

## CONSULT AND INFORM!

### Retirement Views, Conference Edition 2007

New benchmarks have been set with the implementation of the Retirement Villages Act 2003 ("the RV Act") in relation to information to be provided to residents and consultation with them.

Many established and well organised villages have effective communication with their residents through formal residents committees or through regular meetings with their residents. Residents in these villages are regularly consulted on a range of matters regarding the operation of the village, that impact on resident's enjoyment of retirement village living.

A process for consultation with residents has now been set out in the Code of Practice to be implemented in September this year, but in the meantime, operators should not overlook the need to consult with residents in a variety of areas.

#### **Schedule 3 to the Act sets out three areas where an operator must consult with residents:**

- A key area, is the obligation to consult with residents:

*"about any proposed changes in the services and benefits provided or the charges that the residents pay that will or might have a material impact on the residents' occupancy or ability to pay for the services and benefits provided."*

#### **This particular right to be consulted is also reflected in the Code of Resident's Rights.**

- An operator must consult with residents before appointing a new manager. The Regulations and the Code, when read together are unclear as to who "the manager" is, i.e. a management company or the operator, or the

day to day manager. A likely interpretation of this provision is that the operator should consult with residents before appointing a new day to day manager.

- The third provision under Schedule 3, requires the operator and the purchaser of a village, if the Village is being sold, to consult with residents before the village is sold or otherwise disposed of. Consultation with residents in this case, is to take place at a time directed by the statutory supervisor (if there is one) or at any other appropriate time, that is, a reasonable time before settlement of the transaction. This consultative obligation recognises the tensions between the operator's need to be able to negotiate in a commercial and confidential way and the resident's rights to know what is happening to their Village.

#### **Other consultative requirements are included in the Code, including:**

- consulting with residents about the establishment of rules and any changes to them; and
- consulting with residents as part of any periodic review of maintenance agreements.

It is important to note that a consultation process is just that. An operator does not need to act on the views of residents. However, they must consider all responses from residents with an open mind and must not have predetermined any outcome.

The operator is entitled to take into account when going through the consultative process, its need to operate and manage the village effectively and to provide the village facilities and services for the benefit of all residents. It is important to note that any decision made by the operator must be conveyed to residents, with reasons. (Clause 27 of the Code of Practice).

The areas where an operator must consult with residents are reasonably obvious and in many cases, will be simply an enhancement on present practice.

The right under S34 of the RV Act for residents and intending residents to be supplied with certain information which is relevant to their occupancy must not be forgotten. This is quite a separate obligation for the operator from the obligation to consult as outlined above.

**In particular, a resident or an intending resident is required to be promptly informed by an operator about any matter that would or might have a material impact on:**

- the occupancy right, or rights to quiet enjoyment, of the resident or intending resident; or
- the charges levied on a resident or intending residents for his or her occupancy right, or right to services and facilities.

The impact on charges or services and facilities is a matter in respect of which residents are entitled to be consulted. Intending residents are not required to be consulted but are required to be advised.

So, while residents and intending residents are not required to be consulted on matters arising in relation to:

*“their occupancy right, or rights to quiet enjoyment”*,

they must be promptly informed about these rights.

In addition to the obligation to advise residents or intending residents of the above matters, an operator must also advise the village's statutory supervisor (if there is one and if not, then every resident and intending resident) of the matters set out below if they arise. If the statutory supervisor so directs, then the operator must inform each resident and intending resident.

**The matters to be notified to the statutory supervisor are:**

- any proposal to develop or re-develop any part of the retirement village land, or to acquire contiguous land for development;
- any notice of suspension from registration;
- any request by an operator to cancel registration of the Village;
- any decision by the Registrar of Retirement Villages to exempt an operator from appointing a statutory supervisor;
- the appointment of a new statutory supervisor;
- any decision by the Registrar to exempt an operator from complying with any provision of the Code of Practice;
- any proposed increase in secured liabilities of any person over any part of the Village;
- any proposed increase in the maximum sum available to the operator of a retirement village under any credit facility;
- any actual threatened action by a creditor against the village in respect of a sum over \$1,000 or by a mortgagee or chargeholder in respect of that person's security over the village;
- any decision to refuse to insure a village or any part of it;

- any actual or threatened legal proceedings against the village or an operator that affect the interests of any resident or intending resident;
- any action by a creditor to put the operator or the village into receivership or liquidation.

Most of the above requirements to notify the statutory supervisor are significant and are not likely to be overlooked by an operator.

Watch out though, for any actual or threatened action by a creditor for any sum over \$1,000. It is not unusual to dispute invoices with suppliers, for

example, where services are less than satisfactory leading to creditors threatening to take further action. It is important to have a process in place that will ensure that any dispute with a creditor for an amount over \$1,000 is automatically reported to the statutory supervisor.

**The interests of residents and intending residents will be well served by these new provisions. Moving forward, operators must ensure they have robust processes in place to ensure that the consultation is carried out correctly and that the necessity to advise is not overlooked.**

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## Contact Us

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