

ADVERTISING – WHAT YOU NEED TO KNOW!

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Does your advertising comply with the Retirement Villages Act 2003 (the Act) and its Regulations?

Now that the Act is fully operational, the transition provisions no longer apply (see Retirement Views Summer 2006) and registration nightmares are largely over, a review of how Operators are dealing with the Act is timely. A quick glance at advertising in newspapers and on the web, and it seems that many operators are not familiar with the new regime.

A number of villages still refer to investment statements in their advertisements and mention that applications must be made on a specific application form. As operators will be well aware, investment statements are a thing of the past! Nor is there any longer a requirement for applications to be made on a specific application form.

Other villages are failing to comply with new disclosure rules under the Act and its regulations. Whilst the rules relating to advertising retirement villages are brief, their application can still prove difficult. Nonetheless compliance is most important.

The two principal rules are set out in S26 of the Act:

- the operator and promoter of a village must take all practicable steps to ensure that an advertisement is not misleading or deceptive;
- the operator and promoter must comply with their obligations under the Fair Trading Act.

In addition, the Retirement Village Regulations contain five specific advertising rules. The two rules most likely to affect operators are:

- if an advertisement refers to a right to occupy a residential unit in a retirement village, the advertisement must also state that the right is unsecured or alternatively, if secured, the nature and ranking in point of security of the right.
- an advertisement must not contain a statement to the effect that entering into an occupation right agreement relating to a retirement village is safe or free from risk.

There is no requirement to refer to disclosure statements.

What is an advertisement?

The definition of an “advertisement” under the Retirement Villages Act is very broad and encompasses a wide range of media.

An advertisement is defined as “any publication to the public or to any section of the public or to any individual of any words, whether written or printed, spoken or in any electronic form or of any pictorial representation or design or device, used to promote a retirement village.”

This will include websites, signage, pamphlets, radio advertisements, newspaper advertisements, television advertisements and marketing emails and also promotional material prepared for a specific intending resident.

It is important to note that a disclosure statement also falls within the definition of an advertisement.

Right to occupy – Secured or Unsecured?

An advertisement cannot refer to a right to occupy a residential unit without also stating whether the right is secured or unsecured. If secured the advertisement must refer to the nature and ranking in point of security of the right.

The meaning of a "right to occupy" is not defined in the Act or the Regulations. However it seems reasonable to assume that any reference to occupation right agreements in an advertisement would be a reference to a "right to occupy" that requires disclosure as to whether the right is secured or unsecured.

If residents' occupation rights are secured by a mortgage or encumbrance in favour of the village's statutory supervisor, a statement to this effect must be included as part of every advertisement that refers to a resident's right to occupy a unit at the village, the priority that such a security holds.

In the case of a simple sign or a basic newspaper advertisement that does not refer to a right to occupy, no statement is required.

Operators must also be mindful when using the words "secure" or "security". Physical security is often an important reason why residents choose to live in a village and it is natural to wish to emphasise this in an advertisement. However, it is important not to inadvertently breach the provisions of the Act by allowing a description of physical security to confuse residents into thinking the reference is to the security of their investment.

Updating Disclosure Statements

It is important that a village's disclosure statement is kept up to date and amended if there is any material change so as not to become misleading or

deceptive. Whether a change of circumstances is such as to be misleading and deceptive if not disclosed is a matter of judgement. Changes that should ring alarm bells include changes in directors or trustees, development plans, removal of facilities or services, granting of new securities over the village land or increases in a facility limit under an existing facility.

A material change to a disclosure statement must be notified to the Registrar and the statutory supervisor of the village before the changed document is made available to the public.

In addition, any change of circumstances that make any registered document likely to be misleading or deceptive to any resident, any intending resident or the public must be advised to the Registrar and statutory supervisor of the Village.

Securities Act

There are still a number of advertisements that comply with advertising rules set out in the Securities Act and refer to terminology used in that Act. For example village website pages and newspaper advertisements containing statements such as:

"Applications can only be accepted on the application form contained in the Investment Statement issued in accordance with the Securities Act."

Investment statements were prepared under the Securities Act and are not part of the Retirement Villages Act regime. This terminology should be removed from all advertisements as it could potentially be considered misleading to residents (i.e. by implying that their occupation right agreement is offered under the Securities Act rather than the Retirement Villages Act).

Fair Trading Act

Misleading and Deceptive Advertising

An operator and promoter are also required to comply with the Fair Trading Act, which, amongst other things, prohibits misleading and deceptive conduct and false representations.

There have been a number of successful prosecutions brought by the Commerce Commission against real estate agents for misleading advertising.

The fact situations and principles that can be distilled from these decisions are relevant for advertising by retirement villages.

In 2000, an Orewa real estate agency advertised a property as being a "beachside townhouse". When reading such a description and viewing the accompanying photo of Orewa Beach, potential buyers could be forgiven for assuming that the property was located right on the beach and enjoyed the same view of the beach as that shown in the advertisement photo.

This "beachside" property was in fact separated from Orewa Beach by State Highway 1 and a reserve and could perhaps more accurately be described as a "beach-highway-reserve-side property"!

A second property was advertised by the same agency as being "within a few metres of the glorious shores of Red Beach". "A few metres" evokes the same "beachside" assumption and potential buyers could be led to think that the property was 10 metres, or maybe 50 metres away from the beach. This property was actually located 300 metres (the length of three rugby fields) from the beach.

In both cases, the advertisements showed photos of the beach that did not reflect the actual view from the advertised property. The pictures were used to

"entice interest" in the properties. The District Court, while acknowledging a fine of \$9,000 was appropriate due to the financial situation of the defendant, imposed a fine of \$3,600.

This real estate agency is one of a number of real estate firms that have been prosecuted over the last few years by the Commerce Commission for breaching the Fair Trading Act by making false or misleading claims about real estate.

Further information about Commerce Commission prosecutions under the Fair Trading Act can be found on the Commission's website:

www.comcom.govt.nz/MediaCentre/MediaReleases

While these prosecutions related to false or misleading advertising for the sale of real estate, the same principles apply to advertisements for the issuing of occupation right agreements for retirement villages.

Operators should be careful not to make any claims in advertisements that could be considered false or misleading.

For example:

If a village has sea or lake views that can be seen from some, but not all, residential units, advertisements should not imply that the views can be seen from all units.

If a photo of a sea or lake view that can only be seen from part of the village is used in an advertisement, that advertisement should make it clear that the view can only be seen from part of the village.

Care should be taken when referring to specific services and facilities if these are not yet built or may not continue to be provided in the future.

Advertising before registration of a village

Often Operators who are developing a village wish to promote an intended village whilst the occupancy documents required to register a village are being prepared. S25(3) permits limited advertising during this phase.

Any advertisement must include a statement to the effect that it is intended that the village will be registered and when offers of occupation rights will be made. Otherwise only limited factual information regarding the proposed offer may be included.

Ensuring advertising compliance

Operators must keep in mind that they must take all practicable steps to ensure that an advertisement is not misleading or deceptive. It is most important to take the time to review websites, advertisements and promotional material for compliance with the Act and its Regulations and the Fair Trading Act.

All Securities Act terminology must be removed

A breach of the advertising provisions in the Act can result on conviction of a fine for a body corporate of up to \$50,000 and \$15,000 for a person other than a body corporate. In addition, the Operator could be prosecuted under the Fair Trading Act.

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