



**SUBMISSION ON FINANCIAL MARKETS CONDUCT BILL EXPOSURE DRAFT  
(THE *BILL*)**

**TO: INVESTMENT LAW TEAM, MINISTRY OF ECONOMIC DEVELOPMENT**

The Retirement Villages Association of New Zealand Incorporated (the *RVA*) represents the interests of owners, developers and managers of registered retirement villages throughout New Zealand. Our 270 member villages operate some 19,000 dwellings (both villas and apartments) which are home to 22,000 older New Zealanders. This figure is approximately 80% of the registered retirement village industry.

We set out as follows the *RVA*'s submission on the Bill in general, as well as specific aspects of the Bill.

**Retirement village interests should be excluded as a "security"**

- 1 Interests in retirement villages registered under the Retirement Villages Act 2003 (the *RV Act*) should be excluded by legislation from the definition of "security" under the Bill. Key reasons for this exclusion are as follows.

***A retirement village interest is different in economic substance***

- 1.1 Acquiring the rights to occupy a dwelling in a registered retirement village should not be viewed in economic substance as a financial product relating to financial markets.

The focus of the Bill, particularly in terms of definitions of "security" and "financial product", is on the economic substance of a product, not its legal form. The primary (and generally sole) objective of a person acquiring an occupation interest in a retirement village is to purchase the rights to occupy a home in which to spend the latter years of their life and to receive a bundle of services in relation to that dwelling and the village, not to seek financial returns in the manner intended by investors in financial products.

***The retirement village code already provides thorough oversight***

- 1.2 Recognising these unique attributes, the retirement village sector is already governed by a comprehensive regulatory regime, which operates as a code for all retirement villages in New Zealand. This includes a Code of Practice and specific detailed regulations, and the sector is overseen by a number of regulators:

- (a) the *Registrar of Retirement Villages* (who has the key oversight role in ensuring that retirement village operators and statutory supervisors comply with the regime in operating and supervising retirement villages);

- (b) the *Department for Building and Housing* (which takes responsibility for day to day compliance matters);
- (c) the *Retirement Commissioner* (who provides an independent review function, and oversees the dispute resolution process under the RV Act); and
- (d) as of recently, the *Financial Markets Authority*, which has been given the role of licensing retirement village statutory supervisors under the Securities Trustees and Statutory Supervisors Act 2011 (however, see our comments at section 5 below).

***The Bill creates duplicate and inconsistent law for retirement villages***

- 1.3 The aspects of the Bill in respect of which interests in retirement villages are not currently exempted are already substantively addressed under the retirement village regulatory regime.

We note that the Bill currently exempts interests in registered retirement villages from Part 3 of the Bill (disclosure), by virtue of clause 20 of Schedule 1 to the Bill. As you will be aware, the retirement village regulatory regime contains its own tailored and prescriptive disclosure regime. However, many other aspects of the Bill also should not apply to retirement village interests, including the following.

- (a) Part 2 of the Bill relating to misleading or deceptive conduct or representations. Not only do retirement village operators and promoters continue to be bound by the Fair Trading Act 1986, section 26 of the RV Act (and the penalty provisions of the RV Act) governs misleading or deceptive "*advertisements*" in relation to retirement villages. An advertisement includes any publication given to an individual which promotes a retirement village, including a disclosure statement given by a retirement village to a resident or a prospective resident. The disclosure statement is the key disclosure made by a retirement village to a resident or a prospective resident.
- (b) There is potential for many retirement village interests to fall within the definition of "*debt security*" under the Bill (as currently drafted) due to the refundable nature of occupation payments used by many retirement village operators in relation to the resident's right to occupy the unit. Presumably this is not intended. Sub-part 2 of Part 4 of the Bill should not apply to retirement village interests, given each retirement village already has a statutory supervisor under the RV Act to provide the type of oversight envisaged by sub-part 2. The current Securities Act exempts registered retirement villages from all of Part 2.
- (c) The same comments can be made with respect to sub-part 4 of Part 4 of the Bill, in that the statutory supervisor of a retirement village already has the power to obtain all information it requires to fulfil its role under the RV Act, including requiring the auditor of a retirement village to provide information to the statutory supervisor under section 47 of the RV Act. There is therefore unnecessary duplication.

- (d) Sub-part 5 of Part 4 of the Bill which requires a register of regulated products to be maintained. The register of retirement villages currently maintained by MED sets out details of every registered retirement village in New Zealand as well as copies of the key documentation relating to the retirement village. Again, therefore, there is unnecessary duplication.
- (e) Sub-part 6 of Part 4 of the Bill which relates to accounting records and audits. Retirement village operators are already bound by the Financial Reporting Act 1993, and financial oversight by statutory supervisors under the RV Act. This is again unnecessary duplication.

**Alternative approach: exclusion by regulation**

- 2 If it is not considered appropriate that retirement village interests are excluded from the relevant aspects of the Bill within the Bill itself, an alternative approach is to exclude retirement village interests from the definition of "security" under the Bill by way of regulation.
- 3 This approach is already contemplated within the definition of "security" under the Bill. Utilising regulation for this purpose is a useful approach for new interests or products developed after the Bill becomes law, where it is not considered desirable to revert to Parliament in order to include the new interests or rights. However, given interests in registered retirement villages are known interests at the time of the Bill's drafting, it is more appropriate from the perspective of drafting good law that the Bill itself excludes those interests that should be considered at the time of the Bill's enactment not to be a "security".

**Include any shortcomings in current retirement village law in the RV Act**

- 4 Any perceived lack of oversight or powers in relation to retirement village interests should be addressed by amendment to the RV Act, not by adding the Bill as a third large piece of legislation governing retirement villages.
  - 4.1 This reflects Parliament's intent that the RV Act operates as a code for the retirement village sector.
  - 4.2 As noted by the Hon. Lianne Dalziel (when introducing the second reading of the Retirement Villages Bill in July 2003): "*Securities law is actually an inappropriate mechanism to address the social dimensions of retirement village living*". This neatly reflects the substantively different nature of a retirement village interest from a traditional financial investment.
- 5 One area where this approach could have been taken is in the approval of statutory supervisors. As the RVA previously submitted, the optimal position is to avoid the delineation of oversight of retirement village statutory supervisors by including all matters relating to statutory supervisors within the RV Act rather than an additional piece of legislation. Unfortunately, the approach taken in practice under the Securities Trustees and Statutory Supervisors Act 2011 has resulted in the FMA overseeing the appointment of statutory supervisors, but the Registrar of Retirement Villages (the regulator with the specialist knowledge of retirement village sector) overseeing statutory supervisors' compliance and performance.

- 6 Does the Financial Markets Authority have the knowledge and expertise of retirement villages to be the best regulator to license statutory supervisors of retirement villages, when another regulator monitors the performance of these same statutory supervisors? The skills required of a trustee or statutory supervisor of a financial product are not necessarily the same as the skills required for a statutory supervisor of a retirement village. The fact that under section 18 of the Securities Trustee and Statutory Supervisors Act, the Financial Markets Authority must consult with the Registrar of Retirement Villages, is an acknowledgement of where the expertise lies, and is clearly inefficient in involving two regulators.
- 7 To further highlight the suboptimal nature of what is now in effect, examine clause 5 of the Securities Trustees and Statutory Supervisors Regulations 2011 which sets out the issues that the Financial Markets Authority must take into account in assessing whether to grant a licence to a statutory supervisor of a retirement village. As the Financial Markets Authority does not have the regulatory responsibility for supervising the performance of statutory supervisors of retirement villages, the only practical way the Financial Market Authority is going to be able to satisfy itself in relation to many of the criteria is in its discussions with the Registrar of Retirement Villages.
- 8 The RVA has previously submitted a range of suggested changes to the RV Act, which would:
  - 8.1 allow for the appointment/approval of statutory supervisors to be carried out by the Registrar of Retirement Villages under the RV Act, rather than the Securities Trustees and Statutory Supervisors Act; and
  - 8.2 strengthen the Registrar's powers in general in relation to the oversight of retirement villages.

These previous submissions are available on request, and negate the need for the addition of a further regulator.

**A single specialist regulator should oversee the retirement village industry**

- 9 There are a number of key rationale for a single regulatory body being charged with the oversight of retirement villages in New Zealand.
  - 9.1 Multiple regulators create a risk of an overlap in oversight roles between different regulators, or conversely, resultant gaps in oversight due to confusion between regulators as to who is responsible for a particular aspect of retirement village oversight.
  - 9.2 Including retirement village interests within the ambit of the Bill will result in a distraction to the FMA from its core roles, including by way of:
    - (a) the FMA being required to direct resources towards an already-regulated retirement village sector, at the expense of those resources being utilised in the oversight of more applicable financial products; and

- (b) the FMA being expected to play an oversight role in the retirement village sector (a large sector in its own right with more than 330 registered retirement villages in New Zealand), when it is the Registrar of Retirement Villages and his or her team which have considerable expertise built up over a number of years in understanding and monitoring the retirement village sector.
- 9.3 Additional costs arising from overlapping regulation of the sector are ultimately passed onto retirement village residents, for no additional benefit.
- 9.4 There is no obvious benefit in the FMA becoming an additional regulator of the retirement village sector, particularly given that, notwithstanding the recent global financial crisis, not a single resident of a registered retirement village has been forced to leave their residence as a result of a village operator's insolvency. You will be aware of the memorial placed on the titles of retirement villages under the retirement village regime that protects residents in the event of the insolvency of an operator.
- 10 The current position must be that either the Financial Markets Authority has nothing to do with registered retirement villages, or the existing retirement village regime and regulator are subsumed into the Financial Markets Authority. The latter proposition would appear to be distinctly unappealing having regard to the core objectives of the Financial Markets Authority and the Bill.

**The purpose of the Bill support the RVA's approach**

- 11 The purposes of the Bill support the RVA's approach as set out above. In particular:
  - 11.1 Clause 3 of the Bill focuses on the regulation and oversight of "*financial markets*", which in both a layperson's and technical sense are not considered to include the retirement village sector.
  - 11.2 Clause 4(a) of the Bill (relating to timely, accurate and understandable information) is already addressed through retirement village interests being excluded from Part 3 of the Bill relating to disclosure. This exclusion already recognises the strength of the existing retirement village regime.
  - 11.3 Clause 4(b) of the Bill (relating to governance arrangements and effective monitoring) is already a key feature of the RV Act, as described in sections 1.3(b) to 1.3(e) above.
  - 11.4 Clause 4(c) of the Bill highlights that one purpose of the Bill is to avoid unnecessary compliance costs. Part of this is avoiding an unnecessary duplication of regulatory oversight (as noted in section 9 above). It also focuses on ensuring that regulators themselves are not forced to direct scarce resources to an area which is already appropriately supervised – potentially at the expense of areas which warrant greater oversight or present greater risks to New Zealand investors, or are more likely to impact negatively on the reputation of New Zealand's financial markets.

**Definition of “issuer”**

- 12 If the RVA’s submission that retirement village interests be excluded from the definition of “security” is not accepted, then registered retirement village operators should be excluded from the definition of “issuer” under clause 10 of the Bill in relation to retirement village interests, which we understand will also impact on the definition of “issuer” for the purposes of the Financial Reporting Act. We understand that the MED’s intent is to amend the Financial Reporting Act to require retirement village operators to prepare financial statements in accordance with generally accepted accounting practice as defined in section 3 of the Financial Reporting Act, which will appropriately allow retirement village operators to report in accordance with the type of reporting under the Financial Reporting Act which is appropriate to the particular entity. This is not possible if retirement village operators are treated as “issuers” under the Bill.

**General**

- 13 Thank you for considering the RVA’s submission. We are happy to elaborate further on any aspect of our submission should you wish to discuss.

Yours faithfully

A handwritten signature in blue ink, appearing to read "John Collyns", with a large, stylized flourish at the end.

John Collyns  
Executive Director