

## Retirement Villages Act Update

July 2007

### Disclosure statements – the great enigma!

It is now three months (yes – really!) since operators of retirement villages have been required to hand out disclosure statements to intending residents. And the same questions come up frequently from managers and sales people – *what do we have to attach, - how often do we have to update the sales history and sinking fund balance – who do we have to hand the disclosure statement to – how complete does it have to be – will we really have to hand out personalised disclosure statements to all our existing residents????*

Well, we now have some clear guidelines from the Department of Building and Housing (“DBH”) to some of these questions. To other questions, we can only state the legal position as we see it, and mention some practical approaches.

### Attached or not?

The Retirement Villages (General) Regulations 2006 (“the Regulations”) set out what is to be included in a disclosure statement and what is required by way of supporting information. One issue that has caused concern is the heading to clause 37 of the Regulations “*Required attachments to disclosure statement*”. This heading is at odds with the rest of the regulation and there has been confusion as to whether the raft of documents referred to in clause 37 should be attached or just “available”.

We have been advising you that it is not necessary to attach all the documents and we are pleased to note that this advice has now been formally confirmed by the DBH.

The documents that you should have available are:

- The relevant financial statements;
- A copy of any village rules;
- The deed of supervision;
- Any management agreement between the operator and manager.

Remember, you must hand out the Code of Residents' Rights, and, when adopted the Code of Practice. If you have not adopted the Code of Practice you must state the date you propose to adopt the Code (this statement is included in Burke Melrose's standard occupation right agreement).

### When is the date of issue?

The Regulations require that some information be provided that is “*as at the date of issue*” of the disclosure statement. In particular, the sales history over the past 12 months and the balance of the sinking fund. For Operators with no audited financial statements, financial information under Schedule 6 must be prepared within 6 months of the “date of issue”.

The question is, what is “the date of issue”? Is it the date that the disclosure statement is dated, or is it the date the disclosure statement is handed to a resident or an intending resident? Or is it the date that it is registered at the Companies Office?

Whilst not impossible to change this information on a daily basis, we identified that it could be

administratively difficult and unwieldy for many operators.. Our view has been that the date of the of the disclosure statement is the date that the disclosure statement is completed as to its main terms, and dated, not the date that it is handed to a resident. Neither is it the date of registration. Accordingly, we have been of the view that information in the disclosure statement does not need to be updated on a daily basis.

Once again, we are pleased to have this approach formally confirmed by the DBH. The DBH have expressed the reservation that some information will become outdated and misleading. The DBH recommend periodic updating. The frequency of the updating will depend on a number of factors, for example, the size of the village and the significance of the changes.

Not all updates will require a fresh disclosure statement to be registered at the Companies Office, - only those that are material.

This approach does not affect the need to particularise each disclosure statement to reflect the financial information relating to the residential unit that an intending resident is applying for.

#### **When is an intending resident an intending resident?**

Who an intending resident is, is quite clearly defined in the Retirement Villages Act 2003 ("the Act"). An intending resident is a person who:

- (a) has within the last three months:
  - indicated to an Operator that he or she is interested in becoming a resident of the Village; or
  - had discussions with the Operator about entering into an occupation right agreement; and

- (b) has given their current address or other contact details to enable an Operator to send notices to that person.

The Act provides, in section 30(1) that, before an intending resident enters into an occupation right agreement, they must receive a disclosure statement, code of residents' rights, code of practice (if any, or statement as to the date it comes into force) and a copy of the occupation right agreement.

Many villages will have a system where they record details of people who attend open days by writing their name and address in a register for that purpose. Does this mean that a disclosure statement, which is required to be handed to every intending resident, must be handed to all these people?

As a practical matter, our advice is that these documents should only be handed to a resident at the time they sign an application form or an agreement to enter into an occupation right agreement, not to everyone who visits the village. The disclosure statement handed out at that time should contain the financial information relating to the particular unit that the intending resident is interested in. The occupation licence, however, does not need to be completed. It can be in standard form.

The consequences of failing to hand out these documents are severe in that the occupation right agreement will be voidable and the penalty provisions in the Act provide for a fine of \$15,000 in the case of a person other than a body corporate or a fine of \$50,000 in the case of a body corporate.

It is worth noting that it is the Operator's obligation to prove that the intending resident has received the information and advice but a written acknowledgement by the intending resident that they have received the information is, in the absence of evidence to the contrary, sufficient proof that they have received it.

In the case of any other person who requests a disclosure statement but has not signed an application form or an agreement then whether the personal details regarding the financial structure are completed will depend on whether the person has expressed an interest in a particular residential unit or not. If the inquiry is general and the person requests a disclosure statement, then the generic disclosure statement, we suggest, will be adequate, bearing in mind, that the test is at the time of entry into the occupation right agreement not at the time of the inquiry.

#### **Disclosure statements for all?**

With all the emphasis on becoming compliant with the Act and then registering villages, the obligation to hand a disclosure statement to every existing resident by 1 May 2008, has not had high priority.

However, as time has progressed, this obligation has attracted some focus. There are estimated to be over 20,000 existing residents of retirement villages in New Zealand. This means that Operators will be issuing close to that number of disclosure statements.

The question raised is, what form should the disclosure statement take? Should it be the generic disclosure statement registered with the Registrar of Retirement Villages setting out the current information relating to the village, or should it be personalised towards each resident's individual licence agreement as affected by the Act – a logistical nightmare!

The DBH, in response to our question, have advised that the disclosure statement is a statement about the village as a whole and not how it relates to individuals. Accordingly, residents should receive the most recent generic disclosure statement at the time that the Operator chooses to hand out the disclosure statement to their existing residents. It does not need to be adapted to reflect each resident's individual terms under historical licences.

## **Contact Us**

The information in this newsletter is necessarily general.

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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