

## Retirement Villages Act - Compliance News

### Occupation Right Agreements

In this newsletter we look at occupation right agreements and how they are affected by the Retirement Villages Act 2003.

#### What Is An Occupation Right Agreement?

An "occupation right agreement" is the agreement between an operator and a resident of a retirement village. It is an important document for both resident and operator as it establishes each party's rights and obligations.

The Act defines an occupation right agreement as "any agreement or other document or combination of documents that:

- Confers on any person a right to occupy a residential unit within a retirement village; and
- Specifies any terms or conditions to which that right is subject."

For licence to occupy retirement villages, the occupation right agreement will be similar to existing occupation licences.

For unit title and cross-lease title retirement villages, the occupation right agreement may comprise a number of documents, including the agreement to purchase the residential unit, the title to the residential unit, the body corporate rules and any facility or management agreement.

#### No Agreement, No Offer

All retirement villages must have an occupation right agreement. An operator cannot make an offer of occupation in its retirement village or accept an offer from an intending resident, except in accordance with an occupation right agreement.

### Agreement to be Registered

A copy of the occupation right agreement must be lodged with the Registrar of Companies when the retirement village is registered.

A retirement village's statutory supervisor will likely wish to review the occupation right agreement before it enters into a deed of supervision with the operator.

#### Material Changes To The Agreement

The operator must inform the Registrar and the statutory supervisor of any material change to the occupation right agreement before the document is published or made available to any resident, intending resident or the public. In most cases, the operator will need to provide a copy of the amended occupation right agreement to the Registrar and statutory supervisor.

#### What Must The Agreement Contain?

The Act requires certain provisions and information to be included in the occupation right agreement. These are detailed below.

#### Operational Requirements

The following operational matters must be addressed in the occupation right agreement:

- Staffing, safety and personal security, fire protection and emergency management, accounts, maintenance and upgrading;
- Transfers within the retirement village and termination of the occupation right agreement by either party;
- Meetings of residents with the operator; and
- Communication to those for whom English is a second language.

## Consultative Requirements

In the occupation right agreement the operator must covenant to consult with the residents in the following circumstances:

- Before the operator's interest in the retirement village is sold or otherwise disposed of;
- Before the operator appoints a new manager, for example a contracted manager or management company (an employee manager is not caught by this requirement); and
- About any proposed changes in the services and benefits provided or the charges that the residents pay for those services and benefits that will or might have a material impact on the residents' occupancy or ability to pay.

## Other Requirements

The Act requires a number of other provisions to be included in the occupation right agreement, as follows:

- The operator, its employees and contractors must treat the residents with courtesy, respect the residents' rights and not exploit the residents in any way;
- A complaints facility and disputes procedure must be provided by the operator;
- Any provisions required by the Retirement Villages Regulations. The regulations are still to be finalised;
- Information on the Code of Residents' Rights. The Code will be reviewed in a future newsletter; and
- Any provision required by the Code of Practice. Again, this is still to be finalised.

## Other Terms

The Act does not limit the terms that must be included in an occupation right agreement. Operators will need to consider what other terms they wish to include in their occupation right agreement, such as:

- Fundamentally, the right for the resident to occupy a residential unit, to use the facilities and to be provided with the services at the retirement village;
- Payments by the resident on entry into the retirement village;
- Ongoing payments by residents for the use of the village facilities and services; and
- All other terms on which the resident may reside in the retirement village.

### Clear and Unambiguous Form

An occupation right agreement must be in a clear and unambiguous form. This will require careful drafting and co-operation between the operator and its solicitor.

All existing documents that may form part of the occupation right agreement will need to be carefully reviewed.

### Unit Under Construction

If the residential unit the subject of an occupation right agreement is still to be built or completed at a later date, a proposed date for the completion of the residential unit must be included in the occupation right agreement.

### Independent Legal Advice

All residents must obtain independent legal advice before entering into an occupation right agreement.

## Independent Legal Advice (Continued)

The signature of the resident must be witnessed by a lawyer. That lawyer must certify that, before the resident signed the agreement, the lawyer explained to that person the general effect of the agreement and its implications.

The explanation must be given in a manner and language that is appropriate to the age and understanding of the resident.

The occupation right agreement may be signed by an attorney. In this case, the lawyer's explanation may be given to the attorney on the resident's behalf.

To avoid a conflict of interest the resident's lawyer must be independent from the operator.

This process is likely to increase an intending resident's costs when entering a retirement village.

### Cooling Off Period

A resident may cancel an occupation right agreement, whether or not he or she has moved in:

- At any time no later than 15 working days after the occupation right agreement is signed by the resident; or
- If the occupation right agreement relates to a dwelling to be built and the dwelling is not finished within six months after the proposed date for completion, at any time after that six month period.

When an occupation right agreement is cancelled by the resident in this manner the resident must be refunded all moneys which he or she paid less reasonable compensation for any services provided by the operator and the cost of repairing any damage caused by the resident to the dwelling.

## Information To Be Provided

Before any occupation right agreement can be entered into, the operator must have provided to the resident:

- A disclosure statement;
- The Code of Residents' Rights;
- The Code of Practice; and
- A copy of the occupation right agreement.

If the resident has not received these documents then the occupation right agreement may be voidable.

The operator must be able to prove that the resident received these documents before signing an occupation right agreement. Operators must therefore ensure that all residents sign an acknowledgement confirming they received the above documents before entering an agreement.

## Existing Residents

The Act is silent as to whether existing residents' agreements, such as occupation licences, are subject to the occupation right agreement provisions of the Act.

Legislation cannot retrospectively alter commercial agreements unless it expressly provides otherwise. Subject to a Court judgment, existing agreements between operators and residents should therefore remain binding and unaltered. However, it would be prudent for operators to treat existing residents as having the same rights and being entitled to the same information as residents who sign occupation right agreements under the Act.

The Code of Practice may address this issue. It may provide that if a term of an existing resident's agreement is less favourable than the Code, the Code will override the agreement and apply.

## Voidable Agreements

If an occupation right agreement is entered into in contravention of the Act, namely:

- Before the retirement village is registered, (except during the transition period - see our November 2003 newsletter for details);
- While the retirement village's registration is suspended;
- Where the occupation right agreement does not include all the provisions and information required by the Act in a clear and unambiguous form; or
- Where the resident has not been provided with the information described under "Information To Be Provided" above,

then the agreement may be voidable at the election of the resident.

Only a contravention of the foregoing provisions in a "substantial respect" entitles the resident to avoid the agreement. A contravention may be in a "substantial respect" if it:

- Involves a significant detriment to the resident;
- Is otherwise material and is not solely technical or minor in character; or
- Involves deliberate misconduct on the part of the operator.

If the contravention arose as a result of the retirement village not being registered or because its registration was suspended, then the resident may avoid the agreement within the lesser of:

- Three years after the date of the agreement; or
- Six months after the resident knew or ought to have known of the contravention.

If the contravention arose as a result of the agreement failing to contain all the provisions and information required by the Act or the resident not receiving all the required information, the resident may avoid the agreement within the lesser of:

- One year after the date of the agreement; or
- Six months after the resident knew or ought to have known of the contravention.

If the resident exercises the right to avoid his or her agreement, then he or she is entitled to receive:

- A refund without deduction of all capital sums paid and all other payments, except payments for services or facilities;
- Interest at a prescribed rate; and
- Actual and reasonable costs associated with the voiding of the agreement.

## Disputing A Void Agreement

Where a resident seeks to avoid his or her agreement, the operator may elect to dispute this and/or the amount to be paid to the resident. Such disputes will be dealt with in accordance with the Act.

## More Information

Please feel free to contact us for more information about any of the matters raised in this newsletter or about any other matter relating to your retirement village or the Retirement Villages Act.

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