

Retirement Villages in 2014: The year of the residence contract

Health & Aged Care Update

Unfair Contracts law

The national Unfair Contracts law is part of the Australian Consumer Law (which is a Schedule to the *Competition and Consumer Act 2010*). This is a new area of law that will apply to Residence Contracts, as standard form contracts.

If there are provisions in a retirement village's standard Residence Contract which could possibly be interpreted as being unfair, the operator runs the risk of a Court making a finding that those provisions are void. If a provision is found to be void it is treated as if it never existed and cannot be enforced by the operator.

What is "unfair"?

A provision in a Residence Contract will be unfair if it:

- causes a significant imbalance in the parties' rights and obligations;
- is not reasonably necessary to protect the retirement village operator's legitimate interests; and
- would cause detriment (whether financial or otherwise) to a resident if it were to be applied or relied on.

In determining whether a provision is unfair, a Court will consider:

- the extent to which the provision is transparent, that is whether it is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected; and
- the contract as a whole.

Who does this affect?

- Retirement village operators
- Retirement village residents

Article Highlights

- As Residence Contracts are a standard form contract, the Unfair Contracts law applies and must be complied with.
- In 2014, retirement village operators should ensure their Residence Contracts comply with the amendments to the Retirement Villages Act.



Examples of unfair provisions

The following types of provisions might be at risk of being unfair (depending upon the wording and circumstances in question):

- *Permitting the operator to change the characteristics of the services to be provided:* e.g. if the Residence Contract provides for monitoring of an emergency call system but also permits the operator to cancel the monitoring.
- *Permitting the operator to vary a provision:* e.g. if the Residence Contract provides for community facilities such as a hairdresser but allows the operator to unilaterally decide to cease providing a hairdresser on site.
- *Permitting the operator to vary characteristics of the retirement unit being sold:* e.g. if the Residence Contract for the sale of a unit that is yet to be constructed allows the operator complete flexibility to change the size, dimensions, location or boundaries of a unit or alter the finishes to a unit.
- *Unilateral rights of the operator:* e.g. if the operator who is developing a retirement village has the unilateral right to extend the completion date of the retirement village for as so long as the operator sees fit.
- *Limiting the operator's vicarious liability for its agents:* e.g. residents often rely on what is said to them by a sales representative, employee or agent of an operator before or when they are entering into a Residence Contract. A provision that seeks to disclaim the operator's responsibility or liability for representations made to prospective residents by its agents at the point of sale may be unfair.

The above are examples of the sort of matters in Residence Contracts that will now need closer consideration in light of the Unfair Contracts law. Jackson McDonald is not suggesting that the type of matters described above will automatically contravene the law. However, as a result of the Unfair Contracts law, there will be parts of Residence Contracts that, over time, are drafted in language that is more favourable to the resident than may presently be the case.

Key changes to retirement villages legislation

Retirement village operators need to carefully consider amendments to the retirement villages legislation when operating a retirement village and entering into a Residence Contract.

The retirement villages legislation primarily comprises the:

- *Retirement Villages Act 1992 (Act);*
- *Retirement Villages Regulations 1992 (Regulations);* and

Contact



Simon Moen
PARTNER

t: +61 8 9426 6757
e: smoen@jacmac.com.au



Bianca McGoldrick
SENIOR ASSOCIATE

t: +61 8 9426 6684
e: bmcgoldrick@jacmac.com.au



- *Fair Trading (Retirement Villages Interim Code) Regulations (No. 2) 2013 (Code).*

During the Government's review process over 100 recommendations for changes to the Act, Regulations and Code were tabled in Parliament in November 2010. The amendments to the Act passed through Parliament in late 2012. The Government is still developing the changes to the Regulations and the revised Code.

The Department of Commerce has reported that the Government currently intends to proclaim the amendments to the Act at the end of 2013 (for commencement in early 2014) along with changes to the Regulations and a revised Code.

The amendments to the Act include important provisions about:

1. imposing a new cap on the recurrent charges liability of residents after they leave a retirement village;
2. what must or must not be included in Residence Contracts;
3. village operator's expenses that cannot be recouped from residents.

Cap on recurrent charges

A retirement village operator will not be able to charge a former resident with recurrent charges after:

- six months after the former resident has permanently vacated the retirement village (for existing residents); and
- three months after the former resident has permanently vacated the retirement village (for residents who enter a Residence Contract after the changes to the Act commence).

Matters to be included in Residence Contracts

The Regulations will set out matters which must or must not be included in Residence Contracts and will deal with the following principles:

- clearly state when proposed amenities and services are to be provided;
- clearly state the areas set aside for private recreation such as gardening;
- provide residents with the right to add or remove fixtures in their own unit;
- require exit fees to be calculated on a daily pro rata basis to avoid the former resident and incoming resident being charged for the same period.

Village operator prohibiting from demanding payment

There will be prohibitions on the village operator requiring payment in respect of matters that are not directly related to operating the village, such as certain



legal court costs incurred by the village operators, overseas travel by the village operator and depreciation amounts. The details are yet to be made available.

What should you do now?

The changes to the retirement villages legislation will affect all Residence Contracts in existence and new Residence Contracts entered into in the future. The Unfair Contracts law applies to all Residence Contracts entered after 1 July 2010 and does not apply to Residence Contracts entered into before 1 July 2010 unless they were subsequently amended after 1 July 2010.

We recommend that retirement village operator's review their standard Residence Contracts to ensure compliance with both:

- the amendments to the Retirement Villages legislation; and
- the Unfair Contracts laws in the Australian Consumer Law.

Jackson McDonald can review your retirement village's Residence Contracts and other standard documentation (either now or on commencement of the changes to the Retirement Villages legislation) to ensure they comply with the law.

The industry is waiting on the detail of the Government's proposed amendments to the Regulations and the revised Code. Watch this space: we will be distributing further articles once more details are released about the changes to the retirement villages legislation.

About Jackson McDonald

Jackson McDonald's Health & Aged Care group has considerable experience in serving the legal needs of owners, operators and developers of retirement villages and aged care facilities.

Jackson McDonald's core capabilities in the retirement village and aged care sectors include:

1. Buying, selling and developing retirement villages, aged care facilities, hospitals and medical centres
2. Resident agreements and lease / licence for life documentation
3. Not for profit rates and taxes exemptions
4. Interpretation of the *Aged Care Act* and Retirement Villages legislation
5. Taxation advice
6. Risk management and asset protection
7. Workplace relations
8. Safety



9. Treatment and care liability - including coronial investigations and inquests
10. Intellectual property management and protection
11. Corporate structure design, advice and restructure
12. Corporate governance advice
13. Dispute resolution and litigation services.

Disclaimer: This publication is intended to provide general information only and should not be relied upon as legal advice. If you require legal advice on a matter please contact us.

Contact Us

t +61 8 9426 6611 **f** +61 8 9321 2002 **e** jacmac@jacmac.com.au

a Level 25, 140 St Georges Terrace, Perth, Western Australia 6000
GPO Box M971, Perth, Western Australia 6843

www.jacmac.com.au