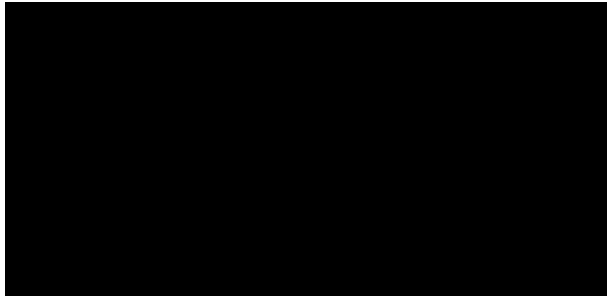


22 February 2024



### **Official Information Act #23.159 - Response**

1. We refer to your request received on 19 January 2024 for copies of the Commerce Commission's (the Commission) letters to retirement village operators in relation to the Commission's retirement village sector investigation.
2. On 19 February 2024, the Commission extended the time limit by which we must make a decision on your request to 23 February 2024.

### **Our response**

3. We have decided to grant your request.
4. We consulted with each of the 12 retirement village operators on release of the Commission's letters.
5. A list of the 12 letters is contained in **Appendix A** below.
6. We have withheld personal information in each letter under section 9(2)(a) of the OIA as the withholding of the information is necessary to protect the privacy of natural persons.
7. We consider that good reasons exist for withholding the information and this is not outweighed by other considerations which would make it desirable, in the public interest, to make the information available (section 9(1) of the OIA).

### **Further information**

8. If you are not satisfied with the Commission's response to your OIA request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and

review this response. However, we would welcome the opportunity to discuss any concerns with you first.

9. Please note the Commission will be publishing this response to your request on its website. Your personal details will be redacted from the published response.
10. Please do not hesitate to contact us at [uia@comcom.govt.nz](mailto:uia@comcom.govt.nz) if you have any questions about this request.

Yours sincerely



OIA and Information Coordinator

<b>Appendix A</b>		
<b>Retirement village operator</b>	<b>Date</b>	<b>Redactions</b>
Arvida Group Limited	17 January 2024	s 9(2)(a) of the OIA
Heritage Lifecare Villages Limited	17 January 2024	s 9(2)(a) of the OIA
Tamahere Country Club Limited	17 January 2024	s 9(2)(a) of the OIA
Ultimate Care Group Limited	17 January 2024	s 9(2)(a) of the OIA
Metlifecare Limited	18 January 2024	s 9(2)(a) of the OIA
Ryman Healthcare Limited	18 January 2024	s 9(2)(a) of the OIA
Vines Co Limited	18 January 2024	s 9(2)(a) of the OIA
Althorp Village Limited	19 January 2024	s 9(2)(a) of the OIA
Coastal View Limited	19 January 2024	s 9(2)(a) of the OIA
Oceania Healthcare Limited	19 January 2024	s 9(2)(a) of the OIA
Omokoroa Healthcare Limited	19 January 2024	s 9(2)(a) of the OIA
Palm Grove Partnership	19 January 2024	s 9(2)(a) of the OIA

**These letters do not represent a formal finding that retirement village operators have contravened the law. Only the Courts can decide if a breach of the law has occurred.**

17 January 2024

[REDACTED]  
[REDACTED]  
Arvida Group Limited

BY EMAIL ONLY: [REDACTED]@arvida.co.nz

Dear [REDACTED]

### **Retirement Villages – Reminder of obligations under the Fair Trading Act 1986**

1. We refer to our telephone discussion of today with yourself and [REDACTED], General Counsel.
2. As discussed, the Commerce Commission (**Commission**) has recently been undertaking an investigation into the Retirement Villages sector to ascertain whether there is any conduct in the sector that raises concerns under the Fair Trading Act 1986 (**FT Act**).

### **Consumer NZ complaint<sup>1</sup>**

3. As part of the investigation, we have revisited a complaint the Commission received from Consumer NZ in September 2021 about how retirement village operators are marketing their aged residential care services.
4. The main concern of this complaint was how ‘continuum of care’ type claims, made by operators on their websites, risk misleading consumers about the availability of aged residential care to retirement village residents and so risk breaching sections 11 and 13 of the FT Act. The complaint cites, as an example, a claim regarding care and support services that was made by Arvida Group Limited (**Arvida**) on its website as at 13 September 2021.
5. As better access to assistance with health and care issues is one of the key reasons why people decide to move into a retirement village,<sup>2</sup> we decided to revisit this

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<sup>1</sup> Refer <https://www.consumer.org.nz/articles/retirement-villages-care-claims-risk-misleading-consumers#article-advertising-claims>.

<sup>2</sup> Refer Broad JB, et al, *BMJ Open* 2020 “Health profile of residents of retirement villages in Auckland, New Zealand: findings from a cross-sectional survey with health assessment” at page 6.

complaint to ascertain whether the concern raised in the complaint is still an issue for the retirement village industry.

6. We have completed a preliminary assessment of this complaint and while we do not intend to further investigate the complaint made against Arvida at this time, we are writing to you to bring our preliminary views to your attention to assist Arvida in complying with its obligations under the FT Act.

### The Commission's role

7. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
8. In our role, we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>3</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm, and the public interest.

### The complaint

9. The complaint alleges that the following statement retrieved from Arvida's website on 13 September 2021 risked misleading consumers about the availability of care in breach of sections 11 and 13 of the FT Act:
  - 9.1 *"Care & support Arvida communities provide a full continuum of care and can support residents who have a multitude of specific personal and health needs. Whatever your care requirements are, you'll be in good hands."*
10. This statement was alleged to be at risk of misleading consumers when considered against a retirement village resident's contractual right to access aged residential care services. Clause 5.8(b) from the Occupation Right Agreement for Village at the Park states that:
  - 10.1 *"If you are needs assessed as requiring long-term residential care, the following options may be available... If a suitable room is available and you request it, you can transfer to an Arvida Care Centre. We will give you priority access to an Arvida Care Centre over applicants who are not residents of an Arvida Village".<sup>4</sup>*

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<sup>3</sup> Refer <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>4</sup> Refer clause 5.8(b) Arvida, Village at the Park Occupation Right Agreement, Document ID: JHB-291857-57-32-3.

### Our more recent review

11. We have conducted a more recent review of Arvida’s website and record at **Attachment A** screenshots of statements made on the website about care that is available at Arvida villages. We note the following statements on Arvida’s website that specifically relate to residential care services that are available to residents of an Arvida village:
  - 11.1 *“If you need care or extra support at any point, you’ll have priority access to an available Arvida care centre – either in your current community, or at another Arvida community”* (see Image 1 at Attachment A).<sup>5</sup>
  - 11.2 *“You can live independently in an architecturally-designed villa or apartment, or you can choose a higher level of support including rest home, hospital and dementia care in our care centre. This continuum of care ensures you won’t need to leave Village at the Park if your needs change in the future”* (see Image 2 at Attachment A).<sup>6</sup>
12. We have also reviewed the terms and conditions relating to a resident’s right to care set out in the most current registered Occupation Right Agreement for Village at the Park. The relevant clauses state:
  - 12.1 Clause 5.7: *“If we consider it advisable or you have required it, you agree to undertake a needs assessment at your cost to determine if you are eligible for long-term residential care. Your right to receive appropriate care in an Arvida Care Centre may depend on the result of this assessment.*
  - 12.2 Clause 5.8: *“If you are needs assessed as requiring long-term residential care, the following options may be available... (b) If a suitable room is available and your request it, you can transfer to an Arvida Care Centre. We will give you priority access to an Arvida Care Centre over applicants who are not residents of an Arvida Village...(d) If you want or need to move to another care facility outside Arvida, we will assist you in finding an alternative.”*<sup>7</sup>
13. We consider that information provided both in the complaint and obtained by the Commission as a result of our further review since the complaint was made, may give rise to a possible breach of sections 11 and 13 of the FT Act.

### Fair Trading Act 1986

14. Section 11 makes it an offence for a person in trade to engage in conduct in relation to services that is liable to mislead the public regarding factors including the *“nature, characteristics, suitability for a purpose or quantity”* of the services.

<sup>5</sup> <https://www.arvida.co.nz/living-with-arvida>

<sup>6</sup> <https://www.arvida.co.nz/living-with-arvida/communities/village-at-the-park>

<sup>7</sup> Refer clauses 5.7 and 5.8 Arvida Village at the Park Occupation Right Agreement dated 6 December 2021.

15. Section 13 makes it an offence for a person in trade in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, to make a false or misleading representation concerning the existence, exclusion, or effect of any guarantee or right (section 13(i)).
16. For your information, we set out sections 11 and 13 of the FT Act at **Attachment B**. You are able to view the FT Act in full at [www.legislation.govt.nz](http://www.legislation.govt.nz).

### **Possible breach of sections 11 and 13 – preliminary assessment**

17. In our view the statements made on Arvida's website regarding aged residential care services offered at an Arvida village may risk misleading the public when compared to the contractual right that a resident of an Arvida village has to such care services.
18. This is because the statements on the website give the overall impression that further care and support services are available to a resident at their discretion, subject only to priority access. The statements on the website do not directly refer to or even allude to:
  - 18.1 the requirement for a needs assessment that will determine the type and level of care that a resident may require; and
  - 18.2 that there are situations where the results of such assessment may require a resident to move out of an Arvida village where the available Arvida care facilities are not able to provide the care that the resident requires (such as, for example, certain types of psychogeriatric care).
19. This overall impression created by the statements on the website do not, in our view, suitably accord with a resident's contractual right to aged residential care services at an Arvida village which provides that such care is subject to both the results of a needs assessment and the actual availability of a suitable care room at an Arvida care facility.
20. The marketing of a resident's right to care in a way that omits to mention (prominently and in proximate distance to other statements about care services) the matters noted in paragraphs 18.1 and 18.2 above, may create an impression that aged residential care will be available to a resident at an Arvida village at their discretion as and when it is required when that is not the case. In our view, this impression risks breaching section 11 and also section 13 of the FT Act.

### **Penalties for breaching the Fair Trading Act**

21. Only the courts can decide if there has been a breach of the FT Act. The court can impose severe penalties where it finds the law has been broken.
22. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence. Where a company is a repeat offender, directors and



those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

#### **Further information**

23. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

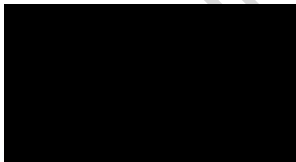
#### **Your response to our letter**

24. Our decision to take no further action on the complaint does not prevent any other person from doing so. We may also choose to take further action in the future should this conduct continue to come to our attention.
25. We recommend that Arvida takes legal advice in relation to the issues raised in this letter and review the statements made on its website and in any other marketing material produced by Arvida in relation to a resident's right to aged residential care services.

#### **Official Information Act 1982 (ORA) request**

26. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose, under the OIA, any letters we send to operators relating to this investigation.
27. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
28. Please contact me on (04) 924 3657 by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions in relation to this letter.

Yours sincerely



Sara Jones  
**Senior Investigator**  
**Fair Trading Branch**

## Attachment A – Screenshots from Arvida’s website

Image 1 (Screenshot taken from <https://www.arvida.co.nz/living-with-arvida> on 2 November 2023)<sup>8</sup>

The screenshot displays the Arvida website's 'Living with Arvida' page. The header includes the Arvida logo, navigation links for 'Why Arvida', 'Living with Arvida', 'Discover', and 'Investors', a search bar, and a contact number '0800 2...' with a 'CONTACT' button. The main content area features a light blue background with a list of benefits on the right and a photograph of a modern living space on the left.

**Living in an Arvida community should be an experience that makes your life better.**

As part of our commitment to helping you live a life with soul - and enjoying this time of your life with a sense of community, belonging and security - we are happy to make a number of commitments to help provide you with certainty over your decision to live with Arvida.

We promise clarity about fees, transfers, ORAs and all the other details related to your relationship with us.

We call this the Arvida Advantage.

**Living with Arvida benefits:**

- A home for life
- Weekly fee fixed for life
- Help to move
- You can change your mind
- Transfers made easy
- Get priority care if you need it
- Capped Deferred Management Fee (DMF)
- Fees stop immediately
- Repayment protection

If you need care or extra support at any point, you'll have priority access to an available Arvida care centre - either in your current community, or at another Arvida community.

*Released under the Official Information Act 1982*

<sup>8</sup> Both screenshots at Images 1 and 2 are current as at the date of this letter.

Image 2 (Screenshot taken from <https://www.arvida.co.nz/living-with-arvida/communities/village-at-the-park> on 2 November 2023)

## A capital life in Wellington

- ✔ Independent living  
Villas & independent apartments
- ✔ Assisted living  
Serviced apartments
- ✔ Personalised care  
Rest home & hospital-level care
- ✔ Specialised care  
Dementia care

As an Arvida Living Well Community, Village at the Park is calm and welcoming with a feeling of cosiness that many retirement villages can't achieve.

You can live independently in an architecturally-designed villa or apartment, or you can choose a higher level of support including rest home, hospital and dementia care in our care centre. This continuum of care ensures you won't need to leave Village at the Park if your needs change in the future.

Released under the Official Information Act 1982

## Attachment B – Sections 11 and 13 of the FT Act

### 11 Misleading conduct in relation to services

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

#### *False representations*

### 13 False or misleading representations

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or
- (c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
- (d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
- (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- (f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
- (g) make a false or misleading representation with respect to the price of any goods or services; or
- (h) make a false or misleading representation concerning the need for any goods or services; or
- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the [Consumer Guarantees Act 1993](#); or
- (j) make a false or misleading representation concerning the place of origin of goods or services.

17 January 2024

██████████  
████████████████████  
Heritage Lifecare Villages Ltd

BY EMAIL ONLY: ██████████@hll.org.nz

Dear ██████████

### Retirement Villages - Reminder of obligations under the Fair Trading Act 1986

1. We refer to our telephone discussion of today with yourself and ██████████, Head of Village Sales.
2. As discussed, the Commerce Commission (**Commission**) has recently been undertaking an investigation into the Retirement Villages sector to ascertain whether there is conduct in the sector that raises concerns under the Fair Trading Act 1986 (**FT Act**).

### Consumer NZ complaint<sup>1</sup>

3. As part of our investigation we have revisited a complaint the Commission received from Consumer NZ in September 2021 about how retirement village operators are marketing their aged residential care services.
4. The main concern of this complaint was how 'continuum of care' type claims, made by operators on their websites, risk misleading consumers about the availability of aged residential care to retirement village residents and so risk breaching sections 11 and 13 of the FT Act.
5. As better access to assistance with health and care issues is one of the key reasons why people decide to move into a retirement village,<sup>2</sup> we decided to revisit this complaint to ascertain whether the concern raised in the complaint continues to be an issue for the retirement village industry.

---

<sup>1</sup> Refer <https://www.consumer.org.nz/articles/retirement-villages-care-claims-risk-misleading-consumers#article-advertising-claims>.

<sup>2</sup> Refer Broad JB, et al, *BMJ Open* 2020 "Health profile of residents of retirement villages in Auckland, New Zealand: findings from a cross-sectional survey with health assessment" at page 6.

6. While the complaint itself does not cite any statements made on the website of Heritage Lifecare Villages Limited (**Heritage**), we have chosen to review the website of Heritage and in particular statements made on the website about aged residential care services that are available to retirement village residents.
7. We are writing to you to bring our preliminary views to your attention to assist Heritage in complying with its obligations under the FT Act. It is not our intention at this stage to take any further enforcement steps against Heritage in relation to this matter.

### Commerce Commission's role

8. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
9. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>3</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.

### Our review of Heritage's website and an occupation right agreement

10. We have reviewed Heritage's website for statements made about residential care that is offered to residents of a Heritage village. We record at **Attachment A** a screenshot of a statement made on the website about care offered to village residents. The statement records:
  - 10.1 *"Village Are you looking for an independent lifestyle with care available when you need it? Take a look at our Villages that offer units, villas or townhouses for independent living, with the peace of mind that care is on hand if needed."* (see Image 1 of Attachment A)
11. We have also reviewed the terms and conditions relating to moving into care for a resident of a Heritage village and cite, as an example, the Occupation Right Agreement between Heritage and a resident for the Carter Village in Te Puke.<sup>4</sup> The relevant clauses state:
  - 11.1 *"Clause 3.13 If you have been needs accessed as requiring long term residential care (and we provide that level of care in the Care Facility) and if we have a bed in the*

<sup>3</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>4</sup> Refer Heritage Lifecare Occupation Right Agreement dated 3 July 2023 BC10066241244.

*Care Facility available, we will ensure that you have priority access to move to a bed in the Care Facility before people who are not residents at the Village...”*

- 11.2 *“Clause 3.16 If the result of any needs assessment is that you require a level of long term residential care that we cannot provide you with in the Care Facility you acknowledge that you will need to make alternative arrangements for your care and we will assist you with these arrangements.”*
- 11.3 *“Care Facility” is defined in the Occupation Right Agreement as “the aged care facility situated at or adjacent to the Village and operated by us or an entity associated with us.”*

#### **Fair Trading Act 1986**

12. Section 11 makes it an offence for a person in trade to engage in conduct in relation to services that is liable to mislead the public regarding factors including the *“nature, characteristics, suitability for a purpose or quantity”* of the services.
13. Section 13 makes it an offence for a person in trade in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, to make a false or misleading representation concerning the existence, exclusion or effect of any guarantee or right (section 13(i)).
14. For your information we set out sections 11 and 13 of the FT Act at **Attachment B**. You are able to view the entire FT Act at [www.legislation.govt.nz](http://www.legislation.govt.nz).

#### **Possible breach of sections 11 and 13(i) of the FT Act – preliminary assessment**

15. We are concerned that the upfront statement made on Heritage’s website advising that retirement village residents can have *“peace of mind that care is on hand if needed”*, risks misleading consumers when compared to the contractual terms relating to residential care options that are offered to village residents under an occupation right agreement.
16. This is because the statement on the website gives the general impression that residential care options that are also offered by Heritage (and outlined on their website alongside the village offering) are available to residents if needed in the future. This impression is not suitably qualified with key information such as that the right to access aged residential care is subject to a needs assessment and the actual availability of a care bed in a Heritage care facility.
17. This general impression created by the statement on the website does not, in our view, sufficiently accord with a resident’s contractual right to aged residential care services at the village. Access to residential care services is always subject to a needs assessment and the availability of a care bed that can provide the assessed level of care.

18. The marketing of a resident's right to care in this way, without a suitable prominent and proximate reference to key qualifying information, risks giving an impression that aged residential care services will be available at the election of the resident. The Commission considers that this impression could risk breaching section 11 and also section 13 of the FT Act.

#### **Penalties for breaching the FT Act**

19. Only the courts can decide if there has been a breach of the FT Act. The court can impose severe penalties where it finds the law has been broken.
20. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

#### **Further information**

21. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

#### **Your response to our letter**

22. Our decision to take no further action does not prevent any other person from doing so. We may also choose to take further action in the future should this conduct continue to come to our attention.
23. We recommend Heritage takes legal advice in relation to the issues raised in this letter and review the statements made on its website and in any other marketing material produced by Heritage in relation to a resident's right to other care services that are offered by Heritage at a care facility.

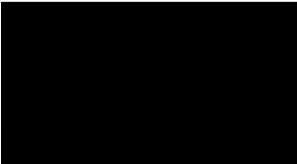
#### **Request under Official Information Act 1982 (OIA)**

24. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose, under the OIA, any letters we send to operators relating to this investigation.
25. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.



26. Please feel free to contact me on (04) 924 3657 or by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions in relation to this letter.

Yours sincerely



Sara Jones  
**Senior Investigator**  
**Fair Trading Branch**

Released under the Official  
Information Act 1982

## Attachment A – Screen shots from Heritage Lifecare’s Website<sup>5</sup>

Image 1 (Screenshot taken on 17 October 2023 under heading ‘Levels of Care – Village’)

### Village

Are you looking for an independent lifestyle with care available when you need it? Take a look at our Villages that offer units, villas or townhouses for independent living, with the peace of mind that care is on hand if needed.

Retirement Villages are vibrant communities within local regions and towns. You'll find great company in like-minded people, wonderful friendly staff and genuine heartfelt care when you need it. Read our resident stories or visit a Retirement Village near you to see just what we mean about living 'A Better Everyday'.

[Find Village options closest to you.](#)

[See our current Village properties on TradeMe.](#)

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<sup>5</sup>[www.heritagelifecare.co.nz/levels-of-care/vilage](http://www.heritagelifecare.co.nz/levels-of-care/vilage). Retrieved 17 October 2023. Still current as at the date of this letter.

## Attachment B – Sections 11 and 13 of the FT Act (as at 10 July 2023)

### 11 Misleading conduct in relation to services

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

#### *False representations*

### 13 False or misleading representations

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or
- (c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
- (d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
- (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- (f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
- (g) make a false or misleading representation with respect to the price of any goods or services; or
- (h) make a false or misleading representation concerning the need for any goods or services; or
- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the [Consumer Guarantees Act 1993](#); or
- (j) make a false or misleading representation concerning the place of origin of goods or services.

17 January 2024

[REDACTED]  
[REDACTED]  
Tamahere Country Club Limited

BY EMAIL: [REDACTED]

Dear [REDACTED]

## Fair Trading Act 1986 – Notice of complaint and preliminary assessment

### Introduction

1. We refer to our telephone discussion of today ([REDACTED]/Jones).
2. As discussed, the Commerce Commission (**Commission**) received a complaint in September 2022 about the Occupation Right Agreement (**ORA**) registered by the Tamahere Country Club Ltd (**TCC**) that raises potential issues under the unfair contract term provisions (**UCT provisions**) of the Fair Trading Act 1986 (**FT Act**).
3. We have completed an assessment of this complaint and have also reviewed statements made on the website of Tamahere County Club<sup>1</sup> (**website**), as part of our investigation into the Retirement Village sector to ascertain whether there is any conduct in the sector that raises concerns under the FT Act.
4. We do not intend to conduct further investigations at this time in relation to the complaint made against TCC or the issues we raise in this letter regarding certain statements on the website. However, we are writing to you to bring our preliminary views to your attention to assist you in complying with your obligations under the FT Act and to invite TCC's response to the issues raised in this letter.
5. We recommend that you take legal advice should you have any questions about complying with your obligations under the FT Act.

### Commerce Commission's role

6. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.

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<sup>1</sup> [www.tamaherecountryclub.co.nz](http://www.tamaherecountryclub.co.nz)

7. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>2</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.
8. In relation to an unfair contract term (**UCT**), only the Commission has the power under the FT Act to make an application to a court for a declaration that a term in a standard form consumer contract is a UCT. Where a court has declared that a term in a standard form contract is a UCT, a person can no longer include that term in its contract or enforce it and is liable for prosecution by the Commission if it does so.

### **Commission's preliminary assessment**

9. We have reviewed this complaint and the ORA dated August 2022 and considered it against the UCT provisions of the FT Act. In 2023 you registered three further amended ORAs in February, May and August. While our initial assessment focussed on the terms in the ORA dated August 2022, where any subsequent ORA amended a term raised in this letter, we note those amendments and provide our comments where relevant.
10. We have also reviewed the website and made a preliminary assessment as to whether there are any statements on the website that may possibly breach sections 11 and 13 of the FT Act, relating to false or misleading conduct or representations.
11. By completing our preliminary assessment and providing our comments on certain terms in the ORA, the Commission does not endorse or approve of the ORA. Instead, our assessment has commented on terms that we consider could give rise to unfairness. In providing our views we acknowledge that we have not provided TCC with the opportunity to respond to our concerns or provide an explanation as to whether the clauses identified in this letter are reasonably necessary to protect the legitimate interests of TCC. Our view is not a determination of non-compliance, as only the courts have the power to declare a term unfair under the UCT provisions.
12. We also note that the complaint identified certain key financial terms that are alleged to breach the UCT provisions of the FT Act and gave examples of such terms found in a range of operators' ORAs. These terms include the exit payment date, the end date for the accrual of the deferred management fee and the end date for payment of the village outgoings charge.<sup>3</sup>

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<sup>2</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>3</sup> In relation to your ORA these terms are clause 15 (exit payment date), Schedule 1 (calculation of village contribution) and clause 13.4.2 (weekly fee end date).

13. These key financial terms have not been considered as part of our review. Parts of the Retirement Villages Code of Practice (**COP**) cover the subject matter of these terms.<sup>4</sup> Given that the COP has the status of an “enactment” and the FT Act excludes from consideration contract terms that are “expressly permitted” by an “enactment”, these terms do not clearly and unambiguously fall within the remit of the UCT provisions of the FT Act.<sup>5</sup> In addition, a term that “sets the upfront price” payable under the contract is excluded from UCT review.<sup>6</sup> In our view, any alleged unfairness issues surrounding these terms are better considered as part of the wider review of the underlying legislation that is currently being undertaken by the Ministry of Housing and Urban Development (**MHUD**).<sup>7</sup> We have informed MHUD of our view.
14. This decision not to review these key financial terms is not to be considered as approval of such terms by the Commission, or as an acknowledgement that there are no fairness concerns with these terms.
15. That said, the Commission does acknowledge a recent amendment that you have made to the term in your ORA dated August 2022 setting out the end date for the charge of the “Village Payment” (clause 13.4.2). Your new term set out in the ORA dated February 2023 (clause 13.4.1) now provides that you will stop charging residents this charge from the “Vacation Date” defined as “*the later of (1) the Termination Date and (2) the date on which the Resident stops living in the Home and the Resident’s Possessions are removed from the Home.*” This amendment addresses the concerns set out in the complaint relating to this key financial term.

### The complaint

16. In September 2022 the Commission received a complaint from the Retirement Villages Residents Association of New Zealand (**RVRANZ**) that raises issues under the UCT provisions of the FT Act and more generally around the fairness of terms in occupation right agreements.<sup>8</sup>
17. The term in the ORA dated August 2022 that was identified in the RVRANZ’s complaint that the Commission would like to raise with you in this letter is:

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<sup>4</sup> Refer clause 54 of the Retirement Villages Code of Practice 2008.

<sup>5</sup> Refer to section 46K(1)(c) of the FT Act.

<sup>6</sup> Refer section 46K(1)(b) of the FT Act. The “upfront price” payable means the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent (section 46K(2)).

<sup>7</sup> We refer you to the Discussion paper published in August 2023 by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development “Review of the Retirement Villages Act 2003: Options for change” and in particular Part D of this paper. See [https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8\\_0.pdf](https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8_0.pdf).

<sup>8</sup> <https://www.rvrnz.org.nz/wp-content/uploads/2022/10/RVR-Unfair-Terms-Oct22-DIGITAL.pdf>

- 17.1 clause 1.1 definition of “Chattels”. We have considered this definition in the context of the related repair and maintenance clauses including clauses 5.1.3, 5.13 and 7.4 (a resident’s repair, replacement and maintenance obligations).

### Other terms of concern

18. We reviewed other terms in the ORA dated August 2022 against the UCT provisions of the FT Act. Our review has identified further terms that raise issues as to their fairness when applying the test for UCTs including:
- 18.1 clause 5.4 and Schedule 2 (change to “Weekly Fee”);
  - 18.2 clauses 6.6, 9.2 and Schedule 5 (resident’s authorisation regarding personal information);
  - 18.3 clauses 8.6.2 to 8.6.4 and 10.12 and clause 8.2 (parties’ obligations for loss and damage that they cause to the property of the other party);
  - 18.4 clause 14.3 (repair of “Home” following termination of ORA);
  - 18.5 clause 19.2 (future development); and
  - 18.6 clause 26 (entire agreement clause).
19. We also reviewed the ‘Tamahere Country Club’ village website<sup>9</sup> and assessed whether statements made on the website are at risk of breaching sections 11 (misleading conduct in relation to services) and 13 of the FT Act (prohibition against the use of false or misleading representations). We have identified one statement on the website that is at risk of breaching these particular sections of the FT Act that we discuss below at paragraph 35.

### Fair Trading Act – UCT provisions

20. The FT Act contains provisions that prohibit the use of UCTs in standard form consumer contracts. The UCT provisions are set out in sections 26A to 26E and 46H to 46M of the FT Act.
21. A consumer contract is a contract between a supplier and consumer that relates to the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption. A standard form consumer contract is one where the terms have not been subject to effective negotiation between the parties, and factors taken into account when determining this include:
- 21.1 whether one party has all or most of the bargaining power;
  - 21.2 whether the terms are prepared in advance by the supplier;

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<sup>9</sup> Refer to <https://www.tamaherecountryclub.co.nz/>.

- 21.3 whether the customer is required to accept or reject the terms and conditions;
  - 21.4 the extent to which the parties had an effective opportunity to negotiate the terms; and
  - 21.5 the extent to which the specific characteristic of any party to the contract is taken into account.
22. If the Commission thinks that a term in a standard form consumer contract is unfair, we can apply to a court for a declaration that the term is a UCT.
23. When deciding if a term is unfair, the court must be satisfied that the term would meet all three of the following criteria set out at section 46L:
- 23.1 the term would cause a significant imbalance in the parties' rights and obligations under the contract;
  - 23.2 the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it; and
  - 23.3 the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
24. The court can also consider any other matters it considers are relevant, but must take into account two mandatory considerations:
- 24.1 the extent to which the term is transparent; and
  - 24.2 the contract as a whole.
25. Section 46M of the FT Act provides a non-exhaustive list of examples of the kinds of terms that, if contained in a consumer contract may be a UCT.
26. Certain terms are exempt from being declared unfair and these are set out at section 46K of the FT Act.

#### **Possible breach of UCT provisions – preliminary assessment**

27. We consider that the ORA between TCC and a resident is likely to come within the definitions set out in the FT Act of a standard form consumer contract".<sup>10</sup>

#### *Significant imbalance and detriment*

28. We have done a preliminary assessment of clauses in the ORA raised in the complaint and the further clauses that we have identified, against the test for unfairness set out at section 46L of the FT Act. We set out at **Attachment A** our

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<sup>10</sup> Refer section 2 of the FT Act and section 46J of the FT Act.



assessment against the tests of significant imbalance and detriment for each clause noted above in this letter.

*Not reasonably necessary to protect legitimate interests*

29. TCC may wish to consider whether the terms raised in this letter are reasonably necessary to protect their legitimate interests.
30. Were the Commission to bring an application to a court for a declaration that the clauses identified in this letter were unfair, the law presumes they are **not** reasonably necessary.<sup>11</sup> The onus would then be on TCC to prove that the clauses are reasonably necessary to protect their legitimate interests.
31. TCC may also want to consider whether there are fairer means to protect any legitimate interest they believe they may have.

*Transparency and contract as a whole*

32. In determining whether a term in a standard form consumer contract is unfair a court must also take into account the extent to which the term is transparent and the contract as a whole. In relation to these two factors, as applied to the clauses identified in this letter, we note:
  - 32.1 the ORA is lengthy and complex legal document. This means that clauses identified in this letter may not be transparent to a resident; and
  - 32.2 the Commission acknowledges that a resident is legally required to obtain independent legal advice before it signs an ORA. Despite this statutory requirement, the Commission is of the view that this does not automatically mean that a term is made transparent. The requirement for legal advice should not save a contract from any transparency issues it may contain.

**Fair Trading Act – Sections 11 & 13**

33. Section 11 makes it an offence for a person in trade to engage in conduct that is liable to mislead the public regarding factors including the “characteristics” of the services.
34. Section 13 makes it an offence for a person in trade in connection with the supply of services or with the promotion by any means of the supply or use of services to make a false or misleading representation concerning the existence, exclusion or effect of any right (section 13(i)).

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<sup>11</sup> Refer section 46L(3) of the FT Act.

### **Possible breach of sections 11 and 13 of the Act – preliminary assessment**

35. The statement at Image 1 of **Attachment B** refers to a “natural disaster guarantee”. The Commission is concerned that this statement may potentially be misleading and in breach of sections 11 and 13 of the FT Act because:
- 35.1 in our view the statement creates an impression that in the event of a natural disaster that damages or destroys a resident’s unit, a resident can move on from the village with their full entry payment refunded (without the deduction of the village contribution);
- 35.2 however, the ORA provides a resident only has a right to have their entry payment paid back without the village contribution being deducted in circumstances where TCC elects to terminate the ORA following a natural disaster.<sup>12</sup> Where the operator offers the resident another residential unit (either in the existing village or in another village owned by the operator) and the resident rejects this offer (for whatever reason), then the ORA is terminated by the resident and the operator has the right to deduct the village contribution from the exit payment.<sup>13</sup>

### **Penalties for breaching the Fair Trading Act**

36. Only the courts can decide if there has been a breach of the FT Act.
37. Where a court has declared a term in a standard form contract is a UCT, the FT Act prohibits that business from including the term in the contract or from enforcing or relying on that term. If a business continued to use or enforce that term it may face:
- 37.1 conviction or a fine of up to \$200,000 for an individual or \$600,000 for a company; and/or
- 37.2 an injunction restraining the business from enforcing or relying on the term; and/or
- 37.3 orders directing it to refund money or pay damages.
38. The same penalties may apply where the court finds a breach of sections 11 and/or 13 of the FT Act.
39. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

<sup>12</sup> Refer clauses 8.3.5, 12.1.4 and 15.2.1 of the ORA (operator terminates the ORA).

<sup>13</sup> Refer clauses 8.3.6, 11.2 and 15.2.2 of the ORA (termination where resident does not accept operators offer to transfer the resident to another unit in the village or another village owned by the operators). This is treated as a termination by the resident and operator entitled to deduct the village contribution from the exit payment.

**Further information**

40. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). You can also view the FT Act at [www.legislation.co.nz](http://www.legislation.co.nz).
41. We attach a link to the Commission's guidance to business on UCTs where a copy of the Commission's "Unfair Contract Terms Guidelines" can be downloaded. <http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>.

**Response to our letter**

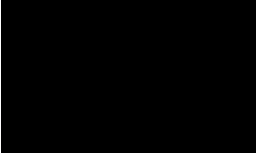
42. Our decision not to take further enforcement action against TCC at this time in relation to the issues raised in this letter does not prevent us from taking action in the future. We ask you to carefully consider the issues we raise and take legal advice should you have any questions about complying with your obligations under the FT Act.
43. We invite you to respond to our letter and, in particular, provide us with your views on any legitimate interest you consider TCC has in the terms we have raised. Any response is voluntary, you do not need to respond if you do not wish to. Please consult a lawyer if you are unsure about whether to provide us with a voluntary response and inform us if you decide not to do so.

**Official Information Act 1982 (OIA) requests**

44. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose, under the OIA, any letters we send to operators relating to this investigation.
45. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
46. Please contact me on 04 924 365 or by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions or comments in relation to this letter.

47. We look forward to receiving TCC's response to our letter.

Yours sincerely



**Sara Jones**  
**Senior Investigator**  
**Fair Trading Branch**

Released under the Official  
Information Act 1982

## Attachment A

### Occupation Right Agreement dated August 2022

<b>(Potentially) Unfair Contract Term identified</b>	<b>Explanation of term</b>	<b>Commerce Commission's Concerns</b>
<p>Clause 1.1 definition of "Chattels"</p> <p>Identified in RVRNZ complaint</p> <p>Clauses 5.1.3, 5.13 and 7.4</p> <p>Identified by Commerce Commission</p>	<p>"Chattels" is defined in the ORA and includes all chattels, fixtures, fittings and equipment located in the residential unit including all whiteware and appliances, bathroom fittings, electrical fittings, drapes and floor coverings etc.</p> <p>A resident is responsible for keeping in working order and maintaining and replacing (as and when they wear out or are broken or become unserviceable or when the operator determines replacement is necessary) and repairing the following (clause 7.4.1):</p>	<p><i>Significant detriment</i></p> <p>We consider that these clauses when considered against the property ownership rights of the parties under the licence to occupy model cause a significant imbalance in favour of the operator.</p> <p>This is because the terms of the ORA provide that the resident has no ownership right or interest in the unit (clause 2.4) or the chattels (clauses 1.1 and 7.6) and does not share in any capital gain in value of the unit on termination and resale of the occupation right to a new resident.</p> <p>We invite TCC to explain its legitimate interests that it is seeking to protect by including these terms in its ORA.</p>

	<ol style="list-style-type: none"> <li>1. the interior of the unit including all “Chattels”;</li> <li>2. except where unit is an apartment, certain exterior surfaces of the unit.</li> </ol> <p>The resident must pay for the costs of all repairs, maintenance and replacements undertaken in accordance with clause 7.4 (clause 5.1.3).</p> <p>AMENDMENT TO THIS TERM BY ORA DATED FEBRUARY 2023</p> <p>The operator is responsible for replacement of “Operator’s Chattels”, at the operator’s cost, where the operator determines such replacement is necessary and is required due to the age of such chattel (new clause 7.1.2)</p> <p>A resident is responsible for keeping in a tidy, clean and sanitary condition and in working order and maintaining, replacing <b>(as and when operator determines replacement is necessary for reasons other than due to the age</b></p>	<p><i>Detriment</i></p> <p>The terms would cause financial detriment to the resident if applied, enforced or relied on.</p> <p><i>Our views on the amendments to these terms</i></p> <p>TCC has a new obligation to replace “Operator’s Chattels” at its cost where it determines such replacement is necessary due to the age of such chattel. As such, a resident is now only required to pay for the costs of replacing the interior of the unit including all “Chattels” where the operator determines replacement is necessary for reasons other than due to the age of the item.</p> <p>We consider that while the amendments address part of the significant imbalance, the terms are still significantly imbalanced in favour of TCC in that TCC can unilaterally determine any replacements and a resident is obliged to continue paying for repair and maintenance until such time as TCC unilaterally decides: (1) it will replace the item and; (2) the replacement is needed due to the age of the time.</p>
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	<p><b>of the item) and repairing (clause 7.4.1)):</b></p> <p>(1) the interior of the unit including all “Chattels” and interior surface of the unit’s windows and glass doors and decks;</p> <p>(2) except where the unit is an apartment, the exterior surface of the unit windows and glass doors etc. (clause 7.4).</p> <p>Where a resident is responsible for the costs of replacing a “Chattel” in accordance with clause 7.4.1 a resident has the benefit of the operator’s insurance and liability is limited to relevant excess (clause 7.4.9)</p>	
<p>Clause 5.4 and Schedule 2 (change to “Weekly Fee”</p>	<p>The operator has a right to change the “Weekly Fee” as at 1 April each year in accordance with the “Weekly Fee Calculation” (clause 5.4).</p> <p>The “Weekly Fee” is the ongoing weekly fee payable by the resident to the operator comprising the “Village Payment” and “any Care Services Charge”.</p>	<p><i>Significant imbalance</i></p> <p>A term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract is an example of a possible unfair contract term under section 46M(f) of the FT Act.</p> <p>Price certainty is an important factor for consumers. A unilateral right to increase a price can have the effect of giving significant power to</p>

	<p>“Weekly Fee Calculation” is calculated to reflect the movement in CPI in accordance with the provisions of Schedule 2.</p>	<p>the operator unless there are sufficient counterbalancing rights in place for the resident.</p> <p>For many reasons, termination of an ORA after a price increase is not a practical option for a resident, given the financial detriment involved and the practicality of then having to move out of their primary residence.</p> <p>An ORA can last for an extended period of time, and it is also acknowledged that the operator’s costs may increase over that time period for reasons outside of its control.</p> <p>The effect of this clause is to permit TCC a broad right to increase the “Weekly Fee” effectively at will with reference to an increase in the CPI. There is no independent analysis requirement that TCC’s costs have actually increased due to the increase in CPI and no right for a resident to maintain the payment of the “Weekly Fee” at the current rate while raising a complaint with TCC as to the increase.</p> <p>We invite TCC to consider what legitimate interest they may have in this term and whether their unilateral price increase as drafted goes beyond what is reasonably necessary to protect their legitimate interests, and whether their interests can be protected by fairer means.</p> <p><i>Detriment</i></p> <p>There may be potential for financial detriment to the resident if the term is applied, enforced, or relied on.</p>
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<p>Clauses 6.6, 9.2 and Schedule 5 (privacy authorisation)</p>	<p>For the purpose of determining a resident's continued suitability to occupy a residential unit and for village administration purposes, clause 9.2 and Schedule 5 provides a resident's authorisation for the operator to collect and release and for relevant agencies to disclose to the operator, personal information about the resident, including information relating to a resident's physical and mental health.</p> <p>This authorisation is in addition to clause 6.6 (resident's consent to an assessment by medical practitioner).</p> <p>This authorisation given by the resident also allows operator to assess the information disclosed and have a right to deem that the resident has materially breached the ORA and then terminate the ORA.</p>	<p><i>Significant imbalance</i></p> <p>We consider that the authorisation may be unnecessarily broad in scope when considered against the needs of TCC and another authorisation at clause 6.6 that a resident provides under the ORA and as such is significantly balanced in favour of TCC.</p> <p>We also note that there is no right given to the resident to withdraw this authorisation in circumstances where a resident considers that TCC may be over exercising this right to collect a resident's health information.</p> <p>We acknowledge that TCC has an interest in certain medical information of the resident. We consider that the right of access to highly confidential and sensitive medical information should be limited so that it is only specifically necessary information relevant to the current circumstances of the resident that is acquirable.</p> <p><i>Detriment</i></p> <p>This term has the potential to cause a detriment to a resident by unnecessarily invading their privacy as to their medical records.</p>
<p>Clauses 8.6.2 to 8.6.4 and 10.12 and clause 8.2 (obligations for loss and damage)</p>	<p>In relation to the operator's loss or damage caused by the resident or their guests, a resident indemnifies the operator for such loss to the extent that the operator is not indemnified under its insurance policies AND is liable to pay any insurance excess</p>	<p><i>Significant imbalance</i></p> <p>There is a significant imbalance in the rights and obligation of the parties in relation to liability for loss or damage caused to each other's property/possessions.</p>

	<p>resulting from a claim under the operator's insurance policies which relates to an incident caused by the resident or their guest (clause 8.6.3).</p> <p>Further where actions of the resident or guests have voided an insurance policy, the resident is obliged to compensate the operator in full.</p> <p>By comparison, the operator has no liability for any loss or damage to any of the resident's possessions (clause 8.2).</p> <p>However, and contradicting clause 8.2, the operator <i>is</i> liable to pay for some loss in limited circumstances – it will pay the insurance excess resulting from a claim under the resident's insurance policy which relates to the damage of a resident's possessions caused by the wilful act or omission of the operator's employees or contractor (clause 8.6.4).</p>	<p>A resident is liable to indemnify TCC for all loss and damage that it causes to TCC's property regardless of whether it was the result of an accident or was intentional/wilful and to the extent that the operator is not covered for this loss or damage under its own insurance policies (resident liable for excess payment).</p> <p>By comparison, TCC is either liable for no loss or damage to any of the residents possession (clause 8.2) under any circumstances, or is potentially (and somewhat contradictorily) only liable for the damage or loss to a resident's possessions that is caused by the "<i>wilful neglect or wilful act of the Operator's employee or contractor</i>" and then it is only liable for the amount of the excess payment payable under the resident's insurance policy (a resident is expected to have insurance for their possessions) (clause 8.6.4).</p> <p>The imbalance here is that the resident's liability applies to all acts or omissions causing loss or damage regardless of whether they are wilful or not, whereas TCC is only liable for intentional act or omissions that cause damage and not accidental acts or omissions and any liability is limited to the amount of a resident's insurance excess.</p> <p><i>Detriment</i></p> <p>These terms have the potential to cause financial detriment to resident if the terms are applied, enforced, or relied on by TCC.</p>
<p>Clause 14.3 (repair of "Home" following termination of ORA)</p>	<p>The operator can appoint its own assessor to determine whether a resident has complied with its obligations set out at clause 14.2 in</p>	<p><i>Significant imbalance</i></p> <p>This clause has the effect of allowing TCC to control the process of determining whether a breach of clause 14.2 has occurred (for</p>

	<p>relation to leaving the residential unit in its “<i>Commencement Condition less Fair Wear and Tear</i>” on termination of the ORA. The operator at its discretion can determine the cost of these repairs to the resident.</p> <p>A resident is obliged to pay for all costs reinstatement work or repair that are set by the operator in its sole discretion.</p> <p>“<i>Fair Wear and Tear</i>” is defined to mean deterioration attributable to normal use and the normal operation of natural forces, but does not include deterioration attributable to: smoking; pets; incontinence; the use of disability or mobility aids; an event where the resident or a resident’s guests has intentionally or recklessly caused or allowed damage to the unit; or an event giving rise to a claim under the operator’s insurance policy for the unit (clause 1.1).</p>	<p>example only TCC can appoint an assessor, and there are no contractual requirements that the assessor be suitably qualified or independent). The operator also has the unilateral right to set the costs the resident must pay to remedy the breach.</p> <p>This term has similarities with the example UCT term set out at section 45M(h) of the FT Act.</p> <p>We invite TCC to consider whether the process set out in this term as stated is reasonably necessary to protect its legitimate interests or whether there may be fairer means.</p> <p>We also invite TCC to consider its definition of “<i>Fair Wear and Tear</i>”. Given retirement villages provide accommodation exclusively to older people this carve out in relation to what amounts to fair wear and tear appears not to take into account that it is foreseeable that residents as they age in place may use mobility/disability aids or if they have a serious medical condition may become incontinent.</p> <p><i>Detriment</i></p> <p>This clause has the potential to cause financial detriment to the resident if it was applied, enforced, or relied on.</p>
Clause 19 (future development)	The operator has an absolute discretion to carry out further development at the village in any way it thinks fit.	<p><i>Significant imbalance</i></p> <p>The Retirement Village Disclosure Statement is required to include information for intending residents about new services and facilities</p>

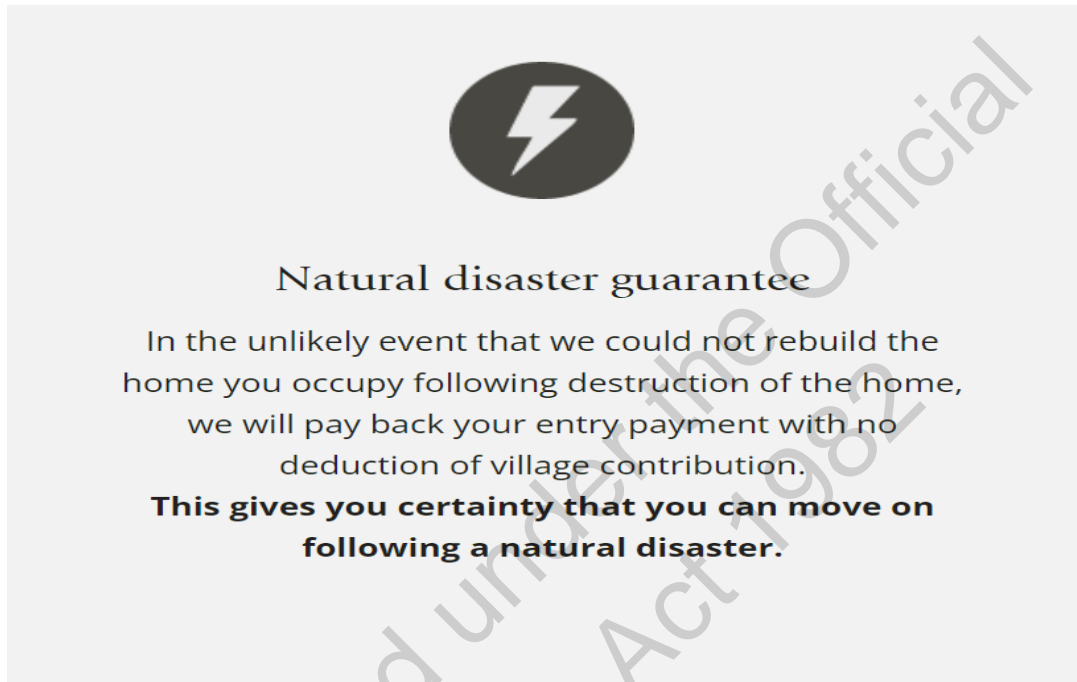
	<p>A resident is obliged to consent to any further development and has no right to object to any resource consent sought by the operator to enable further development. Further a resident is obliged to grant a Power of Attorney in favour of the Statutory Supervisor empowering it to act on the resident's behalf in relation to any further development.</p> <p>Further the resident has no right to object or claim any compensation or abatement of charges or commence any legal proceedings as a result of building works, dust, noise or other discomforts which might arise from further development of the village.</p>	<p>that are planned, including the location, size and effect on residents of those new services or facilities.<sup>14</sup></p> <p>However, in circumstances where a future development has not been disclosed by TCC, this obligation on a resident to provide wholesale consent to further development and give up any right to compensation or to take legal action in relation to the development is significantly imbalanced in favour of TCC.</p> <p>The requirement to consent to future developments that are unknown at the time of consent (and therefore the impact to the resident is unknown) contributes to the imbalance. The term provides full and absolute rights to TCC whilst removing rights of the resident that may serve to counterbalance this right.</p> <p>We also note that a term that has the effect of limiting one party's right to sue another party is an example unfair contract term - see section 46M(k) of the FT Act.</p> <p>It is acknowledged that TCC, as owner and operator, has an interest in the maintenance, investment and development of its properties including facilities such as care facilities which may be of benefit to existing residents should their health needs change. However, we consider that there are likely to be fairer or more balanced means to protect TCC's interests that also take into consideration the interests of existing residents who often move into a retirement village setting to enjoy peace and quiet.</p>
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<sup>14</sup> Refer clause 2(b) of Schedule 2 of the Retirement Villages Act 2003.

		<p><i>Detriment</i></p> <p>There is potential detriment to a resident caused by the removal of their right to claim compensation or object to a development that may materially affect them and their enjoyment of their retirement living if this term is applied, enforced, or relied on.</p>
<p>Clause 26 (entire agreement clause)</p>	<p>The ORA comprises the whole agreement between the parties and all previous negotiations, representations, agreements etc are merged in this ORA and are of no further effect whatsoever. Further no oral information provided by operator to resident affects the meaning or interpretation of this ORA.</p>	<p><i>Significant imbalance</i></p> <p>We consider that 'entire agreement' clauses that state the agreement comprises the entire understanding between the parties' risk being unfair in circumstances of a standard form consumer contract as it serves to exclude responsibility for any pre-contractual representations made prior to entry into the agreement that may have breached the FT Act.</p> <p>Terms such as this serve to limit the evidence a resident may bring in relation to potential court proceedings over the ORA, by excluding pre-contractual statements or representations made by TCC or its staff. Such a term may be unfair and similar to the example unfair contract term at section 46M(l) of the FT Act.</p> <p>This clause also risks being an attempt to contract out of the FT Act, contrary to section 5C of the FT Act.</p> <p><i>Detriment</i></p> <p>There may be a potential for financial and emotional detriment to a resident if the term is applied, enforced or relied on.</p>

## Attachment B

Image 1 (Screenshot taken from [www.tamaherecountryclub.co.nz](http://www.tamaherecountryclub.co.nz) November 2023)





### Natural disaster guarantee

In the unlikely event that we could not rebuild the home you occupy following destruction of the home, we will pay back your entry payment with no deduction of village contribution.

**This gives you certainty that you can move on following a natural disaster.**

Released under the Official Information Act 1982



6. While the complaint itself does not cite any statements made on the websites of Ultimate Care Group Limited (**Ultimate Care**), we have chosen to review the websites of Ultimate Care and in particular statements made on the websites about aged residential care services that are available to retirement village residents.
7. We are writing to you to bring our preliminary views to your attention to assist Ultimate Care in complying with its obligations under the FT Act. It is not our intention to take any further enforcement steps against Ultimate Care at this time in relation to our findings.

### Commerce Commission's role

8. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
9. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>3</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.

### Our review of Ultimate Care's website and an occupation right agreement

10. We have reviewed Ultimate Care's main website<sup>4</sup> and the website of one of Ultimate Care's villages, Oakland Lodge Village,<sup>5</sup> for statements made about care that is offered to residents of an Ultimate Care village.
11. We record at **Attachment A** screenshots of statements made on these websites about care offered to village residents. We note the following statements on Ultimate Care's websites that specifically relate to residential care services that are available to residents:
  - 11.1 *"Independent living Live in one of our villages, a villa, apartment or studio. You will have independence with the added peace of mind that help is at hand should it be needed."* (see Images 1 and 2 Attachment A); and
  - 11.2 *"At Oakland Lodge Village, we care. Our affordable and secure one bedroom apartments are designed to accommodate both independent and assisted living. Residents can choose services such as housekeeping and meals to create an assisted living package, tailored to their individual needs and an*

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<sup>3</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>4</sup> [www.ultimatecare.co.nz](http://www.ultimatecare.co.nz)

<sup>5</sup> [www.oaklandlodgevillage.co.nz](http://www.oaklandlodgevillage.co.nz)



*adjoining rest home and hospital complex gives added peace of mind.”* (see Image 3 at Attachment A).

12. We have also reviewed the terms and conditions relating to a resident’s right to aged residential care services at an Ultimate Care village and cite, as an example, the Occupation Right Agreement for Oakland Lodge Village.<sup>6</sup> The relevant clauses state:
  - 12.1 *“Clause 46.2 If we consider it necessary or desirable and if we have rest home facilities with a bed available for you, we will ensure you receive appropriate rest home care by shifting you into our rest home facilities...”*
  - 12.2 *“Clause 46.3 If we consider it necessary or desirable and if we have hospital facilities with a bed available for you, we will ensure you receive appropriate hospital care by shifting you into our hospital facilities.”*
  - 12.3 *“Clause 46.4 if clause 46.2 or 46.3 applies, we will give you priority access to the rest home or hospital facilities at the Village over applicants who are not residents of the Village.”*

#### **Fair Trading Act 1986**

13. Section 11 makes it an offence for a person in trade to engage in conduct in relation to services that is liable to mislead the public regarding factors including the *“nature, characteristics, suitability for a purpose or quantity”* of the services.
14. Section 13 makes it an offence for a person in trade in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, to make a false or misleading representation concerning the existence, exclusion or effect of any guarantee or right (section 13(i)).
15. For your information we set out sections 11 and 13 of the FT Act at **Attachment B**. You are able to view the entire FT Act at [www.legislation.govt.nz](http://www.legislation.govt.nz).

#### **Possible breach of sections 11 and 13(i) of the FT Act – preliminary assessment**

16. We are concerned that the overall impression made by the statements on Ultimate Care’s websites regarding aged residential care services that are available to residents of their villages, risks misleading consumers when compared to the contractual terms that a resident has to such care services.
17. This is because the statements on the websites give the overall impression that further care services are generally available to residents and this impression is not suitably qualified with key information such as:

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<sup>6</sup> Refer Ultimate Care Oakland Lodge Village Occupation Right Agreement dated 18 October 2022 BC10066226900.

- 17.1 the right to care is subject to a decision by the operator that they consider aged residential care services are necessary or desirable for the resident; and
- 17.2 a bed in the rest home or hospital facilities must be available in the residential care facility offered at the resident's village at the time that a resident is assessed as requiring residential care.
18. This overall impression created by the statements on the website do not, in our view, sufficiently accord with a resident's contractual right to aged residential care services at an Ultimate Care village. Access to aged residential care services (in priority over non-residents) is always subject to a decision of the operator as to whether they consider such services are necessary or desirable for the resident and that the requisite care (as assessed by a needs assessment) is actually available.
19. Further, the main website sets out the care services that Ultimate Care offers to older New Zealanders. In our view, by listing the 'independent living' option alongside the other aged care service options, and by using words such as "*added peace of mind that help is at hand should you need it*", Ultimate Care risks creating an overall impression to the public that a resident of an Ultimate Care village will have access to these other care services if and when required.
20. The wording set out on the website for a specific village also supports this overall impression. For example, the Oakland Lodge village website specifically notes when describing the benefits of village life that "*an adjoining rest home and hospital complex gives added peace of mind*". Again, this reinforces the impression that a resident of a village will have access to aged care services if and when they may be required in the future.
21. The marketing of a resident's right to care in a way that omits to mention (prominently and in proximate distance to other statements about care services) the matters noted in paragraphs 17.1 and 17.2 above, could be at risk of breaching section 11 and also section 13 of the FT Act.

#### **Penalties for breaching the FT Act**

22. Only the courts can decide if there has been a breach of the FT Act. The court can impose severe penalties where it finds the law has been broken.
23. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

#### **Further information**

24. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

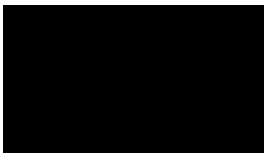
**Your response to our letter**

25. Our decision to take no further action does not prevent any other person from doing so. We may also choose to take further action in the future should this conduct continue to come to our attention.
26. We recommend that Ultimate Care takes legal advice in relation to the issues raised in this letter and reviews the statements made on its websites and in any other marketing material produced by Ultimate Care in relation to a resident's right to residential care services.

**Request under Official Information Act 1982 (OIA)**

27. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose, under the OIA, any letters we send to operators relating to this investigation.
28. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
29. Please feel free to contact me on (04) 924 3657 or by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions in relation to this letter.

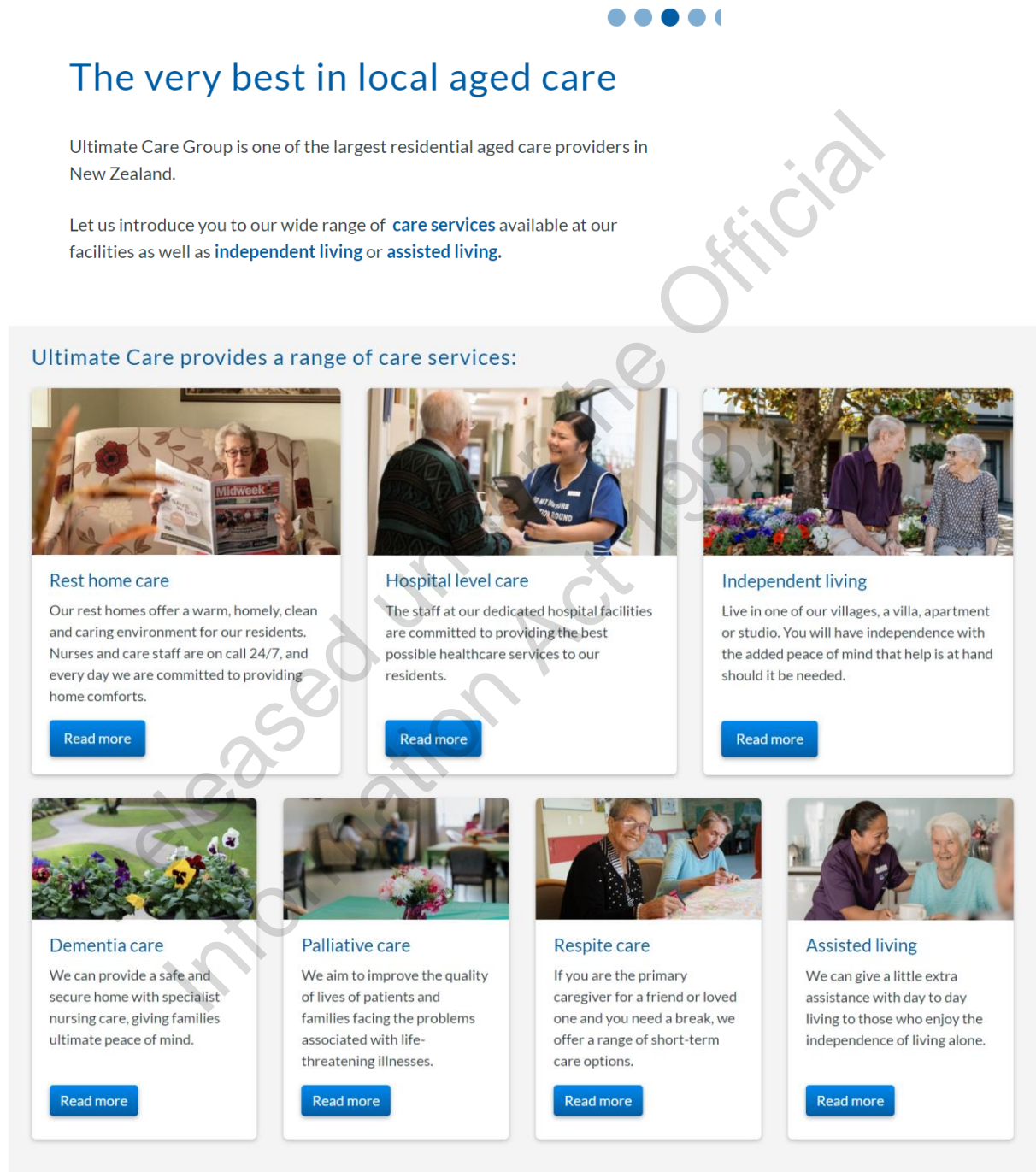
Yours sincerely



Sara Jones  
**Senior Investigator**  
**Fair Trading Branch**

## Attachment A – Screen shots from Ultimate Care Lifecare’s Websites<sup>7</sup>

Image 1 (Screenshot on home page of main website taken on 18 October 2023)




The very best in local aged care

Ultimate Care Group is one of the largest residential aged care providers in New Zealand.


Let us introduce you to our wide range of **care services** available at our facilities as well as **independent living** or **assisted living**.

Ultimate Care provides a range of care services:

- 


**Rest home care**

Our rest homes offer a warm, homely, clean and caring environment for our residents. Nurses and care staff are on call 24/7, and every day we are committed to providing home comforts.

[Read more](#)
- 


**Hospital level care**

The staff at our dedicated hospital facilities are committed to providing the best possible healthcare services to our residents.

[Read more](#)
- 


**Independent living**

Live in one of our villages, a villa, apartment or studio. You will have independence with the added peace of mind that help is at hand should it be needed.

[Read more](#)
- 


**Dementia care**

We can provide a safe and secure home with specialist nursing care, giving families ultimate peace of mind.

[Read more](#)
- 


**Palliative care**

We aim to improve the quality of lives of patients and families facing the problems associated with life-threatening illnesses.

[Read more](#)
- 

**Respite care**

If you are the primary caregiver for a friend or loved one and you need a break, we offer a range of short-term care options.

[Read more](#)
- 

**Assisted living**

We can give a little extra assistance with day to day living to those who enjoy the independence of living alone.

[Read more](#)

<sup>7</sup>[www.ultimatecare.co.nz](http://www.ultimatecare.co.nz) (Main website); [www.oaklandlodgevillage.co.nz](http://www.oaklandlodgevillage.co.nz) (Oakland Lodge Village website).  
These images taken in the screenshots are current as at the date of this letter.

Image 2 (Screenshot on main website taken on 18 October 2023 when click “Read more” under “Independent living” option)

Home / Care Services / Independent living

## Independent living

Live in one of our villages, in a villa, apartment or studio. You have independence with the added peace of mind that help is at hand should you need it. All of our villages are safe and secure and require no maintenance from residents. We also have a care centre and emergency assistance 24/7.



### Locations:

Ranburn (Waipu) Rosedale (Auckland) Oakland Lodge Village (Tauranga) Lansdowne Court (Masterton)  
Madison (Levin) Kensington Court (Nelson) Bishop Selwyn (Christchurch) Bishop Selwyn Village (Christchurch)  
Rose Court (Christchurch) Rose Lodge (Invercargill)

Rest home care  
Hospital level care  
Independent living  
Dementia care  
Respite care  
Palliative care  
Assisted living  
Day Programme

Image 3 (Screenshot on home page on Oakland Lodge Village taken on 18 October 2023)

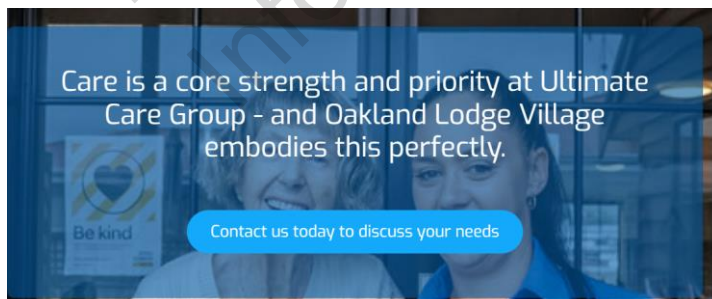
## At Oakland Lodge Village, we care.

Oakland Lodge Village is located in the sought after Avenues in central Tauranga and was known as Copper Beech Village.

Our affordable and secure one bedroom apartments are designed to accommodate both independent and assisted living.

Residents can choose services such as housekeeping and meals to create an assisted living package, tailored to their individual needs and an adjoining rest home and hospital complex gives added peace of mind.

Contact us today to arrange a time to view Oakland Lodge Village for yourself.



## **Attachment B – Sections 11 and 13 of the FT Act (as at 10 July 2023)**

### **11 Misleading conduct in relation to services**

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

#### *False representations*

### **13 False or misleading representations**

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or
- (c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
- (d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
- (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- (f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
- (g) make a false or misleading representation with respect to the price of any goods or services; or
- (h) make a false or misleading representation concerning the need for any goods or services; or
- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the [Consumer Guarantees Act 1993](#); or
- (j) make a false or misleading representation concerning the place of origin of goods or services.

18 January 2024

[REDACTED]  
[REDACTED]

Metlifecare Limited

BY EMAIL: [REDACTED]@metlifecare.co.nz

Dear [REDACTED]

## Fair Trading Act 1986 – Notice of complaint and preliminary assessment

### Introduction

1. We refer to our telephone discussion of today ([REDACTED]/O'Neil).
2. We write as the Commerce Commission (**Commission**) received a complaint in September 2022 that mentions the Occupation Right Agreement (**ORA**) registered by Metlifecare Retirement Villages Ltd (**Metlifecare**) for the retirement village 'The Avenues', and raises potential issues under the unfair contract term provisions (**UCT provisions**) of the Fair Trading Act 1986 (**FT Act**).
3. We have completed an assessment of this complaint and have also reviewed statements made on the website for The Avenues<sup>1</sup> (**website**), as part of our investigation into the Retirement Villages sector to ascertain whether there is any conduct in the sector that raises concerns under the FT Act.
4. We do not intend to conduct further investigations at this time in relation to the complaint made against you or the issues we raise in this letter regarding a statement on your website. However, we are writing to you to bring our preliminary views to your attention to assist you in complying with your obligations under the FT Act and to invite Metlifecare's response to the issues raised in this letter.
5. We recommend that you take legal advice should you have any questions about complying with your obligations under the FT Act.

### Commerce Commission's role

6. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.

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<sup>1</sup> <https://www.metlifecare.co.nz/our-retirement-villages/bay-of-plenty/the-avenues>

7. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>2</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.
8. In relation to an unfair contract term (**UCT**), only the Commission has the power under the FT Act to make an application to a court for a declaration that a term in a standard form consumer contract is a UCT. Where a court has declared that a term in a standard form contract is a UCT, a person can no longer include that term in its contract or enforce it and is liable for prosecution by the Commission if it does so.

### **Commission's preliminary assessment**

9. We have reviewed this complaint and your ORA dated May 2022<sup>3</sup> and considered it against the UCT provisions of the FT Act. You registered three further amended ORAs in November 2022, May 2023 and July 2023. While our initial assessment focussed on the terms in the ORA dated May 2022, where any subsequent ORA amended a term raised in this letter, we did consider the amendment as part of our analysis.
10. We have also reviewed the website and made a preliminary assessment as to whether there are any statements on the website that may possibly breach sections 11 and 13 of the FT Act, relating to false or misleading conduct or representations.
11. By completing our assessment and providing our comments on certain terms in the ORA, the Commission does not endorse or approve of the ORA. Instead, our assessment has commented on terms that we consider could give rise to unfairness. In providing our view we acknowledge that we have not provided Metlifecare with the opportunity to respond to our concerns or provide an explanation as to whether the terms identified in this letter are reasonably necessary to protect the legitimate interests of Metlifecare. Our view is not a determination of non-compliance, as only the courts have the power to declare a term unfair under the UCT provisions.
12. We also note that the complaint identified certain key financial terms that are alleged to breach the UCT provisions of the FT Act and gave examples of such terms found in a range of operators' ORAs. The complaint refers to one of these financial terms in your ORA relating to the repayment of the capital sum (clause 18.2).
13. We have not considered these key financial terms as part of our review. Parts of the Retirement Village Code of Practice 2008 (**COP**) cover the subject matter of these terms.<sup>4</sup> Given that the COP has the status of an "enactment" and the FT Act excludes

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<sup>2</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>3</sup> We note that this ORA was registered in June 2022 but we will refer to it in this letter as May 2022 ORA.

<sup>4</sup> Refer clause 54 of the Retirement Villages Code of Practice 2008.



from consideration contract terms that are “expressly permitted” by an “enactment”, these terms do not clearly and unambiguously fall within the remit of the UCT provisions of the FT Act.<sup>5</sup> In addition, a term that “sets the upfront price” payable under the contract is excluded from UCT review.<sup>6</sup> In our view any alleged unfairness issues surrounding these terms are better considered as part of the wider review of the underlying legislation that is currently being undertaken by the Ministry of Housing and Urban Development (**MHUD**).<sup>7</sup> We have informed MHUD of our view.

14. This decision not to review these key financial terms is not to be considered as approval of these terms by the Commission, or as an acknowledgement that there are no fairness concerns with these terms.

### The complaint and terms of concern

15. In September 2022 the Commission received a complaint from the Retirement Villages Residents Association of New Zealand (**RVRANZ**) that raises issues under the UCT provisions of the FT Act and more generally around the fairness of terms in ORAs.<sup>8</sup>
16. We reviewed the terms in the ORA against the UCT provisions of the FT Act. Our review has identified terms that we consider raise issues as to their fairness when applying the test for UCTs including:
  - 16.1 clause 14 (further development of the village);
  - 16.2 clause 6.4 (repair and maintenance charges);
  - 16.3 clause 12.1 (change to facilities); and
  - 16.4 clause 31 (entire agreement clause).
17. We also reviewed the website and assessed whether statements made on the website are at risk of breaching sections 11 or 13 of the FT Act (prohibition on false or misleading conduct or representations). We have identified one statement on the website that is at risk of breaching the FT Act that we discuss below at paragraphs 34 and 35.

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<sup>5</sup> Refer to section 46K(1)(c) of the FT Act.

<sup>6</sup> Refer section 46K(1)(b) of the FT Act. The “upfront price” payable means the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent (section 46K(2)).

<sup>7</sup> We refer you to the Discussion paper published in August 2023 by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development “Review of the Retirement Villages Act 2003: Options for change” and in particular Part D of this paper. See [https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8\\_0.pdf](https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8_0.pdf).

<sup>8</sup> <https://www.rvrnz.org.nz/wp-content/uploads/2022/10/RVR-Unfair-Terms-Oct22-DIGITAL.pdf>

**Fair Trading Act - UCT provisions**

18. The FT Act contains provisions that prohibit the use of UCTs in standard form consumer contracts. The UCT provisions are set out in sections 26A to 26E and 46H to 46M of the FT Act.
19. A consumer contract is a contract between a supplier and consumer that relates to the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption. A standard form consumer contract is one where the terms have not been subject to effective negotiation between the parties, and factors taken into account when determining this include:
  - 19.1 whether one party has all or most of the bargaining power;
  - 19.2 whether the terms are prepared in advance by the supplier;
  - 19.3 whether the customer is required to accept or reject the terms and conditions;
  - 19.4 the extent to which the parties had an effective opportunity to negotiate the terms; and
  - 19.5 the extent to which the specific characteristic of any party to the contract is taken into account.
20. If the Commission thinks that a term in a standard form consumer contract is unfair, we can apply to a court for a declaration that the term is a UCT.
21. When deciding if a term is unfair, the court must be satisfied that the term would meet all three of the following criteria set out at section 46L:
  - 21.1 the term would cause a significant imbalance in the parties' rights and obligations under the contract;
  - 21.2 the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it; and
  - 21.3 the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
22. The court can also consider any other matters it considers are relevant, but must take into account two mandatory considerations:
  - 22.1 the extent to which the term is transparent; and
  - 22.2 the contract as a whole.

23. Section 46M of the FT Act provides a non-exhaustive list of examples of the kinds of terms that, if contained in a consumer contract may be a UCT.
24. Certain terms are exempt from being declared unfair and these are set out at section 46K of the FT Act.

**Possible breach of UCT provisions – preliminary assessment**

25. We consider that the ORA between Metlifecare and a resident is likely to come within the definitions set out in the FT Act of a standard form consumer contract.<sup>9</sup>

*Significant imbalance and detriment*

26. We have completed a preliminary assessment of the terms that we identified in the ORA against the test for unfairness set out at section 46L of the FT Act. We set out at **Attachment A** our assessment against the tests of significant imbalance and detriment for each clause noted above in this letter.

*Not reasonably necessary to protect legitimate interests*

27. Metlifecare may wish to consider whether the terms raised in this letter are reasonably necessary to protect their legitimate interests.
28. Were the Commission to bring an application to a court for a declaration that the clauses identified in this letter were unfair, the law presumes they are **not** reasonably necessary.<sup>10</sup> The onus would then be on Metlifecare to prove that the clauses are reasonably necessary to protect their legitimate interests.
29. Metlifecare may also want to consider whether there are fairer means to protect any legitimate interest they believe they may have.

*Transparency and contract as a whole*

30. In determining whether a term in a standard form consumer contract is unfair a court must also take into account the extent to which the term is transparent and the contract as a whole. In relation to these two factors, as applied to the clauses identified in this letter, we note:
  - 30.1 the ORA is lengthy and complex legal contract. This means that clauses identified in this letter may not be transparent to a resident; and
  - 30.2 the Commission acknowledges that a resident is legally required to obtain independent legal advice before it signs an ORA. Despite this statutory requirement, the Commission is of the view that this does not automatically mean that a term is made transparent. The requirement for legal advice should not save a contract from any transparency issues it may contain.

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<sup>9</sup> Refer section 2 of the FT Act and section 46J of the FT Act.

<sup>10</sup> Refer section 46L(3) of the FT Act.

### **Fair Trading Act – Sections 11 & 13**

31. Sections 11 and 13(i) of the FT Act are relevant to the statement we have identified on the website and set out in this letter at Attachment B.
32. Section 11 makes it an offence for a person in trade to engage in conduct that is liable to mislead the public regarding factors including the “characteristics” of the services.
33. Section 13 makes it an offence for a person in trade in connection with the supply of services or with the promotion by any means of the supply or use of services to make a false or misleading representation concerning the existence, exclusion or effect of any right (section 13(i)).

### **Possible breach of sections 11 and 13 of the Act – preliminary assessment**

34. There is a statement on the website that we consider is potentially misleading. The statement at Image 1 of **Attachment B** to this letter states:
 

*“1/8 **Your home, your life** When you sign a Metlifecare Occupation Right Agreement (ORA), you have the right to live in your home for the rest of your life.”*
35. We consider that this statement is potentially misleading as it does not accurately reflect the legal right of Metlifecare at clause 17.1(a) of the ORA to terminate a resident’s right to occupy a unit and live in the village where a registered Medical Practitioner certifies that the resident’s physical or mental health is such that the resident or any other resident cannot live safely in their unit.

### **Penalties for breaching the Fair Trading Act**

36. Only the courts can decide if there has been a breach of the FT Act.
37. Where a court has declared a term in a standard form contract is a UCT, the FT Act prohibits that business from including the term in the contract or from enforcing or relying on that term. If a business continues to use or enforce that term it may face:
  - 37.1 conviction or a fine of up to \$200,000 for an individual or \$600,000 for a company; and/or
  - 37.2 an injunction restraining the business from enforcing or relying on the term; and/or
  - 37.3 orders directing it to refund money or pay damages.
38. The same penalties may apply if the court finds a breach of section 11 and/or 13 of the FT Act.

39. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

#### **Further information**

40. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). You can also view the FT Act at [www.legislation.co.nz](http://www.legislation.co.nz).
41. We attach a link to the Commission's guidance to business on UCTs where a copy of the Commission's "Unfair Contract Terms Guidelines" can be downloaded. <http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>.

#### **Response to our letter**

42. Our decision not to take further enforcement action against Metlifecare at this time in relation to the issues raised in this letter does not prevent us from taking action in the future. We ask you to carefully consider the issues we raise and take legal advice should you have any questions about complying with your obligations under the FT Act.
43. We invite you to respond to our letter and, in particular, provide us with your views on any legitimate interest you consider Metlifecare has in the terms we have raised. Any response is voluntary, you do not need to respond if you do not wish to. Please consult a lawyer if you are unsure about whether to provide us with a voluntary response and inform us if you decide not to do so.

#### **Official Information Act 1982 (OIA) requests**

44. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose under the OIA any letters we send to operators relating to this investigation.
45. Where we receive an OIA request for a copy of our letters to operators under the OIA we will notify you of the request prior to any disclosure.
46. Please contact me by email at [Julia.ONeil@comcom.govt.nz](mailto:Julia.ONeil@comcom.govt.nz) or on (09) 919 4442 if you have any questions in relation to this letter.

47. We look forward to receiving Metlifecare's response to our letter.

Yours sincerely



**Julia O'Neil**  
**Senior Legal Counsel**  
**Fair Trading Legal**

Released under the Official  
Information Act 1982

Attachment A

Occupation Right Agreement for The Avenues May 2022

<b>(Potentially) Unfair Contract Term identified</b>	<b>Explanation of term</b>	<b>Commerce Commission's Concerns</b>
<p>Clause 14 (further development)</p> <p>Also referred to in the RVRANZ complaint.</p>	<p>Metlifecare has a right to undertake further development at the village and the resident agrees that they will not make any objection or claim compensation from Metlifecare in respect of any further development, or commence any legal action arising out of the further development.</p>	<p><i>Significant imbalance</i></p> <p>The Retirement Village Disclosure Statement is required to include information for intending residents about new services and facilities that are planned, including the location, size and effect on residents of those new services or facilities.<sup>11</sup></p> <p>However, in circumstances where a future development is not foreseen and has not been disclosed by an operator, this obligation on a resident to provide wholesale consent to further development and give up any right to compensation or to take legal action in relation to the development is significantly imbalanced in favour of the operator.</p> <p>The requirement to consent to future developments that are unknown at the time of consent (and therefore the impact to the resident is unknown) contributes to the imbalance. The term provides full and absolute rights to Metlifecare whilst removing rights of the resident that may serve to counterbalance this right.</p>

<sup>11</sup> Refer clause 2(b) of Schedule 2 of the Retirement Villages Act 2003.

		<p>We also note that a term that has the effect of limiting one party's right to sue another party is an example unfair contract term under section 46M(k) of the FTA.</p> <p>It is acknowledged that Metlifecare, as owner and operator, has an interest in the maintenance, investment and development of its properties including facilities such as care facilities which may be of benefit to existing residents should their health needs change. However, we consider that there are likely to be fairer or more balanced means to protect Metlifecare's interests that also take into consideration the interests of existing residents who often move into a retirement village setting to enjoy peace and quiet.</p> <p><i>Detriment</i></p> <p>There is potential detriment to a resident caused by the removal of their right to claim compensation or object to a development that may materially affect them and their enjoyment of their retirement living if this term is applied, enforced or relied on.</p>
Clauses 6.4 (repair and maintenance charges)	A resident is liable to pay all the costs incurred by Metlifecare in repairing and maintaining the interior of the unit (including the garage door, plumbing and electrical fittings and fixtures) EXCEPT Metlifecare will cover these costs where they relate to remedying any underlying or inherent defect in the unit OR where the need for repair to the interior of the unit occurs within the first twelve months of the	<p><i>Significant imbalance</i></p> <p>We consider that these terms, when considered against the property ownership rights of the parties under the licence to occupy model may cause a significant imbalance in favour of the operator.</p> <p>This is because the terms of the ORA provide that the resident has no ownership right or interest in the unit (clause 5.3) and does not share in any capital gain in value of the unit on termination and resale of the occupation right to a new resident.</p>



	<p>commencement date <i>unless</i> the repair is due to damage caused by the resident or their guests (clause 6.4(a) or (b)).</p>	<p><i>Detriment</i></p> <p>There would be financial detriment to the resident if the term is applied, enforced, or relied on.</p>
<p>Clause 12.1 (change to facilities)</p>	<p>The operator has the right to vary the services and facilities at the village at its discretion.</p> <p>A resident has a right to be consulted.</p>	<p><i>Significant imbalance</i></p> <p>Operators can provide a range of services and facilities to residents. The services and facilities on offer can be of considerable importance to residents and may influence their choice of retirement village.</p> <p>While a resident has a right to be consulted regarding proposed changes in the services and facilities and the right to raise a dispute, the operator has a broad unilateral right to change and remove the services or facilities on offer at will.</p> <p>There are no counterbalancing rights such as a right to receive a reduction in fees commensurate to any reduction in services, in circumstances where the operator makes changes that adversely affect the resident.</p> <p>Further given the large financial commitment made by the resident for an occupation right and the practical reality that the resident lives in the village, a right to terminate the contract due to a change in services and facilities is not a practical or useful right to counterbalance this right to change the services and facilities.</p> <p>We note this is similar to the example unfair contract term in section 46M(g), as it is a term that permits, or has the effect of permitting,</p>

		<p>one party to unilaterally vary the characteristics of the goods or services to be supplied.</p> <p>See also our comment above in relation to clause 14 (further developments). The fact that a resident has no right to object to any development or claim any compensation from Metlifecare as a result of the development, heightens the imbalance of this clause in favour of the Metlifecare.</p> <p><i>Detriment</i></p> <p>There may be financial detriment to the resident and potential loss of enjoyment of lifestyle offered by the village as a result of change to services and facilities.</p> <p>Residents may receive a reduction in services and facilities than what they agreed at the time of entering the ORA at the same cost.</p>
<p>Clause 31 (entire agreement clause)</p>	<p>Unless separately agreed in writing, the clauses in the ORA comprise the entire understanding and agreement between Metlifecare and the resident.</p>	<p>We consider that an 'entire agreement' clause that states the agreement comprises the entire understanding between the parties risks being unfair in circumstances of a standard form consumer contract as it serves to exclude responsibility for any pre-contractual representations made prior to entry into the agreement that may have breached the FT Act.</p> <p>Clauses such as this serve to limit the evidence a resident may bring in relation to a potential court proceeding over the ORA, by excluding pre contractual statements or representations made by the operator or its staff. Such a term may be unfair, similar to example unfair contract terms 46M(l) of the FT Act.</p>

		<p>This clause also risks being an attempt to contract out of the FT Act, contrary to section 5C of the FT Act.</p> <p><i>Detriment</i></p> <p>There may be financial detriment to the resident if the term is applied, enforced or relied on.</p>
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## Attachment B

Image 1 (Screenshot taken from November 2023)  
<https://www.metlifecare.co.nz/why-metlifecare>

1/8

### **Your home, your life**

When you sign a Metlifecare Occupation Right Agreement (ORA), you have the right to live in your home for the rest of your life.

Released under the Official Information Act 1982

18 January 2024

[REDACTED]  
[REDACTED]  
Ryman Healthcare Limited

BY EMAIL ONLY: [REDACTED]@rymanhealthcare.com

Dear [REDACTED]

### **Retirement Villages - Reminder of obligations under the Fair Trading Act 1986**

1. We refer to our discussion of today with yourself and [REDACTED].
2. As discussed, the Commerce Commission (**Commission**) has recently been undertaking an investigation into the Retirement Villages sector to ascertain whether there is any conduct in the sector that raises concerns under the Fair Trading Act 1986 (**FT Act**).
3. As part of the investigation, we have revisited a complaint the Commission received from Consumer NZ in September 2021 about how retirement village operators are marketing their aged residential care services. The main concern of this complaint was how 'continuum of care' type claims, made by operators on their websites, risk misleading consumers about the availability of aged residential care to retirement village residents and so risk breaching sections 11 and 13 of the FT Act. The complaint cites, as an example, a claim regarding care services that was made by Ryman Healthcare Limited (**Ryman**) on its website as at 13 September 2021.
4. As better access to assistance with health and care issues is one of the key reasons why people decide to move into a retirement village,<sup>1</sup> we decided to revisit this complaint to ascertain whether the concern raised in the complaint is still an issue for the retirement village industry.
5. We have completed a preliminary assessment of this complaint and while we do not intend to further investigate the complaint made against Ryman at this time, we are

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<sup>1</sup> Refer Broad JB, et al, *BMJ Open* 2020 "Health profile of residents of retirement villages in Auckland, New Zealand: findings from a cross-sectional survey with health assessment" at page 6.

writing to you to bring our preliminary views to your attention to assist Ryman in complying with its obligations under the FT Act.

### Commerce Commission's role

6. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
7. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>2</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.

### The complaint<sup>3</sup>

8. The complaint alleges that the following statement retrieved from Ryman's website on 13 September 2021 risked misleading consumers about the availability of care in breach of sections 11 and 13 of the FT Act:
  - 8.1 *"Take a weight off your mind knowing that if your needs change we have comprehensive care options that can be dialled up when needed"*.
9. This statement was alleged to be at risk of misleading consumers when considered against a resident's contractual right to access aged residential care services. The complaint cited a clause from the Occupation Right Agreement for the Ryman village, Malvina Major, which stated:
  - 9.1 *"...you will have priority over non-residents of the village to shift into the rest home, hospital or dementia care unit at the village or if such facility is not available at the village, then at another Ryman village, as long as there's a vacancy"*.<sup>4</sup>

### Our more recent review

10. We have conducted a more recent review of Ryman's website and record at **Attachment A** screenshots of statements made on the website about care options available at Ryman villages. We note the following statements on Ryman's website that specifically relate to residential care services that are available to residents of a Ryman village:

<sup>2</sup> <https://comcom.govt.nz/about-us/our-policies-investigations-and-guidelines/enforcement/enforcement-response-guidelines>

<sup>3</sup> Refer <https://www.consumer.org.nz/articles/retirement-villages-care-claims-risk-misleading-consumers#article-advertising-claims>.

<sup>4</sup> Refer Malvina Major Occupation Agreement, clause 4.1(c)(ii), document ID: 100115768/582166.3.

- 10.1 *“Comprehensive Care. Aged Care When You Need it.....So if your health needs change over time, we can continue looking after you, Once you live in a Ryman retirement village, you will always have priority access to our comprehensive care options over non-residents.... (see Image 1 at Attachment A) ;*
- 10.2 *“Comprehensive care. You will have peace of mind knowing that if the need arises for an increased level of care, you can remain living within the village community in close contact with your partner or friends. We guarantee that you will have priority access over non-residents to the care centre within the village, or to another Ryman care centre. Care options vary between villages, please check with your local village; (see Image 2 at Attachment A); and*
- 10.3 *“Care is built into the fabric of our villages from the very beginning. It inspires confidence to live the way you want because you know the future is covered if your health needs change. Ryman villages offer independent living, assisted-living apartments and resthome care. Most of our villages also provide hospital and specialist dementia care” (see Image 3 at Attachment A).*
11. We have also reviewed the terms and conditions set out in the most current registered Occupation Agreement that set out the operator’s obligations relating to the provision of care to residents at the Malvina Major Ryman village. The relevant clause states:
- 11.1 *“Rest home, hospital or dementia care: If we agree to your move, you will have priority over non-residents of the Village to shift into a rest home, hospital or dementia care unit or care suite at the Village or if one is not available at the Village, then at another Ryman Village, as long as there’s a vacancy.”<sup>5</sup>*
12. We consider that the information provided both in the complaint and obtained by us as a result of our further review since the complaint was made, may give rise to a possible breach of sections 11 and 13 of the FT Act.

#### **Fair Trading Act 1986**

13. Section 11 makes it an offence for a person in trade to engage in conduct in relation to services that is liable to mislead the public regarding factors including the *“nature, characteristics, suitability for a purpose or quantity”* of the services.
14. Section 13 makes it an offence for a person in trade in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, to make a false or misleading representation concerning the existence, exclusion or effect of any guarantee or right (section 13(i)).

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<sup>5</sup> Refer clause 4.1(c)(iii) Malvina Major Occupation Agreement dated 13 October 2023.

15. For your information we set out sections 11 and 13 of the FT Act at **Attachment B**. You are able to view the FT Act at [www.legislation.govt.nz](http://www.legislation.govt.nz).

#### **Possible breach of sections 11 and 13 of the FT Act – preliminary assessment**

16. In our view the statements made on Ryman’s website regarding aged residential care options offered at a Ryman village may risk misleading the public when compared to the contractual right that a resident of a Ryman village has to such care services.
17. This is because the statements on the website risk creating the overall impression that residents of a Ryman village have comprehensive care options available to them at their option as their health needs change, subject to the priority access availability condition. Headline messages such as *“Comprehensive Care”* and *“Aged Care When You Need It”* and language such as *“Peace of Mind”* serve to reinforce this overall impression.
18. We consider it possible the representations may lead residents into the erroneous belief that they have discretion over their move, subject to the priority access condition, when in fact:
- 18.1 any further care access is contractually subject to Ryman’s agreement; and
- 18.2 availability of care requires not only that a vacancy is available but also that the level of care needed is actually offered at a Ryman care facility (for example there may be certain types of care that Ryman does not offer, such as specialist psychogeriatric care. In this situation a resident would have to move out of a Ryman village to receive the level of care required).
19. We acknowledge there is mention on the website that care options may vary between villages. However, given the degree of disparity of this statement with the main headline messaging of comprehensive care, we consider this could be more clearly explained for intending residents. Care options are a subject of importance to many intending residents and any key conditions or qualifiers should be prominently and proximately disclosed in marketing materials.
20. The marketing of a resident’s access to care in this way may create an impression that aged residential care will be available to a resident to a greater degree than what is contractually the case and we recommend you seek legal advice to ensure compliance with section 11 and 13 of the FT Act

#### **Penalties for breaching the FT Act**

21. Only the courts can decide if there has been a breach of the FT Act. The court can impose severe penalties where it finds the law has been broken.
22. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence. Where a company is a repeat offender, directors and those



involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

#### **Further information**

23. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

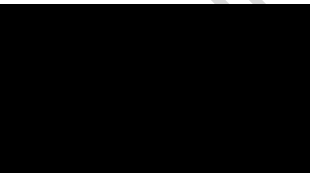
#### **Your response to our letter**

24. Our decision to take no further action on the complaint does not prevent any other person from doing so. We may also choose to take further action in the future should this conduct continue to come to our attention.
25. We recommend Ryman takes legal advice in relation to the issues raised in this letter and review the statements made on its website and in any other marketing material produced by Ryman in relation to a resident's right to other care services that are offered by Ryman in a village or Ryman care facility.

#### **Official Information Act 1982 (OIA) requests**

26. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose under the OIA, any letters we send to operators relating to this investigation.
27. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
28. Please contact me on (04) 924 3657 or by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions in relation to this letter.

Yours sincerely

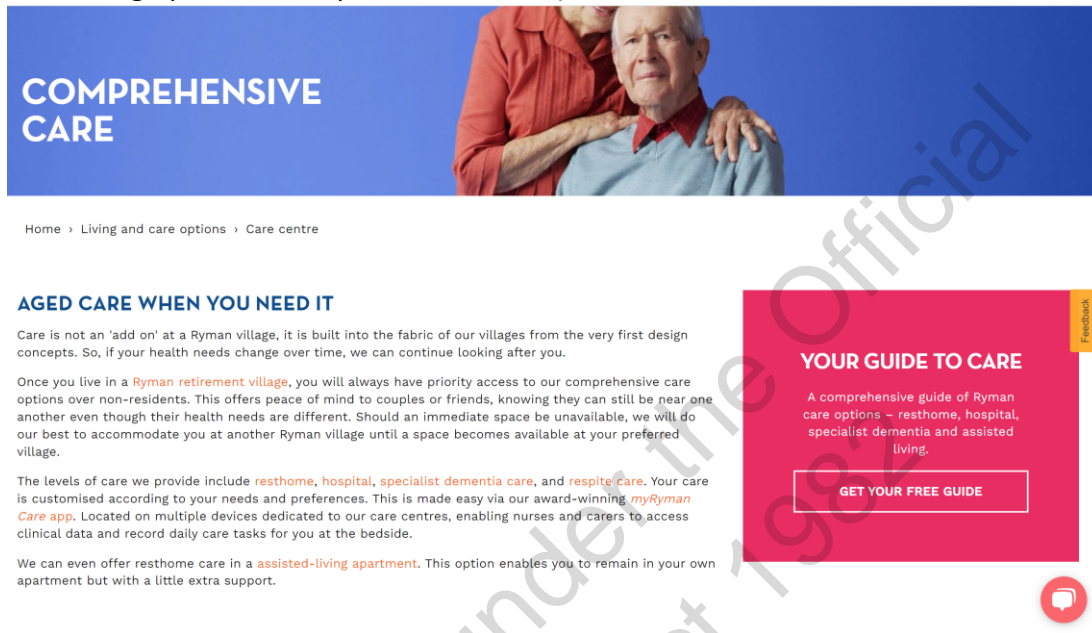


Sara Jones  
**Senior Investigator**  
**Fair Trading Branch**

Cc , General Counsel and Company Secretary

## Attachment A – Screenshots from Ryman’s website<sup>6</sup>

**Image 1** (Screenshot taken from [www.rymanhealthcare.co.nz](http://www.rymanhealthcare.co.nz) on 12 October 2023 - Located under tab “Living options – comprehensive care”)



**Image 2** (Screenshot taken from [www.rymanhealthcare.co.nz](http://www.rymanhealthcare.co.nz) on 12 October 2023 - Located under tab “About Ryman – Ryman Difference – Guarantees”)



<sup>6</sup> All Images taken in screenshots are current as at the date of this letter.

**Image 3** (Screenshot taken from [www.rymanhealthcare.co.nz](http://www.rymanhealthcare.co.nz) on 12 October 2023 - Located under tab "About Ryman – The Ryman Difference – Care")

## CARE

### The future, you're good

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Care is built into the fabric of our villages from the very beginning. It inspires confidence to live the way you want because you know the future is covered if your health needs change.

Ryman villages offer independent living, assisted-living apartments and resthome care. Most of our villages also provide hospital and specialist dementia care.

Released under the Official  
Information Act 1982

## **Attachment B – Sections 11 and 13 of the FT Act (as at 10 July 2023)**

### **11 Misleading conduct in relation to services**

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

#### *False representations*

### **13 False or misleading representations**

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or
- (c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
- (d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
- (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- (f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
- (g) make a false or misleading representation with respect to the price of any goods or services; or
- (h) make a false or misleading representation concerning the need for any goods or services; or
- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the [Consumer Guarantees Act 1993](#); or
- (j) make a false or misleading representation concerning the place of origin of goods or services.

18 January 2024

Vines Co Limited

C/- [REDACTED]  
[REDACTED]

Classic Life Limited

BY EMAIL ONLY: [REDACTED]@classiclife.co.nz

Dear [REDACTED]

## Fair Trading Act 1986 – Notice of complaint and preliminary assessment

### Introduction

1. We refer to our telephone discussion of today ([REDACTED]/Jones).
2. As discussed, the Commerce Commission (**Commission**) received a complaint in September 2022 about the Occupation Right Agreement (**ORA**) registered by Vines Co Limited (**Vines**) for its village, 'The Vines at Bethlehem', that raises issues under the unfair contract term provisions (**UCT provisions**) of the Fair Trading Act 1986 (**FT Act**).
3. We have completed an assessment of this complaint as part of our investigation into the Retirement Villages sector to ascertain whether there is any conduct in the sector that raises concerns under the FT Act.
4. We do not intend to conduct further investigations at this time in relation to the complaint made against you. However, we are writing to you to bring our preliminary views to your attention to assist you in complying with your obligations under the FT Act and to invite Vines' response to the issues raised in this letter.
5. We recommend that you take legal advice should you have any questions about complying with your obligations under the FT Act.

### Commerce Commission's role

6. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
7. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible

breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>1</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.

8. In relation to an unfair contract term (**UCT**), only the Commission has the power under the FT Act to make an application to a court for a declaration that a term in a standard form consumer contract is a UCT. Where a court has declared that a term in a standard form contract is a UCT, a person can no longer include that term in its contract or enforce it and is liable for prosecution by the Commission if it does so.

### **Commission's preliminary assessment**

9. We have reviewed this complaint and the ORA dated September 2021 and considered it against the UCT provisions of the FT Act. You registered two further amended ORAs in September 2022 and November 2023. While our initial assessment focused on the terms in the ORA dated September 2021, where any subsequent ORA amended a term raised with you in this letter, we note those amendments and provide our comments where relevant.
10. By completing our assessment and providing our comments on certain terms in the ORA, the Commission does not endorse or approve of the ORA. Instead, our assessment has commented on terms that we consider could give rise to unfairness. In providing our view we acknowledge that we have not provided Vines with the opportunity to respond to our concerns or provide an explanation as to whether the terms identified in this letter are reasonably necessary to protect the legitimate interests of Vines. Our view is not a determination of non-compliance, as only the courts have the power to declare a term unfair under the UCT provisions.
11. We also note that the complaint identified certain key financial terms and gave examples of such terms found in a range of operators' ORAs. The complaint refers to terms in your ORA dated September 2021 that relate to the date for the repayment of the resident's capital sum following termination of the ORA (clause 14.2), the end date for payment of village outgoings charge (clause 3.2(g)) and the end date for the accrual of the village amenities contribution clause 3.3(b)).
12. We have not considered these key financial terms as part of our review. Parts of the Retirement Village Code of Practice 2008 (**COP**) cover the subject matter of these terms.<sup>2</sup> Given that the COP has the status of an "enactment" and the FT Act excludes from consideration contract terms that are "expressly permitted" by an "enactment", these terms do not clearly and unambiguously fall within the remit of

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<sup>1</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>2</sup> Refer clause 54 of the Retirement Villages Code of Practice 2008.

the UCT provisions of the FT Act.<sup>3</sup> In addition, a term that “sets the upfront price” payable under the contract is excluded from UCT review.<sup>4</sup> In our view, any alleged unfairness issues surrounding these terms are better considered as part of the wider review of the underlying legislation that is currently being undertaken by the Ministry of Housing and Urban Development (**MHUD**).<sup>5</sup> We have informed MHUD of our view.

13. This decision not to review these key financial terms is not to be considered as approval of such terms by the Commission, or as an acknowledgement that there are no fairness concerns with these terms.
14. That said, the Commission does acknowledge the recent amendment that you have made to some of the terms in your ORA that include an amendment to the term that sets out the end date for the payment of the village outgoings charge (clause 3.2(g)). This term now provides that you will stop charging the resident this charge from the “*Termination Date or any later date that the Resident has stopped living in the Unit and removed all their possessions.*” This amendment addresses the concerns set out in the complaint in relation to this key financial term.<sup>6</sup>

### The complaint

15. In September 2022 the Commission received a complaint from the Retirement Villages Residents Association of New Zealand (**RVRANZ**) that raises issues under the UCT provisions of the FT Act and more generally around the fairness of terms in ORAs.<sup>7</sup>
16. The terms in Vines’ ORA identified in the RVRANZ’s complaint that the Commission would like to raise with you in this letter include:
  - 16.1 clause 3.4 (repair charges); and
  - 16.2 clause 3.2(d) (village outgoings charge).

<sup>3</sup> Refer to section 46K(1)(c) of the FT Act.

<sup>4</sup> Refer section 46K(1)(b) of the FT Act. The “upfront price’ payable means the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent (section 46K(2)).

<sup>5</sup> We refer you to the Discussion paper published in August 2023 by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development “Review of the Retirement Villages Act 2003: Options for change” and in particular Part D of this paper. See [https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8\\_0.pdf](https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8_0.pdf).

<sup>6</sup> Refer clause 3.2(g).

<sup>7</sup> <https://www.rvrnz.org.nz/wp-content/uploads/2022/10/RVR-Unfair-Terms-Oct22-DIGITAL.pdf>

### Other terms of concern

17. We reviewed other terms in Vines' ORA dated September 2021 against the UCT provisions of the FT Act. Our review has identified further terms that raise issues as to their fairness when applying the test for UCTs including:
  - 17.1 page 2 (Privacy Act Authorisation);
  - 17.2 clause 8.4 (provision of facilities at sole discretion of operator);
  - 17.3 clauses 10 and 11 (parties' liability for damage to property of other party);
  - 17.4 clause 12 (further development of the village); and
  - 17.5 clause 14.6 (resident's liability for marketing costs etc).

### Fair Trading Act - UCT provisions

18. The FT Act contains provisions that prohibit the use of UCTs in standard form consumer contracts. The UCT provisions are set out in sections 26A to 26E and 46H to 46M of the FT Act.
19. A consumer contract is a contract between a supplier and consumer that relates to the supply of goods and services of a kind ordinarily acquired for personal, domestic, or household use or consumption. A standard form consumer contract is one where the terms have not been subject to effective negotiation between the parties, and factors taken into account when determining this, include:
  - 19.1 whether one party has all or most of the bargaining power;
  - 19.2 whether the terms are prepared in advance by the supplier;
  - 19.3 whether the customer is required to accept or reject the terms and conditions;
  - 19.4 the extent to which the parties had an effective opportunity to negotiate the terms; and
  - 19.5 the extent to which the specific characteristic of any party to the contract is taken into account.
20. If the Commission thinks that a term in a standard form consumer contract is unfair, we can apply to a court for a declaration that the term is a UCT.
21. When deciding if a term is unfair, the court must be satisfied that the term would meet all three of the following criteria set out at section 46L:
  - 21.1 the term would cause a significant imbalance in the parties' rights and obligations under the contract;



- 21.2 the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it; and
- 21.3 the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.
22. The court can also consider any other matters it considers are relevant, but must take into account two mandatory considerations:
- 22.1 the extent to which the term is transparent; and
- 22.2 the contract as a whole.
23. Section 46M of the FT Act provides a non-exhaustive list of examples of the kinds of terms that, if contained in a consumer contract may be a UCT.
24. Certain terms are exempt from being declared unfair and these are set out at section 46K of the FT Act.

#### **Possible breach of UCT provisions – preliminary assessment**

25. We consider that the ORA between Vines and a resident is likely to come within the definitions set out in the FT Act of a “standard form contract”<sup>8</sup> and a “consumer contract”.<sup>9</sup>

#### *Significant imbalance and detriment*

26. We have done a preliminary assessment of clauses in the ORA raised in the complaint and the further clauses that we have identified, against the test for unfairness set out at section 46L of the FT Act. We set out at **Attachment A** our assessment against the tests of significant imbalance and detriment for each clause noted above in this letter.

#### *Not reasonably necessary to protect legitimate interests*

27. Vines may wish to consider whether the terms complained of are reasonably necessary to protect their legitimate interests.
28. Were the Commission to bring an application to a court for a declaration that the clauses identified in this letter were unfair, the law presumes they are **not** reasonably necessary.<sup>10</sup> The onus would then be on Vines to prove that the clauses are reasonably necessary to protect their legitimate interests.
29. Vines may also want to consider whether there are fairer means to protect any legitimate interest they believe they may have.

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<sup>8</sup> Refer section 46J of FT Act.

<sup>9</sup> Refer section 2 of the FT Act.

<sup>10</sup> Refer section 46L(3) of the FT Act.

*Transparency and contract as a whole*

30. In determining whether a clause in a standard form consumer contract is unfair, a court must also take into account the extent to which the term is transparent and the contract as a whole. In relation to these two factors, as applied to the clauses identified in this letter, we note:
- 30.1 the ORA is lengthy and complex legal contract that does not adhere to a plain English style of drafting. This means that clauses identified in this letter may not be transparent to a resident;
  - 30.2 the Commission acknowledges that a resident is legally required to obtain independent legal advice before it signs an ORA. Despite this statutory requirement, the Commission is of the view that this does not automatically mean that a term is made transparent. The requirement for legal advice should not save a contract from any transparency issues it may contain; and
  - 30.3 we have a particular concern around the transparency of clause 14.6 in that it imposes a potential liability on a resident to pay charges relating to the marketing and sale of their unit without clearly presenting the obligation, including what the charges are and how the charges are determined. If Vines did rely on the clause as currently drafted, then the clause risks operating as a unilateral price increase.

**Penalties for breaching the Fair Trading Act**

31. Only the courts can decide if there has been a breach of the FT Act.
32. Where a court has declared a term in a standard form contract is a UCT, the FT Act prohibits that business from including the term in the contract or from enforcing or relying on that term. If a business continued to use or enforce that term it may face:
- 32.1 conviction or a fine of up to \$200,000 for an individual or \$600,000 for a company; and/or
  - 32.2 an injunction restraining the business from enforcing or relying on the term; and/or
  - 32.3 orders directing it to refund money or pay damages.
33. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

**Further information**

34. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). You can also view the FT Act at [www.legislation.co.nz](http://www.legislation.co.nz).

35. We attach a link to the Commission's guidance to business on UCTs where a copy of the Commission's "Unfair Contract Terms Guidelines" can be downloaded. <http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>.

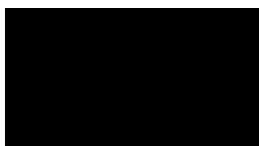
#### **Response to our letter**

36. Our decision not to take further enforcement action against Vines at this time in relation to the issues raised in this letter does not prevent us from taking action in the future. We ask you to carefully consider the issues we raise and take legal advice should you have any questions about complying with your obligations under the FT Act.
37. We invite you to respond to our letter and, in particular, provide us with your views on any legitimate interest you consider Vines has in the terms we have raised. Any response is voluntary, you do not need to respond if you do not wish to. Please consult a lawyer if you are unsure about whether to provide us with a voluntary response and inform us if you decide not to do so.

#### **Official Information Act 1982 (OIA) requests**

38. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose, under the OIA, any letters we send to operators relating to this investigation.
39. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
40. Please contact me on 04 924 3657 or by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions or comments in relation to this letter.
41. We look forward to receiving Vines' response to our letter.

Yours sincerely



**Sara Jones**  
**Senior Investigator**  
**Fair Trading Branch**

## Attachment A

### Occupation Right Agreement The Vines at Bethlehem 23 September 2021

<b>(Potentially) Unfair Contract Term identified</b>	<b>Explanation of term</b>	<b>Commerce Commission's Concerns</b>
<p>Clause 3.4 (repair charges)</p> <p>Identified in RVRNZ complaint</p> <p>Clause 4.1 (resident's obligations – Care of Unit)</p>	<p>The resident has an obligation to keep the interior of the unit and the operator's chattels in a good, clean and tidy condition, excluding fair wear and tear (clause 4.1(a))</p> <p>The resident has an obligation to pay for the costs of any repairs to the interior of the residential unit including the repair of any stove, microwave oven, clothes dryer, refrigerator, washing machine, garage door, plumbing and electrical fixtures and fittings and other operator's chattels contained in the unit, (clause 3.4).</p> <p><i>"Operator's Chattels"</i> are the fixtures, fittings, equipment, furnishing and furniture supplied in the unit by the operator.</p> <p>The resident also has an obligation to replace certain items in the unit including power elements and electrical fittings in the unit as they wear out or</p>	<p><i>Significant detriment</i></p> <p>We consider that these terms when considered against the property ownership rights of the parties under the licence to occupy model may cause a significant imbalance in favour of the operator.</p> <p>This is because the terms of the ORA provide that the resident has no property ownership right or interest in the unit (clause 2.1) or the operator's chattels (clause 5.2) and does not share in any capital gain in value of the unit on termination and resale of the occupation right to a new resident.</p> <p>We also invite Vines to consider its definition of "fair wear and tear". Given retirement villages provide accommodation exclusively to older people this carve out in relation to what amounts to fair wear and tear appears not to take into account that it is foreseeable that residents as they age in place may use</p>

	<p>are broken or become unserviceable (clause 4.1(a)).</p> <p>The resident is not liable for loss or damage to the unit/operator's chattels that are covered by the operator's insurance, except the operator's insurance excess shall be payable by the resident (clause 4.1(c)).</p> <p>The resident is not required to pay the costs of replacing operator's chattels that require replacement solely as a result of fair wear and tear.</p> <p>In these terms "fair wear and tear" excludes damage caused by "mobility aids, smoking, pets, incontinence and other medical conditions".</p> <p>AMENDMENT TO THESE TERMS IN ORA NOVEMBER 2023</p> <p>Clause 4.1(a) has been amended to clarify that the operator is responsible for the costs of all servicing, maintenance, repairs and replacements to the "Operator's Chattels" and the interior of the unit. The resident is responsible for these costs where repair and replacements are required due to damage not attributable to fair wear and tear and where costs are not covered by the operator's insurance.</p>	<p>mobility/disability aids or if they have a serious medical condition may become incontinent.</p> <p><i>Detriment</i></p> <p>The terms have the potential to cause financial detriment to the resident if it is applied, enforced, or relied on.</p> <p><i>Our views on the amendments to these terms in ORA November 2023</i></p> <p>The amendments provide that the resident is now only liable for the costs of repair and replacement to operator's chattels and the interior of the unit that are caused by factors other than fair wear and tear.</p> <p>Further a resident is not liable to pay the operator's insurance excess for damage caused to the interior of a unit and operator's chattels except where the resident or their guests has been negligent in causing such damage.</p> <p>We consider that the amendments made to clauses 3.4 and 4.1 address the significant imbalance in favour of the operator potentially caused by these clauses in the ORA dated September 2021.</p> <p>These amended terms present more balanced terms in relation to the repair and replacement obligations as</p>
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	<p>Clause 3.4 has been amended to delete the obligation on the resident to pay for the costs of repairs to the interior of the unit and operator chattels as set out above.</p> <p>Clause 4.1(c) has also been amended so that a resident is only liable to pay an operator's insurance excess where the resident has been negligent.</p> <p>These definition of "fair wear and tear" was amended to delete the reference to "mobility aids". The consequence of this amendment is that fair wear and tear is now expressly defined to include damage that is attributable to the use of residents of "mobility aids".</p> <p>In relation to clause 4.1 this means that residents are not liable for the costs associated damage caused by mobility aids.</p> <p>In relation to clause 14.4, on termination a resident is not liable to pay for damage associated with the use of "mobility aids".</p>	<p>between the operator and resident when considered against other financial terms set out in the ORA.</p> <p>We also note the amendment to the definition of "fair wear and tear". We consider that this amendment goes some way to addressing the imbalance in favour of Vines that this definition caused in the ORA dated September 2021.</p>
<p>Clause 3.2(d) (change to village outgoing charge)</p>	<p>This term gives the operator the right to increase the village outgoing charge each year by an amount no greater than the percentage movement in the CPI.</p>	<p><i>Significant imbalance</i></p> <p>A term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate</p>

<p>Identified in RVRNZ complaint</p>	<p>The operator also has a right to increase this charge at any other time during the year where there are <i>“any material unexpected or unforeseen changes to any of the costs”</i> that contribute to this charge. The operator will consult with the Residents’ Committee, the residents and Statutory Supervisor prior to the proposed increase.</p>	<p>the contract is an example of a possible unfair contract term under section 46M(f) of the FT Act.</p> <p>Price certainty is an important factor for consumers. A unilateral right to increase a price can have the effect of giving significant power to the operator unless there are sufficient counterbalancing rights in place for the resident.</p> <p>For many reasons, termination of an ORA after a price increase is not a practical option for a resident, given the financial detriment involved and the practicality of then having to move out of their primary residence.</p> <p>An ORA can last for an extended period of time, and it is also acknowledged that the operator’s costs may increase over that time period for reasons outside of its control.</p> <p>The outgoings for the village include a wide range of costs and charges. Some of these charges the operator will have no control over such as rates however the operator will have a measure of control over other costs.</p> <p>The effect of this clause is to give Vines a right to increase this charge. effectively at will with reference to an increase in the CPI, and for a range of other costs</p> <p>There is no independent analysis required that Vine’s costs have actually increased due to the increase in CPI and no right for a resident to maintain the payment of</p>
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		<p>the charge at the current rate while raising a complaint with Vines as to the increase.</p> <p>Further in relation to an increase due to “<i>any material unexpected or unforeseen changes to any of the costs</i>”, this right would essentially be at the discretion of the operator, without the need to be put to proof of such costs, especially where the costs are those that are within the control of the operator.</p> <p>We invite Vines to consider what legitimate interest they may have in this term and whether their unilateral price increase as drafted goes beyond what is reasonably necessary to protect their legitimate interests, and whether their interests can be protected by fairer means.</p> <p><i>Detriment</i></p> <p>The term has the potential to cause financial detriment to the resident if it is applied, enforced, or relied on.</p>
<p>Page 2 (Privacy Act Authorisation)</p> <p>Identified in RVRNZ complaint</p>	<p>For the sole purpose of determining a resident’s continued suitability to occupy a unit, this clause provides a resident’s authorisation that gives the operator the right to collect from any health agency, a resident’s information relating to a resident’s physical and mental health.</p> <p>This authorisation is in addition to clause 4.14 (resident’s consent to an assessment by Medical</p>	<p><i>Significant imbalance</i></p> <p>We consider that the authorisation may be unnecessarily broad in scope when considered against the needs of Vines and the other authorisation that a resident provides under the ORA (clause 4.14) and as such is significantly imbalanced in favour of Vines.</p>



	<p>Practitioner) and clause 13.4 (operator's right to terminate ORA on medical grounds).</p>	<p>We also note that there is no right given to a resident to withdraw this authorisation in circumstances where a resident considers that Vines may be over exercising this right to collect a resident's health information.</p> <p>We acknowledge Vines has an interest in certain medical information of the resident. We consider that the right of access to highly confidential and sensitive medical information should be limited so that it is only specifically necessary information relevant to the current circumstances of the resident that is acquirable.</p> <p><i>Detriment</i></p> <p>This term has the potential to cause a detriment to a resident by unnecessarily invading their privacy as to their medical records.</p>
<p>Clause 8.4 (provision of facilities)</p>	<p>Subject only to information and consultation obligations on the operator set out in clause 8.4 in relation to the facilities, the provision of facilities and the provision of additional buildings, areas, or amenities as part of the facilities, and the removal buildings, areas, or amenities from the facilities whether temporary or permanent, is at the sole discretion of operator.</p>	<p><i>Significant imbalance</i></p> <p>This term gives Vines the right to add or remove buildings, areas, or amenities to the facilities. While we acknowledge there is a legitimate interest in Vines being able to develop facilities at the village, any disruption caused by development or any detriment caused by removal of buildings, areas or amenities ought to be balanced against the rights of residents.</p> <p>While a resident has a right to be informed and consulted regarding proposed changes in the facilities</p>

		<p>and the right to raise a dispute, the operator has a broad unilateral right to change the facilities on offer at will.</p> <p>There are no counterbalancing rights such as a right to receive a reduction in fees commensurate to any reduction in the facilities, in circumstances where the operator makes changes that adversely affects the resident.</p> <p>Further given the large financial commitment made by the resident under the ORA and the practical reality that the resident lives in the village, a right to terminate the contract due to a change in facilities is not a practical or useful right to counterbalance this right to change the facilities as discussed above in relation to the increase in the village outgoings charge.</p> <p>We note this is similar to the example unfair contract term in section 46M(g), as it is a term that permits, or has the effect of permitting, one party to unilaterally vary the characteristics of the goods or services to be supplied.</p> <p>The resident has a right to be informed and consulted regarding changes to facilities however there is no right to approve changes in facilities or a right to terminate the ORA (without significant financial detriment), in circumstances where the operator makes changes to the facilities and the change adversely affects the resident.</p>
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		<p><i>Detriment</i></p> <p>The term has the potential to cause financial detriment to resident and may affect the resident’s enjoyment of village life if it is applied, enforced, or relied on.</p> <p>Residents may receive a reduction in the facilities, buildings or amenities than what they agreed at the time of entering the ORA at the same cost.</p> <p>Residents may suffer inconvenience and reduced peaceful enjoyment of the village while buildings are added or removed and would not be compensated for disruptions caused by building works.</p>
<p>Clauses 10 and 11 (parties’ liability for damage to property of other party)</p>	<p>The operator is not responsible for the loss or damage to any property belonging to the resident due to theft or any cause (clause 10).</p> <p>The resident is obliged to reimburse the operator for any loss or damage suffered by the operator as a result of the carelessness or negligence of the residents or their guests. Where the operator is insured for the loss or damage then resident is required to reimburse the operator’s insurance excess otherwise resident is liable for the full loss or damage (clause 11).</p> <p>AMENDMENT TO THESE TERMS IN ORA NOVEMBER 2023.</p>	<p><i>Significant imbalance</i></p> <p>The obligations of the parties as to their liability to each other for loss or damage that they may cause to each other’s property is significantly imbalanced. The operator has no liability for any loss or damage that it or its employees or contractors may cause to a resident’s property irrespective of whether the damage was caused due to an accident or a negligent or wilful act or omission.</p> <p><i>Detriment</i></p> <p>There may be financial detriment to the resident if clause 10 term is applied enforced or relied on.</p>

	<p>Resident's obligation at clause 11 was amended in that the requirement to reimburse the operator's insurance excess only applies if the resident or their guests have been negligent.</p> <p>The effect of this change is that a resident is no longer required to pay the operator's insurance excess where damage is caused due to carelessness of the resident or guests.</p>	<p>We acknowledge the amendment to clause 11 in that a resident is no longer liable to pay the operator's insurance excess for any loss or damage a resident or its guests cause to an operator's property due to a careless act or omission (not amounting to negligence). We consider that this amendment goes some way to addressing the imbalance in the parties' rights and obligations for liability for loss and damage to the property of the other party.</p> <p>However there remains a significant imbalance as Vines still has no liability for any damage it may cause to a resident's property for any reason.</p>
<p>Clause 12 (further development of village)</p>	<p>This term gives the operator the right in its sole discretion to further develop the village in any way whatsoever subject to using its "best endeavours" to cause as little inconvenience to the resident as it practicable in the circumstances.</p> <p>The resident has no right to object or make a claim for compensation in respect of the further development at the village (clause 12.1).</p> <p>The resident has no right to make an objection to building work associated with any construction at the village or to commence any legal proceeding in relation to such development.</p>	<p><i>Significant imbalance</i></p> <p>The Retirement Village Disclosure Statement is required to include information for intending residents about new services and facilities that are planned including the location, size and effect on residents of those new services or facilities.<sup>11</sup></p> <p>However, in circumstances where a future development is not foreseen and has not been disclosed by Vines, this obligation on a resident to provide wholesale consent to further development and give up any right to compensation or to take legal action in relation to the</p>

<sup>11</sup> Refer clause 2(b) of Schedule 2 of the Retirement Villages Act 2003.

		<p>development is significantly imbalanced in favour of Vines.</p> <p>The requirement to consent to future developments that are unknown at the time of consent (and therefore the impact to the resident is unknown) contributes to the imbalance. The clause provides full and absolute rights to Vines whilst removing rights of the resident that may serve to counterbalance this right.</p> <p>We also note that a term that has the effect of limiting one party's right to sue another party is an example unfair contract term under s 46M(k) of the FTA.</p> <p>It is acknowledged that Vines, as owner and operator, has an interest in the maintenance, investment and development of its village including facilities such as care facilities which may be of benefit to existing residents should their health needs change. However, we consider that there are likely to be fairer or more balanced means to protect Vines' interests that also take into consideration the interests of existing residents who often move into a retirement village setting to enjoy peace and quiet.</p> <p><i>Detriment</i></p> <p>There is potential detriment to a resident caused by the removal of their right to claim compensation or object to a development that may materially affect them and their</p>
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		enjoyment of their retirement living if this term is applied, enforced, or relied on.
<p>Clause 14.6 (marketing costs)</p> <p>Identified in RVRNZ complaint</p>	<p>This clause places an obligation on the resident to pay any marketing costs, commission or other remuneration to a third party relating to sale of an occupation right to a new resident.</p> <p>AMENDMENT TO THIS TERM IN ORA NOVEMBER 2023</p> <p>This term has been amended to restrict the operator's recovery of these costs from a resident to those marketing costs, commission or other remuneration to a third party "<i>appointed by the resident</i>". The example given is if a resident signs a real estate agency agreement.</p>	<p><i>Significant imbalance</i></p> <p>We note that there is no other express term in the ORA that imposes an obligation on a resident to pay for marketing and sales related costs. Nothing is mentioned about this potential liability on a resident in the section of the ORA headed "Payments".</p> <p>This clause appears on its face to raise an imbalance in the rights and obligations of the parties under the ORA as the clause appears to indicate that a resident may have a liability to the operator for marketing and sales related costs without expressly setting this out as an obligation.</p> <p>Assuming Vines relies on this clause to impose an obligation on a resident for marketing and sales costs, this obligation raises a significant imbalance in favour of Vines in that a resident:</p> <ol style="list-style-type: none"> <li>1. has no express rights set out in the ORA relating to the sales process for the unit and therefore no ability to influence costs that Vines may incur and then pass onto the resident;</li> <li>2. has no ownership right or interest in the residential unit; and</li> </ol>

		<p>3. the obligation on the resident to pay these charges is not transparent. The resident has no knowledge of the type, nature and amount of the charges and how they are determined. Nor do they have knowledge of the extent of the liability they are incurring, as it at the discretion of Vines. This has the effect of being a unilateral price increase.</p> <p><i>Detriment</i></p> <p>The term has the potential to cause financial detriment to the resident if it is applied, enforced or relied on.</p> <p><i>Our views on the amendments to these terms</i></p> <p>The amended term clarifies that the resident is only obliged to pay for these costs where they relate to those charged by a third party appointed by the resident, such as a real estate agent. In these circumstances where the resident has a choice as to whether or not to appoint an agent (or other third party) then we consider that the term is evenly balanced as between the parties.</p>
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Released under the  
 Information Act 1982

19 January 2024

Althorp Village Limited  
C/- [REDACTED]  
[REDACTED]  
Althorp Village

BY EMAIL ONLY: [enquiries@althorpvillage.co.nz](mailto:enquiries@althorpvillage.co.nz)

Dear [REDACTED]

## **Fair Trading Act 1986 – Notice of complaint, preliminary assessment and invitation to respond**

### **Introduction**

1. We refer to our telephone discussion of today ([REDACTED]/Jones).
2. As briefly discussed, the Commerce Commission (**Commission**) has received a complaint in September 2022 about the Occupation Right Agreement (**ORA**) registered by Althorp Village Limited (**Althorp**) that raises potential issues under the unfair contract term provisions (**UCT provisions**) of the Fair Trading Act 1986 (**FT Act**).
3. We have completed an assessment of this complaint and have also reviewed statements made on the website of Althorp Village<sup>1</sup> (**website**), as part of our investigation into the Retirement Village sector to ascertain whether there is any conduct in the sector that raises concerns under the FT Act.
4. We do not intend to conduct further investigations at this time in relation to the complaint made against Althorp or the issues we raise in this letter regarding certain statements on the website. However, we are writing to you to bring our preliminary views to your attention to assist you in complying with your obligations under the FT Act and to invite Althorp's response to the issues raised in this letter.
5. We recommend that you take legal advice should you have any questions about complying with your obligations under the FT Act.

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<sup>1</sup> [www.althorpvillage.co.nz](http://www.althorpvillage.co.nz)



### Commerce Commission's role

6. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
7. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>2</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.
8. In relation to an unfair contract term (**UCT**), only the Commission has the power under the FT Act to make an application to a court for a declaration that a term in a standard form consumer contract is a UCT. Where a court has declared that a term in a standard form contract is a UCT, a person can no longer include that term in its contract or enforce it and is liable for prosecution by the Commission if it does so.

### Commission's preliminary assessment

9. We have reviewed this complaint and your ORA dated September 2021 and considered it against the UCT provisions of the FT Act. Althorp registered a further amended ORA in September 2023. While our initial assessment focussed on the terms in the ORA dated September 2021, where the ORA dated September 2023 amended a term raised in this letter, we note those amendments and provide our comments where relevant.
10. We have also reviewed the website and made a preliminary assessment as to whether there are any statements on the website that may possibly breach sections 11 or 13 of the FT Act, relating to false or misleading conduct or representations.
11. By completing our preliminary assessment and providing our comments on certain terms in the ORA, the Commission does not endorse or approve of the ORA. Instead, our assessment has commented on terms that we consider could give rise to unfairness. In providing our view we acknowledge that we have not provided Althorp with the opportunity to respond to our concerns or provide an explanation as to whether the clauses identified in this letter are reasonably necessary to protect the legitimate interests of Althorp. Our view is not a determination of non-compliance, as only the courts have the power to declare a term unfair under the UCT provisions.
12. We also note that the complaint identified certain key financial terms in your ORA dated September 2021 and gave examples of such terms found in a range of operators' ORAs. The complaint refers to financial terms in your ORA including the exit payment date (clause 66.2) and the end date for the accrual of the village

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<sup>2</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

contribution (clause 3.4).<sup>3</sup> The complaint also raises concerns around the term relating to the end date for payment of a weekly fee.<sup>4</sup>

13. We have not considered these key financial terms as part of our review. Parts of the Retirement Villages Code of Practice 2008 (**COP**) cover the subject matter of these terms.<sup>5</sup> Given that the COP has the status of an “enactment” and the FT Act excludes from consideration contract terms that are “expressly permitted” by an “enactment”, these terms do not clearly and unambiguously fall within the remit of the UCT provisions of the FT Act.<sup>6</sup> In addition, a term that “sets the upfront price” payable under the contract is excluded from UCT review.<sup>7</sup> In our view, any alleged unfairness issues surrounding these terms are better considered as part of the wider review of the underlying legislation that is currently being undertaken by the Ministry of Housing and Urban Development (**MHUD**).<sup>8</sup> We have informed MHUD of our view.
14. This decision not to review these key financial terms is not to be considered as approval of such terms by the Commission, or as an acknowledgement that there are no unfairness concerns with these terms.
15. That said, we have noted that in your amended ORA dated September 2023 you have amended all three of these key financial terms.<sup>9</sup>

### The complaint

16. In September 2022 the Commission received a complaint from the Retirement Villages Residents Association of New Zealand (**RVRANZ**) that raises issues under the UCT provisions of the FT Act.<sup>10</sup> In particular the complaint identifies terms contained in the ORA dated September 2021 and alleges that they are “unfair” when applying the test set out at section 46L of the FT Act.

<sup>3</sup> While the RVRNZ’s complaint footnotes clause 3.4 the actual clause recorded in the complaint does not reflect clause 3.4(a) in your ORA.

<sup>4</sup> Refer clause 3.5 of your ORA dated September 2021 that sets out the term for when the village outgoings payment ceases to be payable.

<sup>5</sup> Refer clause 54 of the Retirement Villages Code of Practice 2008.

<sup>6</sup> Refer to section 46K(1)(c) of the FT Act.

<sup>7</sup> Refer section 46K(1)(b) of the FT Act. The “upfront price” payable means the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent (section 46K(2)).

<sup>8</sup> We refer you to the Discussion paper published in August 2023 by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development “Review of the Retirement Villages Act 2003: Options for change” and in particular Part D of this paper. See [https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8\\_0.pdf](https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8_0.pdf).

<sup>9</sup> For end date for accrual of village contribution refer clauses 11.3 and 11.4, for exit payment date refer clause 11.6 and end date for the weekly free refer clause 4.3 of your ORA dated September 2023.

<sup>10</sup> <https://www.rvrnz.org.nz/wp-content/uploads/2022/10/RVR-Unfair-Terms-Oct22-DIGITAL.pdf>

17. The terms in the ORA dated September 2021, identified in the RVRANZ's complaint, that the Commission would like to raise with you in this letter include:
- 17.1 clauses 29.1 and 29.2 (care of residential unit); and
  - 17.2 clause 16.3 (change to village outgoings payment).

#### **Other terms of concern**

18. We reviewed the remaining terms in the ORA dated September 2021 against the UCT provisions of the FT Act. Our review has identified further terms that raise issues as to their fairness when applying the test for UCTs including:
- 18.1 clauses 14.3 and 14.4 (change to support services payment);
  - 18.2 clause 24.5(c) (charges relating to the marketing and sale of the residential unit);
  - 18.3 clause 36 (privacy authorisation);
  - 18.4 clause 55 (further development of the village); and
  - 18.5 clause 64.2 (departure from residential unit).
19. We also reviewed the website and assessed whether statements made on the website are at risk of breaching sections 11 or 13 of the FT Act (prohibition on false or misleading conduct or representations). We have identified two statements on the website that are at risk of breaching the FT Act that we discuss below at paragraphs 36 to 42.

#### **Fair Trading Act - UCT provisions**

20. The FT Act contains provisions that prohibit the use of UCTs in standard form consumer contracts. The UCT provisions are set out in sections 26A to 26E and 46H to 46M of the FT Act.
21. A consumer contract is a contract between a supplier and consumer that relates to the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption. A standard form consumer contract is one where the terms have not been subject to effective negotiation between the parties, and factors taken into account when determining this include:
- 21.1 whether one party has all or most of the bargaining power;
  - 21.2 whether the terms are prepared in advance by the supplier;
  - 21.3 whether the customer is required to accept or reject the terms and conditions;

- 21.4 the extent to which the parties had an effective opportunity to negotiate the terms; and
  - 21.5 the extent to which the specific characteristic of any party to the contract is taken into account.
22. If the Commission thinks that a term in a standard form consumer contract is unfair, it can apply to a court for a declaration that the term is a UCT.
23. When deciding if a term is unfair, the court must be satisfied that the term would meet all three of the following criteria set out at section 46L:
- 23.1 the term would cause a significant imbalance in the parties' rights and obligations under the contract;
  - 23.2 the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it; and
  - 23.3 the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
24. The court can also consider any other matters it considers are relevant, but must take into account two mandatory considerations:
- 24.1 the extent to which the term is transparent; and
  - 24.2 the contract as a whole.
25. Section 46M of the FT Act provides a non-exhaustive list of examples of the kinds of terms that, if contained in a consumer contract, may be a UCT.
26. Certain terms are exempt from being declared unfair and these are set out at section 46K of the FT Act.

#### **Possible breach of UCT provisions – preliminary assessment**

27. We consider that the ORA between Althorp and a resident is likely to come within the definitions set out in the FT Act of a standard form consumer contract.<sup>11</sup>

#### *Significant imbalance and detriment*

28. We have completed a preliminary assessment of the terms in the ORA raised in the complaint, and further terms that we have identified, against the test for unfairness set out at section 46L of the FT Act. We set out at **Attachment A** our assessment against the tests of significant imbalance and detriment for each term noted above in this letter.

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<sup>11</sup> Refer section 2 of the FT Act and section 46J of FT Act.

*Not reasonably necessary to protect legitimate interests*

29. Althorp may wish to consider whether the terms complained of are reasonably necessary to protect their legitimate interests.
30. Were the Commission to bring an application to a court for a declaration that the clauses identified in this letter were unfair, the law presumes they are **not** reasonably necessary.<sup>12</sup> The onus would then be on Althorp to prove that the clauses are reasonably necessary to protect their legitimate interests.
31. Althorp may also want to consider whether there are fairer means to protect any legitimate interest they believe they may have.

*Transparency and contract as a whole*

32. In determining whether a term in a standard form consumer contract is unfair a court must also take into account the extent to which the term is transparent and the contract as a whole. In relation to these two factors, as applied to the terms identified in this letter, we note:
  - 32.1 while the ORA states it is written as a plain English document, the length and complexity of the contract means that terms identified in this letter may not be transparent to a resident. We acknowledge Althorp's ORA registered in September 2023 that introduced a new and revised contract template. In our view this new template ORA is written in a plain English style and the terms are much easier to read and understand compared to the previously registered ORA dated September 2021;
  - 32.2 the Commission acknowledges that a resident is legally required to obtain independent legal advice before it signs an ORA. Despite this statutory requirement, the Commission is of the view that this does not automatically mean that a term is made transparent. The requirement for legal advice should not save a contract from any transparency issues it may contain; and
  - 32.3 we have a particular concern around the transparency of clause 24.5(c) in the ORA dated September 2021 in that it imposes a potential liability on a resident to pay charges relating to the marketing and sale of their unit without clearly presenting the obligation, including what the charges are and how the charges are determined. If Althorp did rely on the clause as currently drafted, then the term risks operating as a unilateral price increase.<sup>13</sup>

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<sup>12</sup> Refer section 46L(3) of the FT Act.

<sup>13</sup> We acknowledge that this term has been deleted from the new ORA dated September 2023 and we refer to our analysis of this term and the replacement term in Attachment A to this letter.

### **Fair Trading Act – Sections 11 & 13**

33. Sections 11 and 13(g) and (i) of the FT Act are relevant to statements we have identified on the website and set out in this letter at **Attachment B**.
34. Section 11 makes it an offence for a person in trade to engage in conduct that is liable to mislead the public regarding factors including the nature or characteristics of services.
35. Section 13 makes it an offence for a person in trade in connection with the supply of services or with the promotion by any means of the supply or use of services to:
  - 35.1 make a false or misleading representation with respect to the price of any goods or service (section 13(g)); or
  - 35.2 make a false or misleading representation concerning the existence, exclusion or effect of any right (section 13(i)).

### **Possible breach of sections 11 & 13 of the FT Act – preliminary assessment**

36. The statement at Image 1 of **Attachment B** currently appears on the website, and also appeared on the website prior to your amended ORA dated September 2023.<sup>14</sup> It provides an example of the return in capital, minus the village contribution, that would be refunded to a resident (who has an occupation right in a Villa) were they to leave the village after 24 months.
37. The Commission is concerned that this statement, when it was published prior to 15 September 2023, was potentially misleading and at risk of breaching section 13(g) of the FT Act.
38. This is because we consider the example gives the impression that for every resident of a villa who leaves the village after two years, their village contribution will cease accruing at the time that they 'leave' the village. However, when comparing this statement against a resident's contractual obligations set out in the ORA dated September 2021, where a resident occupies a villa and leaves after two years the village contribution will stop on the earlier of the expiry of nine months after the "Termination Date" or the "Exit Payment Date".<sup>15</sup> The effect of this term is that the village contribution will continue to accrue after the resident 'leaves' the village.
39. We acknowledge that the ORA registered in September 2023 has amended the term setting out the end date for the accrual of the village contribution and so the statement at Image 1 now correctly represents an intending resident's position under the ORA.<sup>16</sup>

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<sup>14</sup> From at least January 2023.

<sup>15</sup> Refer clause 3.4(a) ORA dated September 2021.

<sup>16</sup> Refer clause 11.4 ORA dated September 2023 that provides that for apartments, units, townhouses and villas, the village contribution stops accruing on the termination date or later vacation date.

40. However, in light of our concern we invite Althorp to check the representations made on its website to ensure that the representations accord with the contractual rights and obligations of residents as set out in the applicable ORA so as not to risk breaching the FT Act.
41. The statement on the website at Image 2 of **Attachment B** suggests that the ORA gives a resident the “*right to occupy a dwelling at the Village for life*”. We are concerned that this statement is potentially misleading and at risk of breaching section 13(i) of the FT Act.
42. The statement as worded risks giving prospective residents the impression that they could live at Althorp Village for the rest of their life. However, this is incorrect when considered against clause 8.4 of ORA dated September 2023 where Althorp has a right to terminate a resident’s right to occupy a unit and live in the village, where it has obtained a medical assessment that the physical and/or mental health of a resident means that either they can no longer live safely in the village or other residents in the village cannot live safely in their units.

#### **Penalties for breaching the FT Act**

43. Only the courts can decide if there has been a breach of the FT Act.
44. Where a court has declared a term in a standard form contract is a UCT, the FT Act prohibits that business from including the term in the contract or from enforcing or relying on that term. If a business continues to use or enforce that term it may face:
  - 44.1 conviction or a fine of up to \$200,000 for an individual or \$600,000 for a company; and/or
  - 44.2 an injunction restraining the business from enforcing or relying on the term; and/or
  - 44.3 orders directing it to refund money or pay damages.
45. The same penalties apply if a court were to find a breach of section 11 and/or 13 of the FT Act.
46. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

#### **Further information**

47. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). You can also view the FT Act at [www.legislation.co.nz](http://www.legislation.co.nz).

48. We attach a link to the Commission's guidance to business on UCTs where a copy of the Commission's "Unfair Contract Terms Guidelines" can be downloaded. <http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>.

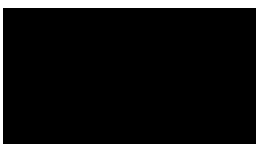
#### **Response to our letter**

49. Our decision not to take further enforcement action against Althorp at this time in relation to the issues raised in this letter does not prevent us from taking action in the future. We ask you to carefully consider the issues we raise and take legal advice should you have any questions about complying with your obligations under the FT Act.
50. We invite you to respond to our letter and, in particular, provide us with your views on any legitimate interest you consider Althorp has in the terms we have raised. Any response is voluntary, you do not need to respond if you do not wish to. Please consult a lawyer if you are unsure about whether to provide us with a voluntary response and inform us if you decide not to do so.

#### **Official Information Act 1982 (OIA) requests**

51. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose, under the OIA, any letters we send to operators relating to this investigation.
52. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
53. Please contact me on 04 924 3657 or by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions in relation to this letter.
54. We look forward to receiving Althorp's response to our letter.

Yours sincerely



Sara Jones  
**Senior Investigator**  
**Fair Trading Branch**



## Attachment A

## Occupation Right Agreement for Althorp Village September 2021

<b>(Potentially) Unfair Contract Term identified</b>	<b>Explanation of term</b>	<b>Commerce Commission's Concerns</b>
<p>Clauses 29.1 and 29.2 (care of residential unit)</p>	<p>Resident has a general obligation to keep the residential unit and operator's chattels in a proper, tidy, clean and sanitary condition and (where appropriate) in working order and condition.</p> <p>Resident also has a specific obligation to repair or, if necessary, replace certain listed items (including plumbing fittings, electrical fittings) that are supplied in a resident's unit for their use when they wear out, are broken or become unserviceable.</p> <p>"Operator's Chattels" are set out in Schedule 4 and include floor coverings, window coverings, whiteware, automatic garage door opener, heating systems, laundry tub and TV.</p>	<p><i>Significant imbalance</i></p> <p>We consider that these terms when considered against the property ownership rights of the parties under the licence to occupy model may cause a significant imbalance in favour of the operator.</p> <p>This is because the terms of the ORA provide that the resident has no ownership right or interest in the unit (clause 6.2) or the "Operator's Chattels" (clauses 5.16, clause 9.1 and 9.2) and does not share in any capital gain in value of the unit on termination and resale of the occupation right to a new resident.</p> <p><i>Detriment</i></p> <p>The terms have the potential to cause financial detriment to the resident if applied, enforced, or relied on.</p> <p><i>Our views on the amendment to these terms in ORA September 2023</i></p> <p>We consider that the amendments address the significant imbalance in favour of the operator caused by clauses 29.1 and 29.2 in the September 2021 ORA.</p>

	<p>AMENDMENTS ORA SEPTEMBER 2023</p> <p>Resident is obliged to keep their home and “Operator’s Chattels” in good order, and in a tidy, clean and proper condition (clause 5.3) and obliged to repair/replace at their costs items such as light bulbs, remote controls and their batteries when they wear out or break (clause 5.4)</p> <p>“Operator’s Chattels” are set out in Schedule 4 and include a range of items located in a unit including whiteware, floor coverings, window coverings, heating units, automatic garage door motors, laundry tub, TV, Hot water cylinder, infinity gas.</p> <p>Operator is responsible for the repair and replacement to the interior of the unit (clause 5.8)</p> <p>Operator is responsible for costs of any repairs or replacement to the “Operator’s Chattels”, the exterior of the unit, other buildings or chattels in the village except where resident or their guests “intentionally or carelessly</p>	
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	<p>cause any damage beyond fair wear and tear” (clause 5.6 and 5.9)</p> <p>Operator is responsible for arranging any repair or replacement to “Operator’s Chattels” that operator considers is required (clause 5.9). Cost will be met by the Operator unless the repair or replacement is necessary because residents or their guests intentionally or carelessly caused damage beyond fair wear and tear.</p> <p>Resident is not responsible for the costs of remedying any underlying or inherent defect to the unit or “Operator’s Chattels” provided resident notifies operator as soon as they are aware of the defect (clause 5.11)</p>	
<p>Clause 16.3 (change to village outgoings payment)</p>	<p>This term gives the operator the right to change the village outgoings payment at any time where there are changes in the outgoings of the village (defined Schedule 1).</p> <p>The village outgoings set out in Schedule 1 includes costs such as taxes, rates, compliance with legislation, utility charges, NZ Fire Service charges, insurance premiums, employee costs,</p>	<p><i>Significant imbalance</i></p> <p>A term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract is an example of a possible unfair contract term under s 46M of the FT Act.</p> <p>Price certainty is an important factor for consumers. A unilateral right to increase a price can have the effect of creating an imbalance in</p>

	<p>cost of replacing minor capital items, annual management fee, alarm services, costs of maintaining and repairing all buildings, common areas and the village generally, contribution to accruing sinking fund to cover costs at Village, Statutory Supervisor fees and legal costs etc.</p> <p>We note that this term has not been materially amended by the ORA September 2023, except for the addition of the word “actual” so that the term now reads “<i>We may change the Weekly Fee at any time to reflect actual changes in the outgoings of the Village</i>”.</p>	<p>favour of the operator unless there are sufficient counterbalancing rights in place for the resident.</p> <p>For many reasons, termination of an ORA after a price increase is not a practical option for a resident, given the significant financial detriment involved (due to the obligation to pay the village contribution payment) and the practicality of then having to move out of their primary residence.</p> <p>An ORA can last for an extended period of time, and it is also acknowledged that the operators’ costs may increase over that time period for reasons outside of its control. While Althorp has an obligation to notify and consult residents on a change to this payment, the increase is at Althorp’s discretion and Althorp does not need a resident’s consent to effect the change.</p> <p>The outgoings for the village as listed in the Schedule include a broadly drafted, wide range of costs and charges, including:</p> <p><i>“all costs, charges, expenses, wages, salaries, fees and other outgoings paid or payable in relation to the management, supervision and operation of the Village”</i></p> <p>Some of the costs are outside of the Althorp’s control, such as taxes, and some costs Althorp will have a measure of control over.</p> <p>We invite Althorp to consider what legitimate interest they may have in this clause, and whether their unilateral price increase as drafted goes beyond what is reasonably necessary to protect their legitimate</p>
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		<p>interests, and whether their interests can be protected by fairer means.</p> <p><i>Detriment</i></p> <p>There may be potential for financial detriment to the resident if the term is applied, enforced or relied on.</p>
<p>Clauses 14.3 and 14.4 (change to support services payment)</p>	<p>This term gives the operator the right to increase the support services payment by an amount that it can solely determine, in the absence of any increased level of support services.</p> <p>While there is mention in clause 14.3 of connecting the price increase to an increase in their costs, in our view the absolute right contained in the clause 14.4 entitles the operator to increase the costs at their sole discretion.</p> <p>We note that this term has not been materially amended by the ORA September 2023 (refer clause 4.5).</p>	<p><i>Significant imbalance</i></p> <p>We refer to the reasons given in relation to clause 16.3 above. The operator has a right to increase prices at its sole discretion.</p> <p>We note there is no right to seek support services from a third party independent of Althorp.</p> <p>We invite Althorp to consider its legitimate interest in this clause and whether it could be protected by fairer means.</p> <p><i>Detriment</i></p> <p>There would be potential for financial detriment to the resident if the term is applied, enforced, or relied on.</p>
<p>Clause 24.5(c) (charges relating to the marketing and sale of a residential unit)</p>	<p>This term places an obligation on the operator to consult with the resident relating to charges for the marketing and sale of the residential unit and indicates that a resident may have a</p>	<p><i>Significant imbalance</i></p> <p>There is no other express clause in the ORA that imposes an obligation on a resident to pay for marketing and sales related costs. Clause 24.5(c) appears on its face to raise an imbalance in the rights and obligations of the parties under the ORA as the clause appears to</p>

	<p>liability to pay for some of these charges.</p> <p>AMENDMENTS ORA SEPTEMBER 2023</p> <p>Clause 10.6 expressly provides that a resident is NOT required to pay for any DIRECT charges relating to the marketing and sale of the residential unit on termination of the ORA.</p>	<p>indicate that a resident may have a liability to the operator for marketing and sales related costs without expressly setting this out as an obligation.</p> <p>Assuming Althorp does rely on this clause to impose an obligation on a resident for marketing and sales costs, this obligation raises a significant imbalance in favour of Althorp in that a resident:</p> <ol style="list-style-type: none"> <li>1. has no express rights set out in the ORA relating to the sales process for the unit and therefore no ability to influence costs that Althorp may incur and then pass onto the resident;</li> <li>2. has no ownership right or interest in the residential unit; and</li> <li>3. the obligation on the resident to pay these charges is not transparent and is at the discretion of Althorp. This has the effect of being a unilateral price increase.</li> </ol> <p><i>Detriment</i></p> <p>There would be potential for financial detriment to the resident if the term is applied, enforced or relied on.</p> <p><i>Assessment of the amendments to these terms in ORA September 2023</i></p> <p>This amendment addresses our concerns regarding the significant imbalance in favour of the operator. We still have concerns in relation to what the word “direct” means in clause 10.6 and question whether the operator may still be able to require a resident to pay for</p>
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		marketing and sales related costs that the operator does not consider to be direct charges.
Clause 36 (privacy authorisation)	<p>For the specific purposes of being able to check a resident’s continued suitability to occupy a residential unit and for village administration purposes, this clause gives Althorp the right to collect, hold and release a resident’s personal information relating to a resident’s physical and mental health <i>“from any relevant agencies, in particular any health agencies who possess information relating to your physical and mental health”</i>.</p> <p>This right is in addition to Althorp’s specific right at clause 63 to obtain a medical certificate about a resident’s physical or mental health before Althorp exercises a right to terminate the ORA.</p> <p>AMENDMENTS ORA SEPTEMBER 2023</p> <p>Clause 36 has been deleted from the amended ORA and a resident is no longer required to provide the authorisation in relation to their personal information. The operator gives an assurance that it will comply</p>	<p><i>Significant imbalance</i></p> <p>We consider that this right at clause 36 may be unnecessarily broad in scope when considered against the needs of Althorp and other authorisations that a resident provides under the ORA and as such is significantly imbalanced in favour of Althorp.</p> <p>We also note that the ORA includes no counterbalancing right for a resident to object to or withdraw their consent for the collection of such information in circumstances where they do not wish to provide this information and there is no obvious useful purpose in the operator obtaining and holding this information.</p> <p>We acknowledge Althorp has an interest in certain medical information of the resident. We consider that the right of access to highly confidential and sensitive medical information should be limited so that it is only specifically necessary information relevant to the current circumstances of the resident that is acquirable.</p> <p><i>Detriment</i></p> <p>This term has the potential to cause a detriment to a resident by unnecessarily invading their privacy as to their medical records where Althorp requires this information for undisclosed administration purposes.</p> <p>While it is accepted that selected information may be required by Althorp in circumstances where it becomes apparent to Althorp that a</p>

	<p>with the requirement of applicable privacy laws which regulate how the operator may collect, store, use and disclose a resident's personal information (clause 16.7).</p> <p>The resident is required to give its consent to a medical assessment that an operator has a right to request under clause 8.4 (termination of ORA).</p>	<p>resident might not be able to continue to live safely in their residential unit or where Althorp requires such information when assessing the health and safety needs generally of its residents, such a broad right to access a resident's medical records may unnecessarily cause a detriment to a resident's right to privacy in such information.</p> <p><i>Assessment of the amendments to these terms in ORA September 2023</i></p> <p>The deletion of clause 36 from the amended ORA addresses the significant imbalance identified above. The amended clauses improve the balance of rights between the parties, that of the right of the operator to personal information about the resident and the right of a resident for privacy in relation to its general medical records.</p>
<p>Clause 55 (further development of the village)</p>	<p>This clause grants the operator the unilateral right to further develop the village in any manner whatsoever, subject to using its best endeavours to cause as little inconvenience to resident as is practical in the circumstances (clause 55.1).</p> <p>A resident has no right to object to or claim compensation relating to any further development and must sign all consents and other documents as may be required by the operator to give</p>	<p><i>Significant imbalance</i></p> <p>The Retirement Village Disclosure Statement is required to include information for intending residents about new services and facilities that are planned including the location, size and effect on residents of those new services or facilities.<sup>17</sup></p> <p>However, in circumstances where a future development is not foreseen and has not been disclosed by an operator, this obligation on a resident to provide wholesale consent to further development and give up any right to compensation or to take legal action in relation to the development is significantly imbalanced in favour of the operator.</p>

<sup>17</sup> Refer clause 2(b) of Schedule 2 of the Retirement Villages Act 2003.



	<p>effect to further development (clause 55.2)</p> <p>AMENDMENTS ORA SEPTEMBER 2023</p> <p>Expressly provides that a resident can make a complaint under the village complaints facility in relation to any further development (clause 6.12)</p>	<p>The requirement to consent to future developments that are unknown at the time of consent (and therefore the impact to the resident is unknown) contributes to the imbalance. The term provides full and absolute rights to the operator whilst removing rights of the resident that may serve to counterbalance this right.</p> <p>We also note that a term that has the effect of limiting one party's right to sue another party is an example unfair contract term see section 46M(k) of the FT Act.</p> <p>It is acknowledged that Althorp, as owner and operator, has an interest in the maintenance, investment and development of its properties including facilities such as care facilities which may be of benefit to existing residents should their health needs change. However, we consider that there are likely to be fairer or more balanced means to protect Althorp's interests that also take into consideration the interests of existing residents who often move into a retirement village setting to enjoy peace and quiet.</p> <p><i>Detriment</i></p> <p>There is potential detriment to a resident caused by the removal of their right to claim compensation or object to a development that may materially affect them and their enjoyment of their retirement living if this term is applied, enforced, or relied on.</p> <p><i>Assessment of the amendments to these terms in ORA September 2023</i></p> <p>The amendment expressly sets out an existing right that a resident has to make a complaint. In our view this does not address the</p>
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		significant imbalance that this term sets up between the parties in relation to further development at the Village.
<p>Clause 64.2 (departure from a residential unit)</p>	<p>This clause places an obligation on the resident's family/executor to remove all of a resident's possessions from a unit within 7 days of the resident's death.</p> <p>AMENDMENTS ORA SEPTEMBER 2023</p> <p>Family/executor of a resident now have four weeks from the date of death of the last surviving resident to remove all personal belongings and vehicles from the home and village on death of a resident (clause 9.1).</p>	<p><i>Significant imbalance</i></p> <p>The obligation to remove a resident's possessions within 7 days of death is significantly imbalanced in favour of Althorp when considering:</p> <ol style="list-style-type: none"> <li>1. the continuing financial obligations of a resident's estate to Althorp following the termination of the ORA on the death of the resident and the fact that that a resident's estate is obliged to continue paying the full amount of the village outgoings payment until all the possessions are removed from the unit (after this point the charge will reduce by 50%) and the village contribution may also continue to accrue up until the exit payment date. Financially there is no detriment to the operator in allowing the resident's family further time to remove a resident's possessions from the unit; and</li> <li>2. that the resident's estate has no control over the sales process for the unit and the ORA does not set out any deadline dates for the sale of the unit and return of the capital payment (less deductions) to the resident's estate.</li> </ol> <p><i>Detriment</i></p> <p>By applying clause 64.2, Althorp gives a resident's family/executor a very short time frame to clear out the resident's possessions from their unit following the death of the resident. This timeframe may place family/executor under undue pressure at a time when they are</p>

		<p>grieving and organising a funeral for the resident. This undue pressure could be viewed as a detriment that affects the resident by knowing their family/executor will be facing undue pressure and distress following the resident's death.</p> <p><i>Assessment of the amendments to these terms in ORA September 2023</i></p> <p>This amendment addresses the significant imbalance between the parties that we have identified above.</p> <p>We also note the amendment at clause 4.3 in the ORA dated September 2023 to clause 3.5 in the ORA dated September 2021 setting out the end date for payment of the village outgoings payment (now referred to as the weekly fee). This fee now ends on the "Termination Date" of the ORA or any later "Vacation Date" which is the date that the resident has stopped living in their unit and have removed all their possessions.</p>
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Released under the Official Information Act 1982

## Attachment B

Image 1 (Screenshot taken from [www.althorpvillage.co.nz/financial-terms](http://www.althorpvillage.co.nz/financial-terms) on August 2023 and again in November 2023)

The Village Contribution is an amount payable by you for the supply of accommodation and the use of the common facilities. The Village Contribution will be an amount equal to 7.5% per annum for 4 years of the Entry Payment that you made to a maximum of 30% and calculated on the commencement date on a daily basis.

By way of example, if you move into a villa and your Entry Payment payment is \$600,000 and you stay in the village for ten years, you will receive back \$420,000. If on the other hand you were to leave after 24 months, you will receive:

Entry Payment	\$600,000
Less village contribution @ 7.5% for 2 yrs	\$90,000
Total refunded	\$510,000

Image 2 (Screenshot taken from [www.althorpvillage.co.nz/financial-terms](http://www.althorpvillage.co.nz/financial-terms) on 21 November 2023)

An Occupation Right Agreement has become the most popular means of acquiring an interest in a dwelling at a retirement village.

An Occupation Right Agreement is not a registerable interest in land; it is a contractual arrangement only and gives a resident the right to occupy a dwelling at the Village for life, to use the community facilities within the Village and to receive, if necessary, and at your cost, a range of services. When you move into the village you will pay an Entry Payment. On termination of a licence and when a new licence has been issued you will get an amount equal to the Entry Payment back, less a Village Contribution, which is 30% of the Entry Payment.

19 January 2024

Coastal View Limited

C/- [REDACTED]

[REDACTED]

Qestral Corporation Limited

BY EMAIL ONLY: [REDACTED]

Dear [REDACTED]

### **Retirement Villages – Reminder of obligations under the Fair Trading Act 1986**

1. We refer to our conversation of yesterday with yourself, [REDACTED]
2. As discussed, the Commerce Commission (**Commission**) has recently been undertaking an investigation into the Retirement Villages sector to ascertain whether there is any conduct in the sector that raises concerns under the Fair Trading Act 1986 (**FT Act**).

### **Consumer NZ complaint<sup>1</sup>**

3. As part of the investigation we have revisited a complaint the Commission received from Consumer NZ in September 2021 about how retirement village operators are marketing their aged residential care services.
4. The main concern of this complaint was how ‘continuum of care’ type claims, made by operators on their websites, risk misleading consumers about the availability of aged residential care to retirement village residents and so risk breaching sections 11 and 13 of the FT Act.
5. As better access to assistance with health and care issues is one of the key reasons why people decide to move into a retirement village,<sup>2</sup> we decided to revisit this

<sup>1</sup> Refer <https://www.consumer.org.nz/articles/retirement-villages-care-claims-risk-misleading-consumers#article-advertising-claims>.

<sup>2</sup> Refer Broad JB, et al, *BMJ Open* 2020 “Health profile of residents of retirement villages in Auckland, New Zealand: findings from a cross-sectional survey with health assessment” at page 6.

complaint to ascertain whether the concern raised in the complaint continues to be an issue for the retirement village industry.

6. While the complaint itself does not cite any statements made on the website of the Coastal View Lifestyle Village (**Village**), we have chosen to review the website of the Village and in particular statements made on the website about aged residential care services that are available to retirement village residents.
7. We are writing to you to bring our preliminary views to your attention to assist Coastal View Limited (**Coastal View**) in complying with its obligations under the FT Act. It is not our intention at this stage to take any further enforcement steps against Coastal View in relation to this matter.

### Commerce Commission's role

8. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economy regulation.
9. In our role, we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>3</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.

### Our review of Coastal View Lifestyle Village website and occupation right agreement

10. We have made a review of the website for any statements about aged residential care services that are offered at the Village.
11. We record at **Attachment A** screenshots of a statement made on the website about care options that are available at the Village as follows:
  - 11.1 *“Coastal View has a strong focus on healthcare, with a full continuum of aged care, including Spritely electronic remote healthcare monitors, serviced houses and resthome/hospital level care.”* (see Image 1 and 2 at Attachment A)
12. We have also reviewed the terms and conditions set out in the most current registered Occupation Right Agreement for the Village that relate to moving into the 'Care Facility' or 'Dementia Care Facility' that offer aged residential care services.<sup>4</sup> The relevant clauses are paraphrased below and provide:
  - 12.1 Clause 17.2: a resident of the Village may choose to receive care offered in a care unit either in the 'Care Facility' (that provides rest home and hospital

<sup>3</sup> Refer <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>4</sup> Coastal View Occupation Right Agreement dated 3 May 2023.

level care) or the 'Dementia Care Facility' (that provides speciality rest home dementia care). Relocation of the resident is subject to consultation with a resident's medical practitioner, the availability of a suitable care unit and a resident complying with the conditions and requirements for entry to the unit.

- 12.2 Clause 17.3: operator has an obligation to use its best endeavours to procure a vacancy for a resident in either the 'Care Facility' or 'Dementia Care Facility', but this is subject to the facility being available and the resident complying with the conditions for entry (this includes a care assessment of needs by the relevant approved agency).

### **Fair Trading Act 1986**

13. Section 11 makes it an offence for a person in trade to engage in conduct in relation to services that is liable to mislead the public regarding factors including the "*nature, characteristics, suitability for a purpose or quantity*" of the services.
14. Section 13 makes it an offence for a person in trade in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, to make a false or misleading representation concerning the existence, exclusion or effect of any guarantee or right (section 13(i)).
15. For your information we set out sections 11 and 13 of the FT Act at **Attachment B**. You are able to view the FT Act at [www.legislation.govt.nz](http://www.legislation.govt.nz).

### **Possible breach of sections 11 and 13(i) of the FT Act – preliminary assessment**

16. In our view the statement made on the website regarding aged residential care options offered at the Village may risk misleading consumers when compared to the contractual terms that a resident has to such care services.
17. This is because, without sufficient qualifying information, the statement on the website may create the general impression that a resident of the Village will have access to a range of care options at a resident's election. In actual fact we note that access to the specific option of "*resthome/hospital level care*" is subject a needs assessment/consultation with a medical practitioner and the actual availability of a care unit at the Village.
18. As discussed, we are not intending to take any further action in relation to this matter at this point. However, as care options are a subject of importance to many intending residents, we are highlighting this to inform you of our view that attention should be taken to ensure any key conditions or qualifiers are prominently and proximately disclosed in marketing material.
19. We recommend you seek legal advice to ensure compliance with section 11 and section 13 of the FT Act.

**Penalties for breaching the Fair Trading Act**

20. Only the courts can decide if there has been a breach of the FT Act. The court can impose severe penalties where it finds the law has been broken.
21. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

**Further information**

22. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

**Your response to our letter**

23. Our decision to take no further action does not prevent any other person from doing so. We may also choose to take further action in the future should this conduct continue to come to our attention.
24. We recommend Coastal View takes legal advice in relation to the issues raised in this letter and review the statement made on its website and in any other marketing material produced by Coastal View in relation to a resident's right to aged residential care services.

**Official Information Act 1982 (OIA) requests**

25. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose under the OIA, any letters we send to operators relating to this investigation.
26. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.




27. Please contact me on (04) 924 3657 or by email at sara.jones@comcom.govt.nz if you have any questions in relation to this letter.

Yours sincerely



Sara Jones  
**Senior Investigator**  
**Fair Trading Branch**

Cc , Chief Operating Officer

Released under the Official  
Information Act 1982

## Attachment A – screenshot from Coastal Views’ website<sup>5</sup>

Image 1 (Screenshot taken from website on 6 November 2023)

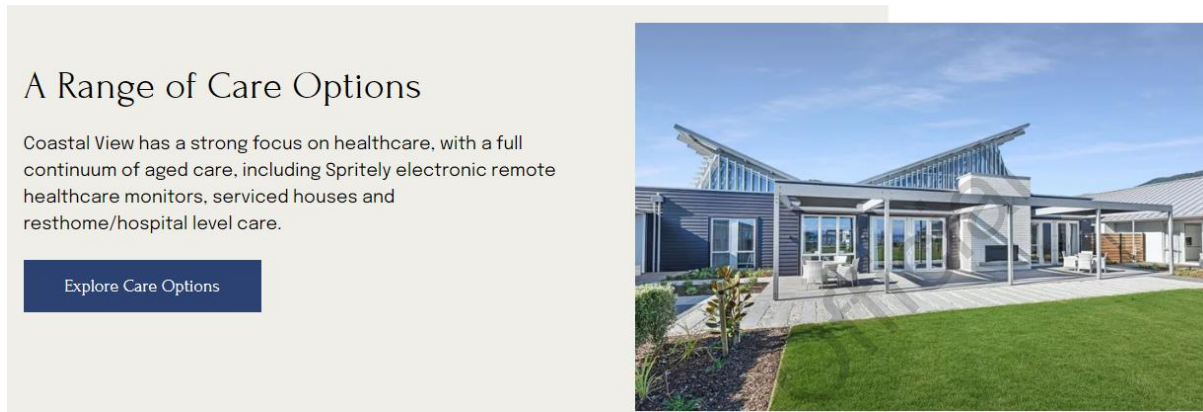


Image 2 (Screenshot taken from website on 15 January 2024)



<sup>5</sup> <https://www.coastalview.co.nz/>

## Attachment B – Sections 11 and 13 of the FT Act

### 11 Misleading conduct in relation to services

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

#### *False representations*

### 13 False or misleading representations

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or
- (c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
- (d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
- (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- (f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
- (g) make a false or misleading representation with respect to the price of any goods or services; or
- (h) make a false or misleading representation concerning the need for any goods or services; or
- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the [Consumer Guarantees Act 1993](#); or
- (j) make a false or misleading representation concerning the place of origin of goods or services.

19 January 2024

██████████  
██████████  
Oceania Healthcare Limited

BY EMAIL ONLY: ██████████@oceaniahealthcare.co.nz

Dear ██████████

### Retirement Villages – Reminder of obligations under the Fair Trading Act 1986

1. We refer to our discussion of yesterday (██████████/Jones).
2. As discussed, the Commerce Commission (**Commission**) has recently been undertaking an investigation into the Retirement Villages sector to ascertain whether there is any conduct in the sector that raises concerns under the Fair Trading Act 1986 (**FT Act**).

### Consumer NZ complaint<sup>1</sup>

3. As part of our investigation, we have revisited a complaint the Commission received from Consumer NZ in September 2021 about how retirement village operators are marketing their aged residential care services.
4. The main concern of this complaint was how ‘continuum of care’ type claims, made by operators on their websites, risk misleading consumers about the availability of aged residential care to retirement village residents and so risk breaching sections 11 and 13 of the FT Act.
5. As better access to assistance with health and care issues is one of the key reasons why people decide to move into a retirement village,<sup>2</sup> we decided to revisit this complaint to ascertain whether the concern raised in the complaint continues to be an issue for the retirement village industry.

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<sup>1</sup> Refer <https://www.consumer.org.nz/articles/retirement-villages-care-claims-risk-misleading-consumers#article-advertising-claims>

<sup>2</sup> Refer Broad JB, et al, *BMJ Open* 2020 “Health profile of residents of retirement villages in Auckland, New Zealand: findings from a cross-sectional survey with health assessment” at page 6.

6. While the complaint itself does not cite any statements made on the website of Oceania Healthcare Limited (**Oceania**), we have chosen to review the website of Oceania and in particular statements made on the website about aged residential care services that are available to retirement village residents.
7. We are writing to you to bring our preliminary views to your attention to assist Oceania in complying with its obligations under the FT Act. It is not our intention at this stage to take any further enforcement steps against Oceania in relation to this matter.

### The Commission's role

8. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
9. In our role, we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>3</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm, and the public interest.

### Our review of Oceania's website and an occupation right agreement

10. We have conducted a review of Oceania's website to consider any statements made about aged residential care services that are offered at Oceania villages. We record at **Attachment A** a screenshot of a statement made on the website about care offered to village residents. The statement records:

10.1 *"Continuum of care Nobody likes having to move, especially if you do need extra support. Thankfully you can enjoy a continuum of care at Oceania, as most of our Villages have a Care Centre either onsite or close by. Plus, you'll have preferential entry if a room is available."*

11. We have also reviewed the terms and conditions relating to residential care services offered to a resident of an Oceania village and cite, as an example, the Occupation Right Agreement (**ORA**) for the Oceania village, Elderslea, which is a village that we understand offers both retirement village living and aged residential care services.<sup>4</sup> The relevant clauses provide:

11.1 *"Clause 6.2(a) If the Resident requires full time residential care, the Resident may apply to move to a Care Suite at the Village subject to availability of Care Suites, Oceania's agreement to the move and to the terms and conditions as*

<sup>3</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>4</sup> Occupation Right Agreement for Villas Elderslea dated 17 November 2021.

*specified by Oceania. Oceania will take into consideration whether a suitable Care Suite is available and whether suitable care is available which meets the particular Resident's needs."*

- 11.2 *"Clause 6.2(b) A Resident of a villa in the Village wishing to move to a Care Suite in the Village will have priority over outside applicants."*

### **Fair Trading Act 1986**

12. Section 11 makes it an offence for a person in trade to engage in conduct in relation to services that is liable to mislead the public regarding factors including the *"nature, characteristics, suitability for a purpose or quantity"* of the services.
13. Section 13 makes it an offence for a person in trade in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, to make a false or misleading representation concerning the existence, exclusion, or effect of any guarantee or right (section 13(i)).
14. For your information, we set out sections 11 and 13 of the FT Act as **Attachment B**. You are able to view the entire FT Act at [www.legislation.govt.nz](http://www.legislation.govt.nz).

### **Sections 11 and 13 – preliminary assessment**

15. In our view the statement made on Oceania's website (Image 1 at Attachment A) regarding enjoying a *'continuum of care'*, may risk misleading the public when compared to the contractual rights that a resident of an Oceania village has to residential care services.
16. Statements on the website such as *"Nobody likes having to move"* and *"Thankfully you can enjoy a continuum of care"* risk creating the overall impression that care services are generally available to a resident, at their option, should they be required in the future. Further, that a resident would not need to move from an Oceania village if their care needs change, and they will have preferential entry if a care room is available.
17. We acknowledge that the wording *"most of our Villages have a Care Centre either onside or close by"* does not suggest that all villages have a Care Centre, but that generally most villages do offer care.
18. We consider it possible that these representations may lead intending residents into an erroneous belief they that they a greater degree of discretion over their move and options for future care than what is contractually the case, given:
- 18.1 further care in a Care Suite is always subject to Oceania's agreement to the move at the time; and

- 18.2 further care is also subject to a Care Suite at the relevant village being available that provides the level of care that a resident is requiring (following a needs assessment); and
- 18.3 in the Elderslea example above, the resident's preferential rights to care only relates to the option of a Care Suite and thus priority access over non-residents to care options only applies to a Care Suite and not a standard or premium room in a Care Centre.
19. As noted, we are not intending to take any further action in relation to this matter at this point. However, as care options are a subject of importance to many intending residents, we are highlighting this to inform you of our view that attention should be taken to ensure any key conditions or qualifiers are prominently and proximately disclosed in marketing material.
20. We recommend you seek legal advice to ensure compliance with section 11 and 13 of the FT Act.

#### **Penalties for breaching the Fair Trading Act**

21. Only the courts can decide if there has been a breach of the FT Act. The court can impose severe penalties where it finds the law has been broken.
22. A company that breaches the FT Act can be fined up to \$600,000 and an individual up to \$200,000 per offence. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

#### **Further information**

23. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

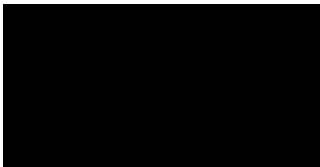
#### **Your response to our letter**

24. Our decision to take no further action does not prevent any other person from doing so. We may also choose to take further action in the future should this conduct continue to come to our attention.
25. We recommend Oceania takes legal advice in relation to the issues raised in this letter and review the statements made on its website and in any other marketing material produced by Oceania in relation to a resident's right to residential care services that are offered by Oceania.

**Official Information Act 1982 (OIA) request**

26. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose under the OIA, any letters we send to operators relating to this investigation.
27. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
28. Please contact me on (04) 924 3657 by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions in relation to this letter.

Yours sincerely



Sara Jones  
**Senior Investigator**  
**Fair Trading Branch**

Released under the Official Information Act 1982



**Attachment A – Screenshot from Oceania’s website**



Image 1 (Screenshot taken on 2 November 2023 at <https://oceaniahealthcare.co.nz/retirement-living>)<sup>5</sup>

<sup>5</sup> Image 1 is current as at the date of this letter.

## Attachment B – Sections 11 and 13 of the FT Act

### 11 Misleading conduct in relation to services

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

#### *False representations*

### 13 False or misleading representations

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or
- (c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
- (d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
- (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- (f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
- (g) make a false or misleading representation with respect to the price of any goods or services; or
- (h) make a false or misleading representation concerning the need for any goods or services; or
- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the [Consumer Guarantees Act 1993](#); or
- (j) make a false or misleading representation concerning the place of origin of goods or services.

19 January 2024

[REDACTED]  
[REDACTED]

Omokoroa Country Estate Limited

BY EMAIL: [REDACTED]

Dear [REDACTED]

## Fair Trading Act 1986 – Notice of complaint and preliminary assessment

### Introduction

1. We refer to our telephone discussion of today ([REDACTED]/Jones).
2. As discussed, the Commerce Commission (**Commission**) has received a complaint in September 2022 about the Occupation Right Agreement (**ORA**) registered by Omokoroa Country Estate Limited (**OCE**) that raises issues under the unfair contract term provisions (**UCT provisions**) of the Fair Trading Act 1986 (**FT Act**).
3. We have completed an assessment of this complaint and have also reviewed statements made on the website of 'Omokoroa Country Estate'<sup>1</sup> (**website**), as part of our investigation into the Retirement Villages sector to ascertain whether there is any conduct in the sector that raises concerns under the FT Act.
4. We do not intend to conduct further investigations at this time in relation to the complaint made against you or the issues we raise in this letter regarding certain statements on your website. However, we are writing to you to bring our preliminary views to your attention to assist you in complying with your obligations under the FT Act and to invite OCE's response to the issues raised in this letter.
5. We recommend that you take legal advice should you have any questions about complying with your obligations under the FT Act.

### Commerce Commission's role

6. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
7. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible

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<sup>1</sup> [www.ocestate.co.nz](http://www.ocestate.co.nz)

breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>2</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.

8. In relation to an unfair contract term (**UCT**), only the Commission has the power under the FT Act to make an application to a court for a declaration that a term in a standard form consumer contract is a UCT. Where a court has declared that a term in a standard form contract is a UCT, a person can no longer include that term in its contract or enforce it and is liable for prosecution by the Commission if it does so.

### **Commission's preliminary assessment**

9. We have reviewed this complaint and your ORA dated April 2022<sup>3</sup> and considered it against the UCT provisions of the FT Act. OCE registered three further amended ORAs in September 2022, May 2023 and September 2023. While our initial assessment focused on the terms in the ORA dated April 2022, where any subsequent ORA amended a term raised in this letter, we note those amendments and provide our comments where relevant.
10. We have also reviewed the website and made a preliminary assessment as to whether there are any statements on the website that may possibly breach sections 11 and 13 of the FT Act, relating to false or misleading conduct or representations.
11. By completing our preliminary assessment and providing our comments on certain terms in the ORA, the Commission does not endorse or approve of the ORA. Instead, our assessment has commented on terms that we consider could give rise to unfairness. In providing our views we acknowledge that we have not provided OCE with the opportunity to respond to our concerns or provide an explanation as to whether the terms identified in this letter are reasonably necessary to protect the legitimate interests of OCE. Our view is not a determination of non-compliance, as only the courts have the power to declare a term unfair under the UCT provisions.
12. We also note that the complaint identified certain key financial terms and gave examples of such terms found in a range of operators' ORAs. The complaint refers to a financial term in your ORA relating to the end date for the accrual of the facilities fees (clause 14.8).<sup>4</sup> The complaint also raises concerns around the term that relates

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<sup>2</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>3</sup> We note that the complaint also made one reference to an earlier registered Occupation Right Agreement dated April 2017.

<sup>4</sup> The RVRNZ's complaint cites a version of clause 14.8 that was contained in an ORA registered prior to June 2019 (although it footnotes the clause as being in ORA dated April 2022).

to the “exit payment date” (that you refer to in your ORA as the “termination payment”).<sup>5</sup>

13. We have not considered these key financial terms as part of our review. Parts of the Retirement Villages Code of Practice 2008 (**COP**) cover the subject matter of these terms.<sup>6</sup> Given that the COP has the status of an “enactment” and the FT Act excludes from consideration contract terms that are “expressly permitted” by an “enactment”, these terms do not clearly and unambiguously fall within the remit of the UCT provisions of the FT Act.<sup>7</sup> In addition, a term that “sets the upfront price” payable under the contract is excluded from UCT review.<sup>8</sup> In our view, any alleged unfairness issues surrounding these terms are better considered as part of the wider review of the underlying legislation that is currently being undertaken by the Ministry of Housing and Urban Development (**MHUD**).<sup>9</sup> We have informed MHUD of our view.
14. This decision not to review these key financial terms is not to be considered as approval of such terms by the Commission, or as an acknowledgement that there are no fairness concerns with these terms.

### The complaint

15. In September 2022 the Commission received a complaint from the Retirement Villages Residents Association of New Zealand (**RVRANZ**) that raises issues under the UCT provisions of the FT Act and more generally around the fairness of terms in ORAs.<sup>10</sup>
16. The term in the ORA dated April 2022 that the complaint alleges breaches the UCT provisions of the FT Act that we would like to raise with you in this letter is:
  - 16.1 clause 6.2 (resident’s repair and maintenance obligations).

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<sup>5</sup> Refer to clauses 14.1 of your ORA dated September 2023.

<sup>6</sup> Refer clause 54 of the Retirement Villages Code of Practice 2008.

<sup>7</sup> Refer to section 46K(1)(c) of the FT Act.

<sup>8</sup> Refer section 46K(1)(b) of the FT Act. The “upfront price” payable means the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent (section 46K(2)).

<sup>9</sup> We refer you to the Discussion paper published in August 2023 by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development “Review of the Retirement Villages Act 2003: Options for change” and in particular Part D of this paper. See [https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8\\_0.pdf](https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8_0.pdf).

<sup>10</sup> <https://www.rvrnz.org.nz/wp-content/uploads/2022/10/RVR-Unfair-Terms-Oct22-DIGITAL.pdf>

### Other terms of concern

17. We reviewed other terms in the ORA dated April 2022 against the UCT provisions of the FT Act. Our review has identified further terms that raise issues as to their fairness when applying the test for UCTs including:
  - 17.1 clause 3.2 (changes to common areas);
  - 17.2 clause 5.6.1 and Schedule 2 (change in village outgoings charge);
  - 17.3 clause 8.2 and Schedule 4 (privacy authorisation);
  - 17.4 clause 19 (further development); and
  - 17.5 clause 26 (resident obligations to pay operator's legal fees and consultant fees).
18. We also reviewed the website and assessed whether statements made on the website are at risk of breaching sections 11 and 13 (prohibition on false and misleading conduct or representations). We have identified two statements on the website that may be at risk of breaching these sections of the FT Act that we discuss below at paragraphs 35 and 36.

### Fair Trading Act - UCT provisions

19. The FT Act contains provisions that prohibit the use of UCTs in standard form consumer contracts. The UCT provisions are set out in sections 26A to 26E and 46H to 46M of the FT Act.
20. A consumer contract is a contract between a supplier and consumer that relates to the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption. A standard form consumer contract is one where the terms have not been subject to effective negotiation between the parties, and factors taken into account when determining this include:
  - 20.1 whether one party has all or most of the bargaining power;
  - 20.2 whether the terms are prepared in advance by the supplier;
  - 20.3 whether the customer is required to accept or reject the terms and conditions;
  - 20.4 the extent to which the parties had an effective opportunity to negotiate the terms; and
  - 20.5 the extent to which the specific characteristic of any party to the contract is taken into account.

21. If the Commission thinks that a term in a standard form consumer contract is unfair, we can apply to a court for a declaration that the term is an UCT.
22. When deciding if a term is unfair, the court must be satisfied that the term would meet all three of the following criteria set out at section 46L:
  - 22.1 the term would cause a significant imbalance in the parties' rights and obligations under the contract;
  - 22.2 the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it; and
  - 22.3 the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
23. The court can also consider any other matters it considers are relevant, but must take into account two mandatory considerations:
  - 23.1 the extent to which the term is transparent; and
  - 23.2 the contract as a whole.
24. Section 46M of the FT Act provides a non-exhaustive list of examples of the kinds of terms that, if contained in a consumer contract may be an UCT.
25. Certain terms are exempt from being declared unfair and these are set out at section 46K of the FT Act.

#### **Possible breach of UCT provisions – preliminary assessment**

26. We consider that the ORA between OCE and a resident is likely to come within the definitions set out in the FT Act of a standard form consumer contract.<sup>11</sup>

#### *Significant imbalance and detriment*

27. We have done a preliminary assessment of clauses in the ORA raised in the complaint and the further clauses that we have identified, against the test for unfairness set out at section 46L of the FT Act. We set out at **Attachment A** our assessment against the tests of significant imbalance and detriment for each term noted above in this letter.

#### *Not reasonably necessary to protect legitimate interests*

28. OCE may wish to consider whether the terms raised in this letter are reasonably necessary to protect their legitimate interests.
29. Were the Commission to bring an application to a court for a declaration that the terms identified in this letter were unfair, the law presumes they are **not** reasonably

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<sup>11</sup> Refer section 2 of the FT Act and section 46J of FT Act.

necessary.<sup>12</sup> The onus would then be on OCE to prove that the terms are reasonably necessary to protect their legitimate interests.

30. OCE may also want to consider whether there are fairer means to protect any legitimate interest they believe they may have.

*Transparency and contract as a whole*

31. In determining whether a term in a standard form consumer contract is unfair a court must also take into account the extent to which the term is transparent and the contract as a whole. In relation to these two factors, as applied to the clauses identified in this letter, we note:

- 31.1 the ORA is lengthy and complex legal contract that does not adhere to a plain English style of drafting. This means that clauses identified in this letter may not be transparent to a resident; and
- 31.2 the Commission acknowledges that a resident is legally required to obtain independent legal advice before it signs an ORA. Despite this statutory requirement, the Commission is of the view that this does not automatically mean that a term is made transparent. The requirement for legal advice should not save a contract from any transparency issues it may contain.

**Fair Trading Act – Sections 11 & 13**

32. Sections 11 and 13(g) and (i) of the FT Act are relevant to statements we have identified on Althorp's website and set out in this letter at Attachment B.
33. Section 11 makes it an offence for a person in trade to engage in conduct that is liable to mislead the public regarding factors including the "characteristics" of the services.
34. Section 13 makes it an offence for a person in trade in connection with the supply of services or with the promotion by any means of the supply or use of services to:
- 34.1 make a false or misleading representation with respect to the price of any goods or service (section 13(g)); or
- 34.2 make a false or misleading representation concerning the existence, exclusion or effect of any right (section 13(i)).

**Possible breach of sections 11 and 13 of the Act – preliminary assessment**

35. There are two statements on the website that we consider are potentially misleading. The statement at Image 1 of **Attachment B** is potentially misleading as to a resident's rights under the ORA. It gives prospective residents the impression they could live at 'Omokoroa Country Estate' village in their home for the rest of their life

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<sup>12</sup> Refer section 46L(3) of the FT Act.



when in fact OCE has a right to terminate a resident's occupation right where it has obtained a medical opinion that the physical and/or mental health of a resident means that they can no longer live safely in their home.

36. In relation to the statement at Image 2 of **Attachment B** that relates to village weekly fees, the Commission's concerns include:
- 36.1 the statement gives the clear impression that the village weekly fee will pay for the maintenance on the exterior of all homes and further that a resident is only responsible for the cost of maintaining the interior of their home. Read together these statements gives the impression that the operator will be responsible for the maintenance on the exterior of the home;
- 36.2 however, under the ORA the resident has some obligations to repair and maintain the exterior of their home and we refer in particular to clauses 6.2.2 to 6.2.4 of the ORA dated September 2023. As such the statement on the website risks being misleading and potentially in breach of the FT Act.

#### **Penalties for breaching the Fair Trading Act**

37. Only the courts can decide if there has been a breach of the FT Act.
38. Where a court has declared a term in a standard form contract is an UCT, the FT Act prohibits that business from including the term in the contract or from enforcing or relying on that term. If a business continued to use or enforce that term it may face:
- 38.1 conviction or a fine of up to \$200,000 for an individual or \$600,000 for a company; and/or
- 38.2 an injunction restraining the business from enforcing or relying on the term; and/or
- 38.3 orders directing it to refund money or pay damages.
39. The same penalties may be apply if the court finds a breach of section 11 and/or 13 of the FT Act.
40. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

#### **Further information**

41. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). You can also view the FT Act at [www.legislation.co.nz](http://www.legislation.co.nz).
42. We attach a link to the Commission's guidance to business on UCTs where a copy of the Commission's "Unfair Contract Terms Guidelines" can be downloaded.

<http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>.

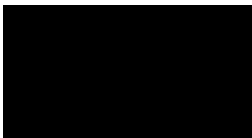
### **Response to our letter**

43. Our decision not to take further enforcement action against OCE at this time in relation to the issues raised in this letter does not prevent us from taking action in the future. We ask you to carefully consider the issues we raise and take legal advice should you have any questions about complying with your obligations under the FT Act.
44. We invite you to respond to our letter and, in particular, provide us with your views on any legitimate interest you consider OCE has in the terms we have raised. Any response is voluntary, you do not need to respond if you do not wish to. Please consult a lawyer if you are unsure about whether to provide us with a voluntary response and inform us if you decide not to do so.

### **Official Information Act 1982 (OIA) requests**

45. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose under the OIA, any letters we send to operators relating to this investigation.
46. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
47. Please contact me on 04 924 3657 or by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions in relation to this letter.
48. We look forward to receiving OCE's response to our letter.

Yours sincerely



**Sara Jones**  
**Senior Investigator**  
**Fair Trading Branch**

**Attachment A**

**Occupation Right Agreement for Omokoroa Country Estate Limited April 2022**

<b>(Potentially) Unfair Contract Term identified</b>	<b>Explanation of term</b>	<b>Commerce Commission's Concerns</b>
<p>Clause 6.2 (repair and maintenance obligations)</p> <p>Identified in RVRNZ complaint</p> <p>Clause 6.3</p>	<p>The resident is responsible at their cost for maintaining and keeping in a good, clean, tidy repair, order and condition:</p> <ol style="list-style-type: none"> <li>1. everything in the interior of the residential unit regardless of its age or condition (clause 6.2.1);</li> <li>2. the exterior surface of the unit's windows and glass doors and structures immediately surrounding or attached to the exterior of the unit (clause 6.2.2)</li> </ol> <p>Resident is responsible for the cost of keeping the "Chattels" in good operational condition <b>including the costs of replacement</b>. The operator will determine when the replacement of</p>	<p><i>Significant imbalance</i></p> <p>We consider that these terms when considered against the property ownership rights of the parties under the licence to occupy model cause a significant imbalance in favour of the operator.</p> <p>This is because the terms of the ORA provide that the resident has no ownership right or interest in the unit (clause 2.3) or chattels (clause 6.3.3) and does not share in any capital gain in value of the unit on termination and resale of the occupation right to a new resident.</p> <p>In relation to the operator's chattels, the operator has sole discretion to determine when a chattel requires replacement and resident has no counter-balancing right to challenge a decision not to replace and in the meantime is obliged to keep paying for potentially economically unviable repairs to the chattel, until such time that the operator decides to replace the chattel.</p> <p>We invite OCE to consider its legitimate interests that it is seeking to protect by including these terms in its ORA.</p>

	<p>the “Chattels” are required (clauses 6.3.1 and 6.3.2).</p> <p>“Chattels” has a wide definition and includes all chattels, fixtures, fittings and equipment in a residential unit including whiteware, plumbing fittings, electrical fittings, drapes, fixed floor coverings etc (clause 1.1).</p> <p>AMENDMENTS TO THESE TERMS ORA DATED MAY 2023</p> <p>The ORA dated May 2023 updated the parties’ responsibilities in relation to the “Chattels” as follows:</p> <ol style="list-style-type: none"> <li>1. definition of “Chattels” was amended and narrowed. It now excludes some items such as drapes and fixed floor coverings but still covers an extensive number of items provided in a resident’s unit, such as hot water cylinders, toilets, dishwashers, heat pumps etc (clause 1.1);</li> <li>2. the operator is now responsible to pay for the replacement of the “Chattels” if they are not</li> </ol>	<p><i>Detriment</i></p> <p>There will be financial detriment to the resident if the term is applied, enforced or relied on.</p> <p><i>Our views on the amendments to these terms</i></p> <p>The May 2023 ORA now obliges OCE to pay for replacement chattels at a point in time that it determines. While this is an improvement in the terms our residual concerns regarding repair obligations remain.</p>
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	<p>functioning and unable to be repaired. The operator will determine when replacement is required (clause 6.3.2); and</p> <p>3. the resident remains responsible for maintaining and repairing all “Chattels” that the operator arranges (clause 6.3.3).</p>	
<p>Clause 3.2 (changes to common areas) Identified in RVRNZ complaint</p>	<p>The operator is entitled to makes changes to the common areas at the village including providing additional buildings, areas or amenities or by removing buildings, areas or amenities.</p> <p>Clause 3.7 requires the operator to consult with residents and the Statutory Supervisor regarding the change and take into consideration the comments of these parties, however operator’s decision is final and binding on all residents.</p>	<p><i>Significant imbalance</i></p> <p>This term gives OCE the right to add or remove buildings, areas or amenities. While we acknowledge there is an interest in OCE being able to develop common areas at the village, any disruption caused by development, or any detriment caused by removal of common areas or amenities ought to be balanced against the rights of residents.</p> <p>While a resident has a right to be consulted regarding changes to common areas (clause 3.7) the operator has a broad unilateral right to change common areas of the village at will.</p> <p>There are no counter balancing rights to appeal/challenge a decision or a right to receive compensation or a reduction in fees commensurate to any reduction in common areas in circumstances where OCE makes changes to common areas or amenities that adversely affect the resident.</p>

		<p>Further given the large financial commitment made by the resident under the ORA and the practical reality that the resident lives in the village, a right to terminate the contract due to a change in common areas is not a practical or useful right to counterbalance this right to change the common areas.</p> <p>See also our comments below in relation to clause 19 (further developments). The fact that a resident has no right to object to any application for a resource consent or claim any compensation from OCE as a result of the development, heightens the imbalance of this clause in favour of the OCE.</p> <p>We note this is similar to the example unfair contract term in section 46M(g), as it is a term that permits, or has the effect of permitting, one party to unilaterally vary the characteristics of the goods or services to be supplied.</p> <p><i>Detriment</i></p> <p>There may be financial detriment to the resident and potential loss of enjoyment of lifestyle offered by the village as a result of change to common areas.</p> <p>Residents may receive a reduction in the common areas, buildings or amenities than what they agreed at the time of entering the ORA at the same cost.</p> <p>Residents may suffer inconvenience and reduced peaceful enjoyment of the village while buildings are added or removed and would not be compensated for disruptions caused by building works.</p>
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<p>Clause 5.6.1 (change in village outgoings charge)</p> <p>Schedule 2</p>	<p>This clause gives the operator a power to increase each year the village outgoings charge in accordance with the “Review Calculation” set out in Schedule 2. The “Review Calculation” takes into consideration the percentage movement in the CPI.</p>	<p><i>Significant imbalance</i></p> <p>A term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract is an example of a possible unfair contract term under s 46M of the FT Act.</p> <p>Price certainty is an important factor for consumers. A unilateral right to increase a price can have the effect of creating an imbalance in favour of the operator unless there are sufficient counterbalancing rights in place for the resident.</p> <p>For many reasons, termination of an ORA after a price increase is not a practical option for a resident, given the significant financial detriment involved (due to the obligation to pay the village contribution payment) and the practicality of then having to move out of their primary residence.</p> <p>An ORA can last for an extended period of time, and it is also acknowledged that OCE’s costs may increase over that time period for reasons outside of its control.</p> <p>The effect of this clause is to permit OCE a broad right to increase this charge effectively at will with reference to an increase in the CPI. There is no independent analysis required that OCE’s costs have actually increased due to the increase in CPI and no right for a resident to maintain the payment of this charge at the current rate while raising a complaint with OCE as to the increase.</p> <p>We invite OCE to consider what legitimate interest they may have in this clause, and whether their unilateral price increase as drafted</p>
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		<p>goes beyond what is reasonably necessary to protect their legitimate interests, and whether their interests can be protected by fairer means.</p> <p><i>Detriment</i></p> <p>There may be potential for financial detriment to a resident if the term is applied enforced or relied on.</p>
<p>Schedule 4</p> <p>Clause 8.2 (privacy authorisation)</p> <p>Identified in RVRNZ complaint</p>	<p>For the sole purpose of determining a resident's continued suitability to occupy a home in the village, this clause provides a resident's authorisation that gives the operator the right to collect from any health agency, a resident's information relating to a resident's physical and mental health.</p>	<p><i>Significant imbalance</i></p> <p>We consider that this term may be unnecessarily broad in scope when considered against the needs of OCE and other authorisations (noted below) that a resident provides under the ORA and as such is significantly balanced in favour of OCE.</p> <p>We also note that there is no right given to a resident to withdraw this authorisation in circumstances where a resident considers that OCE may be over exercising this right to collect a resident's health information.</p> <p>This broad authorisation is given in addition to a specific right of the operator at clause 11.1.8 to appoint a medical practitioner to assess the resident's physical or mental health for the purpose of determining whether to terminate the ORA.</p> <p>We acknowledge OCE has an interest in certain medical information of the resident. We consider that the right of access to highly confidential and sensitive medical information should be limited so that it is only specifically necessary information relevant to the current circumstances of the resident that is acquirable.</p>



		<p><i>Detriment</i></p> <p>This term has the potential to cause a detriment to a resident by unnecessarily invading their privacy as to their medical records.</p>
Clause 19 (further development)	<p>The operator has an absolute discretion to carry out further development at the village in any way it thinks fit.</p> <p>A resident is obliged to consent to any further development and has no right to object to any resource consent sought by the operator to enable further development. Further a resident is obliged to grant a Power of Attorney in favour of the Statutory Supervisor empowering it to act on the resident's behalf in relation to any further development.</p> <p>Further the resident has no right to object or claim any compensation or abatement of charges or commence any legal proceedings as a result of building works, dust, noise or other discomforts which might arise from further development of the village.</p>	<p><i>Significant imbalance</i></p> <p>The Retirement Village Disclosure Statement is required to include information to intending residents about new services and facilities that are planned including the location, size and effect on residents of those new services or facilities.<sup>13</sup></p> <p>However, in circumstances where a future development is not foreseen and has not been disclosed by an operator, this obligation on a resident to provide wholesale consent to further development and give up any right to compensation or to take legal action in relation to the development is significantly imbalanced in favour of the operator.</p> <p>The requirement to consent to future developments that are unknown at the time of consent (and therefore the impact to the resident is unknown) contributes to the imbalance. The term provides full and absolute rights to OCE whilst removing rights of the resident that may serve to counterbalance these rights.</p> <p>We also note that a term that has the effect of limiting one party's right to sue another party is an example unfair contract term – see section 46M(k) of the FTA.</p>

<sup>13</sup> Refer clause 2(b) of Schedule 2 of the Retirement Villages Act 2003.

		<p>It is acknowledged that OCE, as owner and operator, has an interest in the maintenance, investment and development of its property including facilities such as care facilities which may be of benefit to existing residents should their health needs change. However, we consider that there are likely to be fairer or more balanced means to protect OCE's interests that also take into consideration the interests of existing residents who often move into a retirement village setting to enjoy peace and quiet.</p> <p><i>Detriment</i></p> <p>There is potential detriment to a resident caused by the removal of their right to claim compensation or object to a development that may materially affect them and their enjoyment of their retirement living if this term is applied, enforced or relied on.</p>
<p>Clause 26 (legal/consultant fees)</p>	<p>The resident has an obligation to pay the operator's legal costs and any expenses of and incidental to any breach or default by the resident under the ORA and any exercise or attempt by the operator to exercise any right, power, privilege authority or remedy under the ORA.</p> <p>Further the resident also has an obligation to pay fees of professional consultants incurred by the operators in connection with any breach or default by the resident under the ORA.</p>	<p><i>Significant imbalance</i></p> <p>This could have the effect of discouraging a resident from raising valid disputes/issues with OCE under the ORA, or from challenging any inappropriate exercise by OCE of OCE's rights under the ORA.</p> <p>It obliges a resident to pay for full legal costs, uncapped by any measure of reasonableness, and any 'incidental expenses' which could be subject to a broad interpretation.</p> <p>The resident must pay for these costs where OCE seeks to rely on "any exercise or attempted exercise of a right power, privilege, authority or remedy". This is broadly drafted and legally entitles OCE to charge residents for the legal costs and incidental expenditure that it incurs when it seeks to enforce rights, interests, or privileges that</p>

		<p>the resident may contest (note the clause covers '<i>attempted</i>' exercise of rights).</p> <p>There is no counterbalancing right for the resident to receive their legal and incidental costs where the situation is reversed, adding to the imbalance.</p> <p><i>Detriment</i></p> <p>There may be potential financial detriment to a resident if this term is applied, enforced, or relied on.</p>
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Released under the Official Information Act 1982

## Attachment B

Image 1 (Screenshot taken from [ocestate.co.nz/village-life/#faq](https://ocestate.co.nz/village-life/#faq) on 22 November 2023)

### What is an Occupation Right Agreement?

Your Occupation Right Agreement gives you the right to live in your chosen home for your lifetime, and also to enjoy the services and facilities offered at the village in accordance with the terms and conditions of the Occupation Right Agreement. To obtain this occupation right, the resident will agree to pay: a refundable entry payment; and a facilities fee contribution payable on the termination of the Occupational Right Agreement.

Image 2 (Screenshot taken from [ocestate.co.nz/village-life/#faq](https://ocestate.co.nz/village-life/#faq) on 22 November 2023)

### What does the village weekly fee pay for?

A village weekly fee covers the day-to-day operating costs of the village. Some of the items this fee is used to cover are: general rates, water rates, insurance for all buildings, maintenance of the village common areas, recreation facilities and exterior of all homes, lawn mowing and garden maintenance. You will be responsible for insuring your own personal effects and the cost of maintaining the interior of your home. A handyman is available to assist with any maintenance issues you may have for a reasonable fee.

19 January 2024

Palm Grove Partnership  
C/- [REDACTED]

BY EMAIL: Admin@thegroveorewa.co.nz

Dear [REDACTED]

## **Fair Trading Act 1986 – Notice of complaint, preliminary assessment and invitation to respond**

### **Introduction**

1. We refer to our messages left for you yesterday and our brief discussion of today with [REDACTED], Administrator at The Grove Orewa.
2. The Commerce Commission (**Commission**) has received a complaint in September 2022 about the Occupation Right Agreement (**ORA**) registered by the Palm Grove Partnership (**Palm Grove**) for 'The Grove Orewa' that raises potential issues under the unfair contract term provisions (**UCT provisions**) of the Fair Trading Act 1986 (**FT Act**).
3. We have completed an assessment of this complaint and have also reviewed statements made on the website of The Grove Orewa<sup>1</sup> (**website**), as part of our investigation into the Retirement Villages sector to ascertain whether there is any conduct in the sector that raises concerns under the FT Act.
4. We do not intend to conduct further investigations at this time in relation to the complaint made against you or the issues we raise in this letter regarding a certain statement on your website. However, we are writing to you to bring our preliminary views to your attention to assist you in complying with your obligations under the FT Act and to invite Palm Grove's response to the issues raised in this letter.
5. We recommend that you take legal advice should you have any questions about complying with your obligations under the FT Act.

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<sup>1</sup> [www.thegroveorewa.co.nz](http://www.thegroveorewa.co.nz)

### Commerce Commission's role

6. As an independent Crown Entity, the Commission enforces laws relating to fair trading, competition, consumer credit contracts, and economic regulation.
7. In our role we receive complaints about businesses, and we assess those complaints to determine whether we should investigate the complaint further for a possible breach of the relevant legislation. We apply our enforcement criteria when we make decisions on whether to open an investigation and when determining the appropriate enforcement response.<sup>2</sup> In taking these decisions we look at factors including the seriousness of the conduct, the extent of the harm and the public interest.
8. In relation to an unfair contract term (**UCT**), only the Commission has the power under the FT Act to make an application to a court for a declaration that a term in a standard form consumer contract is a UCT. Where a court has declared that a term in a standard form contract is a UCT, a person can no longer include that term in its contract or enforce it and is liable for prosecution by the Commission if it does so.

### Commission's preliminary assessment

9. We have reviewed this complaint and your ORA dated August 2021 and considered it against the UCT provisions of the FT Act. Palm Grove registered a further amended ORA for The Grove Orewa village on 31 October 2023. While our initial assessment has focussed on the terms in the ORA dated August 2021, where the ORA dated October 2023 amended a term raised with you in this letter, we note the amendment and provide our comments as necessary.
10. We have also reviewed the website and made a preliminary assessment as to whether there are any statements on the website that may possibly breach sections 11 and 13 of the FT Act, relating to false or misleading conduct or representations.
11. By completing our assessment and providing our comments on certain terms in the ORA, the Commission does not endorse or approve of the ORA. Instead, our assessment has commented on terms that we consider could give rise to unfairness. In doing so we acknowledge that we have not provided Palm Grove with the opportunity to respond to our concerns or provide an explanation as to whether the clauses identified in this letter are reasonably necessary to protect the legitimate interests of Palm Grove. Our view is not a determination of non-compliance, as only the courts have the power to declare a term unfair under the UCT provisions.
12. We also note that the complaint identified certain key financial terms and gave examples of such terms found in a range of operators' ORAs. The complaint refers to financial terms in your ORA including the date for the repayment of the resident's capital sum following termination of the ORA (clause 63.2) and the end date for the

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<sup>2</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>.

accrual of the village contribution (clause 3.5). The complaint also raises concerns about the end date for the payment of the weekly fee (that you refer to as the village outgoings payment).<sup>3</sup>

13. We have not considered these key financial terms as part of our review. Parts of the Retirement Village Code of Practice 2008 (**COP**) cover the subject matter of these terms. Given that the COP has the status of an “enactment”, and the FT Act excludes from consideration contract terms that are “expressly permitted” by an “enactment”, these terms do not clearly and unambiguously fall within the remit of the UCT provisions of the FT Act.<sup>4</sup> In addition, a term that “sets the upfront price” payable under the contract is excluded from UCT review<sup>5</sup>. In our view any alleged unfairness issues surrounding these terms are better considered as part of the wider review of the underlying legislation that is currently being undertaken by the Ministry of Housing and Urban Development (**MHUD**).<sup>6</sup> We have informed MHUD of our view.
14. This decision not to review these key financial terms is not to be considered as approval of such terms by the Commission, or as an acknowledgement that there are no fairness concerns with these terms.
15. That said, the Commission does acknowledge a recent amendment that you have made to the term in your ORA dated August 2021 setting out the end date for a resident’s payment of the village outgoings payment (clause 13.4). Your amended term set out in the ORA dated October 2023 (clause 13.4) now provides that the resident’s obligation to pay this fee will cease on the termination date or any later date when the resident stops living in the residential unit and removes all their possessions from the unit. This amendment addresses the concerns set out in the complaint relating to this term.

### The complaint

16. In September 2022 the Commission received a complaint from the Retirement Villages Residents Association of New Zealand (**RVRANZ**) that raises issues under the UCT provisions of the FT Act and more generally around the fairness of terms in ORAs.<sup>7</sup>

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<sup>3</sup> While the complaint does not specifically refer to a term in your ORA, we refer to clause 13.4 of your ORA registered in August 2021.

<sup>4</sup> Refer to section 46K(1)(c) of the FT Act.

<sup>5</sup> Refer section 46K(1)(b) of the FT Act. The “upfront price” payable means the consideration (including any consideration that is contingent upon the occurrence or non-occurrence of a particular event) payable under the contract, but only to the extent that the consideration is set out in a term that is transparent (section 46K(2)).

<sup>6</sup> We refer you to the Discussion paper published in August 2023 by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development “Review of the Retirement Villages Act 2003: Options for change” and in particular Part D of this paper. See [https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8\\_0.pdf](https://www.hud.govt.nz/assets/Uploads/Documents/RVA-Consultation/4385-HUD-retirement-document-8_0.pdf).

<sup>7</sup> <https://www.rvrnz.org.nz/wp-content/uploads/2022/10/RVR-Unfair-Terms-Oct22-DIGITAL.pdf>

17. The term in the ORA registered in August 2021 that the complaint alleges breaches the UCT provisions of the FT Act that we would like to raise with you in this letter is:

17.1 clause 27.2 (care of residential unit).

#### **Other terms of concern**

18. We reviewed other terms in the ORA dated August 2021 against the UCT provisions of the FT Act. Our review has identified further terms that raise issues as to their fairness when applying the test for UCTs including:

18.1 clause 22.5 (marketing and sales costs);

18.2 clause 26.2 (no grant of security interest);

18.3 clause 29.1 (insurance);

18.4 clause 34 (privacy authorisation);

18.5 clause 49.1 (change to village facilities);

18.6 clause 52 (further development of the village); and

18.7 clause 61 (departure from unit).

19. We also reviewed the website and assessed whether statements made on the website are at risk of breaching sections 11 or 13 of the FT Act (prohibition on false or misleading conduct or representations). We have identified one statement on the website that is at risk of breaching section 13(g) of the FT Act that we discuss below at paragraph 36.

#### **Fair Trading Act - UCT provisions**

20. The FT Act contains provisions that prohibit the use of UCTs in standard form consumer contracts. The UCT provisions are set out in sections 26A to 26E and 46H to 46M of the FT Act.
21. A consumer contract is a contract between a supplier and consumer that relates to the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption. A standard form consumer contract is one where the terms have not been subject to effective negotiation between the parties, and factors taken into account when determining this include:
- 21.1 whether one party has all or most of the bargaining power;
- 21.2 whether the terms are prepared in advance by the supplier;
- 21.3 whether the customer is required to accept or reject the terms and conditions;



- 21.4 the extent to which the parties had an effective opportunity to negotiate the terms; and
- 21.5 the extent to which the specific characteristic of any party to the contract is taken into account.
22. If the Commission thinks that a term in a standard form consumer contract is unfair, we can apply to a court for a declaration that the term is an UCT.
23. When deciding if a term is unfair, the court must be satisfied that the term would meet all three of the following criteria set out at section 46L:
- 23.1 the term would cause a significant imbalance in the parties' rights and obligations under the contract;
- 23.2 the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by it; and
- 23.3 the term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
24. The court can also consider any other matters it considers are relevant, but must take into account two mandatory considerations:
- 24.1 the extent to which the term is transparent; and
- 24.2 the contract as a whole.
25. Section 46M of the FT Act provides a non-exhaustive list of examples of the kinds of terms that, if contained in a consumer contract may be an UCT.
26. Certain terms are exempt from being declared unfair and these are set out at section 46K of the FT Act.

#### **Possible breach of UCT provisions – preliminary assessment**

27. We consider that the ORA between Palm Grove and a resident is likely to come within the definitions set out in the FT Act of a standard form consumer contract.<sup>8</sup>

#### *Significant imbalance and detriment*

28. We have completed a preliminary assessment of terms in the ORA raised in the complaint and the further terms that we have identified, against the test for unfairness set out at section 46L of the FT Act. We set out at **Attachment A** our assessment against the tests of significant imbalance and detriment for each term noted above in this letter.

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<sup>8</sup> Refer section 2 of the FT Act and section 46J of the FT Act.

*Not reasonably necessary to protect legitimate interests*

29. Palm Grove may wish to consider whether the terms raised in this letter are reasonably necessary to protect their legitimate interests.
30. Were the Commission to bring an application to a court for a declaration that the terms identified in this letter were unfair, the law presumes they are **not** reasonably necessary.<sup>9</sup> The onus would then be on Palm Grove to prove that the terms are reasonably necessary to protect their legitimate interests.
31. Palm Grove may also want to consider whether there are fairer means to protect any legitimate interest they believe they may have.

*Transparency and contract as a whole*

32. In determining whether a term in a standard form consumer contract is unfair a court must also take into account the extent to which the term is transparent and the contract as a whole. In relation to these two factors, as applied to the clauses identified in this letter, we note:
  - 32.1 the ORA is lengthy and complex legal contract. This means that terms identified in this letter may not be transparent to a resident;
  - 32.2 the Commission acknowledges that a resident is legally required to obtain independent legal advice before it signs an ORA. Despite this statutory requirement, the Commission is of the view that this does not automatically mean that a term is made transparent. The requirement for legal advice should not save a contract from any transparency issues it may contain; and
  - 32.3 we have a particular concern around the transparency of clause 22.5 in that it imposes a potential liability on a resident to pay charges relating to the marketing and sale of their unit without clearly presenting the obligation, including what the charges are, and how the charges are determined. If Palm Grove did rely on this term as currently drafted, then in our view, the term risks operating as a unilateral price increase.

**Fair Trading Act – Sections 11 & 13**

33. Sections 11 and 13(g) and (i) of the FT Act are relevant to statement we have identified on Althorp's website and set out in this letter at **Attachment B**.
34. Section 11 makes it an offence for a person in trade to engage in conduct that is liable to mislead the public regarding factors including the "*characteristics*" of the services.

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<sup>9</sup> Refer section 46L(3) of the FT Act.

35. Section 13 makes it an offence for a person in trade in connection with the supply of services or with the promotion by any means of the supply or use of services to:
- 35.1 make a false or misleading representation with respect to the price of any goods or service (section 13(g)); or
  - 35.2 make a false or misleading representation concerning the existence, exclusion or effect of any right (section 13(i)).

**Possible breach of sections 11 and 13 of the Act – preliminary assessment**

36. The statement at Image 1 of **Attachment B** states: *“Join the Grove Orewa from 65 years old and benefit with fixed fees for life and a 25% DMF”*. The Commission is concerned that this statement is potentially misleading as it does not accurately reflect the fees that a resident is liable to pay under the ORA including those that are not fixed, such as interior maintenance fees. It also does not disclose the further administration charge calculated as 1.5% of the entry payment, that when included would in practical effect increase the ‘DMF’ fee paid by the resident to 26.5% of the entry payment.

**Penalties for breaching the Fair Trading Act**

37. Only the courts can decide if there has been a breach of the FT Act.
38. Where a court has declared a term in a standard form contract is an UCT, the FT Act prohibits that business from including the term in the contract or from enforcing or relying on that term. If a business continued to use or enforce that term it may face:
- 38.1 conviction or a fine of up to \$200,000 for an individual or \$600,000 for a company; and/or
  - 38.2 an injunction restraining the business from enforcing or relying on the term; and/or
  - 38.3 orders directing it to refund money or pay damages.
39. The same penalties apply if a court were to find breaches of sections 11 and/or 13 of the FT Act.
40. Where a company is a repeat offender, directors and those involved in the management of the company can be banned from involvement in the management of any company for a period of up to 10 years.

**Further information**

41. The Commission has published a series of fact sheets and other resources to help businesses comply with the FT Act. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). You can also view the FT Act at [www.legislation.co.nz](http://www.legislation.co.nz).

42. We attach a link to the Commission's guidance to business on UCTs where a copy of the Commission's "Unfair Contract Terms Guidelines" can be downloaded. <http://www.comcom.govt.nz/fair-trading/guidelines/unfair-contract-term-guidelines/>.

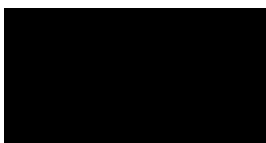
#### **Response to our letter**

43. Our decision not to take further enforcement action against Palm Grove at this time in relation to the issues raised in this letter does not prevent us from taking action in the future. We ask you to carefully consider the issues we raise and take legal advice should you have any questions about complying with your obligations under the FT Act.
44. We invite you to respond to our letter and, in particular, provide us with your views on any legitimate interest you consider Palm Grove has in the terms we have raised. Any response is voluntary, you do not need to respond if you do not wish to. Please consult a lawyer if you are unsure about whether to provide us with a voluntary response and inform us if you decide not to do so.

#### **Official Information Act 1982 (OIA) requests**

45. There has been considerable industry and public interest in the Commission's investigation into the Retirement Village sector and in the wider legislative review undertaken by MHUD. Stakeholders have indicated to us that they would like to receive a copy of any letters that we send to operators relating to our investigation. We also anticipate that we are likely to receive requests from other interested parties, including the media, to disclose under the OIA, any letters we send to operators relating to this investigation.
46. Where we receive an OIA request for a copy of our letters to operators, we will notify you of the request prior to any disclosure.
47. Please contact me on 04 924 3657 or by email at [sara.jones@comcom.govt.nz](mailto:sara.jones@comcom.govt.nz) if you have any questions in relation to this letter.
48. We look forward to receiving Palm Grove's response to our letter.

Yours sincerely



Sara Jones  
**Senior Investigator**  
**Fair Trading Branch**



	<p>AMENDMENT TO CLAUSE 50 in ORA OCTOBER 2023</p> <p>We note that clause 50 was amended by the ORA dated October 2023 by the insertion of a term that provides that the operator is responsible for the replacement of the operator’s chattels when the operator determines that replacement is necessary and as the chattel reaches the end of its economic life and is not due to any damage caused by the resident or their guests and not attributable to fair wear and tear and are not covered by operator’s insurance (in these case the replacement is at the resident’s cost). (refer clause 50.5 ORA 31 October 2023)</p>	<p>in relation to the repair and maintenance obligations of the parties in relation these chattels are not addressed by this amendment.</p>
<p>Clause 22.5 (marketing and sales costs)</p>	<p>This clause places an obligation on the operator to consult with the resident relating to charges for the marketing and sale of the residential unit and indicates that a resident <i>may</i> have a liability to pay for some of these charges.</p>	<p><i>Significant imbalance</i></p> <p>There is no other express clause in the ORA that imposes an obligation on a resident to pay for marketing and sales related costs. Nothing is mentioned about this potential payment in the section of the ORA headed “Your Payments”.</p> <p>This clause appears on its face to raise an imbalance in the rights and obligations of the parties under the ORA as the clause appears to indicate that a resident may have a liability to the operator for</p>

		<p>marketing and sales related costs without expressly setting this out as an obligation.</p> <p>Assuming Palm Grove relies on this clause to impose an obligation on a resident for marketing and sales costs, this obligation raises a significant imbalance in favour of Palm Grove in that a resident:</p> <ol style="list-style-type: none"> <li>1. has no express rights set out in the ORA relating to the sales process for the unit and therefore no ability to influence costs that Palm Grove may incur and then pass onto the resident;</li> <li>2. has no ownership right or interest in the residential unit; and</li> <li>3. the obligation on the resident to pay these charges is not transparent. The resident has no knowledge of the type, nature, and amount of the charges and how they are determined. Nor do they have knowledge of the extent of the liability they are incurring, as it is at the discretion of Palm Grove. This has the effect of being a unilateral price increase.</li> </ol> <p><i>Detriment</i></p> <p>There would be potential for financial detriment to the resident if this term is applied, enforced, or relied on.</p>
Clause 26.2 (no grant of security interest)	A resident has no right to grant a security interest over their right to the exit payment or car park exit payment.	<p><i>Significant imbalance</i></p> <p>This clause does not take into consideration that a resident's financial position may change over the term of the agreement thereby necessitating the need for the resident to have access to the exit payment as security for a loan advance (similar to a reverse</p>

		<p>mortgage). In this way the clause is significantly imbalanced in favour of Palm Grove.</p> <p>A resident invests a significant capital sum with Palm Grove for the occupation right in a residential unit in the village, and the operator has a clear obligation under the ORA to repay that capital sum (less village contribution and other fees) back to the resident/or their estate on the exit payment date.</p> <p>This term appears on its face to be significantly imbalanced in favour of Palm Grove and we would be interested in understanding what legitimate interests of Palm Grove need to be protected by this term.</p> <p><i>Detriment</i></p> <p>There is a potential for financial detriment to a resident if this term is applied, enforced or relied on, in that they are not able to access as security the significant financial interest that they hold in the exit payment due when the agreement terminates.</p>
<p>Clause 29.1 (insurance)</p> <p>Also noted in RVRNZ complaint</p>	<p>The operator has no responsibility <i>under any circumstances</i> for the loss of or damage to a resident's property.</p> <p>By contrast the resident provides an indemnity to the operator for any loss or damage that a resident or their guests may cause that results in a loss to the operator (clause 31.1).</p>	<p><i>Significant imbalance</i></p> <p>When the obligation on Palm Grove at clause 29.1 is compared to obligations on the resident at clauses 31.1 and clause 27.4 there is a significant imbalance in the parties' obligations to cover the loss of the other party in relation to damage that one party may cause to the property of the other.</p> <p>Palm Grove is placed in a much more favourable position as compared to the resident. Palm Grove has no liability at all for any damage or loss it may cause to the resident's possessions whereas</p>



	<p>The resident also has an obligation to repair at their cost any damage a resident or their guests cause to the unit or operator's chattels (clause 27.4).</p>	<p>the resident is liable for all loss and damage to the Palm Grove's property (or for the insurance excess where loss is covered by the operator's insurance).</p> <p><i>Detriment</i></p> <p>There is potential for financial detriment to the resident if this term is applied, enforced, or relied on.</p>
<p>Clause 34 (privacy authorisation)</p>	<p>For the purposes of determining a resident's continued suitability to occupy a unit AND for administration purposes, a resident authorises the operator to collect, from ANY health agency, a resident's personal information relating to their physical and mental health, for such agencies to disclose this information to the operator and for the operator to release this information to any independent medical practitioner under clause 60.1 of the ORA.</p> <p>This authorisation is in addition to:</p> <p>(1) clause 37.3 where resident agrees to cooperate with Palm Grove to obtain a medical assessment; and</p>	<p><i>Significant imbalance</i></p> <p>We consider that the authorisation may be unnecessarily broad when considered against the needs of the Palm Grove and other authorisations that a resident provides under the ORA, and as such is significantly imbalanced in favour of Palm Grove.</p> <p>We also note that the ORA includes no counterbalancing right for a resident to object to or withdraw their consent for the collection of such information in circumstances where they do not wish to provide this information or Palm Grove is over-exercising this right and there is no obvious useful purpose in Palm Grove obtaining and holding this information.</p> <p>We acknowledge Palm Grove has an interest in certain medical information of the resident. We consider that the right of access to highly confidential and sensitive medical information should be limited so that it is only specifically necessary information relevant to the current circumstances of the resident that is acquirable.</p>

	<p>(2) clause 60.2(c) (resident's consent to a medical assessment).</p>	<p><i>Detriment</i></p> <p>These terms if applied, enforced, or relied on would cause a detriment to a resident by unnecessarily invading their privacy as to their medical records.</p> <p>While it is accepted that this information may be required by the Palm Grove in circumstances where it becomes apparent to Palm Grove that a resident might not be able to continue to live safely in their unit or where Palm Grove requires such information when assessing the health and safety needs of residents generally, such a broad right to access a resident's medical records as given by a resident under this authorisation may unnecessarily cause a detriment to a resident's right to privacy in such information.</p>
<p>Clause 49.1 (change to village facilities)</p>	<p>The operator has a right to change village facilities either permanently or temporarily.</p>	<p><i>Significant imbalance</i></p> <p>Operators can provide a range of facilities (including buildings, areas, or amenities) to residents. The facilities on offer can be of considerable importance to residents and may influence their choice of retirement village.</p> <p>While resident has a right to be consulted regarding proposed changes in the services and benefits provided by the operator (clause 22.1) and a right to raise a dispute (clause 70), Palm Grove has a broad unilateral right to change these facilities on offer at will.</p> <p>There are no counterbalancing rights such as a right to receive a reduction in fees commensurate to the reduction in facilities, in</p>

		<p>circumstances where the operator makes changes that adversely affects the resident.</p> <p>Further given the large financial commitment made by the resident for an occupation right and the practical reality that the resident lives in the village, a right to terminate the contract due to a change in facilities is not a practical or useful right to counterbalance this right to change the facilities.</p> <p>We note this is similar to the example unfair contract term in section 46M(g), as it is a term that permits, or has the effect of permitting, one party to unilaterally vary the characteristics of the goods or services to be supplied.</p> <p>See also our comment below in relation to clause 52 (further development of the village). The fact that a resident has no right to object to any development or claim any compensation from Palm Grove as a result of the development, heightens the imbalance of this clause in favour of the Palm Grove.</p> <p><i>Detriment</i></p> <p>There may be financial detriment to the resident and potential loss of enjoyment of lifestyle offered by the village as a result of change to village facilities.</p> <p>Residents may receive a reduction in facilities than what they agreed at the time of entering the ORA at the same cost.</p>
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<p>Clause 52 (further development of the Village)</p>	<p>The operator is entitled to conduct further development at the village and the resident is not entitled to make any objection or claim compensation in respect of any further development or building works that is undertaken.</p>	<p><i>Significant imbalance</i></p> <p>The Retirement Village Disclosure Statement is required to include information for intending residents about new services and facilities that are planned including the location, size and effect on residents of those new services or facilities.<sup>10</sup></p> <p>However, in circumstances where a future development is not foreseen and has not been disclosed by an operator, this obligation on a resident to provide wholesale consent to further development and give up any right to object or claim compensation in relation to the development is significantly imbalanced in favour of the operator.</p> <p>The requirement to consent to future developments that are unknown at the time of consent (and therefore the impact to the resident is unknown) contributes to the imbalance. The term provides full and absolute rights to Palm Grove whilst removing rights of the resident that may serve to counterbalance this right.</p> <p>We also note that a term that has the effect of limiting one party's right to sue another party is an example of an unfair contract term under s 46M(k) of the FTA.</p> <p>It is acknowledged that Palm Grove, as owner and operator, has an interest in the maintenance, investment and development of its properties including facilities such as care facilities which may be of benefit to existing residents should their health needs change. However, we consider that there are likely to be fairer or more balanced means to protect Palm Grove's interests that also take into</p>
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<sup>10</sup> Refer clause 2(b) of Schedule 2 of the Retirement Villages Act 2003.

		<p>consideration the interests of existing residents who often move into a retirement village setting to enjoy peace and quiet.</p> <p><i>Detriment</i></p> <p>There is potential detriment to a resident caused by the removal of their right to claim compensation or object to a development that may materially affect them and their enjoyment of their retirement living if this term is applied, enforced, or relied on.</p>
<p>Clause 61 (departure from unit)</p>	<p>When the ORA terminates due to the death of the resident, there is a requirement for all the resident's chattels and possessions to be removed from the residential unit within 7 days of the death. (clause 61.2).</p> <p>A resident is also obliged to leave the residential unit in similar repair, order and condition as it was at the "Commencement Date" except for "Fair Wear and Tear" or any other damage caused by fire, earthquake or similar (clause 61.1(b))</p> <p><i>"Fair Wear and Tear"</i> is defined as <i>"something that occurs through normal use or is the normal change that takes place with the aging of the property, and may include but is not limited to, any chattels provided by the Operator"</i></p>	<p><i>Significant imbalance</i></p> <p>The obligation to remove a resident's possessions within 7 days of death is significantly imbalanced in favour of Palm Grove when considering:</p> <ol style="list-style-type: none"> <li>1. the continuing financial obligations of a resident's estate to Palm Grove following the termination of the ORA on the death of the resident and the fact that a resident's estate is obliged to continue paying the village outgoings payment following termination and the village contribution may also continue to accrue up until the exit payment date. Financially it appears there is minimal detriment to the operator in allowing the resident's family further time to remove a resident's possessions from the unit; and</li> <li>2. the resident's estate has no control over the sales process for the unit and the ORA does not set out any deadline dates for the sale of the unit and return of the capital payment (less deductions) to the resident's estate.</li> </ol>

	<p><i>such as curtains and drapes, fixtures and fittings. Fair Wear and Tear does not include deterioration attributable to smoking, incontinence and use of mobility aids” (clause 5.16).</i></p>	<p>In relation to clause 61.1(b), we invite Palm Grove to consider its definition of “Fair Wear and Tear”. Given retirement villages provide accommodation exclusively to older people this carve out in relation to what amounts to fair wear and tear appears not to take into account that it is foreseeable that residents as they age in place may use mobility/disability aids or if they have a serious medical condition may become incontinent.</p> <p><i>Detriment</i></p> <p>By applying clause 61.2, Palm Grove gives a resident’s family/executor a very short time frame to clear out the resident’s possessions from their unit following the death of the resident. This timeframe may place family/executor under undue pressure at a time when they are grieving and organising a funeral for the resident. This undue pressure could be viewed as a detriment that affects the resident by knowing their family/executor will be facing undue pressure and distress following the resident’s death.</p> <p>By applying clause 61.1(b), this clause also has the potential to cause financial detriment to the resident.</p>
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**Attachment B**

Image 1 (Screenshot taken from [www.thegroveorewa.co.nz](http://www.thegroveorewa.co.nz) on November 2023)

The screenshot shows the top section of the website. On the left is the logo for 'THE GROVE OREWA', which consists of a stylized flower icon and the text 'THE GROVE OREWA'. To the right of the logo, the address '15 Centreway Road, Orewa, Auckland' is displayed with a location pin icon. Further right, the operating hours are listed: 'Monday-Friday : 8:30 AM to 5:00 PM', 'Saturday : 10:00 AM to 3:00 PM', and 'Sunday : Closed'. On the far right, the phone number '0800 673 924' and the email address 'sales@thegroveorewa.co.nz' are provided.

Below the header is a dark green navigation bar with the following menu items: 'Retirement Village', 'Apartments' (with a dropdown arrow), 'Villas', 'Amenities', 'News', 'About' (with a dropdown arrow), and 'Contact'. A 'REQUEST INFO PACK' button is located on the right side of this bar.

Underneath the navigation bar is a dark banner with white text. On the left, it says 'NEXT OPEN DAY: 6th & 7th December 2023 | 10am to 3pm'. On the right, it says 'Join The Grove Orewa from 65 years old and benefit with fixed fees for life & a 25% DMF'. Below the banner is a horizontal strip of images showing various interior and exterior views of the retirement village.

Released under the Official Information Act 1982