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Sent: Friday, 3 December 2021 4:39 pm
To: aml
Cc: [REDACTED]
Subject: RVA submission on the Anti-Money Laundering and Countering Financing of Terrorism Act review
Attachments: RVA submission 12-21.docx

Good afternoon

I have pleasure in attaching the Retirement Villages Association's submission on the review of the AML/CFT Act for your consideration.

I am very happy to meet and discuss this submission.

Kind regards

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RETIREMENT VILLAGES ASSOCIATION

Submission to the Ministry of Justice

on

AML/CFT Statutory Review Consultation 2021

1. Introduction

The Retirement Villages Association (RVA) represents the interests of the owners, developers and managers of registered retirement villages across New Zealand. Our 401 member villages provide homes to around 50,000 older New Zealanders. The sector is regulated by the Retirement Villages Act, regulations and a Code of Practice. A summary of the regulatory framework is an appendix to this submission.

We welcome the opportunity to comment on the AML/CFT (“the Act”) Statutory review.

The RVA wrote to the Ministry of Justice in September 2011 to seek an exemption from the Act which was successful in that village transactions were deemed to fall outside its ambit.

We are aware of the submission on this review made by the Trustees Corporations Association (TCA) on behalf of retirement village statutory supervisors and support their position.

We understand that statutory supervisors, who have responsibility to provide a fiduciary oversight of villages with which they have a Deed of Settlement, have a limited exemption from the AML/CFT Act. Deposits and settlements from intending residents pass through the statutory supervisors’ trust accounts. If that exemption were to be revoked, we expect that they will ask operators to undertake due diligence on their behalf, thereby requiring operators to have an identification process that complies with the AML/CFT Act.

Our submission is that elderly intending residents of retirement villages are a negligible risk so far as this Act is concerned, and that the requirement to verify information is an unreasonable obligation on operators and statutory supervisors.

2. The process to accept a new resident

We have asked members and statutory supervisors to outline the process they require intending residents to follow when they decide to move to a particular village. While the precise process will vary from village to village, in general intending residents complete an application form which seeks or provides the following information :

- Name/s
- Addresses
- Date/s of birth
- Contact details
- Resident’s solicitor and the solicitor’s contact details

- Information about the unit under consideration
- A summary of the general terms and conditions of the intending resident's ORA
- Advice about the 15 day statutory cooling-off period
- Advice about the statutory supervisor, who will be holding the deposit for the unit
- Information about the settlement date

The intending resident will pay a modest deposit to hold the unit. This deposit, usually between \$2,500 and \$5,000, is paid to the statutory supervisor. Cash is not used; all payments are by cheque or bank transfer. The intending resident has the right to cancel the application at any time up until settlement for any reason and the deposit is repaid.

Statutory supervisors advise that they collect around 3,000 deposits from intending residents annually and we understand that around 19% of those deposits are refunded. The usual reasons given are a decline in health so the resident is no longer able to live independently, a change of mind about the village, or a house sale is not completed.

Statutory supervisors take an active interest if a refund is made into an account other than the one from which the money originally came.

The operator then completes the Occupation Right Agreement (the contract giving the resident the right to live in the village, or ORA) and sends it to the resident's nominated solicitor, who discusses it with the resident. The solicitor is required by the Retirement Villages Act to sign a certificate that s/he has discussed the ORA with the intending resident and that the resident understands it.

The signed ORA is then returned to the operator and the sale process (which is usually conditional on another property being sold) continues. The statutory 15 day cooling-off period starts once the ORA is signed. We are advised that the number of residents who cancel during the cooling-off period are relatively few in number – perhaps a dozen or so annually across the industry.

ORAs for all registered retirement villages are available from the Registrar of Retirement Villages' website.

When the intending resident settles and pays the balance to the statutory supervisor, s/he takes possession and the funds are paid by the statutory supervisor to the operator.

In addition to this process, many operators require the intending resident to undergo a health check or request permission to obtain relevant health information from the resident's doctor to confirm they are capable of living independently. They may also require a doctor's certificate for assistance and extra care, if the resident is eligible for that.

Some operators meet the intending resident in their own home to judge their suitability for the village.

3. Impact on the industry

Assuming that retirement village intending residents represent a low risk so far as the AML/CFT Act is concerned, in addition to the normal application process the Act requires operators to verify the

name, date of birth, and address of intending residents. According to the Identity Verification Code of Practice name and date of birth verification can be done by :

- sighting a passport, firearms licence, national ID card, or
- a full birth certificate plus a driver's licence, or
- a driver's licence plus a bank statement, a SuperGold Card (if volunteered), or a government agency communication such as an IRD statement.

Address verification can be done using documents issued by a "reliable and independent source". The Code is silent about how this might be done but typically a utilities or rates demand would suffice.

The process assumes that elderly intending residents actually have a current passport, driver's licence and so forth, can find them and remember to bring them to the village. In our experience this is unlikely and intending residents will find such a process demeaning and intrusive. It will also require the operator to sight and record the details of additional and, so far as the retirement village process is concerned, irrelevant data.

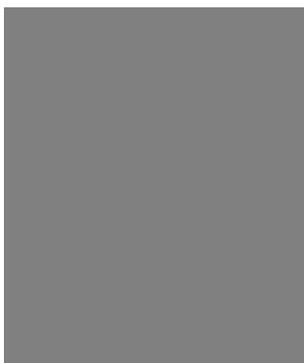
In some cases payment for the ORA comes from a trust. In these cases the obligation to do due diligence will be very onerous for the operator.

It is important to stress that any additional costs of this process will be met by the residents collectively from increased weekly fees. The Association has been working to minimise compliance costs whenever possible.

For these reasons we strongly believe the existing exemption should continue to apply and urge the Ministry to retain it.

I am happy to discuss this submission if there are any questions you may have.

Kind regards



Executive Director

NEW ZEALAND'S RETIREMENT VILLAGE REGULATORY REGIME

1. The retirement village industry

The ageing population in NZ has been known and understood for many years. Between 2020 and 2043, people aged 75+ are projected to increase by almost 460,000, or 142%. Providing safe, secure and age-appropriate housing for them will be a public policy challenge, but is also one that allows retirement village operators to be part of the solution.

Over the last 30 years or so the popularity of retirement (or lifestyle) village living has grown dramatically. In 1998 there were approximately 10,000 villas and apartments; by 2000 this had grown to 12,800 dwelling units (up 27%)¹. By the end of 2019 there were 420 registered retirement villages providing approximately 34,200 completed villas and apartments and which are home to around 44,500 older New Zealanders.²

As at December 2019 the retirement village development pipeline indicated a total of 22,014 units at some point in the design, consent or construction phase across 115 existing villages planning to expand and 90 brand-new villages.

The industry's market share as at December 2020 was around 14.3% of the +75 age population. This figure is an increase on the 9.4% penetration rate recorded at the end of 2012.³ Just to maintain this market share and cater for the natural increase in the +75 demographic, retirement village operators will need to build 17,800 units by 2028.⁴ This is an increase of 52% on the current number of units in just seven or eight years.

The RVA's membership is 96% of the registered retirement village industry by unit number.

Retirement village owners come into one of three broad categories :

- Corporate 60% of completed village units⁵
- Not for profit, trusts 11% of completed village units
- Private village operators 29% of completed village units

“Retirement Villages” are defined in the Retirement Villages Act 2003⁶ as having four characteristics – there are more than two dwellings, they are for people who are predominately retired, the residents have paid a capital sum for the right to live in their unit, and there is a regular fee to cover the cost of services (rates, insurance, maintenance, gardening, etc).

¹ RVA National Survey, 2000

² Jones Lang LaSalle, *NZ Retirement Village Database*, June 2020

³ Jones Lang LaSalle, *op cit*

⁴ Jones Lang LaSalle, *op cit* p. 16

⁵ The five listed corporate groups Ryman Healthcare, Metlifecare, Summerset Group, Oceania Group, the Arvida group plus Bupa Care Services are included in this figure.

⁶ Section 6, Retirement Villages Act 2003

66% of retirement villages include a rest home and/or hospital providing a degree of residential care; at the end of 2018, there were approximately 20,120 care beds (51% of the total number of care beds) could be found in a retirement village. Other villages concentrate only on independent living with the minimum of care services. This latter group tend to see themselves as “lifestyle” villages catering for the active elderly. In general, retirement village living is about maintaining independence.

People move into a retirement village for many reasons, but in our experience, the main ones are:

- Appreciating the peace of mind that a safe and secure environment brings;
- Realising the equity in their home;
- Enjoying a wider range of social contacts and friends;
- Finding out about and experiencing new leisure activities in the company of like-minded people;
- Peace of mind around maintaining a house and garden.

2. Occupancy rights

The Retirement Villages Act ⁷ (“RV Act”) requires residents to have an “occupation right agreement” (ORA) which sets out the terms and conditions of their residence in the village. There are three broad types of occupancy rights in a village – a “licence to occupy” (LTO), unit titles, or rent/leases.

LTOs make up approximately 95% of all occupancy right agreements. The licence is a contractual right to occupy. It does not give rise to any interest in the land and is personal to the licensee.

In unit title villages residents will own the stratum fee simple estate. In a cross-lease village, a resident will usually own the cross-lease title. Approximately 5% of the RVA’s membership comprise of unit title villages.

Some villages offer rental units in which the residents pay a rent which includes the right to live in the unit and have access to any community facilities. The Residential Tenancies Act excludes tenants with an ORA from the provisions of that Act (and includes them in the RV Act).

Financial structure

A resident pays a capital sum for the right to live in the village and have use of the facilities for as long as they want to live there or are able to live there independently. At the end of their occupancy a percentage of the initial capital sum (usually between 70 – 80%) is repaid to the resident. In some cases the village will share any capital gain on the resale of the unit. The retained amount (20-30%), usually referred to as the “facilities fee” or “deferred management fee (DMF)”, includes the cost of the resident’s access to and use of the community facilities and it is charged at the end of the resident’s stay in the village rather than at the start.

An important point to note is that (in most cases) the exiting resident (or their estate) is refunded the capital sum less any deductions as set out in the ORA only when their unit has been resold and the operator has received the incoming resident’s capital payment in full. This is an entirely different

⁷ Retirement Villages Act 2003, Section 27 and schedule 3.

situation to other investments which fall due on specific dates and the risk to the exiting resident is accordingly minimised.

Operators can also agree to pay the exiting resident earlier if they wish. ORAs that are terminated by the operator must be paid within five working days.

All repayments are covered by contract.

3. The retirement village regulatory regime

The retirement village industry is regulated by the Retirement Villages Act 2003 (the Act) and associated regulations. The regime provides comprehensive consumer protection and is designed expressly for residents and intending residents.

Registration

The Act provides for a registry of retirement villages in a manner similar to the Companies Registry and all villages which fit the definition provided in the Act must be registered or face substantial penalties. Registration provides the residents with a degree of security of occupancy in that their interests are protected ahead of any lenders via a memorial over the village's title.

The effect of the memorial on the village title stops the receiver or liquidator of a village from disposing of the village other than as a going concern, or evicting or excluding any resident from using the village's facilities which s/he is entitled to use ⁸.

The importance of the memorial was demonstrated in the Crossdale Courts episode in February 2008 when a group of elderly residents were faced with eviction from their homes because the owner had failed to register the village. The Minister of Building and Housing declared Crossdale to be a retirement village pursuant to S. 103 of the Act, but after considerable court action, the order was found to be invalid because it couldn't be issued after the village operator was found to be bankrupt. Sadly, the remaining residents were evicted.

To register a village, the operator must deposit with the Registrar of Retirement Villages the following documents :

- the deed of supervision from the statutory supervisor and the statutory supervisor's consent to act,
- the ORA,
- a disclosure statement setting out the village's financial situation, ownership etc,
- the legal description of the property.

In certain circumstances, operators must ensure that any amendments to the documents are lodged with the Registrar or that s/he is notified of certain changes.

The Registrar may suspend or cancel a village's registration under certain circumstances ⁹.

⁸ RV Act, s. 22

⁹ RV Act, ss. 18 - 19

Disclosure statements

The requirements to make a disclosure statement available to intending and actual residents is set out in the Retirement Villages (General) Regulations 2006. The disclosure statement must set out :

- Village ownership structure and occupancy rights
- The resident's interests in the residential unit
- Management arrangements for the village, including insurance
- The role of the statutory supervisor
- Legal details about the village title, size, number of dwellings, etc
- Services and facilities provided
- Charges
- Maintenance and development
- Financial statements
- Terms of entering into and exiting ORAs, and moving to higher levels of care.

Occupation Right Agreements¹⁰

ORAs are required to include provisions dealing with the following topics:

- The village name and address
- The nature of the right of occupy (i.e. Licence to Occupy, unit title, etc)
- Rights of both parties around the unit itself, such as selling, security interests, borrowing against the unit, etc)
- Arrangements for managing the village
- Services and facilities available
- Charges relating to the village
- Provisions requiring the operator to use "reasonable care and skill" in managing the village
- Keeping the village in "good condition and order"
- Making and adhering to a long-term maintenance plan
- Insuring the village for full replacement to the satisfaction of the statutory supervisor
- Using reasonable care and skill in the exercise of the operator's powers, functions and duties.

Operators are also required to provide the village's financial statements on request to residents, call and manage residents' meetings, and if the operator is responsible for fining a new resident for a vacant unit, s/he must make all reasonable efforts to do so and not give preference for unoccupied units over previously-occupied units.

Statutory Supervisor¹¹

¹⁰ RV (General) regulations 2006, clauses 6 - 11

¹¹ Statutory supervisors' powers and duties are set out in the Retirement Villages Act 2003, sections 42-43

Unless exempted¹², each village must appoint a statutory supervisor to oversee the village's financial affairs, liaise with the manager, operator and residents, and generally ensure the village is meeting its statutory obligations. If a supervisor believes the financial position of a village is inadequate, s/he may direct the operator to supply specific information to residents, operate the village in a specific manner, or apply to the Court under S. 49 of the Securities Act 1978.

Village operators' and statutory supervisors' duties and responsibilities are set out in the village's deed of supervision, which is available to intending residents.

A Deed of Supervision must contain all information and other matters that are required to be included in it by Regulation 45 of the Retirement Village (General) Regulations 2006. These include the name and address of the operator, a description of the village and its facilities, its degree of completeness, liabilities, ownership structure, rights to occupy the units, a description of the residents' liabilities (if any) resulting from the village's winding-up, details of meetings, and the supervisor's rights and duties, and their costs.

Statutory Supervisors are licensed and regulated through the Financial Markets Authority, a Government agency established to supervise the working of the financial markets.

Code of Practice (CoP)

A legislated CoP came into effect in October 2009.

The Code must be complied with by all registered retirement villages in their day-to-day activities and covers the following matters :

- Staffing of retirement village
- Safety and personal security of residents
- Fire protection and emergency management
- Transfer of residents within retirement village
- Meetings of residents with operator and resident involvement
- Complaints facility
- Accounts
- Maintenance
- The process to terminate an occupation right agreement
- Communication with residents

Following the Canterbury earthquakes the Code was amended to require operators to refund 100% of a resident's original capital sum if a village or unit were destroyed and not rebuilt. This change, led by the RVA, overcame an unfairness when a resident only received the amount in their ORA if their village or unit was not rebuilt in these circumstances. This version came into effect on 14 October 2013.

¹² RV Act, Section 41

All RVA members are audited for their compliance with the Code of Practice every three years. The audit is undertaken by a qualified independent organisation. Villages which pass the audit are accredited; those which fail must improve the areas of weakness and be audited again.

The RVA's Constitution has been revised so that persistent failure to meet the standards set out in the CoP exposes the member to the risk of disciplinary action. The RVA's Disciplinary Authority is a retired High Court Judge, the Hon Dr John Priestley, QC. The Authority's sanctions range from requiring a matter to be remedied through to fines and expulsion from the Association.

Accredited villages receive a certificate to that effect and may use the RVA's logo in their advertisements. Prospective residents and their families are encouraged to ask to see the Certificate of Accreditation and it is an important marketing tool to distinguish compliant villages from others.

Code of Residents' Rights¹³

The Act sets out a list of residents' rights, which include the right to :

- Services and benefits promised in the ORA;
- Information relating to any matters affecting or likely to affect the terms and conditions of the residency;
- Be consulted on any proposed changes in the services and benefits provided or charges paid that may have a material impact on the residency;
- Complain and receive a response;
- A speedy and efficient disputes process;
- Have a support person when dealing with the operator or other residents;
- Be treated with courtesy and have rights respected;
- Not be exploited while living at the village.

Residents are obliged to treat others in the village with respect and courtesy.

Complaints and disputes

Each village must have a complaints and disputes process which residents must use should they wish to lodge a complaint about any aspect of village life. If this system fails to resolve the complaint, residents can take it to the next step, the Retirement Villages Disputes process. This process is set out in detail in the Retirement Villages Act part 4. Managed by the Retirement Commissioner (RC), one or more experienced mediators are selected from a pool appointed by the RC hear the dispute and adjudicate the outcome. Disputes can be brought about alleged breaches of the CoP, the resident's ORA and the Code of Residents' Rights.

The CoP includes a mediation step between the village complaints system and the formal disputes process. Operators must offer residents the opportunity to mediate unresolved disputes. The cost of mediation is met by the operator, although the costs can be shared between the parties if it is a resident v resident matter. The RC maintains a list of approved mediators who have undergone training in elder law and the challenges around mediating disputes involving older people.

¹³ Retirement Villages Act 2003, schedule 4

To date, the formal disputes process has been used 21 times. Most decisions have been in the operator's favour. The costs of mediation and the disputes panel are borne by the operator.

The RVA also operates an informal dispute resolution service for members and residents.

Advertising retirement village units

The RV Act¹⁴ sets out the requirements for advertising units for sale. Only registered villages can advertise themselves as "retirement villages" and offer ORAs. Advertisements must not be misleading or deceptive, and there must be no statement that entering into an ORA is safe or free from risk. Neither can there be any reference to "prospective financial information" unless the advertisement refers to the village's disclosure statement and if a reference is made to a "right to occupy", the advertisement must state if the right is secured or unsecured and if secured, the nature and ranking of the security.

If resident safety and personal security promises are made as a promotional feature in advertising, the operator is required to ensure that the elements of that security are indeed provided.

If a retirement village operator breaches the provisions of the RV Act, the penalties are substantial :

- The Registrar can suspend registration;
- Fine up to \$50,000;
- Injunction;
- Other orders; and
- Adverse publicity.

The provisions of the Fair Trading Act also apply to retirement village advertising.

4. Specific protection for new residents

Intending retirement village residents are encouraged to visit as many villages as they can, talk to other residents and operators, and find out as much as possible about each village, its ambience and quality of amenities.

Intending residents must ¹⁵ be given copies of the ORA and the disclosure statement, the Code of Residents' Rights and the Code of Practice then in force. The deed of supervision and the village's financial statements must be provided on request.

In addition, intending residents must "receive independent legal advice" ¹⁶ about the details of the ORA and the resident's signature on the ORA must be witnessed by a lawyer. The same lawyer must also certify that before the intending resident signed the ORA, s/he "explained to that person the general effect of the ORA and its implications." The RV Act requires that "the explanation must be given in a manner and in a language that is appropriate to the age and understanding of the intending resident."

¹⁴ RV Act 2003, s. 25-26

¹⁵ RV Act 2003, s. 30 (1)

¹⁶ RV Act 2003, s. 27

All ORA must include a provision allowing a resident to cancel the ORA within 15 days after it is signed without having to give any reason (the “cooling-off period”).¹⁷

All deposits and other payments paid by the resident for an ORA must be held for the resident’s benefit in an interest-bearing account held by an independent person to the operator until settlement or the ORA is cancelled pursuant to the cooling-off period. After the 15 day cooling-off period, and provided the ORA has not been cancelled, the money is then paid to the operator.

The ORA is voidable by the resident¹⁸ if the village’s registration has been suspended (s. 18 (3)), the advertising is misleading (s. 25 (1)), the ORA contravenes the requirements set out in the RV Act and regulations (s. 27), or the required information has not been provided (s. 30). If this occurs the resident is entitled to receive a refund of all capital sums paid, interest and costs.

The RV Act (s. 34) sets out the details of additional information a resident is entitled to have if it will have a material impact on the ORA or the charges to be levied as part of the ORA, and lists a range of other specific matters on which residents have the right to be notified. These include issues such as changes in secured liabilities over the village, the Registrar’s decision to exempt the operator from any provisions of the retirement village legislation, suspension, actual or threatened action by a creditor, an insurer’s decision to refuse to insure the village or any part of it, and any actual or threatened legal provisions against the operator that may affect the residents’ interests.

5. Summary

The Association stresses that the retirement village regime was established to provide comprehensive consumer protection for residents. Intending residents also have a far-ranging set of protections including a requirement to have legal advice and sign-off as well as the protections in the RV Act, regulations and Codes. Residents live in the village and have access to the operator, his/her staff, a statutory supervisor and the Registrar of Retirement Villages. Their tenure in the village is protected by a memorial on the village title which guarantees them that the village can only be sold as a going concern and their access to the village amenities.

It's been claimed that the NZ retirement village regulatory regime is “world-leading”. The International Longevity Centre in the UK described the NZ retirement village regime as “perhaps the strongest example of legislation specific to this sector”¹⁹. This view was reflected by Kathryn Griner in her Report on the Enquiry into the NSW Retirement Village sector.

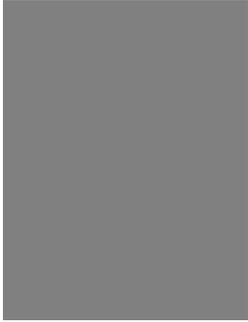
As further evidence of this, we are regularly invited to consult with overseas jurisdictions that are starting out on the retirement village journey and who see the NZ model is a good way to provide affordable, safe, and age-appropriate housing to their seniors. These include Australia, the UK, Malaysia, Singapore, India, among others.

¹⁷ RV Act 2003, s. 28

¹⁸ RV Act 2003, s. 31

¹⁹ P. 12 <https://ilcuk.org.uk/wp-content/uploads/2018/10/Stronger-Foundations-International-Lessons-for-the-Housing-with-Care.pdf>

The Association strongly supports the consumer protection regime contained in the RV Act and regulations and works with relevant Government agencies and stakeholder groups to review it from time to time to ensure it remains relevant for residents.



Executive Director

May 2020