Fineprint | ISSUE 92
Summer 2023

Two decades on: Proposed changes to the Retirement Villages Act 2003

You, or someone you know, may be considering a move into a retirement village. It is a big decision, involving lifestyle choices as well as a significant financial commitment. Understanding the rules that govern retirement villages is crucial – and those rules are set to change.

Why the Act is under review

The Retirement Villages Act 2003 is the cornerstone of retirement village governance. It was designed to provide a clear legal framework for village operators when the industry was new. Two decades have passed, however, and both the sector and our elderly population have grown substantially. The number of villages increased by 24% between 2012 and 2021, and unit numbers surged by 65%. With our ageing population, it is vital to ensure that the legislation is still fit for purpose.

A balanced approach

Te Tūāpapa Kura Kāinga/Ministry of Housing and Urban Development initiated a comprehensive review; submissions on which closed in mid-November. The aim was to strike a balance between safeguarding the interests of residents and encouraging innovation within the sector. A discussion paper was published which you can read here: **https://consult.hud.govt.nz** and go to 'review of Retirement Villages Act 2003'.

What happens now?

Although all retirement villages have slightly different arrangements, there are some common features identified in the discussion document.

+ Before you buy, you are faced with large quantities of paperwork that can be difficult to understand and is sometimes inconsistent; there is little or no room for negotiation
+ You pay an 'entry fee' for the right to live in your unit. This is equivalent to the capital value of the unit. In most cases the retirement village owner benefits from any increase in value
+ You pay a weekly fee that covers rates, insurance, upkeep of the grounds and buildings, etc. Sometimes this is charged even after you have left the unit

In this issue +

Edmonds Marshall
LAWYERS

- The retirement village operators charge a fixed deduction, often referred to as deferred management fee. This is a percentage of the entry fee, generally between 20–30%, that is deducted when you leave your unit
- Many villages charge for the repair of items that come with the unit (such as heat pumps and white goods) and for damage that goes beyond fair wear and tear
- The options for moving into care can be confusing and expectations as to availability are not always met, and
- Complaints are handled by the operators themselves; there is no independent body for dealing with disputes.

What changes are being considered?

Transparency before moving in

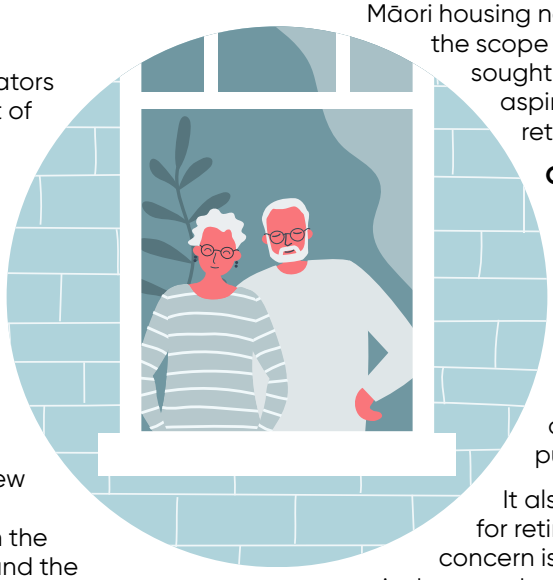
The review recommends re-writing the documents you are given before moving into a village, particularly the occupation right agreement (ORA) and the disclosure statement to make them easier to understand.

Feedback was sought on making it easier to complain about misleading statements made during the sale process and giving you the benefit of the doubt where there are inconsistencies between the ORA and the disclosure statement.

Day-to-day living

There are proposals to require operators to pay for the repair or replacement of the fixtures that come with the unit.

The paper promotes a new independent complaints and dispute resolution scheme. It considers whether free advocacy support should be made available to make it easier to make a complaint.



Moving into care

While there are no proposals to change the current regime, the review urges operators to give clearer and more comprehensive information on the residential care services they offer and the financial implications including:

- Making it clear that being moved into care on the same site is dependent on the availability of a suitable room, and
- Detailing the costs, including where the operator charges a second deferred management fee if you move from a unit and buy a care suite.

What happens at the end of the ORA?

The ORA can end in several ways, the most common being the death of the resident.

During the time you have lived in your unit, its market value may have increased. At present, the operator benefits from the capital gain and from the deferred management fee.

The discussion paper put forward several different options:

- Requiring the operator to repay the capital within a fixed period, say six or 12 months
- Giving the operator the option to share the capital gain with you. If so, then it would be exempt from the requirement to repay the capital within the fixed period, and
- Paying interest on the entry fee after the unit has been empty for six months.

In some cases, the operator continues to charge the weekly fee while the unit remains vacant and there is no limit on how long this can last. The paper considers this to be unfair and proposes to amend the legislation so that operators can continue charging for no more than four weeks after the unit has been vacated.

Finally, the discussion paper sought feedback on whether there should be any limits on the size of the deferred management fee.

Honouring Te Tiriti o Waitangi (Treaty of Waitangi)

The paper acknowledged that retirement villages have mostly been home to older Pākehā. While the review accepted that many of the solutions to address Māori housing needs for older people sat outside the scope of the review, it nevertheless sought information on experiences and aspirations of Māori and Pasifika about retirement village living.

Other matters

The paper considered widening the definition of retirement village so that it encompasses a greater range of occupancy arrangements including residential tenancy agreements, right to occupation by way of share ownership or outright purchase of the unit.

It also examined insurance cover for retirement villages. Of particular concern is what happens if an entire village is damaged or destroyed by a fire, flood or earthquake and cannot be rebuilt. Most insurers will pay out the sum insured - which could be less than the operators are required to pay out to the residents. The paper proposed that the operators should maintain insurance policies that are sufficient to pay out all the residents' capital sums.

Next steps

Once the consultation period is completed, advice will be given to the relevant minister. It remains to be seen whether this will result in an overhaul of the current legislation. We will keep you up to date with developments. +

What happens to your children when you separate?

Goodwill and good process will help prevent turmoil

The time following a separation can be highly emotional – for you and your spouse or partner, and for your children.

In this fraught environment, disputes can easily arise about the day-to-day care arrangements for your children or other vital issues such as where they will live, schooling, medical care, religious/cultural choices and so on. These are formally called guardianship matters.

In cases where the children are safe in their respective parent's care, there are numerous ways in which care arrangements can be resolved and guardianship decisions made, without the need to involve the Family Court. A co-parenting relationship extends well beyond the uncertain period following a separation.

The best case scenario? Parents agree to ongoing care arrangements and guardianship matters between themselves and cooperatively focus on what is in the best interests of their children.

These best case scenarios, however, are not always possible, especially when disputes arise at a sensitive or acrimonious time for separating parents.

Can't reach agreement?

What happens if parents cannot agree? Either parent can initiate the Family Dispute Resolution (FDR) process:

+ This is a mediation service, without lawyers, that deals specifically with care and guardianship disputes
+ A mediator is assigned to work with both parents, individually and/or collectively, to achieve an agreement, and
+ If agreement is reached, this can be documented in a mediated agreement.

If parents cannot reach agreement from the FDR process, then either parent can pursue the matter through the Family Court. Importantly, FDR is a prerequisite to attend the Family Court, unless there are urgent concerns for a child.

Some parents rely on third party assistance:

+ In many instances, parents can reach agreement after receiving (and following) advice and guidance
+ Using a third party can give conflicting parents an objective perspective, particularly at such an emotional time, and
+ Such support can be obtained through lawyers, counsellors and/or personal support networks such as family and/or friends.

Formalising the arrangements

Once you've reached agreement, some parents like (or it may be necessary) to have their children's care arrangements formalised. This can be done with a

parenting agreement; this document outlines the specific care arrangements and/or relevant guardianship provisions for children that both parents sign and (should) adhere to.

Alternatively, parents can consent to the terms of their agreement with a parenting order; this is a court-sealed document that collates the agreed terms and can be enforced if there are unconsented breaches.

Whatever the care provisions, it is in a child's best interests for arrangements to be tailored to their age, stage and needs. Such arrangements should evolve with each child's needs and stages and be regularly reviewed. Lawyers and counsellors who specialise in family and child disputes are often well equipped to provide advice on age appropriate arrangements and options.

Last resort is the Family Court

A Family Court hearing can be an expensive process – not only financially, but it can also take a significant toll emotionally and on the time of both parents, their children and their support networks. It also involves placing the decision regarding your children in the hands of a third party, the judge.

Obviously, having the parents cooperate and reach agreement is always going to be the best outcome for a family. However, there will be some situations where using the Family Court is necessary and preferred, such as when parents cannot reach agreement, where there are safety concerns for a child in either (or both) parents' care or if urgent intervention is required (for example, preventing a child from being taken out of New Zealand).

If you are separating and need guidance about arrangements for your children, it's important to get advice from a specialist family lawyer. Please don't hesitate to contact us if this happens to you. +

Generative AI and copyright

Are you taking the right precautions?

Many businesses have been using artificial intelligence (AI) for a long time to gather insights into their data and make strategic decisions. Recent generative AI improvements, however, have brought the power of AI into the public's hands like never before. As a certain spider[1] once said: *With great power comes great responsibility.*

Generative AI technologies can now be used to create almost any type of content you can imagine; everything from a poem about pineapples to music in the style of Mozart and even three-dimensional models of motorbikes. However, the legal and human issues these technologies create are far less inspiring.

At its core, generative AI models are trained on large datasets of predominantly human-generated works to generate new works, that are 'inspired' from works within the training dataset. This approach raises several important legal questions, including:

+ Are companies allowed to train an AI model on content which they do not own? This is particularly significant considering much of the content is not in the public domain and is, arguably, covered by copyright
+ Once a model has been trained, who owns the content the model produces, and can it be used without infringing the intellectual property (IP) of others, and
+ Can you own and protect the output from an AI model?

There are also the ethical and fairness issues of using the creative works of others without compensation.

Many of these topics are currently being litigated in courts around the world, and while it would take a lengthy article to cover each issue in detail here, we discuss three key issues below.

1. **IP laws vary from country to country**
   While there are international agreements on copyright provided under the Berne Convention, there are still significant differences in copyright law in different countries. This is particularly important when it comes to issues such as relying on 'fair use' as a defence to copyright infringement.

   Copyright is also only a small piece of the puzzle. Depending on how you use AI, you may need to also consider local and international laws covering moral rights, consumer protection such as the Fair Trading Act 1986 and the tort of passing off, breach of contract, violations of the American statute Digital Millennium Copyright Act 1998 and unfair competition laws – to name just a few.
2. **AI-generated content can still infringe the rights of others**
   Even if an AI is tasked with creating new content, this does not guarantee that content can be used without infringing the rights of others. Most AI models have been trained on datasets that include works protected by copyright, patents, trademarks and registered designs. Therefore, before being used, the generated outputs should be reviewed to assess potential infringement issues.
3. **The use of a generative AI may prevent you from asserting copyright in the generated works**
   Most guidance from overseas markets at this stage is that to be copyright-eligible, the creative work requires a human author. Prompting an AI to generate content is unlikely to meet the human authorship standard. The extent to which you can claim copyright on an AI-generated work is likely to be limited to a detailed analysis of exactly what the human inputs were when compared with the computer-generated outputs.

What can you do to reduce risk?

Despite these above issues, you can take practical steps to help reduce your risk in using AI-generated content. These include:

+ Searching to determine how different your AI-generated content is from existing, potentially protected works
+ Ensuring that key issues such as privacy and confidentiality are not breached by your use of the AI
+ Fact checking the outputs of the AI
+ Ethical use of the AI, including not using the AI as a tool to copy or mimic the art style of another person or company, and
+ Keeping detailed records of what the generative AI was used for, including details of prompts, intermediate outputs, manual edits and so on.

Since generative AI technologies can be used in a seemingly endless number of different applications, your risk exposure will depend on exactly what you are using these technologies for and what precautions you can take to reduce your risk. +

1 Spider-Man said this, but it has also been attributed to Winston Churchill.

Receivership, voluntary administration and liquidation

What are the differences?

It's been a challenging time for many businesses since the pandemic hit our shores. If you find your company in financial difficulty, you may be forced to make some difficult decisions. This may involve receivership, voluntary administration or liquidations – but what are the differences?

Receivership

Receivership occurs where a receiver (typically a licensed insolvency practitioner who may also be a chartered accountant) is appointed to deal with secured assets or manage the business of a company for the benefit of the secured creditors.

A receiver can be appointed by a court order or by a secured creditor under the terms of a deed or agreement, under which a contractual right to appoint a receiver has been granted by the company (or any other entity).

The specific powers of a receiver include the right to demand and recover income of the property in receivership, issue receipts, manage property and inspect any documents relating to the property. The receiver may also have additional rights in the deed or agreement under which it has been appointed.

The receiver's primary duty is to try and bring about a situation in which debts are repaid, and the company's property is managed – not for the benefit of the company, but for the secured creditors. To do so, a receiver will collect and sell one or more secured assets on behalf of a secured creditor, and manage other preferential claims against the company. The directors of a company in receivership have restricted powers. They must co-operate with the receiver so that the financial affairs of the business can be resolved fairly and equitably. Directors must provide company accounts, records and other information required by the receiver.

Voluntary administration

Voluntary administration is an option aimed at giving a business the opportunity to survive and avoid liquidation. An administrator can sometimes save a failing business; administrators are generally appointed by the company directors to deal with all a company's creditors and its affairs.

In considering whether voluntary administration is an option for the company, directors must weigh up whether it has the support of creditors, and whether creditors are likely to gain more financial benefit from the company avoiding liquidation and continuing to trade.

Other considerations include the extent of the company's debt, the attitudes of suppliers, its history with creditors and the availability of cash flow.

Liquidation

In receivership and administration situations, there is a chance a business can be saved and return to normal trading. Liquidation, however, is the end of the road.

Previously known as 'winding up', liquidation can be voluntary or compulsory. The main reason a company will face compulsory liquidation is if it is unable to pay its debts and it is insolvent. A voluntary liquidation can be used if the shareholders want to cease trading.

A liquidator's principal duty is to preserve and protect the company's assets to enable distribution to its creditors and, in a solvent liquidation, its shareholders.

Liquidators will recover what they can and distribute the proceeds to a company's preferential, secured and unsecured creditors and, in a solvent liquidation, to its shareholders. Although the liquidator has control of the assets, the company keeps ownership of them and holds the assets on trust for the creditors. When the liquidation is complete the company is removed from the Companies Register.

Ask for guidance

When your business is facing financial strife, it's easy to feel overwhelmed. We recommend you contact us for guidance to support you through the process. +

Postscript

Mainzeal case

The implications of the *Mainzeal* case[1] are being felt far and wide amongst the directorship community. We summarise below the findings of the Supreme Court case.

In August, after the case worked its way through the High Court and Court of Appeal, the Supreme Court found that the directors should be personally liable for $39.8 million plus interest payable at 5% pa from the date of liquidation – together more than $50 million. The chief executive of Mainzeal (who was also a director) is responsible for the full sum, and the personal liability of the three other directors was capped at $6.6 million each plus interest.

In 2013, Mainzeal went into receivership and liquidation. It was calculated the company owed around $110 million to unsecured creditors. The liquidators believed that the directors of the company had breached s135 (reckless trading) and s136 (trading whilst insolvent) of the Companies Act 1993 and should be held personally liable for the losses of the company's creditors.

Many directors may want to take a moment to reflect on what the Supreme Court decision may mean for them now and in the future. Becoming personally liable for a company's debts is a significant risk associated with accepting (or continuing) a director role.

If you are considering taking on a directorship, you should take independent legal and accounting advice to not only carefully assess whether your skills are a good match for the company and the sector in which it operates, but also to be clear on any potential personal liability.

1 *Yan v Mainzeal Property and Construction Limited (in liquidation)* [2023] NZSC 113.

Merry Christmas and a Happy New Year

As this edition of *Fineprint* is the last for 2023, we wish you all a very Merry Christmas and a happy, safe and healthy 2024.

Meri Kirihimete me te Hape Nū la. +

Edmonds Marshall
LAWYERS

PARTNERS
David Parker
Jamie Rae
Kylie Munro-Cross

CONSULTANT
Kurt Edmonds

SOLICITORS
Richard Rae
Richard Brown

LEGAL EXECUTIVES
Sue Coatham
Colleen Kruger
Julie Jamieson
Tash Fraser
Alicia Collins
Linda Boyte
Tania Williamson

TRUST SERVICE MANAGERS
Keith Wells
Sandy Finucane

Arawa Street
PO Box 62
DX GA27002
Matamata 3440
P: 07 888 8137
F: 07 888 8134
E: lawyers@emlaw.co.nz
W: emlaw.co.nz

NZ LAW Stronger Together.

Fineprint is printed on Advance Laser Offset, a paper produced using farmed eucalyptus trees and pulp from Well Managed Forests – manufactured in an ISO14001 and ISO9001 accredited mill.

ISSN 1174-2658 (Print) ISSN 2744-3973 (Online)