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LAW·COMMISSION
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Report 57

Retirement Villages

September 1999
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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15 September 1999

Dear Minister

I am pleased to submit to you Report 57 of the Law Commission,
Retirement Villages.

It may be thought not inappropriate that the Commission should
be completing this report in the United Nations Year for Older
Persons.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Tony Ryall MP
Minister of Justice
Parliament Buildings
Wellington

Preface

IN 1997, the Law Commission was approached by the Securities Commission and invited to consider the law relating to retirement villages, as part of a wider project relating to the marketing of undivided interests in land, which would have the incidental benefit of resolving some of the uncertainties surrounding the somewhat enigmatic provisions of the Securities Act 1978, section 5(1)(b).

A discussion paper (Preliminary Paper 34 *Retirement Villages*) was published by this Commission in October 1998. Some 500 copies were distributed and there was a degree of media coverage. We received over 45 submissions on that paper, including submissions on behalf of their membership from such bodies as the Trustee Corporations Association of New Zealand and the Retirement Villages Association of New Zealand Inc. Those making submissions included representatives of all interested sectors (operators, trustees, and residents), as well as such disinterested bodies as the Securities Commission and the New Zealand Law Society. A complete list of those making submissions is to be found in Appendix C. Following receipt of formal submissions, we wrote to the parties making submissions who we thought would be affected thereby, inviting comment on a few new proposals not advanced in the preliminary paper, and received responses. There have been discussions with industry representatives and others, including participation in a forum at the annual conference of The Retirement Villages Association on 13 May 1999. We have perused a number of residents' contracts. This final report, differing in certain respects as it does from the preliminary paper, has been very much shaped by the information obtained by the processes described and the viewpoints expressed. In relation to practices in new and expanding areas of commercial activity, such as those discussed in this report, the Commission is very dependent on responses to its preliminary discussion papers. We are grateful for the assistance so readily provided.

As it records, we were assisted in preparing the discussion paper by Helen Melrose, Steve Smith, Ian Ramsay, and John McPherson. Peter Ratner of Wellington and Peter Jones of Hamilton reviewed

the draft of the present paper. The final responsibility for the report, however, is of course that of the Commission. The proposed statute was drafted by Vivienne Wilson, formerly of Parliamentary Counsel Office and now an associate in the Wellington office of Simpson Grierson. Megan Leaf was the researcher engaged on this project.

Retirement villages

WHAT IS A RETIREMENT VILLAGE?

- 1 **T**HE TERM "RETIREMENT VILLAGE" is clearly understood in everyday language as meaning a collection of residences (sometimes together with shared recreational, dining, rest home, or hospital amenities) designed for the accommodation of the elderly. There are examples on the New Zealand statute book of the term being employed to convey this general meaning without more precise definition (Friendly Societies and Credit Unions Act 1982, section 57(1)(f); Goods and Services Tax Act 1985, section 2(1) para (f) of the definition of "commercial dwelling"; Human Rights Act 1993, section 55). Retirement village is not a precise legal term. It can be applied to a very wide variety of arrangements. In this report, we will use the term in its everyday popular sense, but it will be necessary for us to explain, as we do in Appendix A, the different sorts of legal structures which the term can encompass. In our suggested new statute for retirement villages, it is our intention to capture these different types of legal structure within the definition of retirement village that we employ.
- 2 People in New Zealand, as in other parts of the world, are today tending to live longer. Among New Zealanders of European descent, there is no widespread tradition of several generations living under the same roof. The nearest approach is the "granny flat", defined in the *New Shorter Oxford English Dictionary* as "part of a house made into a self-contained accommodation for an elderly relative". There is a clear social need for accommodation for elderly persons who are no longer able to cope with the upkeep of large homes, but are anxious to preserve as much independence as possible for as long as possible, and desirous of remaining in a community, of people of a similar age group, that provides various facilities. It is this need that is catered for by retirement villages.
- 3 Initially, retirement villages were typically run by religious and welfare groups; but to an increasing extent over the last 15 years or so, commercially motivated developers and operators have entered, and now dominate, the industry. According to a 1998 survey commissioned by the New Zealand Retirement Villages

Association Inc, which analysed 205 retirement villages in New Zealand, there were 12 426 residents of retirement villages (2.81 per cent of the New Zealand population over 65 years of age). The villages comprised 6777 units and 2231 serviced apartments. There were 62 villages (mainly in the for-profit category) acknowledging an obligation to satisfy the Securities Act 1978 obligations discussed below.

- 4 There are substantial and obvious differences among retirement villages:
 - The difference in their size ranges from the very small (the smallest of which we were told was a group of 9 units owned by a registered charitable trust which is administered by an adjoining church) to between 200 and 300 units (not including rest home and hospital beds).
 - There are widely differing levels of services and amenities provided.
 - There is no uniformity in the legal structure employed.
- 5 The question of an appropriate legal structure for retirement villages has taxed the ingenuity of conveyancing lawyers. Some schemes have been devised with an over-emphasis on cosmetic considerations or with the intention of ensuring that they are beyond the reach of the Securities Act 1978 (an approach which can produce mechanisms that work very clumsily in practice: a multitude of cross-leases, a planned 150 in the case of the initial incarnation of the Peninsula Club, for example), or in a form shaped by considerations of tax avoidance. Our proposed legislation is designed to apply to all retirement villages in the popular sense of that term, regardless of the underlying legal machinery, and so should remove at least some of the incentive for artificiality.
- 6 Flat-owning companies provided for under the Land Transfer Act 1952, sections 121A–121P seem, despite the Act's apparent utility for not-for-profit schemes, not to have been used much, if at all, for retirement villages. There are some structures believed to be unique, such as the unit trust which provides unit holders with a right to occupy a unit under a contractual licence styled a "lifecare agreement". There is the village run by a not-for-profit organisation, under which the resident purchases the building but in relation to the bare land is a monthly contractual licensee.
- 7 Most retirement villages in New Zealand confer on the resident one of the following:
 - a unit title under the Unit Titles Act 1972;
 - a cross-lease of the unit (namely, a 999-year lease of the unit and an undivided share in the reversion);

- a contractual licence to occupy the unit;
- a lease of the unit for life.

These legal structures are described in more detail in Appendix A.

- 8 Retirement villages typically require at least two types of payment from each resident:
- A lump sum, which may conceptually be either an advance by the resident or the purchase price of one of the entitlements referred to in the previous paragraph; and
 - service charges or levies, which may be paid periodically or as a front-end load (by inflating the price of a unit above market value) or as a rear-end load, deducted from the lump sum which would otherwise be paid to the resident or his estate when the occupation right comes to an end, or partly in one way and partly in another. (The justification for the rear end load arrangement is said to be that many residents though asset rich are income poor so that they are assisted by an arrangement that permits them to improve their quality of life by eating up their capital.)

THE SECURITIES ACT 1978

- 9 The Securities Act 1978 applies to offers of securities to the public. The major emphasis of the statute has always been on the protection of investors through disclosure of information. What constitutes an offer of securities is defined, using very broad terms, by section 3. The Act does, however, exempt from its wide net various types of transactions. One such exemption, commonly sought to be invoked by retirement village operators seeking to avoid the compliance requirements of the Act, is section 5(1)(b). Section 5(1)(b) is a difficult provision that exempts offers from the Securities Act that consist of:

- (b) Any estate or interest in land for which a separate certificate of title can be issued under the Land Transfer Act 1952 or the Unit Titles Act 1972, other than any such estate or interest that—
 - (i) Forms part of a contributory scheme; and
 - (ii) Does not entitle the holder to a right in respect of a specified part of the land for which a separate certificate of title can be so issued;

Section 2(1) defines “contributory scheme” in the following terms:

“Contributory scheme” means any scheme or arrangement that, in substance and irrespective of the form thereof, involves the investment of money in such circumstances that—

- (a) The investor acquires or may acquire an interest in or right in respect of property; and
- (b) Pursuant to the terms of investment that interest or right will or may be used or exercised in conjunction with any other interest in or right in respect of property acquired in like circumstances, whether at the same time or not;—

but does not include such a scheme or arrangement if the number of investors therein does not exceed 5, and neither a manager of the scheme nor any associated person is a manager of any other such scheme or arrangement:

- 10 There has been general acceptance that where occupation rights are based on licences so-called, section 5(1)(b) does not apply. This is because if the arrangement is truly a licence, it confers only a personal right and so plainly is outside the exemption, and if (as is noted in Appendix A) the arrangement, though styled a licence, is properly to be classified as a lease, it is unlikely that, in practice, survey and resource consent requirements would have been satisfied. There seems to have been an acceptance that leases for life are similarly subject to the Securities Act. This is no doubt because, although a lease for life, being of uncertain duration creates a freehold estate in respect of which, a title can issue under the Land Transfer Act 1952, section 65, in practice, survey and resource consent requirements are unlikely to have been satisfied. It used to be claimed that where occupation rights depended on unit titles or other registered or registrable interests (be they leases, cross-leases, or life interests), the statute did not apply because of the provisions of section 5(1)(b). This view has required reconsideration in the light of the decision of the Privy Council in the case of *Culverden Retirement Village v Registrar of Companies* [1997] 1 NZLR 257.
- 11 In *Culverden*, the Privy Council ruled that the right granted to the unit holder in that case, to have his unit bought back when his occupation right ended, was a debt security within the meaning of the statute (an option, as distinct from an obligation, to purchase falls short of being such a right). The Privy Council, unlike the High Court and Court of Appeal, took the view, *obiter*, that an offer of units was no less one involving investment, because the return comprised partly money and partly the use of land, and thus could be a contributory scheme within the definition set out at the end of paragraph 9 above and thus not exempted by section 5(1)(b). If this is correct, then in the view of the Commission, most retirement village schemes are caught by the statute. This is not, however, the view universally held among

lawyers advising in this area, and the very fact that there is disagreement and uncertainty is itself a reason for reform. Attempts to circumvent *Culverden* continue. Ryman Healthcare Ltd, which operates seven retirement villages on the basis that it owns a unit title to each unit and grants a life-interest to the resident, told us that it has responded to *Culverden* by introducing the practice of mortgaging the reversion of the unit to the life tenant/resident to secure its debt obligations, thus, it claims, availing itself of the exception in section 5(1)(f) “[a] mortgage of land other than a contributory mortgage”. The Securities Commission has issued a series of exemption notices (currently the Securities Act (Retirement Villages) Exemption Notice 1999 SR 1999/15). The purpose of this notice and its predecessors is not to remove the protection of the Securities Act but to substitute a requirement for alternative and more appropriate forms of disclosure.

THE PROBLEMS

- 12 The first problem concerns the position of retirement village operators as among themselves. In paragraph 3, we noted that only 62, of the 205 retirement villages responding to the New Zealand Retirement Villages Association Inc survey, acknowledged an obligation to satisfy Securities Act obligations. Although the stance of many of those who do not is probably, as a matter of law, unjustified, the present situation is, in most cases, not so much that there is not a level playing field, but that the referee is not looking in the right direction. There appears to be a general view that the same rules should, in fairness, apply to and be enforced against all retirement villages. The submissions made to us generally (but not universally) favoured the recommendation in our discussion paper that this should be achieved by removing retirement villages from the ambit of the Securities Act and enacting a new statute treating all retirement villages alike. We discuss in paragraph 17 why we prefer this to the alternative method of achieving this objective, namely amending the Securities Act.
- 13 The second and more important problem is that, as the law now stands, residents are inadequately protected against risk. The Securities Act is not designed to protect against risk. Its design is to expose risk by requiring disclosure. (Those very requirements of course have some effects on standards of practice.)

It is necessary to endeavour to identify the risk to which residents are exposed with some precision, and to do so, it is necessary to identify the essential substance of the contract between resident and operator.

The economic substance of that contract is that in return for the resident providing

- the use of a lump sum; and
- certain additional payments (made either periodically as a front-end load or as a rear-end load of the sort described in paragraph 8, or partly in one way and partly in another)

the resident is promised

- an entitlement to the occupation of a dwelling place; and
- certain services and amenities that will differ from village to village.

What we have described as the use of a lump sum may, as a matter of legal form, constitute a loan or be based on a sale of the occupation right and an eventual resale either back to the operator or to a third person. The description in this paragraph does not cease to be applicable where the resident's obligation is to pay some or all of the service levies not to the owner but to a manager.

- 14 It is important that the transaction which we have described in the previous paragraph be regarded as one entirety. To the resident, the roof over his head *plus* the return of his lump sum *plus* the services and amenities are essential parts of the entire package for which he has contracted. This is, we think, the answer to those who argue that the resident is sufficiently secure if he has a unit title, or as with Ryman, a registered life interest in a unit title plus a mortgage of the reversion. This no doubt provides security for the resident's lump sum and occupation entitlement, but it does nothing to secure the rest of the package. There is, moreover, the practical consideration that though the resident may have an indefeasible registered unit title, the unit is unlikely to be readily marketable if it is part of a failed complex with tumbledown or overgrown amenities.
- 15 The risks (leaving out of consideration risks outside the operator's control such as hyperinflation and fluctuations in property values) a resident runs, in entering into such a contract, can be put into these three categories:
- The prudential risk, that is, the risk that through undercapitalisation at construction stage or poor administration thereafter, either the operator will be unable to perform promises to provide the dwelling-place, amenities, or the services, or the resident will be unable to recover the lump sum.
 - The risk of entering into contracts that are in their terms unfair. Common complaints relate to the fixing of the amount of periodic payments and the fact that the high cost of exiting

may leave residents locked into villages where they are unhappy. As put to us by Mr BW Wilshire who is now General Manager of Methodist Mission Northern and who has some 15 years experience of the industry:

For the majority of residents the greatest fear is that the operating company will increase the [periodic] service fee beyond their ability to pay. Most also feel helpless to prevent decisions that allow for the increases being made.

So also the Palmerston North Returned Services Association:

Our members are concerned that they have little opportunity to challenge the legitimacy of and justification for these charges.

There is evidence of periodic charges being fixed at such a rate that long-term management contracts are tradable at a healthy price.

- The risk that although the contract terms may be fair, the operator may in fact skimp on his obligations.

16 Given that risk is inseparable from human affairs, what is the case for a special protection for retirement village residents? We think that the factors are:

- Although one has to take care not to generalise rashly, and although no doubt many or perhaps even most residents at the time they enter into their contracts are spry and alert and either commercially sophisticated or with access to advice from those who are (including children anxious to preserve their inheritances), this is not invariably so. Whatever may be the position with future generations, currently there are many widows who have always relied on their husbands to attend to business affairs. It appears from the survey referred to in paragraph 3, that in the case of member villages, the average age per village of new entrants (omitting new entrants to rest homes and hospitals) ranged from 65 to 88 years. We think that the very fact that the consumers concerned are in this age group justifies special protections. It should also be remembered that a resident who is spry and alert at the time of first contracting will not necessarily remain so.
- The complexity of such contracts is probably unmatched by that of any other contract that a consumer may be called upon to adhere to. A consumer will in his or her lifetime rarely enter into more than one such contract, so there is no real possibility of learning from experience. The degree of prudential risk and the fairness of such provisions as those providing for rear-end loading and other exit costs is difficult for an unqualified person to assess, and indeed requires specialist knowledge confined to relatively few lawyers, accountants, and financial advisers. Few

people are qualified to judge (in the case of a complex in the course of development) whether cash projections based on estimates of pre-sales are justified.

- 17 Then, if there is to be protection, why abandon the Securities Act in favour of special legislation for retirement villages? In our view, the imperfect fit between retirement villages and the Securities Act makes this the neatest course because:
- There is a desire to apply the protections to *all* retirement villages, and there is no general acceptance that the present statute does this.
 - At present, the Securities Act lays down general rules and then provides an exemption for retirement villages on the basis of a modification of those rules. The language employed by the statute is (no doubt because designed to cover a multitude of situations) of singular opacity. It is much more user-friendly to lay down a set of rules confined in their application to retirement villages.
 - More fundamental than either of these two points is the fact the Securities Act, which functions by laying down requirements for disclosure (and mainly financial disclosure) designed to put potential investors in the possession of information from which they can divine the existence of risks, is simply not the appropriate framework for providing ongoing protection to, and fairness for, residents.

In fact, the general (but not universal) response to our preliminary paper was to support the proposal of a special statute.

- 18 We should note that, in deference to the faith of the liberal economists in the market as solver of problems, we gave some consideration to the possibility of a dual regime under which prospective residents could choose between a supervised or unsupervised scheme, much as they can choose between chartered accountants and accountants not within that category, or to insure or not to insure. The context of this consideration was our concern to avoid unnecessary compliance costs (a matter further discussed in paragraph 35). Most of the responses to our dual system proposal were adverse, and we do not advance it in this report. Public comprehension of the risks run by not insuring (for example) is not matched by public comprehension of the risks associated with retirement villages. In our discussion paper, we rejected exemptions for not-for-profit organisations in the following terms (paragraph 29):

We considered, but do not believe, that there is a sound case for excluding villages run by not-for-profit organisations except in the rare situation where the resident provides no consideration whatsoever. This is for two reasons. The fact that the village is operated with the best of intentions by a benevolent organisation does not exclude the possibility of the scheme's collapsing with consequent loss to residents. Secondly, it is, in New Zealand, rather too easy for villains to pose as charities or use charities as a front for their less-than-charitable activities.

Most who referred to this point in their submission agreed with it.

We also considered exempting villages under a certain size (paragraph 40):

We gave thought to whether there should be exemptions in the case of retirement villages under a certain size but the difficulty with such an exemption is that some developers may simply subdivide large schemes into a lot of little ones to get around the statute.

The definition of retirement village that we now propose extends the exclusion to be found in the definition of "contributory scheme" in the Securities Act 1978, section 2(1), of "a scheme or arrangement if the number of investors therein does not exceed 5, and neither a manager of the scheme nor any associated person is a manager of any other such scheme or arrangement". In our view, in the case of retirement villages, the 5 should be increased to 12. Fixing this figure is a matter of some nicety. Those who would argue for a lower figure contend that small developments can and do run into trouble because they lack the experience, expertise, and capital available to larger enterprises. On the other hand, the cost of prudential supervision per unit falls more heavily in the case of very small complexes. We think that 12 strikes an appropriate balance. The references in our draft clause 3(c) to operators of other complexes should avoid the subdivision of large schemes to get around the statute in reliance on this exclusion.

There has been criticism of our confining our definition of "occupation right" to a right to occupy a *self-contained* residential unit. It is suggested that the word self-contained is ambiguous, but according to the *New Shorter Oxford English Dictionary*, the word used in relation to living accommodation is well established (having first appeared in print in mid-eighteenth-century Scotland) as meaning "having no rooms shared with another

household or set of occupants, and usually having a private entrance" which seems clear enough. The intention is to exclude hospital and rest home rooms from the definition.

PRUDENTIAL RISK

- 19 In relation to the first of the risks referred to in paragraph 15, the prudential risk, the techniques relied on under the Securities Act regime are twofold, namely disclosure and some limited supervision. We proceed to discuss each of these techniques separately.
- 20 The disclosure currently required comprises:
- A prospectus which needs to be registered with the Registrar of Companies. The Securities Act (Retirement Villages) Exemption Notice 1999 (SR 1999/15) stipulates for a form of prospectus more geared to the situation of retirement villages and extends the life of such prospectuses in the case of debt-free and completed villages. Even so, the existing prospectus provision found little support in the submissions we received. There were complaints as to the costs of compliance. The point is made (and the Law Commission agrees) that while its requirements are no doubt explicable by its genealogy as an adaptation of a document devised to assist risk management by investors, the fit with retirement villages is still far from perfect, and the terminology and contents of the prospectus are not in practice helpful to the decision-making of persons seeking in their declining years a congenial physical environment.
 - An investment statement whose purpose includes "to provide certain key information that is likely to assist a prudent but non-expert person to decide whether or not to subscribe for securities" (section 38D(a)) must be provided in every case (section 37A(1)(a)). The information must be supplied "in a succinct manner" (Securities Regulations 1983 SR 1983/121 R 7A(1)) and the prescribed form contain warnings as to the need for care and the importance of obtaining advice (Schedule 3D).
 - Provision for request disclosure of financial information (Securities Act 1978, sections 54B and R23A(b)).
 - The obligations under the Financial Reporting Act 1993.
- 21 The supervision presently relied on comprises a requirement of a trustee (in the case of debt securities) and a statutory supervisor (in the case of participatory securities) each of whom must enter into a deed promising to exercise reasonable diligence to discover breaches of the issuer's obligations. Having discovered any breach, the trustee or supervisor must, except where no material prejudice results from the breach, exercise all its powers to cause the breach

to be remedied (Securities Regulations 1983, SR 1983/121, Fifth Schedule, clause 1, Seventh Schedule, clause 1). There are various rights and obligations in relation to obtaining information and procuring intervention, if the circumstances so warrant. There are criminal sanctions for failure to produce documents and for obstruction (section 60(1)(a) and (b)).

- 22 The proposal contained in our preliminary paper was intended as a streamlined version of this model. We retained the trustee/supervisor under the new name (to avoid confusion with the existing regime) of prudential supervisor. Under the existing law, a supervisor or trustee in breach of its duties would plainly be liable for causative loss. Section 62 forbids contracting out. It seemed to us a neat solution to make this our starting point, spelling out the present liability of the trustee or supervisor for failure to supervise, but refraining from ordaining detailed rules as to how the supervisor is to do its job, leaving it to the supervisor to tailor its monitoring to the circumstances. A watchdog could, it seemed to us, be more relaxed in the case of a completed debt-free complex of 20 units than in the case of a 200 unit complex still in the course of construction. It seemed to us far more sensible to leave it to the supervisor and operator to set their own rules than to put them into a regulatory straitjacket. Under our proposal, the supervisor would be armed with the necessary powers to obtain the information needed, but by and large, it would be results that counted, and how they were obtained would be up to the parties.
- 23 In much the same way, in relation to initial disclosure we proposed strengthening the warnings already provided for investment statements. It seemed to us sensible for the prudential supervisor, which would have to become informed about the scheme for supervision purposes, also to have the obligation to settle the form of disclosure. We suggested strengthening the present requirement that investment statements be succinct by imposing a rule that initial disclosure be confined to one A4 sheet of paper.
- 24 In this report, we have in the light of the submissions received, modified these proposals in certain respects.
- 25 In relation to initial disclosure, a repeated complaint was, in effect, that allowing supervisors to settle the form of disclosure would put operators too much under the thumb of supervisors who would be hypercautious, and that in any event, the one A4 page limit was not practically achievable. We do not find the first contention persuasive, and in relation to the second, we remain concerned that the best way to conceal an unpalatable truth is to bury it in a

mass of verbiage. The point that we do find compelling is: that what we proposed would make shopping around by prospective residents more difficult than if there were a number of specified matters requiring to be stated. Also, a firm set of rules will enable the received form of notice to settle down reasonably promptly, with a consequent cost saving. So, what we propose in this report is that the form of initial disclosure still be vetted by the prudential supervisor, but that its general form and content be settled by regulation, and that such form and content be broadly based on the Securities Act Investment Statement. A copy of the document will need to be lodged with the Registrar of Companies to avoid argument as to which was the operative document at any particular time. The requirements include, by analogy with the Securities Regulations 1983, SR 1983/121, R7A(1), succinctness. The "prudent but non-expert person" wording of section 38D(a) is adopted. It is not proposed to soften the suggested warnings, though an examination of the draft statute will show that they have been added to in certain respects. We have not overlooked the complaints that the warnings we suggested in our discussion paper were unnecessarily alarmist. In our discussion paper we wrote:

But experience clearly demonstrates that prospective purchasers tend to be impatient of prudential considerations. They are likely to be most influenced by the location of the village or the proposed village, by descriptions of amenities and by the fact that friends are already residents or plan to be. They are likely to be unimpressed by expanses of fine print or polite recommendations, courteously conveyed by their solicitors or accountants, not to proceed. If disclosure is to be effective something more direct and outspoken is needed.

Nothing we learnt following distribution of our discussion paper leads us to modify this view.

- 26 It is most convenient (so that they can, if necessary, be amended by regulation rather than by statute) that the contents of the investment statement, other than the warnings, be fixed by regulation. In the Law Commission's view, the statement should contain:
- Information analogous to that required by Schedule 3D to the Securities Regulations.
 - A statement of amounts paid in advance for services.
 - A statement of amounts to be deducted from the amount payable to the resident on exiting and the manner in which such amounts are to be calculated.
 - A summary of financial statements analogous to that required

by clause 8 of Schedule 2 of the Securities Act (Retirement Villages) Exemption Notice 1999.

- 27 We are persuaded that the Financial Reporting Act 1993 should continue to apply as if the operator were an issuer.
- 28 We think that there is justice in the complaint at the absence from our proposals of criminal sanctions for a refusal to comply with requests for information of any provision (like the Securities Act 1978, section 60(2)(a)) of a defence that the information was immaterial or the breach trivial; and our draft in this report corrects that.
- 29 It will be the obligation of the prudential supervisor to monitor the financial condition of the operator and to take action in the event of a breach or likely breach of the operator's obligation to:
- complete a staged development;
 - insure, maintain, and repair the complex;
 - provide the promised services; and
 - perform any obligation of the operator to make or procure a payment to the resident or the resident's estate on exiting.
- 30 The action available to the prudential supervisor should be to:
- convene a meeting of residents. Our draft statute adopts the provisions of clauses 4(2) and (3) of the Seventh Schedule to the Regulations;
 - withdraw its approval of the initial disclosure statement and so advise the Registrar of Companies, which should bring the sale of future units to a halt; and
 - apply to the High Court to appoint a Manager or for various of the other sorts of orders itemised in the Securities Act 1978, section 49.

The supervisor should have strong powers to obtain information, and these are provided for in our draft Bill.

- 31 In our preliminary paper, we suggested that the Securities Commission should continue to be the approver of persons, other than trustee companies, acting as supervisors. Our reason for this recommendation was that this would draw sensibly on the skills exercised by Securities Commission in the case of securities subject to its statute. However, the Securities Commission has made it clear to us that it is uncomfortable with a situation where its only connection with retirement villages is this one, and that it would prefer that such powers were not reposed in it. Our recommendation is, therefore, that the right to approve supervisors, other than a trustee company, should rest with the Registrar of

Companies, who will have a role in relation to retirement villages if the recommendations of the next paragraph are accepted.

- 32 In paragraph 36 of our preliminary paper, we raise the question of whether an application by the supervisor to the High Court (by analogy perhaps with the Corporations (Investigation and Management) Act 1989) should require the prior blessing of the Securities Commission, and we also raise the effect of making such an application on the saleability of units. On the second of these points, the broad effect of the submissions received (with which we agree) was that it was better to grasp the nettle, notwithstanding any temporary fall in unit values that might result. On the first point, it is our view that the prudential supervisor (being itself at risk should a claim that it has breached, in a manner causative of loss, the obligations of the supervisor's watchdog role) should not have its right to invoke appropriate remedies impeded.
- 33 Our preliminary paper proposed giving certain residual powers to the Registrar of Companies. We said:

The Registrar may feel the need to act swiftly if a promoter is continuing to peddle an insolvent scheme. Residents (persons of advanced years with their funds paid over to a promoter who has practical control over a village) may feel too cowed and vulnerable to withstand invitations to waive breaches and for this reason too, the Registrar should, in appropriate cases, have the power to step in.

We remain of that view. It is said, probably correctly, that the Registrar is under-resourced for such a role. The Registrar, wearing one or other of his various hats, has comparable responsibilities under such statutes as the Companies Act 1993 (sections 241(2)(c) and 365), the Incorporated Societies Act 1908 (section 34A), the Friendly Societies and Credit Unions Act 1982 (sections 89–92 and 137–140) and the Corporations (Investment and Management) Act 1989 Part I, and should be provided with the resources necessary to enable the performance of those duties. We also believe that it should be possible, in extremely rare situations, to invoke the Corporations (Investigation & Management) Act 1989.

- 34 We accept that there is a financial cost in what we propose. While we accept that this cost is greater than no regulation at all, we do not accept that it is greater than under the present Securities Act regime. (We are told, for example, that currently the cost of a prospectus, not required under our proposal, is likely to be \$50 000.) We accept that on a per unit basis, this cost will fall most heavily

on very small schemes and that even if, as our inquiries suggest, it is no more than a few dollars per week, this is not a negligible amount for residents surviving on benefits. The Securities Commission has in the past, when exercising its powers under section 48 to approve trustees or supervisors who are not trust companies, been prepared to approve appropriate individuals for specific securities. One solution may be that if a small debt-free, plainly charitable, village can find a person prepared to take the risk of acting as prudential supervisor on a *pro bono* basis, they can seek to have that person approved for the supervisor's role. Our proposal to exclude schemes involving 12 units or less from the definition of retirement village will help in the case of very small projects where economies of scale are unavailable.

RISK OF UNFAIR TERMS

- 35 Under the provisions of the Securities Act, the risk of the investor agreeing to unwise terms is countered by the whole disclosure regime, and more specifically, by the warnings of the need for caution and professional advice required at the commencement of the form of investment statement (Securities regulations 1983, SR 1983/121, Schedule 3D, clause 1). Our reasons for concern at the adequacy of this should already be plain. Retirement village contracts are usually complex and, to the uninitiated, difficult (a matter discussed in the last bullet point of paragraph 16). There is the likelihood of a lack of commercial sophistication (see the previous bullet point of the same paragraph). There is the reluctance of some potential residents to heed professional advice discussed at the end of paragraph 25. There is the importance to residents of such questions as the amount of periodically payable service fees and the cost of exiting (see paragraph 15).
- 36 We considered, but rejected, two possible techniques to deal with this risk. One was the requirement of certain compulsory provisions in retirement village contracts and the other was a requirement that a contract be not more onerous to a resident than a certain model. The reasons for rejecting these methods were: the enormous variety of contracts which it would be difficult or impossible to fit into one mould and a reluctance to recommend any mandatory interference in the right of the parties to contract on whatever terms they wish. On the other hand, we are reluctant to leave the resident entirely unprotected. The solution we propose in our draft Bill is a discretionary power to the court, or other dispute-resolving body, to override contractual terms that are unfair and unconscionable. (It should be noted for the sake of completeness

that many of the resident's entitlements (to accommodation, for example, if he does not own the unit, or to parking or recreation facilities) are "services", as defined in the Consumer Guarantees Act 1993, to which the resident has certain rights that he or she is unable to contract out of.)

DISPUTE RESOLUTION

- 37 The third class of risk is that operators will skimp on their obligations to provide services and amenities. It is important that there be in place some sort of summary informal method to resolve disputes. This is recognised in the provision of the Exemption Order requiring that Deeds of Supervision establish and maintain a dispute-resolving procedure (Schedule 1, clause 2(h)). In practice, village committees and supervisors play important roles in this process. Our proposed statute provides that in the absence of contractual provision for any other processes, disputes may, at the resident's election, be resolved either by an appointee of the supervisor or by an arbitral committee comprising an appointee of the operator, an appointee of the aggrieved resident, and an appointee of the supervisor who will act as Chairperson. Such an arbitration can be conducted in as informal a manner as the parties desire. (It should not be overlooked that many provisions in existing contracts will probably have been rendered unenforceable as against residents, by the unfortunate provisions of the Arbitration Act 1996, section 11, laying down certain prerequisites to the validity of arbitration provisions in consumer contracts.)

PROTECTION FROM MORTGAGEES

- 38 It is, at present, common for the statutory supervisor to hold a first mortgage over a village's assets, securing performance of the operator's obligations, with financiers content to rank behind such a security. Our draft bill contains a clause intended to achieve a corresponding result.

CONCLUSION

- 39 We recommend the enactment of a statute in the form submitted. Our draft provides for a lapse of three months between royal assent and coming into force of the statute, and it will be important that early in this three-month period, there should be set in place the regulations we propose prescribing the forms of disclosure notice.
- 40 The degree of regulation of retirement villages proposed by this report is minimal. Anyone who doubts that this is so should

examine the exposure draft of a Retirement Villages Bill published by the New South Wales Department of Fair Trading in June 1999. That proposed measure of 155 clauses would minutely control the operation of retirement villages. There is (for example) provision for regulations prescribing the contents of village contracts, a provision (clause 39(1)) that units have locks, and provisions (clauses 129–132) for refurbishment of units when they are vacated. We do not think that there is currently a need for the New Zealand industry to be subjected to this sort of detailed control. The measures we propose are intended to provide the protection appropriate at the present time. If (as is likely) the industry continues to expand and if abuses become apparent, the proposed New South Wales measure will in those changed circumstances no doubt provide useful guidance as to appropriate measures of control.

APPENDIX A

The legal structures

The four legal structures commonly employed in the structuring of retirement villages are: a unit title, a cross-lease, a contractual licence to occupy, and a lifetime lease. This Appendix sets out the typical arrangement for each legal structure; the specifics of each legal structure will vary from retirement village to retirement village (especially between not-for-profit and profit-orientated villages) and may, for example, be enfeebled by contractual terms.

Unit title

- A1 Peter Jones and Helen Melrose in a booklet *Retirement Villages*, prepared in conjunction with a 1997 New Zealand Law Society Seminar, describe the typical unit title arrangement in these terms:

A village development based on a unit title structure established under the Unit Titles Act 1972 will follow a similar pattern to an ordinary residential unit title development. There will be a separate unit title for each unit (including apartments). There may be a separate title for the community centre and facilities, or alternatively, these may be treated as common areas.

The Body Corporate Rules will provide for the appointment of a manager and will usually nominate who that manager is to be. The manager is usually the original developer, but in any event is the person or body who will maintain an ongoing operational role in the village, and who is likely to retain ownership of the community facilities where these are not owned by residents.

A resident, when purchasing a unit, will agree to enter a management contract. The management contract will usually provide for:

- the ongoing management of the village by the manager;
- an obligation on the manager to provide and maintain community facilities, and provide agreed services;
- on exiting the village, payment of a fee to the manager of the village by a resident;
- establishment of a management advisory committee comprising residents;
- a requirement for the manager to procure a sale of a unit when requested by a resident;

- a requirement that any purchasers from the resident sign a similar agreement.

The management contract will also usually provide that a resident will not vote on a matter requiring unanimous consent without the consent of the manager, or only vote as the manager directs. In this way, the manager is able to maintain overall control of the Village.

There may be included in the management contract, or there may be provided separately, an option to purchase the resident's unit exercisable by the manager upon the happening of specified events and at a price to be calculated in the manner set out in the relevant document.

The resident's obligations under the management contract, or possibly under the option agreement, will be secured by way of a Memorandum of Encumbrance in favour of the manager registered over the resident's unit.

Cross-lease

- A2 Where the structure employed is a cross-lease, either the lease will include an undivided interest in the community facilities or such facilities will be leased to the village operator. Management will be vested in the operator by means of an irrevocable power of attorney. There may be an option to purchase granted to the operator and a registered Memorandum of Encumbrance intended to secure the resident's various obligations.

Contractual licence

- A3 Fifty-seven per cent of villages operate under a structure in which the developer, or his successor in title, will own both the units and the community facilities, grant rights of occupation of units to residents, and either retain management of the community facilities or install an operator. Although the documents granting occupation rights are styled "licences", in virtually all cases they will grant exclusive occupation of the unit and therefore be leases.

Lease for life

- A4 The lease for life schemes differ from the contractual licence schemes only by reason of the fact that the leases, if the appropriate resource consent and survey steps are taken, are registrable under the Land Transfer Act 1952.

APPENDIX B
Draft statute and commentary

Draft Retirement Villages Act 200–

TABLE OF PROVISIONS

1	Short Title and commencement	14	What prudential supervisors must do
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2	Definitions	15	Action that prudential supervisors may take
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5	Part II of Securities Act not to apply to residential units		<i>Residents' Right to Information</i>
	<i>Offers of Occupation Rights</i>	19	Residents' right to information
6	Requirements for valid offer of occupation right		<i>Registrar of Companies' Right to Information</i>
7	Offence to contravene requirements for valid offer of occupation right	20	Registrar of Companies' right to require prudential supervisor to report
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8	Purpose of disclosure notice		<i>Inspectors</i>
9	Content and form of disclosure notice	22	Appointment and powers of inspectors
10	Prudential supervisor to approve disclosure notice	23	Offence not to provide information to inspector
11	Registration of disclosure notice		<i>Application of Financial Reporting Act 1993</i>
	<i>Prudential Supervisors</i>	24	Application of Financial Reporting Act 1993
12	Restrictions on who may be appointed as prudential supervisors		
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	<i>Duty of Auditors</i>		
25	Duty of auditor to report to prudential supervisor	29	Application of Contracts (Privity) Act 1982
	<i>Meetings</i>	30	Disputes to be determined by arbitration
26	Power to call meetings	31	Determination of disputes
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27	Applications to the High Court	33	Amendment to Corporations (Investigation and Management) Act 1989
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28	Mortgagees' rights subject to occupation rights		

SCHEDULE
Form of Warning

A BILL INTITULED

An Act to provide improved and effective protection for residents and prospective residents of retirement villages

BE IT ENACTED by the Parliament of New Zealand as follows:

1 Short Title and commencement

- (1) This Act may be cited as the Retirement Villages Act 200–.
- (2) This Act comes into force 3 months after the date on which it receives the royal assent.

Preliminary Provisions

2 Definitions

In this Act

disclosure notice means a notice which complies with section 9.

occupation contract means an arrangement of any kind conferring an occupation right on a resident or prospective resident.

occupation right means the right, however arising, of a person to occupy for whatever period a self-contained residential unit in a retirement village and to receive the benefit of services during such occupation.

offer includes an invitation, and any proposal or invitation to make an offer.

operator means the owner of a retirement village, and any person or persons acting in the management of that retirement village.

principal officer, in relation to a corporation or other body, means

- (a) a director of the body; or
- (b) a person in accordance with whose directions or instructions any or all of the directors of the body are accustomed to act, other than a person in accordance with whose directions or instructions any or all of the directors of a body are accustomed to act by reason only that the directors act on advice given by that person solely in a professional capacity.

prudential supervisor means a person appointed as a prudential supervisor of a retirement village in accordance with section 13.

Registrar of Companies means the person for the time being holding the office of Registrar of Companies or Deputy Registrar of Companies in accordance with the Companies Act 1993.

resident means a person who occupies a residential unit in a retirement village under an occupation right.

retirement village has the meaning given to that term in section 3.

trustee corporation means the Public Trustee or the Maori Trustee or any corporation authorised by an Act of the Parliament of New Zealand to administer the estates of deceased persons and other trust estates.

COMMENTARY

Section 1

- C1 The purpose of the three month delay before the Act comes into force is to enable the regulations settling the contents of disclosure notices to be put in place and to enable operators to make their arrangements with prudential supervisors and settle the form of their disclosure notices.

Section 2

- C2 The term “self-contained” in the definition **occupation right** is designed to make it clear that excluded are (for example) serviced flats, rooms in rest homes, and hospital beds (see the discussion in paragraph 18 of this report).

3 Meaning of retirement village

- (1) Subject to subsection (2), a **retirement village** is a complex of residential units and ancillary facilities predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons.
- (2) The following complexes are not retirement villages for the purposes of this Act:
 - (a) a complex where in respect of every residential unit, no consideration has been or will be provided either directly or indirectly for the occupation rights to those units; or
 - (b) a complex where in respect of every residential unit, the total consideration that has been or will be provided either directly or indirectly for the right to occupy that unit is payable by equal instalments at intervals of not more than 1 month; or
 - (c) a complex of 12 residential units or less where neither the operator of the complex nor any other person who is a principal officer of the operator, is an operator of another complex of self-contained residential units and ancillary facilities that are predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons under an occupation right.
- (3) In subsection (2)(b), if an instalment amount is adjusted to take account of economic changes, the adjustment does not, of itself, mean that the instalments are no longer equal instalments.

4 Act to bind the Crown

This Act binds the Crown.

Section 3

- C3 *Subsection (2)* lists exclusions from the definition. *Paragraph (a)* deals with the situation where residents provide no consideration whatsoever. *Paragraph (b)* excludes contracts under which there is no lump sum paid. *Paragraph (c)* excludes complexes under a certain size. The purpose of the qualification beginning with the words “where neither” is to avoid a situation where developers subdivide a single complex into a number of smaller ones to get around the terms of the Act (see the discussion in paragraph 18 of this report).
- C4 *Subsection (3)* clarifies what is meant by “equal instalments” in *paragraph 2(b)*.

Securities Act Not to Apply to Retirement Villages

- 5 Part II of Securities Act not to apply to residential units**
 Nothing in Part II of the Securities Act 1978 applies in respect of
- (a) a residential unit in a retirement village; or
 - (b) a residential unit in a complex of the kind described in section 3(2)(b) or 3(2)(c).

Offers of Occupation Rights

- 6 Requirements for valid offer of occupation right**
- (1) No person may offer an occupation right to any other person ("the offeree") unless
 - (a) he or she gives the offeree a disclosure notice; and
 - (b) a term of the offer precludes its acceptance by the offeree before at least 10 working days have elapsed after the offeree has received the disclosure notice; and
 - (c) a contract is in force between
 - (i) every operator of the retirement village; and
 - (ii) a prudential supervisor for that retirement village.
 - (2) If an offer of an occupation right contravenes subsection (1), and an occupation contract is made as a result of that offer, the offeree may enforce the contract against the operator of the retirement village.
 - (3) If an offer of an occupation right contravenes subsection (1), and an occupation contract is made as a result of that offer, no operator of the retirement village may enforce the contract against the offeree, unless
 - (a) the offeree has taken steps to enforce that contract; or
 - (b) six months have elapsed since the offeree received the disclosure notice and the offeree has taken no steps to end that contract; or
 - (c) the contravention was in respect of matters which, in the opinion of the court, were immaterial or having regard to all circumstances of the case ought to be reasonably excused.
 - (4) Any person who receives a payment in respect of an occupation contract that is unenforceable against an offeree, is liable, if the offeree so demands in writing, to repay in full the amount of the payment together with interest at the rate of 15% per annum or such other rate as may be determined by the Governor-General by Order in Council, which is calculated from the date the payment was made until the date of repayment.
 - (5) If a person which is a corporation aggregate receives a payment in respect of an occupation contract that is unenforceable against an offeree, subsection (4) applies to every principal officer of that corporation. Every principal officer is liable jointly and severally to repay the amount and interest as stated in that subsection.

Section 5

- C5 This section disapplies the Securities Act 1978 to both retirement villages as defined in the statute and complexes that would be within that definition but for section 3(2)(b) and (c).

Section 6

- C6 *Subsection (1)* is the principal provision of the proposed statute. It forbids the offering of an occupation right unless the offeree is given a disclosure notice, unless at least 10 working days elapse between delivery of the notice and acceptance of the offer and unless there is a prudential supervisor duly appointed. A contract concluded in breach of these requirements is enforceable by the offeree (*subsection (2)*) but is enforceable by the operator only if the offeree has taken steps to enforce the contract, or six months have elapsed since receipt of the notice without the offeree taking steps to avoid the contract, or the breach is trivial (*subsection (3)*). Payments made by an offeree under an unenforceable and unenforced contract are recoverable with interest (*subsection (4)*) and principal officers of a payee are liable jointly and severally with the payee (*subsection 5*).

7 Offence to contravene requirements for valid offer of occupation right

- (1) Subject to subsection (2), if a person offers an occupation right in contravention of this Act to any other person, the person who offers that occupation right commits an offence and is liable on summary conviction to a fine not exceeding \$15,000.
- (2) No person may be convicted of an offence under subsection (1) if, in the opinion of the court,
 - (a) the contravention was in respect of matters which were immaterial or having regard to all circumstances of the case ought to be reasonably excused; or
 - (b) in the case of a person, other than the operator of the retirement village, the contravention took place without that person's knowledge.

*Disclosure Notices***8 Purpose of disclosure notice**

The purpose of a disclosure notice is to provide in a succinct manner certain information as to the terms of the occupation contract and the financial risk involved in accepting an offer for an occupation right which is likely to assist a prudent but non-expert person to decide whether or not to accept such offer.

9 Content and form of disclosure notice

A disclosure notice must

- (a) be in writing; and
- (b) state that it is a disclosure notice for the purposes of this Act; and
- (c) contain the warning set out in the Schedule; and
- (d) contain all information, statements, and other matters that it is required to contain by regulations; and
- (e) be approved by the prudential supervisor of the retirement village to which the notice relates; and
- (f) be registered with the Registrar of Companies in accordance with section 11.

10 Prudential supervisor to approve disclosure notice

- (1) Before a disclosure notice is registered under section 11, it must be approved by the prudential supervisor of the retirement village to which the notice relates.
- (2) Before the prudential supervisor approves a disclosure notice, the prudential supervisor must be satisfied that the notice complies with paragraphs (a) to (d) of section 9.

Section 7

- C7 This section imposes a criminal sanction in addition to the civil sanctions imposed by *section 5* (compare Securities Act 1978, section 59).

Section 8

- C8 This section is based on the Securities Act 1978, section 38D. The reference to a need for succinctness derives from Securities Regulations 1983 (SR 1983/121) R7A(1).

Section 9

- C9 This section follows generally Securities Act 1978, section 38E (1).

Section 10

- C10 This section casts on the prudential supervisor the obligation to ensure that the disclosure notice complies with *section 9, paragraphs (a) to (d)*.

11 Registration of disclosure notice

- (1) Before a person offers an occupation right to any other person, the disclosure notice in respect of the retirement village to which the occupation right relates must be registered with the Registrar of Companies.
- (2) Every disclosure notice delivered to the Registrar of Companies for registration must be signed
 - (a) by or on behalf of every operator of the retirement village to which the notice relates; and
 - (b) by the prudential supervisor of that retirement village.
- (3) The Registrar of Companies must register a disclosure notice that is delivered in accordance with subsection (2).
- (4) The Registrar of Companies is not required to consider whether the disclosure notice complies with section 9.
- (5) No fee is payable for the registration of a disclosure notice.

*Prudential Supervisors***12 Restrictions on who may be appointed as prudential supervisors**

No person may be appointed as a prudential supervisor of a retirement village unless that person is

- (a) a trustee corporation; or
- (b) a person approved for the purpose by the Registrar of Companies; or
- (c) a person whom the Securities Commission approved, before this Act came into force, without qualification to act as a trustee or statutory supervisor under section 48 of the Securities Act 1978, that approval having not been revoked.

13 How prudential supervisors are appointed

A person is appointed as a prudential supervisor of a retirement village when that person enters into a written contract with every operator of that retirement village to act as prudential supervisor of that retirement village.

Section 11

- C11 To avoid argument as to which is the operative disclosure notice at any particular time, disclosure notices must be registered with the Registrar of Companies (*subsection (1)*) and verified by appropriate signatures (*subsection (2)*). Because the purpose of registration is the limited one stated the Registrar is obliged to register every notice delivered (*subsection (3)*) without any obligation to check its contents (*subsection (4)*) and no fee is payable (*subsection (5)*).

Section 12

- C12 This section limits those who may be appointed a prudential supervisor to trustee corporations, persons approved without limitation under the Securities Act 1978 before the coming into force of the present statute, and persons specially approved by the Registrar of Companies.

Section 13

- C13 A prudential supervisor is appointed by entering into an appropriate contract with an operator.

14 What prudential supervisors must do

- (1) A prudential supervisor of a retirement village must exercise reasonable diligence to ascertain whether or not the operator of that retirement village is or is likely to breach his or her obligations
- (a) if the retirement village is part of a staged development, to complete that staged development; or
 - (b) to insure, maintain, and repair the retirement village; or
 - (c) to provide the services promised to the residents; or
 - (d) to make or procure a payment to any resident or the resident's estate when required to do so by the applicable occupation contract.
- (2) Unless the prudential supervisor is satisfied that the breach will not materially prejudice the interests of the residents of the retirement village, the prudential supervisor must do all things that he or she is empowered to do to cause any breach of the obligations referred to in subsection (1) to be remedied.

15 Action that prudential supervisors may take

A prudential supervisor of a retirement village may take 1 or more of the following actions, which the prudential supervisor considers are reasonable, in any case where the prudential supervisor is satisfied that an operator has breached his or her obligations in respect of the retirement village or it is necessary to protect the interests of the residents:

- (a) notify, in writing, all the residents of the retirement village of the breach or likely breach;
- (b) convene a meeting of those residents as set out in section 26;
- (c) withdraw his or her approval of the disclosure notice relating to the retirement village, and notify, as soon as possible, the Registrar of Companies and every operator of the withdrawal of approval;
- (d) apply to the High Court for an order or orders as set out in section 27.

Section 14

- C14 This section spells out the duties of a prudential supervisor (compare Securities Regulations 1983, SR 1983/121, Fifth and Seventh Schedules, clause 1).

Section 15

- C15 This section sets out the enforcement machinery available to prudential supervisors.

16 Retirement or death of prudential supervisor

- (1) Unless a prudential supervisor of a retirement village obtains the prior written consent of the Registrar of Companies, the prudential supervisor may not be discharged or seek to be discharged or retire from the position of prudential supervisor.
- (2) The Registrar of Companies must not consent to the retirement or discharge of a person from the position of prudential supervisor, unless the Registrar of Companies is satisfied that a new contract is in place between
 - (a) every operator of the retirement village; and
 - (b) a different prudential supervisor for that retirement village.
- (3) If a prudential supervisor who is a natural person dies or, in the opinion of the Registrar of Companies, is incapable of acting as a prudential supervisor, the Registrar of Companies must, as soon as practicable,
 - (a) cancel the registration of any disclosure notice relating to that retirement village; and
 - (b) take any other steps which the Registrar of Companies considers appropriate to require the operator of the retirement village to enter into a new contract with another person for that other person to act as prudential supervisor of that retirement village.

17 Prudential supervisors' right to information

- (1) A prudential supervisor of a retirement village may, for the purpose of carrying out his or her duties, require every operator of that retirement village to provide the prudential supervisor with information about the business, operation, or management of that retirement village.
- (2) When the prudential supervisor requires information under subsection (1), the prudential supervisor must give a written notice to that effect to the operator. The prudential supervisor may specify in the notice, financial particulars and copies of documents that must accompany the information.
- (3) The written notice must state the time period within which the operator must provide the information. The time period must be a reasonable time period.

18 Offence not to provide information to prudential supervisor

- (1) Every operator commits an offence if he or she, without lawful justification or excuse,
 - (a) fails to comply in any respect with a notice referred to in section 17; or
 - (b) supplies in response to that notice any information that is false or misleading in a material particular.
- (2) Every person who commits an offence against subsection (1) is liable on summary conviction to a fine not exceeding \$10,000.

Section 16

- C16 This section is designed to ensure that a village is not left without a prudential supervisor.

Section 17

- C17 This section spells out the prudential supervisor's right to relevant information (compare Securities Regulations 1983, SR 1983/121, Fifth and Seventh Schedules, clause 2).

Section 18

- C18 This section imposes a criminal liability for failure to comply with *section 16* (compare Securities Act 1978, section 60(1)(b)).

*Residents' Right to Information***19 Residents' right to information**

- (1) A resident of a retirement village may write to the prudential supervisor of that retirement village requesting any information about the business, operation, or management of that retirement village, and the prudential supervisor must comply with the request if the information is in the prudential supervisor's possession.
- (2) The prudential supervisor is not required to comply with a request under subsection (1) if the person who provided the prudential supervisor with that information has asked the prudential supervisor to keep that information confidential and, in the opinion of the prudential supervisor, it is reasonable to treat that information as confidential.

*Registrar of Companies' Right to Information***20 Registrar of Companies' right to require prudential supervisor to report**

- (1) The Registrar of Companies may require the prudential supervisor of a retirement village to provide the Registrar with a written report concerning all matters relevant to whether any breach of the rights of and obligations to residents under each occupation contract has occurred or appears likely to occur.
- (2) When the Registrar of Companies requires a report under subsection (1), the Registrar must give a written notice to that effect to the prudential supervisor. The Registrar may specify in the notice, financial particulars and copies of documents that must accompany the report.
- (3) The written notice must state the time period within which the prudential supervisor must provide the report. The time period must be a reasonable time period.
- (4) In subsection (1), the reference to a breach of rights of, and obligations to, residents means a breach of a kind that may materially prejudice the interests of the residents of the retirement village.

21 Offence not to provide information to Registrar of Companies

- (1) Every prudential supervisor commits an offence if he or she, without lawful justification or excuse,
 - (a) fails to comply in any respect with the notice referred to in section 20; or
 - (b) supplies in a report to the Registrar of Companies under section 20 any information that is false or misleading in a material particular.
- (2) Every person who commits an offence against subsection (1) is liable on summary conviction to a fine not exceeding \$10,000.

Section 19

- C19 This section provides in effect that a prudential supervisor must furnish information in the supervisor's possession requested by a resident unless there is a reasonable need for confidentiality.

Section 20

- C20 This section entitles the Registrar of Companies to call for information from a prudential supervisor.

Section 21

- C21 This section provides a criminal sanction for breach of *section 19* (compare Securities Act 1978, section 60(1)(b)).

*Inspectors***22 Appointment and powers of inspectors**

- (1) The Registrar of Companies may appoint in writing an inspector to ascertain whether any breach of the rights of and obligations to residents under this Act and each occupation contract has occurred or appears likely to occur.
- (2) An inspector may, for the purposes of this section, require every operator of the relevant retirement village to provide the inspector with information about the business, operation, or management of that retirement village.
- (3) When an inspector requires information under subsection (2), the inspector must give a written notice to that effect to the operator. The inspector may specify in the notice, financial particulars and copies of documents that must accompany the information.
- (4) The written notice must state the time period within which the operator must provide the information. The time period must be a reasonable time period.
- (5) An inspector may, for the purposes of this section,
 - (a) require any person to produce for inspection any document in the possession of that person that contains information relating to the business, operation, or management of a retirement village; and
 - (b) inspect and make records of any such document; and
 - (c) for the purpose of making records of any such document, take possession of and remove it from the premises where it is kept for a period of time that is reasonable in the circumstances.
- (6) In subsection (1), the reference to a breach of rights of, and obligations to, residents means a breach of a kind that may materially prejudice the interests of the residents of the retirement village.
- (7) This section does not limit any power that the Registrar of Companies or any other person may have under the Companies Act 1993 or any other enactment.

23 Offence not to provide information to inspector

- (1) Every operator commits an offence if he or she, without lawful justification or excuse,
 - (a) fails to comply in any respect with a notice referred to in section 22; or
 - (b) supplies any information in response to that notice that is false or misleading in a material particular.
- (2) Every person commits an offence if he or she, without lawful justification or excuse, refuses or fails to produce for inspection any document when required to do so under section 22(5).
- (3) Every person who commits an offence against subsection (1) or subsection (2) is liable on summary conviction to a fine not exceeding \$10,000.

Section 22

C22 This section empowers a Registrar of Companies to appoint an inspector (compare Securities Act 1978, section 67(1)).

Section 23

C23 This section makes it an offence to withhold information from an inspector (compare Securities Act 1978, section 60(1)(b)).

*Application of Financial Reporting Act 1993***24 Application of Financial Reporting Act 1993**

For the purposes of the Financial Reporting Act 1993, every operator of a retirement village is an issuer within the meaning of section 4 of that Act.

*Duty of Auditors***25 Duty of auditor to report to prudential supervisor**

- (1) Whenever the auditor of an operator of a retirement village provides the operator with any report, financial statements, certificate, or other document that is required by any Act to be so provided, the auditor must send a copy to the prudential supervisor of that retirement village as soon as possible.
- (2) Whenever in the performance of the auditor's duties, the auditor of an operator of a retirement village becomes aware of any matter that, in the auditor's opinion, is relevant to the exercise or performance of the powers or duties of the prudential supervisor of that retirement village, the auditor must, within 7 working days of becoming aware of the matter, send
 - (a) to the operator, a report in writing on the matter; and
 - (b) to the prudential supervisor, a copy of that report.
- (3) The auditor of an operator of a retirement village must from time to time, at the request of the prudential supervisor of the retirement village, provide the prudential supervisor with such information or particulars relating to the operator as are
 - (a) requested; and
 - (b) within the auditor's knowledge; and
 - (c) in the auditor's opinion, relevant to the exercise or performance of the powers or duties of the prudential supervisor.
- (4) This section does not affect the duties or liability of a prudential supervisor.

Section 24

- C24 This section makes clear the obligations of an operator under the Financial Reporting Act 1993.

Section 25

- C25 This section spells out the relevant duties of auditors (compare Securities Act 1978, section 50).

*Meetings***26 Power to call meetings**

- (1) A prudential supervisor of a retirement village, the Registrar of Companies, or an inspector appointed under section 22, may at any time convene a meeting of the residents of the retirement village.
- (2) In addition to subsection (1), the prudential supervisor must, at the written request of at least 10% of the total number of residents of the retirement village, convene a meeting of the residents to enable them to give to the prudential supervisor their opinions and directions about the exercise of the prudential supervisor's powers.
- (3) Meetings under this section must be convened by sending by post a notice to each resident of the retirement village at least 14 days before the date of the meeting. The notice must state the time and place of the meeting.
- (4) The prudential supervisor, the Registrar of Companies, or an inspector, as the case may be, must nominate a chairperson for the meeting, or if a chairperson has not been nominated, the residents at the meeting may nominate a person to be the chairperson.

Section 26

- C26 This section empowers prudential supervisors to call a meeting (compare Securities Regulations 1983, SR 1983/121, Fifth Schedule, clause 3, and Seventh Schedule, clause 4).

*Applications to the High Court***27 Applications to the High Court**

- (1) A prudential supervisor of a retirement village or the Registrar of Companies may apply to the High Court for an order or orders under this section, if at any time the prudential supervisor or the Registrar of Companies is satisfied that
 - (a) an operator has breached his or her obligations in respect of the retirement village and an order or orders are necessary to remedy that breach; or
 - (b) an order or orders are necessary to protect the interests of the residents.
- (2) An application under this section must
 - (a) be made by originating application under Part IVA of the High Court Rules; and
 - (b) be served on such persons as the Court may direct.
- (3) The High Court may, after giving the operator and such other persons as the Court thinks fit an opportunity to be heard, make 1 or more of the following orders:
 - (a) that a manager be appointed for the retirement village;
 - (b) that such restrictions be imposed on the activities of the operator as the Court thinks necessary to protect the interests of the residents;
 - (c) that the operator or prudential supervisor convene a meeting of the residents to enable the prudential supervisor to put before the residents information about the residents' position, and such proposals for the protection of their interests as the Court or the prudential supervisor thinks necessary or appropriate;
 - (d) that the operator or prudential supervisor conduct the meeting referred to in paragraph (c) in a manner that the Court directs;
 - (e) that all civil actions or civil proceedings before any court by or against the operator be stayed;
 - (f) that the operator is restrained from paying any money to 1 or more of the residents;
 - (g) any other directions as the Court considers necessary to protect the interests of the residents.
- (4) In making any order under subsection (3), the High Court must have regard to the interests of all creditors of the operator in respect of the retirement village.
- (5) The High Court may at any time vary or rescind any order made under this section.
- (6) Despite the requirement in subsection (2) as to service of the application and the requirement in subsection (3) as to the provision of an opportunity to be heard, the Court may where justice so requires make any of the orders referred to in subsection (3) *ex parte*.

Section 27

- C27 This section permits an application by the supervisor to the High Court (compare Securities Act 1978, section 49). *Subsection (4)*, analogously to the concluding words of section 49(3), is intended to make it clear that in determining whether to make an Order and what Order, regard can be had to the future of the Scheme as a whole as distinct from the interests of an individual creditor or resident.

*Miscellaneous Provisions***28 Mortgagees' rights subject to occupation rights**

The rights of a mortgagee of any interest in a retirement village are, in respect of the rights of any resident or residents of that retirement village, no greater than those of the mortgagor.

29 Application of Contracts (Privity) Act 1982

For the purposes of the Contracts (Privity) Act 1982, the prudential supervisor of a retirement village is to be treated as having promised, in the contract referred to in section 13, to perform the duties imposed by section 14 for the benefit of the residents of the retirement village; and every resident of that retirement village is a beneficiary in relation to that promise.

30 Disputes to be determined by arbitration

- (1) Subject to any provision of an occupation contract, any dispute arising out of an occupation contract between a resident of a retirement village and the operator of that retirement village must be determined according to this section.
- (2) The resident must choose who is to determine the dispute and may choose between
 - (a) an appointee of the prudential supervisor; or
 - (b) a tribunal of 3 arbitrators consisting of
 - (i) an appointee of the resident; and
 - (ii) an appointee of the operator; and
 - (iii) an appointee of the prudential supervisor, who is to act as the chairperson.
- (3) A determination of a dispute under this section is an arbitration within the meaning of the Arbitration Act 1996 and that Act applies accordingly.

31 Determination of disputes

- (1) A judge, arbitrator, or arbitral tribunal determining a claim by, or in respect of, a resident of a retirement village against an operator of that retirement village may make 1 or more of the following orders:
 - (a) a work order against the operator;
 - (b) if it appears to the judge or arbitrator that the occupation contract is harsh or unconscionable, or that any power conferred by that occupation contract has been, or is threatened to be, exercised in a harsh or an unconscionable manner, an order varying the occupation contract;
 - (c) such order as the judge or arbitrator thinks will stand with equity and good conscience.
- (2) A work order has the meaning assigned to that term in section 2 of the Disputes Tribunal Act 1989.

Section 28

- C28 It has become common for there to be created in favour of a trustee a first charge over the assets of a retirement village securing all the contingent entitlements of residents, with other creditors ranking behind such charge, and *section 28* is intended to give such arrangements statutory form and to apply such arrangements universally.

Section 29

- C29 This section is intended to make clear the civil liability of the prudential supervisor to residents. The apparatus chosen is to treat the supervisor's *section 14* obligations as promises for the benefit of residents.

Section 30

- C30 This section provides that in the absence of any other contractual arrangements, disputes will be determined at the resident's election by either a sole arbitrator or a panel of arbitrators. The Arbitration Act 1996 permits appropriate informality in dealing with disputes.

Section 31

- C31 Whether a resident's claim is determined by a judge or by arbitration, there is power by analogy with the District Courts Act 1947, section 59, and the Disputes Tribunals Act 1988, section 19, and the Arbitration Act 1996, First Schedule, article 28(3), to achieve a fair result, overriding, if need be, a strict application of contractual terms. There is also a power to require an operator to carry out certain works.

32 Regulations

The Governor-General may from time to time, by Order in Council, make regulations for 1 or more of the following purposes:

- (a) prescribing the information, statements, or other matters that must or must not be contained in or attached to any disclosure notice:
- (b) prescribing the rate of interest in respect of any repayments under section 6(4).

33 Amendment to Corporations (Investigation and Management) Act 1989

Section 2(1) of the Corporations (Investigation and Management) Act 1989 is amended by inserting, after the definition of the term "information", the following definition:

"Member", in relation to a corporation, includes a resident of a retirement village (as defined in the Retirement Villages Act 200–) that is owned or operated by that corporation.

Section 33

- C32 The Corporations (Investigation and Management) Act 1989 is concerned with the preservation of the interests of a corporator's members or creditors and *section 33* makes it clear that residents are to be treated as members for this purpose.

SCHEDULE
FORM OF WARNING
(See section 9(c))

Warning

This disclosure notice sets out a summary of what your rights and obligations will be if you sign a contract for the right to occupy the unit in the retirement village described in this notice.

By entering into that contract you will take a risk. Often schemes for retirement villages can be completed and continue to operate only if all the proposed units are sold promptly. If this does not happen, the promoter of the scheme may run out of money and you may lose the money you have paid or you may find that the retirement village does not provide all the amenities that were promised.

Even if the retirement village is completed and all the rights to occupy units are sold, the village will function smoothly only if it is managed effectively.

You should also be sure that you understand what your rights, or those of your estate, will be when your occupation of the unit ends.

You should be sure that you understand how periodic charges are fixed and whether you will have any involvement in the process of fixing the amount of such charges. You should consider what your position will be if you find that the retirement village does not suit you and you want to move elsewhere.

So before you sign any contract, it is very important that for your own protection you obtain sound advice concerning the legal and accounting matters involved. Not all lawyers and accountants are skilled at understanding retirement village schemes. If your usual advisor is not an expert on retirement village schemes, you should ask him or her to refer you to a specialist lawyer or accountant who is.

You should keep this paper for further reference.

I acknowledge that I have read and understand this warning.

(Signature)

(Date)

APPENDIX C

Persons making submissions

A Sub-Committee of Residents of Alandale Retirement Village
Age Concern Wellington Inc
Alandale Foundation Board
Auckland District Law Society's Property and Business Law
Committee
Ball & Co
RT Bain
James Beard
Birchleigh Village
Burke Melrose
FA Conlon
Covenant Trustee Company Ltd
JWP Crocker and 22 residents of McAlister Place, Mt Roskill,
Auckland
GP Cryer
Culverden Retirement Village Ltd
G Duindam
FJ Fenton
Mrs Jocelyn Hunter
Govett Quillam
Grand Lodge of New Zealand Freemasons
Grey Power New Zealand Federation Inc
Kapiti District Trust Board
Kiely Thompson Caisley
Lifecare Management Ltd
McGillivray Callaghan & Co
Ross M McLean
Dr JC Mathias
Methodist Mission Northern
Metlife Care Ltd
Ministerial Advisory Council for Senior Citizens

National Council of Women of New Zealand
New Zealand Law Society's Commercial and Business Law
Committee
Palmerston North Returned Services Association
Presbyterian Support New Zealand
Principal Tenancy Adjudicator
Remuera Gardens Management Ltd
Ryman Healthcare Ltd
Securities Commission
Social Services Trust Board
Steel & Co
Taita Home Trust Board
The Retirement Villages Association of New Zealand Inc
Trustee Corporations Association of New Zealand
Waiapu Anglican Social Services Trust Board
Mrs KB Weir

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