



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 34

RETIREMENT VILLAGES

A discussion paper

*The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.*

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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. Our work on retirement villages would have the incidental benefit of resolving some of the uncertainties surrounding the somewhat enigmatic provision of the Securities Act 1978 s 5(1)(b).

We are now at the stage of publishing our proposals for reform of this area of the law with a view to obtaining comment and submissions on them. We would emphasise that what is described as a preliminary paper is precisely that. Although, as mentioned below, we have received and are grateful for skilled professional assistance in this highly specialised area, and although we have had some communication with the Retirement Villages Association Inc, there has yet to be consultation with the industry. Until that has taken place our views are necessarily tentative.

Much of the published material in New Zealand relating to retirement villages concentrates on the conundrum of s 5(1)(b). Because of the approach we have taken it has not been necessary for us to discuss that literature in detail. We have received the greatest assistance from the following sources:

- A report published by the Securities Commission in December 1993, *Resident Funded Retirement Villages: proposals for the reform of the law*, prepared by a Task Force of experts. The Task Force's preferred approach for reform was

to establish separate legislation governing the regulation of retirement villages. Such a course of action would enable the establishment of a regulatory regime which is simple and clear and directly relevant to retirement villages and the special requirements which pertain to them. (para 2.6)

The Task Force took the view that there were practical difficulties in the way of new separate legislation – however desirable – and went on to consider alternative solutions. The view of the Law Commission is that there should be separate legislation.

- *Retirement Villages* by Peter Jones and Helen Melrose (who had been a member of the Task Force) prepared in connection with a New Zealand Law Society seminar on retirement villages held in 1997.
- An account by Dr AP Moore of the legislation of the various Australian states to be found in *Laws of Australia*, subtitle 28.12, Retirement Villages.

The Commission has been assisted in its task by help from Helen Melrose, a partner of Burke Melrose, Mr Steve Smith who is a partner in Pricewaterhouse-Coopers, and Ian Ramsay and John McPherson of the Business and Registries Branch of the Ministry of Commerce and from the Securities Commission itself. It should, however, be made clear that the proposals now advanced are those of the Law Commission.

Submissions or comments on the proposals in this paper should be sent to Megan Leaf, Law Commission, PO Box 2590, DX SP 23534, Wellington by 28 February

1999, or by email to MLeaf@lawcom.govt.nz. We prefer submissions to be made by email if possible. Any initial inquiries or comments can also be directed to Megan Leaf: phone (04) 473 3453 or fax (04) 471 0959. This paper is also available from the Commission's website: www.lawcom.govt.nz.

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 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 s 57(1)(f); Goods and Services Tax Act 1985 s 2(1) para (f) of definition of “commercial dwelling”; Human Rights Act 1993 s 55). *Retirement village* is not a precise legal term. It can be applied to a very wide variety of arrangements. In this paper we will use the term in its everyday popular sense but it will be necessary for us to explain, as we do in paragraphs 5 to 10, the different sorts of legal structures which the term can encompass. In our suggested new statute for retirement villages we try to catch these different types of legal structure within our proposed definition of retirement village.
- 2 People in New Zealand today, as in other parts of the world, are tending to live longer (see appendix A for more detailed statistics). 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, anxious to preserve as much independence as possible for as long as possible, and desirous of remaining in a community with facilities to meet medical requirements. 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 analysing 205 retirement villages in New Zealand there were 12,426 residents of retirement villages (2.81 percent of the New Zealand population over 65 years of age). The villages comprised 6,777 units and 2,231 serviced apartments. There were 62 villages (mainly in the for-profit category) acknowledging an obligation to satisfy the Securities Act obligations discussed in paras 12–17.
- 4 The size and facilities offered by retirement villages vary infinitely. We cannot better the summary given by Peter Jones and Helen Melrose in their 1997 book, *Retirement Villages*:

Larger villages often comprise a range of detached or semi-detached units, apartments, and serviced apartments. They often allow for transferability within the village, and provide facilities such as 24 hour on-call nursing assistance, a restaurant, and security.

House and garden maintenance is taken care of. There is also often a range of optional recreational facilities available. Some villages also include a rest home facility. Even less frequently, a hospital may form part of the village.

Smaller villages may be more focused around a rest home facility, with the provision of some serviced apartments and units being a natural adjunct to this facility. There is likely to be less choice in recreational facilities in such villages, but the important things such as nursing care, meal provision, and security will invariably be available. Other smaller villages may be no more than a cluster of houses with some limited services, such as house and garden maintenance provided, where people of a similar age group can live. (3)

THE LEGAL STRUCTURE

- 5 The question of an appropriate legal structure for retirement villages has tried the ingenuity of conveyancing lawyers. This account leans heavily on pages 4–7 of the Jones and Melrose book. 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, for example). Our proposed bill is designed to apply to retirement villages in the popular sense of that term, regardless of the underlying legal machinery, and should remove some of the incentive for artificiality.
- 6 Flat-owning companies provided for under the Land Transfer Act 1952 ss 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 (ie, 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.

Unit title

- 8 Jones and Melrose 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. (4-5)

Cross-lease

- 9 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

- 10 Fifty-seven percent of villages operate under a contractual licence structure. In this scenario, the developer or his or her successor in title will own both the units and the community facilities, licensing the occupation of units to residents and either retain management of the community facilities or install an operator.

Lease for life

- 11 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.

2 The problem

The Securities Act 1978

12 THE SECURITIES ACT 1978 applies to offers of securities to the public. What constitutes such an offer is broadly and inclusively defined by s 3. The wide net cast by the Act exempts various types of securities; one such exemption commonly sought to be invoked by retirement village operators seeking to avoid compliance requirements of the Act is s 5(1)(b). Section 5(1)(b) is a difficult provision that disapplies that part of the Securities Act that restricts the offer and allotment of securities to the public in respect 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” as being any scheme or arrangement involving “the investment of money”.

13 There has been general acceptance where occupation rights were based on licences that they fell within the scope of the Securities Act 1978. (A licence confers only a personal right and so is plainly outside s 5(1)(b)). There seems to have been an acceptance that leases for life are similarly subject to the Act, 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 s 65, in practice survey and resource consent requirements are unlikely to be satisfied. It used to be claimed that where occupation rights depended on unit titles or registered cross-leases the statute did not apply because of the provisions of s 5(1)(b). However, the recent case of *Culverden Retirement Village v Registrar of Companies* [1997] 1 NZLR 257, has changed that view.

14 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. The Privy Council, unlike the High Court and Court of Appeal, took the view that a scheme 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 and not exempted by s 5(1)(b).

15 The practical consequences of this decision are that it is now clear that the great majority of retirement village schemes are subject to the Securities Act. That disposes of one anomaly, because it was never satisfactory that that statute should apply to some retirement villages and not to others. The concern of the Securities Act is the management of the risk that is an inseparable element of

the trade in securities. This is an inappropriate approach to the protection of the senior citizens who take up residence in retirement villages. In their case the concern should not, as in the case of traders, be to manage the risk but should be first to reduce the risk to the extent possible, and secondly, to warn of any remaining hazards.

16 The Securities Commission has issued a series of exemption notices (currently the Securities Act (Retirement Villages) Exemption Notice 1998 SR 1998/187 – see appendix B). 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.

17 In the Law Commission's view (though opinions may legitimately differ) these arrangements are clumsy and inadequate and should be replaced.

The risk and the need for protection

18 Those acquiring occupation rights in residential villages require as much protection as those who buy other securities. But there are particular features of retirement villages that call for additional and special protections.

19 First there are the risks connected with the financial stability of the developer. In practice developers are likely to be under-capitalised. To perform their promises they are dependent on a timely succession of sales. It is the money paid by the proposed residents that funds the development. In this situation of tight cash flow margins it is not difficult for things to go horribly wrong. There is a long list of New Zealand examples of failed retirement village developers. (It seems unfair to name them because in most cases they have restructured with new owners but with the original project names preserved.) Such failure can impose on residents and the proposed residents substantial financial harm. If the collapse occurs at an early stage they may lose the proportion of the price they have paid by way of deposit. They also are at risk of being dispossessed by mortgagees or receivers. Even if (as tends to be the case in practice) the occupation rights of the residents survive, either because the secured creditors do not have the heart to turn the residents out into the street or because the rights of the residents as a matter of law rank ahead of those of the secured creditors, the residents may even so find themselves with amenities falling a long way short of those that had been promised. If units are never built or are built but unoccupied there are fewer residents available to meet ongoing operating costs. For the protection of prospective residents the budgeting of developers needs a careful scrutiny that few prospective purchasers are qualified to make.

20 If a retirement village surmounts these difficulties and reaches the stage of being fully developed even then its continuing viability is dependent on it being prudently managed. As well as the cost of day-to-day management, the costs of periodic refurbishment must be found. If a resident or his or her estate on termination of occupation has a right to a refund that (as in *Culverden*) is not conditional on the provision of funds by a new resident then the monies to pay out the former resident must also be budgeted for.

21 The fact that the residents of a retirement village are *ex hypothesi* elderly underscores the need for protection. Moreover, if a retirement village scheme runs aground persons in their seventies or eighties or older with homes sold and a major part of the person's assets invested in a retirement village unit are not

ideally placed to battle to preserve entitlements. It is for the reasons set out in this and the three previous paragraphs that a special scheme of protection for retirement village residents would seem to be warranted.

The Australian position

- 22 It may be noted that it has been thought necessary to enact legislation concerning retirement villages in all Australian jurisdictions except the Australian Capital Territory and Tasmania, though the New South Wales and Northern Territory legislation is largely confined to the protection of residents against eviction. The statutes of the remaining jurisdictions are concerned with such matters as pre-contractual disclosure, the oversight of management by-laws, rights in relation to entry fees, the control of ongoing charges, and priority in respect of refunds as against encumbrancers (see *Laws of Australia*, subtitle 28.12, for an account).

The adequacy of existing protection

- 23 The existing protection for residents apart from that provided by the general law is to be found in the provisions of the Securities Act. These protections seem to us inadequate (always keeping in mind the vulnerability of retirement village residents already referred to) for the reasons discussed in the following paragraphs.
- 24 It is clear from even a cursory examination of the exemption notice reproduced in appendix B that despite gallant attempts to wrest the provisions of the Securities Act to the function of warning prospective residents of the risks they are running, the documents that result from this process are the reverse of lucid. They certainly do not fulfil their intended purpose of putting prospective residents on guard. The documents may be slightly more comprehensible to the advisers of such intended residents or some of them. 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.
- 25 Not all retirement villages are subject to or acknowledged by their promoters to be subject to the Securities Act.
- 26 The major concern and thus the expertise of the Securities Commission is in the marketing of securities. Adequate security for residents at retirement villages moves beyond marketing to ongoing supervision which is not really the Securities Commission's cup of tea.
- 27 Compliance costs under the existing regime are claimed to be disproportionately high in relation to the benefits achieved.
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The solution

- 28 **S**O WHAT IS TO BE DONE? In the Commission’s tentative view an appropriately robust solution would be the draft Act as set out at pages 11–24. This chapter provides a discussion of that draft Act.
- 29 The term “retirement village” should be defined in as watertight a fashion as possible. 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. We considered excluding schemes to which residents do not make a capital commitment but rejected this; it is too easy to disguise what is in substance a capital commitment as some other sort of up-front payment.
- 30 Retirement villages so defined should be excluded from the Securities Act 1978 altogether. The Securities Commission would, however, retain the residual function of approving prudential supervisors other than trustee corporations.
- 31 The statute should provide that no contract to acquire an occupation right in a retirement village is to be enforceable against a resident unless disclosure requirements have been complied with and a supervision contract is in force.
- 32 Rather than the elaborate prospectus provided for under the Securities Act provisions, there should be a succinct and lucid notice, the form of which is settled by the prudential supervisor. The notice should set out the rights and liabilities of the resident and the risks run by a resident resulting from the financial position of the developer or failures in ongoing management. Because any inadequacy in disclosure that is causative of loss would be actionable against the supervisor at the suit of the resident we would expect supervisors to take their obligations seriously. Because supervisors are likely to investigate schemes thoroughly before accepting the role of supervisor it seems more thrifty in relation to compliance costs if, with knowledge of the scheme so acquired, the supervisor settles the form of the disclosure rather than some third party. Because of the likely resistance of prospective residents to less robustly expressed warnings referred to in para 24, we propose that accompanying these documents there should be a set form of warning in terms as trenchant as we can persuade the legislature to agree to.
- 33 Under s 6 of our draft legislation the effect of non-compliance with the disclosure requirement should be:
- (a) that an occupation contract is unenforceable except at the suit of the resident;
 - (b) that the resident should be entitled to demand repayment from the payee (and if the payee is a corporation aggregate then any officer of the payee) of

all monies paid plus interest at 15 percent (there is an analogy with the Securities Act 1978 s 37(6)); and

(c) that those involved in the promotion are subjected to criminal sanctions.

- 34 The Registrar of Companies should have a right broadly analogous to that provided by the Securities Act 1978 s 67 to commission an inspector's report as an aid to policing.
- 35 Reliance for prudential supervision is placed on the prudential supervisors who will be liable in damages at the suit of residents if they fail to exercise the necessary diligence. Their statutory powers will include a very wide right to require information, a right to summon a meeting of residents, and a right to apply to the High Court for the appointment of a manager. There should be an obligation on the supervisor to pass on any information it holds on the request of any resident. Our initial view is that as for other rights (such as reporting and audit requirements) supervisors may be expected to settle as a matter of contract as part of their price for taking on the position. The alternative approach would be to enact some equivalent of the Securities Act 1978 ss 53–53F. This seems unnecessary, but expressions of opinion are invited.
- 36 Two issues on which we would particularly value submissions are:
- the effect that the making of an application to the High Court will have on the saleability of units; and
 - whether such application should require (as with the Corporations (Investigation and Management) Act 1989) the prior blessing of the Securities Commission.
- 37 Although prudential supervisors would have these powers it is appropriate to confer on the Registrar of Companies a similar power to apply for the appointment of a manager. The Registrar may feel a 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. It should also be possible to invoke the Corporations (Investigation and Management) Act 1989, though we entirely agree with what we understand to be the current government view that this should be very much a last resort.
- 38 The statute should provide that rights of occupation have priority over the rights of encumbrancers. Our understanding is that in practice this is generally a term of security arrangements with lenders to retirement villages so that existing practice will not change. Australian legislation requires a notification against the title that a property is a retirement village as a condition of priority and also extends the priority to monies payable on termination of occupation rights. We do not recommend either of these alternatives. On the first point it is singularly unlikely that any lender will lend without knowing that a retirement village is being proffered as security. On the second point it seems to us that while the social evil of old men and women being turned out of their homes warrants interference with bargains in the manner proposed, rights to payment are not in the same category of importance.
- 39 It is usual for contracts to provide that rights of occupation can be terminated by the manager of a retirement village in certain circumstances. Sometimes the operator is given a fairly wide discretion to terminate. This is perhaps justified

by the sad fact that old people can become disruptive and difficult in ways that have a significant effect on others but that are difficult for a conveyancer to define with any precision. The Australian statutes emphasise protection of occupation rights. In our view no more is needed than to give a right to determine disputes to the tribunal established under the Residential Tenancies Act 1986.

Compliance costs

- 40 In framing our recommendations we have endeavoured to take account of the undesirability of imposing excessive compliance costs. We believe that what we propose in relation to the initial documentation will be cheaper than the elaborate documents required by the exemption order made under the Securities Act. Under the existing law wildly inappropriate legal structures have been adopted (an excessive number of cross-leases, for example) to avoid Securities Act obligations and we would hope that our proposals will put an end to expensive nonsense of this sort. Our proposal will see an end to the need to file audited financial statements under the Financial Reporting Act 1993 s 18. It is correct of course that the burden to be imposed under the draft Act on prudential supervisors is greater than at present and that they will expect to be paid for this. 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. We expect trust corporations and others acting as prudential supervisors to develop an expertise that should keep costs down. The degree of regulation we propose is not heavy-handed and in our view appropriate in the light of experience in this industry for the protection of the elderly persons likely to be affected.
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Draft Retirement Villages Act 199– with commentary

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Schedule 1
Form of warning

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- 1 Title**
This Act is the Retirement Villages Act 199–.
- 2 Commencement**
This Act comes into force at the end of 3 months beginning on the day on which it receives the Royal Assent.
- 3 Purpose**
The purpose of this Act is to provide improved and effective protection for residents and prospective residents of retirement villages.

4 Definitions

In this Act

disclosure notice means a notice in a form which complies with section 7(1).

occupation contract means an agreement conferring an occupation right on a resident or prospective resident.

occupation right means the right of a resident to occupy a residential unit in a retirement village.

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

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.

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 is entitled to an occupation right.

retirement village means a complex of residential units and ancillary facilities predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons under an occupation right which

- (a) is conferred by a lease or licence; or
- (b) is conferred by ownership of a share in a company; or
- (c) forms part of or is subject to a contract under which a right or option to purchase the occupation right or the residential unit is conferred on another person or by which the subsequent disposal of the occupation right or the residential unit is restricted,

but does not include such a complex where in respect of every unit, no consideration has been or will be provided either directly or indirectly for the right to occupy that unit.

Securities Commission means the Securities Commission established by the *Securities Act 1978*.

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

working day means a day of the week other than

- (a) a Saturday, a Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, and Labour Day; and
- (b) a day in the period beginning on 25 December in a year and ending on 2 January in the following year; and
- (c) if 1 January falls on a Friday, the following Monday; and
- (d) if 1 January falls on a Saturday or a Sunday, the following Monday and Tuesday.

COMMENTARY

Section 4

- C1 The term **occupation right** is wide enough to include every sort of entitlement including entitlement as life tenant, licensee, lessee or owner.
- C2 *Part (a)* of the definition of **retirement village** includes rights under a lease or licence. *Part (b)* includes flat-owning companies. *Part (c)* includes rights as owner (including of a unit title) where the ultimate disposition of the rights or the property is restricted by an option to purchase or other restriction.

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 residential unit in a retirement village.

6 Requirements for valid offer of occupation right

- (1) A person must not offer an occupation right either to retired persons generally or to a particular retired person unless
 - (a) a term of the offer precludes its acceptance by an offeree before at least 3 working days have expired after that offeree has received a disclosure notice which complies with the requirements of section 7(1); and
 - (b) a contract is in force between all persons acting in the promotion and management of the retirement village on the one hand and a person who has accepted the office of prudential supervisor on the other in which contract the prudential supervisor has promised to perform the duties imposed on prudential supervisors by this Act.
- (2) If an offer of an occupation right is made in contravention of subsection (1) and an occupation contract is concluded in consequence of that offer,
 - (a) the contract cannot be enforced against an offeree by any person acting in the promotion or management of the retirement village;
 - (b) the contract can be enforced by the offeree against any person acting in the promotion or management of the retirement village.
- (3) If an offer of an occupation right is made in contravention of subsection (1),
 - (a) the offeror; and
 - (b) if the offeror is a corporation or other body, every person who is a principal officer of the offeror at the time of the contravention; and
 - (c) every person who has authorised himself or herself to be named and is named in any advertisement relating to the offer as a director of the offeror or as having agreed to become a director either immediately or after an interval of time,each commits an offence and is liable on summary conviction to a fine not exceeding \$15,000.
- (4) A person is not liable to be convicted under subsection (3) if, in the opinion of the court,
 - (a) the contravention was in respect of matters which were immaterial or having regard to all the circumstances of the case ought reasonably to be excused; or
 - (b) in the case of a person other than the offeror, the contravention did not take place with that person's knowledge and consent.
- (5) If an offer of an occupation right is made in contravention of subsection (1) and a payment is made by an offeree under or in anticipation of an occupation contract, the person receiving the payment and, if that person is a corporation aggregate, every principal officer of that corporation is, on demand in writing made by the offeree, jointly and severally liable to repay the amount of the payment in full together with interest at the rate of 15% calculated from the date the payment was made until the date of repayment.
- (6) This section does not apply to the offer by a resident or a resident's legal personal representative, of an occupation right relating to the residential unit occupied or formerly occupied by that resident.

Section 5

- C3 This section disapplies the Securities Act 1978. It is contemplated that the application of that statute will phase out as offers made after the proposed statute comes into force will be subject to the new statute.

Section 6

- C4 *Subsection (1)* lays down two requirements for a valid offer of an occupation right. One is that the offer may not be accepted earlier than 3 working days after receipt by the offeree of a disclosure notice (the requirements of which are to be found in *section 7(i)*). The other is that a prudential supervisor should have been appointed by the procedure and upon the terms spelled out in *section 9*.
- C5 *Subsection (2)* provides that an occupation contract concluded in breach of the provisions of *subsection (1)* is enforceable by but not against the resident or prospective resident. *Subsection (3)* provides that in such circumstances the offeror, and where the offeror is a corporation directors and *de facto* directors of the offeror, are liable to criminal sanction (but subject to defences spelled out in *subsection (4)*). There is a provision for recovery by the offeree of monies paid and interest under *subsection (5)*. *Subsection (6)* makes it clear that the subsection does not apply where the unit is being disposed of by a resident or the administrator of a resident's estate.

7 Disclosure notice

- (1) A disclosure notice must be printed on a single sheet of A4 paper in a clear typeface of not less than 10 point font size. On one side of the sheet must be set out the warning in Schedule 1 and on the other side must be set out, in a form agreed to by the prudential supervisor, a summary of
 - (a) the rights and obligations of a resident under the proposed occupation contract; and
 - (b) the financial risks which the offeree will assume if he or she enters the occupation contract resulting from
 - (i) the stage of development that the retirement village has reached at the time the offer was made; and
 - (ii) the financial position of the persons acting in the promotion and management of the retirement village; and
 - (iii) any failure in sound prudential management by the persons acting in the promotion and management of the retirement village.
- (2) If an offer of an occupation right is accepted, the offeror must, without delay, send to the prudential supervisor a copy of the disclosure notice received by the offeree before acceptance of the offer.

8 Persons who may act as prudential supervisors

A person cannot be appointed, or accept appointment as, a prudential supervisor for the purposes of this Act unless that person is a trustee corporation or a person approved for the purpose by the Securities Commission.

Section 7

- C6 This section sets out what is required for a disclosure notice. *Subsection (1)* sets out the physical and visual requirements of the form as well as the content. On one side must be the Schedule 1 warning. On the other must be set out in a form agreed to by the prudential supervisor a summary of the resident's rights and obligations under the proposed contract together with a statement of the relevant financial risks. Because prudential supervisors who breach their obligations under supervision contracts in respects causative of loss to any resident are liable to such resident in damages it can be expected that prudential supervisors will be diligent in ensuring that disclosure notices are properly framed. *Subsection (2)* provides for a copy of the notice to be provided to the supervisor on conclusion of any contract. This should assist prudential supervisors to monitor compliance with the disclosure obligation.

Section 8

- C7 This section provides that a prudential supervisor must be either a trustee corporation or a person approved by the Securities Commission.

9 Appointment and obligations of prudential supervisors

- (1) A person becomes a prudential supervisor of a retirement village by accepting such an appointment as a party to a contract with all persons acting in the promotion and management of the retirement village and promising in that contract
 - (a) to settle the form of the summary required to be set out in the disclosure notice required by section 6 in a manner that communicates the information stipulated by section 7(1) to offerees as plainly as is possible in the circumstances; and
 - (b) to exercise reasonable diligence to ascertain promptly any breach of the rights of and obligations to residents under each occupation contract that may occur or appears likely to occur; and
 - (c) if such a breach has occurred or appears likely to occur, then unless satisfied that the breach does not and will not materially prejudice the interests of the residents, to
 - (i) notify in writing all the residents of the retirement village of the breach or likely breach; and
 - (ii) unless it would be unreasonable to do so in the circumstances, exercise all or any of the powers conferred on prudential supervisors by section 13; and
 - (d) not to retire or seek to be discharged from the position of prudential supervisor except with the prior consent of the Securities Commission.
- (2) The Securities Commission must not consent to the retirement or discharge of a person from the position of prudential supervisor of a retirement village unless satisfied that a contract is in force between all persons acting in the promotion and management of the retirement village on the one hand and a person who has accepted the office of prudential supervisor in place of the retiring prudential supervisor on the other and in which contract the replacement prudential supervisor has promised to perform the duties of prudential supervisors referred to in subsection (1).

10 Prudential supervisors' right to information

- (1) A prudential supervisor may, by notice in writing given to the owner, promoter or manager of a retirement village, require that owner, promoter or manager to supply to the prudential supervisor within the time specified in the notice such information relating to the business, operation or management of that retirement village for such periods and in such form as is specified in the notice.
- (2) The prudential supervisor may specify in the notice financial particulars and copies of documents that must accompany the information.
- (3) Every owner, promoter or manager of a retirement village commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 if, without lawful justification or excuse, that person
 - (a) fails to comply in any respect with a notice under this section; or
 - (b) supplies any information in response to such a notice that is false or misleading in a material particular.

11 Residents' rights to information

The prudential supervisor of a retirement village must provide any resident of the retirement village with such information as the resident may request in writing that relates to the business, operation or management of that village and is in the possession of the prudential supervisor.

Section 9

- C8 This section sets out the obligations of a prudential supervisor. Except as provided in *section 10* the obligations of a promoter, owner or manager to the prudential supervisor are not spelled out in the statute. The expectation is that such obligations will be exacted by the supervisor and spelled out in the supervision contract as part of the price of the supervisor's taking on the job.
- C9 Apart from settling the form of the disclosure notice the broad function of the prudential supervisor is to act as a watch dog and detect breaches or likely breaches of obligations to residents. No attempt is made to stipulate how the supervisor is to go about this. One would expect the supervisor by its contract to impose such obligations as to regular provision of financial particulars, audits and the like as seem appropriate. Where there is a breach that may materially prejudice the interests of residents the supervisor must notify residents and may exercise the powers set out in *section 13*.
- C10 Under *section 9(1)(d)* the prudential supervisor may vacate its position only with the consent of the Securities Commission which under *section 9(2)* may only give consent if a substituted supervisor has been duly put in place.

Section 10

- C11 This section spells out the prudential supervisor's right to call for information and imposes criminal sanctions for non-compliance.

Section 11

- C12 This provision obliges the prudential supervisor to make available to any resident such information as to the functioning of the village as the resident may request in writing and the supervisor may have.

12 Registrar of Companies' right to require prudential supervisor to report

- (1) The Registrar of Companies may by notice in writing require the prudential supervisor of a retirement village to provide within the time specified in the notice a 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) The Registrar of Companies may specify in the notice financial particulars and copies of documents that must accompany the report.
- (3) Every prudential supervisor of a retirement village commits an offence punishable summarily and is liable to a fine not exceeding \$10,000 if, without lawful justification or excuse, that person
 - (a) fails to comply in any respect with a notice under this section; or
 - (b) supplies in a report to the Registrar of Companies any information in response to such a notice that is false or misleading in a material particular.
- (4) A reference in this section to a breach of the rights of and obligations to residents is a reference to a breach of a kind that may materially prejudice the interests of the residents of the retirement village.

13 Registrar of Companies may appoint inspector

- (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 each occupation contract has occurred or appears likely to occur.
- (2) An inspector may for the purposes of this section by notice in writing require the owner, promoter or manager of a retirement village to supply to the inspector within the time specified in the notice such information relating to the business, operation or management of that retirement village for such periods and in such form as is specified in the notice.
- (3) The inspector may specify in the notice financial particulars and copies of documents that must accompany the information.
- (4) 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 such period of time as is reasonable in the circumstances.
- (5) Every person commits an offence punishable summarily and is liable to a fine not exceeding \$10,000 if, without lawful justification or excuse, that person
 - (a) fails to comply in any respect with a notice under subsection (2); or
 - (b) supplies any information in response to such a notice that is false or misleading in a material particular; or
 - (c) refuses or fails to produce for inspection any document when required to do so under subsection (4).
- (6) A reference in this section to a breach of the rights of and obligations to residents is a reference to a breach of a kind that may materially prejudice the interests of the residents of the retirement village.

Section 12

- C13 This section is a *quis custodiet* provision entitling the Registrar of Companies to require reports from prudential supervisors, and imposes criminal sanctions on supervisors for non-compliance.

Section 13

- C14 This section entitles the Registrar of Companies to appoint an inspector. The Registrar is likely to do this if
- dissatisfied with the performance of the prudential supervisor, or
 - the additional powers of an inspector seem to be needed, or
 - a retirement village is operating without a prudential supervisor having been appointed.

14 Powers to call meetings and apply to High Court

- (1) The prudential supervisor of a retirement village, an inspector appointed under section 12(1), or the Registrar of Companies may at any time convene a meeting of residents of the retirement village.
- (2) The prudential supervisor of a retirement village or the Registrar of Companies may at any time apply by originating application under Part IVA of the High Court Rules for an order
 - (a) appointing a manager of the retirement village; or
 - (b) giving such additional or other directions as the Court considers necessary to protect the interests of the residents of the retirement villageand the High Court may vary or rescind an order made under this subsection.

15 Mortgagees' rights subject to occupation rights

The rights of a mortgagee of any interest in a retirement village are subject to the occupation right of every resident of the retirement village notwithstanding any term of the mortgage instrument to the contrary effect.

16 Residents' rights against prudential supervisor

For the purposes of the *Contracts (Privity) Act 1982*, the promises that are referred to in section 9 and are made by a prudential supervisor in a contract of the kind referred to in sections 6(1)(b) and 9(2) constitute a benefit in relation to residents of a retirement village and every resident of the retirement village is a beneficiary in relation to those promises.

17 Jurisdiction of the Tenancy Tribunal

The Tenancy Tribunal constituted by the *Residential Tenancies Act 1986* has jurisdiction to determine any dispute as to the entitlement of a resident to occupy a residential unit in a retirement village and for such purposes the Tenancy Tribunal may, subject to necessary modifications, exercise the powers conferred by sections 77(2)(g), 78(1)(f), 83 and 85 of that Act and, subject to necessary modifications, in the exercise of the jurisdiction conferred by this section, sections 86–93, 95–99, 101–106, and 109–120 apply.

18 Amendment of the 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 "Information" the following:

““Member” in relation to a corporation, includes a resident of a retirement village (as defined in the *Retirement Villages Act 199–*) that is owned, promoted or managed by that corporation:”.

Section 14

- C15 This section empowers the taking of two steps. One is the convening of a meeting of residents. The other (obviously far more drastic) is an application to the High Court for the appointment of a manager or for other orders. A manager so appointed would be a receiver under the Receiverships Act 1993 so that it is not necessary to spell out further rights and obligations.

Section 15

- C16 This section provides that the rights of mortgagees are subject to occupation rights.

Section 16

- C17 This section intends to make it clear that a breach of duty by the prudential supervisor causative of loss to a resident entitles a claim by the resident against the prudential supervisor.

Section 17

- C18 This section is intended to give the Tenancy Tribunal jurisdiction to determine disputes as to occupancy rights. It is not intended to displace mediation and arbitration arrangements in place under some schemes but where there are no binding arrangements of that sort the mechanism proposed in *section 17* should be of use.

Section 18

- C19 The Corporations (Investigation and Management) Act 1989 is concerned with protecting inter alia a corporation's members or creditors (ss 4(b)(i) and 39(c)(i)). This section ensures that residents are eligible for protection whether or not they are in any strict sense members or creditors by extending the definition of member to include a resident.

SCHEDULE 1
FORM OF WARNING
(See Section 7(1))

Warning

On the reverse side of this sheet is set 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 that summary.

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.

So before you sign any contract, it is very important that for your own protection you must 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 future reference.

I acknowledge that I have read and understand this warning.

(Signature)

(Date)

APPENDIX A

Statistics

- A1 **T**HE STATISTICS PROVIDED in paras A1–A10 are derived from Prosser, *New Zealand Now 65 Plus* (Statistics New Zealand, Wellington, 1998). In compiling the text, results from the 1996 Census were utilised. That generalised method of inquiry provides useful data on matters such as age, income, and disability, but is of limited use on subject matter with less discernible distinction between categories because of the increased room for error in response and in formulation of questions.

Quantum of elderly

- A2 In 1976 the number of people aged 65 and over (the elderly) was 275,201 (8.9 percent of the population). On census night 1996 elderly people numbered 422,667 or 11.7 percent of the population. This represents an increase of around 50 percent on the 1976 figure, compared with an overall population growth over the same period of around 17 percent. Projections from the 1996 base figures of population (assuming medium fertility, medium mortality and a net gain from migration of 5,000 people per year) estimate the number of elderly people to grow by 150 percent by the year 2051 (25.5 percent of the population). The increase will be greatest after 2011 as the baby boomers enter the elderly age groups (Prosser, 12).

The elderly are getting older

- A3 Surveys divide the elderly into three groups: young-old age group (65–74), median-old age group (75–84) and old-old age group (85+). Over time the predominant age of our elderly group (as a whole) is getting older: in 1956 the young-old age bracket accounted for two-thirds of the elderly population, numbering 128,878. In 1996 they accounted for 58 per cent of the elderly population, numbering 246,633 (Prosser, 14).

More elderly are living longer

- A4 A greater proportion and number of elderly are living longer. In 1956 in the old-old age group there were 9,534 (4.8 percent of the total elderly population). In 1996 this figure quadrupled to 38,463 (9.1 percent of the elderly population). Population projections for the year 2050 predict that those over 85 will number 255,000 people, constituting 22.3 percent of the elderly population (Prosser, 14).

Types of residence and proportion of elderly living in each type

- A5 At the time of the 1996 census:
- over 70 percent of elderly people (297,585) resided in separate houses;
 - slightly over 20 percent lived in a flat joined to other flats; and
 - the remainder resided in non-private dwellings.

Of those living in non-private dwellings, around 5 percent (19,926) were living in residential homes for the elderly (Prosser, 43–44).

- A6 These figures were drawn from responses to the 1996 Census wherein the definition of “home for the elderly, retirement home (cared)” included:
- non-private dwellings providing cared accommodation for the aged or retired (the provision of meals is a minimum requirement for cared accommodation);
 - licensed old people’s homes;
 - hostels for the aged;
 - war veterans homes;
- and specifically excluded:
- institutions providing mainly medical or nursing care (eg private geriatric hospitals, convalescent homes, and hospices); and
 - self-care units, flats or houses within a retirement village or complex.
- A7 Self-care units, flats or houses within a retirement village or complex were categorised as private dwellings. Thus the Census figures, by virtue of the definition of retirement home, severely under-represent the proportion of the elderly population who reside in retirement villages, as the term is commonly understood.

Age and sex of residential home residents

- A8 Elderly people in residential homes were more likely than elderly people in other dwellings to be widowed (68.9 percent) and less likely to be married (11.2 percent). Three in every four elderly residents were women. The median age of elderly people in residential homes was 84, much higher than the median age of 73 of the total elderly population. Of the young-old age group only 1.3 percent resided in residential homes compared with 5.7 percent of the median-old age group and 24.5 percent of the old-old age group (Prosser, 46–47).

Income of elderly

- A9 In 1996 the median annual income for an elderly person in New Zealand was \$12,040 (around \$232 per week gross). A third of elderly people earned \$10,000 or less per year and almost three-quarters earned \$15,000 or less (Prosser, 55).

Disability of elderly living in residential care facilities

- A10 A survey of residential care was conducted early in 1997. This survey involved a sample of residents in a range of residential care facilities, including homes for the elderly, public and private hospitals, mental health units, and intellectual and physical disability units. The majority of respondents to this survey were elderly people (86.2 percent) and almost all elderly people (approximately 92%) said that they had some form of physical disability and also suffered from some “other” form of disability (approximately 68%) (Prosser, 62).

Other statistics

- A11 The following excerpt is from Davey, *Tracking Social Change in New Zealand: From Birth to Death* (Institute of Policy Studies, Wellington, 1998). Again, the 1996 Census figures provided the data for this text.

The rate at which people enter residential care increases with age. The majority of older people needing such care are in rest homes or private geriatric hospitals. Nearly

three quarters of rest homes are run privately for profit, but these have only 58% of the beds (Jack, 1994a). Religious and welfare-based rest homes are larger, with 28% of homes and 42% of beds. Eighty-five percent of rest home beds are classified as Stage 2, for people with appreciable dependency. Only 4% are Stage 3, introduced in 1992 for people with Alzheimers disease or age-related dementia. Geriatric hospital beds are equally divided between commercial and charitable institutions, with only a quarter in public hospitals. (217)
