Submission to the Review of Residential (Land Lease) Communities Act 2013 (RLLC Act)

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Introduction

The RLLC Act was assented to in November 2013 and commenced operation in November 2015. The Act requires review to ascertain continuing validity and suitability to ensure the fulfilment of those policy objectives for all stakeholders.

I am a resident of a Residential Land Lease community and have been for 14 years, thus giving me experience in a community before the Act, and after the Act came into being. There have been 3 operators during these 14 years, all of whom have their own interpretations of the Act. Those interpretations have often been at odds with the intent of the Act.

At the beginning of my residency there was no Residents' Committee, but a need for one was identified and I was on the Residents' Committee that was elected and remained so for 10 years as Secretary. I was a member of the Northern Area Park Residents Association, which was very helpful to us, and then became merged with ARPRA, the association meant to represent homeowners and residents of Residential Land Lease Communities in dispute with operators. I am no longer connected to ARPRA.

I have also, informally, assisted homeowners with information and representation at Tribunal hearings related to site fee increases and reductions in site fees due to loss of facilities and services.

I sincerely hope that all submissions are read and taken into serious consideration during this very much needed Review. I have made a summary of the issues as I see them below.

1. The current RLLC Act 2013 objectives, as a result of the review of the Residential Parks Act 1998, which commenced in November 2011, made commitments to:

(i) introduce licensing of park operators;

(ii) mandatory education /training of new operators;

(iii) ensure processes for resolution of 'excessive rent increase' applications.

1(i) there is NO clear licensing system and operators are NOT required to be licensed. There is NO monitoring of operators' conduct. As a long-term resident who has seen average and only slightly above average operators, a licensing system would be advantageous to ensure operators are held accountable for their actions. The current system has not protected residents/homeowners from intimidation, unfair business practices and in some cases bullying, or bias towards particular residents/homeowners.

Operators simply do not comply with the rules of conduct for operators set out in Schedule 1 of the Act. There seems to be NO action taken against operators, even after breaches are reported. Since

the Rules of Conduct have no real effect on operator behaviour, a new approach to deal with non-compliance by operators must be sought.

1(ii) In my own experience I am aware the current park manager has undertaken seminars when available. Managing a community is very different to being an administrator in the head office of the owner of the business. When I have been involved in Tribunal hearings I have found that the person from head office is rarely prepared for that hearing, has a combative attitude, and invariably blatantly refused any form of mediation prior to a Tribunal hearing. This can make it very difficult for a manager on the ground to come to a resolution when there are conflicting attitudes and knowledge of the issues. Ongoing training and education are vital for both new and incumbent operators/managers and should be monitored as part of ongoing licensing conditions.

2. Site Fee Increases

The Act states that site fee increases are either by 'Fixed Method' or 'By Notice'.

Section 65(2)(a) relates to increases in proportion to CPI or aged pension. My own site agreement, which I agreed to in November 2006, is fixed method i.e. "CPI or 5%, whichever is the lesser". It has remained and will continue remain the same as agreed in the site agreement.

This is no longer the case for newer homeowners. In my village I am aware there are several types of site agreements, depending on who the operator was at the time of purchase and their preferred option. New homeowners have the option of 'CPI + 3.75% for 5 years'. Naively, they believe it's a wonderful deal as they have certainty for 5 years. However, whatever the 'jump' may be at the end of that period is unpredictable, given what the so called 'market value' might be at that time. The other issue with this arrangement is that by agreeing to this arrangement it changes the 'market value' of site fees for those already here and on 'by notice' increases.

'By Notice' increases invariably are quite high annually and therefore need to be challenged at NCAT hearings. This is a difficult process.

S69(2) "an objection to an increase in site fees on the ground that it is excessive may be made by lodging an application for mediation under Division 2 of Part 12 signed by at least 25% of the homeowners who received the notice, within the first 30 days of the notice period, and not otherwise."

This is not practical for the reasons that some people may be away from the community for health or travel reasons and not able to participate as part of the 25% or the time limitation.

In my community it is virtually impossible to ascertain the number of residents that would make up 25%. The on-site managers take the view that it is a matter of confidentiality and will not advise how many of our homeowners have 'by notice' agreements. There is no provision in the Act to support their assertion regarding confidentiality. There is no Residents' Committee to assist homeowners, and because homeowners' ignorance and apathy means most of them simply do not make a challenge. This then compounds to the next year's increase and so the operator takes advantage of high 'market value' increases. Individual residents have no opportunity under the current Act, to challenge the 'By notice' increase. This is unfair. **The Review of the Act needs to remove the necessity for 25% of affected residents to challenge the increase.**

Increases in site agreement fees when purchasing an existing home.

Currently, the Act provides that new site agreements set the rate, following the sale of a home by the homeowner, at no more than the current market value. Fair Market Value is the higher of the site fees

currently payable by the vendor/homeowner selling the home or, the site fees currently payable for residential sites of a similar size or location within the community. This does not work. Prospective purchasers are NOT informed that site fees must be fair market value. Operators have exploited this. While it is mandatory that prospective home owners receive a Disclosure Statement, Fair Market Value is not mentioned in the Disclosure Statement. Prospective homeowners logically ask what the vendor pays for site fees. When told, most assume they will be paying a similar, if not the same as the vendor. When it comes to completing the sale that is often the first time they discover what the Fair Market Value has been calculated to be. This practice disadvantages sellers and buyers. I have knowledge of sales falling through because buyers do not want, or cannot to pay significantly more than the vendor.

Section 109 and Section 111 Must be amended to ensure incoming homeowners/residents pay what the incumbent homeowners pay. This is not detrimental to any of the parties. The vendor can give certainty to the buyer regarding site fee. The buyer has certainty (at least until the next site fee increase) and the operator will have the opportunity to increase the site fee in the usual process, annually.

3. Repair and Maintenance Obligations.

(1) The current RLLC Act has caused confusion around responsibilities in this area. S.37 needs to be fleshed out to include the operators' obligation too maintain the site, or repair any damage not caused by the homeowner.

(2) The Land Lease Industry Association (LLIA) site agreement document, used across the industry has included additional terms at 55, 56 & 57 home owners agree: "that community rules can set out requirements regarding the presentation of the site including hardscape and landscape, to comply with any landscaping or building code that the operator may publish from time to time, that any dwelling, associated structure, shed, driveway, pathway, retaining wall or any structure or fixture including but not limited to any hardscape (for example, concrete slabs) or landscape on site is their property".

This is designed to shift operator responsibility for infrastructure to the home owners. In the case of retaining walls, which the homeowner relies upon for the integrity of the site, and which they did not build or buy, it forms part of the land, which is 'leased' from the operator and should always remain the property and responsibility of the operator. The Act must clarify and ensure that operators are responsible for the maintenance of the residential site, that hardscaping e.g. driveways, slabs, retaining walls that are essential to the integrity of the site are differentiated in 'dilapidation' notices. Dilapidation notices must only be issued in relation the home.

4. Dispute Resolution

In the case of site fee disputes mediation is mandatory and should be undertaken in good faith. In my experience, and depending upon the manager of the community, mediation can be very difficult to achieve.

Very often the company dictates that the manager cannot take part in mediation as they do not have the authority to do so. It is also a tactic to wait until the last minute before a scheduled meeting and then cancel or postpone, causing additional stress to some homeowners and often they then opt out of the process at this point.

Mediation fails because of the lack of genuine intent from the operator to come to a resolution. They can then 'tick the box' that indicates they attempted mediation, and the matter proceeds to NCAT mediation hearing.

S67. 4 (d) states; 'include such other information as may be prescribed by the regulations". This needs amendment to read: "include EVIDENCE to support the increase in site fees".

S151 (2) enables the mediation hearing, whether convened by an internal or external mediator, to disclose details of their case and 'evidence' in support of that case. To date NSW Fair Trading (the formal mediator) has never required disclosure evidence from the operator. This must change. Disclosure of information should be made by all parties. This would lead to successful mediation if homeowners can see evidence as to why the operator has nominated the amount of the site fee increase.

In the event that mediation fails, and I have only been involved in one successful mediation, which involved only one resident, then the matter proceeds to NCAT hearing. At this time the operator must provide 'evidence' to the sitting Tribunal member or risk having the case thrown out because of, as I have heard it put, 'arrogance', and lack of written evidence to support their case.

Mediation, in and of itself, is a valuable avenue to resolve issues between operators and homeowners/residents, but it requires the goodwill of both parties to come together with supporting evidence and an open mind.

Applications to Tribunal. See Div 3 S156.

My understanding is that NCAT Rule 23 provides a period of 28 days in which to lodge an application. There are many reasons why this may not be workable for some home owners who may or may not be in the position to know the grounds for a dispute. A more suitable time limitation should be determined to enable all homeowners the opportunity to be part of any NCAT application.

Group Applications

Disputes over the amount of a site fee increase can be disputed by a group, but it must be 25% of those residents who received the notice of increase in the 'by notice' method of increase. The impracticalities of this has been dealt with above.

In matters apart from site fee increases i.e. site fee reduction due to loss of facilities and services, as the Act stands, these are meant to individual cases, even though several individuals have the exact same issues. Such an instance arose in my community where facilities and services were withdrawn from every household in the community. I invited all households to attend a meeting with the operator with the intention of resolution, negating the need to proceed to Tribunal.

Twice the meeting was postponed by the operator. When the meeting finally took place with Head Office personnel and 28 homeowners, it was clear from the start that mediation was not going to be an option. Evidence was presented to the operator that we could come to an agreement there and then, thus preventing 28 individual applications to Tribunal. This would save everyone time and money. The operator declined, and was happy to front the Tribunal 28 times. From 28 homeowners, only 11 were prepared to go further with the application. This is because many elderly people just don't want the stress that comes with a lengthy process because the unfamiliarity with the system and anxiety it causes. The applications were lodged at the same time, with the exact same evidence, and 11 sets of fees were paid. However, after contacting NCAT several times it was agreed that we could mount a group case to save time and money for all concerned. At the Tribunal mediation

hearing the operator's representative was late, flippant and dismissive of our evidence, while having nothing of substance of their own. A further attempt to mediate failed. Finally, the matter was resolved in the homeowners' favour.

The point I'm making is this process is time consuming, stressful and if a group of homeowners have common issues, the Act should accommodate one hearing to resolve the issue. This should apply to all disputes apart from Site fee increases.

5. Community Rules

In some instances community rules are too broad and not specific, e.g. the Act enables community rules to be made about 'the use, engagement, control and management' of a community. Sounds fine, but in practical terms some communities have found themselves restricted by rules that limit their freedom and rights. For example, the number and size of garden ornaments visible from the front of the site. The colour of window coverings, awnings, blinds etc., to conform with the operator's preference.

It would be better to standardise the subject across the industry so homeowners' rights are, and those of the operators, are sensible and fair.

Compliance with Rules

The Act is clear that the rules should be followed by all parties in the community, homeowners, staff, tradespeople and visitors. I do not live in a tourist park and so the issues that arise with tourists not complying does not arise here. However, I am aware through discourse with other communities that tourists just are not required or expected to comply with community rules. That is patently unfair to full time residents in tourist and holiday parks.

New and Amended Rules

Under S90(2)(b) 'the operator is required to consult with homeowners', is an imperfect situation.

Where a community has a Residents' Committee (RC), the operator can consult with the RC in writing seeking comment on proposed amendments, or additions to existing community rules. Very often, regardless of the RC's advice or comments, the operator proceeds with the changes.

The intention of S90(2)(b) is clear. Homeowners/residents should have the opportunity to take part in establishing the rules that will govern their everyday lives. In my experience when new rules are mooted, the operator would meet with the RC and give them the proposed new or amended rules. The RC would disseminate the proposal to all residents seeking feedback, which would then be passed to the community manager. Where there was a clear majority of agreement or not, that was the position taken by the RC. We do live in a democracy after all.

However, in a community like mine where now there is no RC, the practice has become lax. The proposed new or amended rules are placed in homeowners' letterboxes and unless something is glaringly wrong, apathy from homeowners who have no visible advocate to voice their concerns, i.e. an RC, simply acquiesce because it's all too hard to rock the boat. A hard and fast requirement of 75% approval in writing is required before Park Rules are commenced.

Disputing Community Rules

It is difficult to dispute a community rule. The Act should provide that the Tribunal have the power to declare a community rule to be unfair, just as the Residential Parks Act of 1998 was able to do. Where 75% of the residents of the community dispute a park rule, they should be given the opportunity to

make a group application to Tribunal to rescind the community rule, on the basis of the reasons for consideration, including health and safety.

6. Utility Charges

In my community we are not on an embedded network for electricity. We are all well aware of the cases that have to NCAT and right up to the Supreme Court. There have been many instances of overcharging by operators.

This Review provides the opportunity to review how land lease communities are charged for their utilities. Presently, payment of utilities comes under Residential Tenancies Act 2010 (RT Act). This Act presumes tenants purchase electricity from an energy retailer and so further protections are unnecessary in tenancy legislation. This is the case in my community.

For those on embedded networks they cannot purchase electricity from the market as we do. They are at a huge disadvantage financially. There is no freedom of choice of the supplier. This needs to be rectified in the Review.

7. Further points to consider

S21 needs improvement. If S109 is not amended as previously mentioned in this submission, the disclosure statement must contain information regarding fair market value. It should also state if the operator is the utility provider and just what the current rates payable for each utility, including availability charges.

The Disclosure Statement, when provided to a prospective buyer should include copies of the approval to operate and a community map; the proposed site agreement; and the community rules.

S32 should specify a timeframe in which the written agreement must be given to the homeowner. (In my case, in 2006 when I took up residence, it took 14 months to finally obtain my site agreement, and some conditions had been changed in the document without my approval.)

S42 should be broadened to allow homeowners to make minor alterations without written consent, i.e. fitting security alarming, installing locks, screens and shutters on windows and security screens on doors.

S45 is entitled 'Subletting or assignment of agreement'. Subsection1(b) provides that a home owner may 'assign the site agreement'. The word 'tenancy' should be replaced by 'site'. As it stands, because of a drafting error, homeowners have not had the right to assign their site agreements to prospective purchasers of their home. Theoretically, it is possible, but in practice it's not. The operator simply refuses to do so, as a result of S45(1)(b) because there is no (properly drafted) restriction on the operators' ability to refuse. This has led to many homeowners losing the sale of their home, often permanently. When a prospective purchaser asks what the homeowner pays in site fees, they justifiably believe they will pay the same upon purchase. Assignment of site agreements at this time is a huge selling incentive that is not detrimental to the operator. Site fees increase annually which provides them with an increase in revenue.

It should be noted that for those over 50 who are now more than ever, encouraged to downsize to a lifestyle they can afford, the glossy brochures and TV ads, make no mention of the way site fees increase across the industry. Some homeowners are being forced out of their homes because the increases to their site fees is becoming a financial burden that they can no longer sustain.

S64 should be amended to include a reduction in site fees where the reduction or withdrawal of goods, services, or facilities provided by the operator under the site agreement, contract or arrangement. If the operator agrees to provide something but does not, then a reduction in site fees is warranted.

S64 was the basis for the group application to NCAT by homeowners from my community, mentioned above.

S127 is not justifiable in its current form. It enables the operator to pay no compensation to homeowners simply by changing the designation of a site from long term to short term. This makes 'no grounds' terminations possible. This should never be the case. Compensation must be payable where a site agreement is terminated under any circumstances under S127.

S128 should be repealed. Whether a home is occupied or not, should not be the basis for termination. If the occupier has, for whatever reason, e.g. health or travel, is absent, as long as the property is maintained and the site fees are paid, vacancy should not be the basis for termination.

S144 should be expanded to cover correspondence between the operator, resident and/or RC. Commonly, some operators just ignore correspondence. The Act should require at least acknowledgment by written response within a certain time period.

S154 confidentiality between the writers, be they Operators' head office, Resident Committee, on site manager and homeowners or residents should be paramount. Too often the contents of correspondence is not treated as confidential.