Statutory Review of The Residential (Land Lease) Community Act 2013
Policy and Strategy Division,
Department of Customer Services,
Paramatta Square,
12 Darcy St., Parramatta NSW 2150

The Officer in Charge,

Please find attached a submission to the above review.

The submission is in four parts:

Part A "Site Fee Increases - Searching for an Explanation".

Part B "Imbalance of Power or in Pursuit of Fairness"

Part C - “Community rules – ineffectual rules”

Part D “Special Levy – interpretation”.

The submissions address the most pressing issues that the respective authors consider need rectifying in the Residential (Land Lease) Community Act 2013 (the Act) and the administration of the Act and Regulations. It is not intended to be comprehensive of all issues, other submissions will deal with those.

It would be a mistake to consider the log of complaints kept by Fair Trading or the outcome of Tribunal hearings to represent a fair gauge of conditions and concerns in our or other villages. Or the level of stress in our communities. Both processes have, for practical and resource reasons, become largely inaccessible to the client populations of RLLC villages and therefore home owner problems and concerns do not fairly register in the public record.

Your research must take a wider view, looking beyond these records, to gain insight into the true health of the 'affordable home' model as a solution to homing an ageing population. Since 2013 these villages have become captive to large corporations who have found a way of channelling Government **age pension** and **self-funded retire funds** to their shareholders. Their prime objective being maximising returns to shareholders, not the viability of retirees to occupy RLLC villages.

In the past Fair Trading has relied on ARPRA as the advocate of home owners. ARPRA represents only a small number of RLLC home owners, and they too are in dire need of a review in their processes and procedures. The Tenants Union and other home owner associations more capable of representing home owners' interests than ARPRA and ask that this be considered when assessing submissions and representations.

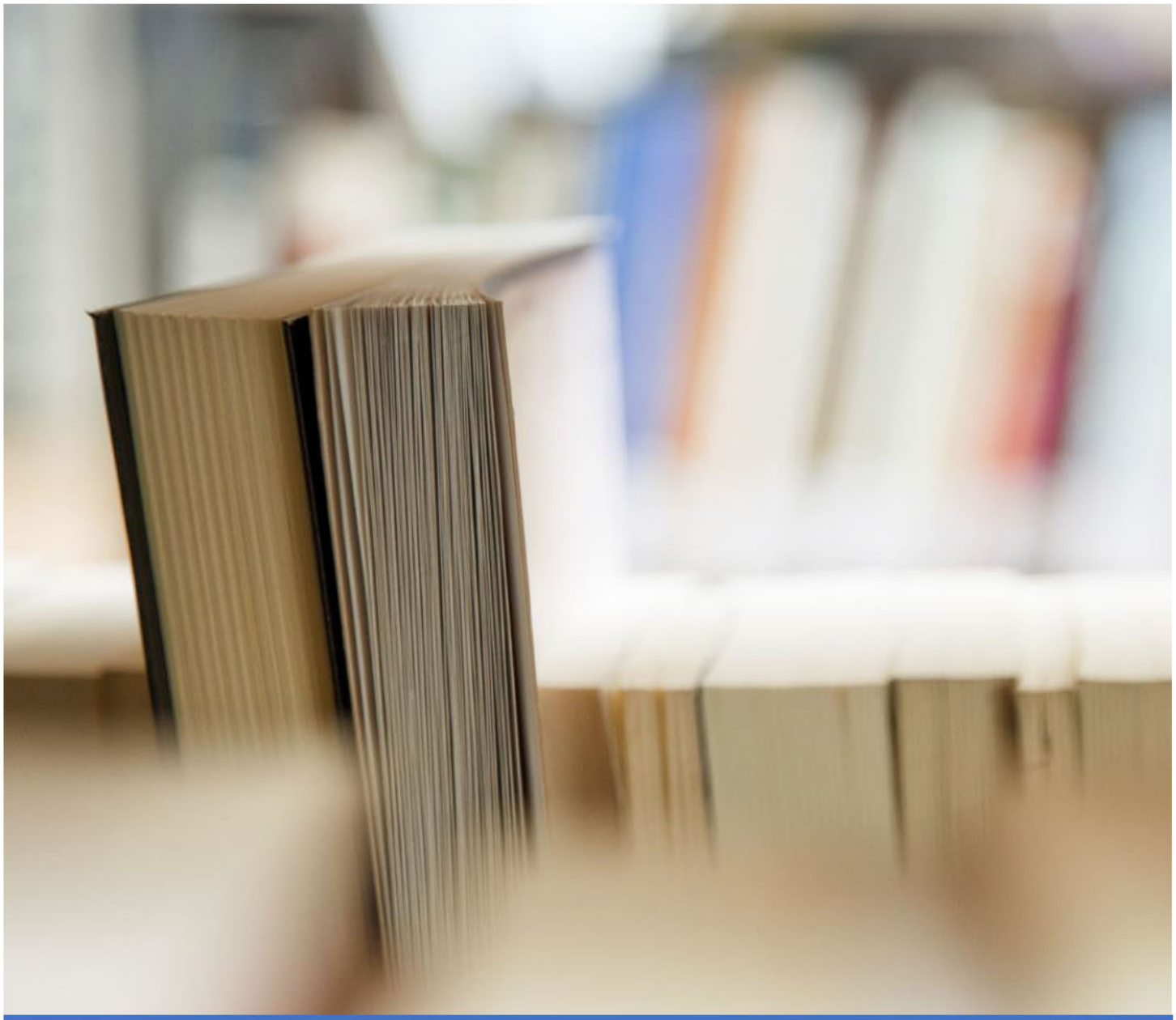
If required, the relevant authors of each part would be pleased to elaborate on or respond to questions regarding these submissions.

Yours sincerely,

Glenda Thomas

(on behalf of all contributors

10 March 2021



2021 Review of Residential (Land Lease) Communities Act 2013

Contents

Part A - Executive summary

Site fees are of major importance to existing and incoming home owners in Residential (Land Lease) Communities. Having bought into these communities, home owners have become significant stakeholders both in terms of capital invested and ongoing payment of site fees. As potentially there are significant exit costs, home owners are in a sense locked in and at the mercy of the operators of such communities.

The Act provides operators with the power to set site fees and notify increases in them.

Where operators increase site fees by notice, they are required to provide an explanation for the increase. Whilst home owners can object to increase site fees, they face a complex process involving compulsory mediation and perhaps application to the Tribunal (NCAT). Clearly there are both power and information asymmetries between the operator and the home owners.

To create a more level playing field we suggest:

- The increase should be limited to the rate of increase in the CPI (Consumer Price Index Sydney All Groups) except in exceptional circumstances.
- Where site fees are increased on the grounds of cost increases above CPI there should be clear criteria satisfied before such increase can be implemented.
- Where an increase above the CPI is sought, the operator should fully disclose the outgoings and operating costs and revenues of the community, as well as other benefits and detriments to the community.
- Where a one-off increase to cover increased outlays and operating costs has been introduced, this must be not be built into the base for future site fee notifications.
- There must be provision to ensure that operators manage the residential community effectively and efficiently. To the extent operators seek to recover outlays and operating expenses from home owners, it is necessary that such outlays and operating expenses:
    - must be directly identifiable with the operations of the land lease residential community or apportioned on a reasonable basis reflecting resource consumption.

    - must be supported by appropriate, verifiable records (not arbitrary or capricious allocations).
    - must not include the costs of activities associated with sales, marketing, land development, construction, and other off-site activities.
    - must not include the costs of excess capacity; and
    - must reflect efficient and effective resource acquisition and utilisation.
- The disclosure statement issued to potential purchasers must disclose the current site fee for the home being resold, and the penalty for nondisclosure must be increased and substantial.

We believe that the above recommendations are in the best interests of all stakeholders in residential land lease communities.

Part A - Site fees

Written by John Macmullen, Peter Manas and Dennis Richards

The following addresses some of the perceived deficiencies in this Act with respect to setting of site fees (also known as rent) and increases thereto.

s.4 (definitions) includes:

> ***site fees*** means money paid or payable by a home owner to an operator on a periodic basis for occupation of a residential site under a site agreement.

The home owner enters into a site agreement which discloses the site fee payable at entry and the method by which the site fee may be increased.

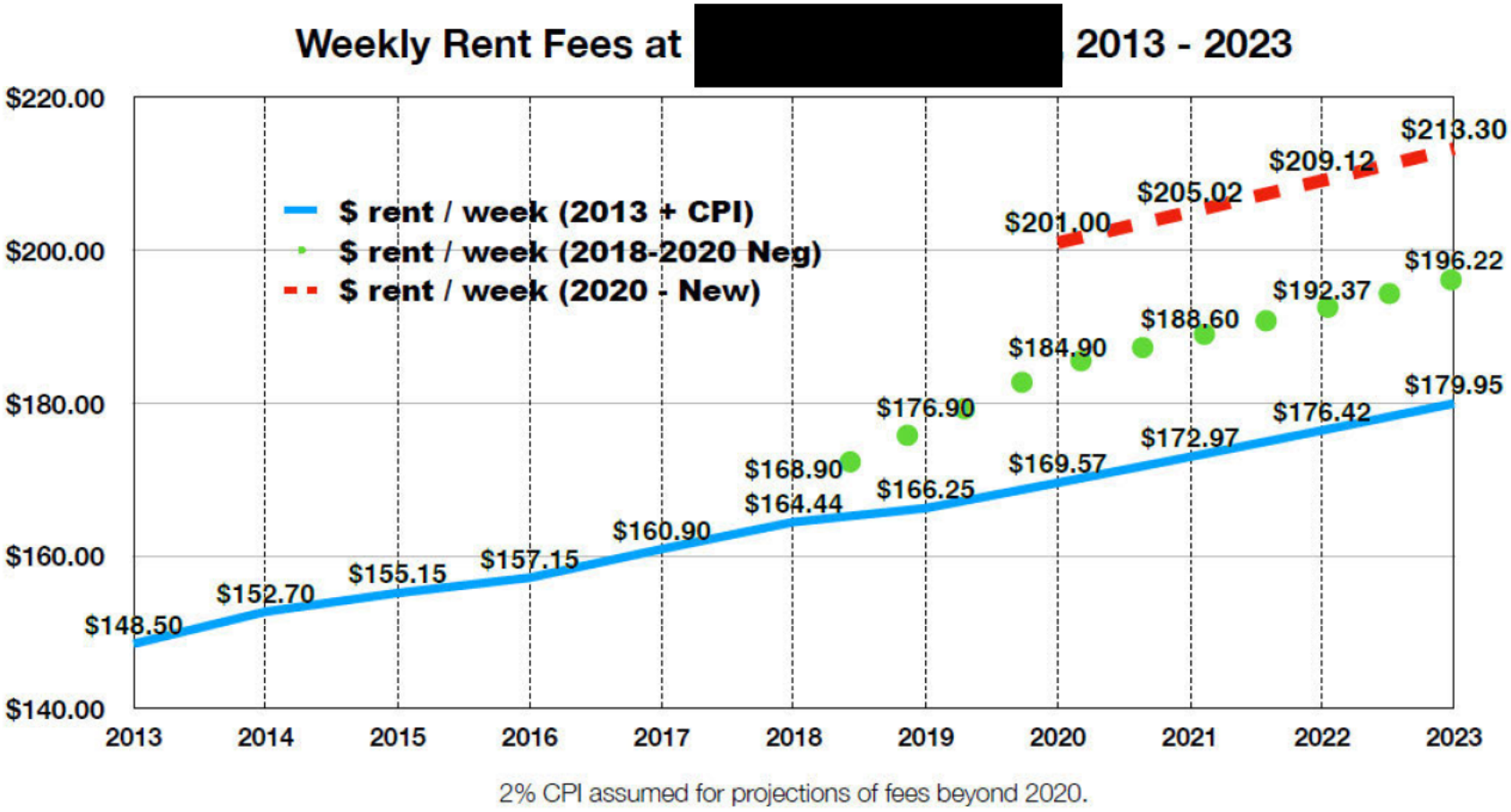
The Act provides that the operator may increase the site fees. The significant question is how site fees may be increased under the Notice (non-fixed method).

The following case study reviews site fees at [redacted]), owned by [redacted] The current site agreement discloses [redacted] as the owner of the community and [redacted] as the "PARK OPERATOR". For simplicity we have referred to the Operator in the following text.

A case study.

[redacted] Site Fees, Historical 2013-2020, and Projected 2021-2023

Weekly site/rent fees for [redacted] based on historical data, and projected using conservative assumptions are depicted in the graph on the following page.



2% CPI assumed for projections of fees beyond 2020.

The quantum of annual site fee increases, and the methods of determination of the increases as used by the Operator, clearly define three periods:

1. 2013 to 2017 – Site fee increases as per CPI

Weekly site fees payments were annually indexed in July, according to the annual CPI released for the March quarter of that year. This mechanism was generally accepted by home owners as it provided affordable increases on a recurring predictable basis. This level has been continued projected beyond 2018 on the graph to serve a baseline for comparison.

2. 2018 to 2020 – Site fee increases by compulsory mediation

In July 2017, the site fees were set at $160.90 pw throughout the community. Shortly before July 2018, the Operator surprised home owners with a proposed quantum increase, well above that based on CPI increases. Subsequent to initial householder objections, the Operator produced a justification document for the increase citing the need to compensate for some of their historical cost overruns. Several home owners, who thought this justification was poorly argued and presented, decided to pursue the matter further with the NSW Department of Fair Trading (NSWFT). An $8 pw increase for each of the years 2018 to 2020 was eventually agreed at the compulsory mediation conducted by the NSWFT, leading to site fees being $168.90 pw in July 2018, $176.90 pw in July 2019 and $184.90 pw in July 2020.

These issues are discussed more fully later in this document.

But could this set of increases have been avoided altogether? In Australian Financial Review article of 8 July 2014, Mr. John Gilmour, Director of Huntingdale Properties, and described as a partner in the development, was reported as saying: *"We always knew that to make these projects stack up you have to do it with sufficient scale, we always knew you'd need 250 houses as a minimum to make it work."*

Furthermore, in [redacted]r of January 2016, the Operator reported that there were 112 houses and *"Construction is still booming with 50 houses being built each year.*

Under this business plan the Operator would reach 250 houses in the latter half of 2018.

In summary, new home availability and sales performance has fallen well below the expectations of this business plan.

Less occupied houses yield less rental income. Simple analysis shows that by adding 10 new occupied houses for each of the 5 years 2016 to 2020, would have added over $1.2M to [redacted] coffers, even based on the original CPI based rate in 1. above. **This would have eliminated the purported deficit described above, and still left the Operator with a handsome surplus! Should home owners be forced to carry the financial burden for Operator's overly ambitious or poorly executed Business Plans?**

3. 2021 to 2023 - What about the future?

It has become apparent that from July 2018, new house owners at [redacted] have been placed directly on a Weekly Site Fee Schedule that is well above the schedule in 2. above, even though that period has not yet expired. At the time of writing, this difference is significant at $16.10 pw - $201 pw for new home owner's *vs* $184.90 pw for existing home owners! In some cases, the Operator may not have disclosed this information to potential new home owners, and even if they did, it was justified as some sort of "Fair Market Value".

Approaching July 2021, will the bulk of existing home owners be in for another nasty surprise? Having seeded the Resort with new arrivals paying the higher rate of $201 pw, it is highly likely the Operator will try to move the remaining home owners, who form the bulk of the population, onto this new baseline level (or even beyond???).

Site fee increases.

Of major significance is the question of site fees and the mechanism by which site fees are increased over time. It is clear from the above that there is little or no guidance as to the determination of the quantum of the increase nor the level of detail in the explanation for the increase.

s.67 deals with increase of site fees by notice.

(1) This section applies to a site agreement that provides for the increase of the site fees by notice (otherwise than by a fixed method).

(2) An increase in the site fees is not payable unless the fees are increased in accordance with this section.

(3) The site fees must not be increased except by notice in writing given to all the home owners in the same community at the same time under site agreements to which this section applies.

(4) The notice must—

(a) specify the amount of the increased site fees, and

(b) specify the day (the ***effective day***) on and from which the increased site fees are payable, and

(c) include an explanation for the increase, and

(d) include such other information as may be prescribed by the regulations, and

(e) be in the approved form (if any).

It is relatively easy to accept that that site sees may increase in line with variations in the relevant CPI. The Consumer Price Index (CPI) is a measure of household inflation and includes statistics about price change for categories of household expenditure. A CPI is a statistical estimate constructed using the prices of a sample of representative items whose prices are collected periodically.

Although imperfect it is widely used, for example in setting pension levels. To the extent it is used in setting pension levels it acts as a constraint upon the income of those residential village home owners who are pension recipients.

Where increases in site fees exceed CPI increases there is a significant probability the aged pensioners will be significantly disadvantaged and placed under financial stress. This is illustrated in the following example.

Example: Single Age Pensioner who is a home owner within the community.

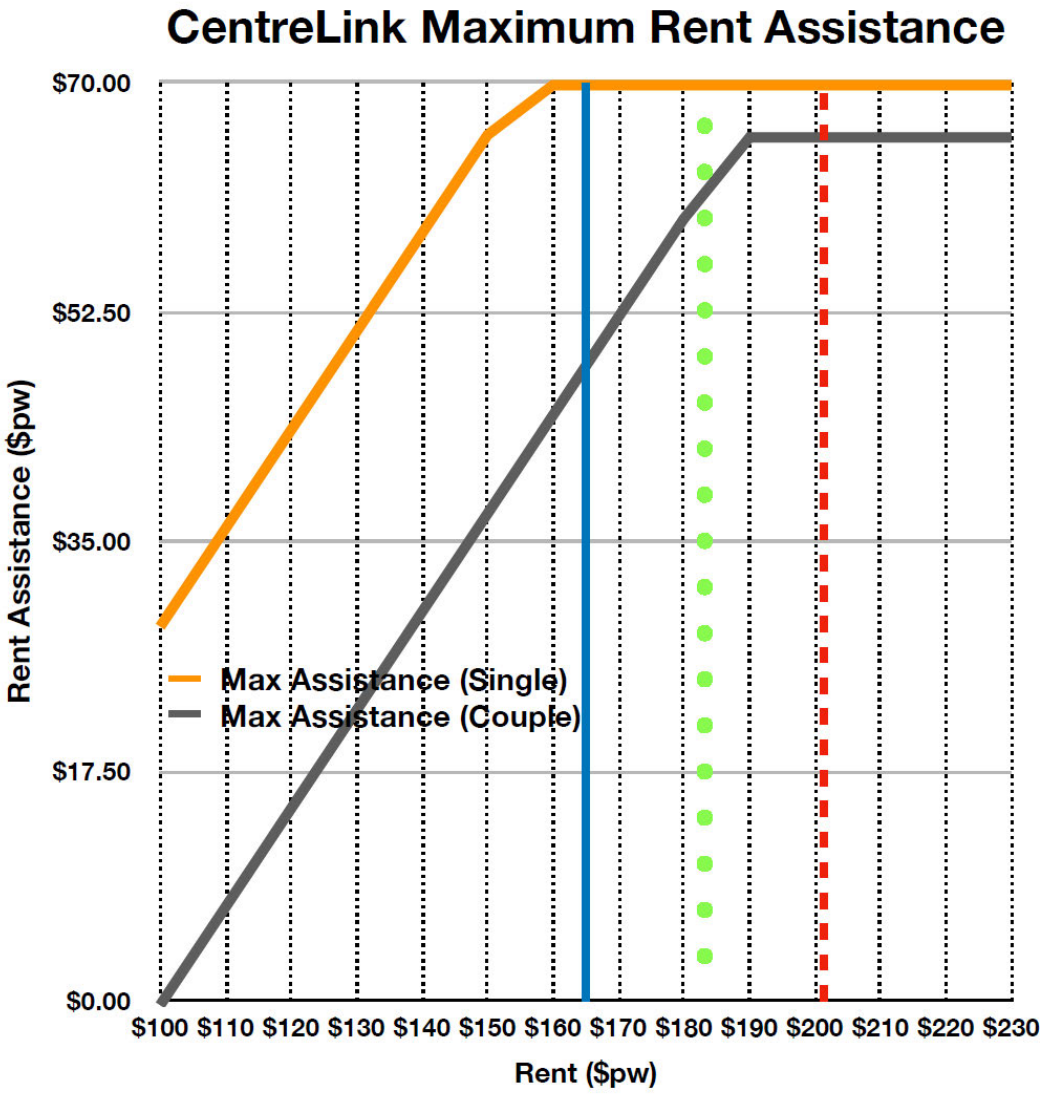
The single age pension rate (including pension and energy supplements) is $944.30 per fortnight (pf), effective from March 2020.

Current maximum rent assistance is $139.60 pf (based on threshold of $310.73 pf).

The current site fee for 2020/21 is $369.80 pf as per Mediation agreement dated 23/06/2018. This exceeds the threshold ($310.73 pf) for maximum payment of rent assistance.

The net rent after rent assistance is $230.20 pf. As the site fee exceeds the threshold for maximum payment of rent assistance, the rent assistance payment is $139.60 pf.

This is illustrated in the following diagram.



Challenge to increased site fee

It is noted that NSWFT provides the following guidance:

"Any increase can be challenged if 25 percent or more home owners object. This includes small increases and those under consumer price index (CPI)."

https://www.fairtrading.nsw.gov.au/housing-and-property/strata-and-community-living/residential-land-lease-communities/site-fee-increase-disputes

Explanation for the increase (s.67(4)(c))

Prior to May 2018, site fees were increased in line with increases in CPI, as set out in the following table.

Date	Prior Site Fee	CPI %	$ Value of CPI increase	[redacted] advised Increase	New Site Fee
01/07/12					144.50
01/07/13	148.55	2.80	4.05	4.05	148.55
04/07/14	148.55	2.80	4.16	4.15	152.70
31/07/15	152.70	1.60	2.38	2.45	155.15
01/07/16	155.15	1.305	2.02	2.00	157.15
01/07/17	157.15	2.40	3.77	3.75	160.90

For example, on 27th April 2017 the [redacted]) provided the following notice.

From the 1st July 2017 the rent for the residential premises occupied by you, at [redacted] will be $160.90 per week. This is an increase of $3.75 (being the CPI increase of 2.4% to 31st March 2017) from your current rent of $157.15.

Yours sincerely

[redacted]

Note that in this advice the Operator uses "rent" in lieu of "site fees".

In general, the community accepted site fee increases in line with increases in CPI as fair and reasonable.

A case study of increase in site fees

It is noted that s.67 fails to prescribe the acceptable reasons and explanations for the increase.

This leads to operators providing minimal justification for the site fee increase, as exemplified by the following with respect to July 2018 increased site fees provided by the Operator of OCR on 4 May 2018):

Explanation for the increase:

Since 2013, the increase in the site fees has not kept pace with the actual increase in outgoings incurred by the resort operators. Your site agreement affords the operator the right to increase the site fees by Notice (non-fixed) Method.

Analysis of operating expenses shows significant annual outgoings increases over the last 5 years. We have also been advised by our waste management contractor of an increase in rubbish and recycling expenses well above expectations.

Following a formal independent valuation - the new site fee is $185.00 per week.

As referenced previously site fees had until then been adjusted in line with increases in CPI.

After this notice the Operator provided some further explanation in an undated letter. This included:

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2. Site Rental Independently Assessed

The resort managers took the step to engage a qualified Valuer to research the market for similar resorts and provide an independent, professional opinion as to the rental value of the sites noting the location and quality of facilities.

We thought it was important to see how [redacted] compared to other independent seniors living resorts. The assessed rental of $185 per week is above the median by 6.9% but 16.8% less than the highest. We are of the view that OCR is far better than average resorts but are prepared to accept the professional assessment.

The Operator stated that "analysis of operating expenses shows significant annual outgoings increases over the last 5 years".

Full-time adult average weekly ordinary time earnings (trend) increased from $1469.19 for November 2012 to $1567.90 for November 2017, an average annual average increase of less than 2%.

There was no adequate explanation of these increased expenses and outgoings. As [redacted] was then and still is in the development stage, we are concerned that the methodology employed may not properly attribute outgoings and operating expenses to the various activities outside those properly attributable to existing occupied/owner homes. These other activities include sales and marketing, display homes, completed but unsold homes, houses in construction, empty lots, undeveloped land, and other off-site developments. There is a perception that the proposed increase results in cross subsidisation which is unfair to current home owners.

This raises our concerns that other cost items may not be properly attributable in whole or in part to the land lease community (vs sales and marketing, and other development activities). From what we have been able to ascertain there is little in the way for formal recording of expenses to correctly identify shared expenses between the various activities. The allocation if done at all at best seems arbitrary and perhaps even capricious.

The Operator's undated letter issued to home owners in late May 2018 provided further cause for concern. Various %ages for cost items were stated but with no identification of dollar values, these are not helpful.

In this letter, for example, it is stated that postage costs have increased by 146.7% between 2014 and 2017. That this cost item is highlighted suggests that postage cost is considered by the Operator to be significant. But postage is more driven by sales and marketing activities than servicing the community of home owners. That this is so conceded at compulsory mediation.

Likewise, telephone expense was highlighted as another item. Again, this is more likely to be driven by sales and marketing activities than servicing the community of home owners? As the office hours for residents are restricted to 10 hours per week, it appears that sales and marketing activities are the heavy consumers of staff hours, office space and associated facilities and expenses.

Misunderstanding by the operator of operating expenses

Another specific item is land tax which was queried after mediation on the grounds that land tax did not apply to home owners within the residential community.

The Operator advised as follows:

"Operators of relocatable housing estates are exempt from land tax to the extent that the land has been developed for occupation, i.e., land on which completed communal facilities and houses have been completed. As each year goes by the land on which land tax is payable reduces as the site completes. At the end of the day no land tax will be payable once fully completed."

BUT...

The relevant ruling is:

Revenue Ruling No. LT 071v3
Exemption - Residential Parks Primarily Used and Occupied by Retired Persons
Section 10Q Land Tax Management Act, 1956

Preamble
1. Where a residential park is used to provide homes for a community of senior or retired persons, an exemption from land tax or a reduction in the taxable land value of the land is available in accordance with the following Treasurer's guidelines.

The test is **not** one of relocatable housing **but** of the community of senior or retired persons (as defined … retired or at least 55 years old). In fact, relocatable housing or relocatable home is not specifically referred to in *Revenue Ruling No. LT 071v3. Inter alia*, the ruling refers to manufactured home estate.

Among the guidelines are:

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3. These guidelines apply for the purposes of determining whether land which is or includes a "community or residential community" within the meaning of the Residential (Land Lease) Communities Act 2013 ("RLLC Act"), and referred to in these guidelines as a "community", is entitled to a land tax exemption or reduction in taxable value under s.10Q of the Land Tax Management Act 1956 (LTM Act).

4. An exemption or reduction in taxable value does not apply unless the community is registered under section 14 of RLLC Act.

5. If a parcel of land is used solely for the purposes of a community and more than 50% of the homes on the land are used and occupied by at least one qualifying home owner, the land is exempt low-cost accommodation under s.10Q.

The Operator's response suggests an elementary misunderstanding by the Operator of legitimate operating expenses.

Outcome of Mediation
As this was a new experience for the home owners' representatives, contrasted with the representative for the Operator, they may have felt quite intimidated and preferred to accept mediation rather than proceed to the Tribunal.

The outcome of mediation on 21 June 2018 as signed by the Operator and its representative, the community's representatives and the mediator were:

THE PARTIES AGREE THAT:

1. The site fee increase effective on or after 6th July 2018 will be $8.00 per week for all home owners.
2. The site fee increase effective on or after 6th July 2019 will be $8.00 per week for all home owners.
3. The site fee increase effective on or after 6th July 2020 will be $8.00 per week for all home owners.

On 26 June 2018, the Operator advised as follows:

Attached is an amended notice of site fee increase.

As a result of the compulsory mediation held on Thursday 21st June 2018, please see below variation to the previous rent review dated the 4th May 2018:

- The site fee increase effective on or after 6th July 2018 will be $8.00 per week for home owners
- The site fee increase effective on or after 6th July 2019 will be $8.00 per week for home owners
- The site fee increase effective on or after 6th July 2020 will be $8.00 per week for home owners

Matters the Tribunal may consider about excessive increases.

s.74 provides some guidance as to the issues that may be considered in the case of the matter going to the Tribunal.

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74 Matters to be considered about excessive increases

(1) The Tribunal may have regard to any or all of the following factors when deciding whether to make an order under section 73:

(a) the frequency and amount of past increases in site fees for the community,

(b) any actual or projected increase in the outgoings and operating expenses for the community as provided by the operator since the previous increase (if any) in site fees for the community,

(c) any repairs or improvements to the community:

(i) carried out by the operator since the previous increase (if any), or

(ii) planned by the operator for the period covered by the increase being reviewed,

(d) the general condition of the community including its common areas,

(e) the range and average level of site fees within the community,

(f) the value of the land comprising the community, as determined by the Valuer-General,

(g) the value of any improvements to the community (including common areas) paid for or carried out by home owners,

(h) any explanation for the increase provided by the operator by notice in writing to the affected home owners,

(i) variations in the Consumer Price Index (All Groups Index) for Sydney,

(j) whether the increase is fair and equitable in the operation of the community,

(k) any other matters prescribed by the regulations.

(2) The regulations may require the Tribunal to disregard any specified matters (not being a matter referred to in subsection (1)), in any specified circumstances, when deciding whether to make an order under section 73.

But there is ambiguity. s.74(1)(c) refers to "outgoings and operating expenses". Clarification is needed as to what are allowable/recoverable outgoings and operating expenses.

As it is the Act is so vague that the issue of site fee increases is heavily weighted in favour of operators.

There is the prospect of non-recurring one-off cost increases being embedded in site fees and then continuing into future recurring site fees. It seems more appropriate for such non-recurring one-off cost increases to be clearly identified and subject to exclusion when subsequent future increases are sought. This could be achieved by such non-recurring one-off cost increases separately identifies and clearly excluded beyond the relevant period identified for the duration of the one-off increase.

There is ambiguity as to whether the cost of capital preservation, as distinct from routine repairs and maintenance, of community assets is fairly treated as an operating expense.

Clearly issues may arise in determining the proper outlays and operational expenses to be attributed to the residential land lease community.

It would seem appropriate to require the operator to provide a detailed report, with explanations and subject to scrutiny, of actual and budgeted/planned allowable/recoverable outgoings and operating expenses.

Some suggested criteria for statutory outlays and operating expenses are:

- must be directly identifiable with the operations of the land lease residential community or apportioned on a reasonable basis reflecting resource consumption.
- must be supported by appropriate, verifiable records (not arbitrary or capricious allocations).
- must not include the costs of activities associated with sales, marketing, land development, construction and other off-site activities.
- must not include the costs of excess capacity.
- must reflect efficient and effective resource acquisition and utilisation.

In summary much greater precision and clarity is required and should be provided in the Act. As it is there is little or no incentive to efficiently control resource acquisition and utilisation. There exists the very real possibility that the operator may pay excess remuneration to staff which may include associates of the operator, or to deploy staff time and community assets to the benefit of those associates. With the present level of disclosure, clearly home owners are severely disadvantaged and largely at the mercy of the operator.

It is not clear how the criteria to be considered under s.74 are to be monetised. Some may offer benefits and some detriments to the community. Some may involve capital outlays which (hopefully) provide benefits over time. It is not clear whether the capital outlays are eligible to be recovered either immediately or by way of depreciation or amortisation or are not eligible to be recovered at all. By a sleight of hand operators may seek to recover both the capital outlay immediately as well on ongoings recovery through depreciation or amortization. There is a risk of double counting and hence over-recovery.

As at present minimal explanation is required to be provided by the operator, there is the presence of information asymmetry to the benefit of the operator and the detriment of home owners. In an effort to overcome this the information required should be both clarified and required to be disclosed. The provision of audited detailed statement of outlays and operating cost including the figures for the previous year, current year and the budgeted figure for the coming year is required and should be mandatory.

Site fees for resales

There is the opportunity for operators to gouge when entering into site agreements for resales by failing to comply with disclosure requirements.

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s.109 includes:

(5) The site fees under the new site agreement must not exceed fair market value.

(6) Fair market value is the higher of the following:

(a) the site fees currently payable by the home owner who is selling the home,

(b) the site fees currently payable for residential sites of a similar size and location within the community.

It is noted that s.21 provides:

(2) The disclosure statement is to be in the approved form and is to include—
(a) details of the fees and charges that will be payable under the proposed site agreement for the particular residential site, and
(b) details of the current range of site fees paid in the community…

NSWFT at https://www.fairtrading.nsw.gov.au/help-centre/forms#Residentiallandleasecommunityformsandpublications lists the following approved forms, one of which is "Disclosure statement":

Residential land lease community forms and publications

Approved forms

- Registration form (PDF, 84.21 KB)
- Change in registered details form (PDF, 35.88 KB)
- Completion of mandatory education briefing for new operators (PDF, 76.87 KB)
- Disclosure statement (PDF, 39.87 KB)
- Moving into a land lease community (PDF, 279.52 KB) Order bulk copies at the NSW Government's online shop.
- Termination notice (PDF, 194.56 KB)
- Compulsory mediation form for site fee disputes (PDF, 243.84 KB)
- Other mediation/complaints form (PDF, 319.3 KB)

As it stands, s.21 does not require disclosure of current site fee payable by the outgoing home owner, although NSWFT has published the following which includes some additional information in the Disclosure Statement, as shown below.

Disclosure Statement

Residential (Land Lease) Communities Act 2013, section 21(2)
Included in this publication is the following:

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3. SITE FEES

The current site fees for the site you are interested in are: **$** ☐ Weekly ☐ Fortnightly

Current range of site fees paid in the community: *Low*: $ *High*: $

It is proposed that your site fees will be: **$** ☐ Weekly ☐ Fortnightly

In the future your site fees may be increased by: (*tick only **ONE** option*)

☐ Fixed method: (*Give details of the method*)

_____

_____

_____

☐ By notice (non-fixed):

Date of the last increase:	/ /
Amount of last increase:	$
Date of next increase (if known):	/ /

***Note**: Site fee increases by notice cannot occur more than once in any 12-month period.*

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s.109(5) requires that site fee under the new site agreement must not exceed fair market value. Fair Market Value may be defined as *"The price that would be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length".* In the case of resales, failure by the operator to fully disclose the current site fee being paid by the selling home owner for the property in which the prospective buyer is interested creates information

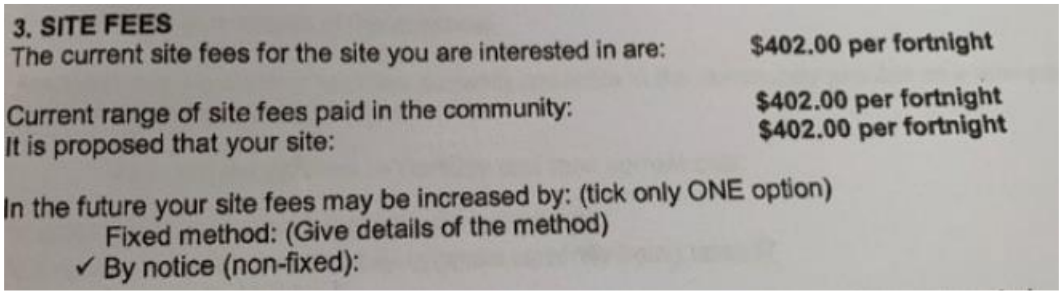
asymmetry between the operator (to its potential advantage) and the prospective incoming home owner (to his/her potential disadvantage.

It appears that it is not uncommon for operators to fail to disclose (either by ignorance, manipulation, or malicious intent) the current site fees as shown in NSWFT approved Disclosure Statement.

The site fees currently payable by the home owner who is selling the home should be disclosed to the purchaser or prospective home owner. There is opportunity for the operator to gouge by including in the new site agreement a substantially higher site fee. As mentioned previously (see [redacted] site fees, Historical 2013-2020, and Projected 2021-2023), there have been occasions at [redacted] where the outgoing home owner was paying $184.90 pw, but the new home owner was hit with $201.00 pw, even though adjacent and nearby sites of similar size and location were levied at $184.90 pw.

We are aware of a case in which the incoming home owner in October 2018 was advised that the then current site fee was $185 pw, with increases of $8 pw in July 2019 and again in July 2020 as agreed in mediation. However as of July 2018 the agreed site fee was set at $168.90 pw as per the Mediation agreement. This is clearly a case of price gouging and misrepresentation by the Operator. It appears that incoming home owners, irrespective of whether they are purchasers on new homes or resales have been subject to a site agreement leading to a site fee of $201 pw for the 2020/21 year.

A recent example of the advice of site fees given to an incoming home owner on a resale during the first quarter of 2021 is:



3. SITE FEES

The current site fees for the site you are interested in are: **$402.00 per fortnight**

Current range of site fees paid in the community: **$402.00 per fortnight**
It is proposed that your site: **$402.00 per fortnight**

In the future your site fees may be increased by: (tick only ONE option)
Fixed method: (Give details of the method)
✓ By notice (non-fixed):

This is clearly misleading. The outgoing home owner was paying $184.90 pw, and the range of site fees was $184.90 pw to $201 pw. It may be that this is a device used by the Operator to indicate that the range and average level of site fees is limited to $201 pw to support proposed future increased site fees, even though the vast majority of home owners are currently paying $184.90 pw. To increase these site fees to $201 represents an increase of 8.71%, let alone any further increase above $201.

On 1 August 2020, the residents committee enquired about site fees, as follows:

[redacted]

The RC has been contacted to clarify wording you have on the OCR public website, specifically,

1. What are the weekly fees?

The weekly fees cover resort maintenance and rates ranging from $131.20 per week to $201.00 per week depending on government rent assistance.

To the resident's knowledge, every home owner pays the same rent (with or without government assistance and taking into account the fee for parking a caravan or RV). Are you able to clarify the variation between $184.90 and the $201. Is the latter charge what we expect to be paying with the next fee increase?

cheers

RC

On 6 August 2020, the Operator replied as follows:

Yes the website is correct on the range of site fees (taking in consideration rental assistance when applicable)

As for future rent levels – I have no information.

Regards

[redacted]

Manager/Sales

Recommendations

s.21(2) should be amended to include as (a) details of the current site fees payable by the existing home owner for the site in which the prospective home owner is interested, or if there is no existing home owner then this is to be so stated.

Pursuant to this the existing (a), (b), (c), and (d) should be adjusted.

s.67(c) should be modified to specify more clearly what level of explanation is required.

s.67(d) provides for such other information as may be prescribed by the regulations. The regulations should provide clarity as to:

- Detailed statement of outlays and operating cost including the figures for the previous year, current year, and the budgeted figure for the coming year, preferably or subject to scrutiny by the home owners.
- Clarification of the meaning of "outlays and operating expenses".
- The extent to which the criteria set out in s.74 are to be incorporated in s.67(c) explanations; and
- How the criteria to be considered under s.74 are to be monetised.

In principle any increase in site fees should not exceed increases in CPI, as the income of many home owners is constrained by income streams indexed to CPI. Any increase above CPI should be subject to rigorous examination. s.67 should be modified to include this intended outcome.

There must be provision to ensure that operators manage the residential community effectively and efficiently. To the extent operators seek to recover outlays and operating expenses from home owners, it is necessary that such outlays and operating expenses:

- must be directly identifiable with the operations of the land lease residential community or apportioned on a reasonable basis reflecting resource consumption.
- must be supported by appropriate, verifiable records (not arbitrary or capricious allocations).
- must not include the costs of activities associated with sales, marketing, land development, construction and other off-site activities.
- must not include the costs of excess capacity; and
- must reflect efficient and effective resource acquisition and utilisation.

The provision of a disclosure statement to incoming home owners must be strengthened as it is clear that operators have avoided proper (and as required by s.21 and s.109) disclosure of fair market value of site fees, having regard to the current site fees payable by the home owner who is selling the home, and the site fees currently payable for residential sites of similar size and location with the community. The present provision (s.21) does not require disclosure of the current site fees payable by the outgoing home owner. The maximum penalty provided for breaching is 100 penalty points. Having regard to the potential damage to the incoming home owner, this is trivial and ought to be increases substantially.

Likewise, there should be provision for the incoming home owner to recover additional costs from the operator if and when they become aware of the improper disclosure, with site fee being held at the rate paid by the selling home owner for a period of three (3) years from the date of the new site agreement. This would provide a significant penalty to discourage operators from committing this offence.

Part B - Executive summary

Since the introduction of the Residential (Land Lease) Communities Act 2013 the growth in the sector has been a significant with an increasing number of retirees choosing this as their future lifestyle choice, whilst also attracting a diverse range of owner/operators including large investment companies and corporations (international and national). With this diversity of owner/operators and their investment capabilities comes more modern facilities to enhance the lifestyle within the communities.

Unfortunately, it can also mean more significant challenges from a legal perspective for residential home owners where a dispute arises between the home owner and owner/operator.

The current iteration of the Act offers a variety of means to assist in resolving matters in dispute, whether seeming trivial or of significance, including internal voluntary dispute resolution, mediation or through a Tribunal. Whilst the Act may provide definitions of certain aspects of this subject, i.e., the Commissioner and the Tribunal, these definitions are extremely limited in detail creating additional challenges to any home owner considering a complaint.

Unfortunately, any endeavour to put forward a complaint for resolution is fraught with challenges for the individual home owner. Consideration of a complaint being made by a resident requires a knowledge of and ability to interpret the Act, understanding the process to commence proceedings and if and where advice regarding the potential support of a third party to mount a complaint is available. Without an awareness of the availability of this third-party support, e.g., Department of Fair Trading, the Tenants Union, ARPRA etc., the daunting task of navigating through the legalistic and bureaucratic process of mounting a dispute, whether it be through internal voluntary dispute resolution, mediation, or the tribunal and with the potential for a significant financial outlay to ensure a fair hearing can be a significant deterrent to a home owner.

Clearly there is a need for more detailed information to be made available to residents and potential residents regarding the Act and the course of action necessary and support that may be available should a home owner consider disputing a matter with an owner/operator. The requirement for the provision of this information should be considered within the review of the Act.

Records of a particular owner/operator with regard to their standing as being compliant with all aspects of the Act, their qualifications as owner/operators of a Residential Land Lease Community and the standard of knowledge of matters pertaining to the management of these communities by the owner/operator and their staff should be publicly available to ensure the integrity of the sector. The requirement for the provision of this information should also be considered within the review of the Act to ensure compliance.

Part B - Resolving Disputes – Internal Voluntary Resolution, Mediation and Tribunals

Written by Kevin Lewis

At the time of the Review there are approximately 500 land lease communities in New South Wales, accommodating about 34,000 residents. With the plethora of advertising for the sector it is evident that the growth in Residential Land Lease Communities will continue. It is further evident that this future lifestyle is the choice an increasing number of retires. It is also attracting a diverse range of owner/operators including large investment companies and corporations (international and national) With this diversity of owner/operators and their investment capabilities comes more modern facilities to enhance the lifestyle within the communities. Unfortunately, it can also mean more significant challenges from a legal perspective for residential home owners in instances where a dispute may arise between the home owner and the owner/operator with a potential significant outlay to ensure a fair hearing.

The Act

The Current iteration of the Act offers a variety of means to assist in resolving matters in dispute, including internal voluntary dispute resolution, mediation or through a Tribunal. Whilst the Act may provide definitions of certain aspects of this subject, i.e., the Commissioner and the Tribunal, these definitions are extremely limited in detail creating additional challenges to any home owner considering a compliant.

Disputes, Administration and Enforcement

The statistics at page 36 of the discussion paper addressing the number of enquires received afford a number of interpretations, but without further information available if the number of complaints by home owners received by NSWFT is a mere 15% of enquires made it would not be too difficult to assume that a number of the enquirers were too intimidated by the process and decided not to proceed with any further action.

The endeavour to put forward a compliant for any dispute is fraught with challenges for any individual home owner. Any consideration by a resident being given to a compliant requires a knowledge of and ability to interpret the Act, understanding the process to commence proceedings and if and where advice regarding the support of a third party to mount a compliant is available. Without an awareness of the availability of this third party, e.g., NSWFT, the Tenants Union, ARPRA etc, being faced with the daunting task of navigating through the legalistic and bureaucratic process of mounting a dispute whether it be through internal voluntary dispute resolution, mediation or the tribunal, can be a significant deterrent to a home owner. It even raises the question of whether the complainant is aware of the existence of the Act. The question is whether this, together with any potential financial implications the complainant may envisage is reflected in the statistics referred to previously.

Internal Voluntary Dispute Resolution (Part 12 Disputes Division 1)

The resolution process described under this Part of the Act suggests that the operator may establish the necessary arrangements, supposedly in consultation with the Residents Committee, should one exist. If the community does not have a committee or the operator does not recognise it in the formal sense, any such action to attempt to resolve the matter would be brought into question about the credibility of the arrangement with the process being heavily biased toward the operator. This approach to the resolution of an issue leaves the home owner facing the choice of proceeding under a question of the credibility of the procedure or to take it further to mediation in accordance with the Act.

The uncertainty of facing a process that is neither clear to the resident and possibly biased towards the operator, with potentially a panel of experts defending the operator, makes the process a daunting one that may well result in the home owner withdrawing the compliant.

Mediation (Part 12 Disputes Division 2)

Again, this approach to the resolution of a dispute, as described under the Act, raises similar challenges to individual home owners as those considering voluntary dispute resolution, including an ability to understand the Act exists. While the Act itself spells out the procedural aspects necessary for parties to commit to mediation it does not offer advice regarding the steps necessary to commence these proceedings. In fact, the detail contained withing this section of the Act itself is s deterrent to any complaint proceeding. Without the

knowledge by the home owner of where to go for advice regarding such matters as that advised under Division 2 (Paras 145 & 146) the process again errs on the side of the owner/operator with access to legal resources for advice on the Act and the necessary issues to be addressed during mediation. Whilst Division 2 (para 152) refers to the matter of representation of parties the advice under this section again places the home owner in the unenviable position of further uncertainty as, with so many other aspects of the Act, the advice there-in is either too ambiguous or uncertain as to the way forward.

Powers of Tribunal (Part 12 Disputes Division 3)

Regarding Division 3 Powers of the Tribunal (Para 156) the question of a clearer definition of what the Tribunal is, under what authority it operates, its function and when it would be called into the resolution of a dispute is uncertain leaving a potential complainant to question whether to proceed. Access to the Tribunal for the home owner under the current act would require legal expertise, again being a financial impediment to the process for the home owner. The final 'nail in the coffin for the home owner in any attempt at a resolution to a dispute is the ability of the owner/operator to challenge the findings of the Tribunal in a higher court. This action would, in most instances be beyond the financial resources of the home owner and with the thought of an ongoing legal battle would be a significant deterrent to continue to seek a fair and equitable outcome to the dispute.

Conclusion

From the perspective of the home owner the challenges to be faced seeking resolution to a dispute are daunting. Extremely limited information is provided to new or potential home owners regarding the protective instruments in place to ensure an effective and efficient resolution to any complaint. As evidenced at the beginning of this summary the statistics provided would seem to indicate a significant number of complainants walking away from taking matters forward simply because of a lack of information being available to explain the process in simple terms. The current structure is weighted heavily in favour of the owner/operators, just by their own resources would be readily available to mount a challenge against any complaint or dispute whatever process is being utilised, i.e., voluntary dispute resolution, mediation, or through the tribunal. The potential financial implications to the home owner and the limited knowledge of the resources available may be to the detriment of a dispute being set led in a fair and equitable manner.

The Act clearly needs to be revisited to ensure it is fair and impartial as it forms the basis in law for the existence of the industry and the mechanisms for all disputes between the two parties involved. In its current form It is clearly too biased toward a favourable outcome for the owner/operator and is too challenging to interpret and find a way forward for the home owner. There is a distinct need for more simplified information for home owners to consider the steps necessary to raise a matter for resolution in keeping with the intent of the Act.

More detailed information for the home owner or potential home owner addressing the staged process of establishing and proceeding with a complaint should be provided on request from the owner/operator in the form of a publication available through the NSWFT (and not the owner/operator) to ensure consistency across the sector.

General Comments

Education

A training regime (constituting a form of continuing professional development) needs to be established under the auspices of the NSWFT with the status of the owner/operators standing recorded against the business register. Such a program would ensure the integrity of owner/operators and some certainty for both the current and potential home owners of the currency of the owner/operator with all matters relevant to the functioning of a community under the Act.

Licensing of Owner/Operators

Like real estate agents and noting the significant growth of Residential Land Lease Communities it seems timely to introduce a licensing regime to ensure the credibility of owner/operators of the sector. Such a regime would enhance the regulatory aspects of the sector providing further certainty for home owners and potential home owners of buying into a community.

Penalties and Fines

With the significant growth in Residential Land Lease Communities and the considerable Investment opportunities it seems timely that a review of the penalties and fines be undertaken. The credibility of current owner/operators is not being questioned but with the growth in the Sector opportunities will exist where future investors recognise the potential for unscrupulous behaviour. A

more stringent and strongly enforced penalty and fines structure with appropriate Investigative powers by the NSWFT would seem appropriate. This will ensure the integrity of the Residential Land Lease Communities sector and provide the necessary protective measures to all current and future home owners.

> **NB.** An education program and licensing for owner/operators combined with a stronger and enforceable penalty and fines regime would lead to better managed communities to the benefit of all parties.

Current Register of Owner/Operators

The current Register of owner/operators is extremely difficult to navigate and does not clearly provide the information it is meant to, i.e., whether a community has a Residents Committee, whether the owner/operator has been fined or any penalty imposed, the number of complaints against the owner/operator, matters resolved and whether in favour of the owner/operator or the Resident should also be included. This information could be a deciding factor in the decision by the potential home owner. The efforts of potential home owners looking for a community within a certain locality would be simplified if the Register is provided in local council/shire order.

Part C – Executive Summary

The RLLC Act enables community rules to be made about "the use, enjoyment, control and management" of a community. Prima facie this appears to cover the same subjects, however the lack of specificity has led to unnecessary, restrictive, and non-enforcement of community rules that do impinge on the freedom and rights of residents.

Part C explores the following areas and offers recommendations for each area:

a) Part 5 Rights and obligations

b) New and amended rules.

c) Disputes about community rules

d) Enforcement of Community rules

e) Community rules to be consistent with other laws.

Part C -Community rules – ineffectual rules

Written by Glenda Thomas

Under the repealed Residential Parks Act 1998 park rules could be made regarding a prescribed list of subjects: noise; speed limits; parking; rubbish disposal and recycling; pets; games and sports; the use and occupation of communal facilities; maintenance of homes and sites; safety; storage and repair of cars, boats, and trailers; and transportation within the park. This was a comprehensive list that enabled operators to manage the community without overly restricting the freedom or rights of residents.

The RLLC Act enables community rules to be made about "the use, enjoyment, control and management" of a community. Prima facie this appears to cover the same subjects, however the lack of specificity has led to unnecessary, restrictive, and non-enforcement of community rules that do impinge on the freedom and rights of residents.

Definition

s.4 (definitions includes):

home owner means—

(a) a person who owns a home on a residential site in a community that is the subject of a site agreement (whether or not the person resides at the site), or ……..

***operator** of a community means a person who is--*
(a) 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, or

***"owner"** of a community means--*
(a) the owner of land on which the community is located, …….

Part 5 Rights and obligations

At s.35 the Act outlines the basic responsibilities of home owners and operators. At s.36, a home owner has the following responsibilities, for this submission s.36(l) is relevant in that compliance is required with the site agreement and community rules.

Likewise, at s.37, the operator of a community has the following responsibilities, for this submission s.37(1) (l) is relevant in that compliance is required with the site agreement and community rules.

In the Act is clear that everyone in the community, including the operator and their employees, must comply with the community rules. However, the owner appears to hold a different view. While home owners and their visitors are prohibited from riding skateboards, kick-scooters rollerblades etc around the resort, the owner is permitted to let his family and visitors to be exempt from this and various other community rules.

Recommendation

That the owner be added to the Act and be made to comply with the Part 5 in line with home owners and the operator.

New and amended rules.

Home owners have reported feeling detached from the process of amending community rules. Our Community Rules were updated and finalised in October 2019 with the input from some residents who instigated the update. In accordance with s. 90 (2) (b), there is only a limited obligation on operators to involve home owners in the process of amending or introducing community rules. The requirement on operators to advise and consult with residents' committees under section 90 (2) (b) is, in practice, a hollow provision. For example, where a residents committee exists, operators can fulfil this obligation by writing to the committee and seeking comment on the proposed rule amendments. Often, however, operators proceed to introduce the rules as planned regardless of the perspective of the residents committee or the residents the community it represents. Although the intention behind section 90 (2) (b) is clear - that residents should have the opportunity to play an active role in community rules which will affect their day-to-day lives - in practice this is not occurring.

Broadly speaking, the inadequate community rules processes are a result of two issues. Firstly, the obligation of consultation by operators prior to the introduction of community rules under section 90 (2) (b) does not benefit communities where there is no residents committee, thereby depriving home owners in many residential communities from active involvement in the process. Secondly, as outlined above, even where a committee does exist, the

provision has no teeth and requires reform to be effective. The impact of community rules on the lives of residents is significant and the Act should provide a meaningful process that requires their engagement and acceptance to new or proposed amendments to community rules. A simple way to achieve this is to require 75% of all residents to agree to any new or proposed amendment to a community rule. The Act, at section 50 has a similar requirement for the introduction of a special levy and consequently such a concept is not new.

Recommendation

Section 90 be amended to include the community engagement to all new or proposed amendments. Any new or prosed amendment must see the operator be totally inclusive of input from the community and not just what works for them.

At section 86 (1), written rules relating to the use, enjoyment, control, and management of a community may be made in accordance with this Part. Be amended to read 'Written rules relating to the use, enjoyment, control and management of a community in consultation with the community

Disputes about community rules

Home owners also believe that challenging the fairness of community rules has become more difficult under the RLLC Act. One operator introduced a rule which prohibited home owners from installing ornaments or statues of any size or type on their site. A home owner challenged the rule at the Tribunal on grounds including that it was not fair and reasonable but was unsuccessful with the Tribunal finding the rule was lawful under section 86. Under the Residential Parks Act 1998 the Tribunal had the power to declare a park rule to be unfair. The RLLC Act should provide that same power.

Recommendation

Residents of a community should also be able to make an application to the Tribunal to have a community rule set aside if 75% of the residents of the community support the application. The Tribunal could be given a list of factors for consideration, including health and safety.

Enforcement of Community rules

At s. 93 (1) of the Act states "*the operator of a community must ensure that the community rules are enforced and interpreted consistently and fairly*." Enforced is open to lose interpretation as there is no definition in the Act. Without just clarification, each operator can use the enforced very liberally or to the other extent, strictly.

What are the criteria for enforcement? Aside from the definition, there is no weighting against any breaches of the community rules. What constitutes a breach and what actions should be undertaken. Where is the consistency across each village let alone all villages within NSW? For example, a neighbour's dog is barking to excess. A report to the pet owner highlights the offence with a formal warning being sent. In another like event, the owner of the dog was taken to the Tribunal with the resident leaving the village. On what basis are two like events handled differently? Where is the equality and on what basis are rules weight let alone enforced?

Recommendation

That a definition for enforced be included in the Act and that a weighting be introduced to enable consistency throughout individual villages and all villages throughout NSW.

Community rules to be consistent with other laws.

At s87, a community rule is of no effect to the extent that it is inconsistent with this Act or any other Act or law.

Section 44 (6), it is not unreasonable for an operator to withhold or refuse consent on the ground that the additional person does not meet age restrictions for occupancy set out in the community rules that were in force when the home owner entered into the site agreement. In our community rules, it states that *home owners must be over 50 years of age (excepting on-site management staff) but may have a partner or spouse aged less than 50 years.*

Has the Act has encouraged the introduction of age restrictions within the community. Has it been read by operators to mean that any community can introduce an age restriction without having regard to anti-discrimination law, in most cases the age of entry is restricted to 50 - 55 years or older?

Age discrimination occurs when a person is treated less favourably, or not given the same opportunities as others in a similar situation, because he or she is too old or too young. The Age Discrimination Act 2004 (ADA) prohibits discrimination in employment based on age. It applies to young and older workers alike. The ADA also protects younger and older Australians from discrimination in other areas of public life, including education; getting or using services; or renting or buying a house or unit.[1] The Act clearly contravenes Commonwealth legislation, specifically the Age Discrimination Act 2004.

Recommendation

That s.87 be amended to reflect that an age restriction community rule can only be made in a community that has obtained an exemption under anti-discrimination law.

[1] Age discrimination act 2004 Australia – accessed 6 March 2020.

Part D - Executive summary

At s.50 and s.69 (2) of the Act, “the term special levy is introduced. In these two sections, all but one of 2 or more home owners for such a site are excluded from the definition of home owner in s4 (1) of the Act for those purposes only. In all other circumstances that are conducted in the villages, all residents should be entitled to a vote (i.e., not just to one home owner).

A case study has been provided which highlights the lack of understanding by the operator as to when the restrictions that apply to special levy are enforceable. The case study highlights a recommendation that s.50 and s.69 (2) of the Act with a flow on effect to s.15 of the Regulations, be rewritten to ensure that home owners, operators and all other parties understand when the limitations of special levy apply.

Part D - Special Levy – interpretation

Written by Glenda Thomas

Section 50 of the Act pertains to a special levy for community upgrade.

> (1) The home owners in a community may, by a special resolution, agree to pay a special levy to enable the operator of the community to provide a specified new facility or service for the community or to make a specified improvement to the community (a community upgrade).

In the Residential (Land Lease) Communities Regulation 2015 which comes under the Residential (Land Lease) Communities Act 2013, there is specific information that outlines cases where a residential site has 2 or more home owners.

At s.15 of the Regulation,

> (1) The purpose of this clause is to ensure that regard is to be had to only one home owner for each residential site for the particular purposes mentioned in subclause (2).
>
> (2) This clause applies for the purposes of the following matters, in cases where there is more than one home owner for a particular residential site:
>
> (a) determining the percentage of home owners—in connection with a resolution under section 50 (3) of the Act that is to be passed by a certain percentage of home owners in relation to a special levy,
>
> (b) determining the percentage of home owners—in connection with an application under section 69 (2) of the Act for mediation that is to be signed by a certain percentage of home owners.
>
> (3) All but one of 2 or more home owners for such a site are excluded from the definition of home owner in section 4 (1) of the Act for those purposes only.

At s.50 of the Act, the term special levy is introduced. In these two sections, all but one of 2 or more home owners for such a site are excluded from the definition of home owner in s4 (1) of the Act for those purposes only. In all other circumstances that are conducted in the villages, all residents should be entitled to a vote (i.e., not just to one home owner)[2].

Case Study

Recently, the owners of the village made a considerable donation "to the residents committee to be used by the residents as decided by the residents".

[2] Residential (Land Lease) Communities Act 2013 No 97 [NSW] 2015, s.50

The residents committee put out a call for submissions on how best to spend the money. A multitude of submissions were received and once finalised, the submissions were sent to be voted on by the residents. The operator believed that is accordance with the Regulations s. 15, each home should have only been permitted one vote in lieu of each resident voting. The residents committee believed that both the Act and the Regulation were explicit in their meaning and that the restriction of one vote per household only applied to s.50 and s.69 (2) of the Act.

The operator attempted to justify their reasoning for only one vote per home citing s50 and s69(2) of the Act applied to all voting. If this were the case, then elections for the residents committee would only allow one home owner to have a vote. Who has the right to this vote if the home is occupied by two people?

Recommendation

That s.50 and s.69.(2) of the Act be rewritten to ensure that home owners, operators and all other parties understand when the limitations of special levy apply and more importantly that the Act specifically permits each resident to have a s.50 and s.69 (2). This should have a flow on effect to the Regulations.

The Regulation, at s.15, an additional clause should be included stating that aside from s.50 and s.69 (2), each resident is permitted to have a vote on any matter.