

The Retirement Villages Act 1999 Issues for Practitioners

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ABOUT THE AUTHOR

Trevor Cork was admitted as a solicitor in February 1975.

From 1975 until 1985, he worked as a solicitor assistant and ultimately partner with the then firm of Dawson Waldron. In May 1985, he became a partner in McPhee Kelshaw.

Since 1978, Trevor has regularly advised on retirement village and aged care matters. He currently serves as an adviser to one such aged care provider, and serves as a director of the Buckland Retirement Village, a large retirement and aged care complex in the Lower Blue Mountains.

The Retirement Villages Act 1999

Issues for Practitioners

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1 Introduction

The *Retirement Villages Act 1999* (the “RVA”) was passed by Parliament in November 1999. The RVA received assent on 3 December 1999. Apart from some provisions that were gazetted for earlier operation, the legislation took effect as a whole on 1 July 2000.

The RVA replaces the *Retirement Villages Act 1989* and the *Retirement Village Industry Code of Practice 1995*.

The RVA was introduced following a review of the legislation relating to retirement village regulation in New South Wales, involving the preparation of an issues paper and wide-ranging consultation between government, retirement village residents, and the retirement village industry. This process resulted in a report released on 20 December 1998 by the Minister for Fair Trading. The outcome of this review was summarized as follows:

The review found the Code of Practice to be unsatisfactory and ineffective and had clearly failed to address issues of concern within the industry, particularly for residents. It proposed that the Code be consolidated into a Retirement Villages Act and Regulation containing clear requirements that provide greater certainty for consumers and industry.

As contemplated in the report, the RVA and the accompanying *Retirement Villages Regulation 2000* (the “RVR”) impose a prescriptive regime within which retirement villages must operate. For practitioners, whether acting for residents or village operators, it is necessary to come to grips with the requirements of the RVA and the RVR, and to become aware of the rights and obligations which they confer and impose. The purpose of this paper is to give an overview of relevant issues, although it is not possible in the time available to review every section and every regulation. A thorough reading of the RVA and the RVR is recommended.

The objects of the RVA are found in section 3, and are:

- (a) To set out particular rights and obligations of residents and operators of retirement villages, and
- (b) To facilitate the disclosure of information to prospective residents of retirement villages, and
- (c) To require contracts between residents and operators of retirement villages to contain full details of the rights and obligations of the parties, and
- (d) To facilitate resident input, where desired by residents, into the management of retirement villages, and
- (e) To establish appropriate mechanisms for the resolution of certain disputes between residents and operators of retirement villages.

For most practitioners, our principal involvement with retirement villages will arise when we are instructed to act on the purchase or sale of a unit or dwelling in such a village. In these circumstances, it is essential that we have a detailed understanding of the disclosure and contractual requirements of the RVA, and ensure that the prescribed steps in the conclusion of our client's contract are appropriately taken.

2 What is a retirement village?

The majority of the definitions of the RVA are found in section 4. The definition of "retirement village" is shortly stated in that section, by means of a reference to section 5, which sets out the detailed definition. However, elsewhere in the RVA other terms and phrases are defined or definitions are supplemented. For example, the term "cooling off period" is defined in section 32. The term "condition report" is defined in section 38.

Section 5 is in the following terms:

5 Meaning of "retirement village"

- (1) For the purposes of this Act, a **retirement village** is a complex containing residential premises that are:
 - (a) predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons who have entered into village contracts with an operator of the complex; or
 - (b) prescribed by the regulations for the purposes of this definition.
- (2) It does not matter that some residential premises in the complex may be occupied by employees of the operator or under residential tenancy agreements containing a term to the effect that this Act does not apply to the premises the subject of the

agreement (instead of being occupied under residence contracts), or that those premises do not form part of the retirement village.

(3) However a **retirement village** does not include any of the following:

(a) any building or any part of a building used or intended to be used for the provision of residential care, within the meaning of the Aged Care Act 1997 of the Commonwealth, by an approved provider under that Act,

Note Paragraph (a) excludes from the definition of **retirement village** buildings that are commonly known as Commonwealth-subsidised hostels and nursing homes.

(b) any building the subject of a licence under the Nursing Homes Act 1988,

(c) any building or part of a building intended to be used for the provision of respite care (within the meaning of Aged Care Act 1997 of the Commonwealth),

(d) a residential park (within the meaning of the Residential Parks Act 1998),

(e) a place at which accommodation is provided by the Aboriginal Housing Office or the New South Wales Land and Housing Corporation (unless it is provided pursuant to a joint venture, or otherwise in conjunction, with another person or body),

(f) a boarding-house or lodging house,

(g) any accommodation provided in a complex for employees of the complex who are not residents of the retirement village,

(h) any residential premises the subject of a residential tenancy agreement in the form prescribed under the Residential Tenancies Act 1987 to which the operator of the retirement village is a party and that contains a term to the effect that this Act does not apply to the residential premises the subject of the agreement,

(i) any other place or part of a place excluded from this definition by the regulations.”

The term “**ingoing contribution**” is defined in section 6 as follows:

“(1) For the purposes of this Act an ingoing contribution is:

(a) any money payable to the operator under a residence contract, or

(b) any other money, regardless of how it is described, that is paid to the operator of a retirement village in consideration for, or in contemplation of, the person by whom (or on whose behalf) the payment was made becoming a resident of the village, regardless

of whether the payment is made in a lump sum or by instalments.

- (2) Despite subsection (1), an ingoing contribution does not include any of the following:
 - (a) a waiting list fee referred to in section 21,
 - (b) recurrent charges,
 - (c) if the resident owns his or her residential premises - the purchase price of the premises,
 - (d) any other payment of a kind prescribed by the regulations.”

The following section 4 definitions are also relevant:

“**operator** of a retirement village means the person who manages or controls the retirement village, and includes:

- (a) a person (other than a resident or other person referred to in sub-section (2)) who owns land in the village, and
- (b) any other person or class of persons prescribed by the regulations for the purposes of this definition,

but does not include:

- (c) the relevant association of a community land scheme or the owners corporation of a strata scheme, or
- (d) the managing agent of such a scheme, or
- (e) any person or class of persons excluded from this definition by the regulations.”

“**residence contract** means a contract that gives rise to a residence right.”

“**retired person** means a person who has reached the age of 55 years or has retired from full time employment.”

“**service contract** means a contract under which a resident of a retirement village is provided with general services or personal services in the village.”

“**village contract** means:

- (a) a residence contract, or
- (b) a service contract, or
- (c) a contract under which a resident of a retirement village obtains the right to use a garage or parking space, or a storage room, in the village, or
- (d) any other contract of a kind prescribed by the regulations for the purpose of this definition.

Note. A residence contract, a service contract and any other village contract may be contained in a single document.”

As will be noted, the definition of “retirement village” has the following elements:

- a complex containing residential premises;
- predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied by retired persons;
- those retired persons have entered into village contracts;
- the village contracts are concluded between retired persons and an operator of the complex.

No complex containing residential premises has to date been prescribed by the regulations for the purposes of section 5(1) of the RVA.

In the absence of the conclusion of a village contract, as defined, between a retired person and an operator of the village, an essential element of the definition will not be satisfied. For example, a strata title SEPP 5 (Seniors Living) development, which is administered by the owner corporation on behalf of the proprietors, does not fall within the definition. Subject to the comments made below in relation to section 11 of the RVA, the dismantling of the management structure of a retirement village, with the consequent elimination of any independent “operator” will have the same effect. In other words, it is possible for a complex to begin its life as a “retirement village” but to cease to have that status under the RVA. Such a situation can generate both opportunities and problems for the residents.

The definition excludes “any residential premises” that are the subject of a residential tenancy agreement prescribed under the relevant legislation, to which the operator of a retirement village is a party, if the agreement contains a term to the effect that the RVA does not apply to the premises concerned.

It will also be noted that the definition does not include a “residential park”, as defined in the *Residential Parks Act 1998*. In that Act a “residential park” means:

- (a) a caravan park (that is, land, including a camping ground, on which caravans, or caravans and other moveable dwellings, have been, are or are to be placed, installed or erected), or
- (b) a manufactured home estate (that is, land on which manufactured homes have been, are or are to be placed),

whether or not the caravan park or manufactured home estate is the subject of an approval under the Local Government Act 1993.

3 Section 11 of the RVA

Section 11(1) overrides any attempt to contract out of the provisions of the RVA. The RVA is stated to apply “to all retirement villages (whether established before or after the commencement of this section)”.

Section 11(2) is an important provision, as it broadens the application of the Act in significant respects in relation to persons rather than retirement villages, and is in the following terms:

- (2) This Act extends to apply to and in respect of:
 - (a) a retired person who continues to occupy residential premises in a former retirement village that was a retirement village when the retired person took up residence in the premises, and
 - (b) a retired person who has a right to occupy residential premises in a former retirement village that was a retirement village when the right was obtained, and
 - (c) a former resident of a retirement village who continues to have rights or liabilities under the contract, agreement or arrangement under which he or she occupied (or had the right to occupy) the residential premises in the former retirement village when it was a retirement village, and
 - (d) the person who is the other party to the contract, agreement or arrangement under which the retired person occupies or occupied (or has or had the right to occupy) the residential premises in the former retirement village,even though the former retirement village is no longer a retirement village.

Relevantly, sections 11(5) and 11(6) provide as follows:

- (5) For the purposes of this Act:
 - (a) a reference in this Act to a resident of a retirement village includes a reference to a person described in subsection (2)(a), (b) or (c), and
 - (b) a reference in this Act to the operator of a retirement village includes a reference to the person referred to in subsection (2)(d).
- (6) In this section, **former retirement village** means a complex that was previously, but is no longer, a retirement village within the meaning of this Act (even if it ceased to be such a retirement village before the commencement of this Act).

Section 11(3) limits the operation of section 11 with the result that the RVA does not apply to premises which may have fallen within the definition of “retirement village” under the previous legislation but which are excluded from the current definition by operation of section 5(3). For

example, a Commonwealth subsidised hostel fell within the original definition. By operation of section 5(3) such a hostel is now excluded from the operation of the RVA.

At a practical level, the extension of the operation of the RVA under section 11 may be of importance to residents and former residents. It is not uncommon for retirement villages, particularly strata title villages that were established with a management structure, to cease to fall within the original definition following the withdrawal of the manager and the elimination of the old structure. However, residents of such a village may well have entered into occupation of the premises concerned, even premises owned by them, with the expectation that services would continue to be made available to them. The relief offered to such persons by the RVA may still be of importance. Section 11 may also be relevant in relation to the appointment of an administrator under section 84 and following of the RVA.

4 Representations and information about retirement villages

Sections 14 to 20 inclusive of the RVA regulate pre-contractual representations and disclosure in relation to retirement villages. Restrictions are imposed on:

- advertising or promoting the village or the sale of premises in the village before development consent is secured (section 14)
- advertising or representing that a residential care facility will be associated with the village unless all authorisations required by law have been obtained (section 15)
- representing that a complex is a retirement village, unless the complex falls within the definition of that term under the RVA (section 17(1))
- an operator of a retirement village knowingly misrepresenting to a prospective resident that a particular service or facility is available (section 17(3))
- an operator representing that a particular service or facility is to be provided or made available, without specifying in the relevant village contract the date by which that service or facility will be provided or made available (section 17(4))

Section 17(5) allows a resident to apply to the Tribunal if the service or facility is not provided or made available either by the date specified in the relevant contract or, if the operator breached the RVA by not specifying a date, within a reasonable time.

Disclosure statement

Section 18 requires the operator of a retirement village to provide a prospective resident, or a person acting on behalf of that prospective resident, with a disclosure statement prepared in accordance with the section. The disclosure statement must be written and must be in the form prescribed by clause 9 and Schedule 1 of the RVR. The statement must be signed and dated by the operator of the village.

The disclosure statement is both lengthy and detailed. Information is set out under each of the following headings:

1. Location
2. Size
3. Village ownership
4. Village management
5. Resident input
6. Financial management
7. Security and safety
8. Compliance with legislation
9. Village contracts
10. Facilities
11. Services
12. Entry costs
13. Recurrent charges
14. Payments on vacating the village
15. Vacancies

Section 25 specifies that if there is an inconsistency between the disclosure statement and any term in a village contract, then as far as is practicable, the contract is to be construed as if it contained the information in the statement. Any dispute as to the alleged inconsistency may be referred to the Tribunal for determination. Section 33 of the RVA empowers the Tribunal to make an order allowing a resident to rescind a village contract

if a disclosure statement is not provided in accordance with the Act or if the information in it is false or misleading in a material particular.

Section 18(5) specifies that the operator of a retirement village must not enter into a village contract with a person earlier than fourteen days after the person, or their representative, has been provided with a disclosure statement by the operator.

Section 19 requires that the operator must also provide “general information about the retirement village industry” in a form approved by the Director General, to any person to whom a disclosure statement is provided. The general information must be provided no later than at the time at which the disclosure statement itself is provided.

Section 20(1) requires that the operator of a retirement village have copies of the documents listed below available either at the village or at a place of business in New South Wales, for inspection “at all reasonable times” by a prospective resident or a person acting on their behalf. Section 20(3) requires that the operator must, if required, give or send by post a copy of any of those documents to a prospective resident or to a person acting on their behalf. The copies must be sent no later than seven days after receiving the request.

The documents concerned are the following:

- (a) a site plan of the village;
- (b) plans showing the location, floor plan and significant dimensions of residential premises;
- (c) the statements of proposed expenditure and the statements of approved expenditure for specified periods;
- (d) the accounts of the village audited as referred to in Division 6 of Part 7, for the last 3 financial years;
- (e) examples of all village contracts that an incoming resident may be required to enter into;
- (f) the trust deed for any trust fund into which money paid by the residents is deposited;
- (g) the village rules;
- (h) the terms of the development consent for the village but only if construction of the village is not complete or there is a consent condition requiring that a particular service or facility be provided for the life of the village;
- (i) if there is a capital replacement fund or a maintenance fund, the statements of the balances in the fund as at specified periods;

- (j) the most recent quarterly accounts of the income and expenditure of the village;
- (k) such other documents relating to the village, and to retirement villages generally, as the regulations may prescribe.

In relation to the documents referred to in section 20(1)(k), clause 10 of the RVR prescribes certain documents. At present, those documents are the following:

- (a) The decision or order of any Court or Tribunal, within the immediately preceding five years, relating to proceedings between the operator and a residents' committee.
- (b) If a waiting list for the village is maintained, and a waiting list fee is charged, then the operator's written policy in relation to that list must also be furnished.
- (c) If a retirement village is subject to a company title scheme, then either the constitution or replaceable rules of the company concerned.
- (d) If the retirement village is subject to a community lands scheme, the management statement of the scheme, any relevant management agreement and the minutes of the most recent annual general meeting.
- (e) If the retirement is subject to a strata scheme, the by-laws, any management agreement to which the relevant owners corporation is a party and the minutes of the most recent annual general meeting.
- (f) Every other document referred to in the disclosure statement under the heading "Village Contracts".

Condition report

In addition to these documents, section 38 specifies that the operator must not permit a prospective resident to occupy residential premises unless the operator prepares and gives to the prospective resident a report relating to the condition of the premises.

The form of this condition report is prescribed by clause 11 of the RVR. It must be prepared during an inspection of the premises in the presence of the prospective resident or a person nominated by them. The report must be in the form of Schedule 2 to the RVR. The report must then be signed by both parties.

A copy of the condition report must be annexed to the first village contract that the prospective resident enters into with the operator.

If a condition report is not prepared in accordance with the RVA and the RVR, and the operator permits a prospective resident to occupy premises, then the operator is prohibited from recovering any payment or other compensation for any alleged damage occurring to the premises during the occupancy of the prospective resident.

The provisions relating to condition reports do not apply where a prospective resident is to occupy the premises with a person already in residence, or if the residential premises are to be owned by the resident.

5 Entry into retirement villages

Section 21 allows an operator to charge a fee not in excess of \$200.00 to enter a prospective resident's name on the village waiting list. However, to be eligible to impose such a fee the operator must have a written policy setting out the way in which the waiting list operates. When the fee is paid, a copy of that policy and a receipt for the payment must be given to the person concerned.

If the prospective resident ultimately enters into a village contract, then the amount of the waiting list fee must be deducted from any ingoing contribution. If the prospective resident does not proceed, then the waiting list fee must be refunded in full no later than fourteen days after the operator is requested to make that refund. There is no entitlement to forfeit a waiting list fee if the person does not ultimately take up occupation of accommodation in the village.

An operator may request the payment of a holding deposit by a prospective resident. However, such a deposit can only be paid in respect of premises that are occupied if the occupant concerned has given the operator written notice of intention to vacate the premises.

If the operator is not a body constituted or established by an Act of Parliament, or a body constituted or established for any benevolent philanthropic or patriotic purpose, then any deposit must be held in trust, in one of the accounts specified in section 23(3).

If a holding deposit is paid then it must be held until one of two events occurs. First, if the prospective resident enters into a contract, then the holding deposit may form part of the deposit. Secondly, if the prospective resident dies or elects not to proceed, then the holding deposit must be refunded within fourteen days after notice is given.

Section 23(6) requires that money paid as a deposit under a village contract is to remain held in trust until final payment is made under the contract, presumably of the full amount payable upon the resident's entry into occupation. However, the requirements for a refund, or for money to remain in trust until the full final payment is made, do not apply in respect of a contract for the sale of residential premises. Section 23(7) allows the contract itself to regulate the way in which the deposit is to be held.

6 Village contracts

Section 24(1) specifies that the operator of a retirement village must not permit a prospective resident to occupy residential premises until the prospective resident enters into at least one of a residence contract or a service contract. However, this requirement does not apply if the resident occupies premises with a person who has entered into such a contract or if the resident takes up occupation under a residential tenancy agreement.

If the operator fails to comply with this section, then section 24(3) provides that any former occupant of the premises concerned is released from any liability to pay recurrent charges after the date on which the prospective resident occupies those premises. Further, the operator must no later than one month after that date make any required refund of the former occupant's ingoing contribution and make any other payments required, under a village contract, to be made to the former occupant.

Section 26 requires that, to be enforceable against a resident of a retirement village, a village contract must be in writing.

Consistently with section 18, section 27 requires that an operator must not enter into a village contract with a person earlier than fourteen days after the person has been provided with a copy of each village contract that the person is to enter into.

Independent advice

Section 28 prevents any restriction on the right of a prospective resident to seek independent advice, and prohibits any requirement that a prospective resident use the services of a particular legal practitioner or conveyancer. If such a requirement is imposed, then the resident may secure a refund of all fees paid to that person.

Once a contract is entered into, a variation of that contract cannot be effected unless the resident obtains a written certificate given in accordance with section 29. The costs of obtaining that certificate must be paid by the operator. These provisions do not apply if the variation or the new contract was requested by the resident.

The costs of preparation of village contracts generally are regulated by section 31. An operator is entitled to recover only one half of the legal and other expenses incurred by the operator in connection with the preparation of village contracts. Further, the operator must provide the resident with a copy of the account presented to the operator, before such a payment can be sought. The regulations may prescribe a maximum amount payable by a resident in respect of the legal and other expenses, but to date there is no such regulation.

Section 31(5) specifies that if a residence contract is in the form of a lease then the duty, if any, payable on the lease, and the registration fee payable to secure registration, are both payable by the resident. (In relation to stamp duty, section 179 of the *Duties Act 1997* may exempt the documents concerned from stamp duty.)

Cooling-off period

The RVA retains a cooling off period, but extends that period from five working days to seven business days after a village contract is entered into. Section 32(3) requires that a contract must not be completed until after the cooling off period has expired. However, sub-section (4) provides that the cooling off period is waived if the resident commences to live in the residential premises to which the contract relates.

Section 36(4) specifies that any fees or costs associated with a rescission during the cooling off period are to be paid by the party incurring them. Subsection (5) provides that any fees or costs associated with a rescission at any other time are payable by the operator. If the operator fails to pay those amounts, then the Tribunal may order it to do so.

Rescission

As already noted, section 33 confers a right of rescission on a resident if a disclosure statement “is not provided in accordance with this Act” or if information in that statement is false or misleading in a material particular.

In either event, a resident may apply to the Tribunal for an order allowing that person to rescind “any” village contract to which the person and the operator are party.

Section 33(2) specifies the circumstances in which the Tribunal is not to make an order. This will be the case if the Tribunal is of the opinion that the operator acted reasonably and honestly and ought to be excused for the failure to provide accurate information. Further, the order should not be made if the Tribunal considers that the person to whom the statement was made “is in substantially as good a position as he or she would have been had the failure not occurred”.

If the Tribunal does make an order, then it may also make an order as to compensation payable to the resident by the operator of the village. The order will allow the person themselves to rescind the contract. The rescission is effected by the person giving notice in writing of the rescission to the operator.

Re-negotiation of service contracts

Section 35 contemplates that a resident may rescind a service contract but not a residence contract. In that event section 35(1) requires that the resident and the operator attempt to renegotiate the service contract. If that effort is unsuccessful then section 35(2) allows either party to apply to the Tribunal for an order “setting out the terms of the new contract”. The Tribunal may make the order sought and may also, if the Tribunal “considers it advisable”, order the operator and the resident to enter into the new contract.

If a rescission notice is given in relation to a residence contract, then that notice is also taken to apply to the service contract and to any other village contract that may have been entered into between the resident and the operator. Section 36(2) requires the operator to repay to the resident, within one month after the rescission notice takes effect, all moneys due to that person.

Either party to a rescinded residence contract may apply to the Tribunal for an order for compensation or adjustment between the parties, if the rescinding party received the benefit of possession of the premises, or for the payment of damages, costs, or expenses arising out of any breach of any term, condition, or warranty.

Change of operators

One issue that has frequently arisen in relation to retirement villages relates to the enforcement of contracts when a new operator assumes the conduct of the village. (The threshold issue of whether the original operator's obligations under the contract could be assigned, seems to have been largely ignored.) This issue is now addressed by section 40, which specifies that a village contract may be enforced against any operator for the time being of the village concerned. In specified circumstances a resident may also be entitled to take action against the owner of land in a retirement village.

Any proposed new operator of a village must at least twenty eight days before becoming the operator convene a meeting of residents. At that meeting the operator must report on his or her financial ability to operate the village, and the plans for the future management and operation of the village. At least seven days' written notice of the meeting must be given.

Content of contracts

Section 42(1) specifies that the regulations to make provision for or with respect to matters that are to be included in village contracts or in a class of such contracts. The relevant matters are found in clause 12 of the RVR and Schedule 3 to the RVR.

First, the Schedule specifies in paragraphs (a) to (j) inclusive the details of each of the village, the operator, and the resident that must be included in the contract. Secondly, the Schedule requires that the following headings, and the requirements in relation to the matter appearing below those headings, must also be included:

- cooling off period
- retirement village legislation
- ingoing contribution
- recurrent charges
- services and facilities
- repairs and maintenance
- alterations and additions
- operator's access to premises
- village rules
- village management

- dispute resolution
- changes in operator
- termination of contract
- transfers
- departure fees
- payments on termination
- changes to this contract
- annexures.

Section 42(1) also provides for the RVR to specify matters that are to be excluded from village contracts. These matters are referred to in clause 12(2) of the RVR and are specified in detail in Schedule 4.

Included in the prescribed matters are requirements that the resident have a will, take out a specified insurance policy, or be individually charged for legal, accounting, or other services incurred by the operator in corresponding with the resident. A village contract must not restrict the period of time during which the resident may be absent from the village.

In relation to recurrent charges, if a contract makes provision for those charges to be varied in accordance with a fixed formula, then the contract must not prevent the formula from including a component relating to the actual or proposed expenditure of the village.

A contract must not contain a provision removing liability from the operator for any negligent act or omission by the operator, its employees, or agents, nor a provision to the effect that the written contract represents the entire agreement between the parties.

Section 43 specifies that the RVR may prescribe a standard form of village contract. At present there are no such regulations.

7 Village rules

Sections 46 to 56 deal with village rules. The relevant provisions do not apply to such part of a retirement village as is subject to a community land scheme or a strata scheme. Clause 13 of the RVR specifies that village rules may relate to security in the village concerned or to the external appearance of residents' premises in the village.

In substance, written rules relating to the use, enjoyment, control, and management of a retirement village may be made in accordance with Division 1 of Part 6. However, a village rule is of no effect to the extent that it is inconsistent with the RVA or any other Act or law.

Section 48 specifies that the regulations may prescribe model village rules that may be adopted. The model rules are found in Schedule 5. Their adoption is not mandatory.

An operator may make rules for a proposed new retirement village, but only if the village has no residents at the time that these rules are made. If there are existing residents then new rules or amendments to rules must be made in accordance with section 51.

Section 51 requires a village operator to propose an amendment to the village rules if either the residents' committee of the village or a minimum of five residents or 10% of the residents (whichever is the greater), request the operator to do so. A proposed amendment is not to be made unless the residents of the village, by a special resolution, consent to the amendments. The requirements for passing a special resolution are set out in Schedule 1 to the RVA, Part 3. A special resolution is carried only if the quorum requirements for the meeting are satisfied and if the resolution is passed by at least 75% of the number of residents who are present (whether in person or by proxy), and entitled to vote, at the meeting concerned.

If the residents' consent to the amendment is given, it takes effect seven days after the date on which the passing of the special resolution is notified to the operator. However, the operator is given the opportunity, within that seven day period, to make an application to the Tribunal objecting to the amendment or of seeking the residents' consent to a consequential amendment to the statement of approved expenditure. The latter will arise if the operator is concerned that the amendment of the village rules will impose a cost on the operator additional to that allowed for in the statement of approved expenditure. If the residents refuse to approve that change then the operator is able to apply to the Tribunal for an order in relation to the proposed amendment of the expenditure statement. In that event, the Tribunal may make the order sought or may decline to make that order, but also order that the proposed amendment to the village rules not take effect.

Section 54 gives jurisdiction to the Tribunal, on the application of an operator or a resident, to determine a dispute concerning the legal validity

of a village rule or whether a rule is unjust, unconscionable, harsh, or oppressive.

In the context of contracts, section 55(2) specifies that if a village rule is inconsistent with a term of the village contract, then the village rule prevails to the extent of the inconsistency.

Each village contract is deemed by section 56(2) to include a term that the operator will use his or her best endeavours to ensure compliance with the village rules by the tenants of the operator, the operator's employees, and any other persons who are in the village at the operator's invitation. Similarly, it is a deemed term of every village contract (by virtue of section 56(1)) that the resident or former occupant who is the party to a contract will use his or her best endeavours to ensure compliance with the village rules by a tenant or sub-tenant, any other person who is lawfully on the resident's or former occupant's residential premises (other than a person who has right of entry without their consent), and any other person who is in the village at the invitation of the resident or former occupant.

8 Security and village emergency systems

An operator is required by section 58 to ensure that the village is reasonably secure. In particular, all residential premises within the village must have locks or other security devices, in good working order, so as to make the premises reasonably secure.

The residents of a retirement village may, by special resolution, request the operator of the village to provide or arrange for a village emergency system of a specified kind to be installed. Section 59 compels the operator to respond to that request and to install the system. Upon making the request, the residents are taken to have consented to the inclusion, in the statement of proposed expenditure for the next following financial year, of the cost of providing or arranging for the system to be installed. If the operator fails to act on the request, then the residents may approach the Tribunal for an order compelling the operator to do so.

9 Services

The services and facilities provided at a village may be varied either by proposal of the operator or at the request of the residents. However, in either case final consent to the proposed variation must be given at a

meeting of residents, and then by the passing of a special resolution. If the variation will, in the opinion of the operator, impose a cost in addition to that provided for in the statement of approved expenditure, then the operator must seek the residents' consent to a variation to that statement. Section 60(10) includes definitions of "services and facilities" and "variation".

Importantly, section 61 deals with services or facilities that may be required by a condition of a development consent for the retirement village. If the service or facility is required by the consent, then it may only be withdrawn or reduced if the development consent is amended accordingly.

If the service or facility is withdrawn or reduced other than in accordance with section 60, then a resident may apply to the Tribunal for one of a number of orders. Those orders may include an order for reinstatement of the service or facility, an order for payment of compensation or an order for reduction in the recurrent charges payable by any one or more of the residents.

10 Powers of attorney and proxies

Practitioners will be familiar, particularly in the context of strata title retirement villages, with the long standing practice of requiring residents to provide irrevocable powers of attorney and proxies, both generally related to voting at general meetings of the strata.

This issue has been addressed by sections 64 and 65. The former prohibits any requirement that a resident give a power of attorney in favour of the operator, a close associate, or a person nominated by the operator. If a power of attorney was given in favour of any person prior to the commencement of section 64, then the power of attorney terminated upon the commencement of the section. Any power of attorney given after the commencement of the section is void.

Section 65 deals, in similar terms, with proxies. Again, a proxy given in favour of the operator, a close associate, or a person nominated by the operator, before the commencement of the section, terminates on its commencement. Such a proxy given after the commencement of the section is void.

Notwithstanding section 65, a resident may appoint a person as their proxy. Clause 37(1) of the RVR requires that the proxy appointment be made in the form set out in Schedule 9. Under clause 37(2) the appointment is effective in relation to a meeting of the residents of the village only if the duly completed form is given to the chairperson of the meeting before any vote is taken at the meeting.

There is one further saving provision. Section 77(4) specifies that any appointment of a person as the proxy of a resident of a retirement village (other than an appointment of the operator, a close associate of the operator, or a person nominated by the operator), that was in force at the commencement of the RVA, is taken to have been made under section 77.

If a complying proxy appointment is made, then the appointment may be revoked at any time by the appointor giving notice in writing. Alternatively, if it is not revoked, the appointment terminates after the first meeting at which it is exercised. If it is not exercised during the period of six months immediately following the date on which the appointment is made, then it expires at the expiration of that six month period. The appointor is then able to reappoint the person as proxy, if he or she so wishes.

Section 78 specifies, effectively, that a person may only hold and vote five proxies at any one time. Any appointment of that person as the proxy of a sixth resident, if the person already holds appointments by five residents, is void.

11 Resident's agent

Section 68 allows a resident to appoint another person as the resident's agent. The appointment is made for the purpose of receiving notices or other documents to be given to the resident under a village contract or under the RVA. The operator, a close associate of the operator or a person nominated by the operator may not be appointed as a resident's agent.

Once this appointment is made, section 68(4) requires the operator to give to the agent any notices or other documents that the operator is required to give in accordance with the contract or the RVA.

12 Residents' committees and organisations

A residents' committee may, with the consent of the residents of a retirement village, be established in the village for the purposes of the RVA.

The way in which residents consent to this or any other measure under the RVA is specified in Schedule 1 Part 2. Clause 2 of Schedule 1 provides that the residents of a village are taken to have given their consent if more than 50% of the residents who vote (whether personally or by proxy) on the measure or action (being residents who are entitled to vote) consent to it. As already noted, some resident consents require the passage of a special resolution.

The residents' committee is to be elected by the residents. There may be only one residents' committee in a village, the Tribunal having jurisdiction to determine whether a particular body or committee is the "residents' committee" for the purpose of the RVA. Only a resident of the village may be a member of the committee.

13 Rights of certain non-residents

Section 81 was introduced to protect the interests of persons who are relatives of a resident in a retirement village. If such a person is a retired person, who is occupying the residential premises at the time that the resident dies or vacates the premises, and has been occupying those premises for at least six months immediately before that time, then the relative has the right to enter into a residence contract with the operator. There are certain exceptions in sub-section (2). If the operator refuses to enter into a residence contract, then the relative may apply to the Tribunal for an order directing that the operator enter into the contract within the time specified.

14 Administrators and others

In the case of villages that experience management or financial difficulties, section 84 could prove to be very useful.

Section 84(1) empowers the Director General to apply to the Supreme Court for an order appointing a specified person as an administrator of a retirement village.

A person so appointed would be empowered to:

- (a) exercise all the functions of the operator of the retirement village, or
- (b) exercise specified functions of the operator, or
- (c) exercise all the functions other than specified functions of the operator.

However, the Director General may apply for an order under section 84(1) only if he or she is of the opinion that the well-being or financial security of the residents of the retirement village concerned is at risk.

The disadvantage of the power is that an application will be costly to pursue, and the Department may be reluctant to undertake the work involved. However, an important preliminary step may be taken by the Director General under section 84(3). This section authorises the appointment of a person to enquire into, and report to the Director General on, the well-being and financial security of the residents of a retirement village. Such an enquiry may in itself significantly improve the residents' position, and allow the Department to negotiate with an operator on behalf of residents, to resolve difficulties being faced in the village.

Sections 85 to 90 inclusive regulate the appointment of an administrator, the obligations of the operator while the appointment remains in force, and the revocation of the appointment. Section 89 relates to the appointment of receivers and managers. Section 90 protects the person appointed from personal liability in respect of any matter or thing done or omitted to be done by the person in the course of performance of their duties.

15 Financial matters

Section 91 requires the operator of a retirement village to determine a financial year for the village. That year must be a period of twelve months commencing and ending on dates determined by the operator.

Capital replacement and capital maintenance

The provisions of Part 7, dealing with financial management of villages, are among the most controversial provisions in the RVA. The Part 7 provisions distinguish between the cost of depreciation or capital replacement and the recurrent charges that are levied by the operator on residents.

The term “item of capital” is defined in section 4 to mean:

- (a) any building or structure in a retirement village, and
- (b) any plant, machinery or equipment used in the operation of the village, and
- (c) any part of the infrastructure of the village, and
- (d) any other item prescribed by the regulations,

but does not include any item excluded from this definition by the regulations.

Clause 5 of the RVR provides that the items specified in the clause are prescribed for the purposes of the definition, including items in residential premises in the village. Those items include fixtures (for example, bench tops, built-in cupboards and wardrobes, floor coverings, hot water systems and stoves .

The operator is not required to bear the cost of depreciation or capital replacement in respect of any capital item that is owned by a resident, any item that is the responsibility of a resident under the resident’s village contract (as referred to in section 165) or any item that is replaced because of wilful damage or wear and tear in excess of fair wear and tear.

Section 165 of the RVA relates to contracts that were in force before the commencement of the section. If such a contract required that the resident pay for the cost of refurbishment of residential premises when permanently vacating those premises, then the operator must provide a work schedule with at least three quotations of costs before carrying out the refurbishment work. The operator must negotiate with the former occupant to attempt to come to an agreement concerning the quotation.

If agreement cannot be reached then the former occupant must be allowed to obtain other quotations in an attempt to find one that is acceptable to both parties. When the work is completed the former occupant must receive a fully itemised account for carrying out the refurbishment. No payment may be demanded or accepted until the refurbishment work is complete.

If agreement cannot be reached then either party may apply to the Tribunal for an order directing that one of the quotations be accepted. The above regime need not be followed if the former occupant agrees that the refurbishment is to be carried out by tradespersons who ordinarily carry out maintenance in the village.

Section 165(4) provides that if a former occupant is required to pay a specified amount for the cost of refurbishment of residential premises then they are not required to pay an amount in excess of that amount and, if the actual cost is less than the specified amount, they are required to pay only the lesser amount.

Section 94 allows the operator to fund capital replacement and depreciation in the village from the recurrent charges, but only if no ingoing contribution was payable by the resident. There are two exceptions. First, non-fixed items of capital (such as a village bus) could be funded from recurrent charges. Secondly, if the residents by special resolution request the operator to provide an item of capital that the village does not already possess, then that provision may also be funded from recurrent charges. The note to section 94(3) gives the example of a swimming pool.

If the operator represents in any promotional material that a specified proportion of ingoing contributions or departure fees (or both) is allocated for the purpose of financing depreciation and capital replacement, then the operator must establish and maintain a capital replacement fund. Moneys held in that fund must be placed with an authorised deposit taking institution or invested as if the moneys were trust funds. That fund must be used exclusively for the purpose of capital replacement in the village.

Section 99 imposes on the operator a positive obligation to maintain items of capital in the village in a reasonable state of repair, having regard to specified matters. Those matters include the age of the village, its prospective life, the amount of ingoing contributions, recurrent charges and departure fees, and the amount of money available to be used for the purpose of maintenance in accordance with the statement of approved expenditure.

In the case of allowances for long term maintenance, section 100 requires the establishment of a maintenance fund. That fund must be established if the statement of approved expenditure provides for the setting aside of a portion of recurrent charges in the period extending beyond the financial year to which the statement relates. Again, the money must be held in an authorised deposit taking institution, and must be invested in accordance with the law relating to the investment of trust funds. The proportion of recurrent charges stipulated in the statement of approved expenditure, must be paid into the maintenance fund. The proceeds of the fund must be used only for the purpose of repairs and maintenance of items of capital or for

any other purpose prescribed by the regulations. At present, there are no such prescribed purposes.

Insurance

Section 97 requires that the operator insure the village. The village must be insured for its full replacement value. In accordance with section 97(4), clause 15 of the RVR requires that any public liability insurance be for an amount of ten million dollars.

Variation of recurrent charges

The term “recurrent charge” is defined in section 4 to mean “any amount (including rent) payable under a village contract, on a recurrent basis, by a resident of a retirement village”.

Section 104 allows a village contract to provide that any recurrent charges are to be varied from time to time. Two mechanisms are envisaged. First, variation at specified intervals (or on specified dates) according to a fixed formula. Variations in the Consumer Price Index would fall within this provision.

Alternatively, recurrent charges may be varied at specified intervals (or on specified dates) otherwise than in accordance with a fixed formula.

Section 104(2) provides that if a contract allows for the variation of recurrent charges without specifying when they are to be varied then the second and any subsequent purported variation in any period of twelve consecutive months is of no effect.

A village contract must not provide for more than one method of variation in the recurrent charges. If more than one method is stipulated then the method that results in the lowest increase in the charges is the applicable method.

Variation by fixed formula

The operator must give at least fourteen days’ written notice to the residents of a retirement village in respect of any variations of recurrent charges, made in accordance with a fixed formula. The notice must specify the amount of the new charges, the dates on which they are payable and any other information specified in the regulations.

Clause 17 of the RVR specifies the further matters that must be included in a variation notice, given under section 105. Those matters include details of the fixed formula for the variation, and a worked example of the way in which the new recurrent charges have been calculated. The notice must be dated and must be signed by the operator or an agent or employee.

Variation – no fixed formula

In relation to variations of recurrent charges other than in accordance with a fixed formula, the operator must give at least sixty days' written notice of any proposed variation. Section 106(2) requires that the notice specify the amount of the proposed recurrent charges and the date from which it is intended that they are to be payable. The notice must also contain a brief explanation of the reasons for the variation. Importantly, the notice must also state that the variation will not take effect unless the residents concerned consent to the variation or the Tribunal orders that it take effect. Finally, the notice is to contain such further information as is prescribed in the regulations. Clause 18 of the RVR applies to such notices. The notice must specify that a period of at least sixty days' written notice must be given of any proposed variation made in accordance with section 106. Amongst the matters to be included in the notice are the following statements:

- (a) the operator must not increase or attempt to increase recurrent charges beyond any upper level specified in the relevant village contract;
- (b) the variation does not take effect unless the residents whose recurrent charges will be affected by the variation consent to it or unless the Tribunal orders that the variation take effect;
- (c) the affected residents must within thirty days after receiving the notice, meet, consider and vote on the proposed variation and advise the operator whether or not they consent to it;
- (d) If the operator is not advised one way or the other, the residents are taken to have refused consent;
- (e) the operator must provide such information in relation to the proposed variation as the residents' committee (or, in the absence of any such committee, any resident) reasonably requests for the purpose of deciding whether consent should be given to the variation.

A number of these matters are also addressed in section 107, specifically the need for resident consent or a Tribunal order to give effect to the

variation. The requirement that the residents meet within thirty days is also covered by section 107(2).

Application to the Tribunal

Section 108 allows the operator to apply to the Tribunal for an order in respect of the proposed variation, if the residents do not consent to it. The Tribunal may order that the proposed variation, with or without modification, take effect or order that it not take effect. The Tribunal may also specify the date from which the variation is to take effect, which could be a date different from that specified in the operator's original notice under section 106. The Tribunal may also order that the recurrent charges not be further varied for a specified period, being a period that does not exceed twelve months.

In making its determination the Tribunal may have regard to the matters specified in section 108(4). These matters include the general market level of recurrent charges paid at similar retirement villages in the locality of the retirement village concerned, or in a similar locality. The level and cost of services and facilities provided for in the statement of proposed expenditure or approved expenditure is also a relevant matter, and the frequency and amount of past variations of the recurrent charges.

If an increase in recurrent charges is made in breach of sections 105 and 106, then a resident may apply to the Tribunal for an order directing a refund of overpaid charges. However, such an application must be made within twelve months of the date on which the increases in the charges came into effect.

16 Statements of proposed and approved expenditure

The operator of the village must supply each resident of the village with a statement of proposed expenditure at least sixty days before the commencement of each financial year of a retirement village. The statement must itemise the way in which the operator proposes to expend the money to be received by way of recurrent charges from the residents during the financial year concerned (section 112).

The statement must be accompanied by a notice confirming that the operator is required to obtain the consent of the residents before expending money as itemised in the statement. The notice must also specify that if the

residents do not give their consent then the operator may expend the money in accordance with an order of the Tribunal. A brief explanation of the reasons for any changes in expenditure from the previous financial year must be given. If any change in expenditure arises from a variation of the services or facilities provided at the village then consent to that variation must be by way of a special resolution of the residents.

Clause 19 of the RVR prescribes the matters that must be dealt with in a statement of proposed expenditure. Again, those items include details of the recurrent charges and the method by which they have been calculated. They also include the effect of the expected surplus or deficit for the current year on the finances of the village, all proposed categories of expenditure and the proposed expenditure on each of those categories. If expenditure is apportioned, then the apportionment method must also be specified. The expected surplus or deficit itself must be stated.

Clause 20 of the RVR specifies that certain matters may not be financed by way of recurrent charges imposed on residents. Those items are:

- (a) fees for membership of industrial or professional associations;
- (b) overseas travel by the operator of the retirement village or the operator's agent or employees;
- (c) internal repainting of vacant residential premises in the retirement village.

Clause 21 of the RVR designates a model statement of proposed expenditure, which is found in Schedule 6. An operator may, but is not required to, use the model form.

If an operator fails to provide a statement of proposed expenditure, as required by section 112, then a resident may apply to the Tribunal for an order directing that the operator supply that statement.

Again, the consent of the residents to the statement of proposed expenditure is required. Within thirty days of receiving a request for that consent the residents must meet, consider, and vote on the statement and then advise the operator whether they consent or do not consent to the statement. If the residents do not give their consent, then they must specify the item or items in the statement to which they object.

If the operator is not advised by the residents as to whether they consent or do not consent then the residents are taken to have refused consent to the statement. Further, if the operator fails to seek the consent of residents to

the statement then the residents are also taken to have refused consent (see section 114(6)).

If the residents refuse their consent to the expenditure itemised in the statement of proposed expenditure then either the operator or a resident may apply to the Tribunal for an order in respect of the expenditure proposed for the financial year concerned. Section 115(2) specifies the orders and directions that may be made by the Tribunal in response to such an application. Apart from specific orders, the Tribunal may give procedural directions to the parties to facilitate agreement between them concerning the proposed expenditure, including directions to prepare new costings for services and a direction to meet and discuss disputed matters. The Tribunal may also make recommendations to the parties about the proposed expenditure (including recommendations about the cost and type of services to be provided).

Section 115(3) allows the operator to expend money received by way of recurrent charges to meet the reasonable and necessary costs of operating the village, if an application is made but the Tribunal does not, before the commencement of the financial year, make an order that gives rise to a statement of approved expenditure.

If the Tribunal adopts an intermediary type role, and gives directions or makes recommendations, then it may adjourn the proceedings for a report from the parties, and then take further action, if necessary, when the proceedings resume.

Section 115(6) specifies that in making its determination the Tribunal may have regard to the following:

- (a) the reasonable cost of services provided (or proposed to be provided) in the village,
- (b) the need for the services to be provided in the village,
- (c) any other relevant matter.

Once the statement of proposed expenditure is either the subject of a residents' consent or Tribunal orders then it is taken to be a statement of approved expenditure.

Section 116(3) stipulates that the operator must not expend money received by way of recurrent charges otherwise than in accordance with the statement, unless the statement is varied in accordance with section 117. If the operator contravenes this provision, or does not provide a statement of

proposed expenditure in respect of the current financial year, (despite any order of the Tribunal under section 113), then a resident may apply to the Tribunal for an order directing the operator to refund the recurrent charges paid by the resident during so much of the financial year as has passed at the time the order is made.

Section 117 was amended in 2004. The section permits the operator to seek the consent of residents to amend the statement of approved expenditure. The residents may agree to that request or, if they decline the request, then the operator may seek the approval of the Tribunal. However, section 117(4) limits the power of the Tribunal to make an order allowing further expenditure. In substance, the Tribunal must be satisfied that there is an urgent need for that further expenditure, and that it was not reasonably foreseeable when the statement of proposed expenditure was approved under section 116.

17 Annual accounts and audit

Section 118 requires that the accounts for a retirement village must be audited annually by a person qualified to audit accounts for the purposes of the Corporations Act.

If audit fees are to be paid by the residents of the village then section 118(2) requires that the fees be itemised in the statement of proposed expenditure, and that the item include the name of the auditor to be appointed. The residents' consent to the appointment of the auditor is required in the same way as their consent is required for the expenditure of the audit fees.

The operator is also required by section 118(2) to give to the residents' committee (rather than to individual residents) copies of quarterly accounts of the income and expenditure of the village. However, if there is no residents' committee established for the village then a copy of the quarterly accounts must be given to any resident who requests a copy of them. The operator is not required to secure the audit of the quarterly accounts.

Within four months after the end of the financial year of a village the operator must provide the residents of the village with copies of the audited accounts for that financial year. Section 119(2) specifies the details that must appear in those accounts. The requirements include a statement that:

- (a) specifies whether or not money payable by the village operator to former residents during the financial year concerned was paid in full and on time, and
- (b) specifies if any money so payable has not been paid, the amount concerned, details of the delay, and the reasons for the delay.

Section 119(4) specifies that the format of the accounts must correspond as closely as possible to the layout of the statement of proposed expenditure.

The operator will comply with section 119 if copies of the audited accounts are provided to the residents' committee for the village, and to any individual resident who asks the operator for a copy of those accounts. However, in contrast to the quarterly accounts, if there is no residents' committee then the copies of the accounts must be provided to each resident.

Section 119(3) imposes an obligation on the auditor. If the auditor is not satisfied that the operator has the capacity, during the financial year immediately following, to meet the liabilities relating to the village as and when they fall due, or if the auditor believes "that there is considerable uncertainty regarding the ability of the operator" to meet those liabilities as and when they fall due, then a statement to this effect must be included in the audited accounts.

18 Disputes

Jurisdiction to determine disputes between a resident and the operator or the operator and one or more residents is given to the Tribunal. If the dispute involves two or more residents, then they may nominate one of their number as their representative. In that event any order made by the Tribunal may apply to the residents who are represented by their nominee.

A resident of a retirement village may apply directly to the Tribunal for an order in relation to any village contract to which the resident is a party, and which the resident considers to be harsh, oppressive, unconscionable or unjust. The Tribunal is granted jurisdiction to determine any application made to it under section 123, and jurisdiction to make the orders specified in section 128(1).

Importantly, section 123(2) confers on the Tribunal the same jurisdiction as the Supreme Court, and all powers and authority of the Supreme Court, in proceedings in which relief under the *Contracts Review Act 1980* is sought in relation to a contract between an operator of a retirement village and a resident of the village. The sole exception to that jurisdiction is that the Tribunal may not exercise the powers conferred by section 10 of the *Contracts Review Act*, under which the Court may prescribe or otherwise restrict the terms on which certain persons may enter into contracts of a specified class.

Notwithstanding section 123, the Supreme Court retains its jurisdiction under *Contracts Review Act* in relation to contracts between operators and residents of retirement villages.

Notwithstanding these provisions, section 125 specifies that the disputes provisions of the RVA do not prevent the operator and residents of a retirement village from establishing mechanisms in the village for the purpose of attempting to resolve disputes. However, a village contract cannot make participation in such dispute resolution processes compulsory. It remains open to a resident to take their matter directly to the Tribunal.

19 The Tribunal

The jurisdiction of the Tribunal is referred to in section 126 to 128. Section 127 confirms that in exercising the jurisdiction conferred on it by the RVA, the Tribunal is not limited in the amount of money that it may order to be paid.

The orders that may be made by the Tribunal on the application of a resident (or residents) or an operator are detailed in section 128(1). Those orders include the following:

- (a) an order directing a resident (or residents) or operator to comply with a requirement of this Act or the Regulations,
- (b) an order that varies or sets aside a provision of a village contract that conflicts with this Act or the Regulations,
- (c) an order that:
 - (i) restrains any action in breach of any village contract or village rule, or
 - (ii) requires the performance of any village contract or village rule,

- (d)
- (e) an order for the payment of any amount of money,

Clause 27 of the RVR allows the Tribunal to make an order that varies, sets aside, or stays a previous order of the Tribunal that is in force under the RVR.

Clause 28 of the RVR allows the Tribunal to make different orders in relation to different residents, when determining an application to which two or more residents of the village are parties or an application made by the operator to which two or more residents are the other parties.

Clause 24 and Schedule 7 of the RVR specify the time within which certain applications may be made to the Tribunal. For example, if the Tribunal makes an order allowing a resident to rescind a village contract, then either party to that rescinded contract is entitled to make a claim for compensation, adjustment, or accounting under section 36(8)(a). Alternatively, the party concerned could make a claim for payment of damages, costs, or expenses arising out of a breach of any term, condition, or warranty. Each of these applications must be made within three months after the date on which the contract is rescinded.

An application by an operator to the Tribunal under section 108 (following the refusal of residents to consent to a proposed variation in recurrent charges) may be made up to thirty days after date of notification of the refusal. Alternatively, if that refusal is not notified, the application must be made within fourteen days after the end of the thirty day period within which the residents were required to respond to the operator's application for their consent.

20 Termination of residence contracts

Part 9 of the RVA regulates the termination of residence contracts.

In relation to premises owned by the resident, section 129(1) provides that the resident's right relating to those premises terminates only on completion of the sale of the premises. New section 129(1A) was introduced in 2004 and provides that a residence right arising from a contract in the form of an assignable lease terminates on the assignment of that lease. A residence contract relating to any other premises terminates in the circumstances specified in section 129(2). The relevant dates include the following:

- ❖ the date on which the resident delivers up vacant possession of the premises to the operator, either with the operator's consent or at least one month after the date on which the resident has given the operator written notice of intention to vacate;
- ❖ the date of death of the last surviving resident under the residence contract;
- ❖ the date on which the contract is terminated by the Tribunal.

In relation to owner occupied premises, section 130 confirms that the Tribunal has no jurisdiction to terminate a residence contract if the resident owns the premises concerned, nor does the Tribunal have jurisdiction to determine any question as to the title to any land.

If either the operator or a resident intends to apply to the Tribunal for an order terminating a residence contract then the intending applicant must give to the other party to the contract written notice of that intention. Section 131(2) requires that the notice be given in the form and within the time prescribed by the regulations. There appears to be only one exception to this requirement. Clause 39 of the RVR specifies the termination notice does not have to be given if an operator seeks to terminate a residence contract on the grounds of the resident causing serious damage to the village or serious injury to the operator, an employee of the operator, or another resident.

The form of the notice of intention to seek termination is found in Schedule 10 to the RVR. Except in the case of an application referred to in section 136 of the RVR (relating to the conduct of improvement works within the village or the changing of the use of the land on which the village is situated) clause 39(2) of the RVR requires that the notice be given no later than at the time at which the applicant makes the application to the Tribunal, but no earlier than fourteen days before that date. Clause 39(3) requires that a fresh termination notice be given if the person who gave the notice does not apply to the Tribunal for the relevant order within fourteen days after giving the notice.

Section 132 deals with the frustration of a residence contract, in circumstances such as the destruction of the premises or the premises being rendered wholly or partly uninhabitable. In that event, either the resident or the operator may give immediate notice of termination to the other party. If there is a dispute as to the circumstances relied upon by the resident, then this matter may be referred to the Tribunal for determination. Any notice of termination is suspended pending the Tribunal's determination.

Sections 133 and 134 allow the operator to seek the termination of a residence contract. The former relates to applications made on the ground that the premises are unsuitable for occupation by the resident because of his or her physical or mental incapacity. The latter relates to termination on the ground of breach of any village rule.

However, the Tribunal may only make an order terminating the residence contract for breach of a village rule if the Tribunal is satisfied that the breach, in the circumstances of the case, is sufficient to justify the termination, or that persistent breaches justify the termination, in the circumstances of the case. Further, if the Tribunal forms the opinion that a village rule is unjust, unconscionable, harsh, or oppressive then it may make an order setting aside the rule or modifying its operation. The Tribunal may refuse to make an order sought under section 134 if the Tribunal is satisfied that the resident or operator who breached the contract or rule has remedied the breach concerned.

Section 135 relates to an application made by the operator on the ground that the resident has intentionally or recklessly caused or permitted, or is likely intentionally or recklessly to cause or permit, serious damage to any part of the village or injury to the operator or an employee of the operator or any other resident. Such an application may be made whether or not the operator has given a notice of intention to apply to the Tribunal.

The Tribunal may not make an order terminating a residence contract under section 136 (relating to an upgrade of the village or a change of use) unless the Tribunal is satisfied that:

- ❖ the operator has given the resident at least twelve months' written notice of the operator's intention to make an application under the section,
- ❖ development consent and all necessary approvals to carry out the works etc have been obtained, and
- ❖ the operator has obtained or made available alternative accommodation for the resident that meets the requirements of the section

That accommodation must be of approximately the same standard, and require no greater financial outlay on the part of the resident than the premises that were the subject of the residence contract. The new premises must also be acceptable to the resident or reasonably ought to be so acceptable.

Section 136(3) requires that the Tribunal must fix in the order a date by which the resident must vacate the premises, but must also specify the

penalty that the operator will incur if the proposed works are not substantially commenced, or action to facilitate the use of the land for the other purpose not taken, within six months after the date on which the resident vacates the premises. Further, the Tribunal may order the operator to allow the resident to return to the premises, under a contract identical to that which was in force, on completion of the works, and may make such other orders as the Tribunal thinks fit.

Having made an order for the vacation of the premises, the Tribunal may, under section 137(1) suspend the operation of that order if it is satisfied that it is desirable to do so, having regard to the relative hardship likely to be caused by the order to:

- (a) the resident, or
- (b) other residents or the operator of the village.

21 Matters relating to vacation of premises

These matters are regulated by Part 10 of the RVA. The Part has effect despite the provisions of any village contract. It applies in respect of a former occupant of a retirement village whose residence contract was in force immediately before Part 10 commenced, except as otherwise provided.

Section 150 includes definitions of “owner” and “the sale of residential premises”. For the purposes of Part 10, an “owner” includes a resident or former occupant of the premises:

- (a) who is taken to have a residence right in respect of the premises in accordance with section 4(2), or
- (b) who does not own the premises but whose residence contract:
 - (i) is in the form of a registered long term lease; and
 - (ii) includes a provision that entitles the resident or former occupant to at least 50% of any capital gains in respect of the premises.

Payment of recurrent charges – absence and former occupants

Definitions of “general services” and “personal services” are found in section 4 of the RVA. The latter would include provision of meals, laundry, and cleaning services.

A person who is absent from the village for a period of at least twenty eight days is not liable to pay, in respect of the remainder of the absence period, recurrent charges for personal services. If the resident has died or moved out of the village, then liability to pay those charges ceases from the removal date or the date on which the operator is notified of the resident's death. If the operator and the resident cannot agree on the proportion of recurrent charges that are payable for personal services then this matter may be determined by the Tribunal.

In relation to general services, section 152, which relates to former occupants who own the premises, specifies the circumstances in which the liability of a former occupant to pay for such services is brought to an end. That occurs when, for example, the operator enters into either a village contract with an incoming resident or a residential tenancy agreement with an incoming resident. Alternatively, the liability will end on the date on which a person takes up residence in the premises with the consent of the operator.

Section 153 relates to recurrent charges for general services in respect of premises that are not "*owned*" by the former occupant. The liability to pay those charges, arising after the former occupant has permanently vacated the premises, ceases on:

- (a) the date on which the operator enters into either a village contract with an incoming resident or a residential tenancy agreement with an incoming resident in relation to the premises;
- (b) the date on which a person takes up residence in the premises with the consent of the operator;
- (c) if the Tribunal terminated the residence contract, the date on which the former occupant delivers up possession of the premises to the operator;
- (d) if the former occupant delivered up vacant possession after receiving notice of the operator's intention to apply to the Tribunal for an order, the date on which vacant possession was delivered up; and
- (e) the date that is six months after the date on which the former occupant otherwise delivered up vacant possession of the premises to the operator, whichever date occurs first, or such earlier date as the operator and the former occupant agree upon.

Importantly, section 154 allows a former occupant to pay recurrent charges as and when they fall due for payment or to allow the charges to accumulate and to pay them from the proceeds of sale of the premises or from money payable to the former occupant by the operator under any

village contract. The former occupant must elect which course to follow and must notify the operator of that election as soon as practicable after permanently vacating the premises. This is an important concession, as it may significantly reduce the financial burden on former occupants, particularly those who have been compelled to seek accommodation in a high care or low care residential facility.

If the deferral option is taken up by the former occupant then the operator is entitled to claim interest on the amount unpaid from time to time. Clause 23 of the RVR specifies that the interest rate is 10% per annum, which is the maximum rate of interest prescribed under section 95(1) of the *Supreme Court Act* for payment of interest on a judgment debt. However, the operator and the former occupant may agree on a lower rate of interest.

22 Departure fees

The term “departure fee” is defined in section 156 as follows:

“a departure fee is:

- (a) any amount of money payable under a village contract by a former occupant of a retirement village that is calculated in relation to:
 - (i) the period, or part of the period, during which the former occupant has or had a residence right in the village, and
 - (ii) such period after the termination of the former occupant’s residence right as is specified in section 160(2), or
- (b) any other money payable by a former occupant of a retirement village that is declared by the regulations to be a departure fee.

Section 160 relates to the departure fee which may be charged after premises not “owned” by the former occupant are permanently vacated. Section 160(2) allows the departure fee to be calculated in respect of the period that ends on dates defined in identical terms to those set out in section 153(2). As a result, the calculation of the departure fee must end no later than the date that is six months after the date on which the former occupant delivered up vacant possession of the premises to the operator. However, if the village contract itself provides for the calculation to cease at an earlier date than that arising by operation of section 160(2), then the earlier date is the relevant date.

A former occupant may approach the Tribunal for an order reducing or waiving the former occupant's liability to pay such part of the departure fee as is calculated in respect of a period after the former occupant's permanent vacation of the premises. However, under section 161(2) the Tribunal may only make such an order if it is of the opinion that any delay in the operator's entering into a new contract with another person in respect of the premises is attributable to action or non-action of the operator.

In the case of departure fees calculated in relation to premises that are owned by the former occupant, and which were in force before the commencement of section 159, similar cut-off dates to those specified in section 152(2) apply. Again, provision is made for an earlier date to be agreed upon by the operator and the former occupant.

23 Repair and refurbishment

Section 163 requires a former occupant to leave the premises as nearly as possible in the same condition as those premises were in at the beginning of the residence contract, fair wear and tear excepted and, where relevant, as described in the condition report. If the former occupant does not comply with this obligation then the operator may require the former occupant to bear the cost of any necessary repairs.

Where a dispute arises concerning the condition of the premises, and in particular where the contract was entered into before section 38 of the RVA, then the former occupant may apply to the Tribunal for an order in relation to the claim.

Where refurbishment of residential premises is to be carried out at the cost of a former occupant, in a case where the contract was in force before the commencement of section 165, then the regime under that section must be followed.

24 Sale or letting of premises

Section 167 regulates options held over units in a retirement village by the operator. Within twenty eight days of the date on which the resident permanently vacates the premises concerned, the operator is required by section 167 to decide whether or not to exercise the option. If the resident has not lived in the premises then the operator's decision on the option

must be made within twenty eight days after the resident notifies the operator in writing that the premises are for sale. If the operator fails to give the resident written notice of the operator's decision to exercise the option, within the twenty eight day period, then by operation of section 167(2) the option lapses.

The sale price and selling agent

Section 168 confers upon the resident the right to set the sale price for his or her residential premises in a retirement village, and the right to appoint a selling agent of the resident's choice. The operator is eligible to be so appointed, provided that the operator is a licensed agent.

If the operator is appointed as the selling agent under section 168(1) then the resident may also, but is not compelled to, allow the operator to set the sale price of the premises.

Any provision in a residence contract in force at the date of commencement of section 168, under which the resident was required to appoint the operator, or a person chosen by the operator, as either the selling agent or the party setting the sale price for the premises, terminates on the commencement of the section. Any similar appointment after the date of commencement of the section is void.

Section 168(5) is clearly intended to respond to complaints that in some cases operators were choosing to give sale priority to units in a retirement village that may never have been the subject of a residence contract. This became a particular problem if residents had vacated accommodation, leaving the village with a mix of units, some of which were occupied, some of which had never been occupied and some of which had become vacant following the departure of the resident. If the operator or a person chosen by the operator is appointed as a selling agent then that party:

- (a) must notify the resident of all offers to purchase the premises, and
- (b) must, if the resident so requests, provide the former occupant at the end of each named month with a report:
 - (i) detailing the marketing programme (including details of all advertising of the premises or the village), and
 - (ii) listing all enquiries received about the sale, and
 - (iii) providing the names and telephone numbers (or other contact details) of the persons who made the enquiries (insofar as these are known to the operator), and

- (iv) providing details (including the asking price) of all other residential premises for sale in the village, during that month.

Section 168(6) imposes obligations on the resident, if a person other than the operator is appointed as selling agent. The resident is required to notify the operator of the name and contact details of the agent and of the asking price for the premises. Any changes in either of these matters must also be notified by the resident.

An operator is prevented by section 169 from interfering with the sale of residential premises, if the operator has not been appointed as the selling agent. This includes interference with any “for sale” sign relating to the premises, subject to a savings provision where the sign may have been erected contrary to village rules or in a way that interferes with the peace, comfort and quiet enjoyment of another resident of the village.

Section 170(1) is in the following terms:

- (1) A resident of a retirement village who sells residential premises in the village and the operator of the village are to share the costs of the sale in the same proportion (if any) as they are to share any capital gains on the sale in accordance with a village contract.

However, if the resident appoints an independent agent, then the resident is solely responsible for the payment of the agent’s commission.

Section 170(3) provides that a resident is not liable to pay commission to the operator, or a person chosen by the operator, if the premises are sold other than as a result of the operator’s actions as selling agent.

Sale where the operator is not the vendor

Section 171 regulates the sale of residential premises, where the operator is not the vendor. The section requires the vendor to give the operator sufficient notice of the proposed sale to allow the operator to prepare and supply to the prospective purchaser a disclosure statement, at least fourteen days before the contract is entered into.

Section 172 operates to deem the inclusion in any sale contract of a provision to the effect that the contract is conditional on the purchaser entering into a service contract with the operator of the village on or before completion of the purchase. As soon as practicable after the contract for the sale of premises is entered into, the vendor must notify the operator in writing of that fact.

The operator must then decide whether or not to enter into a service contract with the purchaser. If the operator decides against entering into that contract then it must notify the vendor, not later than fourteen days after being notified of the conclusion of the sale contract, of its decision, and the reasons for that decision. The operator must also apply to the Tribunal for an order declaring that the operator is not obliged to enter into the service contract.

If the operator fails to enter into the new service contract or fails to apply to the Tribunal for an exempting order, then the vendor may apply to the Tribunal for an order directing that the operator enter into the service contract. If the operator proposes to enter into a service contract that is substantially different, to the detriment of the purchaser, from the terms and conditions of the sample contracts that are made available for inspection under section 20(1)(e) then the resident may also approach the Tribunal, seeking an order that the operator enter into a service contract that is substantially in accordance with the sample contract.

Under section 173 the Tribunal must determine whether the operator's decision not to enter into the service contract is reasonable in all the circumstances. The Tribunal will have regard to the suitability of the premises for occupation by the proposed purchaser (or another person proposed to be the resident) having regard to the physical and mental capacity of the person concerned. The Tribunal may also consider any other factor that it considers relevant. The age of the person is not relevant, if the purchaser (or the proposed occupant) is a retired person.

Having made its determination, the Tribunal may set the terms of the service contract to be entered into, having regard to the service contracts in force in the village and the sample contract available for inspection under section 20(1)(e). If the Tribunal orders the operator to enter into a service contract with the purchaser then the Tribunal may also order the operator to pay compensation to the vendor or the purchaser, for delay and inconvenience.

25 Letting or sub-letting of premises

Section 174 permits the resident of a retirement village to let or sub-let premises, providing that this is effected by entering into a residential

tenancy agreement. The agreement must not be for a term that, taken together with any option to renew, exceeds three years.

The resident must notify the operator of specified details of the tenancy, and the operator must consent in writing to the tenancy. However, if the operator refuses consent, other than on the ground that the term of the tenancy (including any option) would exceed three years, then the operator must both advise the resident of the decision, and the reasons for the decision, and apply to the Tribunal for an order declaring that the operator is not obliged to consent to the agreement.

That application is considered by the Tribunal under section 175 of the RVA. The Tribunal must determine whether the operator's refusal to consent is reasonable in the circumstances. Again, the Tribunal is to have regard to whether the premises are suitable for occupation by the proposed tenant or sub-tenant, having regard to his or her physical and mental capacity. The Tribunal may also have regard to any other factor that it considers relevant. The age of the proposed tenant or sub-tenant is not relevant if that person is a retired person.

If a residential tenancy agreement is entered into, then the operator must provide services under the service contract to the tenant, as if that person were the resident. Section 176(2) confirms that the letting or sub-letting of the premises does not affect any right or obligation of the resident and the operator under a village contract. The operator is specifically precluded by section 177 from interfering with a resident's attempt to let his or her residential premises.

A tenant or sub-tenant under a residential tenancy agreement must not assign his or her interest under that agreement, or sub-let the premises that are the subject of the agreement.

26 Payments to former occupants

Section 180 regulates payments to former occupants who “own” the premises that they have occupied. In this regard it is relevant to recall that under section 150 an “owner” includes a person who does not own the premises but whose residence contract includes a provision to the effect that the amount of any payment required to be made by the operator, after the resident permanently vacates the premises, is wholly dependent on the amount paid by the next incoming resident.

The operator must make any payment required to be made to the former occupant following the sale of the premises within fourteen days after the earliest of the following:

- (a) the date on which the operator receives full payment under a residence contract with an incoming resident of the premises,
- (b) the date on which the operator enters into a village contract with an incoming resident of the premises,
- (c) the date on which the operator enters into a residential tenancy agreement with an incoming resident of the premises,
- (d) the date on which a person takes up residence in the premises with the consent of the operator,
- (e) if the operator buys the premises from the former occupant - the date on which the operator completes the purchase, unless the contract between the operator and the former occupant provides for an earlier payment.

At the same time as the payment is made, the operator must give the former occupant a statement, setting out the matters referred to in section 180(3) and showing how the amounts were calculated. The required matters are the following:

- (a) the departure fee, if any, payable by the former occupant,
- (b) accrued or outstanding recurrent charges, if any, payable by the former occupant,
- (c) any amount payable by the former occupant in relation to the sale of the residential premises concerned,
- (d) any other amount payable by the former occupant under a village contract,
- (e) in the case of a former occupant referred to in section 150(1)(b) - the sale price of the premises,
- (f) in the case of a former occupant who is required to pay for the cost of refurbishment of his or her residential premises (as referred to in section 165) - the cost of that refurbishment,
- (g) the amount of the payment to the former occupant.

If payment is not made within the time prescribed by section 180 (2) then the former occupant may apply to the Tribunal for an order directing the operator to make the payment, or to recalculate the amount and to pay any additional amount due to the former occupant following that recalculation.

Section 181 regulates payments to a former occupant who did not “own” the residential premises concerned. Again, section 181(2) specifies the time within which a refund of the former occupant’s ingoing contribution must be made. Importantly, one of the specified dates is the following:

- (f) the date that is six months after the date on which the former occupant otherwise delivered up vacant possession of the premises to the operator,

The relevant date under section 181(2) is the date which occurs first, or such earlier date as the operator and the former occupant may agree upon.

Section 181(3) requires that any other payment to be made under a village contract to a former occupant, being an amount that is dependent on the amount of the ingoing contribution of the incoming resident is to be paid to the former occupant within fourteen days after the earlier of:

- (a) the payment, under a village contract, of any money to the operator, by that incoming resident, or
- (b) the incoming resident taking up residence in the premises.

For example, the residence contract with the former occupant may provide for that person to share with the former occupant in any capital gains. The unit may not be the subject of a new residence agreement within six months, with the result that under section 181(2)(f), a refund of the ingoing contribution must be made by the operator. Some months later, a new residence contract might be entered into, which triggers the capital gain participation provisions of the original contract with the former occupant. The date for payment of the former occupant's entitlement to a share of that gain is determined by sub-section (3).

The operator is required to give a similar statement to the former occupant as that referred to in section 180(3).

Section 181(5) makes some concession to the operator, if it considers that it will not be able to enter into a residence contract with another person in respect of the premises within six months of the date on which the former occupant delivered up vacant possession. The operator can apply to the Tribunal for an order extending the time allowed for payment or allowing payment by instalments. The ground of the application is that compliance with section 181(2)(f) would cause undue hardship to the operator.

In determining that application, the Tribunal may have regard to the hardship to be caused to the former occupant if the order sought by the operator is made. The Tribunal may make an order allowing additional time for payment but it may also order the payment of interest at a rate determined by the Tribunal on the amount that is not paid.

27 Conclusion

It is not possible in this paper to review in detail every provision of the RVA. However, for practitioners advising either prospective residents or residents of retirement villages on the one hand or operators of villages on the other hand, the RVA significantly changes the legal landscape.

The RVA and RVR have introduced a very detailed regulatory framework for retirement villages. The rights and obligations of residents and operators are prescribed in detail. The jurisdiction of the Tribunal is very broad. The Tribunal is required to deal with applications that raise complex contractual and relational issues.

For those of us engaged in advising in this field, there is no substitute for carrying out a detailed review of the RVA and the RVR to ensure that the advice that we give reflects the current regime under which retirement villages are being conducted.

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