

EXEMPTION CERTIFICATES UNDER SECTION 77C OF THE RETIREMENT VILLAGES ACT

GUIDELINES FOR APPLICANTS

1. Introduction

These guidelines explain the new provisions of the *Retirement Villages Act 1992* (the Act) that prohibit certain persons from being the administering body or being concerned, directly or indirectly, in the administration of a retirement village unless the person holds an exemption certificate granted by the Commissioner.

The purpose of the provisions is to protect the wellbeing and financial interests of residents i.e. to ensure that individuals concerned in the administration of a retirement village do not present a risk to the wellbeing and financial interests of the residents of the retirement village.

These guidelines are intended to assist applicants by providing an overview of the process for considering an application for an exemption certificate in relation to these provisions. *However, these guidelines are not a substitute for legal advice.*

**A person should consider seeking legal advice if they have any doubt as to whether they are a prohibited person and are concerned, directly or indirectly, in the administration of a retirement village.*

2. Persons who are not to be the administering body or concerned in the administration of a retirement village

The new section 76 of the Act prohibits the following persons from being the administering body of a retirement village, or being in any way, directly or indirectly, concerned in the administration of a retirement village:

- a person who is bankrupt or whose affairs are under insolvency laws;
- a person who has been convicted of an offence:
 - involving violence, fraud or dishonesty punishable on conviction by imprisonment for not less than 3 months; or
 - under Chapter XXXI of *The Criminal Code* (which covers sexual offences);
- a person who is disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* (Cth) (Corporations Act); and
- a person who was a director of, or concerned in, the management of a corporation when it was involuntarily wound up.

Section 76 enables regulations to prescribe further offences or persons subject to the prohibition. There are no further offences or persons prescribed at this time.

For the purposes of these Guidelines, a person to whom any of the above applies will be referred to as a “prohibited person”.

3. Penalties

The following offences each attract a penalty of up to \$20,000 under the Act:

- being the administering body or being in any way, directly or indirectly, concerned in the administration of a retirement village whilst being a prohibited person, unless the person holds a current exemption certificate granted by the Commissioner under section 77C;
- employing or engaging a prohibited person if the person's employment or engagement is or is to be in any way, directly or indirectly, concerned in the administration of a retirement village, unless the persons holds a current exemption certificate granted by the Commissioner under section 77C;
- for anyone who subsequently becomes a prohibited person, failing to provide relevant information on being a prohibited person to the person's employer or the person engaging them within 14 days of becoming prohibited;
- providing false or misleading information to a person who employs or engages the prohibited person; and
- failing to return an exemption certificate which has been revoked or cancelled.

4. Limitation of period for which s 76 applies to certain persons

The period for which a person is prohibited from being the administering body or being concerned in the administration of a retirement village is provided for in section 77A. The period is 5 years from the happening of a specified event. That is:

- in relation to section 76(1)(b), the period is 5 years from the time of the person's conviction, or if the conviction results in a term of imprisonment, from the time of the person's release from custody;
- in relation to section 76(1)(c), the period is 5 years from the time of the person's disqualification from managing corporations; and
- in relation to section 76(1)(d), the period is 5 years from the corporation's involuntary winding up.

In the case of a person who is a bankrupt or whose affairs are under insolvency laws there is no set time period, because the period is the duration of the person's bankruptcy (i.e. until the person become discharged) or the duration for which their affairs are under insolvency laws.

5. What is the meaning of "administering body"?

Under the Act, an administering body means a person by whom, or on whose behalf, the retirement village is administered and includes a person (other than a resident) who is the owner of the land within the retirement village.

A prohibited person cannot be the administering body of a retirement village.

6. What is the meaning of “being in any way, directly or indirectly concerned in the administration of a retirement village”?

In addition to being prohibited from being the administering body of a retirement village, a prohibited person cannot be in any way, directly or indirectly, concerned in the administration of a retirement village i.e. the prohibited person cannot perform any of the tasks of the administering body, either directly or indirectly.

This applies to persons who manage or direct, or are capable of influencing the management or direction, of the retirement village or the administering body.

There are numerous responsibilities and duties that a person may have within a retirement village or administering body. In each case, the Commissioner will consider the particular roles, responsibilities and duties of the applicant to determine if the person manages or directs, or is capable of influencing the management or direction, of the retirement village or the administering body.

(a) Could the director of a company that owns but does not directly administer a village be prohibited?

Whether the director of a company is a person “indirectly” concerned in the administration of a retirement village will be a question of fact in each case, depending on the decisions taken by the company in relation to the retirement village and the level of influence the director has in relation to those decisions of the company. In each case, the Commissioner will consider whether the applicant is a person who manages or directs, or is capable of influencing the management or direction, of the retirement village or the administering body

Further, it is important to note that a person may be construed as a director even if they are not validly appointed if they are acting in a role within the company and performing functions that one would reasonably expect to have been performed by a validly appointed director or if the appointed directors are accustomed to acting in accordance with the person’s instructions.

(b) Persons who are not directly involved in the administration of the retirement village but are employed or engaged by the administering body to perform tasks on the retirement villages grounds

The provisions do not capture gardeners, cleaners, maintenance staff and like employees or contractors as these persons are not directly or indirectly concerned in the administration of a retirement village. Such persons would not be managing or directing the affairs of the retirement village or administering body, or influencing them, but would rather be subject to management or direction by those administering the retirement village or the administering body.

7. Who can apply for an exemption certificate?

An exemption certificate may be sought by prohibited persons who are already involved in administering a particular village and by persons who propose to become involved in administering a village after the provisions commence.

Exemption certificates may be granted by the Commissioner subject to conditions and limitations specified in the certificate and may be revoked by written notice. If a person is granted an exemption certificate and subsequently becomes a person to whom section 76 further applies, by the occurrence of a bankruptcy,

conviction, disqualification, winding up or other matter relevant to section 76, the exemption certificate will be immediately cancelled.

8. What is the process for applying for an exemption certificate?

If you wish to apply for an exemption certificate, you must:

- complete the form titled “*Persons who are not to be involved in the administration of a retirement villages – Exemption Application Form*”, including any attachments as required by the form (e.g. evidence of your duties and responsibilities in relation to the retirement village); and
- pay the application fee.

The application form is published on the Department of Commerce website at www.commerce.wa.gov.au. Details of the current fee and methods of payment are available at www.commerce.wa.gov.au/CP/licensing_fees.

During the process of assessing your application, the Department may request further or additional information from you.

9. What are the grounds for granting an exemption certificate?

Under section 77C, the Commissioner may only grant an exemption certificate if satisfied that neither the wellbeing nor financial interests of residents will be at risk if a person is the administering body or is, directly or indirectly, concerned in the administration of the retirement village.

10. What factors will the Commissioner take into account in deciding whether to grant an exemption certificate?

The new section 77C does not limit the factors that the Commissioner may consider in determining whether the wellbeing or financial interests of residents will be at risk if the person is granted an exemption certificate. Each application will be considered on its individual merits.

The ground/s on which a person is prohibited (and any mitigating circumstances) will generally be considered in the context of the specific role of the person in the administration of the village, as this will affect the nature and extent of any risk to the wellbeing or financial interests of village residents.

The range of factors to be considered by the Commissioner will vary from application to application. Some factors will be relevant for all applications, such as:

- the full details and circumstances that result in the person being prohibited under section 76;
- the nature and extent of the person’s proposed involvement in the administration of the retirement village including whether the person or person’s employer has exercised reasonable diligence by putting in place measures or policies to address any possible risks;
- the reasons why the person believes consent should be granted; and
- any relevant conduct of the person subsequent to the person becoming a prohibited person including whether the person shows insight, remorse etc and/or has taken steps to address any underlying causes of past conduct that has led to the prohibition.

Other factors, however, may be relevant for some applications and not for others.

The following are examples of factors that may be considered relevant in particular circumstances. These are not intended to be an exhaustive list of factors because, as indicated above, these will vary from application to application depending on the individual circumstances surrounding each application.

Example

A person is prohibited under section 76(1)(a) on the basis of insolvency. The nature and extent of the person's proposed involvement in the financial management of the village (such as whether the person has authority to incur expenditure or debt) is likely to be relevant.

Example

A person is prohibited under section 76(1)(b) on the basis of a conviction for an offence involving violence to another person. A relevant factor is whether the person's role involves, or may involve, contact with the residents of the village in relation to the functions and responsibilities of the administering body.

Example

A person is prohibited under section 76(1)(b) because they have been convicted of stealing. A relevant factor is whether they have any involvement in the handling of residents' monies that are received by the administering body (such as premiums and recurrent charges) or would be in a position to access residents' monies or other belongings (e.g. by being near to individual residential premises).

11. What if a person is granted an exemption certificate and the person's role in the administration of a retirement village changes?

Section 77C(2) allows an exemption certificate to be granted subject to any condition or limitation that the Commissioner considers appropriate, including a limitation on the period that the certificate has effect. For example, if the Commissioner granted a certificate on the basis that the person will have no contact with residents, the exemption certificate could be subject to the condition that if this changes, the Commissioner must be informed so that consideration can be given as to whether the certificate should be revoked.

In the above situation, the prohibited person would have an ongoing obligation to inform the Commissioner if the person's role changes such that they will have contact with residents. The Commissioner could then consider whether to revoke the exemption certificate under s 77C(3).

12. Can my employer, or the person engaging me, force me to make an application to the Commissioner?

It is an offence under section 76(2) of the Act for a prohibited person to be concerned in the administration of a retirement village unless they hold a current exemption certificate granted by the Commissioner.

If you consider yourself to be a prohibited person, you should make an application to the Commissioner for an exemption certificate. If you are unsure, you should consider seeking legal advice.

It is also an offence to employ or engage a prohibited person if the person's employment or engagement is concerned in the administration of a retirement village, unless the person holds a current exemption certificate granted by the Commissioner.

If you are a prohibited person under section 76(1), this may adversely impact upon your continued employment. You should discuss the matter with your employer and consider seeking independent legal advice.

Please also refer to the section on transitional provisions below.

13. Transitional provisions

On the day of commencement of the new provisions, anyone who is an administering body, or is concerned in the administration of a village, and is a prohibited person under section 76:

- must give relevant information as to the person's prohibition, to the person by whom they are employed or engaged, within 14 days of commencement; and
- is deemed to have been granted an exemption certificate for a period of 6 months. If a person makes an application for an exemption certificate under section 77C within that 6 months, the deemed exemption certificate will continue to have effect until the person's application is determined.

Anyone who is a prohibited person under section 76, and who wishes to commence being concerned in the administration of a village after the commencement day, must first apply to the Commissioner for an exemption certificate before commencing the employment or engagement and have an exemption certificate issued to them.

14. Will decisions be made public?

Decisions will not be made public for privacy reasons although because of the offence relating to employing a prohibited person it may be necessary to inform the administering body who is the employer of the person of the Commissioner's decision.

15. Refunds and partial refunds

The Commissioner may refund the whole or part of the fee for an application for an exemption certificate if satisfied that there are special circumstances that justify the refund.

Note that the refusal of an application is not a special circumstance.

A full refund may be given only if the Commissioner is satisfied that no resources of the Department have been applied to assess the application.

In deciding whether to refund part of the application fee, the Commissioner must consider whether the application has been made in error (i.e. section 76 does not apply to the person) and the extent to which the Department's resources have been applied to assess the application.