

NEWS: Commerce Commission finds "Significant Imbalance" in Retirement Villages terms | FEBRUARY 2024

Special Update from the CE...

Good morning All

Our President, Brian Peat is currently on the road speaking to villages and Minister Bayley today, so I'm emailing all of you with some very positive news around Occupation Right Agreements.

In 2022 RVResidents filed a complaint with the Commerce Commission alleging unfair terms in residents contracts. A copy of that complaint can be viewed [here](#).

We're now able to announce the findings into a year long investigation by the Commerce Commission into perceived 'unfair terms within Occupation Right Agreements (ORA's) that affect tens of thousands of retirement village residents contracts and ORA's. Under an OIA (Official Information Act) request filed by RVResidents, the Commerce Commission has released it's letters sent to 12 village operators around New Zealand. These letters can be downloaded from the Commissions site.

You'll find some early media comments by Consumer NZ, Newsroom (plus another Newsroom [here](#)) and the NZHerald (Click on the media names to view - note Herald has a paywall). Margaret Hobbs, RVResidents volunteer Policy Advisor has also written the following summary...

Significant imbalance in favour of the operator

The Commerce Commission (the Commission) has investigated a sample of retirement villages regarding possible breaches of the Fair Trading Act 1986 (the Act). The Commission had received complaints from the Retirement Villages Residents Association (RVResidents) and NZ Consumer about unfair clauses. The Commission's findings have been conveyed to these villages to assist them in complying with their obligations under the Act.

Only the courts can decide if there has been a breach of the Fair Trading Act. The court can impose severe penalties where it finds the law has been broken. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

The Commission indicated it may take further action in the future should these possible retirement village breaches continue.

In many of the possible breaches there are no counter balancing rights for a resident to appeal or challenge an operator's decision or a right to receive compensation or a reduction in fees commensurate to

changes that adversely affect the resident's finances or enjoyment of their lifestyle.

Further, for many reasons, termination of an Occupation Right Agreement is not a practical option for a resident, given the significant financial detriment involved due to the obligation to pay the village contribution payment and the practicality of having to move out with no capital gain and no certainty as to when they will receive their repayment sum.

The Commission did not consider complaints about retirement villages key financial terms some of which are allowable under current retirement village legislation. Any alleged unfairness issues surrounding these terms are better considered as part of the wider review of the underlying legislation that is currently being undertaken by the Ministry of Housing and Urban Development.

The following examples of possible breaches of the Act were investigated by the Commission.

1.Examples of false or misleading conduct or representations potentially breaching sections 11 and 13 of the Act

a) 'Continuum of care' type claims, made by operators on their websites, risk misleading consumers about the accessibility of aged residential care to retirement village residents.

Statements found on retirement village websites risk creating the erroneous impression that residents of a village have comprehensive care options available to them, at their option, as their health needs change, subject to the priority access availability condition. However in most Occupation Right Agreements there are caveats around this.

b) A claim that a resident has a right to live in their home for the rest of their life.

This statement on a website is potentially misleading where the Occupation Right Agreement states the operator can terminate a resident's right to occupy a unit and live in the village when a registered Medical Practitioner certifies that the resident's physical or mental health is such that the resident cannot live safely in the village or other residents in the village cannot live safely in their units.

c) Conflicting information on a website and in the Occupation Right Agreement about when the village contribution (DMF) stops accruing.

d) Conflicting information on a website and in the Occupation Right Agreement about what happens when the operator cannot rebuild the resident's home following destruction of the home.

e) A claim of 'fixed fees for life' that does not include other fees that are not fixed.

2. Examples of unfair contract terms potentially breaching sections 26A to 26E and 46H to 46M of the Act.

In relation to an unfair contract term (UCT), only the Commission has the power under the Act to make an application to a court for a declaration that a term in a standard form consumer contract (such as an Occupation Right Agreement) is a UCT. Where a court has declared that a term in a standard form contract is a UCT, a person can no longer include that term in its contract or enforce it and is liable for prosecution by the Commission if it does so.

A standard form consumer contract is one where the terms have not been subject to effective negotiation between the parties, and factors taken into account when determining this include:

- 19.1 whether one party has all or most of the bargaining power;
- 19.2 whether the terms are prepared in advance by the supplier;
- 19.3 whether the customer is required to accept or reject the terms and conditions;
- 19.4 the extent to which the parties had an effective opportunity to negotiate the terms; and
- 19.5 the extent to which the specific characteristic of any party to the contract is taken into account.

Examples of terms in retirement village contracts that raise issues as to their fairness when applying the test for UCTs include:

- a) further development of the village, where the operator has a right to undertake further development at the village and the resident has to agree that they will not make any objection or claim compensation from the operator in respect of any further development, or commence any legal action arising out of the further development;
- b) repair and maintenance charges, where a resident who does not own the unit or receive any capital gain is liable to pay all costs incurred by the operator in repairing and maintaining and/or replacing the interior of the unit (including the garage door, plumbing and electrical fittings and fixtures and the operator's chattels such as floor coverings, window coverings, whiteware, automatic garage door opener, heating systems, laundry tub and TV);
- c) change to facilities, where an operator has the right to vary the services and facilities at the village at its discretion;
- d) entire agreement clause, stating that unless separately agreed in writing, the clauses in the ORA comprise the entire understanding and agreement between the operator and the resident;
- e) change to support services payments at the operator's sole discretion;
- f) charges relating to the marketing and sale of the residential unit that the resident may have a liability to pay;
- g) privacy authorisation, a clause that gives the operator the right to collect, hold and release a resident's personal information relating to a resident's physical and mental health from any relevant agencies, in particular any health agencies;

- h) departure from residential unit, a clause that places an obligation on a resident's family/executor to remove all of the resident's possessions from a unit within a very short time such as 7 days after the resident's death;
- i) conflicting information such as who is responsible for the repair and maintenance of the exterior of homes;
- j) no limitation on the amount the weekly fee / village contribution / outgoings will increase;
- k) operator's right to change the weekly fee each year with reference to an increase in the CPI. There is no independent analysis requirement that the operator's costs have actually increased due to the increase in CPI and no right for a resident to maintain the payment of the weekly fee at the current rate while raising a complaint with the operator as to the increase;
- l) resident's obligation to pay the operator's legal or consultancy fees with any breach or default by the resident;
- m) lack of balance between operators' and residents' rights and obligation in relation to liability for loss or damage caused to each other's property/possessions;
- n) an operator's unilateral right to set the costs a resident must pay for repairs to the home when the resident leaves;
- o) no right for a resident to grant a security interest over their right to the exit payment or car park exit payment.

Quote from the operators lobby group - Retirement Villages Association Submission on "Options for change", Discussion Paper, Date 20 November 2023:

Q11 Are there terms currently included in ORAs that could be considered unfair to residents? If yes, what are they and why are they unfair?

RVA's reply: "The RVA is not aware of any unfair terms in its members' current ORAs. The RVA has actively worked with its members educating them on the need to ensure that their

What now...?

While the investigation only applied to 12 operators, the ramifications apply to ALL VILLAGES. We would expect ALL operators to quickly update their ORA's and remove terms that the Commission have identified as potentially having significant imbalance. This would include all existing ORA's, and if you have these clauses in your own ORA's, then we would encourage you to write to your operator / village manager and ask what they are doing about them.

If operators are slow to acknowledge and fix these, then court action by the Commerce Commission is the next option, and RVResidents will be strongly encouraging that, if action is not forthcoming.

If you have an update for us, please email admin@rvr.org.nz

Many thanks,

Nigel Matthews, Chief Executive

Ongoing RVR & RVA talks & misinformation...

There have still been ongoing suggestions that RVResidents has declined to meet with the operators lobby group (RVA). We wanted to reassure members that your Association has, and always will be, open to meeting with all stakeholders, including the RVA.

RVResidents continues to make regular requests to meet with RVA Exec in a bid to find common ground and solutions going forward. We have reiterated that request multiple times, and continue to do so. A recent request to meet the RVA was answered with "*...the [RVA] Exec want to wait and see what happens next before considering which issues can be reviewed for any change to the Code*".

We look forward to the full review continuing, and an update from the Ministry of Housing and Urban Development as the year progresses.