

THE TERMS THEY ARE A-CHANGING

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After a false start, a legislative Code of Practice will come into force on 2 October 2009. The Retirement Villages Code of Practice 2008 ("Code") sets out minimum requirements that operators must carry out to meet their legal obligations under the Retirement Villages Act 2003. Some of these requirements are procedural and relate to the day to day affairs of the village, whereas others relate directly to the occupation rights of the residents. As such, operators should be reviewing the terms of their current occupation right agreements ("ORAs") in light of the Code and making changes as necessary.

Why amend your current ORA?

Some provisions in the Code expressly state that they must be incorporated in the ORA, therefore it is necessary to update your current ORA to reflect these provisions.

The Code also takes effect as a contract between the operator and each resident and prevails over any less favourable provisions in the ORA. It makes sense to update your ORA so that all relevant provisions are set out. This makes things clearer for both residents and staff when reading the ORA.

So what changes need to be made?

A number of changes may need to be made to your current ORA. The main requirements of the Code for ORAs are summarised below:

- **Reference to Code:** The ORA must include a disclosure that the Code will come into force on 2 October 2009.

- **Operator's access to a resident's residential unit:** You must inform residents about the circumstances in which you can enter the unit, and the amount of notice you must give.
- **Policies, processes and procedures:** There are a number of policies, processes and procedures you must have. These should be referred to in the ORA.
- **Insurance:** You must inform residents whether any insurance excess is passed on to them. It is a good idea to set this out in the ORA.
- **Temporary Accommodation:** Your ORA must state whether or not you will provide temporary accommodation or facilities whilst a unit or facility is being repaired or replaced after an insured event. This goes further that the previous code which only related to alternative accommodation and not to facilities.
- **Transfer Requirements:** Where the ORA provides for a resident to transfer from an independent unit to a unit with a higher level care (such as a serviced apartment), there are certain requirements as to what must be included in the ORA. The new Code has an additional requirement that the ORA must inform the resident that a needs assessment may be required to access subsidies.

- **Alterations for residents with disabilities:** The ORA must state that a resident has a right to alter their unit if it does not meet their needs. Who is responsible for alterations and the effect of alterations on disposal of the unit, must also be set out.
- **Termination:** The Code sets out various requirements about termination of the ORA:
 - *Damage or destruction of unit or village:* The ORA can only be terminated on these grounds by agreement between the operator and the resident. The previous code specified that on termination on these grounds the resident must be paid the insurance proceeds relating to the unit without deduction. There is no such equivalent provision in this Code, so it is up to each operator to carefully consider whether residents should be entitled to a different payment on termination for damage or destruction.
 - *Termination on medical grounds:* The previous code provided that termination on medical grounds could only occur where the resident's health was such that they or other residents could not live safely in the village. Under this Code the test is whether their health is such that they or other residents cannot live safely in their residential units. In terms of procedure, the operator can now appoint the independent medical practitioner to assess the resident.
 - *Termination for breach of ORA:* The previous code provided that the operator could terminate for breach of the ORA if the breach was "significant" or became

significant if it continued. Under this Code the operator can only terminate for "material" breach and there is no corresponding "continuing" test.

- *Termination for serious damage or harm:* Operators now have the ability to terminate the ORA if the resident causes or is highly likely to cause serious distress to the operator, its employees, residents or residents' guests.
- *Termination notice:* The previous code required the operator to suspend termination of the ORA if the resident complained about a decision relating to the ORA. This Code states that the operator can continue with termination after consulting the statutory supervisor, if it is in the best interests of the village as a whole to do so.

One interesting quirk of the new Code is that it states that death of a resident equates to automatic termination of the ORA, yet the table setting out notice periods states that on the death of a resident the operator must give as much notice of termination as is reasonable under the circumstances. It remains to be seen whether this is simply an error or whether operators should use crystal balls!

- **Exit payments:** If the operator terminates the ORA, it must now pay the resident all sums due within 5 working days (formerly seven standard days). Where the operator has sold the unit, the payment must be made within 5 working days of the date the operator receives the new resident's settlement moneys.

- **Refurbishment:** The restrictions on recovering refurbishment costs now only apply where the operator has the responsibility for selling the unit and only to ORAs entered into after 25 September 2006. Residents cannot be charged for fair wear and tear if the ORA was entered into after 25 September 2006.
- **Introduction of prospective new resident:** The ORA must allow for the old resident to introduce a prospective new resident to the operator. The new Code provides that the operator is not obliged to accept anyone whose offer does not meet the "fair market value". It will be difficult to ascertain what the fair market value is, if there is no independent valuation.
- **Buy-backs:** The new provisions are that if the operator agrees to "buy back" the unit, it must be at a price set in accordance with the ORA or any other amount that reflects the market value of similar units locally. A resident can only require a valuation where the resident is entitled to capital gain or is liable for capital loss. The operator must pay the resident all sums due within 20 working days of the agreement to buy back.
- **Village outgoings:** The required 50% reduction in the village outgoings now kicks in on the later of six months after termination of the ORA, or any later date the resident moves out and removes their belongings from the unit. The previous provision did not extend to removal of belongings.
- **Fixed deductions:** The provisions relating to fixed deductions (village contributions, facilities fees or deferred management fees)

have been changed but only in relation to ORAs entered into after 25 September 2006. In those cases the deduction must not be calculated past the date the exit payment is due. Therefore the deduction must be calculated on a daily basis and cannot be rounded up to the next month end, or similar.

What about the disclosure statement?

Any changes to the ORA should be flowed through to the disclosure statement where relevant. The only specific requirement in the Code is that the disclosure statement must inform residents about how the village can meet their changing needs and whether it complies with a certain building standard. You will need to check this carefully.

Where to from here?

When updating your ORA you should consider the above points, but it is also a good opportunity to review all of the terms now that you have had a chance to get to understand and work with the ORA.

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