

COMPLAINT NUMBER	21/134
ADVERTISER	Ryman Healthcare
ADVERTISEMENT	Ryman Healthcare Print
DATE OF MEETING	28 April 2021
OUTCOME	Settled in part, Not Upheld in part Advertisement amended No further action required

Summary of the Complaints Board Decision

The Complaints Board ruled a complaint about a newspaper advertisement for Ryman Healthcare was Settled in part and Not Upheld in part. The Board said that while three of the four aspects of the complaint were Not Upheld, the amended version of the advertisement provided by the Advertiser gave a clearer explanation of the deferred management fee (DMF) and what it is used for.

Advertisement

The New Zealand Herald newspaper advertisement for Ryman Healthcare was headed "Ryman Pioneers - Peace of Mind". The text included the following:

"The deferred management fee (DMF) is your contribution to the refurbishment of the village. It is charged on an 'enjoy now, pay later' basis, and is deducted when your occupancy advance is repaid, which is the amount you've paid to occupy the unit. Your DMF will be no more than 20 percent - one of the lowest in the retirement sector... For full details on our Peace of Mind Guarantees or our 11 Auckland village locations visit rymanhealthcare.co.nz or call 0800 000 290".

Summary of the Complaint

The Complainant was concerned the information about the deferred management fee was misleading in four different ways, specifically with regards to: the purpose of the fee, whether it is paid on an 'enjoy now, pay later' basis, what happens on termination of the agreement and lastly, what happens on exit from the unit.

Issue Raised:

- Truthful Presentation

Summary of the Advertiser's Response

The Advertiser defended the advertisement and said some of the comments made by the Complainant were incorrect. The Advertiser also made some changes to the advertisement, after receiving the complaint, amending the description of the deferred management fee. It is now described as: "your contribution to the continued maintenance and management of the village, including your unit and the village amenities. It's deducted when your occupancy advance is repaid, which is the amount you've paid to occupy the unit."

Relevant ASA Codes of Practice

The Acting Chair directed the Complaints Board to consider the complaint with reference to the following codes:

ADVERTISING STANDARDS CODE

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not misleading.

Rule 2(b) Truthful Presentation: Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

Complaints Board Discussion

The Acting Chair noted that the Complaints Board's role was to consider whether there had been a breach of the Advertising Standards Code. In deciding whether the Code has been breached the Complaints Board has regard to all relevant matters including:

- Generally prevailing community standards
- Previous decisions
- The consumer takeout of the advertisement, and
- The context, medium, audience and the product or service being advertised.

Consumer Takeout

The Complaints Board agreed the likely consumer takeout of the advertisement was the Deferred Management Fee (DMF) charged at Ryman Healthcare villages is capped at 20%, and this is one of the lowest DMFs in the retirement sector.

The Complaints Board noted the legislative framework for retirement villages is complex and the provisions in occupation right agreements (ORAs) contain industry specific jargon. It is common practice for consumers to seek legal advice before signing up to one of these agreements.

Was the advertisement misleading?

The Complaints Board considered each of the four aspects of the complaint in turn:

1. The complainant stated that the Ryman Occupation Right Agreement describes the DMF as **a fee or rental** "for us providing you with occupation of your Unit for life (or a shorter period determined by you) together with the right to use the community facilities".

The Complaints Board considered whether this description was materially different from the description in the advertisement.

The Complaints Board noted the consumer takeout of the advertisement and said this aspect of the complaint did not reach the threshold to be regarded as misleading and was Not Upheld.

The Board noted however that the Advertiser had amended the advertisement, after receiving this complaint. The Board noted the amended version of the advertisement said the DMF is used for "the continued maintenance and management of the village, including your unit and the village amenities", not "the refurbishment of the village", as originally stated. The Board

agreed that while the amended advertisement provided a clearer explanation of the DMF and what it is used for, the original version did not reach the threshold to be misleading.

2. The complainant stated that the DMF is “**paid up-front**”, which would make the “enjoy now, pay later” language misleading.

The Complaints Board noted that the DMF is technically a deferred fee which is deducted from the occupancy advance at the time the occupancy advance is repaid. The Complaints Board said that, rather than taking a technical legal interpretation of the advertisement, its role was to determine whether the description of the DMF as “enjoy now, pay later” was consistent with how a consumer would understand the advertisement.

A majority of the Complaints Board said this aspect of the original advertisement was confusing and could mislead some consumers. The majority said the consumer takeout of the term “pay later” was that an amount would be charged at some time in the future and that money would be paid in relation to the fee at a future date. The majority noted the amended version of the advertisement did not include the term “enjoy now, pay later”. The majority said the amended version of the advertisement does not contain any suggestion that the resident will “pay” the DMF “later”, rather it confirms that the DMF will be deducted from the occupancy advance, at the time the occupancy advance is repaid. The majority therefore said this aspect of the complaint was Settled.

A minority disagreed. The minority said this aspect of the complaint did not meet the threshold to be misleading. The minority noted that the Advertiser was summarising the provisions of a complex occupation right agreement into simple language. The minority said the original advertisement made it clear that the DMF is deducted when the occupancy advance is repaid and the “enjoy now, pay later” language did not reach the threshold to be misleading in that context.

3. The complainant stated that only the refundable resident’s deposit (RRD) portion of funds is repaid on termination.

The Complaints Board said this aspect of the complaint also related to the question of whether the “enjoy now, pay later” language and the description of how the DMF would be paid was confusing or misleading. For the same reasons as outlined above, the majority said this aspect of the complaint was Settled and the minority said the original advertisement did not reach the threshold to be misleading.

4. The complainant stated that **on exit**, any refurbishment costs are paid out of the new Entry Payment loan from the next resident. And, in fact, so is the repayment of the exiting residents’ RRD.

The Board noted the comment from the Advertiser that the refurbishment of a resident’s unit after their ORA ends “is funded by Ryman generally, not out of any particular funds provided by either the outgoing resident or the incoming resident.” The Complaints Board said this aspect of the complaint was not misleading and was Not Upheld.

In Summary

The Complaints Board said taking into account context, medium, audience and product, two aspects of the complaint were Not Upheld, and not in breach of Principle 2 or Rule 2(b) of the Advertising Standards Code and two aspects of the complaint were Settled as the advertisement had been amended.

Outcome

The Complaints Board ruled the complaint was **Settled in part/Not Upheld in part.**

Advertisement amended, no further action required.

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 calendar days of receipt of this decision.

APPENDICES

1. Complaint
 2. Response from Advertiser
 3. Response from Media
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Appendix 1

COMPLAINT

Re Ryman full page: Advertisement NZ Herald 4March 2021 p.A10 (attached files)

States:

“The deferred management fee (DMF) is your contribution to the refurbishment of the village. It is charged on an 'enjoy now, pay later' basis, and is deducted when your occupancy advance is repaid, which is the amount you've paid to occupy the unit. Your DMF will be no more than 20 percent - one of the lowest in the retirement sector.”

This is false, misleading and inaccurate in four important respects:

1. The DMF is **a fee or rental** “for us providing you with occupation of your Unit for life (or a shorter period determined by you) together with the right to use the community facilities” *Extract from recent Ryman ORA, below.
2. It is **paid up-front** together as part of the entry payment on the Occupation Date to obtain the occupational right agreement (ORA), the 20% of this being the DMF is an interest-free loan, until the fee is amortised over the stated tenure for amortisation (when it is accounted for as income to the operator); while the 80% is a refundable resident’s interest-free loan. See extract 2.3 from ORA below.
3. On **termination** of the agreement (after exiting due to death or other reason) the interest-free loans are repaid, and if beyond the stated amortisation tenure period, only the refundable resident’s deposit (RRD) portion is repaid.
4. **On exit**, any refurbishment costs are paid out of the new Entry Payment loan from the next resident. And, in fact, so is the repayment of the exiting residents’ RRD.

The operator uses all the up-front entry payments (treated as new loans) for any operational purpose, as it becomes a cash resource, offset in the balance sheet as a resident’s liability until the DMF portion is amortised to income; or the RRD is repaid

Ryman’s financial reports, Disclosure Statements and Occupational Rights Agreements are clear in their operations, despite their wording*. The interest-free loans – unamortised DMFs and the RRDs are described in the Notes to their financial accounts – as “occupancy advances” for example See blow extract from Ryman HY Report to 30 Sept. 2020:

Notes to the consolidated interim financial statements

4. OCCUPANCY ADVANCES (NON-INTEREST BEARING)

	Six months ended 30 Sept 2020 unaudited	Six months ended 30 Sept 2019 unaudited	Year ended 31 March 2020 audited
	\$000	\$000	\$000
Gross occupancy advances (see below) ¹	3,837,383	3,427,688	3,686,813
Less management fees and resident loans	(469,507)	(412,053)	(439,636)
Closing balance	3,367,876	3,015,635	3,247,177
Movement in gross occupancy advances			
Opening balance	3,686,813	3,203,851	3,203,851
Plus net increases in occupancy advances:			
new retirement-village units	90,052	160,726	386,673
existing retirement-village units	50,815	55,493	109,566
Net foreign-currency exchange differences	19,568	8,766	(4,276)
Decrease in occupancy advance receivables	(9,865)	(1,148)	(9,001)
Closing balance	3,837,383	3,427,688	3,686,813

¹Gross occupancy advances are non-interest bearing.

*Extract from recent Ryman ORA:

Deferred Management Fee:	<p>See clause 7 for full details. In short, this is:</p> <ul style="list-style-type: none"> • 20% of your Occupancy Advance, but reduced where you have occupied an independent unit for less than 5 years or a serviced unit for less than 3 years (as relevant to your Unit); • only payable on termination of this agreement; • not payable at all where we don't provide you the Unit for life (or for a shorter period as determined by you) e.g. if your Unit is destroyed and we do not rebuild.
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- 2.3 An occupancy advance is a loan to us that is a requirement for a person wishing to become a resident in the Village. You will pay your Occupancy Advance to us on the Occupation Date. Your Occupancy Advance to us is or will be secured by a registered mortgage granted to the Statutory Supervisor over our interest in the Village other than our interest in the care and community facilities at the Village (the Mortgage).
- 2.6 Under this agreement we grant you the right to occupy your Unit for life (or a shorter period determined by you). You will pay the Deferred Management Fee to us in exchange for us providing you with occupation of your Unit for life (or a shorter period determined by you) together with the right to use the community facilities. The Deferred Management Fee is only payable at the end of this agreement when we fulfil our obligation to you. Clause 7 provides a full overview of the Deferred Management Fee, including where no Deferred Management Fee applies.
- 7.1 **Overview and time for payment:** The Deferred Management Fee is a fee for us providing the Unit to you for life (or such shorter period as you determine) together with the right to use the community facilities. There is no liability for the Deferred Management Fee until this agreement ends (i.e. we have completed the provision of this service to you). This Deferred Management Fee is payable by set off from the Occupancy Advance we repay to you.
- 7.3 **Amount of your Deferred Management Fee:** Your Deferred Management Fee is equal to 20% of your Occupancy Advance. It may, however, be reduced under clause 7.4 below.
- 7.4 **Reductions:** Where you have occupied an independent unit for less than 5 years or a serviced unit for less than 3 years (as relevant to your Unit), the Deferred Management Fee will be reduced based on a reduction formula. A reduction formula only applies in these circumstances. There is a different reduction formula for independent units and serviced units.
- Any reduction is determined at the time this agreement has ended, you have permanently

vacated your Unit and you have removed all your possessions (the End *Date*).

Appendix 2

RESPONSE FROM ADVERTISER,

Complaint 21/134

1 We refer to your letter of 24 March 2021 about a complaint received by ASA concerning a Ryman ad published in the New Zealand Herald on 4 March 2021 (the **original ad**).

2 The complaint focuses on the elements of the original ad relating to the deferred management fee (**DMF**) payable by a Ryman resident under their occupation agreement (**ORA**).

3 Ryman wishes to comment on the various aspects of the complaint, as some of the comments made by the complainant are not correct. We also want to outline the changes we have made to our ad since receipt of your letter.

Original ad

4 After receipt of your letter we withdrew the original ad from circulation while we considered the complaint in detail. We have since amended the description of the DMF in our ads to more clearly state what the DMF relates to.

5 A copy of Ryman's new ad with the updated DMF description (the **new ad**) is enclosed with this letter.

6 You will see we have explained that the DMF is described as being "your contribution to the continued maintenance and management of the village, including your unit and the village amenities". This is consistent with the provisions of Ryman's ORA.

Timing of DMF payment

7 The complainant is not correct when they say the DMF is paid upfront by the resident (points 2 and 3 in the complaint). On commencement of the ORA the resident pays an occupancy advance to Ryman. This is a loan from the resident to Ryman for the resident's unit, which is repayable in full by Ryman after the resident leaves their unit.

8 The DMF only becomes payable by the resident after they leave their unit. This is clearly outlined in the resident's ORA, which states:

8.1 the DMF is 'only payable on termination of this agreement';

8.2 'there is no liability for the Deferred Management Fee until the agreement ends (i.e. we have completed the provision of the service to you)'; and

8.3 the DMF 'is payable by set off from the Occupancy Advance we repay to you'.

9 There are circumstances where no DMF becomes payable by a resident. This includes where the resident's unit has been damaged in a natural disaster and is not rebuilt. Some residents of other operators' retirement villages experienced this following the Christchurch earthquakes. In these circumstances the village operator has not fully performed the ORA, and no DMF becomes payable.

- 10 This is also outlined in Ryman's disclosure statement, which is provided to every resident before they enter into an ORA.
- 11 These statements are consistent with the wording in both the original ad and the new ad on timing. The new ad states that the DMF is 'deducted when your occupancy advance is repaid'.
- Refurbishment costs**
- 12 The complainant is also not correct when they say that on the resident's exit any refurbishment costs for the resident's unit are paid out of the next resident's occupancy advance (point 4 in the complaint).
- 13 Ryman is responsible for refurbishment of a resident's unit after their ORA ends. This is funded by Ryman generally, not out of any particular funds provided by either the outgoing resident or the incoming resident.
- 14 This is outlined in both the resident's ORA and in the disclosure statement provided to every resident before they enter into an ORA.
- General**
- 15 In relation to both the timing of the resident's DMF payment and refurbishment costs, Ryman disagrees that either the original ad or the new ad are false, misleading or inaccurate in any material respect.

Appendix 3

RESPONSE FROM MEDIA, NZME

Re: Ryman Healthcare: Complaint 21134

We are writing on behalf of NZME (the advertiser) in response to the above complaint.

Firstly, our sincere apologies in the delay in this response.

The ASA has identified Advertising Standards Code – Principle 2, Rule 2(b) as potentially being breached:

Advertisements must be truthful, balanced and not misleading.

Truthful presentation

Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise.

Obvious hyperbole identifiable as such is not considered to be misleading.

We understand that upon receiving the ASA referral, Ryman Healthcare withdrew the advertisement in question. We understand that Ryman has since amended the description of the DMF in its ads to more clearly state what the DMF relates to.

We trust that this settles this matter.