ARPRA LTD.
Representing Residential Land Lease Communities

Submission into the Review of the Residential Land Lease Communities Act 2013

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Introduction

The Residential (Land Lease) Communities Act 2013 (RLLC Act) was assented to on 20 November 2013 and commenced operation on 1 November 2015. The Act requires the Minister responsible to review the Act to determine whether the policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives.

ARPRA has been around for 35 years in the residential land lease community space assisting homeowners across NSW. ARPRA has 6633 members in NSW.

Through its Chief Executive Officer, Operational Managers, Regional Managers, Community Representatives, Tribunal Advocates and Volunteer Personnel, ARPRA has drawn on data from mediations, Tribunal representations, discussions, and individual letters that ARPRA has received.

Through our branch network, homeowners engage with representatives to discuss issues they face. ARPRA meets with Fair Trading on a 3-monthly basis, meets with NCAT on a regular basis and we mediate and discuss issues our members raise directly with community operators.

ARPRA approach matters without emotion, nor do we engage in conspiracy theories and gossip. We deal in fact, not assumptions. ARPRA understands that there are two sides to community living. Without homeowners, community operators cease to have a business, and, without community operators, homeowners cease to have access to this unique housing model.

ARPRA believes that whilst it is a delicate balancing act, issues are never insurmountable and with open and transparent dialogue, solutions can always be found.

ARPRA is grateful for being allowed the opportunity to participate in this stakeholder engagement for the review of the *Residential (Land Lease) Communities Act 2013.*

Peter Reberger J.P
BA Soc Sc
UCertMgt

Chairman

Chapter 1 Objectives of the Act

1. ***Are the objects of the Act still relevant to residential land lease communities?***
   Yes
2. ***Has the Act been effective in delivering its objects?***
   In some parts – see summary.
3. ***Should the objects of the Act be expanded or updated to reflect the changing nature of land lease communities? Please identify how they should be expanded or updated and why.***
   See Summary.

Summary

An objects clause is a provision often located at the beginning of a piece of legislation that outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity. Objects clauses have been described as a 'modern day variant on the use of a preamble to indicate the intended purpose of legislation Some objects provisions give a general understanding of the purpose of the legislation. Other objects provisions set out general aims or principles that help the reader to interpret the detailed provisions of the legislation.

Whilst regard may be had to an objects clause to resolve uncertainty or ambiguity, the objects clause does not control clear statutory language, or command a particular outcome of exercise of discretionary power. The current objectives of the regulatory framework to govern the relationship between the operators of residential land lease communities and the people who live in them in brief are:

(a) Improve governance
(b) Set out rights and obligations of Operators and Homeowners (HO)
(c) Enable prospective HO to make informed choices.
(d) Procedures to resolve disputes.
(e) Protect HO from bullying, intimidation, and unfair business practices.
(f) Encourage continued growth and viability of residential communities.

ARPRA believes the objects of the act are relevant because the ideals expressed in (a) to (f) are the basis for living and residing in a Residential (Land Lease) Community (RLLC), however it is the application of these objectives which, in part, is failing.

ARPRA believes that there are numerous examples in which whilst the objects are courageous in the intent, it is what happens in practise that often fails. One example is the lack of adequate training of RLLC staff from Operators through to their ground staff, in the rights and obligations of both Operators and Homeowners.

ARPRA believes one solution could be to introduce a rating system for parks, ensuring they reach a certain level in designated areas to obtain accreditation. This would be similar to that accreditation of Retirement villages. The Australian Retirement Village Accreditation Scheme [1](ARVAS), the new, unified accreditation scheme for retirement community owners and operators is now working well.

The ARVAS standards are now finalised following the consideration and evaluation of feedback received from industry and stakeholders. ARVAS is designed to be supported by the Retirement Living Code of Conduct, forming a new and robust quality framework for the operation of retirement communities. ARPRA believes there could be the introduction of a cost-effective self-assessment accreditation similar to that of the Retirement Village sector with 6 underlying factors:

- Standard 1 – Community Management
- Standard 2 – Human Resource Management
- Standard 3 – Homeowner Entry & Exit
- Standard 4 – Homeowner Engagement & Feedback
- Standard 5 – Community Environment, Services & Facilities
- Standard 6 – Safety & Security

Another example of where the intended objects of the Act are noteworthy in principal but fail in practice is the use or more precisely the adaptation of the disclosure statement. This was meant to prevent unfair business practices such as increasing the overall site fees of the community by stealth. They have often been manipulated for the exact opposite result. It is inappropriate that when the range of fees in the community is quoted to the incoming HO it is always determined that the higher or in some case greater fee becomes the fee they must pay. There are many examples of this occurring and it appears to be a deliberate way of manoeuvring around the objectives of the Act.

In sections 109 and 111 of the Residential (Land Lease) Communities Act 2013 it sets an upper limit on site fees in new site agreements when a home has been sold by one homeowner to another. This is called fair market value. Just what is fair market value and how was it envisioned to assist new homeowners? Fair market value is the higher of either the site fees payable by the homeowner who is selling the home, or the site fees payable for residential sites of a similar size and location within the community.

[1] https://lasa.asn.au/aged-services-in-australia/retirement-living/

This is a no brainer really, however because there is no oversight protection, over time the community operator has been able to effectively lift the site fee higher and higher. There have only ever been two Section 109 cases taken to the tribunal. In both cases the homeowners won. In one case the community operator presented that only one other site in the community was at the highest site fee. They advised that this was fair market value because this is what the incoming resident was prepared to pay. This is not what the original drafters of the legislation had intended. In this case the Tribunal agreed that the intention of fair market value was to only pay the highest site fee in the community for a site size comparable with size and amenity.

Statutory interpretation says that any particular section of an Act is to be read in context of the part of the Act in which it falls overall, and objectives of the Act in entirety. In this case The Tribunal said that it is obvious "the value of the home is highly impacted by the nature of the site agreement for the new resident. If the operator could increase the site fee markedly for the new owner beyond the confines of section 109 that would impact on the old owner's ability to sell the home."

ARPRA believes that whilst the procedures for resolving disputes is clear to follow and the use of NCAT applications as last resort measure, the powers of the Tribunal to enforce any action against the community operator are limited to inadequate fines, which are rarely if ever imposed. It cannot be disputed that the new regulatory regime of mediation and settling disputes has resulted in an 86% decrease in NCAT applications. ARPRA believes that there are less matters being disputed and where there are active resident committees or where homeowners are members of external organisations, dispute resolution is working.

Again, whilst the intent is clearly stated in the Act to try and prevent bullying, intimidation, and unfair practices the reality is very different. Using the example of increasing site fees by stealth the power in negotiations is always in the hands of the Operator. As the final word on issuing a site agreement is up to the Operator. There are many examples of potential HO's walking away from negotiations because they are told basically to take it or leave it.

Chapter 2 Informed choices for prospective homeowners (HO)

4. Is the ban on inducing a person to enter into an agreement through false, misleading or deceptive statements or promises working effectively?

ARPRA knows of no instances where this "ban" has worked. The problem we have is that almost everything that is said by the seller is verbal and can be denied or disregarded over time or at a later date.

Yes, the Prospective HO gets a copy of the community rules – to be read at a later date, as is often the case with any rules. This also occurs with any booklets or pamphlets from Fair Trading or other organisations on what people need to know when entering a RLLC. They are put in a folder to be read later. The issue really becomes how do we protect people from making mistakes which will cost them dearly, later. The problems are often about what is

being paid by other HOs compared to the new HO. There is a need to standardise what fees the new HO is required to pay in line with current HOs with a view to creating parity across the park.

5. Does the disclosure statement provide enough information to a prospective homeowner to allow them to make an informed decision about buying into the community? Why/why not?

If the disclosure document is correctly filled in and all information is provided. The disclosure statement needs to be part of the package of information as prescribed in the Act in Sections 21 and 22. In particular Section 22 (2).

6. Is the form of the disclosure statement easy for prospective homeowners to understand?

Yes

7. Is the disclosure statement provided at the right time? i.e., should it be given earlier or later?

Yes, provided it is completed competently and correctly.

8. Does the disclosure statement form need to be improved? If yes, how would you improve it?

The current disclosure document might need some adjustments. It is clear that the whole document should be correctly filled out by the community operator. ARPRA have seen some disclosures that are not complete.

9. If an operator of a community fails to provide a disclosure statement to a prospective homeowner before entering into a site agreement with them, a penalty will apply. Do you think the maximum penalty of 100 units ($11,000) is appropriate?

Penalties are great in theory. In practise ARPRA knows of no community operator that has been given significant penalties for any breaches of non-disclosure. Amongst many residents the office of Fair Trading is known as a "toothless tiger". Whilst ARPRA believes that penalties may improve some operators conduct, the better approach would be accreditation and mandatory education of all operators. The penalty notice provisions are intended to make it easier for the regulator to resolve issues of noncompliance however, for penalty notices to be effective they must be utilised, and they must impact the operator.

10. Are you aware of homeowners not being provided with the correct written site agreement?

ARPRA is aware of several cases in which the HO was not given the correct written agreement. Currently before the NSW Supreme Court is Fontainas v Gennacker Pty Ltd t/as

Homestead Holiday Flats [2] in which the HO has spent 5 years attempting to get a RSA, yet despite all the orders from the Tribunal, the community operator kept insisting the HO get a Casual Occupation Agreement under the Holiday Parks Act. Similarly, in Dodge v Hacienda Caravan Park Pty Ltd[3] the HO is only being offered a casual occupation agreement. It should not take 5 years and result in the intervention of the Supreme Court in order for a HO to be given the correct agreement.

11. Does having a prescribed standard form site agreement work well?

Yes, because it is the failsafe or default position that covers every HO who is entitled to have a site agreement.

12. Should the list of prohibited terms in site agreements be modified? If so, what type of terms should be included or removed?

No

13. Should the requirements about additional terms be changed or improved?

Yes. The standard form of an agreement has clauses up to 33. Additional clauses that an operator wishes to include do not start at "additional clause 1". Rather they start at Clause 34. ARPRA believes this practise is ambiguous. Some prospective homeowners may believe that the "additional and optional" clauses are indeed part of a standard agreement because they simply follow on in the numbering format.

ARPRA believes that whilst communities vary from community to community, and additional clauses might be relevant for one community over another, some additional clauses that the industry try to include, have long term consequences that are little understood by an incoming homeowner. One particular clause is that about retaining walls. A retaining wall is not something the homeowner purchases as part of the home. They cannot take it with them when they sell or vacate the site. Yet, the additional clause locks them into paying for the maintenance of the infrastructure.

When a retaining wall is being built for other purposes, for example, landscaping, or when it is proposed to demolish, remove, repair, or alter an existing retaining wall, then development approval from your local council will generally be required. The law relates only to the "landowner"? There is no reference to a tenant or resident.

The landowner who altered the natural state of the land (in this case the park owner for the express purposes of building sites in which to place homes in which to receive an economic benefit) is responsible for the wall. If the erection of the retaining wall is due solely to one landowner affecting the natural state of the land, then the party affecting the natural state of the land is responsible for repairs and maintenance of the wall.

[2] https://www.caselaw.nsw.gov.au/decision/176da0d81ba86f98ee4937b8
[3] https://www.caselaw.nsw.gov.au/decision/176da1026c24a27410c4a01f

Generally speaking, the property owner who changes the level of land, either by excavation or filling to ensure that there is no earth movement, is responsible for the cost of construction of the retaining wall, as well as any ongoing maintenance bills. Retaining walls are usually the responsibility of the owner on whose property the wall is erected.

14. Have you accessed the communities register? If so, was the register easy to navigate? Did the information on the register inform a decision you made regarding a community?

The register is easy enough to navigate. However, it provides no more information than Google or the Yellow Pages. It states the communities name, address, phone number and postcode. ARPRA believes this is not the intention of the register. When the register was first thought of, the then Minister had intended the register be a way for prospective homeowners to see information about the community in which they might intend to live.

Minister Roberts spoke about the information from the register of communities that is publicly available being expanded to include details of any enforcement or disciplinary action taken against an operator. Minister Roberts said, "The addition of these details should help improve accountability and transparency".[4]

ARPRA believes the register is little more than a spreadsheet about the contact details of a community. ARPRA also knows there is information on the register that is not made publicly available. Whilst we believe in confidentiality, we are disappointed that information relating to penalties, breaches and matters in which the regulator has been involved with an operator are not made available for those seeking to purchase into a community.

15. What information should be included on the public register and how should the information be presented?

The register is a valuable source of information on land lease communities if it was more comprehensive. Information relating to any penalties the community operator was given, regulatory intervention that was given, if the community has recently been sold, any development applications lodged, or changes proposed for the community. If the community owner is a corporation, then a link to the relevant details in the ASIC register would also be useful. It may also be beneficial for prospective homeowners and the community owner to show how many communities the owner manages.

Summary

As a general statement the whole approach towards prospective HOs needs to be reworked because even the most astute prospective HO enters negotiations and signs contracts having little knowledge or understanding of what they are signing or the consequences of what they have agreed to.

[4] https://www.parliament.nsw.gov.au/bill/files/1523/2R%20Residental%20(Land%20Lease).pdf

If we use a hypothetical example (drawn from many examples) of a prospective HO coming to a RLLC to look at 'a new home' they are generally met by the Community Operator (be that a salesperson or community manager).

If the prospective HO has done their homework, they already have a 'new home' in mind or had preliminary discussions with an existing HO. The exiting HO as is the case with the salesperson is out to make a sale. They may or may not gloss over many key areas such as the real site fees, when increases occur, additional charges of electricity, water, and sewerage.

Generally, the idea is to continue to blind the real vision of the starry-eyed prospective HO to make the sale.

The problem we have is that almost everything that is said by the seller is verbal and can be denied or disregarded over time or at a later date.

Yes, the Prospective HO gets a copy of the community rules – to be read at a later date, as is often the case with any rules. This also occurs with any booklets or pamphlets from Fair Trading or other organisations on what people need to know when entering a RLLC. They are put in a folder to be read later.

ARPRA's concern is how do we protect people from making mistakes which will cost them dearly, later. The problems are often about what is being paid by other HOs compared to the new HO. There is a need to standardise what fees the new HO is required to pay in line with current HOs with a view to creating parity across the park.

The disclosure statement does provide enough information if it is completed correctly and all relevant information is included. This means showing the correct site fees range that is applicable for sites compatible, from within that park, with the one being leased. The disclosure statement needs to be part of the package of information as prescribed in the Act in Sections 21 and 22. In particular Section 22 (2).

We believe that a large penalty is appropriate but also that the withholding of the disclosure statement can potentially make the site agreement null and void. This occurs all too frequently at present where disclosure statements and other information is delayed and all sorts of reasons given e.g. out of stock, out of print etc. ARPRA believes the "null and void" penalty might be an effective tool to ensure the documents are available when required.

Section 21 needs improvement to enable homeowners to make informed choices. If a disclosure statement is not provided as required, section 21 (4) should also enable a current homeowner and the prospective homeowner's agent to apply to the Tribunal. At the time the disclosure statement is provided the operator should also be required to provide:

- copies of the current approval to operate and community map
- the proposed site agreement
- and the community rules.

The prospective homeowner can seek copies of these documents and must be provided with the community rules upon signing the agreement – they will be better informed if the documents are provided up front.

Chapter 3 Site Fees

16. Should the Act continue to allow for both the fixed method and the notice method of site fee increases? Why or why not? If not, what method should be allowed?

Yes, provided it is properly administered and is fair and equitable for all. There should be an attempt to create true parity across the park.

17. Should there be any restrictions on the method that can be used for fixed method fee increases, or is the existing flexibility working well and/or necessary for operators?

Yes. The current method using the term "other" has become significantly problematic. ARPRA believes that the use of "other" attempts to use multiple methods to increase a site fee. Section 65 (2) (a) provides that a fixed method increase may be either fixed amounts or, a fixed calculation (for example, in proportion to variations in the Consumer Price Index or in the age pension). The standard form site agreement provided in the Regulation advises that under the fixed method site fees can be increased using ONE of the following options: a dollar amount; a percentage; a percentage of the age pension; other.

ARPRA believes that what was originally intended by the Parliament in regard to S65 of the Act was to provide the parties with reasonable certainty as to the site fee increase. The use of the "other "method has unwittingly allowed an unfettered site fee increase, that provides only one party with certainty. The community operator is certain to be able to exercise its corporate power and increase the site fee to the detriment of the homeowner.

As an example of a current fixed method agreement using the "other" term:

The sum of

1. Any positive change in the CPI, plus

2. 3.75%, plus

3. A proportional share of any increase in costs incurred by the operator since the calculation of the last site fee increase calculation for the following:

- electricity and water (net of any amount that has been recouped from homeowner), plus
- gas, plus
- communication, plus
- insurance, plus
- rates, plus

• any other Government (Federal, State or Local) charges or taxes other than company tax.
Plus

4. The effect of any change in the rate of GST or similar tax that is included in the site fees.

Rounded up to the nearest dollar.

This calculation is based on so many variables, that it cannot provide certainty to the homeowner as to the amount they might pay in a site fee increase. Remember, this is a Fixed Method Increase, that seeks to use variable or non-fixed methodology. In section 109 (2) (b) of the Act, site agreements are generally given on a take it or leave it basis. Section 109 (2) (b) provides that an operator can decline to enter into a new site agreement with a prospective homeowner if they do not agree on the terms of the proposed agreement. The RLLC Act provides that if site fees are to be increased by a fixed method there can be only one method and it must be either fixed amounts or a fixed calculation (for example changes in the CPI or a percentage).

ARPRA strongly believes the use of "other" should be removed to provide clarity and certainty for homeowners. Homeowners often are on a fixed income. The use of "other" provides so much uncertainty that a homeowner may unwittingly sign up to this form of agreement and not fully comprehend the charges that they will receive during the lifetime of their agreement.

ARPRA believes the intention of the legislation was to provide certainty to all parties. ARPRA is aware that Kincumber Nautical Village has had a successful hearing in the Tribunal on this matter, although the community operator has appealed on a question of law.

18. Should there be a requirement that site fees can only be increased once per year, whatever method is used? Why or why not?

ARPRA believes once a year is appropriate as it allows certainty for both HOs and Operators and once a year allows for more effective budgeting. Senior Australians who rent in the private market are much more likely to suffer financial stress than homeowners, or renters in public housing. Nearly half of retired renters are in poverty once housing costs are taken into account.

The explanation is simple: retirees spend a lot less on housing as they pay down their mortgage, but housing costs keep rising for retired renters. The typical homeowner aged over 65 spends just 5 per cent of their income on housing, compared to nearly 30 per cent for renters.

Couples and singles who receive an Age Pension and rent spend 29 per cent and 36 per cent of their income respectively on housing. The most recent Age Pension increases saw an

increase in Commonwealth Rent Assistance (CRA) for both singles and couples of $1.60 to $139.60 per fortnight for singles and $131.60 for couples, depending on rent paid.

However, it is often stated by community operators that homeowners are only paying 25cents in the dollar for site fees, because they get rental assistance. Rental assistance was not designed in order for community operators to increase site fees disproportionally against incomes.

ARPRA believes that some operators would have no idea just what a pensioner receives on the Age Pension and the costs of living. Anglicare recently stated that a pensioner paying more than 30% of their pension on rent is in rental stress. How much more stress is a homeowner, who has the obligation to maintain the home (unlike a renter) and also pay a site fee. A homeowner receiving the Age Pension plus the maximum rent assistance receives $1083 per fortnight. In some communities, homeowners are paying in excess of $175 per week or $350 a fortnight in site fees. This equates to their site fees being 32% of their income. This then places them in the rental stress category.

ARPRA believes the current way in which site fee increases are handled, the manner in which there is little transparency in providing details surrounding the operational cost increases and the payment of capital cost items, needs to be addressed so that homeowners do not continue to erode their savings, and be priced out of their homes.

19. Should there be any grounds on which a site fee increase that is based on a fixed method is able to be challenged in the Tribunal?

NSW appears to be the only State that prevents a homeowner from initiating an excessive increase dispute in relation to a fixed method increase. ARPRA believes that the provisions of S74 (1) (b), (d), (i), (j) should allow a homeowner under a fixed method increase to have recourse to argue the increase is excessive with reference to these and any other relevant factors. ARPRA believes that it is reasonable to expect that parties to any contract should be held to the terms of the contract, however it is also unreasonable that a fixed method increase that is unclear and substantially burdensome with large increases is not able to be challenged in certain circumstances.

20. Is the process for resolving disputes over site fee increases by notice working effectively?

On the whole the provisions regarding site fee increases by notice appear to be working. ARPRA has found when there is open and honest dialogue between both parties, disputes often are settled. ARPRA also believes that there is a need to remove the emotive arguments surrounding site fee increases. The fact that “I’m a pensioner” is not a reason that a site fee increase is invalid. The community owner could argue that “gambling, drinking and smoking” is not a necessity of life and spending the taxpayer funded pension in this manner is reckless.

The fact is that in residential land lease communities, unlike most other forms of community, there is a fine balance between the interests of a community owner who may be employing people, and have shareholder interests, with that of a homeowner who is on a fixed pension. There needs to be less emotive arguments and more factual based information.

ARPRA believes that when an operator provides clear and transparent reasons surrounding increases in operating expenditure, that is easy and clear to determine, then homeowners are willing to be reasonable and understand.

21. Should there be changes to the grounds for challenging site fee increases by notice?

ARPRA believes that Sec 73 (4) is tying the hands of the of the Tribunal. It should be up to the discretion of the Tribunal as they examine all evidence presented to them for determination. Further, one of the grounds for challenging a site fee increase is the assumption by the homeowners that the increase is excessive.

Homeowners will always be at a disadvantage when in a vacuum of no information. A site fee increase may not be excessive in comparison to the CPI or other factors, however in the absence of information, homeowners have no way of knowing if a site fee is excessive or not. This stems from the fact that community owners will not provide transparent information as to the costs involved in the site fee increase. They supply a generic, template style list of increases in costs, but rarely show the actual costs.

Of course, the burden of proof is upon the applicants. Applicants could summons the costs; however, this can amount to tens of thousands of dollars in costs. Homeowners are at a distinct disadvantage. The community operator knows that if the homeowners cannot prove the increase as excessive in the light of a lack of evidence, they have not met the burden of proof and the operator will likely succeed in a site fee increase. In the Queensland legislation[5], at least there is a clearer and more transparent arrangement in which homeowners can see the costs. The RLLC Act at section 151 (2) enables a mediator to require a party to disclose details of their case and evidence in support of that case, however, NSW Fair Trading (the mediator) has advised they never have, and never would, require a party to disclose evidence.

ARPRA believes this to be fundamentally unfair and unjust. There are plenty of industries and corporations that need to supply information to regulatory bodies like ASIC. ARPRA believes that in mediation, the community owner could disclose to the mediator their costs and justifications for a site fee increase. If, in the mediator's professional opinion, the evidence stacked up, the mediator could without disclosing specific information, advise homeowners that the community operator had evidence of the increase in operational expenses.

[5] https://www.legislation.qld.gov.au/view/pdf/inforce/2020-12-04/act-2003-074

Further S83 of the RLLC Act requires the operator of a community to provide a homeowner with reasonable access to bills or other documents in relation to utility charges payable by the homeowner to the operator. ARPRA believes this provision could extend to the operator providing bills and invoices of operational expense items to justify or explain the site fee increase.

22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest?

The intention of S67 was originally designed to provide better transparency to homeowners when faced with a site fee increase. However, the provision of a "generic" list of increases in costs has become problematic. ARPRA reviewed one large operators site fee increase notices for 9 of its operations in NSW. The site fee increases by notice used the exact same list of increases for every community. Was that by design or was it an easy way for the operator to simply comply with S67?

The Tribunal may have been "satisfied" by the explanation, as the explanation does meet the requirements of S67. However, ARPRA believes again that this was not the intention of the legislation and believes that the legislation should go one step further.

- The Manufactured Homes (Residential Parks) Act 2003 (QLD) provides for greater clarity and transparency for homeowners in Queensland. In Queensland the community operator can give a general site fee increase once per year and that may be linked to the CPI as an example. Further the operator can then issue an increase to site rents in a residential park to cover special costs using methods not contained in the site agreement.
- The 3 special cost types are:
    - operational costs: a significant increase in the cost of running a park, such as rates, taxes or utility costs for the park.
    - repair costs: the cost of significant repairs to common areas or communal facilities in the park that you couldn't have reasonably foreseen.
    - upgrade costs: the cost of significant upgrades to common areas or communal facilities in the park.

Further under Queensland legislation the operator is required to issue an increase notice with a number of details, including the following:

(a) the total amount of the special cost incurred, or expected to be incurred, and the proportion of the total amount proposed to be included in the site rent;

(b) the amount of the proposed increased site rent including the proportion of the special cost mentioned in paragraph (a);

(c) how the proposed amount relating to the proportion of the special cost has been worked out;

If a homeowner disagrees with a site rent increase to cover a special cost or doesn't respond to the notice, the park owner can assume they dispute the site rent increase and begin dispute resolution procedures.

- ARPRA believes that this method of site fee increases would significantly provide transparency between community owners and homeowners.
- security and confidence for homeowners.
- Provide for one off increases in operational costs or maintenance costs to be increased rather than the total site fee being increased year upon year. Effectively if an upgrade or improvement is needed, homeowners will be able to have a say about the way in which these costs impact them, and, not pay for the repair or upgrade year after year.

ARPRA believe these changes provide a clear regulatory framework that will improve certainty for the residential land lease community and to build a stronger industry.

Section 74 of the Act sets out the factors that the Tribunal may consider when deciding whether a site fee increase is excessive. ARPRA believe these factors are appropriate and enable the Tribunal to make a reasoned assessment of the proposed increase. ARPRA does have concerns relating to obtaining evidence relating to the increased operational costs put forward by some operators.

There have been some excuses as to why homeowners should not be able to see certain evidence. Some operators suggest confidentiality as a reason. In order to justify any increase in operational expenses, it should be a reasonable expectation that the community operator at least provide to the homeowners the invoices or statements that relate to the increase in operational costs from one year to the next. By providing greater transparency and giving homeowners confidence that they are not just being "fleeced" for more money year after year, homeowners would likely participate openly and reasonably in dialogue when it comes to site fee increases.

ARPRA has on behalf of its members participated in hundreds if not thousands of negotiations over its 35-year history. It is fair to say that it has rarely been about "the money", when it comes to a dispute about a site fee increase.

Most homeowners are reasonable people. They understand that costs increases are part of business. In fact, they are part of life. They understand that basic commodities rise in price and so too will their site fees. However, site fee increases become emotive on the basis that the site fee increase amount is not really the crux of the dispute. It's about the fact the community owner didn't repair the roads, or flooding was not attended to, the amenities were failing, the bowls green was starting to deteriorate, or the pool wasn't cleaned.

Homeowners expect that the community they live in is well maintained and when repairs are needed, they simply are not fobbed off. ARPRA believe the key here is transparency.

ARPRA has long held concerns about projected increases in costs. In a community on the Mid North Coast there was large projected increases relating to new sewerage infrastructure was relied upon by the operator as a justification for a significant site fee increase. A number of years later, the operator has still not commenced work on the sewerage project despite securing an increase based partly on the projected costs.

The Act should provide a mechanism, for the reduced site fees, when an operator has increased fees based on projected costs and where the community operator has not carried out the improvements or the improvements came in under the costs projected. ARPRA also believe that 74 (1) (f) The value of the land comprising the community should be removed as it has no bearing on site fee increases and is rarely, if ever, raised in Tribunal proceedings.

23. Are the provisions governing site fees for new agreements fair and effective?

Generally speaking, No.

Since the commencement of the RLLC Act the most significant increases in site fees have occurred in new site agreements following the sale of a home by a homeowner. This is the third method of increase and the one that causes us the greatest concern. The Act seeks to limit site fees in new agreements by providing they can be no higher than fair market value. Fair market value is the higher of: the site fees currently payable by the home owner who is selling the home or, the site fees currently payable for residential sites of a similar size and location within the community.

Prospective homeowners are not informed that site fees in the site agreement offered must be fair market value, and operators have taken advantage. The disclosure statement does not assist. It requires the operator to provide the current site fees payable by the selling homeowner and the range of site fees within the community, but there is no reference to fair market value.

Invariably the site fees in the site agreement offered are the highest amount paid in the community but that is often not fair market value. ARPRA became aware of a prospective homeowner purchasing a home in a Central Coast community from a homeowner who was paying site fees of $151.00 week.[6]

The site fees in the new agreement were $194.00 a week, an increase of $43. After receiving advice, the homeowner made an application to the Tribunal challenging the new site fees. Eventually the matter settled, the site fees reverted to $151.00 a week and the homeowner was refunded more than $2000 in overpaid site fees. Wiseberry Real Estate who uses ARPRA's website to advertise homesales has reported many times that they are unable to

[6] Courtesy of Tenants Union information

lock in a purchaser because of this practice. Each time, they lose a sale because the site fee has been increased far higher than the current site fee paid for that site.

A homeowner in a Central Coast community was advised her site fees would be $215 a week when she enquired about the purchase of a home. When she went to sign her new site agreement the site fees were actually $242 a week. It appears that community owners increase site fees above fair market value in order to circumvent the provisions in the act that were originally intended to stop this.

ARPRA believes the simplest way is to amend sections 109 and 111 to provide that site fees in a new site agreement must be the site fees payable by the current homeowner who is selling the home. This is a fair provision that causes no disadvantage to operators. The RLLC Act provides operators with mechanisms for increasing site fees and these mechanisms result in the operator receiving fair market value for the site, and for that value to be reassessed and increased at least annually. ARPRA believes that community operators that try to increase site fees in this manner when issuing a new site agreement are behaving in an unconscionable manner and being opportunistic.

24. Have you entered into an agreement with an operator/homeowner that included a voluntary sharing arrangement?

ARPRA has no knowledge that anyone has entered into a voluntary sharing arrangement post the new legislation.

25. If you have been party to an agreement with a voluntary sharing arrangement, were there any problems with parties understanding or meeting the terms of the arrangement?

ARPRA has no knowledge that anyone has entered into a voluntary sharing arrangement post the new legislation.

26. If you have been party to an agreement with a voluntary sharing arrangement and are a homeowner, did the arrangement assist you to afford to live in the community?

ARPRA has no knowledge that anyone has entered into a voluntary sharing arrangement post the new legislation.

Chapter 4 Living in a RLLC

27. Should there be neighbour to neighbour obligations that are able to be enforced by other homeowners? Why or why not?

There is already a right to quiet enjoyment Section 38 which covers most issues that arise between neighbours. However, there is a need for Operators to properly enforce Section 38.

28. Should the Act be clearer on whether ongoing maintenance of a residential site or certain aspects of a site is the responsibility of an operator or a homeowner? Why or why not?

Section 37 sets out the operator's responsibilities and includes an obligation to "provide the residential site in a reasonable condition". What it fails to provide is an ongoing obligation to maintain the site, or repair any damage not caused by the homeowner. Under the Residential Parks Act 1998 it was clear that the park owner was responsible for the repair and maintenance of residential sites and not the homeowner. The current legislation has given some ambiguity to this.

ARPRA believes that homeowners are responsible for the site if they cause damage to it. However, if the site contains retaining walls or other infrastructure installed, built or owned by the operator, it is not the homeowner's responsibility to maintain or repair that infrastructure. Essentially a homeowner does not take a retaining wall with them when they leave occupation of the site.

29. Is the Act clear about rights and responsibilities relating to repairs and maintenance of the home and alterations, additions and replacement of the home?

ARPRA believes that section 43 could be a problem. It provides the operator with a remedy to deal with dilapidated homes. Rightfully so. However, it extends to the operator being able to take action for damage to the site, regardless of how the site was damaged. Termites may be present and the Homeowners would be responsible to repair the damage. ARPRA believes the Act should not enable operators to pass on to homeowners the cost of repairing, maintaining or replacing essential infrastructure. The Act must clarify that the operator is responsible for maintaining the residential site.

30. Should there be any changes to the provisions about repairs and maintenance of the home, and alterations, additions and replacement of the home?

No, the provisions are adequate.

31. Are the special levy provisions useful or are upgrades usually funded by site fee increases?

Upgrades are usually funded through site fee increases which actually imposes a greater cost onto the HO then the costs of the upgrade as the fees increased are never reduced.The special levy is a provision that is rarely used but should be used more often and could follow that of the Queensland legislation. Special Levy provisions however are not clear in current form. ARPRA is aware of one community operator who openly advised to residents that Fair Trading advised him he could introduce the special levy provisions in order to upgrade his community from its current form to a manufactured home estate. The 18 residents were advised by ARPRA that this was not what the levy was intended for. The Land Lease Living Association also advised the community operator that special levy provisions were not

designed for the operator to seek development funds for a change of the use of the community.

32. Are the rules of conduct adequate and are they having the intended effect of ensuring appropriate conduct by operators?

Schedule 1 of The Act provides a comprehensive set of rules of conduct for operators to comply with. ARPRA routinely gets complaints about operators that verbally abuse, harass, and intimidate homeowners. Whilst ARPRA believes the provisions in the Schedule are definitive, it is the regulator that routinely fails to take action. ARPRA routinely meets with the regulator and raises these matters. However, the regulator appears to favour "operator education" rather than impose a penalty. Even when many homeowners report the same details, the regulator requires a higher burden of proof than what is required by the Tribunal.

33. Should the content of the rules be expanded to cover other issues?

The rules of conduct already in place are adequate. However, it is not the rules in place that present the problem. It is the regulator that fails to apply the sanctions when breaches have taken place. Land Lease Communities are not a one-way street with only homeowners requiring to "behave". Community operators and their staff also need to be well versed in the knowledge of these rules of conduct and abide by them.

34. Are the operator education requirements effective?

The Act defines operator: "operator of a community is the person who manages, controls or otherwise operates the community, including by granting rights of occupancy under site agreements or tenancy agreements, whether or not the person is an owner of the community". The requirement for the operator to undertake mandatory education does not recognise the operational structures of many land lease communities.

Land Lease communities are diverse. They appeal to a wide range of people. They are effectively mini cities in themselves. The operator needs to be the town planner, Mayor, counsellor and maintenance man all in one. ARPRA believes that the negative licensing system that was first envisaged has not worked. Education and accreditation go hand in hand.

Land Lease communities are one step away from retirement villages. In fact, some advertising of land lease communities would have you believe they are in fact a retirement village. Informal care networks, close proximity living, caring managers living onsite. All key aspects of the advertising. However, no accreditation requirements, no requirements to have an understanding of the legislation. In fact, not just the RLLC Act, but the regulations, the Local Government Regulations and a range of other legislative provisions.

All a "new" operator must do is watch a video and notify Fair Trading that they have done so. ARPRA does not believe this is quality education. ARPRA does not believe that "new"

operators are monitored by Fair Trading. How does Fair Trading know that a new operator is on the scene and has done its “mandatory” education?

We believe it is important that all operators have regular mandatory education. Further, we believe that this requirement should be retrospective to include all operators of communities, not just new operators. It is not sufficient for an operator to be exempted from training because they were the operator of a community “at any time” within the period of two years before becoming the operator. In addition, it is not clear who should be trained under the clause. The term ‘operator’ needs to be clearly defined.

35. Can you suggest other educational resources or topics to facilitate a greater understanding of the role and responsibilities under the Act?

ARPRA believes that the industry body along with Fair Trading should undertake greater training and accreditation. Accreditation is independent recognition that an organisation meets the requirements of governing industry standards.

Health and community organisations are recognised for their commitment to best practice, quality, high performing systems and processes, and continuous improvement with the award of accreditation.

An experienced and qualified assessor or assessor teams conduct an on-site, telephone or web-based review, depending on the standards being accredited against, to assess the compliance against the standards. After this accreditation assessment is conducted, the assessor(s) will prepare a report for submission to the regulator.

If the organisation is not yet compliant in an area of the standards, they will be given an opportunity to provide feedback or to submit additional evidence, known as the Natural Justice period. This is a way of ensuring decisions are fair and transparent for all organisations.

Priorities for residential land lease community management training should be:

- familiarisation with relevant legislation.
- awareness and needs of homeowners.
- ethics and professional responsibility.
- communication and dispute resolution skills.
- basic financial bookkeeping and budgeting.
- health and safety issues.

36. What delivery methods could be used to improve mandatory education?

The use of videos, with questionnaires and fact sheets can supplement the accreditation system.

37. Before reading this discussion paper, were you aware of the option of communities having community rules?

Yes

38. Does your community have community rules?

ARPRA makes no comment on this question.

39. Does your community have a community rule regarding age restrictions? If so, does this impact your community?

ARPRA believes many communities want age restrictions and we as an organisation have not had many complaints about age restriction.

40. Where residents committees are in place, should they be involved in the development of community rules? Why or why not?

ARPRA believes where an active resident committee is in place that they should have a role in making contributions to community rules. After all, the word community involves inclusion by all, not just the community operator. However, ARPRA are aware that some resident committees can be militant, dictatorial and those committee members have proven to cause trouble within their community. Members of resident committees should equally be versed in the legislation and be able to operate within a set of rules for the operation of resident committees.

41. If there is no residents committee in place, how could residents contribute to the development of community rules?

The operator could engage more with homeowners by calling regular meetings, asking for suggestions and input and engaging in real terms with the community. By engaging with the community, people generally feel they are part of a community and will often respond sensibly. There are some communities that have no resident committee; however, they engage effectively with their operator and the community is happy.

42. Is the system of enforcement of community rules appropriate?

The Act is clear that everyone in the community, including the operator and their employees, must comply with the community rules. However, many operators do not seem to believe that the community rules, of which they are a part of, apply to them. There are also problems in mixed communities where operators have a set of rules for residents and another set for holiday makers. This is a major source of dispute in those communities.

ARPRA is also aware of rules that apply for homeowners that challenge site fee increases, different rules for the homeowners that have a beer or a meal with the operator and pass on information about fellow homeowners. Unfortunately, life inside a land lease community mimics life outside that community. Not all homeowners get the same treatment when it comes to the rules.

43. Are community rules being used to improve life in residential communities?

Some communities use the rules to restrict or exclude activities. Whilst others use the rules to enable and enhance activities. There is a fine line and balance required. Effective managers generally have fewer rules and greater flexibility.

44. Should residents committees also be required to take part in mandatory education? If yes, what topics should be covered?

Absolutely. Training should be given to residents committee members. It would lessen the confrontational approach by some committees. Topics could include how committees should operate, how to mediate, how to read the legislation, what constitutes community rules.

45. If your community has a residents committee, is it working effectively?

ARPRA is not in a position to provide an answer to this question.

46. Do you have any suggestions for changes to the way residents' committees are established or run?

ARPRA believes that just like operators need to be educated, so should an effective resident committee. ARPRA receives complaints by members that indicate some resident committees act like guards in the gulag. Further, some committees do not engage with the homeowners, but meet in secret and communicate "the committees" wishes to the operator as if it were the wish of the entire community. Each member of a prospective committee should undertake a training course on the act and park rules. They need to gain accreditation before they can be nominated for the committee. They need to be able to show they can perform the duties and act in an effective manner.

ARPRA believe that rather than provide a model set of rules for resident committees, that it be legislated that those model rules are the rules that a committee must follow. ARPRA has been involved in assisting communities in which some resident committees were able to set their own rules in which the elected officials of the committee were never unelected. They reside in office for as long as they want. This provides a dictatorship rather than a democracy.

Chapter 5 Utilities

47. What are your overall views on utilities charging provisions under the Act, other than electricity charging in embedded networks, which is discussed below?

Unfortunately, when it comes to a standardised billing arrangement in residential communities, ARPRA has seen firsthand a myriad of different billing systems. Community operators who use legacy software systems primarily designed for the tourist component of a mixed mode community, does not adequately reflect electricity usage for land lease living.

The Australian Energy Regulator will continue to set the maximum price for electricity in the form of standing offers. ARPRA believes where discounted pricing is offered to a community operator, the same rate should apply to homeowners.

ARPRA is aware that there is a multitude of other charges on a commercial bill, and the operator is entitled to charge for those, however the methodology in which it is charged still needs to be addressed. The Tribunal has in two cases used two different methods. ARPRA believes a mix of these methods may produce a fairer system.

48. How well do the current provisions relating to accounts, access to bills and other documents work?

The current provision of S83 works in theory. Unfortunately, it has taken homeowners to apply to the Tribunal because some operators simply will not show the records. Some operators constantly "buck" the system.

49. What are your views on the operation of section 77(3) as it applies to an embedded electricity network in a community?

ARPRA believes that it clarifies the situation and explains the law as it stands in a simple fashion.

50. Which reform option for electricity charging do you support and why?

The Tribunal prior to 'Reckless' heard several cases on electricity charging. In Myles v Holiday Retreats Australia Pty Ltd t/as Rivergum Holiday Park (No. 2) [2018] NSWCAT the Tribunal determined the operator could charge the peak rate (billed to the operator) for electricity use and continue to charge the service availability charge (SAC) for supply.

In another case heard by the Tribunal, Marsh v The Pines Resort Management Pty Ltd [2018] NSWCAT the Tribunal, in its usual fashion of providing an inconsistent decision, determined the usage charge should be the average of the three energy use rates charged to the operator. The Tribunal further determined that the SAC would remain a separate charge.

ARPRA believes that both these methods have some merit. They enable the operator to recover usage charges and they appear to be simple to calculate and understand for home owners. ARPRA believes those homeowners who receive less than 60AMPS should pay a discounted SAC.

51. Are there other reform options which you think should be considered?

ARPRA is currently in discussions with Fair Trading along with other stakeholders on this issue.

52. What is your view on the impacts these options would have on electricity bills in your community?

Electricity charging should be open and transparent and not provide the community operator with profiteering from electricity.

53. If your community uses another method other than the Reckless method to calculate electricity charges that has not been considered in this paper, can you describe your experience with this?

ARPRA cannot provide an answer to this question.

54. As an operator, what costs do you incur due to maintaining an embedded network and to what extent do you recover these?

ARPRA cannot provide an answer to this question.

55. Are the current discounts in the Regulation appropriate?

ARPRA cannot provide an answer to this question.

56. Are you an operator or homeowner with less than 60 amps? Are there any steps which could be taken to increase this level?

ARPRA cannot provide an answer to this question.

57. What difficulties are operators facing in managing solar systems in communities?

The biggest problem appears to be the metering processes. Often without the correct meters they run backwards and makes the determining of exact usage very difficult. The other problem is that the grid has only a certain capacity. If a large community were all to take up solar, the feed into the grid could damage the outside network. In some cases, the operator has been advised that they would need to pay hundreds of thousands of dollars in order to install specialised equipment that would be able to regulate the feed in from the community to the outside grid.

58. Are there other forms of sustainability infrastructure that are becoming common in communities?

ARPRA is aware of some communities that have begun installing solar lighting in common areas, solar heating for swimming pools and grey water systems for watering of gardens and lawns. ARPRA encourages the use of sustainability reforms as this will have a flow on effect for homeowners by reducing overall operational costs.

59. What are the greatest barriers to homeowners installing solar panels?

The greatest barrier is embedded networks. Some networks are simply not equipped to handle solar technology. Whilst some homeowners have successfully installed solar PV, depending on the embedded network infrastructure in existence, the amount of load on the network that passes out to the grid, installing solar en mass may be problematic. The cost of solar installation is falling, and the technology is improving. Homeowners face the pressure of rising energy costs, the installation of solar within residential land lease communities is becoming increasingly popular. Homeowners of residential land lease communities are either retirees on fixed incomes or persons from low socio-economic backgrounds. They are people who are in need of low-cost living. In its report to the NSW Department of Planning

& Environment - Resources & Energy[7], the Land Lease Living Industry Association (LLLIA) acknowledges that significant barriers exist to install solar.

60. How can sustainability infrastructure be made more available in land lease communities?

Sustainable infrastructure could be done on a partnership basis. ARPRA is already aware that in one community, solar installations were funded jointly by the operator and homeowners, resulting in lower operational costs, which, resulted in lower site fees.

Residential communities often miss out on incentive programs offered by the Office of Environment and Heritage because they are not classified as "bricks and mortar" dwellings. Further, most homes in land lease communities are not required to be built to an environmental standard.

ARPRA believes that by engaging with communities in a partnership arrangement, significant sustainability infrastructure could be installed, resulting in significant costs savings to community owner and homeowners alike.

Chapter 6 The end of the agreement

61. Are the Act's provisions about the sale of a home and interference with a sale working well in practice?

ARPRA believes that the legislation provides greater clarity about interfering in home sales. However, further education is needed to ensure that compliance is strong in this area.

62. Is the Act's control over operators who act as selling agents appropriate?

ARPRA believes that the control mechanisms are adequate, rather it is the enforcement of breaches that needs addressing. ARPRA has noted that in some cases an operator who acts as a selling agent in a community that also has new homes, often will prefer to steer a prospective buyer to the community owned homes rather than showing preloved homes.

Further the anecdotal evidence suggests that the agent may say detrimental things about a preloved home in order to steer a buyer elsewhere, especially if higher profits are available.

63. Should operators continue to be able to act as selling agents?

ARPRA still believes that community operators that wish to act as a selling agent and earn commissions should be either licenced or at least registered as an agent. In our submission to the Draft Bill of this legislation we proposed something along the lines of:

[7] https://energy.nsw.gov.au/sites/default/files/2018-09/CCIA-Submission-to-NSW-Government-Protecting-Consumers-in-a-Changing-Energy-World-Discussion-Paper-19.12.17.pdf

The Property, Stock and Business Agents' Act 2002. A Certificate IV in Property Services usually takes two years to complete, part time, and can cost thousands. A Certificate of Registration[8] course can be completed within a week if done full-time, less than six months part-time, and costs less than $500. Modules required are—

- CPPDSM3019A Communicate with clients as part of agency operations.
- CPPDSM4007A Identify legal and ethical requirements of property management to complete agency work.
- CPPDSM4008A Identify legal and ethical requirements of property sales to complete agency work.
- CPPDSM4080A Work in the real estate industry.

A Certificate of Registration course for residential land lease community operation and management could be devised along the same lines.

64. Do you have any other suggested changes to the provisions about the sale of homes?

ARPRA believes that most community operators know the community well and therefore are ideally placed at selling. However, some operators exclude outside agencies, prevent showings and generally interfere with sales because they object to outside agencies being appointed. Homeowners should be free to appoint whomever they choose to sell their asset.

65. Should the Act be amended to also prevent an operator unreasonably refusing consent to assignment of a site agreement? Why or why not?

ARPRA believes that assignment of agreements is still problematic. We offer the following in support of why we have come to this position.

A homeowner is seeking to sell their home. They have an interested buyer. The buyer advises they have already sold their home and are looking to settle reasonably quickly.

The seller is happy, they found a buyer and look like they will be able to move on. The seller advises that they are paying $150 in site fees. They would like the buyer to be able to take advantage of that. The seller attempts to assign their agreement.

The community owner has other ideas. They say that for the site size and amenity there are already two other sites paying $165 per week. They refuse to enter into an assignment.

The buyer now faces the choice of paying a higher site fee, in which they cant see the justification, after all, are they not getting access to all the same facilities that the seller has rights too? So what options are open to both the seller and buyer?

1st option is the seller can make application to NCAT on the grounds that the community operator unreasonably refused to enter into an assignment. This process alone may take a

[8] https://training.gov.au/Training/Details/CPPDSM4080A

month or two. What does the buyer do in the meantime? Invariably they walk away from the sale, they are not interested in a long drawn-out legal case.

The 2nd option is the buyer pays the increased site fee. The seller really doesn't care as long as the sale is complete. They have plans to move on and nothing will stop them. There is no moral or ethical argument that would implore them to forgo the sale.

The real matter is what defines "unreasonable consent". The legislation would need to be strong to remove ambiguity as to what was unreasonable and what was reasonable. The Tribunal would be otherwise left to making inconsistent decisions if the legislation did not spell it out.

66. Are the provisions relating to the assignment of tenancy agreements working well in practice?

No. Currently assignments are rare and on two occasions ARPRA is aware of they both resulted in Tribunal action. In the matter of Davey v Leth, the Tribunal ordered the assignment take place. In the second case Farraway v Galt Investments Pty Ltd [2016] NSWCATCD 53, the Tribunal ruled against the assignment.

67. Are the provisions about sub-leasing by homeowners working well?

ARPRA has not had any requests to assist any homeowner with subleasing.

68. Are the grounds on which operators can terminate a site agreement appropriate? Should any other grounds be added?

ARPRA believes that S 127 in its current form is problematic. Compensation is only payable to the homeowner if the site was unlawful when they entered into the agreement. However, this had to be unknown to the homeowner.

ARPRA has dealt with cases in which termination was sought by an operator because they are free to change the designation of sites (long-term or short-term). Operators at any time without justification or question can change the site structure. Any operator seeking to terminate an agreement without paying compensation to the homeowner can simply re-designate the site to short-term and issue a termination notice.

ARPRA believes this opens up 'no grounds' terminations against homeowners. Compensation should always be payable where a site agreement is terminated under this section.

69. Are the notice periods that operators are required to give for the different termination reasons appropriate?

ARPRA believes the notice periods are appropriate.

70. Are the compensation provisions working well?

Section 127 is inequitable in its current form. If a site agreement is terminated, compensation is only payable to the homeowner if, unknown to them, the site was unlawful when they entered into the agreement. The designation of sites (long-term or short-term) is not fixed and can be changed by operators at any time without justification or question. Any operator seeking to terminate an agreement without paying compensation to the homeowner can simply re-designate the site to short-term and issue a termination notice. In its current form section 127 essentially opens up 'no grounds' terminations against homeowners, something which has never been, and should not be available. Compensation must be payable in all circumstances where a site agreement is terminated under this section. Additionally, the 'Note' is unhelpful and should be removed. It is questionable whether a short-term site makes a site unlawful, as suggested by the 'Note' and whether termination is appropriate in that circumstance.

Chapter 7 Resolving disputes

71. Are there other ways that residents and operators can resolve disputes?

ARPRA believes the current processes are working very effectively.

72. Are there barriers to accessing mediation provided by Fair Trading? Should mediation continue to be provided by digital means after social distancing measures end?

ARPRA believes the mediation provided by Fair Trading is effective. The use of digital mediation is the way of the future.

Chapter 8 Administration and enforcement

73. Are the Commissioner's disciplinary powers adequate?

It is not so much about are the disciplinary powers adequate, rather has the Commissioner ever used them. Regulatory agencies occupy a unique position in government. They exercise substantial powers as one of the more direct means by which laws are translated into tangible changes to the market and to society. However, they also serve as a 'face' for government's authority and are therefore subject to the demands and complaints of the organisations and people with whom they engage.

Regulators rely on the community's trust and support. A regulator's delivery of an objectively beneficial outcome can be undermined if it does not satisfy the community's idea of how they should have acted. Therefore, regulators must closely attend to and engage with public commentary.

The Australian Competition and Consumer Commission suggested that its staff should feel confident about bringing proceedings, even when the outcomes are uncertain; eventually

empowering more staff to take such risks. Further, the Australian Transaction Reports and Analysis Centre's recent proceedings against Tabcorp[9], which it pursued all the way to judgment rather than settling out of court, demonstrated the regulator's commitment to outcomes and thereby substantially raised its profile and prestige. This was in stark contrast to its former reputation of being unwilling to aggressively enforce certain aspects of its mandate.

ARPRA believes that effective regulation sits at a nexus between a contemporary approach and willingness to take action. If a regulator's staff are not appropriately skilled to manage current problems, or do not understand the public's needs; it won't be able to meet the regulatory landscape's challenges. However, even the most contemporary and engaged regulator will paradoxically still fail if it isn't willing to risk failure to enforce its regulations' letter and intent. And ultimately, regulation is about changing behaviour to ensure compliance.

ARPRA believes if the regulator took more action in circumstances, then it becomes a more effective regulator. The "toothless tiger" gets its teeth back.

74. Are there breaches of certain provisions of the Act that are currently not offences that should be offences?

ARPRA believes that there is no need for an endless list of offences. Penalty notices are hardly ever given. This either suggests the whole of the industry is compliant, or the regulator prefers not to issue penalties.

75. Are there any other offences that should be penalty notice offences?

ARPRA believes that there is no need for an endless list of offences. Penalty notices are hardly ever given. This either suggests the whole of the industry is compliant, or the regulator prefers not to issue penalties.

76. Are the powers of Fair Trading investigators appropriate?

ARPRA believes the powers are adequate, however the powers need to be used for them to be effective.

77. Would you be interested in attending a community information session via webinar?

ARPRA is always eager to participate.

[9] https://www.afr.com/companies/games-and-wagering/tabcorps-record-45m-austrac-fine-could-have-been-a-lot-worse-20171110-gzikuf

78. Do you have any access issues preventing you from attending a community engagement session digitally? For example, internet access, computer or smartphone access, digital literacy etc.

ARPRA has been using digital means to access members for some time. ARPRA is also a BeConnected Partner and we have been providing community education in using smartphones and online resources.

Further Recommendations

Group Applications

Group Applications also need examination. Other than site fee increases, disputes about other matters that may involve homeowners that are seeking the same orders, are dealt with by each homeowner making a separate application. This results in homeowners all paying an application fee, along with each homeowner preparing evidence. By seeking to group applications together, this would result in less work administratively for NCAT and homeowners alike.

Group applications should be available for matters like common area maintenance issues, community rules and matters that effect all members of the community, in which an application seeks the same orders. Orders that are sought on an individual basis that differ should always be treated individually.

Disclosure Documentation

Disclosure is the key to homeowners making a purchasing decision. Disclosure should be clear, transparent, and honest. ARPRA believes that the disclosure statement must contain information regarding If the community operator is the utility provider and the current rates payable for each utility, information about the fair market value of the site the prospective homeowner is seeking to occupy, information about the site size, community map, a site dimension map, potential flooding information and the community rules should all be included up front in order for the prospective homeowner to make an informed choice. We all know the term caveat emptor. Section 21 needs to reflect this position.

Timeframes to supply

ARPRA believes that there should be timeframes in which a community operator must supply a written site agreement. There are many cases where homeowners are waiting months for an agreement. Whilst we are aware that the Act deems a homeowner to have an agreement, by delaying the supply of one, only provides stress to the homeowner. There should be no delay or reason that an agreement cannot be supplied. S32 needs to reflect this position.

Emergency & Safety

Under the Retirement Villages Act S58A & 58B, there is requirements to have emergency and safety plans. Operators must prepare an emergency plan for their village and conduct evacuation exercises. These guidelines are issued under section 189B of the Retirement Villages Act 1999 (the Act) to assist operators and residents by providing information on the requirements.

It should be noted that the NSW Civil and Administrative Tribunal (the Tribunal) may take these guidelines into account to determine if operators have complied with the requirements of the Act. Any reference to an operator in this guideline means "the person operating a retirement village who manages or controls the village".

ARPRA believes that each residential community must have an emergency plan. This is a written set of instructions that outlines what staff, residents, and visitors in the community should do in an emergency. The plan does not need to be lengthy or complex. It should be easy to understand and tailored to the particular retirement community.

An emergency plan should provide for:

- emergency procedures, including effective responses to an emergency.
- evacuation procedures.
- notifying emergency service organisations at the earliest opportunity.
- effective communication between the emergency response coordinator and all residents in the community.
- testing the emergency procedures—including the frequency of testing, and the results of safety inspections guiding any corrective action needed.
- and, informing, training and instructing relevant workers in relation to implementing the emergency procedures.

Minor Additions

ARPRA receives complaints from homeowners that they are prevented from installing minor things on their home. Security cameras, security screens and doors have all been denied installation from community operators.

ARPRA believes that homeowners should be allowed to install minor items without consent. This provision allows for a true community. Homeowners do not reside in a stalag. It is unfair for minor additions not to be allowed. We believe that S42 needs to reflect this position.

Children to be included

ARPRA has dealt with several cases in which grandparents became the legal guardians of children. Tragically the parents were killed in motor vehicle accidents and the grandparents were given custody.

In one case, the operator tried to evict the child, stating that the community was for age restricted living. ARPRA understands that most communities are made up of a particular age group.

S44 (5) should be expanded to allow for children to reside when custody has been given and guardianship approved.

Written Complaints

ARPRA receives complaints from homeowners that are frustrated that they have written to the community operator about an issue and never receive a reply. Not only is this poor business practice but shows contempt for the homeowner. The homeowner is a client. If the community owner dealt with customers in this fashion in any other business, they soon would be out of business. S144 should include that written complaints from homeowners or their representatives, whether that be the residents committee or an external organisation, should be replied to in a business-like timeframe and manner.

-This Ends the Submission-

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