

Recommendations to the Minister for Building and Construction on proposed variations to the Retirement Villages Code of Practice 2008

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Retirement Commissioner
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Recommendations to the Minister for Building and Construction on the Retirement Villages Code of Practice 2008

Introduction

As Retirement Commissioner, pursuant to section 90(4) of the Retirement Villages Act 2003, I make my recommendations on the three sets of variations to the Retirement Villages Code of Practice 2008 received by me in mid 2011. In accordance with section 91 of the Retirement Villages Act, on 6 October 2011 I jointly notified with the Department of Building and Housing the proposed variations and invited submissions on them, to be received in my office by 21 November 2011.

I received three sets of proposed variations to the Code. They were from:

- the Association of Residents of Retirement Villages (Auckland Region)
- the Retirement Villages Association (an association of retirement village operators)
- The Department of Building and Housing.

I have carefully considered the proposed variations to the Code, the 151 submissions I received and the advice received on it.

Key recommendations

Recommendation 1

I recommend the Minister for Building and Construction appoints a panel of independent experts with experience in areas such as insurance, retirement village contractual arrangements, and retirement village financial issues under an independent chair and that they provide advice to:

- Address the issue of which insurance arrangements would best provide security for villages in terms of accommodation and termination payouts for residents, where a village requires a rebuild or not, in a no-fault exit situation, and to identify the overall impact and feasibility of these options on village operators.
- Address the role of the statutory supervisor in this process and how this role is best incorporated in the retirement villages legislation.
- Define the meaning of a no-fault event and advise how the Code of Practice can best deal with the consequences across a range of no-fault events.
- Report to the Minister on proposals to vary the Code of Practice.

Recommendation 2

I recommend that, if the Minister for Building and Construction accepts recommendation 1, then he inform the sector of this decision.

Rationale

At this stage, I have insufficient information and expertise with which to make a recommendation in which I can be reasonably confident of the outcome and the impact on both residents and operators.

General comments

Any change to the Code of Practice becomes part of a minimum standard or condition with which an operator must comply. Before making a recommendation to change the Code, I would need to have sufficient information to be very confident that the change is feasible across all villages, workable in terms of costs to operators and residents, and provides the best possible level of protection to residents. At this stage the full effect and impact of the individual variations, particularly those specific to village insurances, across a diverse village sector, are not clear to me from this consultation process. I consider the risk of imposing an unworkable clause is high and that any recommendations I make may not achieve the desired outcomes. Without independent expert advice I cannot take this matter further.

In analysing the submissions, I have been looking for a balanced position between what everyone in the sector can afford and one that will provide protection in the situation of an event such as the Canterbury earthquakes. I want to see changes made to the Code that provide full and accessible disclosure to residents and intending residents of insurance and termination matters in a no-fault event. The protection for residents in this situation in terms of their financial and housing situation should be as high as possible. I also want the operators of villages to have levels of insurance which are affordable and workable in achieving as a first priority, that a village is rebuilt (on the original or on a new site), or secondly, that they are able to pay out of insurance proceeds an amount that best enables the resident to replace their lost accommodation. However, as a matter of general policy, I note that introducing new commercial terms into already agreed contracts (ORAs) is not desirable. I respect the need for different operators in the sector to present a choice to the market in terms of their ORA content.

I have reached the conclusion that I cannot make a recommendation which is best for the sector without more technical information, mainly in the area of insurance, which my office does not have the resources or expertise to provide.

I do not support any interim or partial changes to the Code of Practice 2008 on this issue until agreement on the key payout on termination clauses is reached. At this stage, there is nothing preventing an operator from taking a position greater than the minimum requirements currently prescribed by the Code.

Issue background

Five retirement villages sustained damage in the Canterbury earthquakes. Three of these were subsequently confirmed as being in the red zone. They have closed and cannot be rebuilt on that land. This required the termination of the occupation right agreements for 194 affected units under the no-fault exit provisions. The residents from those 194 units had to find alternative accommodation.

The Canterbury earthquake experience has led to questioning as to the adequacy of the Code of Practice in such situations. Just over three and a half thousand village residents were sufficiently concerned in June 2011 to petition the Government on changes to the Code of Practice 2008 over this issue.

There has been previous work on this issue and, as I noted that in the last consultation process I ran in 2008 on the Code of Practice, some residents supported the reinstatement of an insurance clause 21.5 from the previous 2006 Code. This clause concerned the distribution of insurance proceeds if a destroyed unit is not rebuilt. My recommendation was at that time that DBH and the Insurance Council work with operators and residents to find workable, fair clauses for this section of the Code.

In my comments I noted that the omission of that clause was relatively important where a resident pays for their own insurance cover. Further there should be a requirement to rebuild unless there are good reasons that prevent rebuilding such as physical dislocation caused by earthquake. Other submissions wanted the provision of temporary accommodation to be required. I note these issues also arise in the current variations.

Criteria/Approach

In developing my recommendations I consider the Code of Practice should reflect the following criteria as far as is feasible that:

- Where a retirement village is affected by a no-fault event which results in the termination and the payout of an ORA, the economic impacts do not fall unfairly on any person or group, nor should they obtain a windfall
- Appropriate insurances are taken out with proper notation of the interests of operators as well as residents, since in many cases residents will have contributed to those insurance premiums
- Full and accessible disclosure principles are met
- The Code of Practice is workable for both residents and operators and across all tenure types in a no-fault event
- The Code reflects what we have learnt as a result of the Canterbury earthquake
- The statutory supervisor should have a strong and clearly defined role in a no-fault event that results in a village rebuild or in ORA terminations.

My preferred outcomes are that the Code of Practice and ORAs provide residents with a high level of disclosure and assurance about their financial and housing situation in a no-fault event. I consider that the first priority should be that a damaged village is rebuilt and that, if possible, residents are rehoused in a timely manner in accommodation of a similar standard, and as close geographically as possible. I would also expect the sector to work together to support the operator and residents of any village that experiences such an event.

Submissions: Main points

In making my recommendation/s, I am mindful of the salient points to have come out of this consultation process.

Insurance

- The issue of how insurance best protects the assets of residents and operators in the retirement village sector is complex.
- The technical information required to fully address the insurance question is not necessarily best provided in a written submission process.
- The impact of the Canterbury earthquake on the retirement village sector is still not clear with respect to insurance.
- There is real concern by residents, as a result of the Canterbury experience, to ensure their housing situation and financial interest in the village is protected in any similar event.
- The unavailability of information on some insurance issues: for example, the insurance products that may well address those concerns are not fully understood, possibly don't exist, and/or have changed (e.g. in cost) since the Canterbury earthquake.

Disclosure

- Accessible disclosure is an important principle of the Retirement Villages Act 2003 and the Code of Practice.
- Relying solely on disclosure requirements in the Code of Practice may be insufficient to ensure consumer protection in some aspects of retirement village contracts.

Varying the Code of Practice

- One variation to the Code of Practice, and many of the submitters, supported an interim variation to the Code to give immediate assurance and protection to residents.
- The diversity of tenure and operator types in the sector is a strength in terms of providing consumer choice, but means that a single response to this issue by varying the Code is a difficult exercise. It may be a situation where one size doesn't fit all.

Nature of the sector

- Retirement village residents are at a particular stage in their lives which typically means they are unable to replace lost capital; and relocating, or waiting for a rebuild of their home is a difficult option.

I am pleased to see the initiatives taken by a number of operators in making changes to their ORAs and/or in providing extra disclosure and reassurance to residents as to the payout amounts they would receive on termination in a no-fault exit situation. I am aware this is easier for some operators to do than others. I note the points made in submissions that operator size, tenure type, debt levels, the age of the village, and the differing business rationale amongst villages, are all factors that could affect an operator's response.

Specific comments on the three proposed variations

Variation 1 proposed by the Association of Residents of Retirement Village (Auckland region)

This variation has considerable support from residents, many who see it is an interim change to the Code or Practice which would provide an immediate level of protection and assurance to residents. Many supported proposals for a working group on insurance issues to develop and cost options that could, for example, provide termination payouts based on market value of units.

While this variation, and its support by residents, clearly demonstrate the importance of this issue I have several concerns about it. In particular, there is the impact on the sector of any interim change to the Code, in terms of the cost and possible confusion. The time and effort to get an interim clause made into law would be better used to develop a permanent change to the Code.

My other key concern is that I am not able to assess the financial impact of this variation on current retirement village operators and on residents. To comply with this proposed variation may involve some operators in increased insurances costs, and residents in increased weekly fees.

Variation 2 proposed by the Retirement Villages Association

This variation deals with the issue of residents receiving an ORA termination payout of their full capital sum without any deductions. The proposals aimed at improving disclosure about insurance and payments were well received by submitters.

While this variation has the advantage of clarity, I am concerned that this does not meet the principle of residents benefiting from the proceeds of insurance policies to which they have contributed. It does not address the objective of some residents to be able to fully replace in terms of value, their retirement village accommodation with an equivalent unit or apartment. This is particularly an issue where a resident has been living in a village for a long time.

The RVA's supporting argument is that the capital sum is not open to dispute and therefore a fair and simple way to proceed, and that distinguishing individual components of a claim is difficult. I have received conflicting information on whether operators, through their insurance valuation requirements, do know how much individual units are worth. Further information on the basis for the amount many residents pay through weekly fee contributions to insurance would be useful.

The RVA position as a minimum one is appropriate for some villages but I have insufficient information to support the variation for all villages without knowing the effect on those villages which are independently owned, have insufficient insurance, are incorrectly valued, or have debt that may be significant in the circumstances.

I note that the RVA is concerned about the level of debt a village is holding and the willingness of a bank to lend to a village, when a no-fault termination payout is based on the insurance payout.

Variation 3 proposed by the Department of Building and Housing

This variation has merit in its attempt to provide effective disclosure around the termination payout and insurance issues. It does not seek to prescribe a specific termination payout clause but rather to explicitly state the process to be followed in a no-fault exit situation. This approach relies on the residents finding and understanding this information before they sign their ORAs. Some submitters were concerned about the significant effort required by intending residents to do research into the insurance and debt situation of a village. While I am reluctant for the Code to become overly prescriptive, in my view this is an insufficient approach for this issue and does not meet the test of consumer protection legislation.

I find merit in the new proposed clause 47(5), which provides a safeguard for residents if they do not accept an option to transfer to a different village or if the operator decides to rebuild on a new site, that they can terminate their occupation right agreement under the no-fault exit provisions. I do not support the particular aspect of clause 47(4) which had a proposed 50km limit, nor was this well supported by submitters.

I have not made specific comments on the parts of the variations which concerned insurance arrangements, nor those which concerned payments and charges when an ORA is terminated in a no-fault exit situation. The submissions suggest there are areas of consensus, but until the clauses concerning termination payout basis and process are finalised, I am not making recommendation on them.

Consultation process followed

The Retirement Villages Code of Practice 2008 was issued by the Minister for Building and Construction. When in force, the Code is enforceable as a contract and prevails over any less favourable provision in a resident's agreement.

The proposed variations to the 2008 Code concerned the process of a no-fault termination of an occupation right agreement (ORA) in an event such as an earthquake where the unit or village is required to be rebuilt or the ORA terminated and the basis for and adequacy of the termination payout.

A consultation document was produced jointly with the Department of Building and Housing and sent out to the sector on 6 October 2011. Public notice of the consultation process on the three proposed variations was gazetted on 6 October 2011, notified on our website at www.retirement.org.nz, published in major newspapers, and copies of the Code were sent to residents' committees at all known retirement villages and to key groups in the sector. Operators and others in the sector were advised by email of the consultation process. Copies were available to read in public libraries, and available on request by email from the Retirement Commission and the Department of Building and Housing, or by phoning the Department of Building and Housing's 0800 number.

Part one of the consultation document sought submissions to the Retirement Commissioner. The format of the consultation document asked the same set of questions about each of the three variations. While this gave some structure to the submission analysis, it is important to recognise this was not designed as a survey and the responses should not be given the statistical validity of a survey. What the submissions do give though is a strong sense of the importance and concern about the particular issues to those in the retirement village sector.

The submissions made in response to the proposed variations were the major part of my consultation process and I have produced a separate paper which summarises them. My office has also undertaken consultation meetings with key sector groups. I am providing you with a copy of the submission document and an electronic copy of the individual submissions.

The summary of the submissions received is available to be read or downloaded from our website at www.retirement.org.nz

Advice received

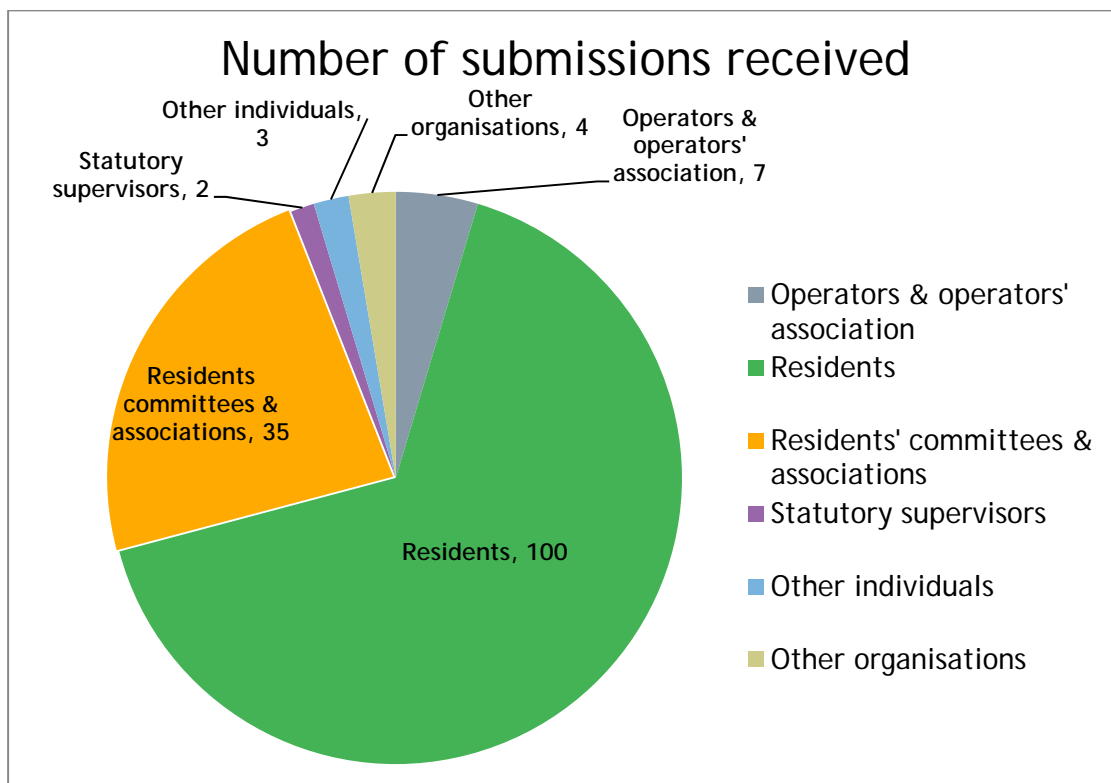
I have taken legal advice on the proposed variations to the Code of Practice 2008 from John Greenwood, Partner, Greenwood Roche Chisnall.

Appendix A: Submissions received

I received 151 submissions:

- 100 were from individual residents
74 of the individual submissions were from one retirement village.
- 32 residents groups /committees/body corporate rep
20 of these residents committees /groups stated that their submission represented in total 2,787 residents (many included on their submission all those residents signatures)
- 3 regional resident associations representing a large number of villages
- 6 operators
- 1 from the operators' association(RVA)representing 271 members
- 2 from community law centres
- 1 combined submission from the national bodies of Grey Power and Age Concern
- 1 from a Grey Power regional group
- 2 from statutory supervisors (includes Trustees Corporation Association)
- 3 from other individuals.

The chart shows the submissions by category.



All submissions addressed the key issue of the payout due to residents when their occupation right agreement is terminated in a non fault exit situation and where their village will not be rebuilt. A number, (86), mostly residents, supported all of the three different wording variations on this issue. I take their concern to be a desire for clarity and certainty in any no-fault exit situation and that all the variations are improvements on the current clauses.