploitation by retirement housing operators at the expense of elderly consumers. There are a number of practical features to the regulation that will, taken together, provide the necessary fairness and accessibility that is currently lacking.

First, in the vast majority of cases, the DMF should be based on a percentage of the purchase price when the resident first enters the village, rather than the sale price when they leave. While this does occur in some cases, it is by no means the norm—a majority of DMF arrangements are currently based on the sale price.

Regulating DMFs in this way would ensure that the dollar value of the DMF can be calculated when the arrangement is entered into—and the consumer can then compare relative costs across villages before they choose where to live. This would also work against the behavioural factors cited above, setting the DMF as a hard figure in the consumer's mind—which means they are more likely to effectively factor it into their housing decision.

In a minority of cases, (such as in ageing demountable residential parks), the value of the property may decline over the period of occupancy. In cases where that occurs, the DMF should be based on the sale price—so as not to unfairly disadvantage the residents. Operators and owners who wish to avoid this situation will therefore have an incentive to maintain and upgrade properties.

As they're now used, DMFs enable operators to make above market rates from the sale of property rights. Regulating DMFs in this way would still afford operators a significant profit margin, but would also enable residents to gain more capital gain from the appreciation of the value of their unit over the course of their occupancy. Given the DMF is nominally charged in order to provide management services, there seems little justification for it to be a speculative amount linked to property market growth. Put another way, if the services the DMF pays for can be quantified, then the DMF should also be quantifiable at the outset of the contract.

Further, the percentage that can be charged as a DMF should be capped, and the DMF should have to be applied equally over a ten year period (rather than 'front-loaded', as described in the

example above). An appropriate level for the DMF cap should be determined following a thorough, independent market study and consultation period.

Finally, the resident should always have the opportunity pay the DMF upfront if they wish to do so (effectively choosing not to defer the fee, to ensure they capture a maximum of the sale price when they leave), or to enter into the arrangement on the basis of a long term tenancy—essentially as a renter, rather than on the basis of a DMF arrangement. This may have the effect that a DMF would be reasonably considered part of the ‘upfront price’ of the contract, so that it couldn’t be challenged for unfairness under the ACL.<sup>14</sup> At the moment, the amount of DMFs are uncertain and unclear, contributing to the likelihood that they can be considered unfair contract terms.

This would ensure that consumers are in a position to make a clear choice around taking on a DMF, which should in turn lead to a greater understanding of how DMFs operate—and less distress, discontent and confusion when the DMF is ultimately applied. Again, this would require the quantum of the DMF to be clearly determined at the outset of the contract. One major benefit of regulating DMFs in this manner would be to improve consumer understanding of DMFs, and remove incorrect expectations that a consumer is making an investment when they enter a retirement park or village. Currently, far too few retirees truly understand that by entering into a retirement living arrangement they are transitioning back to being a tenant, rather than a property owner. The misunderstanding alone leads to a great deal of discontent with the DMF business model.

#### **Summary and Recommendations:**

- The DMF model has evolved over time from being a legitimate means to enable retirees to buy into retirement living at below market rates, to a price gouging mechanism that is heavily weighted in favour of operators and open to exploitation.
- The DMF model contributes to wide-spread consumer confusion and misunderstanding around the nature of the property rights being acquired when retirees enter a village or park.
- DMFs should be regulated to provide greater clarity for consumers, and re-set the power imbalance so that elderly consumers are not exploited. This regulation could include:
  - Requiring the DMF to be calculated on the basis of the purchase price, rather than the sale price of the property. This would enable consumers to make a genuinely informed choice at the commencement of the contract. The only exception to this rule would be in the minority of cases where the value of the property is expected to decline over the course of the occupancy, in which case the DMF should be calculated on the basis of the sale price.

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<sup>14</sup> Section 26(2), Australian Consumer Law.

- Cap the allowable DMF at a set percentage value of the purchase price (or the sale price, for the minority of those cases described in the point above), and require that value be applied evenly over a ten year period, rather than being “front-loaded” in the first few years of the lease. An appropriate cap should be established following an independent market study, and thorough consultation.
- Require the DMF arrangement to be offered as a choice of three options. The DMF may be paid as an exit fee, or upfront—allowing the consumer to maximise their capital gain on sale of the property. Alternatively, the consumer may choose to offset the DMF as a long term rental arrangement. A benefit of presenting DMFs in this manner would be to break down the current levels of confusion and misunderstanding that surround DMFs, which causes a great deal of consumer dissatisfaction.
- Sales and marketing materials should also be required to be clearer on the nature of DMFs, and actively advise the consumer that buying into a retirement living arrangement is not an investment in property, but a payment for services.

## 2. A Retirement Housing Ombudsman

The time, money and energy currently required for retirees to obtain justice in retirement housing disputes is excessive, and directly militates against retirees making formal legal complaints. This leaves a vulnerable consumer class grossly under-served by the justice system and open to exploitation by commercial operators.

The procedural requirements for applicants are complicated and burdensome, particularly VCAT requirements to produce expert reports and witnesses. Residents can also find it difficult to enforce VCAT decisions if they eventually obtain a favourable outcome. Residents are often facing well-resourced opposition with legal representation, and VCAT processes do not sufficiently take into account this imbalance of power.

In addition to these factors, a lack of available community legal assistance services in this sector creates a significant barrier to justice. Community legal centres simply do not have the resources to provide casework assistance to residents. Paid legal advice and support for residents can be difficult to obtain due to a lack of affordable expertise, and many commercial firms are unable to provide advice in any event, due to conflicts of interest.

The vulnerability of retirees as a collective consumer class should not be underestimated, and often goes unnoticed and unappreciated by policy makers.

Consumer Action has long held this view, and raised the issue in a joint submission made with the Council of the Ageing (**COTA**), the Residents of Retirement Villages Victoria (**RRVV**) to Consumer Affairs Victoria (CAV) in March 2015.

Part of that submission is reproduced below:

*“Retirement housing problems are often 'hidden' as older people may be unwilling or unable to make complaints or enforce their legal rights. Many older people may have difficulty accessing complaint mechanisms and communicating their needs due to physical limitations, communication difficulties, or a lack of knowledge of their rights, entitlements, and the complaint mechanisms available.<sup>15</sup> Another barrier is the difficulty in accessing specialist advice, which is often both expensive and hard to find. In general, retirement housing residents are not wealthy, and may find it impossible to pay for specialist advice. The majority of residents are either fully or partially reliant on the age pension.<sup>16</sup>*

*There are also social barriers which leave some residents feeling too intimidated to complain. Residents may fear being labelled a trouble-maker by other residents, or damaging their relationship with staff and management.<sup>17</sup> As set out above, the importance of housing is amplified as we age, and older residents may fear losing their homes if they complain. We have received reports of outright bullying by retirement village managers in response to complaints, or to deter residents from making complaints.*

*Statistics relating to abuse in aged care is indicative of the barriers older residents face to seeking assistance. It is estimated that close to 70% of older people do not access legal services in instances of abuse because the situation is personal and individual and the older person may fear retribution from the abuser if they attempt to stop them.<sup>18</sup>*

*The Human Rights Commission has identified a number of general barriers impacting on older people's access to legal services, which included:*

- *technological barriers, particularly for telephone and web based services;*
- *a lack of awareness of where to obtain legal information and assistance;*
- *a lack of appropriately communicated legal information;*
- *the high cost of legal services;*
- *a lack of interest by some legal practitioners in older clients;*
- *difficulties in accessing legal aid, including restrictive eligibility tests;*
- *a lack of availability of legal aid for civil disputes;*
- *lack of specialised legal services for older people, particularly in rural, regional and remote areas; and*
- *lack of resources in community legal centres to tailor their services to the needs of older people.<sup>19</sup>*

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<sup>15</sup> Dr. B. Black, 'Empowering and rights-based approaches to working with older people', *Alliance for the Prevention of Elder Abuse: Western Australia*, 2004, available at: <http://apeawa.advocare.org.au/publications/empowering/rights-based-a/>

<sup>16</sup> L. Towart, 'Who Lives in Retirement Villages; are they wealthy enclaves, ghettos or connected communities?', University of Technology, 2013, available at: <http://www.soacconference.com.au/wp-content/uploads/2013/12/Towart-Social.pdf>.

<sup>17</sup> Above n. 4.

<sup>18</sup> D. Cripps et. al., 'Abuse of older people: Issues for lawyers', *Elder Law Review* Volume 1 No. 1, 2002, pp14-19, as quoted in Australian Human Rights Commission, 'Submission to the House of Representatives Standing Committee on Legal Affairs regarding Inquiry into Older People and the Law', 2006, available at: <https://www.humanrights.gov.au/inquiry-older-people-and-law#toc6>.

<sup>19</sup> S. Ellison et. al., 'The legal needs of older people in NSW', *Law and Justice Foundation NSW*, 2004 as quoted in Australian Human Rights Commission, 'Submission to the House of Representatives Standing Committee on Legal Affairs regarding Inquiry into Older People and the Law', 2006, available at: <https://www.humanrights.gov.au/inquiry-older-people-and-law#toc6>.

*These factors together mean that government, regulators and the public are often unaware of the difficulties being faced by residents, and residents often feel powerless to enforce whatever rights they may have.”*

In Consumer Action’s own casework, we have recently conducted two major matters which speak to the complexity and resource intensive process of pursuing retirement housing dispute resolution through VCAT. In the Willow Lodge matter, described above, we estimate that had the matter run to trial it would have cost in the vicinity of \$200,000 to \$300,000. As it is, the matter settled before trial. —While it is yet to be fully costed, there is no question that collective costs will run into hundreds of thousands of dollars—well in excess of retirees (or indeed currently employed citizens) capacity to pay.

To illustrate the length and complexity of the Willow Lodge matter, we include a chronology of the proceedings below:

### ***Willow Lodge—Chronology***

<b>No</b>	<b>Date</b>	<b>Event</b>
1.	04/12/2014	Application and Points of Claim filed
2.	19/02/2015	Application and Points of Claim served
3.	27/02/2015	Affidavit of service of Amanda Storey affirmed on 27 February 2016 filed
4.	03/03/2015	Notice of Hearing issued for directions hearing on 18 March 2015
5.	17/03/2015	Orders made by consent adjourning directions hearing listed on 18 March 2015
6.	08/04/2015	Notice of Hearing issued for directions hearing on 6 May 2015
7.	28/04/2015	Respondent's application for orders under s 77 of the VCAT Act ( <b>s 77 application</b> )
8.	28/04/2015	Respondent serves affidavit of Sazz Nassimi sworn on 28 April 2015 in support of s 77 application
9.	06/05/2015	Orders made at a directions hearing <i>inter alia</i> that: <ul style="list-style-type: none"> <li>• Respondent file and serve its Points of Defence by 21 May 2015;</li> <li>• Applicants file and serve any affidavits in which they seek to rely on in relation to the s 77 application by 4 June 2015</li> </ul>
10.	25/05/2015	Respondent files and serves its Points of Defence
11.	27/05/2015	Orders made upon the Tribunal's own motion listing the proceeding for compulsory conference on 1 July 2015
12.	03/06/2015	Applicants file and serve the affidavit of Amanda Storey affirmed on 3 June 2015 in opposition to the Respondent's s 77 application.

13.	24/06/2015	Orders made by consent to vary the orders made on 6 May 2015 to extend the date to file written submissions in relation to the s 77 application to 8 July 2015
14.	01/07/2015	Parties attend compulsory conference
15.	01/07/2015	Orders made at the compulsory conference <i>inter alia</i> that: <ul style="list-style-type: none"> <li>• The s 77 application be listed before a judicial member as soon as possible;</li> <li>• The proceeding be transferred to the civil claims list;</li> <li>• The parties must file and exchange written outlines of submissions not exceeding 4 pages at least 7 days prior to the date set for the s 77 application</li> </ul>
16.	12/08/2015	Respondent serves request for further and better particulars of points of claim
17.	16/09/2015	Notice of Hearing issued listing s 77 application for hearing on 8 October 2015
18.	30/09/2015	Application filed by the Respondent for orders that the applicants provide further and better particulars for their points of claim dated 4 December 2015
19.	30/09/2015	Respondent serves Affidavit of Amelia Strano affirmed on 28 September 2015
20.	01/10/2015	Applicants file and serve their submissions in opposition to the Respondent's s 77 application
21.	06/10/2015	Orders made in Chambers that in the event that the Respondent's s 77 application is unsuccessful, the Respondent's application for further and better particulars of points of claim be listed for hearing on a date to be fixed
22.	07/10/2015	Respondent files and serves their submissions in support of the Respondent's s 77 application
23.	08/10/2015	Hearing of the Respondent's s 77 application
24.	08/10/2015	Orders made at the hearing of the s 77 application <i>inter alia</i> that: <ul style="list-style-type: none"> <li>• The s 77 application be dismissed</li> <li>• The Respondent pay the applicants' costs of the s 77 application</li> <li>• By 11 December 2015, the parties complete discovery</li> <li>• The Respondent's application for further and better particulars of points of claim be adjourned until further order</li> </ul>
25.	12/10/2015	Notice of Hearing issued for the Respondent's application for further and better particulars of points of claim listed on 9 December 2015
26.	07/12/2015	Orders made in Chambers that the directions hearing listed on 9 December 2015 be adjourned to a date to be fixed after 24 March 2016



27.	11/12/2015	Applicants file and serve their list of discoverable documents
28.	14/01/2016	Applicants file and serve application for urgent directions hearing seeking orders <i>inter alia</i> that the Respondent file and serve its list of documents
29.	14/01/2016	Affidavit of Amanda Storey affirmed on 14 January 2016 filed and served
30.	22/01/2016	Orders made in Chambers that the proceeding be listed for a directions hearing on 29 January 2016
31.	25/01/2016	Notice of Hearing issued listing proceeding for directions on 29 January 2016
32.	25/01/2015	Respondent files and serves its list of discoverable documents
33.	27/01/2016	Respondent serves amended list of discoverable documents
34.	28/01/2016	Affidavit of Amanda Storey affirmed on 28 January 2016 filed and served in support of application dated 14 January 2016
35.	29/01/2016	Orders made at the directions hearing <i>inter alia</i> that: <ul style="list-style-type: none"> <li>• Respondent pay the applicants' costs of the application dated 14 January 2016;</li> <li>• By 23 February 2016 the Respondent file a supplementary list of documents relevant to specified documents;</li> <li>• By 11 March 2016, the Applicants are to file and serve their witness statements, save for the fourth and fifth applicants which must be filed on or before 24 March 2016;</li> <li>• By 22 April 2016, the Respondent must file and serve its witness statements in reply.</li> </ul>
36.	26/02/2016	Notice of Hearing issued listing proceeding for trial on 18 July 2016 with an estimated duration of 20 days
37.	03/03/2016	Notice of Hearing issued listing proceeding for trial on 18 July 2016 with an estimated duration of 25 days
38.	11/03/2016	Applicants file and serve 14 witness statements
39.	24/03/2016	Applicants file and serve witness statements for fourth and fifth applicants
40.	15/04/2016	Applicants file and serve supplementary list of discoverable documents
41.	24/04/2016	Applicants file and serve their Amended Points of Claim

42.	05/05/2016	<p>Orders made by consent <i>inter alia</i> that:</p> <ul style="list-style-type: none"> <li>• The Applicants have leave to file their amended points of claim dated 22 April 2016;</li> <li>• By 6 May 2016, the respondent shall file a supplementary list of documents relevant to specified documents;</li> <li>• By 6 May 2016, the respondent shall file and serve its witness statements in reply;</li> <li>• By 13 May 2016, the respondent shall file and serve its Amended Points of Defence;</li> <li>• By 20 May 2016, the applicants shall file and serve their witness statements in reply;</li> <li>• By 13 June 2016, the respondent shall file any expert report relied on</li> <li>• By 4 July 2016, the applicants shall file any expert report relied on</li> </ul>
43.	06/05/2016	Respondent files and serves supplementary list of discoverable documents
44.	06/05/2016	Respondent serves 3 unsigned witness statements of Shirley Horsburgh, Arthur Horsburgh and Jim Hutchinson
45.	15/05/2016	Respondent serves signed witness statements of Shirley Horsburgh and Arthur Horsburgh
46.	17/05/2016	Respondent files and serves Amended Points of Defence dated 16 May 2016
47.	20/05/2016	Applicants file and serve 14 witness statements in reply
48.	01/06/2016	Applicants file and serve urgent application seeking orders <i>inter alia</i> that the Respondent provide further and complete discovery
49.	02/06/2016	Applicants file and serve affidavit of Tom Willcox affirmed on 1 June 2016 in support of application dated 1 June 2016
50.	03/06/2016	Notice of Hearing issued listing Applicants' application dated 1 June 2016 for hearing on 9 June 2016
51.	09/06/2016	Hearing of Applicants' application dated 1 June 2016
52.	09/06/2016	<p>Orders made at the directions hearing <i>inter alia</i> that:</p> <ul style="list-style-type: none"> <li>• By consent, that the parties attend mediation of the proceeding on 14 June 2016;</li> <li>• By 17 June 2016, the Respondent file and serve any Amended Points of Defence;</li> <li>• By 16 June 2016, the Respondent file and serve a Further Supplementary List of Documents on the Applicants;</li> <li>• By 4 July 2016, the Applicants may file any Further Supplementary List of Documents;</li> <li>• By 15 July 2016, the Respondent must file and serve certain witness statements;</li> <li>• The hearing date of 18 July 2016 is confirmed.</li> </ul>

53.	14/06/2016	Parties attend mediation
54.	18/07/2016	Orders made in Chambers by consent that the proceeding be listed for a directions hearing on 16 August 2016 (among other orders)
55.	15/08/2016	Orders made in Chambers by consent that the proceeding be listed for a directions hearing on 20 September 2016 (among other orders)
56.	16/09/2016	Orders made in Chambers by consent that the proceeding be listed for a directions hearing on 24 October 2016 (among other orders).
57.	24/10/2016	Parties attend final directions hearing. Orders made by consent that the proceeding be struck out with a right of reinstatement

Consumer Action routinely fields complaints from elderly consumers who have found VCAT unhelpful and intimidating, or otherwise unsatisfying, and have also failed to achieve a just outcome with the assistance of CAV.

The key issues raised with Consumer Action by elderly consumers include complexity of contracts, unfair fees, inadequate repairs and maintenance, lack of financial accountability and poor financial management. Lack of staff training and qualifications, bullying and intimidation by management (and other residents) and delays to sale of property also form common complaints.

One such matter is described below:

**Alleged interference in sale of property**

Marie\* lives alone in a retirement village, and the relationship between her and management has long since broken down. Marie feels bullied and powerless in her village, and feels that she has 'no rights'.

Marie had previously been involved in a VCAT action by residents against management of the village, contesting fee increases. The residents were unsuccessful in that action. Marie described the VCAT experience as stressful and intimidating, and felt that because they did not have lawyers the residents' concerns had not been taken seriously. As a result, Marie was reluctant to repeat the experience and did not want to lodge a new complaint with VCAT.

Marie's current complaint concerned her attempts to sell her property to leave the village, and her belief that village management had interfered in those attempts.

In early November 2015 a potential buyer made enquiries about purchasing property at the village as a result of seeing Marie's property advertised on a sign outside the village.

The potential buyer's inquiry was fielded by the manager of the village. The manager took the buyer through to the village community room, and when he asked to view Marie's unit, the manager replied that the unit was very run down and over-priced. The potential buyer did not view the unit at that time.

A week or so later, the potential buyer was again inspecting the advertising boards out the front of the village when he was approached by one of the owners of the village.

The potential buyer was accompanied by his daughter on this second occasion. The village owner opted to show the potential buyer and his daughter through another unit at the rear the village. The owner explained that the rear unit was in the final stages of renovation, and was to be sold leasehold.

When the potential buyer again requested to see Marie's unit (the advertised property), the village owner discouraged him from doing so, explaining that Marie's unit was run down and over-priced.

The potential buyer's daughter later found Marie's unit advertised on realestate.com.au and the potential buyer arranged for an inspection through a real estate agent.

On inspection of the property, the potential buyer found that in his view the property was well maintained, modern and appeared to be very good value for money.

Based on the potential buyer's version of events, (which the potential buyer had related to both Marie and the real estate agent), the village owner and manager may have breached section 32C of the Retirement Villages Act.

Clause 32C of the Retirement Villages Act (VIC) 1986 ("Act") states:

***32C Manager not to interfere in sale***

*(1) A manager of a retirement village who is not appointed as an agent for the sale of the premises of an owner resident in the village must not interfere with the sale of the premises.*

*Penalty: 60 penalty units*

The Act defines a manager as:

- (a) A person who manages a retirement village; and*
- (b) if there is no such person, the owner of retirement village land;*

Marie wrote to both the village manager and the village owner requesting that they desist from any further interference in the sale of her property, and advising that the matter has been reported to the relevant authorities. She was suffering from stress and anxiety as a result of the events around the sale of her property, and did not wish to have any further involvement with VCAT.

In January 2016 Consumer Action lodged a complaint with CAV on Marie's behalf.

CAV investigated the matter and spoke with Marie, the real estate agent, and the village manager.

CAV subsequently wrote to the village owner to the village owner, notifying them of section 32C of the Act and advising that if further non-compliance was identified then enforcement action would be considered.

Marie was disappointed with this outcome, and felt that enforcement action should have been taken in this instance. Her collective experiences with VCAT and CAV have left her feeling powerless and without recourse to justice.

Marie has expressed a view that the ongoing difficulties with village management have affected her physically and emotionally.

\*—Name changed for privacy purposes.

Consumer Action believes that a Retirement Housing Ombudsman (**RHO**) scheme is needed to address the current shortfall in access to justice for retirees.

The RHO should be industry funded and have broad terms of reference, covering residents of residential parks, retirement villages, rental villages and Independent Living Units.

Through our experience with the Financial Ombudsman Service (**FOS**), the Telecommunications Industry Ombudsman (**TIO**), and the Energy and Water Ombudsman Victoria (**EWOV**) we have seen first-hand how industry funded ombudsman schemes can provide free, accessible and authoritative dispute resolution services to vulnerable consumers. Without ombudsman schemes, hundreds of thousands of people would have been left with no avenue for redress other than courts, or more likely, because of cost and other access barriers, would have been left with nowhere to turn.

The need for such a service in retirement housing is evident, and will continue to grow as the population ages. An RHO that has the power to make binding decisions would provide residents with access to free and independent dispute resolution without the need for lawyers. It would also create incentives for operators to settle disputes internally, as they would incur costs each time a case is brought against them.<sup>20</sup>

We also note that in the case of an RHO, consumers should have the power to nominate a representative (such as a relative, or a friend) to represent them in the matter if they do not feel capable of managing the dispute themselves. This is an important consideration for a consumer base that includes very elderly and sometimes infirm consumers.

The RHO would be expected to comply with the *Benchmarks for Industry-based Customer Dispute Resolution*.<sup>21</sup> These benchmarks set out minimum standards in relation to accessibility, independence, fairness, accountability, efficiency and effectiveness.

### **3. Legislative framework and clarity in contracting**

The retirement housing sector in Victoria is complex, poorly defined and subject to overlapping legislation. This in turn can create complexity and confusion in drafting and interpreting contracts, which are often lengthy and difficult to navigate. Frequently, the rights, responsibilities, and legislative constraints on parties are unclear, or at least arguable.

#### **3.1 The problem**

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<sup>20</sup> Productivity Commission (2015) *Access to Justice Arrangements: Inquiry Report Overview*, p. 11, available at: <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>.

<sup>21</sup> The Treasury (March 2015) 'Key Practices for Industry-based Customer Dispute Resolution', available at: <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/key-pract-ind-cust-dis-reso>

In previous submissions, Consumer Action has identified this legislative complexity as a defining issue in the retirement housing sector.<sup>22</sup> The lack of clarity about which legislation applies to what accommodation types directly causes (or at least contributes to) many of the problems faced by residents of retirement housing. While the *Retirement Villages Act*'s definition of 'retirement village'<sup>23</sup> should generally determine which legislation applies, it can be very difficult to determine whether a development meets that definition, especially in the case of not-for-profit villages. As a result, seemingly very similar developments can be governed by different legislation and the residents in those developments will enjoy different rights.<sup>24</sup>

To illustrate the complexity of the legislative framework covering Victoria's retirement housing sector, we attach a diagram showing how various Acts and Regulations relate to each other, (and the housing types that they cover), at **Appendix A** to this submission.

A common area of disputation lies in housing complexes where the *Retirement Villages Act 1986* (Vic) overlaps with the *Owners Corporation Act 2006* (Vic), leading to confusion around applicable fees—and the limits which apply to those fees. Disputes can arise between residents and management as to who is liable for the costs of maintenance, repairs and replacement works in a retirement village are generally caused by a lack of clarity in residence contracts, including the very ambiguous definitions of variable outgoings and refurbishment fund.

Consumer Action has dealt with a number of matters of this nature. In one matter, a management company had failed to distinguish between management fees (levied under the *Retirement Villages Act*) and body corporate fees (under the *Owners Corporation Act*). More clearly distinguishing between different fees would have resolved much of the confusion.

In another matter, our client argued that the fees charged by management were not calculated in accordance with the *Retirement Village Act* and regulations. Argument around the correct interpretation of the law and regulations relating to what management could charge was extremely complex. In our view, very few retirement village residents would be capable of understanding their rights under these provisions without expert assistance.

Complexity and lack of transparency in retirement housing contracting was recently addressed by Consumer Affairs Victoria (**CAV**), resulting in reforms which came into effect on 1 July 2014.

Under the reforms, Victorian retirement villages are required to provide standardised fact sheets and enhanced disclosure statements, clearly setting out the details of financial obligations that residents will incur in choosing their village. Importantly, CAV has taken enforcement action to ensure these disclosures are provided.<sup>25</sup> CAV also provides online resources<sup>26</sup> to assist residents in understanding how retirement villages operate, and the fees and charges that will apply. While

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<sup>22</sup> Joint submission made by Consumer Action, COTA and RRVV to CAV re: Proposed remake of Retirement Village Regulations, 31 March 2015.

<sup>23</sup> *Retirement Villages Act 1986* (Vic) s 3.

<sup>24</sup> Council on the Ageing Victoria, 'Submission to: Options Paper: Tenancy Policy Framework for Residential Parks', 2009, available at: [http://cotavic.org.au/wp-content/uploads/2011/01/microsoft\\_word\\_-\\_residential\\_parks\\_options\\_paper\\_final\\_july\\_09\\_web\\_version.pdf](http://cotavic.org.au/wp-content/uploads/2011/01/microsoft_word_-_residential_parks_options_paper_final_july_09_web_version.pdf)

<sup>25</sup> CAV, *News update: Illawong Lakeside Retirement Pt Ltd, Illawong Retirement Group Pty Ltd and Vladymir Martyniuk, Court action*, 8 June 2016, available at: <https://www.consumer.vic.gov.au/news-and-events/news-updates/illawong-lakeside-retirement-pty-ltd-court-action>.

<sup>26</sup> Available at: <https://www.consumer.vic.gov.au/housing-and-accommodation/retirement-villages>,

these measures were positive, there are limits and pitfalls when relying heavily on disclosure as a means of consumer protection.

Consumer Action continues to encounter widespread confusion and misunderstanding amongst retirement housing residents regarding their housing contracts. This is likely due to the complexity and variance of the DMF business model, along with the complex legislative framework applying to the area—but can also be attributed to poor quality fact sheets and disclosure statements, which do not always reflect contracts accurately. Where this occurs, the documents have the opposite effect, adding layers of complexity and confusion. Inconsistencies mean that disclosure documents have to be carefully cross-checked with the contract, effectively defeating the purpose of their implementation. Even retirees who have sought independent legal advice before entering a village frequently report misunderstandings. It is often contended that the advice received is poor as it is difficult to find solicitors with the necessary expertise.

Of course in many cases, retirees are not in a position to afford legal advice. They instead make a major life decision by entering into a complex contractual arrangement with a far from perfect understanding of what they are signing up for. Low income consumers who are considering moving into not-for-profit retirement villages are highly unlikely to be able to afford professional advice.

A 2011 Housing for the Aged Action Group survey of (mostly low income) residents of Independent Living Units found that 79% did not seek any advice before moving into their new accommodation, and 69% said that they had no help understanding their contract.<sup>27</sup> It is unrealistic to expect these residents to cross-check their contracts with disclosure documents. More likely, disclosure documents will be relied upon as a decision making 'heuristic', leading to a false sense of security and a potentially poor, and damaging decision.

### **3.2 The solution**

Consumer Action believes legislative reform is necessary to clarify the legislation that applies to various forms of retirement housing, which in turn will reduce contractual misunderstandings and disputation. We are aware that the overlap of the *Retirement Villages Act 1986* and the *Owners Corporation Act 2006* is currently under review by CAV, and look forward to reform that may be undertaken in that area. At the same time, we believe that the *Retirement Villages Act 1986* requires full review. Through this process the legislative demarcation between various forms of retirement housing could be clarified, and more effectively cross-referenced.

A comparison of Victoria's retirement village legislation with similar legislation in other Australian jurisdictions, (and New Zealand), reveals that Victoria is noticeably lagging in a number of key areas. These include eviction processes, investigation of complaints, operation of resident's committees, and oversight of village budgets. In addition, Victoria is rare in allowing charitable and not for profit organisations to apply for exemptions to all or part the state's retirement village act. Only the Northern Territory and South Australia mirror this provision, although in both of those cases, Ministerial approval is required. In Victoria, this power sits with the Director of CAV.

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<sup>27</sup> Housing for the Aged Action Group (HAAG), 'Speak Out—Have Your Say on Housing: The Not For Profit Retirement Housing Community Education Project, Eastern Metropolitan Region of Melbourne', 2011, pp. 13-14.

In order to compare retirement village legislation across Australia and New Zealand, Consumer Action obtained pro bono assistance from one of our panel firms to update a table we had previously prepared, comparing retirement village legislation across various jurisdictions. The table is presented as a ‘traffic light document’, highlighting areas where various acts are effective or deficient. We attach that document as **Appendix B** to this submission, to demonstrate that a review of the *Retirement Villages Act 1986* is justified, and could deliver significant benefit to the sector.

While it is sometimes claimed that standardising contracts could result in reduced competition and innovation in products and services offered, we believe that standardising contracts can improve competition by enabling consumers to compare like products with like, without complex differences in contractual construction and presentation. This approach has been taken in sale of land and residential tenancies contracting, and we see no reason why it should not be applied in retirement housing. While the *Retirement Villages (Contractual Arrangements) Regulations 2006* (Vic) stipulate prescribed terms and layout for residence and management contracts, they exclude lease agreements and contracts of sale.<sup>28</sup>

Standardised fact sheets and disclosure documents do not appear to have had the desired impact, and there is a genuine need to address the length and complexity of the contracts themselves. At the very least, basic guidelines should be developed to ensure that contracts are expressed in plain English and meet a certain standard of readability. Further, consideration should be given to the establishment of a free, independent advice service to assist retirees in understanding their housing contracts prior to committing to purchase.

It is important that the unique vulnerability of the retirement housing consumer base is taken into account. Elderly citizens who are often going through a traumatic and upsetting time of their lives should not be expected to navigate complex and lengthy legal documents, (often without any legal assistance), in order to make significant life decisions. If made poorly, those decisions can have a disastrous impact on their lives.

#### **4. Training and qualifications for managers and operators**

Victoria’s retirement housing sector currently lacks any formal qualification requirement for managers of retirement villages and residential parks.

##### **4.1 The problem**

Breakdowns in communication, loss of trust and hostility between residents and managers is common, often leaving residents feeling powerless and intimidated in their own homes. Disputes between residents and managers can quickly become personal and intractable. Bullying and elder abuse is not uncommon, and often goes unreported. The potential for factions to form amongst residents, and for residents committees to become dominated by cliques or powerful personalities can lead to ongoing frustration, disempowerment and resentment. This can leave the most vulnerable residents—who may be alone and in poor health—feeling unrepresented and unable or unwilling to air legitimate grievances.

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<sup>28</sup> *Retirement Villages (Contractual Arrangements) Regulations 2006* r. 8G.



Consumer Action proposes a qualification system for managers of retirement villages and residential parks. These are specialised roles, dealing with a specific consumer base which requires particular skills and knowledge. Village and park managers should have a strong knowledge of their statutory obligations and training in the effective management of their facility—ranging from financial matters, to their interactions with individual residents and residents committees, to the management of other staff. Managers carry significant administrative responsibility, and are required to balance their managerial role with a sales function. Under the *Retirement Villages Act 1986*, village managers must also manage an internal dispute resolution process. Finally, village and park managers also require basic health and fitness levels, and practical knowledge around health management, first aid and basic facility maintenance.

Professionalising the role of village and park managers would be an important acknowledgment of a challenging, demanding and unique role. Ongoing professional development and registration would also be a powerful way to ensure that management standards across the sector are maintained, and protect elderly residents from abuses of the power imbalance that can arise in the resident/manager dynamic.

As it currently stands, village and park managers require no more formal qualifications to perform their role than does a retail shop assistant—with the exception of first aid requirements. Given the observed and anticipated growth of the retirement housing sector, this means that retirement villages and parks could be subject to management by inexperienced managers in a challenging role, with no training, and no clearly established professional standards for their performance to be measured by.

#### **4.2 The solution**

The current parliamentary inquiry represents an excellent opportunity to move towards professionalising the role of facility managers in the retirement housing sector. This could be achieved by establishing a Certificate IV qualification under the Australian Qualifications Framework<sup>29</sup>, and establishing a register of professionally qualified managers with a requirement to maintain their qualification through ongoing professional development. This system could also provide a mechanism to bar managers from the register, if they can be shown to have breached their professional duties in a significant manner. This could play a powerful role in lifting management standards across the industry, and would help to re-set the power imbalance that often exists between managers and residents.

#### **5. A Code of Conduct**

In addition to implementing a training and qualification requirement for park and village managers, Consumer Action recommends that a Code, or Codes of Practice be developed to prescribe standards that must be met under relevant legislation in the retirement housing sector.

Codes of Practice provide a clear outline of minimum industry standards. Crucially, they do this in a form that is easily understood and communicated (far more effectively than an Act, or set of Regulations—for example), and operate as a digestible summary of the obligations and responsibilities of the various parties engaged in the activity to which the code applies. In this way,

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<sup>29</sup> <http://www.aqf.edu.au/>

Codes of Practice can play a role as a “manual” that communicates legislative standards, far more effectively than the legislation itself does.

While South Australia and Western Australia currently employ Codes of Conduct, the *Retirement Villages Code of Conduct 2008 (Code)*, administered by the New Zealand Ministry of Business, Innovation and Employment arguably provides the clearest outline of responsibilities for stakeholders. Certainly, it is the most clearly expressed of the three—and has clearly been designed to be actively used by the people to which it applies, rather than to simply exist as a statutory document, indecipherable to many without the benefit of legal training or advice.

The Code is established under the *Retirement Villages Act 2003* (New Zealand), and carries considerable legal force, prevailing over any less favourable provision in a resident’s occupancy agreement. The legal status of the Code is set out in section 6, reproduced below (section references in the text are to *the Retirement Villages Act 2003* (New Zealand)).

#### **6. Legal status of the Code of Practice**

1. *This Code of Practice is a legal document. Every operator of a retirement village must meet the requirements set out in the Code of Practice. Section 92(2)(a)(i)*
2. *The Code of Practice is enforceable as a contract by a resident and prevails over any less favourable provision in the resident’s occupation right agreement. Section 92(2)(b)*
3. *The Code of Practice must be given effect to in any occupation right agreement offered to a resident. Section 92(2)(c)*
4. *The operator must make a copy of the Code of Practice available to every resident and intending resident on request. Section 92(4)*
5. *An operator may be exempted from meeting the requirements of any provision of this Code of Practice, if an exemption has been granted by the Registrar. Sections 93(1)-(3)*
6. *A resident can give a dispute notice for a breach of the Code of Practice. Section 53(1)(d) and 53(3)*
7. *The Retirement Commissioner monitors the effects of the Code of Practice.*

The purpose of the Code is similarly clearly expressed, in section 4 of the Code:

#### **4 Purpose of the Code of Practice**

1. *This Code of Practice is written for people who own, manage, oversee, or live (or intend to live) in retirement villages, in particular:*
  - a. *the operator*
  - b. *residents and intending residents (and their representatives)*
  - c. *statutory supervisors.*
2. *The purpose of this Code of Practice is to set out the minimum requirements that operators of retirement villages must carry out, or make sure are carried out, to meet their legal obligations under the Retirement Villages Act 2003.*

Consumer Action submits that the development of a Code of Practice based on the New Zealand model for retirement villages, and another Code for residential parks, would represent a significant step forward in industry standards in Victoria—both to operators, and to residents. In conjunction with a training and qualification regime for managers, this could significantly lift management standards in retirement villages and parks—and would empower residents to assert their rights under applicable legislation. A copy of the New Zealand Code is attached to this submission at **Appendix C** for ease of reference.

Of course, to be effective, any code of practice would have to be accompanied by a robust and sufficiently-resourced compliance and monitoring regime. This responsibility could sit with an industry regulator, but it may benefit by having a more specialist administrator which provides more attention and focus. This is discussed further in part 7.

## **6. Financial oversight and auditing**

Financial mismanagement is a consistent theme of retirement housing related complaints fielded by Consumer Action.

In two recent and significant cases, residents were billed for unjustified charges. In one case, involving Dromana Holiday Village, it was clear that accounting practices and record keeping were lax, and there was little to no oversight to ensure that the park operator justified charges made for maintenance and other services.

### **Case Study: Dromana Holiday Village**

#### ***Our client and her lease***

Our client is an 89 year old widow who lives at the Dromana Holiday Village, Dromana, Victoria. She moved there with her late husband in 2007. She purchased a lot with a 99 year lease with a 99 year option to renew and built a two bedroom and two bathroom home on her lot. Our client is a pensioner and pays annual park fees on an interim basis.

#### ***The Dromana Holiday Village***

The Dromana Holiday Village has approximately 210-220 lots. Some of the leaseholders own their own lots and live there on a permanent basis, other leaseholders rent out their lots to long-term tenants or holiday-goers. The village has a variety of facilities including an indoor and outdoor swimming pool, a BBQ area, a community room and amenity blocks containing a laundry and toilets. The Dromana Holiday Village is not regulated by the *Residential Tenancies Act 1997*, the *Retirement Villages Act 1986* or the *Owners Corporations Act 2006*.

#### ***The dispute***

The leaseholders' annual liability to pay their park fees is determined pursuant to the "total cost of ownership" (LTCO) clauses in their lease. This clause is opaque and difficult to understand.

The LTCO clause permits the landlord to reasonably determine the total cost of owning and operating the land, any improvements on the land and any services being provided from the

land including reasonable allowances for costs, liabilities and expenses that the landlord reasonably expects to incur. The lot holders' annual liability is calculated by multiplying the LTCO by the lot liability allocated to each individual lot, and dividing that figure by the total lot liability.

In 2007, our client's annual fees were \$2,180 per year (\$41.92 per week). These gradually increased each year reaching \$2,697 (\$51.87 per week) in the 2012-2013 financial year.

However, in April 2013, our client's annual fees were increased to \$4,280 per year (\$82.31 per week) for the 2013-2014 financial year – equating to a 63% increase in one financial year. The landlord continued to charge those annual fees for the 2013-2014, 2014-2015 and 2015-2016 financial years. In 2016, the landlord notified the residents that their fees would increase by \$6-\$7 per week for the 2016-2017 financial year, signalling a further 7.3% to 7.9% increase.

No new services or amenities were provided to the residents at the Dromana Holiday Village during 2013 to 2016 period.

### ***The litigation***

On 17 June 2015, our client filed an application in the Victorian Civil and Administrative Tribunal (**VCAT**) asking that VCAT declare what the LTCO should be for the Dromana Holiday Village for the 2013-2014, 2014-2015 and 2015-2016 financial years.

Our client made four types claims against the landlord.

First, that the annual fees (or LTCO) claimed by the landlord for those financial years included expenses that were unreasonable and/or not properly incurred.

Second, that the landlord had failed to make a determination of the LTCO for the relevant financial years and that the rental increases were not permitted under the terms of the lease.

Third, our client alleged that the landlord had engaged in misleading and deceptive conduct and unconscionable conduct.

Fourth, our client asked VCAT to vary the terms of her lease to make them fairer and more transparent.

On 30 May 2016, VCAT heard our client's application over a 3 day trial. As at the date of filing this submission, VCAT has not handed down its decision in the proceeding.

### ***Resources and Access to Justice***

At its simplest, our client claimed that the annual fees charged by the landlord were too high. The fees had increased by over 60% in one year and there had been no commensurate improvement in the services and amenities at the village.

However the complexity of the terms of the contract and the adversarial forum of VCAT required our centre to dedicate considerable resources to prepare our client's claim for trial.

These included:

- A junior barrister and/or a senior solicitor appearing at multiple interlocutory disputes, which are set out in further detail below;
- A QC, junior barrister and a senior solicitor to appear at the 3 day trial with litigation support provided by graduate lawyers;
- An expert accounting witness preparing an expert report (taking approximately 110 hours to complete), giving evidence and being cross-examined at the trial for approximately 5 hours;
- Our client and her daughter giving evidence at the trial and being cross-examined by the landlord's senior barrister;
- A senior solicitor and graduate lawyer attending a full day compulsory conference (also known as a mediation); and
- The provision of extensive litigation support including briefs to barristers, briefs to the expert witness, collating and analysing the parties' discovery and preparing court books for trial.

Despite VCAT being less formal than a Court, elderly consumers and their advocates are required to dedicate significant time, expertise and costs to have their claim heard at VCAT.

Most elderly consumers would be unable to access, and pay for, an accounting expert to prepare a 49 page report and to give evidence at a trial. Ombudsman schemes have specialist expertise and consumers are not burdened with the same evidential onus as a Court and Tribunal.

In this case, the parties appeared at multiple interlocutory disputes which were hard fought. These interlocutory disputes included hearings about discovery of documents, applications for leave to file a counterclaim and to split the trial into two trials, and an application by the landlord to adjourn the trial to a later date. These applications were highly technical. An Ombudsman scheme is not hampered by the same civil procedure rules as a Tribunal and Courts. This means that the parties will spend less time arguing about technical issues, and more time resolving the actual dispute. Successive interlocutory applications are resource intensive and there is a strong risk that self-represented elderly consumers would be discouraged from bringing their application to trial.

Finally, an Ombudsman scheme is a more appropriate forum for elderly consumers. Our client and her daughter gave evidence at the trial and were cross-examined by the landlord's barrister. This alone would deter many 89 year old widows from bringing a complaint against their landlord to VCAT. An Ombudsman scheme would allow elderly consumers to make written submissions, and to appear by telephone conference if required.

The Dromana Holiday Village case does not seem to be an isolated incident. Anecdotally, we are advised that it is common for park and village operators to contract out services to related entities, and then pay above market rates for those services. This is yet another area where the vulnerability

and perceived powerlessness of the consumer base, (in conjunction with a lack of regulation and oversight), can easily lead to financial exploitation. It also speaks to the lack of professional training and qualifications currently required of park and village owners and managers.

In New Zealand the problem of financial mismanagement in the retirement village sector has been partly met with the establishment of statutory supervisors.

Under s38(1) of the *Retirement Villages Act 2003* (New Zealand):

*“The operator of a retirement village must appoint a statutory supervisor who holds a licence under the Financial Markets Supervisors Act 2011 that covers supervision of the village, unless the operator has obtained an exemption under section 41.”*

Sections 42 and 43 of the *Retirement Villages Act 2003* (New Zealand) set out the duties and powers of the statutory supervisors respectively.

Under section 42 statutory supervisors are required to:

- monitor the financial position of the village,
- act as an independent stakeholder for deposits and progress payments by residents to operators, and
- report annually to the Registrar of Retirement Villages and residents on the performance of its duties and the exercise of its powers.

Statutory supervisors are required to exercise reasonable care and skill to ascertain that the financial position of the village, the security interests of the residents, and the management of the village are adequate.

If the statutory supervisor believes the financial position of the retirement village, the security interests of the residents, or the management of the village is inadequate then under section 43, they have the power to:

- direct the village operator to supply all residents, (or their nominated representatives), with the information that the statutory supervisor may specify,
- direct the operator to operate the retirement village in a specified manner, or
- apply to the Court for an order under s43A of the Act.

Section 43 also grants the statutory supervisor the power to veto the publication or distribution of an advertisement, disclosure statement, occupation right agreement or code of practice which they believe is inconsistent with the Act or regulations.

Section 43A allows the court (defined as the High Court of New Zealand) to make a range of orders at the application of a statutory supervisor.

These include:

- imposing restrictions on the activities of operators (including restrictions on advertising) that the court thinks are necessary to protect the interests of residents,
- directing the operator to convene a meeting of residents (and give any other directions it thinks fit relating to the conduct of that meeting) for the purpose of:
  - enabling the statutory supervisor to present the information or proposal that the court or statutory supervisor thinks necessary or appropriate for the residents interests, and
  - obtaining the opinions and directions of the residents.
- restraining the transfer of an interest in all or any part of the retirement village.
- removing a receiver or manager of the retirement village.

Statutory supervisors form part of a well-developed framework of regulatory oversight of the retirement village sector in New Zealand, which also encompasses the Retirement Commissioner and the Registrar of Retirement Villages. Statutory supervisors themselves are held to rigorous professional standards, and are regulated by the *Financial Markets Supervisors Act 2011 (New Zealand)*.

The purpose of the *Financial Markets Supervisors Act 2011 (New Zealand)* is to:

*... protect the interests of product holders, and of residents of retirement villages, and to enhance investor confidence in financial markets and retirement villages, by—*

*(a) requiring persons who wish to be appointed as supervisors to be capable of effectively performing the functions of supervisors; and*

*(b) requiring supervisors to perform their functions effectively; and*

*(c) enabling supervisors to be held accountable for any failure to perform their functions effectively.<sup>30</sup>*

Given the instances of financial mismanagement currently occurring in Victoria's retirement housing sector, combined with the projected growth of that sector (not to mention the strongly deleterious impact such mismanagement has on a highly vulnerable consumer base), there is a strong argument for the establishment of a similar role in Victoria.

Such a role could provide valuable financial oversight of both retirement villages and residential parks, and could play an effective role in ensuring that the DMF business model is not exploited to the detriment of Victoria's retirees.

## **7. Administrative responsibility for the sector**

Taken together, Consumer Action's recommendations would amount to significant regulatory reform of the retirement housing sector. They would also require ongoing work, and monitoring of the sector. In order to achieve this, it would seem sensible to also review administrative responsibility for the retirement housing sector.

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<sup>30</sup> *Financial Markets Supervisors Act 2011 (New Zealand) s3(1)*.

Currently, CAV administers the *Retirement Villages Act 1986* (VIC), to which the *Australian Consumer Law and Fair Trading Act 2012* (VIC) applies. Amongst other duties CAV is required to keep a register of Victorian retirement villages<sup>31</sup>, and has the power to bring proceedings for breaches of the Act.<sup>32</sup> CAV also provides online resources to assist retirees in understanding how retirement villages work, including how to resolve disputes and what fees to expect.<sup>33</sup> CAV also has responsibility for the *Residential Tenancies Act 1997* (VIC), and the *Owners Corporation Act 2006* (VIC), both of which are currently under review.

Victoria also has a Commissioner for Senior Victorians, who administers *Seniors Online*, —a Victorian Government website that aims to be the first port of call online for older Victorians.<sup>34</sup> Seniors Online provides information around the seniors card program, seniors events, health information, state government programs and provides an online community space for seniors. The information is well-pitched to its audience, and includes useful advice on how to save on energy bills, how to access support services and health and dietary advice. Seniors Online also conducts important research, and in January 2016 published the report *Ageing is everyone's business: a report on isolation and loneliness among senior Victorians*. Currently, Seniors Online does not appear to provide information about retirement housing, nor does it provide links to the CAV resources.

In South Australia, the Office of the Ageing has responsibility for both the *Office of the Ageing Act 1995* (SA), and the *Retirement Villages Act 1987* (SA). The Office of the Ageing administers a range of programs for elderly South Australians, (including the South Australian Seniors card), and works to a strategic plan—*Prosperity Through Longevity: South Australia's Ageing Plan 2014-2019*. The Office of the Ageing contributes to policy planning and development, and raises issues affecting older people. Through the sa.gov.au online portal, the Office of Ageing provides a range of resources to older South Australians—including an extensive range of fact sheets on retirement villages.<sup>35</sup>

While South Australia does not have a Retirement Housing Ombudsman, the Office of the Ageing does provide a mediation service—providing parties with independent advice of their rights and obligations under the *Retirement Villages Act 1987* (SA), or assistance in preparing an application to the South Australian Civil and Administrative Tribunal (SACAT) if required. This service cannot make binding determinations but can assist parties to reach agreement by mutual consent—and SACAT generally suggests that mediation be attempted, before hearing the matter. It should be noted that this service does not cover all retirement housing disputes—and is limited to retirement village matters.

In New Zealand, the Retirement Commissioner (appointed by the Minister of Commerce) has responsibility for the Commission for Financial Capability, and oversees the *Retirement Villages Act 2003* (NZ).

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<sup>31</sup> *Retirement Villages Act 1986* (VIC) Part 6C.

<sup>32</sup> *Retirement Villages Act 1986* (VIC) s41.

<sup>33</sup> Available at: <https://www.consumer.vic.gov.au/housing-and-accommodation/retirement-villages>

<sup>34</sup> Available at: <https://www.seniorsonline.vic.gov.au/>

<sup>35</sup> Available at: <http://www.sa.gov.au/topics/seniors/housing-and-help-at-home/aged-care-and-retirement-housing/retirement-housing-information-for-residents>



The Commission for Financial Capability monitors and reports on the retirement village sector, as well as providing complaints handling and dispute resolution services through the appointment of dispute panels (panel members are appointed by the Retirement Commissioner).

Under section 36 of the *Retirement Villages Act 2003* (NZ), the Retirement Commissioner is required to:

*(a) to monitor the effects of this Act and the regulations and code of practice made under this Act:*

*(b) to advise on issues relating to retirement villages when requested to do so by the Minister or required by this Act:*

*(c) to promote education about retirement village issues and to publish information about such issues:*

*(d) to collect and publish information relating to any of the functions referred to in this section:*

*(e) to perform any other function conferred by this Act or regulations made under this Act.*

In addition,

*(3) Every operator of a retirement village must answer any questions and supply any information relating to the retirement village reasonably requested by the Retirement Commissioner for the performance of the Retirement Commissioner's functions.*

One striking feature of the Commission for Financial Capability is its focus on financial security of retirees.

In regulating an industry which is structured to extract maximum wealth from an asset rich consumer base, the New Zealand Commission for Financial Capability is squarely focused on protecting consumers from exploitation, and actively works to advise consumers of their rights.

In addition to administering the Retirement Village Code of Practice, the Commission for Financial Capability also produces a Code of Residents' Rights handout—which summarises resident's rights under the *Retirement Villages Act 2003* (NZ). Village operators are required to provide a copy of the Code or Residents' Rights to all intending residents, along with their disclosure statement. They must also provide a copy to a resident or intending resident if they ask for one. The Code is also available for download, as a handout or in poster form, from the Commission web-site.<sup>36</sup> A copy of the Code of Residents' Rights is attached to this submission at **Appendix D** for ease of reference.

Consumer Action raises the examples of South Australia and New Zealand to illustrate that consideration of administrative approaches at the time of this review might assist in more durable reforms to support older Victorians. While both the South Australian Office of the Ageing and the New Zealand Commission for Financial Capability have a focus on retirement villages, there is

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<sup>36</sup> Available here: <http://www.cffc.org.nz/retirement/retirement-villages/legislation/code-of-residents-rights/>

no reason they could not be assessed as models on which to base a fit for purpose Victorian agency—to cover all forms of retirement housing.

Given the size of the retirement housing sector, its imminent growth, and the legislative complexity of the area, Consumer Action believes there is merit in examining such an approach.

## **Conclusion**

Retirement housing for older Victorians is currently subject to a framework of overlapping legislation, much of which was not drafted with the needs of retirees in mind. The wide-spread DMF model is open to exploitation and requires regulation. Contracts are often lengthy, unclear, and confusing. Many retirees enter into agreements without professional advice and with a fundamental misunderstanding of their contract, often to their great detriment.

Professional standards for park and village management are low or absent, and financial mismanagement can go unchecked. In the event of a dispute, many residents feel there is no appropriate forum to hear their complaint—it is clear that pursuing matters through VCAT can be lengthy, expensive and stressful. A low level of VCAT listings, therefore, does not necessarily reflect a low level of discontent or consumer detriment.

A holistic approach must be taken to reform the retirement housing sector and provide older Victorians with effective consumer protection. The DMF model must be strictly regulated to prevent exploitation, and legislative reform must be undertaken to clarify residents' rights. Contracts also need to be simpler and clearer—and disclosure documents improved to reduce confusion and the need for cross-checking.

Training and qualification standards should be developed for retirement village and residential park managers, and the New Zealand concept of the 'statutory supervisor' should be adopted to address financial mismanagement.

A Code, or Codes, of Practice should be developed to provide clear and accessible guidance for both residents and operators, and a Retirement Housing Ombudsman should be established to resolve disputes simply, and at no cost to residents.

Finally, a dedicated agency should be established to co-ordinate this work, and provide ongoing monitoring of the sector.

The retirement housing sector will expand substantially in the next five to ten years as baby boomers transition to retirement living. Consumer Action is aware that the matters we encounter represent only a very small proportion of the difficulties faced by Victoria's retirees, and that a large number of complaints and disputes go unreported, and unresolved. The impact of these difficulties can be extreme, and can have a devastating impact on vulnerable Victorians.

To properly serve this growing need, Victoria needs a comprehensive reform approach, and should take the opportunity to establish a regulatory and administrative framework to protect the housing and financial interests of older Victorians both now, and into the future.

Please contact Zac Gillam, Senior Policy Officer on 03 9670 5088 or at [zac@consumeraction.org.au](mailto:zac@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



Gerard Brody  
Chief Executive Officer

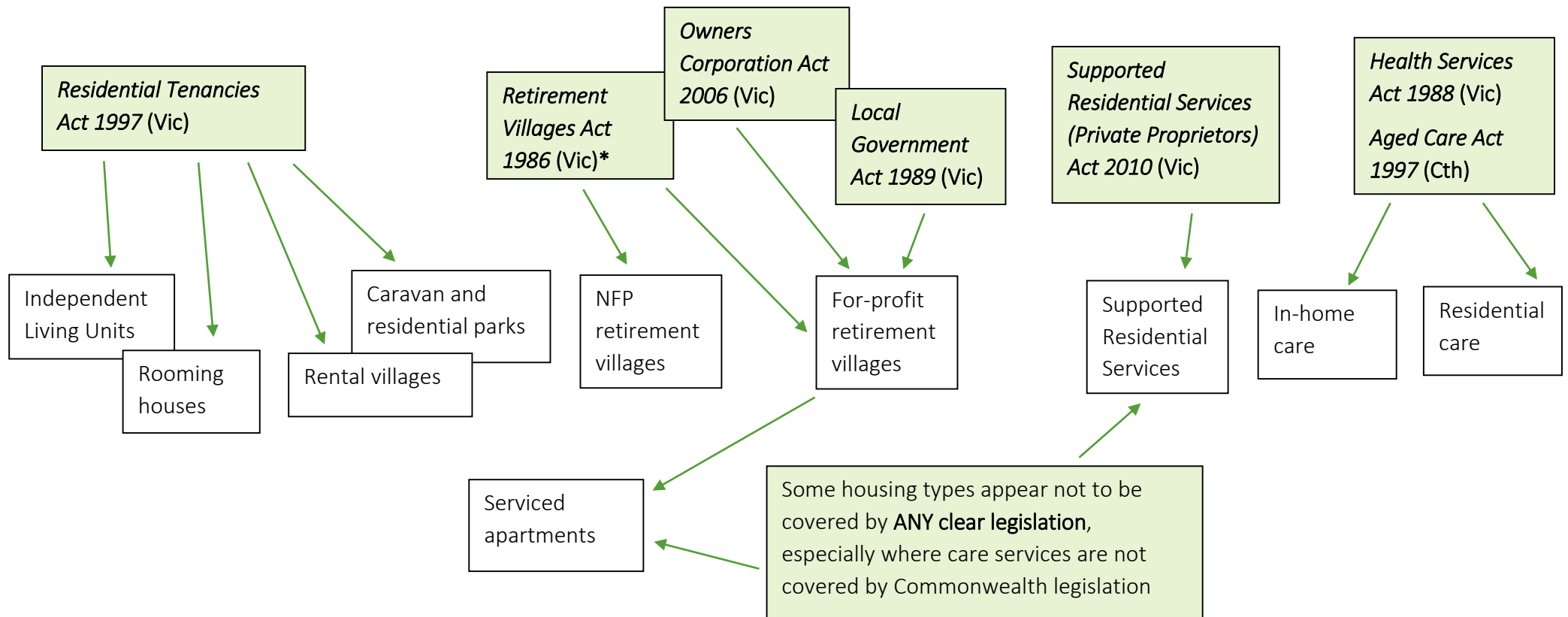
Zac Gillam  
Senior Policy Officer

**Attachments:**

- **Appendix A:** Victorian retirement housing sector – legislative framework diagram.
- **Appendix B:** *Retirement Villages Act 1986* (Vic) – “Traffic light document”.
- **Appendix C:** New Zealand Retirement Villages Code of Practice 2008.
- **Appendix D:** New Zealand Code of Residents’ Rights.

# Retirement Housing Legislation - Victoria

Australian Consumer Law and Fair Trading Act 2012 (Vic) and Competition and Consumer Act 2010 (Cth) Schedule 2



\* Relevant regulations include Retirement Villages (Contractual Arrangements) Regulations 2006, Retirement Villages (Records and Notices) Regulations 2005 and Estate Agents (Retirement Villages) Regulations 2006.

# Australia's Retirement Village Laws

June 2016

A number of other states have undertaken reviews of their retirement housing laws in recent years, with Victoria now noticeably the 'odd one out'. This paper compares the strengths and weaknesses of each states' retirement village laws, and highlights the need for Victoria to commit to significant reform in this sector.

## Scorecard summary

	<b>Victoria</b>	<b>NSW &amp; ACT<sup>1</sup></b>	<b>QLD</b>	<b>Tasmania</b>	<b>NT</b>	<b>WA</b>	<b>SA<sup>2</sup></b>	<b>New Zealand</b>
<i>Exemptions for religious groups and charities</i>	Red	Green	Yellow	Green	Red	Green	Red	Green
<i>Dispute resolution process</i>	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
<i>Eviction process</i>	Red	Green	Red	Yellow	Green	Green	Green	Yellow
<i>Investigation of complaints</i>	Red	Green	Yellow	Yellow	Yellow	Yellow	Yellow	Green
<i>Residence contracts</i>	Yellow	Green	Yellow	Yellow	Yellow	Yellow	Yellow	Green
<i>Closing down a retirement village</i>	Yellow	Green	Yellow	Red	Red	Red	Yellow	Green
<i>Residents' committees</i>	Red	Yellow	Green	Green	Red	Green	Yellow	Yellow
<i>In-going contributions</i>	Yellow	Yellow	Yellow	Yellow	Red	Yellow	Yellow	Yellow
<i>Repair and maintenance</i>	Yellow	Green	Red	Red	Red	Yellow	Red	Green
<i>Village budgets</i>	Red	Green	Yellow	Yellow	Yellow	Green	Yellow	Yellow
<i>Training for retirement village staff</i>	Yellow	Yellow	Yellow	Yellow	Red	Yellow	Yellow	Green
<i>Deferred management fees</i>	Red	Yellow	Green	Red	Red	Yellow	Red	Red
<b>OVERALL SCORE</b>	Red	Green	Yellow	Yellow	Red	Yellow	Yellow	Green

<sup>1</sup> The ACT legislation generally mirrors the NSW legislation. Unless otherwise stated in the tables below, the content of the ACT and NSW provisions are identical.

<sup>2</sup> Legislation is under review; *Retirement Villages Bill 2016* (SA) introduced into the Legislative Council on 25 May 2016

## Exemptions for religious groups and charities

Churches, charities and not-for-profit organisations are usually provided exemptions from the Vic Act. For example, the Uniting Church is not required to (amongst other things) conduct annual meetings, lodge retirement village notices or comply with pre-disclosure requirements. We query whether it is appropriate for not-for-profit operators to be exempted from the Act when some of these operators are charging in-going contributions of \$100,000 or more.

Victoria	Charitable and religious organisations may apply to the Director of CAV seeking an exemption from all or part of the <i>Retirement Villages Act 1986 (Vic)</i> ( <b>Vic Act</b> ). <sup>3</sup>
NSW & ACT	The <i>Retirement Villages Act 1999 (NSW)</i> ( <b>NSW Act</b> ) & <i>Retirement Villages Act 2012 (ACT)</i> ( <b>ACT Act</b> ) do not provide exemptions for not-for-profit retirement village operators or mention them at all. Retirement village contracts can be specifically exempted from the NSW Act and, in general terms, could be exempted under the ACT Act by Regulations. So far, no retirement village contracts have been exempted under the NSW Regulations or the ACT Regulations. <sup>4</sup>
Queensland	Under the <i>Retirement Villages Act 1999 (Qld)</i> ( <b>Qld Act</b> ), the Queensland equivalent of the Director of CAV can exempt a village from the requirement that a statutory charge be placed over village land if the owner is a religious or charitable organisation. <sup>5</sup>
Tasmania	The <i>Retirement Villages Act 2004 (Tas)</i> ( <b>Tas Act</b> ) does not provide exemptions for not-for-profit retirement village operators or mention them at all. Retirement villages can be exempted from the Act by Regulation. So far, no retirement village has been exempted. <sup>6</sup>
NT	The <i>Retirement Villages Act 1995 (NT)</i> ( <b>NT Act</b> ), similar to the Vic Act, confers power on the relevant minister to exempt a retirement village from the NT Act on the conditions the minister thinks fit. <sup>7</sup>
WA	The <i>Retirement Villages Act 1992 (WA)</i> ( <b>WA Act</b> ) only provides an exemption for a retirement village established before the commencement of the WA Act. <sup>8</sup>

<sup>3</sup> s 6(1) of the Vic Act

<sup>4</sup> s 203(4) of the NSW Act; s 264 of the ACT Act (however, the ACT Act is not as specific as the NSW Act)

<sup>5</sup> s 116(5) of the Qld Act

<sup>6</sup> s 44 of the Tas Act

<sup>7</sup> s 5(2) of the NT Act

<sup>8</sup> s 84 and item 3 of Sch 1 to the WA Act

SA	The <i>Retirement Villages Act 1987</i> (SA) ( <b>SA Act</b> ), similar to Victoria, confers power on the relevant minister to exempt a charitable or religious retirement village from the SA Act. <sup>9</sup>
NZ	The <i>Retirement Villages Act 2003</i> (NZ) ( <b>NZ Act</b> ) does not provide for any exemptions for not-for-profit retirement village operators, charitable or religious organisations.

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<sup>9</sup> s 4(2) of the SA Act

## Dispute resolution process

The dispute resolution process for residents in Victoria is often lengthy and complicated, particularly for people without legal training. If residents are unable to resolve their complaint directly with the retirement village manager, they can utilise CAV's conciliation service. However, CAV does not have the power to make binding decisions, and residents seem generally unsatisfied with the process. The next step for residents is to take the matter to VCAT. This is often a costly, legalistic and stressful process. Free or affordable legal advice is almost impossible to obtain, and many residents fear they will be ostracised by other residents or management if they complain. We believe an ombudsman would be the ideal model to resolve disputes.

Victoria	Retirement village managers must have a written dispute resolution procedure. <sup>10</sup> The manager must make residents aware of their rights and the procedure. <sup>11</sup> The manager is required to keep a register of all complaints made and report on this at the annual meeting of residents. <sup>12</sup> The Vic Act does not contain a provision explicitly allowing a resident to apply to VCAT in respect of a resident dispute, save in respect of the sale of premises. <sup>13</sup> That being said, VCAT is available to hear retirement housing disputes as 'consumer and trader' disputes under the <i>Australian Consumer Law and Fair Trading Act 2012</i> (VIC)
NSW & ACT	Parties can apply to the Tribunal for an order, including a residents' committee which can apply on behalf of a single resident or the whole village. Residents and managers can also establish informal dispute resolution processes, but any contract requiring these informal mechanisms to be used is void. <sup>14</sup>
Queensland	The Qld Act has a 3 stage process. Firstly, the parties must attempt to informally resolve the dispute. Secondly, they must attempt to resolve the dispute through mediation. Thirdly, either party may apply to the Tribunal. <sup>15</sup>
Tasmania	The Tasmanian Act relies upon applications to the Tasmanian equivalent to the Director of CAV. The Director has broad conciliation and investigation powers and has the ability to make orders. <sup>16</sup>
NT	The <i>Retirement Villages Regulations 1995</i> (NT) ( <b>NT Regulations</b> ) contain a similar process as in the NSW Act, except that parties apply to a court rather than a Tribunal. The NT Regulations also makes provision for an informal disputes committee, which must hear disputes before either party can apply to a court. <sup>17</sup>

<sup>10</sup> s 38F of the Vic Act

<sup>11</sup> s 38G of the Vic Act

<sup>12</sup> s 38H of the Vic Act

<sup>13</sup> pt 5A of the Vic Act

<sup>14</sup> s 123 and s 125 of the NSW Act; s 176 to s 178 of the ACT Act

<sup>15</sup> s 154 to s 167 of the Qld Act

<sup>16</sup> s 28 to s 33 of the Tas Act

<sup>17</sup> reg s 38 to reg 40 of the NT Regulations



WA	The WA Act provides for a similar process to the ACT Act and NSW Act. The Tribunal can decline to hear the matter if it thinks it could be resolved under the village's dispute resolution processes or by mediation. <sup>18</sup>
SA	Residents can complain to the Tribunal, but the Tribunal can decline to hear the matter if it thinks it could be resolved under the village's dispute resolution processes. The retirement village manager must provide residents with a document setting out its processes for resolving disputes, which must allow the resident to be accompanied by a support person. <sup>19</sup>
NZ	There are two forms of dispute procedure: a complaints facility and dispute resolution. <sup>20</sup> A resident may direct a complaint to a disputes panel by providing a dispute notice. However, a dispute notice can only be issued where the dispute has earlier been referred to the complaints facility and 20 days have elapsed since this referral. The NZ Act sets out the types of disputes for which a resident may give a dispute notice. <sup>21</sup>

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<sup>18</sup> s 42 of the WA Act; reg 30 and reg 31 of the *Fair Trading (Retirement Village Code) Regulations 2015* (WA) (**WA Code**)

<sup>19</sup> s 32 of the SA Act; item 7 of sch 1 to the *Retirement Villages Regulations 2006* (SA) (**SA Regulations**)

<sup>20</sup> s 50 of the NZ Act

<sup>21</sup> s 52 to s 54 of the NZ Act

## Eviction process

The process of eviction is incredibly traumatic for a resident. In our view, there are insufficient protections for residents from eviction in the RV Act, and the process of eviction is unclear. Housing becomes increasingly important as we age, and it is important that residents have security of tenure when moving into a retirement village.

<b>Victoria</b>	If a resident has breached their residence contract, the owner must serve a notice requiring the breach to be remedied within 28 days. If the breach is 'substantial' and the resident does not remedy the breach, the owner can serve a notice requiring them to leave within 60 days. A resident may also be required to leave if the resident requires health care that cannot be provided in the village. <sup>22</sup>
<b>NSW &amp; ACT</b>	The NSW Act is more detailed than the Vic Act. It sets out when a contract is taken to end and how, the process for ending a residence contract and repossessing a residence. An order of the Tribunal is required to terminate a residence contract. However, an order of the Tribunal may not be required in circumstances of abandonment, death or frustration. <sup>23</sup>
<b>Queensland</b>	The Qld Act permits a village operator to terminate the resident's right to reside by providing two months' written notice. Only 14 days' written notice is required if the resident has injured another resident or damages village property. <sup>24</sup>
<b>Tasmania</b>	The Tas Act provides a list of circumstances in which the village operator can terminate the residence contract, including if the resident commits a serious breach of contract or village rules. The notice of termination needs to state the reason for the termination, and the resident's right of review. <sup>25</sup>
<b>NT</b>	The NT Act provides that the right of occupation cannot be terminated unless the resident dies, the resident terminates the contract, the resident abandons the property or the contract is terminated by the court. <sup>26</sup>
<b>WA</b>	Under the WA Act, the right of occupation cannot be terminated unless the resident dies, the resident terminates the contract, the resident abandons the property or the contract is terminated by the governing tribunal on medical grounds or breach of residence contract or rules, or the holder of a mortgage or charge in existence at the commencement date becomes entitled to vacant possession. <sup>27</sup>

<sup>22</sup> s 16 of the Vic Act

<sup>23</sup> s 129 to s 137 of the NSW Act; s 182 to s 192 of the ACT Act

<sup>24</sup> s 53 of the Qld Act

<sup>25</sup> s 8 and s 32 of the Tas Act

<sup>26</sup> s 14 to s 20 of the NT Act

<sup>27</sup> s 17 and s 58 to s 59 of the WA Act

SA	The SA Act sets out how a residence contract can be terminated, subject to the residence contract. <sup>28</sup> For certain types of termination, the decision is only effective once it is confirmed by the Tribunal. If a manager decides to terminate a residence contract, it must provide reasons and information about review rights. <sup>29</sup> A termination notice given to a resident must include certain information. <sup>30</sup>
NZ	The NZ Act states that a disclosure statement must address arrangements for termination of an occupation rights agreement, including the effect of termination. <sup>31</sup> Under the <i>Retirement Villages Code of Practice 2008</i> (NZ) ( <b>NZ Code</b> ), a residence contract may be terminated upon death, where the person can no longer live safely in the unit, material breach of the agreement, abandonment and conduct causing serious damage to the unit or serious harm to people. <sup>32</sup> There are prescriptive notice requirements, including that the decision may be contested before the disputes panel. <sup>33</sup>

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<sup>28</sup> s 31(1) and s 31(2) of the SA Act

<sup>29</sup> s 31(12) of the SA Act

<sup>30</sup> reg 11 of the SA Regulations

<sup>31</sup> s 30(1)(a) and item 3 of sch 2 to the NZ Act; reg 25 of the *Retirement Villages (General) Regulations 2006* (NZ)

<sup>32</sup> s 89 of the NZ Act; item 9 of sch 5 to the NZ Act; s 48 of the NZ Code

<sup>33</sup> s 49 of the NZ Code

## Investigation of complaints

We often hear from residents who have made complaints to Consumer Affairs Victoria, but have failed to have their complaint fully investigated. We have been informed by CAV that retirement villages are not an enforcement priority. Without enforcement, the meagre protections in the current Vic Act are almost worthless. We have provided a summary of the enforcement powers in other states, but ultimately it is up to each regulator to determine whether they will use such powers.

<b>Victoria</b>	The Director of CAV has powers to investigate and commence proceedings against persons who have committed an offence against the Vic Act. <sup>34</sup>
<b>NSW &amp; ACT</b>	The NSW Act allows the Office of Fair Trading to investigate complaints, issue warning notices, conduct proceedings on behalf of residents and intervene in proceedings between other parties. <sup>35</sup> The ACT Act provides for the same processes, but the powers are vested in the director-general and ACAT. <sup>36</sup>
<b>Queensland</b>	The Queensland Act confers upon Fair Trading inspectors the function of investigating and monitoring compliance with the Queensland Act. <sup>37</sup>
<b>Tasmania</b>	Residents can make a complaint to the Tasmanian equivalent of the Director of CAV in relation to contraventions of the Act or a residence contract, or village rules that are unreasonable. The Director can decide whether to investigate the complaint and can make wide variety of orders to resolve the dispute. <sup>38</sup>
<b>NT</b>	The NT Act confers similar powers to those in the NSW Act, but does not provide the power to intervene. <sup>39</sup>
<b>WA</b>	The WA Act confers on the Commissioner similar powers to those in the NSW Act, but does not provide the power to intervene. <sup>40</sup>
<b>SA</b>	The Office for the Ageing is responsible for administering the SA Act. The SA Act appoints a Registrar charged with overseeing the retirement village industry. The powers of the Registrar are directed to overseeing the retirement villages industry as a whole, but it can still investigate complaints. <sup>41</sup>

<sup>34</sup> s 41 of the Vic Act

<sup>35</sup> s 189 to s 192 and s 196A and s 196B of the NSW Act

<sup>36</sup> s 250 to s 256 of the ACT Act

<sup>37</sup> s 3A of the Qld Act

<sup>38</sup> s 31 to s 33 of the Tas Act

<sup>39</sup> s 6 to s 8 of the NT Act

<sup>40</sup> s 8 of the WA Act

<sup>41</sup> s 5 to s 6 of the SA Act

NZ

New Zealand has a regulator with a similar role to the Office of Fair Trading in NSW. However, the NZ Act also requires retirement village managers to appoint a 'statutory supervisor.' The supervisor must hold a licence, and amongst other things, is responsible for monitoring the village's financial position and providing a stakeholder facility for residents who pay deposits or progress payments.<sup>42</sup> Further, the NZ Code sets out the procedure for making and acknowledging complaints and for resolving complaints.<sup>43</sup>

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<sup>42</sup> s 42 of the NZ Act

<sup>43</sup> s 89 of the NZ Act; item 6 of sch 5 to the NZ Act; s 32 to s 36 of the NZ Code

## Residence contracts

We have seen cases where retirement village residents were placed in difficult and confusing situations because their contracts did not contain an appropriate level of detail, or are too complex for residents to understand. Contracts are often drafted by the retirement village management and, as a result, are generally weighted in favour of the manager. While residents' rights need to be clearly set out, this must be balanced against making contracts so long and legalistic that they are impossible to understand. The Vic Act is similar to most other jurisdictions. However, it could be strengthened by deeming inconsistent information provided before entry to the village to be included in the residence contract.

Victoria	The <i>Retirement Village (Contractual Arrangements) Regulations 2006</i> (Vic) ( <b>Vic Regulations</b> ) identify terms that <u>must not</u> be included in contracts, including terms requiring a resident to have a will or to take out an insurance policy. <sup>44</sup> The Vic Regulations also identify terms that <u>must</u> be included in contracts, such as the personal details of the parties. <sup>45</sup> The Vic Regulations provide a prescribed form and layout for the contract. <sup>46</sup> Any term inconsistent with these regulations is void. <sup>47</sup>
NSW & ACT	The NSW Act is substantially similar to the Vic Act in that it prescribes a standard form contract. The standard form contract is not required for strata title villages. If a disclosure statement provided before entering the village conflicts the village contract and is detrimental to the resident, the contract will be read as though it included the information. <sup>48</sup>
Queensland	The Qld Act sets out a number of issues that must be addressed in the contract. If a disclosure statement provided before entering the village conflicts the village contract and is detrimental to the resident, the contract will be read as though it included the information in the statement. <sup>49</sup>
Tasmania	The Tas Act sets out a number of issues that must be addressed in the contract, and contains requirements about the presentation of the contract. <sup>50</sup>
NT	The NT Act sets out a number of issues that must be addressed in the contract. It contains requirements about the presentation of the contract. <sup>51</sup>

<sup>44</sup> Reg 8B of the Vic Regulations

<sup>45</sup> Reg 8C of the Vic Regulations

<sup>46</sup> Reg 8F of the Vic Regulations

<sup>47</sup> Reg 8H of the Vic Regulations

<sup>48</sup> s 42 and s 43 of the NSW Act; reg 15, reg 15A, sch 2 and sch 3 of the *Retirement Villages Regulation 2009* (NSW) (**NSW Regulations**); s 66 to s 69 of the ACT Act; pt 1.1 of sch 1 to the *Retirement Villages Regulation 2013* (ACT) (**ACT Regulations**)

<sup>49</sup> s 36 and s 37 of the Qld Act

<sup>50</sup> s 6 and sch 1 to the Tas Act

<sup>51</sup> s 48 of the NT Act; reg 4 and pt 3 of sch 2 to the NT Regulations

WA	The WA Act is substantially similar to the Vic Act. It also contains requirements about the presentation of the contract. <sup>52</sup>
SA	The SA Act and SA Regulations set out a number of issues that must be addressed in residence contracts. The SA Act and SA Regulations also address requirements about the presentation of the contract. <sup>53</sup>
NZ	The NZ Act sets out an extensive list of topics that must be included in residence contracts. <sup>54</sup> The NZ Act also includes a requirement for prospective residents to receive independent legal advice before signing a residence contract. <sup>55</sup>

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<sup>52</sup> s 13 and s 14A of the WA Act and div 3 of pt 2 of the *Retirement Villages Regulations 1992 (WA)* (**WA Regulations**)

<sup>53</sup> s 17 of the SA Act; reg 5 of the SA Regulations

<sup>54</sup> items 1 and item 2 to sch 3 of the NZ Act; reg 7 of the NZ Regulations

<sup>55</sup> s 27(3) of the NZ Act

## Closing down a retirement village

There are a number of issues that arise when a retirement village closes down. Residents often do not understand their rights and obligations in the process, including whether they are entitled to relocation costs. Some residents also feel incredibly anxious as they wait for information from management about its intentions for the future of the village. Retirement village legislation in other states, most notably NSW and ACT, sets out residents' rights in far greater detail.

<b>Victoria</b>	A retirement village notice can be cancelled if all residents agree to the cancellation, or the Director of CAV approves the cancellation. <sup>56</sup> Residents are able to provide submissions to the Director before a decision is made.
<b>NSW &amp; ACT</b>	The NSW Act provides a process for ending residence contracts where the manager intends to undertake substantial works requiring vacant possession, there are no more residents or there is an administrator appointed. The Tribunal is required to approve applications to undertake works that require vacant possession. <sup>57</sup>
<b>Queensland</b>	The Qld Act makes no provision for ending residence contracts, but does provide a similar process to the Vic Act in terms of cancelling retirement village registrations. <sup>58</sup>
<b>Tasmania</b>	The TasAct does not provide for termination of residence contracts, but allows for cancellation of the retirement village by application the Supreme Court. <sup>59</sup>
<b>NT</b>	The NT Act provides for a similar process to the Qld Act, but it is unclear whether residents have a right to lodge objections. <sup>60</sup>
<b>WA</b>	The WA Act provides for a similar process to the Tas Act. <sup>61</sup>
<b>SA</b>	The SA Act does not provide for termination of residence contracts, but provides for a process for terminating a retirement village scheme. <sup>62</sup> This can occur where all residents of a retirement village agree to the termination. The SA Act has a provision specifically dealing with redevelopment of villages. <sup>63</sup>

<sup>56</sup> s 39 of the Vic Act

<sup>57</sup> s 136 of the NSW Act; s 190 of the ACT Act

<sup>58</sup> s 40 and s 41 of the Qld Act

<sup>59</sup> s 40 of the Tas Act

<sup>60</sup> s 36A of the NT Act

<sup>61</sup> s 22 of the WA Act

<sup>62</sup> s 36 of the SA Act

<sup>63</sup> s 25 of the SA Act



<b>NZ</b>	The NZ Act provides for the cancellation of registration of a retirement village. However, operators are prohibited from cancelling the registration of any retirement village unless all the residents have received independent legal advice about the effects of cancellation and at least 90% of those residents have consented in writing to that cancellation. <sup>64</sup>
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## Residents' committees

In Victoria, the role of residents' committees is not clearly defined. This can not only cause conflict between residents and management, but mean that the committee is used for management rather than resident purposes. The rules around the formation of residents' committees are also unclear. Residents' committees play an important role in ensuring that residents' voices are heard by management, but in order for them to be most effective their operation and role needs to be clarified.

<b>Victoria</b>	Where a retirement village has no owners corporation, the residents may choose to form a residents' committee. Committee members are elected for one year terms but can be re-elected. There is limited guidance about the operation of the committee, leaving the committee largely able to determine its own procedures. Committees can mediate some disputes between residents and call meetings. <sup>65</sup>
<b>NSW &amp; ACT</b>	The NSW Act is similar to the Vic Act, but prohibits residents holding the same office for more than three consecutive years. There is also capacity to prescribe rules. It is an offence for a village manager to discourage the formation of, or obstruct, a residents' committee. The manager must also provide reasonable administrative assistance to the committee upon request. <sup>66</sup>
<b>Queensland</b>	The Qld Act is similar to NSW Act, except that it makes specific provision for the committee to invite the manager to attend a meeting and require the manager to attend to answer questions about the budget. It also requires minutes of meetings to be kept and made available to residents. <sup>67</sup>
<b>Tasmania</b>	The Tas Act is similar to the Qld Act, except there must be a minimum of three members on a committee. <sup>68</sup>
<b>NT</b>	The NT Act has no provision dealing with residents' committees, but does require management to create appropriate structures to facilitate resident input into the operation of the village. <sup>69</sup>
<b>WA</b>	The WA Act is similar to Qld Act, except there are additional rules around electing committee members. <sup>70</sup>

<sup>64</sup> s 19 of the NZ Act

<sup>65</sup> s 36 of the Vic Act

<sup>66</sup> s 70, s 70A and s 71 of the NSW Act; s 103 to s 107 of the ACT Act

<sup>67</sup> s 127, s 129 and s 129B of the Qld Act

<sup>68</sup> s 14 and s 16 of the Tas Act

<sup>69</sup> s 48 of the NT Act; reg 4 and pt 5 of sch 2 to the NT Regulations

<sup>70</sup> reg 24 of the WA Code

SA	The SA Act allows for the formation of residents' committees that may request meetings with the retirement village manager. There is no obligation to keep minutes. <sup>71</sup> The retirement village manager must undertake reasonable consultation with a residents' committee. <sup>72</sup>
NZ	The NZ Code provides residents with the right to form a residents' committee and agree their own rules for the running of the committee. Operators and statutory supervisors are expected to attend a meeting called by the residents' committee unless the request is unreasonable. Where there is no residents' committee, operators and statutory supervisors are expected to meet with residents at their request, unless the request is unreasonable. <sup>73</sup> The responsibilities of operators and statutory supervisors who attend a residents' committee meeting are unclear.

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<sup>71</sup> s 30 of the Act

<sup>72</sup> item 5 of sch 1 to the SA Regulations

<sup>73</sup> Retirement Villages (General) Regulations 2006 (NZ) r 10.

## In-going contributions

The complexity of retirement village pricing structures have been well documented. The in-going contribution and deferred management fee model appears to be unique to the retirement housing market, and is difficult for many prospective residents to understand. It is also unclear how in-going contributions are spent, and what protections there are for residents to ensure they will actually be paid their exit entitlements. While we acknowledge the policy difficulties in mandating how in-going contributions should be spent, in our view additional financial management requirements should be put in place.

Victoria	The Vic Act does not place restrictions on the uses to which in-going contributions can be put. However, there are obligations to hold in-going contributions in trust for a certain period. There is also a process for refunding of in-going contributions. <sup>74</sup>
NSW & ACT	The NSW Act is broadly equivalent to the Vic Act, but also provides a mechanism for determining the amount of interest payable on an in-going contribution. <sup>75</sup>
Queensland	The Qld Act is broadly equivalent to the Vic Act. <sup>76</sup>
Tasmania	The Tas Act is broadly equivalent to the Vic Act. <sup>77</sup>
NT	The NT Act has a process for refunding in-going contributions, but does not have an obligation to hold the contributions in trust for any period of time. <sup>78</sup>
WA	The WA Act is broadly equivalent to the Vic Act. <sup>79</sup>
SA	The SA Act is broadly equivalent to the Vic Act. <sup>80</sup>
NZ	Although in-going contributions are not specifically mentioned, the NZ Act states that every deposit or payment made by a resident for an occupation right or future occupation right must be held "for the resident's benefit in an interest-bearing account". If an occupation right agreement is cancelled, the resident is entitled to a refund of the deposit and all progress payments. <sup>81</sup>

<sup>74</sup> s 25 and 26 of the Vic Act

<sup>75</sup> s 22, s 23 and s 43(8) of the NSW Act; reg 28 of the NSW Regulations; s 11, s 39 and s 40 of the ACT Act; s 1.4 of pt 1.2 of sch 2 to the ACT Regulations

<sup>76</sup> s 46 of the Qld Act

<sup>77</sup> s 9 to s 10 of the Tas Act

<sup>78</sup> s 12 of the NT Act

<sup>79</sup> s 18 and s 19 of the WA Act

<sup>80</sup> s 18 and s 19 of the SA Act

<sup>81</sup> s 29 of the NZ Act



## Repair and maintenance

We often receive complaints about management failing to properly maintain and repair property. There is also sometimes confusion over which repairs residents are responsible for, and what the monthly service fees actually pay for. We recommend providing a minimum standard for maintenance and repair (similar to residential tenancies legislation), that also confers on residents a right to undertake urgent repairs.

Victoria	The Vic Act does not specify any minimum repair or service level, but the responsibilities of the manager and the resident must be set out in the residence contract. <sup>82</sup>
NSW & ACT	The NSW Act obliges retirement village managers to repair or replace items they are responsible for within a reasonable time, and residents have the right to undertake urgent work and recover the reasonable costs. <sup>83</sup>
Queensland	The Qld Act has no provisions clearly outlining how or what repair and maintenance work should be undertaken by the retirement village manager.
Tasmania	The Tas Act has no provisions clearly outlining how or what repair and maintenance work should be undertaken by the retirement village manager.
NT	The NT Act has no provisions clearly outlining how or what repair and maintenance work should be undertaken by the retirement village manager. Such information must, however, be disclosed by management. <sup>84</sup>
WA	The WA Act takes a similar approach to the Vic Act. <sup>85</sup>
SA	The SA Act has no provisions clearly outlining how or what repair and maintenance work should be undertaken by the retirement village manager. However, where a person enters into a residence contract, the person must be provided an accompanying premises condition report that details who is responsible for repairing and replacing items and how the cost of repairs is to be funded. <sup>86</sup>
NZ	The NZ Act prescribes that the disclosure statements must contain provisions relating to maintenance and maintenance rates. <sup>87</sup> Under the <i>Retirement Villages (General) Regulations 2006 (NZ) (NZ Regulations)</i> , a residence contract must set out the repair and maintenance responsibilities imposed on the operator and on the resident. <sup>88</sup> An operator must maintain all

<sup>82</sup> Reg 8C(2)(b)(iv) of the Vic Regulations

<sup>83</sup> s 92 to s 95 of the NSW Act; s 135 to s 144 of the ACT Act

<sup>84</sup> s 48 of the NT Act; reg 4, item 19(1)(h) of pt 3 of sch 2 to the NT Regulations and sch A to sch 2 to the NT Regulations

<sup>85</sup> reg 7G of the WA Regulations

<sup>86</sup> s 17(3) of the SA Act; item 2 of sch 1 to the SA Regulations

<sup>87</sup> item 2(d) of sch 2 of the NZ Act

<sup>88</sup> reg 21 of the NZ Regulations

the retirement village in "clean and safe working order" and ensure all buildings comply with relevant legislation. The operator must ensure resident requests for repairs and maintenance are "actioned without unnecessary delay", and periodically review maintenance agreements. Residents should also be consulted about changes to any charges they are required to pay. The operator must ensure it can afford to maintain the retirement village and, if contributions are required from residents, those funds must be held in a designated bank account.<sup>89</sup>

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<sup>89</sup> item 2(d) of sch 2 of the NZ Act; s 40 to s 45 of the NZ Code

## Village budgets

We often receive complaints from residents concerned that maintenance charges are too high relative to the standard of maintenance they observe in the retirement village. Residents are sometimes concerned by the lack of financial accountability of management, and the lack of detail in financial statements presented to residents.

<b>Victoria</b>	The Vic Act requires the retirement village manager to prepare and present a financial statement at the annual meeting. <sup>90</sup> This statement must be audited unless residents agree otherwise. Increases to maintenance charges are restricted to annual CPI increases, with some exceptions. <sup>91</sup>
<b>NSW &amp; ACT</b>	The NSW Act is similar to the Vic Act, but also provides that managers must provide a village specific budget and must seek the consent of residents to the proposed village budget. If residents do not consent, the manager or a resident can apply to the Tribunal. <sup>92</sup>
<b>Queensland</b>	The Qld Act requires the retirement village to prepare three different budgets. The residents' committee can require the manager to provide it with a copy of a draft budget and attend a meeting about budgets, but it does not include a specific provision entitling residents to challenge the budget. The manager must also prepare audited financial statements. <sup>93</sup>
<b>Tasmania</b>	The Tas Act requires the operator of a retirement village to ensure that accounts are audited annually. <sup>94</sup>
<b>NT</b>	The NT Act requires the village manager to give residents an opportunity to provide input on the village budget and agree to the budget. The manager is also required to provide residents with a copy of the previous year's budget and audited accounts. <sup>95</sup>
<b>WA</b>	The WA Act is similar to SA Act, but also sets out the categories of information that must be included in a village budget. <sup>96</sup>
<b>SA</b>	The SA Act requires the retirement village manager to consult with residents about the proposed budget and to provide audited income statements and balance sheets. Residents can ask questions about the budget, but there is no specific mechanism to challenge it. <sup>97</sup>

<sup>90</sup> s 34(3) of the Vic Act

<sup>91</sup> Reg 8A of the Vic Regulations

<sup>92</sup> s 112 to s 117 of the NSW Act; s 158 to s 167 of the ACT Act

<sup>93</sup> s 92 to s 113 of the Qld Act

<sup>94</sup> s 15 of the Tas Act

<sup>95</sup> s 48 of the NT Act; reg 4 and pt 5 of sch 2 to the NT Regulations

<sup>96</sup> reg 17 to reg 20 of the WA Code

<sup>97</sup> s 22(6) of the SA Act

NZ	The disclosure statement provided to residents must contain details relating to charges for the preparation, auditing and disclosure of financial accounts for the retirement village. <sup>98</sup> Under the NZ Code, the operator must invoice residents in certain circumstances and provide a detailed breakdown of invoiced charges. <sup>99</sup> In addition, the operator must ensure financial statements are audited. <sup>100</sup>
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<sup>98</sup> item 2(e) of sch 2 to the NZ Act

<sup>99</sup> item 7 of sch 5 of the NZ Act; s 37 to s 39 of the NZ Code

<sup>100</sup> s 35D of the NZ Act



## Training for retirement village staff

Residents have raised concerns about the lack of training of some retirement village staff, particularly retirement village management. Unfortunately, no state in Australia imposes any training requirements on retirement village staff. This is very concerning, given the potential vulnerability of residents in their care. However, all states (except the Northern Territory) restrict certain people from being involved in retirement village management.

Victoria	The Vic Act does not impose any training requirements, but limits who can be a retirement village manager. <sup>101</sup>
NSW & ACT	The NSW Act and ACT Acts are similar to the Vic Act. <sup>102</sup>
Queensland	The Qld Act is similar to the Vic Act. <sup>103</sup>
Tasmania	The Tas Act is similar to the Vic Act. <sup>104</sup>
NT	The NT Act does not have any restrictions on who can be a village manager.
WA	The WA Act is similar to the Vic Act. <sup>105</sup>
SA	The SA Act is similar to the Vic Act. <sup>106</sup>
NZ	The NZ Code has a range of requirements with respect to staff at retirement villages. The village manager must develop and implement written procedures for staff selection, training and supervision. Staff must also carry identification and be appropriately qualified and experienced for the position that they hold. The village manager must also provide appropriate supervision to ensure staff competence. <sup>107</sup>

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<sup>101</sup> s 17 of the Vic Act

<sup>102</sup> s 57 of the NSW Act; s 89 of the ACT Act

<sup>103</sup> s 88 of the Qld Act

<sup>104</sup> s 41 of the Tas Act

<sup>105</sup> s 76 of the WA Act

<sup>106</sup> s 37 of the SA Act

<sup>107</sup> item 1 of sch 5 of the NZ Act; s 12 to s 15 of the NZ Code

## Deferred management fees

Deferred management fees, also referred to as "exit fees" or "departure fees", may be payable when a resident ceases to reside in a retirement village.

<b>Victoria</b>	All fees payable by the resident to the owner on permanent departure from their premises must be set out in the residence contract. <sup>108</sup> No specific reference to deferred management fees.
<b>NSW &amp; ACT</b>	Any "departure fees" must be calculated daily, <sup>109</sup> but cannot be calculated by reference to any period after the former occupant permanently vacates the residential premises concerned. <sup>110</sup> A departure fee may be paid from a former occupant's ingoing contribution or the proceeds from selling a residential premises where the former occupant is a registered interest holder. <sup>111</sup> Information about any applicable "departure fees", including how they are calculated, must be included in the disclosure statement provided to occupants before they enter into a "village contract". <sup>112</sup>  The ACT Act and ACT Regulations broadly mimic the NSW Act and NSW Regulations. <sup>113</sup>
<b>Queensland</b>	Under the Qld Act, an "exit fees" may be payable when a resident ceases to reside in the accommodation. <sup>114</sup> A "resident contract" must include details about an "exit fee". <sup>115</sup> The operator must provide the balance of any "exit fee" payable by a resident upon request and the method of its calculation must be made available in a public information document. <sup>116</sup> The "exit fee" must be calculated on a daily basis unless an exception applies. <sup>117</sup>
<b>Tasmania</b>	Similar to the Vic Act, while not specifically mentioning deferred management fees, all residence contracts are required to specify " the various fees and charges payable by the resident, distinguishing between recurrent charges and other fees" and "each fee or charge is payable and the amount of the fee or charge, or its method of calculation ". <sup>118</sup>

<sup>108</sup> Reg 8C(1)(xii) of the Vic Regulations

<sup>109</sup> s 156(3) of the NSW Act

<sup>110</sup> s 158(2) of the NSW Act; subject to limited exceptions relating to contracts entered into before commencement of the section (see, s 159 and s 160 of the NSW Act)

<sup>111</sup> s 157 of the NSW Act

<sup>112</sup> see, generally, sch 1 of the NSW Regulations

<sup>113</sup> div 10.3 of pt 10 of the ACT Act and s 503ZG to s 503ZL of the ACT Act. See also, item 1.16 of sch 1 of Part 1.2 of the ACT Regulations which require all "village contracts" to include clauses relating to departure fees, including whether it is payable and how it is calculated.

<sup>114</sup> s 15 of the Qld Act

<sup>115</sup> s 45(1)(e) of the Qld Act

<sup>116</sup> s 54 and s 74 to s 76 of the Qld Act

<sup>117</sup> s 53A of the Qld Act; subject to limited exceptions relating to contracts entered into before commencement of the section

<sup>118</sup> s 6 and sch 1 to the Tas Act

NT	Where a deferred fee is payable, the residence contract must clearly set out the fee and the basis for its determination. <sup>119</sup>
WA	The WA Regulations requires all residence contracts contain details about an “exit fee”, including the method of calculation, its purpose and when and how it is payable. <sup>120</sup> An exit fee must be calculated on a pro-rata daily basis. <sup>121</sup>
SA	Residence contracts must contain details of "recurrent charges (if any) that will continue to be payable if the resident is absent of leaves the retirement village". <sup>122</sup>
NZ	Details of any deferred management fees must be set out in a disclosure statement. <sup>123</sup>

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<sup>119</sup> s 48 of the NT Act; reg 4, item 26 of pt 3 of sch 2 to the NT Regulations

<sup>120</sup> item 2 of reg 7F of WA Regulations

<sup>121</sup> reg 7K(3) of the WA Regulations

<sup>122</sup> s 17 of the SA Act; reg 5(j)(iii)(E) of the SA Regulations

<sup>123</sup> item 9(c) of sch 5 to the NZ Act and item 3(c)(ii) of Sch 3 to the NZ Act; s 54 of the NZ Code



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HIKINA WHAKATUTUKI



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# Retirement Villages Code of Practice 2008

**Variations included October 2013**

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## Approval and review

### The Retirement Villages Code of Practice 2008, Variations

Having given notice under section 89(6) of the Retirement Villages Act 2003 (the Act) of my approval to variations to the Code of Practice, and having satisfied the other requirements of section 89 of the Act, the Retirement Villages Code of Practice 2008 (Variations 2013) is issued by me on 8 September 2012.

Minister for Building and Construction

Copies of this Revised Code of Practice may be obtained from the Ministry of Business, Innovation and Employment's website: [www.dbh.govt.nz/retirement-villages](http://www.dbh.govt.nz/retirement-villages).

### Review

This Code of Practice is administered by the Ministry of Business, Innovation and Employment.

The Minister for Building and Construction has given notice of variations to the Retirement Villages Code of Practice 2008. The variations to clauses 22, 47 and 54 replace the current Code of Practice clauses 22, 47 and 54 and **come into force on 14 October 2013**.

The Code of Practice will be revised as required. Suggestions for improvement of the Code of Practice are welcome and should be sent to:

General Manager, Construction & Housing Markets

Ministry of Business, Innovation and Employment

PO Box 5488

Wellington 6011

[www.dbh.govt.nz](http://www.dbh.govt.nz)



## **Part 1: The Retirement Villages Code of Practice**





# Introduction

## 1 References and interpretations in the Code of Practice

- 1 This Code of Practice should be read in conjunction with the following Acts and regulations:
  - Retirement Villages Act 2003 and associated regulations
  - Interpretation Act 1999
  - Building Act 2004 and Building Code
  - Fire Safety and Evacuation of Buildings Regulations 2006
  - Code of Health and Disability Services Consumers' Rights 1996
  - Protection of Personal and Property Rights Amendment Act 2007
  - any other applicable Acts.

If any of these Acts or regulations is superseded the Code of Practice remains in force but operators may need to adapt their business models to meet any new requirements.

- 2 The references in *italics* at the end of some sentences are to the relevant section and subsection(s) of the Retirement Villages Act 2003. Any other Acts of Parliament referred to in this Code of Practice are given their full title.
- 3 In this Code of Practice all references to a resident include the representative of the resident. *Right 6, Code of Residents' Rights*
- 4 Any note following the heading of a section is for guidance and is not legally binding.

## 2 Definitions

Please refer to the Act for definitions of other terms if not included in the definitions. *Sections 5, 6 and 48*

**Act** means the Retirement Villages Act 2003.

**Code of Practice** means this Code of Practice under section 89 of the Act, including any variations made to the Code of Practice in accordance with the Act.

**Consult/consultation** means to invite parties to comment and provide advice on a given matter, so that the comment or advice can be taken into account when making a decision.

**Disability/disabilities**, as defined in section 21(1)(h) of the Human Rights Act 1993, means:

- i physical disability or impairment

- ii physical illness
- iii psychiatric illness
- iv intellectual or psychological disability or impairment
- v any other loss or abnormality of psychological, physiological or anatomical structure or function
- vi reliance on a guide dog, wheelchair or other remedial means
- vii the presence in the body of organisms capable of causing illness.

**Disputes panel** means a disputes panel appointed in accordance with section 59 of the Act.

**Enduring Powers of Attorney** means the mechanism under the protection of Personal and Property Rights Act 1988 by which an individual (known as the 'donor') appoints a person or persons (known as 'the attorney' or 'attorneys') to administer the donor's financial affairs or act in relation to the donor's personal care and welfare when the donor is mentally incapable of acting, and ceases on a resident's death.

**Fair wear and tear** is something that occurs through normal use or is the normal change that takes place with the ageing of the property, and may include but is not limited to any chattels provided by the operator such as curtains and carpets, fixtures, and fittings.

**Fixed deduction** means any payment that may be payable by a resident to an operator in terms of that resident's occupation right agreement if the:

- a amount or method of calculation of the payment is fixed and known at the start of the resident's occupation right agreement
- b payment is made to or to be made by the resident to the operator at the start of or on termination of the occupation right agreement
- c payment amortises or accrues to the operator over a specified period of time against the resident's capital sum or former resident's capital repayment.


**Former resident** means a person:

- a who was a resident, or a representative of that former resident, of a retirement village
- b whose occupation right agreement has since terminated.

**Interconnected smoke detection system** means a system of smoke alarms connected in such a way that when one alarm sounds, they all sound.

**Intending resident** means a person

- a who has within the last 3 months,—
  - i indicated to an operator of a retirement village or the operator's agent that he or she is interested in becoming a resident of the retirement village; or
  - ii had discussions with the operator or the operator's agent about entering into an occupation right agreement; and
- b in respect of whom the operator or the operator's agent has a current address, or sufficient other contact details to enable the operator to send notices to that person.



**Interpreter** means a person who offers translation services, but does not constitute a support person or representative.

**Maintenance agreement** means a contract between the operator and a service provider for the delivery of specified maintenance services.

**Occupation right agreement** means any written agreement or other document or combination of documents that—

- a confers on any person the right to occupy a residential unit within a retirement village; and
- b specifies any terms or conditions to which that right is subject.

**Operator** means any person who is one or more of the following:

- a a person who is, or will be, liable to fulfil all or any of the obligations under occupation right agreements to residents of the village
- b a holder of a security interest who is exercising effective management or control of the retirement village
- c a receiver of the property comprising the retirement village, or the liquidator of the person to whom either paragraph a or b applies.

**Outgoings** include costs relating to the operation, management, supervision, and maintenance of the retirement village as a whole that will be recovered from residents as a group under the occupation right agreement, but do not include costs of providing personal services to a resident.


**Personal services** means services provided to a resident on an individual basis at that resident's request, for example, meals, laundry, nursing care, and cleaning. Personal services do not include services provided by the operator to residents as a group; those costs are charged by the operator as an outgoing.

**Refurbishment** means to restore a residential unit to no more than the condition it was in when the resident entered it, less fair wear and tear.

**Resident** means any of the following

- a a person who enters into an occupation right agreement with the operator of a retirement village
- b a person who under an occupation right agreement is, for the time being, entitled to occupy a residential unit within a retirement village, whether or not the agreement is made with that person or some other person
- c if the occupation right agreement so provides or with the consent of the operator of the retirement village, the spouse, civil union partner, or de facto partner of the person referred to in paragraph b who is occupying the residential unit with that person, or after that person's death or departure from the retirement village.

**Representative** means a person:

- 
- a acting in the place of and for a resident under a power of attorney or an enduring power of attorney that has not been revoked or suspended under the Protection of Personal and Property Rights Amendment Act 2007, or
  - b who is a welfare guardian or manager appointed for a resident under the Protection of Personal and Property Rights Act 1988, or
  - c the resident has nominated, but who is not a member of staff or the operator of the retirement village.

**Retirement village property** is buildings, plant, and equipment that are owned by retirement village operators (including assets, amenities and utilities within the retirement village boundary).

**Rules** mean the rules governing the day-to-day management and operation of the retirement village which the operator and residents must comply with. The rules include without limitation body corporate rules, rules in leases and licences to occupy, and organisational rules.

**Specified system**, as defined section 7 of the Building Act 2004:

- a means a system or feature that -
  - i is contained in a building; and
  - ii contributes to the proper functioning of the building (for example, an automatic sprinkler system); and
  - iii is declared by the Governor-General, by Order in Council, to be a specified system for the purposes of [the Building Act 2004]; and
- b includes a cable car.

**Staff** means all people paid or unpaid by an operator to perform routine or regular services at the retirement village including managers, employees, and contracted workers.

**Termination date** is the later of the end of the notice period specified in the occupation right agreement, or the date the resident stops living in the residential unit and removes all their possessions.

**Weekly service fee** is the weekly fee payable by the resident to the operator for services and facilities provided by the operator, and is an apportionment of the village operating costs as detailed in the occupation right agreement.

**Working day**, as defined in section 29 of the Interpretation Act 1999, means a day of the week other than -

- a a Saturday, a Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, and Labour Day; and
- b a day in the period commencing with 25 December in a year and ending with 2 January in the following year; and
- c if 1 January falls on a Friday, the following Monday; and
- d if 1 January falls on a Saturday or a Sunday, the following Monday and Tuesday.

### 3 Title and start of the Code of Practice

- 1 This Code of Practice is called the Retirement Villages Code of Practice 2008 (the Code of Practice).
- 2 The Code of Practice is issued under the Retirement Villages Act 2003 (the Act). *Section 89(4)*
- 3 The Code of Practice comes into force on 2 October 2009. *Section 90(1)(a)(i)*
- 4 The Code of Practice may be changed from time to time. Any changes to the Code of Practice must be approved by the Minister for Building and Construction. *Section 90(4)*.

### 4 Purpose of the Code of Practice

- 1 This Code of Practice is written for people who own, manage, oversee, or live (or intend to live) in retirement villages, in particular:
  - a the operator
  - b residents and intending residents (and their representatives)
  - c statutory supervisors.
- 2 The purpose of this Code of Practice is to set out the minimum requirements that operators of retirement villages must carry out, or make sure are carried out, to meet their legal obligations under the Retirement Villages Act 2003.

### 5 Layout of the Code of Practice

- 1 The Code of Practice is laid out in four parts.
  - a **Part 1** covers general information about the Code of Practice, including its legal status.
  - b **Part 2** covers general requirements for policies, procedures, notices, and induction processes referred to in each of the topics in Part 3.
  - c **Part 3** covers the minimum requirements to be given effect to in any occupation right agreement in relation to the following topics, as set out in *Schedule 5 of the Act*.
    - Staffing of retirement village.
    - Safety and personal security of residents.
    - Fire protection and emergency management.

- Transfer of residents within a village.
  - Meetings of residents with operator and resident involvement.
  - Complaints facility.
  - Accounts.
  - Maintenance and upgrading.
  - Termination of occupation right agreement by operator or resident.
  - Communication.
- d **Part 4** sets out information that operators or residents and intending residents might find useful in relation to the Code of Practice. This information includes:
- extracts from the Retirement Villages Act 2003
  - contact details for the Retirement Commissioner and the Registrar of Retirement Villages
  - a page where the operator or resident can write the contact details of the operator's contact person, and the statutory supervisor (if there is one).

## 6 Legal status of the Code of Practice

- 1 This Code of Practice is a legal document. Every operator of a retirement village must meet the requirements set out in the Code of Practice. *Section 92(2)(a)(i)*
- 2 The Code of Practice is enforceable as a contract by a resident and prevails over any less favourable provision in the resident's occupation right agreement. *Section 92(2)(b)*
- 3 The Code of Practice must be given effect to in any occupation right agreement offered to a resident. *Section 92(2)(c)*
- 4 The operator must make a copy of the Code of Practice available to every resident and intending resident on request. *Section 92(4)*
- 5 An operator may be exempted from meeting the requirements of any provision of this Code of Practice, if an exemption has been granted by the Registrar. *Sections 93(1)-(3)*
- 6 A resident can give a dispute notice for a breach of the Code of Practice. *Section 53(1)(d) and 53(3)*
- 7 The Retirement Commissioner monitors the effects of the Code of Practice. *Section 36(1)(a).*



## 7 Disclosure statement, the Code of Practice, and other documents

- 1 The operator must provide every intending resident with a copy of the Code of Practice along with the disclosure statement, occupation right agreement, and Code of Residents' Rights before the intending resident enters into an occupation right agreement. If the Code of Practice is not yet in force the operator must state in writing when it comes into force. *Section 30(1)(c)*.
- 2 A disclosure statement must include the following:
  - a all prescribed details of any exemption from the requirement to comply with any provision of the Code of Practice. *Clause 4(b) in Schedule 2*
  - b matters required by the Code of Practice to be included. *Clause 4(c) in Schedule 2*
  - c the management arrangements for the retirement village. *Clause 1(c) in Schedule 2*.
- 3 Under the Retirement Villages (General) Regulations 2006, the operator must also inform residents and intending residents that copies of the following documents must be made available.
  - a village rules (if such rules exist). *Retirement Villages (General) Regulations 2006 37(4)(a)*
  - b management agreement between the operator and manager of the village (if such an agreement exists). *Retirement Villages (General) Regulations 2006 37(4)(b)*
  - c deed of supervision (if the village has a statutory supervisor). *Retirement Villages (General) Regulations 2006 37(4)(c)*



## **Part 2: General requirements**





# Policies and procedures, notices, and induction requirements

## 8 Policies and procedures

### Written policies and procedures

- 1 The operator must have, maintain, and implement written policies and procedures for each of the 10 topics in Part 3 of this Code of Practice. The policies and procedures must:
  - a meet all relevant legal requirements and the requirements of this Code of Practice
  - b be written in a way that residents can understand
  - c be kept at the retirement village or in a location that is accessible to residents.

### Disclosure of policies and procedures to residents

- 2 The operator must:
  - a inform residents and intending residents about the policies and procedures
  - b inform residents and intending residents about how the operator meets the requirements of the Code of Practice
  - c give residents and intending residents a copy of the policies and procedures, on request.

### Review and alteration of policies and procedures

- 3 The operator must regularly monitor and review policies and procedures to make sure they are still effective and appropriate.
- 4 The operator must consult all residents in writing before changing any policies, procedures, and systems in a way that will, or may, have a material impact on residents' occupancy or their ability to pay for services and facilities in the retirement village. *Section 34(1); Right 3, Code of Residents' Rights*

## 9 Induction in this Code of Practice

- 1 The operator must have, maintain, and implement an induction process to inform residents about this Code of Practice. See clause 12.3 for staff induction requirements.



## 10 Notices to residents

- 1 The operator must meet the requirements of the Act if giving any notice to a resident. *Section 106*
- 2 If the operator has to give a notice to a resident in accordance with this Code of Practice, the notice must be in writing. If the resident has a representative then the notice must be sent to the representative.

## 11 Operator's access to a resident's residential unit

- 1 An operator must inform residents about the circumstances under which the operator has the right to enter a resident's residential unit and the amount of notice which the resident will receive in each case. Circumstances may include:
  - a emergencies
  - b installing, checking and maintaining smoke alarms or specified systems
  - c carrying out minor repairs and maintenance
  - d refurbishing or upgrading the residential unit.
- 2 Notice may be waived in cases of emergencies. However, in all other cases the notice period must be reasonable and take into account the:
  - a amount of time that the operator will require access to the unit, and
  - b level of disruption to the resident's use of the unit during that access.
- 3 During this process residents have the right to be treated with courtesy and have their rights respected. *Right 7, Code of Residents' Rights*



## **Part 3: Minimum requirements to be included in any occupation right agreement**





## Staffing of retirement village

### 12 Staffing policies, processes, and procedures

- 1 If a retirement village has staff, whether paid or unpaid, the operator must have, maintain, and implement written policies, processes, and procedures for staff selection, training, and ongoing supervision.
- 2 The operator's staffing policy and procedures must set out the:
  - a appropriate qualifications needed for staff employed for specific positions
  - b appointment process for staff without appropriate qualifications, if the potential staff member can demonstrate appropriate work experience
  - c appointment process for staff without appropriate qualifications and experience, if the potential staff member demonstrates a willingness to undertake the appropriate training and is willing to be supervised as required
  - d requirement for a recognised first aid qualification for particular staffing positions.
- 3 The operator must have an induction process to familiarise staff with this Code of Practice, their own staff codes of conduct, and any management practices and what it covers. All staff must complete this process.

### 13 Information about staff

- 1 All staff will carry identification while on duty so residents can check their identity. The operator must inform residents and intending residents about staff employed at the retirement village, including:
  - a roles
  - b relevant qualifications (for example, first aid, nursing) and experience
  - c specific qualifications or training relating to residents with particular needs (for example, strokes, dementia-related conditions)
  - d skills in communicating with residents with limited ability to communicate (for example, sign language, speech therapy)
  - e skills in communicating with residents who speak languages other than English

- f if staff are on site and, if so, when they are at the retirement village.

## **14 Staff qualifications and experience**

- 1 Staff should be appropriately qualified and experienced for their role and the responsibilities to be carried out. The operator must:
  - a use an appropriate process to select staff
  - b take reasonable steps to make sure that a new staff member is suitable for the position at the retirement village
  - c check a prospective staff member's references and past employment.

## **15 Staff supervision and ongoing training**

- 1 The operator must provide ongoing training and ongoing supervision to make sure staff competence is achieved and maintained.
- 2 If a staff member does not meet the requirements for the role they are employed in, they may still be employed by the operator. However, the staff member must:
  - a be supervised by a suitably qualified and experienced staff member
  - b take part in training to meet the requirements for the role.



## Safety and personal security of residents

### 16 Safety and personal security policy

- 1 The operator must have, maintain, and implement a written policy that:
  - a sets out how their own staff codes of conduct, and any management practices for the village and the physical environment (the grounds, facilities, common areas and residential units) help maintain and enhance all residents' safety and security. [See the examples below].
  - b requires lighting in the retirement village that is appropriate to the size, location, and layout of the retirement village including its grounds, facilities, common areas, and residential units
  - c requires heating capabilities in all habitable spaces as required by the Building Code at the time of construction or alteration of those spaces.
- 2 The operator must provide a written copy of the safety and personal security policy to residents and intending residents on request.

#### **Examples of safety measures (not all of the examples listed below are provided in each retirement village)**

Examples of safety measures include: gradients and surfaces; door and access widths; stairs, lifts and railings; communication aids to make the everyday environment more manageable; heights and location of work surfaces, appliances, cupboards, light switches, power points, telephones and call points.

#### **Examples of codes of behaviour**

Examples of codes of behaviour include: codes to protect against bullying, harassment, unfair discrimination, victimisation, exploitation and breaches of personal privacy; codes and guidance issued under the Human Rights Act 1993 and the Privacy Act 1993.

#### **Examples of personal security measures**

Examples of security measures include: fencing, security patrols, lighting, alarms, locks, and door and window fittings.

#### **Examples of management practices**

Examples of management practices include: plans, policies and procedures; staffing ratios, qualifications and training; systems for identifying and eliminating or minimising risks and hazards; checking equipment; regular contact and communication with residents and their right to be treated with courtesy; reporting to the residents and the statutory supervisor (if there is one); addressing issues raised by, or on behalf of, residents; reviews of management practices.





## 17 Safety and security processes, procedures, and systems

- 1 The operator must have, maintain, and implement the following policies and procedures. These are aimed at maintaining and enhancing the safety and personal security of residents of the retirement village.
  - a a policy that provides for the safety and personal security of residents
  - b a procedure for reviewing the safety and personal security of residents
  - c a procedure for responding to all safety and personal security needs of residents and others
  - d a procedure for residents and others to report accidents, incidents, and hazards in retirement villages
  - e a procedure for security if no staff members are present (or a full number of staff is not present) at the retirement village.

## 18 Personal security as a promotional feature in advertising

- 1 Promotional material relating to residents' safety and personal security must not include a description of any policy, procedure, or system that a retirement village does not actually have in place or that the operator does not intend to put in place. *Section 26*
- 2 Any safety or personal security policy, process, procedure, or system that is advertised in promotional material must be maintained to at least the level described for as long as any resident who purchased a residential unit at the time the material was available remains in the village. This applies unless those residents, after consultation, consent in writing to a significant variation or removal of that policy, procedure, or system. For example, an alarm system described in promotional material as being monitored must continue to be monitored unless the residents concerned agree in writing to that system no longer being monitored.



## Fire protection and emergency management

### 19 Fire protection and emergency management policy

- 1 The operator must have, maintain, and implement a written policy for fire protection and emergency management that sets out and meets the requirements of this Code of Practice and all applicable statutory requirements, including the following.
  - a Building Act 2004
  - b Building Code
  - c Fire Service Act 1975 and associated regulations including the Fire Safety and Evacuation of Building Regulations 2006.
- 2 The operator must give a copy of the fire protection and emergency management policy written in an easily readable format to residents and intending residents on request.
- 3 The operator must clearly instruct all residents and staff in the retirement village's fire protection and emergency management policy and associated systems and procedures. All staff must be familiar with and participate in this process.

### 20 Protection of residential units and retirement village facilities from fire

- 1 The operator must have measures and systems in place to protect the residential units, facilities, and indoor areas in the retirement village from fire.
- 2 Except where the residential units are unit-title or cross-lease or are owned by the residents and residents have responsibilities for these matters, the operator must ensure:
  - a that any building with a specified system must have a compliance schedule and an annual warrant of fitness that states the inspection, maintenance, and reporting procedures for that system under the Building Act 2004 and associated regulations
  - b that the operator must consult the New Zealand Fire Service or an appropriately qualified fire engineer:
    - i during the building design phase of all new retirement villages
    - ii when alterations to existing residential units, facilities, and common areas of the retirement village require building consent.



## Smoke alarms

- 3 The operator must make sure that every residential unit, facility and indoor area in the retirement village is fitted with smoke alarms in a manner that meets the requirements of the Building Code. Residents in unit-title or cross-lease retirement villages or units are owned by the residents should be encouraged to fit smoke alarms in their residential unit.
- 4 The operator must supply, install, and maintain smoke alarms, and:
  - a check the working order of interconnected smoke detection systems agreed with the building consent authority as a requirement of the compliance schedule (operators can set out in the compliance schedule the testing period)
  - b check the working order of other smoke alarms in accordance with the manufacturer's guidelines or as recommended by the New Zealand Fire Service.


## 21 Plans, instructions, and equipment for dealing with fire and other emergencies

### Fire-fighting equipment

- 1 The operator must make sure that:
  - a it has in place equipment for dealing with fire and other emergencies at the retirement village as required by the Fire Safety and Evacuation of Buildings Regulations 2006
  - b fire equipment is checked and maintained as required by the Fire Safety and Evacuation of Buildings Regulations 2006.

### Evacuation scheme or procedure

- 2 The operator must have an evacuation scheme or procedure in place for the safe, prompt and efficient evacuation of the occupants from the scene of a fire or other emergency, as required by the Fire Safety and Evacuation of Buildings Regulations 2006. The operator must make sure that:
  - a staff are trained and aware of their responsibilities for operating the evacuation scheme
  - b there are regular fire and evacuation drills
  - c a written record is made of each fire and evacuation drill and these records are kept at the retirement village.

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- 3 The operator must:
    - a give a written copy of the evacuation scheme or procedure to residents and intending residents on request
    - b give a written copy of the fire and evacuation drill records to residents and intending residents on request
    - c regularly check and review the evacuation scheme or procedure.

### **Emergency response procedure**


- 4 The operator must have, maintain, and implement a written policy setting out how emergencies in the retirement village are dealt with. This policy should be provided to residents and intending residents on request. Emergencies covered should include: fire, earthquakes, floods, medical emergencies, damage to units or facilities, and security issues. The policy must include the following details:
  - a written instructions for residents on the emergency procedure
  - b the emergency procedure for the retirement village shall be practiced and recorded at least every six months, or more often if required
  - c who responds in an emergency, and how they are qualified to manage an emergency situation
  - d expected response time
  - e any charges to the residents, for example security firm callouts.

## **22 Insurance**

### **Insurance cover**


- 1 The operator must take out and keep in force a comprehensive insurance policy, or must ensure that a policy is taken out and kept in force. The policy must cover loss or damage to or destruction caused by fire, accident or natural disaster of all:
  - a retirement village property
  - b capital improvements or additional fittings provided by residents
  - c residential units that are owned by residents.

The insurance policy must be for full replacement to the satisfaction of the statutory supervisor (if there is one) unless insurance for full replacement is not available.

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- 2 Indemnity insurance is permitted if full replacement insurance is not available. The operator must inform the residents what cover is provided in circumstances where the operator is unable to obtain full replacement insurance.
  - 3 Where the retirement village is a unit title development, the insurance policy may be taken out and kept in force by the body corporate.
  - 4 If the insurance policy is taken out by the operator, the operator must ensure that:
    - a the insurance valuation of the retirement village property is updated as often as required by the insurance policy
    - b the insurance reflects what is written in the occupation right agreement
    - c residents are provided with a copy of the insurance certificate of currency on request.
  - 5 The operator may choose to take out any other relevant insurance policies in relation to the retirement village (for example, covering business interruption or liability). All insurance policies held by the operator must be listed in the disclosure statement.
  - 6 All insurance policies taken out by the operator in relation to the retirement village must state the:
    - a responsibilities and liabilities of the operator, residents, and statutory supervisor (if there is one), as the insured parties
    - b dollar amount of the excess an operator has to pay if a claim is made
    - c any exclusions of insurance cover for the insurance policy
    - d responsibilities of the statutory supervisor (if there is one) where there is an insured event, including where the statutory supervisor receives the insurance payouts as stakeholder for the operator and residents.
  - 7 Operators must inform the residents whether or not they pass on any insurance policy excess amount to the resident and in what circumstances.
  - 8 The resident is responsible for insuring any contents that they own in the residential unit. The resident may choose to take out a contents insurance policy with their preferred insurer, but is not required to hold contents insurance.

### **Temporary accommodation**

- 9 The operator must inform the residents in the occupation right agreement:

- 
- a whether they will provide temporary accommodation or facilities while a residential unit or facility is being repaired or replaced
  - b how the cost of any temporary accommodation or facilities will be met
  - c how soon any temporary accommodation or facilities will become available.
- 10 Regardless of whether or not the operator will provide temporary accommodation or facilities, the resident may (but is not required to) take out their own insurance policy providing for temporary accommodation or facilities.


## **23 Access to residential units and retirement village facilities for people with disabilities**

- 1 The operator's fire protection and emergency management policy must set out how it provides access to, from, and within buildings for people with disabilities, as required under the Building Act 2004 and the Building Code.
- 2 The operator must provide these details in writing to residents and intending residents on request.

## **Transferring residents within a retirement village**

### **24 Transfer requirements in the occupation right agreement**

- 1 If an occupation right agreement allows a resident to transfer from an independent self-care residential unit to a unit in the retirement village where a higher level of care will be provided, it must set out the terms of transfer. The terms of transfer must include, but need not be limited to, the following:
  - a the circumstances under which the transfer may be initiated and by whom
  - b whether residents have priority over outside applicants
  - c whether the transfer depends on:
    - i a suitable residential unit being available
    - ii suitable care being available
    - iii the resident being assessed as suitable for the available care
  - d that residents affected have the right to:
    - i be given information on all available options

- 
- ii have an independent assessment (including a needs assessment)
  - iii be consulted, along with their family or representative.
- 2 Residents who are considering a transfer should be made aware that a needs assessment may be required in order to access subsidies administered by other government agencies such as the Ministry of Health and Work and Income.

## **25 Financial and other arrangements in a transfer**

- 1 The occupation right agreement must set out the financial and other arrangements that apply if a resident transfers from an independent self-care residential unit to a unit in the retirement village where a higher level of care will be provided. These include:
- a any changes in charges to the resident as a result of the transfer
  - b other arrangements for the transfer, such as the physical transfer of the residents and their personal belongings
  - c any other costs incurred by the transfer, and who is responsible for those costs.



## Meetings of residents with operator and resident involvement

**Note:** in clauses 26 – 31 if a retirement village has a certificate confirming that it is exempt from appointing a statutory supervisor then any reference to a statutory supervisor in these clauses will not apply.

### 26 Frequency of meetings

#### Annual general meeting

- 1 The operator must hold an annual general meeting of residents. This meeting is to receive the retirement village's financial statements, the statutory supervisor's report, the maintenance report, and discuss any other matters. The meeting must be held within six months of the retirement village's most recently completed financial year.

#### Special general meeting

- 2 The operator must call a special general meeting with the residents if:
  - a the Act, regulations, or this Code of Practice require the operator to obtain the consent of the residents
  - b other enactments, the residents' occupation right agreement, or other such documents require the operator to get the residents' collective consent.
- 3 The operator must call a special general meeting for any reason, if asked to do so in writing by:
  - a not less than 10 per cent of the residents of the retirement village
  - b the statutory supervisor.

#### Informal meetings


- 4 The operator may from time to time call informal meetings of residents to discuss matters about the retirement village.

### 27 Procedures applying to annual and special general meetings

#### Notice

- 1 The operator must inform every resident and the statutory supervisor in writing of an annual or special meeting, specifying the time, place, and agenda of the





meeting. The notice must be given no less than 10 working days before the date of the meeting. The agenda and all papers to be considered at the meeting must be attached to the notice.

### **Notice of matters to be decided by vote**

- 2 If a matter is to be decided by a vote of residents at the annual or special meeting the notice of the meeting must:
  - a state the number of residents that need to attend before a vote can be taken
  - b confirm and set out the voting rights of residents, including each resident's right to:
    - i vote
    - ii use a representative
    - iii cast proxy votes
  - c confirm and set out the voting rights of representatives voting on behalf of a resident, including the representative's right to cast proxy votes.

### **Chair**

- 3 The annual or special meeting must be chaired by the statutory supervisor or a person appointed by the statutory supervisor, or by a person appointed by the majority of the residents who are at the meeting. *Retirement Villages (General) Regulations 2006 10(1)(b)*

### **Roll**

- 4 Before the start of the annual or special meeting the operator must give the chairperson a list of the names and addresses of all residents.

### **General business**

- 5 The general business part of special general meetings must allow the operator, statutory supervisor, and residents to raise and discuss any matters about the village.

### **Records**

- 6 The operator must make sure that:
  - a minutes of the annual or special meeting are taken and kept at the retirement village and made available on requestor

- b all residents are given copies of the meeting minutes within 30 working days.

## 28 Residents' participation in decision-making

### Operator must consult residents

- 1 Residents have the right to be consulted by the operator. Subgroups of residents, or individual residents, are also entitled to be consulted. *Right 3, Code of Residents' Rights*
- 2 The operator must consult residents:
  - a as required in the Code of Residents' Rights and the occupation right agreement. *Right 3, Code of Residents' Rights*
  - b about the content of any proposed rules if not already established by the operator, or any proposed amendment or addition to the existing rules by the operator.

### Consultation process

- 3 When consulting residents the operator must:
  - a give them all the relevant information so they are able to provide informed comment and advice about the matter
  - b allow enough time for residents being consulted to consider and draw up their comments or advice
  - c fully consider any comment or advice before reaching a decision.
- 4 Residents may, individually or as a group, appoint a person or people to represent their views in the consultation process.
- 5 The operator must not decide a matter before consultation has been completed, but is not obliged to agree with every comment or to act on the advice provided. The operator must consider all responses received with an open mind. The outcome cannot have already been decided.
- 6 Following consultation the operator must tell residents as soon as reasonably practicable the decision(s) made, with reasons.
- 7 The consultation process must take into account the operator's need to operate and manage the retirement village effectively and to provide the facilities and services for the benefit of all residents.



## 29 Notifying residents of information about the retirement village

- 1 Every resident and intending resident has the right to be given information on any matters affecting, or likely to affect, the terms and conditions of their occupancy. The operator must notify residents of information about the retirement village as required under the Act. *Section 34; Right 2, Code of Residents' Rights*

## 30 Residents' committee

- 1 Residents have the right to form a residents' committee and agree their own rules for running the committee.
- 2 The residents' committee may call a meeting with the operator or its representative. The operator or its representative is expected to attend residents' committee meetings when invited, unless the request is in some way unreasonable (e.g., too short a period of notice).
- 3 In villages that have a statutory supervisor the residents' committee may call a meeting with the statutory supervisor. The statutory supervisor is expected to attend residents' committee meetings when invited, unless the request is in some way unreasonable (e.g., too short a period of notice).
- 4 If there is no residents' committee the operator or its representative and the statutory supervisor are expected to meet with the residents at the residents' request, unless the request is in some way unreasonable (eg, too short a period of notice).


## 31 Resident access to operator and statutory supervisor

### Access to operator or operator's contact person

- 1 The operator must have, maintain, and implement a process so that residents can contact the operator or their contact person about concerns and issues. The process must allow the operator or the contact person to acknowledge and respond in writing within a reasonable time, depending on the subject. The operator must tell residents in writing about any change to this process.
- 2 The operator must give residents written details of the name of a contact person, when they are available, and how to contact them. *Right 2, Code of Residents' Rights*

### Access to statutory supervisor

- 3 The operator must have a process for residents to contact the statutory supervisor about an alleged breach of a right or to make a complaint. The operator must tell residents about any change to the process, including providing a contact name and details.


- 
- 4 The operator must tell residents in writing of the name of the statutory supervisor and how to contact them. *Right 2, Code of Residents' Rights*

## Complaints facility

**Note: in clauses 32 – 36 if a retirement village has a certificate confirming that it is exempt from appointing a statutory supervisor then any reference to a statutory supervisor in these clauses will not apply.**

### 32 Procedure for making and acknowledging complaints by residents

- 1 The operator must have a written procedure for dealing with complaints by residents about the retirement village, the operator, or other residents of the retirement village. The operator must give a written copy of the complaints procedure to residents and intending residents on request. *Section 51*
- 2 The procedure for making, receiving, and resolving complaints must enable complaints to be resolved simply, fairly, and quickly.
- 3 The complaints procedure must also:
  - a state that residents can ask the operator's contact person (and provide contact details) for information about their rights. *Code of Residents' Rights*
  - b refer to the resident's right to complain to the village's statutory supervisor (and provide contact details) or to the Registrar of Retirement Villages (and provide contact details). *Code of Residents' Rights*
  - c state that information about residents' rights and complaints and disputes procedures is published by the Retirement Commissioner
  - d refer to the resident's right to involve a support person or people to represent them (at the resident's cost). *Right 6, Code of Residents' Rights*
  - e state that complaints do not have to be made in writing. All complaints, however made, must be recorded and responded to as if they had been received in writing.
  - f state that complaints may be made to the operator's contact person
  - g state what the village's complaints procedures are, including any other help the operator will give to residents. Operators may offer residents a mediation service for informal discussions as an alternative to either the complaints or disputes process.
  - h provide for the complaint to be promptly acknowledged by the operator or contact person in writing, including complaints received other verbally

- 
- i state that the resident or operator may require that a dispute be resolved by a disputes panel *Section 52*
  - j state the types of dispute, including breaches of the Act, for which a resident may give a dispute notice. *Section 53*
  - k if a complaint is about the resident's occupation right agreement, state that the proposed action on the complaint will be suspended until the complaint is resolved. There may be occasions when the operator, after consulting the statutory supervisor, decides that it is in the best interests of the village as a community to continue with the proposed action.

### **33 Informing resident of the progress of the complaint**

- 1 The operator must ensure that the resident who has made a complaint is regularly kept informed about its progress.

### **34 Procedures for resolving and deciding complaints**

#### **Resolving complaints**

- 1 The operator must follow the retirement village's complaints procedure.
- 2 Operators may offer residents a mediation service for informal discussions as a first step to resolving the complaint.
- 3 If a complaint is about the resident's occupation right agreement, any proposed action on the subject of the complaint must be suspended until the complaint is resolved. This is unless the operator, after consulting the statutory supervisor, decides that it is in the best interests of the village as a community to continue with the proposed action.
- 4 If a complaint is resolved by mutual agreement, the resolution must be recorded and then signed by, and copied to, all parties.

#### **Deciding complaints where resolution is not possible**

- 5 The operator must have a procedure for deciding complaints where resolution through the retirement village's complaints system is not possible.
- 6 Complaints that are not resolved through the complaints system can be referred to a disputes panel. Resolution of a dispute by a dispute panel is provided for in Part 4 of the Act and associated regulations. The operator is obligated to meet the costs of dispute resolution. *Sections 48–75 and the Retirement Villages (Disputes Panel) Regulations 2006*



### **35 Time limits for making and notifying the decision about the complaint**

- 1 The operator or person dealing with a complaint on behalf of the operator must make and notify a decision on the complaint as soon as reasonably practicable. In any event it should be within 20 working days of the complaint being made.

### **36 Form of notification of the decision about the complaint**

- 1 The operator or person dealing with a complaint must inform the parties affected by the complaint of the decision in writing. The following details must be included:
  - a the reasons for the decision
  - b any action the operator intends to take as a result of the decision
  - c a statement that no party affected is bound by this decision
  - d a statement informing the resident of their right to give a dispute notice if:
    - i the resident is not satisfied with the decision
    - ii 20 working days have elapsed since the complaint was made. *Section 52*



## Accounts

- 1 In clauses 37 – 39 any reference to residents includes any people appointed by a resident to look after their affairs (e.g. an attorney appointed under a Power of Attorney or an enduring power of attorney).

### 37 Frequency of accounts


- 1 The operator must have, maintain, and implement a system for invoicing residents the agreed charges for outgoings and/or services.
- 2 The operator must invoice the resident when:
  - a it is the first payment made under an occupation right agreement
  - b the amount to be charged has been amended
  - c the resident requests an invoice.
- 3 When an invoice is issued the operator must tell the resident what to do if they wish to query a charge.

### 38 Breakdown of items

- 1 On invoices to residents, the operator must list charges for items as follows:
  - a whether the item charged is for services or outgoings
  - b a breakdown of what the charge covers
  - c the date the charge was incurred
  - d the dollar amount of the charge.

### 39 Format of invoices

- 1 The layout of invoices given to residents must be easy for them to read and understand.
- 2 Invoices must follow a consistent format and include the following details:
  - a breakdown of items as under clause 38
  - b total amount to pay
  - c when payment is due

- 
- d what the resident should do if they wish to query a charge
  - e how the invoice may be paid
  - f where the invoice is to be paid by direct debit or automatic payment, a statement that says that the invoice is for notification only and that the amount will be paid automatically unless queried before a specified date.





## Maintenance and upgrading

**Note: Sections 40 - 45 apply only to buildings, plant, and equipment that are owned by retirement village operators (referred to as 'retirement village property'). In villages where the residential units are owned by the residents, the responsibility for maintenance and upgrading must be set out in the occupation right agreement.**

### 40 General obligations

- 1 The operator must maintain all buildings, plant, and equipment in clean and safe working order, suitable for their intended use.
- 2 The operator must ensure compliance schedules and warrants of fitness for buildings are obtained in accordance with the Building Act 2004 and associated regulations.

### 41 Minor repairs, maintenance, and emergency repairs

- 1 The operator must have, maintain, and implement a procedure that ensures requests from residents for minor repairs, maintenance, and emergency repairs of retirement village property are actioned without unnecessary delay.
- 2 In particular, the operator must:
  - a reply to all non-urgent maintenance requests within five working days and give residents an expected timeframe for the maintenance to be done
  - b tell residents in writing the name and contact details of a person to contact about minor repairs and maintenance requests (this may be the village operator, manager, or other employee of the village)
  - c have, maintain, and implement a process for responding to urgent requests for emergency maintenance of retirement village property.
- 3 Where possible, operators or the person dealing with a maintenance request should tell the resident the name of the company that is doing the work. The contractor representing this company should be encouraged to carry official identification confirming their right to be in the retirement village.

## 42 Periodic review of maintenance agreements


- 1 The operator must periodically review maintenance agreements for retirement village property. Residents should be consulted in writing about any proposed changes in the services and benefits being provided. They should also be consulted about any changes to the charges that they pay that will or might have a material impact on their occupancy or ability to pay for the services and benefits provided. *Right 3, Code of Residents' Rights*

## 43 Funding for maintenance and periodic upgrading of retirement village property

- 1 The operator must ensure that it can afford to maintain the retirement village property.
- 2 The operator must report to the annual general meeting about how it proposes to pay for the maintenance and periodic upgrading of retirement village property. This information must include the operator's responsibilities for the costs of maintaining the residential units.
- 3 The operator must consult all residents in writing if the proposal for funding the costs of maintenance and periodic upgrading will, or may, have a material impact on residents' occupancy or their ability to pay for services and facilities in the retirement village. *Right 3, Code of Residents' Rights*
- 4 If the operator requires residents to contribute to the funding of long-term maintenance and replacement of retirement village property, all money contributed by residents for that purpose must be kept in a separate bank account. This designated bank account should be named 'Residents' Contribution to Maintenance Account' (or similar). The account must only be used to hold residents' contributions to long-term maintenance.
- 5 All deposits, including interest, in the maintenance account must stay in this account until they are used to pay maintenance costs as outlined in the maintenance agreement and the long-term maintenance plan.

## 44 Construction standards for new retirement villages or units

- 1 Building standards for new retirement villages or residential units within existing villages must meet the requirements of the Building Act 2004 and the Building Code.
- 2 The operator must, through the disclosure statement, inform residents and intending residents how the village can meet their current and changing needs so



that residents can continue to live in their village of choice. Information provided must include the extent to which the residential units, facilities, grounds, and common areas of the retirement village meet the requirements of the national standards identified in NZS 4121: 2001 Design for Access and Mobility: Buildings and Associated Facilities.

## **45 Alteration of residential units for residents with disabilities**

- 1 The operator must make sure that the occupation right agreement includes statements addressing the following:
  - a the rights of residents with disabilities to alter their residential unit if the units do not meet their needs. *Human Rights Act 1993*
  - b who is responsible for making the alterations to units for residents with disabilities and for paying the costs
  - c the effect any such alteration might have on the sale or disposal of the residential unit in the future, including any obligation for the resident to remove an alteration made to cater for a disability, or make any payment instead of removal.


## Termination of an occupation right agreement

### 46 Resident's right to terminate the occupation right agreement

- 1 A resident must be entitled to terminate their occupation right agreement for any reason and at any time. The resident must give the period of notice specified in the occupation right agreement. If no notice period is specified the resident must give the operator at least one month's notice in writing.

### 47 Grounds for termination if the unit is damaged or destroyed through no fault

- 1 The occupation right agreement must:
  - a provide that, except in certain specified circumstances (if any), if the unit is damaged or destroyed the operator must fully repair or replace it as soon as practicable
  - b state the circumstances (if any) when a unit that is damaged or destroyed may not be fully repaired or replaced (for example if repair or reinstatement of the unit is not practicable because of the extent of the damage or destruction, or because the necessary building consents cannot be obtained)
  - c state the procedure to be followed if the unit is damaged or destroyed and one or more of the circumstances referred to in clause 47(1)(b) of this Code of Practice apply.
- 2 The procedure referred to in clause 47(1)(c) of this Code of Practice must provide as a minimum that:
  - a the operator must consult the resident to decide whether it is practicable to repair or replace the unit
  - b after consultation, the operator must follow up in writing, setting out the decision on whether the unit will be repaired or replaced
  - c if the operator decides to repair or replace the unit, then the operator will fully repair or replace the unit as soon as practicable
  - d if the operator decides not to fully repair or replace the unit, that the occupation right agreement is terminated
  - e if the occupation right agreement is terminated in these circumstances, the repayment to the resident will be calculated in accordance with the



occupation right agreement. The repayment must be an amount at least equal to the capital sum paid by the resident, less any charges owed to the operator by the resident under the occupation right agreement. Those charges may not include any fixed deduction. The operator and resident may agree a higher repayment amount in the occupation right agreement.

- 3 The occupation right agreement must specify:
  - a any costs to the resident for transferring to another unit
  - b the timeframe for consulting and notifying residents of the operator's decision on whether the unit will be repaired or replaced following damage or destruction.
- 4 If a resident's unit is damaged or destroyed and the operator has decided that it is not practicable to repair or replace that unit, the operator may offer a resident the option to transfer to another unit (either pre-existing or yet to be constructed) in the same retirement village or in another retirement village owned by that operator in reasonable proximity to the original village, with regard to the circumstances giving rise to this situation.
- 5 If the resident does not accept an option to transfer to another unit, the occupation right agreement will be treated as if it has been terminated by the resident and for the avoidance of doubt the payment provisions in clause 47(2)(e) of this Code of Practice shall not apply.

#### **48 Grounds for termination by the operator**


- 1 An occupation right agreement may give the operator the right to terminate the agreement on the grounds set out in this clause.
- 2 Residents have the right to challenge the operator's decision through the complaints process. However, there may be occasions when the operator, after consulting the statutory supervisor, decides that it is in the best interests of the village as a community to continue with the proposed action while the complaint about termination is dealt with.

#### **Termination on death of a resident**

- 3 An occupation right agreement is automatically terminated when the resident dies. If the occupation right agreement applies to more than one named resident, the agreement is terminated when the last surviving resident dies.

#### **Termination on medical grounds**

- 4 A resident's occupation right agreement may permit the operator to terminate the agreement if a medical practitioner, after assessing the resident, certifies that the resident's physical or mental health is such that the resident or other



residents cannot live safely in their units. The following conditions apply to this right of termination:


- a the medical practitioner, who in the first instance should be the resident's regular medical practitioner or otherwise may be another medical practitioner appointed by the operator, must be independent of the operator
- b the assessment by the medical practitioner must take into account:
  - i the care, support, and facilities offered in the village, including the opportunity to transfer to a higher level of care
  - ii support services that could be brought in from outside the retirement village to support the resident to remain in their unit
- c the resident (or support person or holder of an Enduring Power of Attorney for Personal Care and Welfare) may, as part of being consulted on the proposed termination, obtain a second medical opinion and present it to the operator.

### **Termination for breach of the occupation right agreement**

- 5 The operator may have grounds for termination of a resident's occupation right agreement if the resident has materially breached the agreement. The following conditions apply to this right of termination:
  - a the operator must have notified the resident in writing of the operator's intention to terminate the occupation right agreement unless the breach is remedied
  - b the operator must have given the resident reasonable time, not less than one month, to remedy the breach
  - c the operator must have taken into account the nature and extent of the breach in determining the time given for the resident to provide a remedy
  - d the resident must have failed to remedy the breach in the time given.

### **Termination for abandoning the residential unit**

- 6 The operator may have grounds for termination of a resident's occupation right agreement on the grounds of abandonment. The following conditions apply to this right of termination:
  - a the operator must have made reasonable enquiries and determined that the resident has permanently abandoned the residential unit

- 
- b the operator must have notified the resident in writing of its intention to terminate the occupation right agreement unless the resident reoccupies the residential unit
  - c the operator must have given the resident at least one month to reoccupy the unit
  - d the resident must have failed to reoccupy the unit in the time given.

### **Termination for serious damage to residential unit or serious harm to people**


- 7 The operator may have grounds for termination of a resident's occupation right agreement if the resident, intentionally or recklessly, has caused or allowed or is highly likely to cause or allow:
  - a serious damage to the residential unit or facilities, or damage which has become serious because it continues
  - b serious injury, harm, or distress to the operator or another resident, or to an employee or guest of the operator or the resident *Code of Residents' Rights*
- 8 The following conditions apply to this right of termination:
  - a the operator must have notified the resident of its intention to terminate the occupation right agreement unless the damage, injury, harm, or distress is remedied in a specified time that is reasonable under the circumstances. The operator must have taken into account the nature and extent of the damage, injury, or harm in determining the time given for the resident to provide a remedy.
  - b the resident must have failed to remedy the damage, injury, harm, or distress in the time given.

## **49 Operator's process for exercising the right to terminate the occupation right agreement**

- 1 The operator must comply with the following process before exercising any right to terminate an occupation right agreement.

### **Notice of intention to terminate**

- 2 If the occupation right agreement gives the operator the right to terminate the agreement, the operator must issue a notice of intention to terminate that includes the following information:

- 
- a the date the notice was issued
  - b the specific terms and conditions in the occupation right agreement and this Code of Practice which must be complied with to terminate the resident's occupation right agreement
  - c the proposed grounds for termination, and how they apply to the resident's actions
  - d the process and the timeframes involved, such as periods to remedy or the dispute resolution process
  - e that the resident has the right to information about any matters affecting, or likely to affect, the terms or conditions of their residency *Right 2, Code of Residents' Rights*
  - f that the resident has the right to refer any dispute to a disputes panel *Section 53*
  - g that the resident has the right to involve a support person or people to represent them *Right 6, Code of Residents' Rights*
  - h that the resident, or their representative, has the right to be consulted. This includes the resident or their representative having the right to make representations and have those representations taken into account by the operator. *Right 3, Code of Residents' Rights*

### **Notice of termination**

- 3 If the operator has complied with clauses 48 and 49 and still wishes to terminate the occupation right agreement, the operator must issue the resident a written notice of termination. The termination notice must state the following:
  - a date issued
  - b grounds for termination
  - c specific terms and conditions in the occupation right agreement and this Code of Practice that entitle the operator to terminate the resident's occupation right agreement
  - d the right of the resident to give a dispute notice under the Act *Section 53*
  - e that the operator may suspend the action if the resident has a complaint about a decision in relation to the occupation right agreement. (The operator, after consulting the statutory supervisor, may decide that it is in the best interests of the village as a community to continue with the proposed action.) *Clause 34 of this Code of Practice*



f the period of notice. (See the table below for details).


If the reasons for termination are...	then the operator must give the resident not less than...
a death of a resident	as much notice of termination as is reasonable under the circumstances
b medical grounds	one month's written notice of termination
c breach of occupation right agreement	one month's written notice of termination
d because the resident has abandoned the residential unit	one month's written notice of termination
e serious damage to the residential unit or harm to people	as much notice of termination as is reasonable under the circumstances

### Payment on termination by the operator

- 4 If the operator terminates a resident's occupation right agreement the operator must, within five working days of the date on which the termination takes effect, pay all sums due to the resident. *Clause 53 of this Code of Practice*

## 50 Refurbishment costs and process

- 1 This clause only applies to occupation right agreements where the operator has the responsibility for the sale of the residential unit.
- 2 If an occupation right agreement entered into after 25 September 2006 says that the resident must pay or contribute to the costs of refurbishing their residential unit after termination, the refurbishment process must be set out clearly in the agreement. The refurbishment process must:
  - a set out the terms of the operator's right to enter the residential unit to do the work
  - b identify how the cost will be divided between the operator and the resident
  - c set out the rights (including consultation) and obligations of the former resident (or the estate of the former resident, or the holder of an Enduring Power of Attorney for Property) in the refurbishment process.
- 3 Where an occupation right agreement provides that the resident must pay or contribute to the costs of refurbishing their residential unit after termination, the resident is not required to pay for fair wear and tear:

- 
- a if the occupation right agreement was entered into after 25 September 2006
  - or
  - b the occupation right agreement was entered into before 25 September 2006 but after that date was varied to increase the resident's rate of fixed deduction or decrease the resident's share of capital gain upon sale of the unit.

## **51 Operator's responsibilities relating to the sale or disposal of a vacant residential unit following termination**


- 1 This clause only applies to occupation right agreements where the operator is responsible for selling the residential unit.
- 2 In this clause a reference to former resident also includes their estate or holder of an appropriate Enduring Power of Attorney.

### **Operator to seek new resident**

- 3 Where the former resident has not already been paid all sums due to them, the operator must promptly:
  - a start the process of entering into a new occupation right agreement for the former resident's residential unit in accordance with the former resident's occupation right agreement and this Code of Practice
  - b take proper steps to market the residential unit
  - c respond to all enquiries about the residential unit in a timely and helpful way.
  - d take all reasonable steps to enter into a new occupation right agreement for the residential unit in a timely manner and for the best price reasonably obtainable.

### **Consultation on marketing of the residential unit**

- 4 The operator must consult with the former resident about the marketing of their residential unit. As a minimum, the operator must consult the former resident about:
  - a when the residential unit goes on the market
  - b the general nature of the marketing plan for the residential unit

- 
- c the actual charges relating to marketing and sale of the residential unit that the former resident is liable to pay, if any.
  - 5 The operator must keep the former resident informed on at least a monthly basis about progress with the marketing.
  - 6 If the property is ready for sale immediately after the former resident has removed all of their personal belongings, the operator must immediately supply monthly reports to the former resident about the marketing process.

### **Report after three months**


- 7 If a new occupation right agreement for a unit has not been entered into within three months of the termination date, the operator must report in writing to the former resident. The operator must then provide monthly reports until a new occupation right agreement is entered into. The operator's report must state the steps taken to market the residential unit and the progress made towards finding a new resident.

### **Valuation after six months**

- 8 If a new occupation right agreement for a unit has not been entered into within six months of the termination date the operator must obtain, at its expense, a valuation of the unit to establish a suitable price for marketing it.
- 9 The valuation must be in writing and be done by an independent registered valuer who is experienced in valuing retirement village units.
- 10 If the former resident does not agree with the valuation s/he may obtain a second valuation, which must also be performed by an independent registered valuer. The former resident must pay the cost.
- 11 The operator must market the unit at the price established by the valuation unless the former resident obtains a second valuation that is different. If the former resident has done this, then the operator must consider the second valuation in determining a suitable price.

## **52 Rights of the former resident relating to sale or disposal of the vacant residential unit following termination**

- 1 A complaint may be brought at any time. However, a resident may not take a dispute notice until nine months after the unit becomes available for re-occupation or disposal. *Sections 53(1)(3), 55(3) and 57(3)*

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- 2 The occupation right agreement must allow former residents the right to introduce a new resident at any time and set out the terms for doing so. The operator is not obliged to accept any prospective resident who does not meet the normal entry criteria for the retirement village or whose offer to buy does not meet the fair market value (as set out in clause 51 of this Code) or conditions.
  - 3 If a former resident or their estate introduces a prospective new resident who then buys the residential unit, the sales costs charged to the former resident or their estate must be the actual costs incurred, and the former resident or their estate must be informed.

### **53 Operator may buy residential unit**

- 1 At any time before entering into a new occupation right agreement with a new resident for the vacant residential unit, the operator may agree in writing to buy the former resident's interest in the vacant unit.
- 2 The price for the residential unit must reflect the former resident's occupation right agreement or other amount agreed between the operator and former resident. The 'other amount' must reflect the market value of similar retirement village properties locally.
- 3 The former resident may request that the operator appoint an independent registered valuer to determine the market value of the residential unit. The former resident or their estate and the operator must each pay half the cost of the valuation. The circumstances under which the former resident can make this request are when the:
  - a occupation right agreement provides for the sharing of any capital gain between the operator and former residentand/or
  - b amount due to the former resident is a capital loss and the resident may be liable for meeting that capital loss.
- 4 The operator must, within 20 working days of the date of the agreement to purchase, pay to the former resident the amount due to them as a consequence of termination of the occupation right agreement.

### **54 Payment due to the resident on termination or end of occupation**

#### **Charges for personal services**

- 1 The operator must stop charging a resident for personal services on the date the resident stops living permanently in the residential unit.



## **Continuing charges for outgoings**

- 2 The operator must reduce by at least 50 per cent the outgoings charged to the former resident if no new occupation right agreement has been entered into for a former resident's unit by the later of:
  - a six months after the termination date, or
  - b the date the former resident stops living in the residential unit and removes all their possessions.

## **Fixed deductions**

(Fixed deduction is also known as a facilities fee, village contribution, or deferred management fee).


- 3 These fixed deduction clauses only apply to contracts entered into after 25 September 2006.
- 4 The fixed deduction must not accrue past the date on which the resident is paid the amount payable to them on termination of the agreement.
- 5 Details of fixed deductions must be set out in the disclosure statement.

## **Payment after sale or disposal of the residential unit by the operator**

- 6 If an occupation right agreement allows the operator to sell or dispose of the former resident's unit, the operator must pay all money owing to the former resident no later than five working days after the date the operator receives payment in full from the new resident.

## **Payment after damage or destruction of the residential unit**


- 7 Clause 54(1) and (2) do not apply to the situation where a residential unit has been damaged or destroyed through no fault of the resident and is uninhabitable. Clauses 54(8) to 54(13) apply to this situation.
- 8 If a residential unit has been damaged or destroyed through no fault of the resident and is uninhabitable, the operator must stop charging for personal services and outgoings from the date of the damage or destruction.
- 9 If a residential unit has been damaged or destroyed through no fault of the resident and is uninhabitable, the fixed deduction must not accrue or amortise to the operator past the date of the damage or destruction, unless the operator is providing temporary accommodation to the resident.

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- 10 While the operator is providing temporary accommodation to the resident, the operator may charge for personal services and outgoings relating to that temporary accommodation, and fixed deductions charged to the resident under the occupation right agreement may continue to accrue or amortise to the operator.
  - 11 Charges for personal services and outgoings relating to the residential unit, and accrual or amortisation of the fixed deduction may resume once the unit has been replaced and is ready for occupation by the resident, if the occupation right agreement has not been terminated already.
  - 12 An operator may not extend or increase the rate of accrual or amortisation of fixed deductions because they have provided a repaired or replacement unit to a resident.
  - 13 If a resident's occupation right agreement is terminated because the residential unit is damaged or destroyed through no fault of the resident and the operator has decided not to repair or replace the unit, the operator must pay all money owing to the former resident no later than ten working days after the date the operator or the statutory supervisor receives payment in full under any insurance policy covering the unit. This clause does not remove the operator's obligation to pay all money owing to the former resident if the operator does not receive payment in full under the insurance policy for the retirement village property.

## Communication with residents

### 55 Communication policies, systems, and procedures

- 1 The operator must have, maintain, and implement written policies and procedures for communicating with residents or intending residents. The operator cannot pass on to a resident the cost of meeting this requirement.
- 2 The operator's policy must cover how the physical environment and management practices at the retirement village make it possible and easy to communicate with all residents. Examples include:
  - a large print in written materials
  - b signs and communication aids that residents can see, hear, or touch to make communication more manageable
  - c translations in languages other than English
  - d alternative ways of communicating (audio, video, electronic text, Braille)
  - e staff communication skills
  - f availability of an interpreter.

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- 3 The operator must set up a system for informal, regular communication with the residents, for example newsletters and notice boards.
  - 4 The operator or a staff member may provide support, if appropriate, but may not act as a representative of the resident.

## **56 Communicating with residents for whom English is a second language**

- 1 If a resident is not able to easily communicate in English, the operator must – at all times when the rights and obligations of the resident may be affected – use an interpreter who is fluent in both English and the resident’s preferred language. The operator must not charge the resident for the cost, if any, of the interpreter.

## **57 Communicating with residents with limited ability to communicate**

- 1 If the operator is aware that a resident or intending resident has a limited ability to communicate the operator must – at any time when the rights and obligations of the resident may be affected – inform the resident of their right to use a support person or representation. *Right 6, Code of Resident’s Rights*



## **Part 4: Useful information**








## Extracts from the Retirement Villages Act 2003

### **Section 34 Right to be supplied with information relevant to occupancy**

- (1) Each resident or intending resident of a retirement village has the right to be promptly informed by the operator of the retirement village about any matter that would or might have a material impact on –
  - (a) the occupancy right, or rights to quiet enjoyment, of the resident or intending resident; or
  - (b) the charges levied on the resident or intending resident for his or her occupancy right, or right to services and facilities, within the retirement village.
- (2) The operator of a retirement village must, -
  - (a) if the village has a statutory supervisor, promptly notify the statutory supervisor and, if the statutory supervisor so directs, each resident and intending resident of the retirement village of the matters referred to in subsection(3); or
  - (b) if the village does not have a statutory supervisor, promptly notify each resident and intending resident of the retirement village of the matters referred to in subsection (3).
- (3) The matters required to be notified under subsection (2) are -
  - (a) any proposal by the operator to develop or redevelop any part of the land on which the retirement village is situated or to acquire any contiguous land for development:
  - (b) the receipt by the operator of a notice from the Registrar of suspension of the registration of the retirement village:
  - (c) any request by the operator to the Registrar for cancellation of the registration of the retirement village:
  - (d) any decision by the Registrar, under section 41, to exempt the operator from the requirement to appoint a statutory supervisor:
  - (e) the appointment of a new statutory supervisor:
  - (f) any decision by the Registrar, under section 93, to exempt the operator from the requirement to comply with a provision in the code of practice:
  - (g) any proposed increase in secured liabilities held by any person over any part of the retirement village:
  - (h) any proposed increase in the maximum sum available to the operator of a retirement village under any credit facility:
  - (i) any actual or threatened action by a creditor, mortgagee, or charge holder in respect of the retirement village against the operator of the retirement village in respect of that person's security or any sum over \$1,000:


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- (j) any decision by an insurer to refuse to insure the retirement village or any part of it:
  - (k) any actual or threatened legal proceedings against the retirement village or an operator of the retirement village that affect the interests of any resident or intending resident:
  - (l) any action by a creditor to put the operator or the retirement village in receivership or liquidation.
- (4) This section does not limit section 32 or Schedule 4.

## **Section 52 Resident or operator may require dispute resolution**

- (1) A resident or the operator may require that a dispute be resolved by a disputes panel by giving the other party or parties a dispute notice.
- (2) A resident may not require resolution of a dispute (other than a dispute referred to in section 53 (3)) by a disputes panel unless -
  - (a) the dispute has earlier been referred to the complaints facility; and
  - (b) 20 working days have elapsed since referral to the complaints facility.
- (3) An operator may not require resolution of a dispute by a disputes panel unless -
  - (a) the operator has notified the resident concerned of the dispute; and
  - (b) the operator has made reasonable efforts to resolve the dispute with the resident; and
  - (c) 20 working days have elapsed since the resident was notified.

## **Section 53 Types of dispute for which resident may give dispute notice**

- (1) A resident may give a dispute notice (1) for the resolution of a dispute concerning any of the operator's decisions -
  - (a) affecting the resident's occupation right or right to access services or facilities; or
  - (b) relating to changes to charges for outgoings or access to services or facilities imposed or payable under the resident's occupation right agreement; or
  - (c) relating to the charges or deductions imposed as a result of the resident's occupation right coming to an end for any reason or relating to money due to the resident under the resident's occupation right agreement following termination or avoidance under section 31 of the resident's occupation right agreement; or
  - (d) relating to an alleged breach of a right referred to in the code of residents' rights or of the code of practice.
- (2) Nothing in subsection (1) enables a resident to give a dispute notice concerning any health services or disability services, or any facilities to which the Code of Health and




Disability Services Consumers' Rights under the Health and Disability Commissioner Act 1994 applies.

- (3) A resident may give a dispute notice for resolution of a dispute concerning the operator's breach of the resident's occupation right agreement or code of practice in disposing of a residential unit in a retirement village formerly occupied by the resident.
- (4) A resident may give a dispute notice for the resolution of a dispute affecting the resident's occupation right between the resident and any other person who is -
  - (a) another resident of the retirement village; or
  - (b) in another resident's residential unit with that other resident's permission.

### **Section 89 Code of practice must be prepared and published**

- (1) The Minister may approve 1 of the draft codes of practice submitted to the Minister by any retirement village, group of retirement villages, or association of operators of a retirement village as the code of practice applicable to all retirement villages, after considering any recommendations of the Retirement Commissioner made in accordance with subsection (2).
- (2) Before making a recommendation to the Minister for the purposes of subsection (1), the Retirement Commissioner must consider any recommendations by any groups of persons or bodies that, in the opinion of the Retirement Commissioner, represent the interests of -
  - (a) operators of retirement villages; or
  - (b) residents or intending residents; or
  - (c) statutory supervisors; or
  - (d) other persons.
- (3) The Minister is not obliged to approve a draft code of practice submitted under subsection (1) that the Minister considers is incomplete or inappropriate or that fails to comply with the requirements of subsection (5) or Schedule 5.
- (4) If no draft code of practice acceptable to the Minister has been submitted under subsection (1) before 1 January 2005, the Minister must prepare, approve, and publish a code of practice after considering any recommendations of -
  - (a) the Retirement Commissioner; and
  - (b) any groups of persons or bodies that, in the opinion of the Minister, represent the interests of operators of retirement villages, residents or intending residents, statutory supervisors, or other persons.
- (5) A draft code of practice submitted under subsection (1) or a code of practice prepared under subsection (4) must -
  - (a) specify rules of practice in relation to every matter that the code is required by Schedule 5 to address;
  - (b) be consistent with the rights referred to in the code of residents' rights.


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- (6) The Minister must publish in the *Gazette* notice of -
    - (a) the approval of any code of practice approved by the Minister under subsection (1) or subsection (4) and any variation under section 90(4); and
    - (b) the place or places at which copies of the code and any variation can be obtained.

## **Section 90 Duration and variation of code of practice**

- (1) The code of practice -
  - (a) comes into force, -
    - (i) in the case of the first code of practice, 1 year after it is approved under section 89(1) or (4);
    - (ii) in the case of any subsequent code of practice approved under section 89(1), on the date stated by the Minister in the document approving the code; and
  - (b) continues in force until a subsequent code of practice approved under section 89(1) comes into force.
- (2) An operator of a retirement village may elect to be bound by a code of practice that is not yet in force, by giving notice of that election to -
  - (a) the Registrar; and
  - (b) statutory supervisor of the village (if there is one); and
  - (c) every resident and intending resident of the retirement village.
- (3) If an operator elects, under subsection (2), to be bound by a code of practice that is not yet in force, -
  - (a) that code must for all purposes be treated as if it were in force in respect of that operator and the retirement village to which the election relates; and
  - (b) any earlier code of practice ceases to apply to that operator and the retirement village to which the election relates.
- (4) The code of practice approved under section 89(1) or (4) may be varied by the Minister after considering any recommendations of -
  - (a) the Retirement Commissioner; and
  - (b) any groups of persons or bodies that, in the opinion of the Minister, represent the interests of operators of retirement villages, residents or intending residents, statutory supervisors, or other persons.
- (5) Any variation by the Minister comes into force on the date stated by the Minister in the document making the variation.

## **Section 91 Retirement Commissioner to provide publication information**

- (1) Before making any recommendation under section 89 or section 90(4), the Retirement Commissioner must give public notice of -


- 
- (a) the places at which the public may inspect or obtain, without charge, -
  - (b) the draft code of practice under consideration; or
  - (c) the proposed variation under consideration:
- (2) the last date on which the Retirement Commissioner will receive written submissions on the draft code of practice or variation (which date must not be less than 1 month after the date of the publication of the notice).
- (3) The Retirement Commissioner must also ensure that the information required to be given by public notice under subsection (1) can be accessed by the public at a website maintained by the Commissioner.

## **Section 92    Status of code of practice**

- (1) A code of practice is a regulation for the purposes of the Regulations (Disallowance) Act 1989, but not for the purposes of the Acts and Regulations Publication Act 1989.
- (2) While a code of practice is in force, it -
- (a) must be complied with by -
    - (i) every operator of a retirement village;
    - (ii) every receiver or liquidator or statutory manager of an operator or the property of the operator; and
  - (b) is enforceable as a contract by a resident and prevails over any less favourable provision in his or her occupation right agreement; and
  - (c) must be given effect to in any occupation right agreement offered to a resident.
- (3) Nothing in a code of practice applies to any health services or disability services or facilities to which the Code of Health and Disability Services Consumers' Rights under the Health and Disability Commissioner Act 1994 applies.
- (4) The operator of a retirement village must make a copy of the code of practice available to every resident and intending resident on request.
- (5) Subsection (2) is subject to section 93.

## **Section 93    Exemption from requirement to comply with code of practice**

- (1) The Registrar may exempt an operator from complying with any provision of the code of practice if the Registrar is satisfied that the criteria for exemption prescribed under section 105 are met.
- (2) An operator applies to the Registrar for an exemption by –
- (a) completing the prescribed form and delivering it to the Registrar; and
  - (b) paying the prescribed fee.
- (3) The Registrar may exempt the operator on the terms and conditions, and for any period (not exceeding 2 years), that the Registrar thinks appropriate in the particular circumstances.

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- (4) The Registrar may revoke an exemption, or vary its terms or conditions, if the Registrar is satisfied that -
    - (a) the ground for the exemption no longer applies; or
    - (b) the operator has not complied with its terms and conditions.
  - (5) The Registrar must give notice of the revocation or variation of an exemption as soon as possible to -
    - (a) the statutory supervisor (if there is one); and
    - (b) the operator.

## **Schedule 4 of the Act**

## **Code of residents' rights**

### **Basic rights of residents**

This is a summary of the basic rights given to you by the Retirement Villages Act 2003.

#### ***Services and other benefits***

- 1 You have the right to services and other benefits promised to you in your occupation right agreement.

#### ***Information***

- 2 You have the right to information relating to any matters affecting, or likely to affect, the terms or conditions of your residency.

#### ***Consultation***

- 3 You have the right to be consulted by the operator about any proposed changes in the services and benefits provided or the charges that you pay that will or might have a material impact on your -
  - a occupancy, or
  - b ability to pay for the services and benefits provided.

#### ***Right to complain***

- 4 You have the right to complain to the operator and to receive a response within a reasonable time.

#### ***Disputes***

- 5 You have the right to a speedy and efficient process for resolving disputes between you and the operator or between you and other residents of the village.

#### ***Use of support person or representative***

- 6 You have the right, in your dealings with the operator or other residents of the village, to involve a support person or a person to represent you. The cost of involving a support person or person to represent you must be met by you.



### ***Right to be treated with courtesy and have rights respected***

- 7 You have the right to be treated with courtesy and have your rights respected by the operator, the people who work at the village, and the people who provide services at the village.

### ***Right not to be exploited***

- 8 You have the right not to be exploited by the operator, the people who work at the village, and the people who provide services at the village.

### **Your obligations to others**

Your rights exist alongside the rights of other residents and the rights of the operator, the people who work at the village, and the people who provide services at the village. In the same way that these people are expected to respect your rights, it is expected that you in return will respect their rights and treat them with courtesy.

### **Operator's contact person**

If you want more information about your rights or wish to make a complaint against the operator or another resident, the operator's contact person is [name] [telephone number].

### **Other contact persons**

Other contact persons, if you want to make a complaint about a breach of your rights, are -

- a the statutory supervisor (if there is one)
- b the Registrar of Retirement Villages.

### **Information**

The Retirement Commissioner publishes information on the Code of Residents' Rights and disputes procedures available under the Retirement Villages Act 2003 that may assist to resolve your complaint.



## Contact details

This page is for the operator to fill in the details of key contact people when giving the code to residents and intending residents. The resident can update the details as necessary when the operator tells them about any changes.

### Operator's contact person for maintenance requests

When available:

Name:

Phone:

Address:

Fax:

Email:

### Operator's contact person for complaints

When available:

Name:

Phone:

Address:

Fax:

Email:

### Operator's contact person (if different from above)

When available:

Name:

Phone:

Address:

Fax:

Email:







## **Statutory supervisor (if there is one) of the retirement village**

Name:

Company name (if applicable):

Phone:

Address:

Fax:

Email:

## **The Ministry of Business, Innovation and Employment (for general information on the implementation of the Act)**

Toll free: 0800 83 62 62

Website: [www.mbie.govt.nz](http://www.mbie.govt.nz)

Email: [office@cffc.govt.nz](mailto:office@cffc.govt.nz)

## **Registrar of Retirement Villages (for information on registration and the register)**

Toll free within New Zealand: 0800 268 269

International callers: +64 3 962 2602

Website: [www.retirementvillages.govt.nz](http://www.retirementvillages.govt.nz)

Address: Registrar of Retirement Villages  
Northern Business Centre  
Private Bag 92061  
Auckland Mail Centre  
Auckland 1142

## **Retirement Commissioner (for information on complaints and disputes)**

Phone: (04) 499 7396

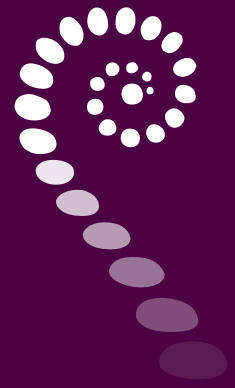
Address: Retirement Commissioner  
PO Box 106-056  
Auckland City 1143

Website: [www.cffc.org.nz](http://www.cffc.org.nz)

Email: [retirement.villages@cffc.org.nz](mailto:retirement.villages@cffc.org.nz)

# The Code of Residents' Rights

## Basic rights of residents



This is a summary of the basic rights given to you by the Retirement Villages Act 2003

- 1. Services and other benefits**

You have the right to services and other benefits promised to you in your occupation right agreement.
- 2. Information**

You have the right to information relating to any matters affecting or likely to affect the terms or conditions of your residency.
- 3. Consultation**

You have the right to be consulted by the operator about any proposed changes in the services and benefits provided or the charges that you pay that will or might have a material impact on your:

  - a. occupancy; or
  - b. ability to pay for the services and benefits provided.
- 4. Right to complain**

You have the right to complain to the operator and to receive a response within a reasonable time.
- 5. Disputes**

You have the right to a speedy and efficient process for resolving disputes between you and the operator or between you and other residents of the village.
- 6. Use of support person or representative**

You have the right, in your dealings with the operator or other residents of the village, to involve a support person or a person to represent you. The cost of involving a support person or person to represent you must be met by you.
- 7. Right to be treated with courtesy and have rights respected**

You have the right to be treated with courtesy and have your rights respected by the operator, the people who work at the village, and the people who provide services at the village.
- 8. Right not to be exploited**

You have the right not to be exploited by the operator, the people who work at the village, and the people who provide services at the village.



### Your obligations to others

Your rights exist alongside the rights of other residents and the rights of the operator, the people who work at the village, and the people who provide services at the village. In the same way that these people are expected to respect your rights, it is expected that you in return will respect their rights and treat them with courtesy.



### Operator's contact person

If you want more information about your rights or wish to make a complaint against the operator or another resident, the operator's contact person is:

Name

Telephone number



### Other contact persons

Other contact persons, if you wish to make a complaint about a breach of your rights, are:

- a. The statutory supervisor (if there is one)
- b. The Registrar of Retirement Villages.



### Information

The Retirement Commissioner publishes information on the Code of Residents' Rights and disputes procedures available under the Retirement Villages Act 2003 that may assist to resolve your complaint.

### For more information:

- If you have a retirement villages query, free phone 0800 268 269.
- The Retirement Commissioner can be contacted on 09 356 0052 or by emailing [retirement.villages@cffc.org.nz](mailto:retirement.villages@cffc.org.nz).