

<p>INFORMATION FOR BUILDERS, OWNERS AND DEVELOPERS - November 2004</p>
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Home Indemnity Insurance Exemption for Leased Retirement Villages

Introduction

Obtaining home indemnity insurance (HII) for residential building work is a legal obligation under the *Home Building Contracts Act 1991*. HII protects home owners against financial loss if a builder is unable to complete residential building work or meet a valid claim for faulty workmanship because of death, disappearance or insolvency (i.e. inability to meet outstanding debts). HII cover remains effective for a six year period following “practical completion” of the work.

If you are building a new retirement village, in which all dwellings will be leased to residents, then it’s likely the building work will be exempt from the legal requirement to have HII.

This fact sheet explains the *Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002*, referred to here as the Exemption Regulations, which provides an exemption for retirement villages with leased dwellings.

Copies of the Regulations

You can purchase copies of the Exemption Regulations by contacting the State Law Publisher, 10 William Street Perth, telephone (08) 9321 7688. You can also view them by accessing the State Law Publisher’s web site at www.slp.wa.gov.au/.

The Exemption Regulations Relating to Leased Retirement Villages

The Exemption Regulations enable an owner/developer of a retirement village in which **all** of the dwellings are to be leased to residents to make a commercial decision about whether or not to require their builder to take out HII.

There are two conditions, which must be met before an exemption may be taken up. These conditions are explained in detail on page two of this brochure, “Conditions for taking up an Exemption”.

In the event that the owner/developer wishes to **sell** one or more of the dwellings in the retirement village within six years of practical completion, the owner/developer must obtain HII or corresponding cover for all residential building work undertaken under the building licence. The details of this policy of insurance are outlined in Regulation 10(2) and essentially reflect the existing terms of HII coverage. The six year term is the period of HII cover required under the *Home Building Contracts Act 1991*. Purchasers of the dwellings in the retirement villages will therefore have the same protection as other purchasers of residential property.

After six years from practical completion, the owner/developer may sell the dwellings in the retirement village without obtaining HII.

The Exemption Regulations provide owners/developers of leased retirement villages with the option of making a commercial decision about whether to obtain HII. After assessing the prospective builder, considering their own financial position and other appropriate issues, the owner/developer can make a decision about whether it is necessary to take out HII.

It should be noted that when HII is not obtained, the owner/developer bears the risks of non-completion, loss of deposit and faulty workmanship in the event of the death, disappearance or insolvency of the builder. In most cases, faulty building work should be fixed by the builder in accordance with the builder's obligations under the *Builders' Registration Act 1939*. However, if the builder dies, disappears or becomes insolvent, then the owner/developer would have to bear these costs.

Retirement village residents come under the protection of the *Retirement Villages Act 1992*. This Act places strong disclosure and other requirements on the sale of dwellings in retirement villages. Any deposits paid by the residents must be held in trust in accordance with section 18 of the Act. Disputes concerning retirement village residents may be conciliated by the Department of Consumer and Employment Protection and, in some cases, are heard by the Retirement Villages Disputes Tribunal. The Tribunal can make orders for payment, which are legally binding on the parties.

Conditions for Taking up an Exemption

The exemption applies to retirement villages in which all of the dwellings are intended to be leased to residents.

The exemption **does not** apply to building work for which a building licence has already been issued before the Amendment Regulations commenced on 9 April 2003.

In order to take up the exemption, before a building licence is issued, the owner is legally obliged to do two things.

- First, a memorial on the property must be lodged with the Registrar of Titles at the Department of Planning and Infrastructure stating that there is no home indemnity insurance for the dwellings in the retirement village.
- Second, a signed statutory declaration must be provided to the local government authority on application for a building licence verifying that the owner intends the retirement village to be a leased retirement village and that the owner has lodged a memorial with the Registrar of Titles in accordance with the Exemption Regulations. The local government authority may rely upon this statutory declaration as proof that the memorial has been lodged.

Commercial Risk Assessment Process

Prior to signing a contract with a builder, or commencing building work, the owner/developer is advised to assess the risks of such a decision and decide whether the builder should either obtain home indemnity insurance or take advantage of the exemption. After completing their risk assessment, some owners/developers may well consider it is worthwhile to obtain HII. Others may decide that they are prepared to take the commercial decision to proceed without HII cover.

There is no guarantee that an insurer would be willing to provide HII cover after the building work has been completed. In light of these factors, owners/developers are advised to be very careful about making a decision not to take out HII prior to commencement of the building work. If HII cannot be obtained, all dwellings in the retirement village will have to be available for lease for six years after practical completion and no dwellings can be sold during this time. Once the six year period has expired, owners may dispose of the retirement village dwellings without obtaining HII cover.

The types of issues that owner/developers are advised to consider in their risk assessment process prior to commencing building work, include:

- reviewing their own financial status and whether they would be able to bear the additional costs associated with completing the construction and correcting faulty building work if the builder dies, disappears or becomes insolvent;
- reviewing their expertise and whether they have the technical and building expertise to manage the project if the builder is unable to complete the work;
- assessing the financial status of the builder;
- assessing the trading history of the builder;
- considering references from the builder's previous clients;
- considering expert advice from architects, engineers, quantity surveyors;
- verifying that a quantity surveyor will provide a detailed assessment to ensure that all progress claims from the builder are carefully checked prior to payment;
- considering whether a project management team including architects and engineers etc will supervise the entire construction process; and
- considering any other issues that may be relevant.

SUMMARY TABLE OF KEY ISSUES

HII EXEMPTION FOR RETIREMENT VILLAGES THAT ARE TO BE LEASED TO ALL RESIDENTS

Exemption

- Retirement village exemptions apply only to retirement villages in which all the dwellings are intended to be leased to residents.
- An exemption does not apply to building work that has already been issued with a building licence prior to the regulations commencing on 9 April 2003.
- If one or more of the dwellings are to be sold before six years has elapsed from the date of practical completion of the building work, then HII must be obtained for all residential building work undertaken under the building licence.
- After six years from practical completion, there is no legal obligation to obtain HII in order to sell the dwellings.

Conditions for Taking up an Exemption

- A memorial on the property must be lodged stating that there is no home indemnity insurance cover on the dwellings in the retirement village.
- A signed statutory declaration must be provided to the local government authority on application for a building licence verifying that the owner intends the retirement village to be a leased retirement village and that the owner has lodged a memorial with the Registrar of Titles in accordance with the *Home Building Contracts (Home Indemnity Insurance Exemptions) Regulations 2002*.

Risks for Owner/Developers

- Owner/developers are advised to undertake a detailed risk assessment if they are considering taking advantage of the HII exemption because if the builder dies, disappears or becomes insolvent then the owner/developer will be responsible for completing the construction and correcting faulty building work.
- It may not be possible to obtain insurance after commencement of building work and prior to completion of construction. If HII cannot be obtained, all dwellings in the retirement village will have to be available for lease for six years after practical completion and no dwellings can be sold during this time.