

**Summary of the Ministerial Orders under
section 204 of the *Retirement Villages Act 1999***

NSW Fair Trading
Department of Customer Service
May 2020

Table of Contents

- Introduction3**
- Ministerial Order 1 – Services & Facilities3**
- Ministerial Order 2 – Meeting Requirements4**
- Ministerial Order 3 – Village Rules4**
- Ministerial Order 4 – Budget Processes & Expenditures5**
- Ministerial Order 5 – Access to Retirement Villages6**
- Ministerial Order 6 – Consent of Residents7**

Introduction

This summary provides an overview of the Ministerial exemptions prescribed during the COVID-19 pandemic made by order pursuant to section 204 of the *Retirement Villages Act 1999* and published in the NSW Government Gazettes.

Ministerial Order 1 – Services & Facilities

The object of this Order is to provide the operator of a retirement village with power to vary or withdraw access to the services and facilities of a retirement village without the consent of the residents of the retirement village, in circumstances where the operator of the retirement village is acting in pursuance of a Public Health Order, issued under the Public Health Act. For example, the operator of a retirement village may need to close a library, pool or other common area within a retirement village in accordance with social distancing requirements to prevent the risk of infection of the coronavirus.

The effect of this Order is to exempt the operator of a retirement village from noncompliance with sections 60, 61 and 62 of the Act.

Under the Act, the operator of a retirement village is required to provide a prospective resident with a disclosure document which details the services and facilities available at the retirement village. The disclosure document forms part of the resident's contract information.

It is a requirement under the Act, that the operator of a retirement village does not vary or withdraw access to the services or facilities unless the residents of the retirement village have consented to the proposed variation or withdrawal of the services and facilities.

Where the operator of a retirement village varies or withdraws access to the services and facilities of a retirement village without the consent of the residents, the operator of a retirement village is liable for breach of contract. The operator of a retirement village may also be liable for misleading and deceptive conduct.

The Order, therefore, allows the operator of a retirement village to withdraw or vary the services and facilities of a retirement village without being in breach of the Act or contracts entered into with the residents of a retirement village.

This Order is in place until 26 September 2020.

Ministerial Order 2 – Meeting Requirements

The object of this Order is to temporarily suspend the operation of provisions of the Act that require the operator of a retirement village to convene meetings with or as between the residents of the retirement village where the convening of such meetings would contravene a Public Health Order, issued under the Public Health Act. For example, the operator of a retirement village may be required to convene a meeting of residents under the Act or Regulations which is in excess of the number of people permitted to gather in one place in accordance with social distancing requirements.

The effect of this Order is to exempt the operator of a retirement village from non-compliance with sections 41, 69A and 72 of the Act.

Under the Act, the operator of a retirement village is required to convene meetings with or as between the residents of a retirement village for specific purposes. For example, it is a requirement under the Act that the operator of a retirement village meet with a resident of a retirement village to explain the contents and effect of the resident's current village contract information, upon the written request of the resident.

Where an operator of a retirement village does not convene meetings with or as between the residents of a retirement village, in accordance with the provisions of the Act, the operator is liable for non-compliance with the Act.

The Order, therefore, allows the operator of a retirement village to introduce alternative measures that remove the need to convene physical meetings or exempt the need for a meeting altogether without breaching the Act or the Regulations.

This Order is in place until 26 September 2020.

Ministerial Order 3 – Village Rules

The object of this Order is to authorise the operator of a retirement village to create new village rules or amend existing village rules, without the need for a special resolution of the residents of a retirement village, in circumstances where the operator of a retirement village is acting pursuant to a Public Health Order issued under the Public Health Act. For example, where the operator needs to make a temporary rule regarding access to facilities (pool, gym or other common area) within the retirement village.

The effect of this Order is to exempt the operator of a retirement village from non-compliance with section 51 of the Act.

Under the Act, the operator of a retirement village and the residents of a retirement village may establish village rules for the use, enjoyment, control and management of a retirement village. For

example, rules may be created or amended which relate to visitors, including overnight and short stay guests and the use and operation of services or facilities (including restrictions on their use) of a retirement village.

It is a requirement under the Act that the operator does not create a new village rule or amend an existing village rule unless the residents of the retirement village have, by special resolution, agreed to the creation of a new village rule or amendment of an existing village rule. This process can be time consuming and may impose an undue burden on the operator of a retirement village when trying to comply with a Public Health Order.

If the operator creates a new village rule or amends an existing village rule without the consent of the residents of a retirement village, the residents of a retirement village may apply to the tribunal to have the rule set aside. This is despite the fact that the creation of a new rule or amendment to an existing rule was made to accommodate a Public Health Order.

The Order, therefore, allows the operator of a retirement village to introduce a new rule or amend an existing rule in a timely manner in order to facilitate their obligations their obligation to comply with a Public Health Order.

This Order is in place until 26 September 2020.

Ministerial Order 4 – Budget Processes & Expenditures

The object of this Order is to authorise the operator of a retirement village to temporarily adjust the financial management of a retirement village, without the need for a vote or special resolution of the residents of the village, in circumstances where the operator is unable comply with the provisions of the Act as a result of a Public Health Order issued under the Public Health Act. For example, the operator of a retirement village is not allowed to give effect to a proposed annual budget unless the residents of the retirement village consent to the proposed budget. This ordinarily involves a meeting of the residents which may not be possible for larger retirement villages because of social distancing requirements.

The effect of this Order is to exempt an operator of a retirement village from liability for non-compliance with sections 72A, 107 and 114 of the Act.

Under the Act, the operator of a retirement village is not authorised to adjust the financial management of a retirement village unless the residents of a retirement village have, by vote or special resolution, consented to the proposed adjustments. For example, the operator of a retirement village is required to have all itemised expenditures in a proposed budget approved by the residents of a retirement village during each financial year.

Where an operator adjusts the financial management of a retirement village without the prior consent of the residents of a retirement village, either by vote or special resolution, the operator of

a retirement village is liable for non-compliance with the Act and the residents of a retirement village may seek relief from the Tribunal.

The Order, therefore, allows the operator of a retirement village to temporarily adjust the financial management of a retirement village without the need for consent to be obtained in a manner that contradicts a Public Health Order.

This Order is in place until 31 December 2020.

Ministerial Order 5 – Access to Retirement Villages

The object of this Order is to authorise an operator of a retirement village to introduce control measures that temporarily limit or restrict access to retirement villages or parts of a retirement village during the COVID-19 pandemic, notwithstanding that such control measures may interfere with a resident's right to sell, let or sublet his or her residential premises in the retirement village.

The effect of this Order is to temporarily exempt an operator of a retirement village from liability for non-compliance with sections 169 and 177 of the Act and Clause 11(2)(d) and (e) of Schedule 3A of the Rules of Conduct in the Retirement Villages Regulation 2017.

Under the Act, the operator of a retirement village is not permitted to interfere with a resident's right to sell, let or sublet his or her residential premises in the retirement village. For example, the operator is not permitted to prevent access by persons engaged with the marketing or sale of a residential premises within the retirement village or displace or remove a 'for sale' signs in relation to the sale of a residential premises from within the retirement village.

Where the operator engages in conduct that interferes with a resident's right to sell, let or sublet his or her residential premises, the resident may apply to the Tribunal for relief. This is despite the fact that the operator is acting in accordance with their obligation to provide a safe living environment and pursuant to a Public Health Order during the pandemic period. For example, the operator of a retirement village is not permitted to introduce a control measure which prevents a real-estate agent or non-resident from inspecting a residential premises within a retirement village because the operator of a retirement village is concerned about the noise that may be created during an inspection.

The Order, therefore, allows the operator to work with residents and non-residents (real estate agents, guests, delivery drivers) to ensure that measures are in place for the safety of all residents of all retirement villages.

This Order is in place until 26 September 2020.

Ministerial Order 6 – Consent of Residents

The object of this Order is to authorise the residents of a retirement village to provide consent via alternative voting methods not recognised under the Act during the COVID-19 pandemic.

The effect of this Order is to temporarily exempt residents of a retirement village from liability for non-compliance with section 9 and Schedule 1 of the Act and clause 6(1) and 6(4) of Schedule 6 of the Retirement Villages Regulation 2017, subject to conditions.

Under the Act the residents are required to vote in accordance with the methods of voting set out in Schedule 1 of the Act and supported by Schedule 6 of the Regulations. For example, consent is needed from residents on changes made to the village budget, by a show of hands or a written ballot. In circumstances where the Operator introduces measures to prevent the spread of the coronavirus, physical meetings may not be possible.

The Order, therefore, sets out additional voting methods that allow the residents to provide consent without breaching a Public Health Order or compromising their health and safety or that of the operators.

This Order is in place until 26 September 2020.