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July 2018

Submissions on Amendments to the Code of Practice

For several months a sub-committee of the National Executive has been preparing proposals for amendments to the Code, regulations and Act. They were submitted to the Retirement Commissioner at a meeting in Auckland on 11 July and at a meeting with MBIE officials in Wellington on 25 July. The full submission (19 pages) is available for you to see here: [See Code of Practice Submission](#)

Summary of Concerns

History

Preparation of the Retirement Villages Act and the Code had input from the Retirement Village Association (RVA - the Operators) and the legislation passed was influenced by recommendations from that group. There was no organisation of residents at that time. This has resulted in the terms of the Act and the Code being weighted in favour of the operators.

Statutory Supervisors

The duty of the statutory supervisor is to protect the rights of residents, but although residents fund them, residents do not have a say in who is appointed to act for them. Their role lacks independence, because the selection and payment for the role is placed with the operator.

Appeals to the Statutory Supervisors are ineffectual in many cases because the terms laid out in the COP are so broad that many interpretations are possible and their recommendations are non-binding, allowing outcomes which are perceived by residents as unfair, but in accordance with the black letter of the law. There can be no consideration of fairness.

Fair Trading Act

The Occupation Rights Agreement terms are not legally negotiable, placing the operator in a powerful position.

A substantial number of clauses contained in the COP may be *ultra vires* of the Fair Trading Act.

ORA exit clauses in particular, are heavily slanted in favour of operators and result in extremely unfair situations and outcomes on termination of an ORA. These clauses are sanctioned by the current COP and it is RVRANZ's view that those provisions are therefore illegal. The ORA effectively reduces the rights of residents below those of tenants under the Residential Tenancies Act, 1986

Code of Residents Rights: no.8 *No provision of the ORA may result in exploitation of residents.*

The current wording in the Code of Practice allows for the indirect financial exploitation of residents, who are subject to ORAs which may contravene and infringe provisions of the Fair Trading Act. For the relevant section: [See Fair Trading Act](#)

Disputes Tribunal Process

Contrary to the views expressed by RVA that the process is working because only a small number of disputes were made through the Disputes Panel, RVRANZ is of the opinion that their view is a total misjudgement of the actual position. The limited number of disputes initiated and adjudicated by the Disputes Panel in the past, actually bear witness to the fact that the current process is far too formal and is therefore a barrier to due process. There is a need for a Tribunal or Moderator to be appointed where issues can be decided which are consistent with previous decisions



Photo of the Sub-Committee, taken by a CFFC staff member following the meeting with the Retirement Commissioner. Left to right:

Colin Porter, President, Auckland
Anton Coetzee, Lawyer and Chairman, BOP
Dick Williams, Secretary, Bay of Plenty
Graham Kelly, ex MP, Wellington
Troy Churton, Retirement Commission, Auckland

Summary of Concerns (continued)



Financial Constraints

There is a significant power imbalance between the well-funded Retirement Villages Association (RVA) and the Retirement Villages Residents Association (RVRANZ) because of the financial viability of one over the other. In most instances operators charge their respective membership fees as an outgoing of their village and therefore residents indirectly fund the RVA. Residents' contributions should support the RVRANZ, not the RVA.

The Key Issues Submitted

After the meeting with the Retirement Commissioner and her staff, the sub-committee concluded that it would be wise to avoid any legislation changes at this stage, as it would entail a lengthy Parliamentary process.

Changes to the Code are able to be signed off by the Minister after his approval of recommendations to him by the Retirement Commissioner and the Minister's policy advisors.

The sub-committee therefore concentrated on the following key issues in order to expedite the process:

1. **Prescriptive Definitions for the DMF, Outgoings, Maintenance, LTM**

The COP is non-prescriptive to the point that wide interpretations of clauses are possible and usually not in favour of the resident. There are as many variations of interpretation as there are villages.

Appeals to the Statutory Supervisors are ineffectual in many cases because the terms laid out in the COP are so broad that many interpretations are possible and their recommendations are non-binding, allowing outcomes which are perceived by residents as unfair but in accordance with the black letter of the law. There can be no consideration of fairness.

Financial exploitation of residents, especially by operators of the so-called 'resident funded villages', also referred to as 'cost recovery villages'

2. **Exit conditions**

a. Total destruction Clause 47(5)

The changes to the COP made subsequent to the Christchurch events, were insufficient to protect residents. The operator will still receive the replacement value of the destroyed unit which should be sufficient compensation but the resident will be out of pocket.

b. Termination by resident Clause 54

There is a myriad of examples that constitute exploitation of residents when exit clauses are unfairly used and applied to the detriment of vacating residents. The COP effectively reduces the rights of residents below those of tenants under the Residential Tenancies Act, 1986.

One of the main reasons that residents vacate a unit is that they need to go into care, either directly or from a hospital. All care providers require an up-front deposit and the resident should be able to finance it. All vacating residents, whatever the reason, should be able to get on with their life.

Amendments Proposed:

- The charges for outgoings shall cease on the date of termination of the Occupational Rights Agreement.
- The Operator shall, within three months of the date on which the termination takes effect, pay all sums due under the ORA to the resident.
- *c. Code of residents' rights - Right not to be exploited -* Amendments proposed:
 - You have the right not to be exploited, financially or otherwise, by the operator, the people who work at the village, and the people who provide services at the village.
 - New addition: Exploitation includes any contractual provision that would be contrary to Clause 46L of The Fair Trading Act

To download a copy of the Key Issues, [See Key Issues](#)

Monitoring the Effectiveness of Statutory Supervisors

CFFC commissioned Mobius Research and Strategy Ltd for this report.

The effectiveness of supervision by Statutory Supervisors has become a major concern and may adversely affect the interests of residents in the future. The industry landscape is changing as many villages now have fixed fees or CPI linked fees which result in operators being responsible for all operational costs and maintenance and residents become more complacent. The sub-committee presented the following response to MBIE and the Retirement Commissioner:

[See Full Report \(40 pages\)](#)

[See RVRANZ Response](#)