

TRANSFORMING AN INTENDING RESIDENT INTO AN ACTUAL RESIDENT

**Retirement Views,
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In the three months since the Retirement Villages Act 2003 came fully into force operators, managers and sales people have found themselves facing many challenges. Transforming an intending resident into an actual resident is one such challenge that managers are grappling with especially at the moment.

The most pressing and confusing questions seem to be what should be handed to intending residents and when?

What?

Managers and sales people will be well aware that an intending resident must receive the following (referred to in this article as the "disclosure documents"):

- a disclosure statement that complies with Schedule 2 of the Act;
- the Residents Code of Rights';
- the Code of Practice (if any) and, if the Code is not yet in force, a statement that it is not yet in force and the date on which it will come into force; and
- a copy of the occupation right agreement.

Schedule 2 of the Act requires the disclosure statement to contain a raft of information as set out in the Retirement Village (General) Regulations 2006 ("the Regulations"). The Regulations also refer to other information to be handed to intending residents.

And, the Code of Practice itself (once in force) requires certain information to be handed to intending residents.

Disclosure statements

One issue that has caused concern is whether copies of the following additional documents must be handed to intending residents on request or whether they should be attached to the disclosure statement. These additional documents are:

- financial statements;
- any village rules;
- deed of supervision; and
- any management agreement between an operator and a manager.

This question is of particular concern as a disclosure statement, with all the additional documents attached, becomes a document comprising over 100 pages.

The confusion has arisen because the heading to the relevant clause in the Regulations is at odds with the content of the clause. The heading requires the additional documents to be "attached" to the disclosure statement whereas the content required the additional documents to be made "available".

The Department of Building and Housing has now confirmed the general approach adopted by many in the industry, that these documents should be made "available" to intending residents, rather than "attached" to the disclosure statement.

It should be noted that these documents are "available" and only need to be handed to

intending residents if requested. There is no requirement to hand these documents to an intending resident if they have not requested them.

Code of Practice

The Code of Practice provides that operators must have written policies and procedures regarding the following areas:

- Staffing of retirement village;
- Safety and personal security of residents;
- Fire protection and emergency management;
- Transfer of residents within the retirement village;
- Meetings of residents with operator and resident involvement;
- Complaints facility;
- Accounts;
- Maintenance and upgrading;
- Termination of an occupation right agreement; and
- Communication with residents.

Intending residents (and for that matter, all existing residents) must be informed about these policies and procedures and if an intending resident requests any of these, then a copy must be handed to them.

Information under s 34 of the Act

In addition to the documents, policies and procedures to be handed to intending residents as referred to above in this article, an operator has an obligation to keep intending residents (and once again, every existing resident) informed of certain matters. These are, 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 the resident or intending resident for his or her occupancy right or right to services and facilities with the retirement village.

When?

An intending resident is defined in the Act as a person who:

- 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
- has given their current address or other contact details sufficient to enable an operator to send notices to that person.

Disclosure documents

Managers have asked whether an intending resident must receive the disclosure documents even if the "intending resident" has simply viewed a unit and written down their contact details.

The Act provides, in section 30(1) that the disclosure documents must be provided to an intending resident before the intending resident enters into an occupation right agreement. It is our view that it is not a requirement to hand the disclosure documents to every single person who falls within the above definition.

The question remains however, as to whether all the disclosure documents should be handed to an intending resident at the time that intending resident signs an application form or an initial agreement to enter an occupation right agreement, or rather, at the time the actual occupation right agreement is entered into.

The best approach to take is to make sure all the disclosure documents are handed to an intending resident at the time they sign an application form or an initial agreement. This is because the definition of “occupation right agreement” under the Act provides that an occupation right agreement may include more than one document that confers on any person the right to occupy and specifies any terms and conditions.

However, this approach is open to interpretation, and it is possible to take view that so long as an intending resident has the disclosure documents prior to their signing of the actual document that gives rise to the occupation right, (usually an occupation licence or an occupation right agreement combined with a unit title), then the strict provisions of the Act are complied with.

This process must be clearly thought through because the obligation to ensure that a resident has all the disclosure documents lies with an operator and the consequences of not handing them out are significant. If they are not handed out to intending residents, then the occupation right agreement will be voidable for up to one year. Further, failure to provide intending residents with the disclosure documents is a criminal offence giving rise to fines of up to \$15,000 for an individual and \$50,000 for a body corporate.

As a matter of good practice, intending residents should always be given the disclosure documents in time for them to properly inform themselves about their proposed commitment.

Code of Practice – Policies and Procedures

As mentioned above, the timing of handing the policies and procedures to intending residents as required under the Code of Practice is less clear. By implication this must be before the intending resident

enters the occupation right agreement, because at that point they cease to be an intending resident and become a “resident”.

It may, practically speaking, be difficult to inform intending residents about the policies and procedures without actually handing them a copy of them but the answer may be one of timing. For example, an operator may send out an information pack including a copy of the required policies and procedures to an intending resident once their application becomes unconditional but should be prepared to hand an information pack to an intending resident earlier if requested.

Information Under s 34 of the Act

Here again, there is no specific time at which an intending resident must be informed of or handed this information. The only reference to timing is the word “promptly”. A commonsense approach would be to ensure that any information under this head is advised once an intending resident has indicated a firm interest.

Change In Content Of Disclosure Statements

Disclosure statements are required to include some information that changes on a daily basis. They are also required to disclose information that is resident specific.

A disclosure statement must set out the specific financial details relating to the particular residential unit that an intending resident is interested in. More of an issue for operators is, however, the extent to which the other information that changes reasonably frequently (and in some cases daily) needs to be updated for intending residents. For example, a disclosure statement is required to contain details relating to:

- sales over “the previous 12 months before the day the disclosure statement was issued”;
- what the balance of any sinking fund is “at the date of issue of the disclosure statement”;
- and
- have available, where there are no audited financial statements, financial information complying with Schedule 6 of the Regulations that contains information at a date that is not more than six months before “the date of issue of the disclosure statement”.

Whilst it is not impossible to comply with providing this information on a daily or frequent basis, it can be administratively difficult.

Once again, the Department of Building and Housing has been of assistance in this regard. They have indicated that, in their view, the date of issue of the disclosure statement is the date that it is completed as to its main terms and then dated, not the date that it is handed to a resident. Neither is the date of the disclosure statement the date it is registered under the Act.

Accordingly, the information referred to above does not need to be updated on a daily basis.

As pointed out by the Department of Building and Housing however, some information clearly will become outdated and so they recommend periodic updating. The updating will depend on a number of factors and certainly must occur if any of the information becomes misleading. But the size of the village, the significance of the changes and

whether or not a village in fact has a sinking fund will be amongst the factors affecting the timing of the updating of the disclosure statement.

Not all updates will require a fresh disclosure statement to be registered at the Companies Office. Only those changes that are therefore material or are material when viewed collectively over a period of time give rise to the requirement for a further registration of an updated disclosure statement.

Conclusion

Clear and effective processes, carefully followed, will ensure that any unexpected pitfalls will be avoided.

We have set out in this article the legal requirements relating to disclosure, but the overriding factor that must be borne in mind is that residents should be informed at an appropriate time of all relevant information, and sooner is better than later.

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