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| **From:** | Tom Coster |
| **To:** | Residential Land Lease Communities Review |
| **Subject:** | RLLC 2013 Act review. |
| **Date:** | Sunday, 7 February 2021 7:59:04 PM |
| **Attachments:** | Submission to Statuary Review of RLLC 2013 Act V5 .docx<br>Submission Imbalance of Power or in Pursuit of Fairness - Final 7-02-21.docx |

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,

I present in the attached documents, my submission to the above review.

My submission is in two parts.

(a) "Site Fee Increases - Searching for an Explanation" dated 20th January 2021 and,
(b) "Imbalance of Power or in Pursuit of Fairness" dated 7th February 2021.

The submissions address the most pressing issues I, and many other RLLC villages, consider need rectifying in the Act and the administration of the Act and Regulations. It is not intended to be comprehensive of all issues. I am sure others 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 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 homeowner 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.

We started this review process not having any contacts outside our village. At the time of making this submission, some 30 villages from South of Sydney to the QLD border have expressed interest and support in the matters raised. As also do our local politicians.

In the past Fair Trading has relied on ARPRA as the advocate of homeowners. ARPRA represents only a small number of RLLC homeowners. I and others have found the Tenants Union and other homeowner associations more capable of representing homeowners interests than ARPRA and ask that this be considered

when assessing submissions and representations.

Your deep consideration of the issues raised is sought, not just a papering over of some of the more obvious cracks in the Act.

If required I would be pleased to elaborate on, or respond to questions regarding my submissions.

In this we trust a better and sustainable environment can be developed for the RLLC model.

Yours sincerely,

Tom Coster [redacted]

# Submission

20th January 2021

## To Statutory Review

Residential (Land Lease) Communities Act 2013 No 97 NSW

**Prepared by** - T.C. Coster

For the Riverbend Residents Committee

## Site Fee Increases Searching for an Explanation

Part A. Introduction

Part B. The Explanation

Part C. Non-Recurring Expenses

Part D. Asset Preservation

# Part A. Introduction

The focus of this submission is, from a homeowner's perspective, on one of the most serious defects in the RLLC Act. That is the control of site fee increases in RLLC villages.

In considering this subject, it is useful to consider recent history since the introduction of the RLLC villages Act. When the Act was introduced in 2013, it was aimed at improving the regulation of caravan parks offering long term site rentals upon which a resident could place a removable home. Long term sites were usually grouped with conventional short-term camping and caravan sites. Hence the principal lobby group for operators is the Caravan & Camping Industry Association NSW. Fast forward to the present, while caravan parks with long term site rentals remain, the overwhelming bulk of these RLLC villages are now purpose built, in conjunction with the Manufactured Housing Industry, as permanent long-term home sites with not a tent or caravan in view.

This transformation has been accompanied or facilitated by a dramatic change in ownership of these parks. From a municipal council or privately owned caravan park, they are now owned by large investment companies, often international organisations, and operated by specialist management companies. In conducting their business this class of ownership has access to legal and financial resources homeowners can only dream of.

At the expense of homeowners, mainly self-funded retirees or pensioners it is becoming apparent, this new class of operator is now using their resources to find weaknesses in the RLLC Act, through which they can maximise their returns on investments. *Site fees* have become a pipeline enabling the transfer of private and public pension money, into operator coffers.

Certainly, the quality of life provided in these new styles villages and the contribution to homing an ageing population is commendable, but as when the 2013 Act was introduced, regulation appropriate to current circumstances is now needed.

The 2013 Act has a weakness that puts the operators in control of the valve regulating the flow of cash to their coffers. That valve is the 'By Notice site fee increase'. While a provision of the Act requires an 'explanation' to be provided justifying the reason for site fee increases, by failing to mandate the form and content of that 'explanation' the operator has control of that valve.

A form and content of the explanation has been constructed by operators that is meaningless and devoid of information useful to a homeowner in administering their site agreements. By blinding the homeowner with this veil of secrecy as to the reason and justification for increases, the operator is freely charging whatever the market will bear. These actions are causing major distress to older long-term residents. Unable to meet the escalating fees demanded, they are being forced out of their homes only to be replaced by newer, younger, cashed up replacements yet to encounter the inequity. That defeats the overall objective of the Act; to facilitate affordable retirement housing.

The operator is entitled to operate a profitable business, but not by using unfair, predatory tactics against a community with limited resources to defend itself. Our submission deals with an important aspect of this issue, the **explanation,** and its dependant issues.

# Part B. The Explanation

**Synopsis**

*The **explanation** required to be provided by the operator under the Act justifying a By Notice site fee increase, provides no information useful to the homeowner, in the form and content adopted by village operators for that notice.*

*There are more than 70,000 people living in residential land lease communities (RLLC) in Australia, 35,000 in NSW alone. Homeowners are classified by the Operator lobby group[1] as over 55 low-income retirees and pensioners.*

*The explanation universally provided is a concoction created by the operator lobby group designed to hide and conceal financial information necessary for homeowners to administer their site agreements.*

*The Act requires amending to ensure the form and content of the explanation is fit for purpose as the homeowner's source of financial evidence relating to site fee increases and related ability to administer homeowner site agreements.*

*Statutory Review – Discussion Paper*

20. Is the process for resolving disputes over site fee increases by notice working effectively? No. In our 192-home village, over last 9 years fees have exceeded CPI increase by more than $700,000 without explanation.

*21. Should there be changes to the grounds for challenging site fee increases by notice? Yes, the requirement for a valid fit for purpose 'explanation' should be mandatory, and the obligations of site agreements observed.*

*22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest? Yes, the Tribunal system is highly legalistic requiring legal expertise to navigate and advocate. An expense beyond homeowners' resources. It requires change to provide a consistent and common-sense system within the financial and intellectual grasp of the homeowner clientele, +55's low-income retirees and pensioners.*

*Page 14*

**Introduction - The issue**

1. A site agreement is a contract that sets out the rights and obligations of parties to that contract.
2. The standard form of site agreement provides an option for the operator to vary the fee charged for rental of the homeowner's site in a village. This option may be exercised by the operator but only under conditions set out in a site agreement and the Act.

[1] Source: Submission to Commonwealth Treasury 2017 consultation paper on Stapled Structures by Land Lease Living, Caravan & Camping and Manufactured Housing Industry Association.

3. The Act [Article 65] allows two methods for the operator to increase site fees. A **Fixed** method or a **By Notice** method. The discussion that follows relates specifically to the By Notice method.
4. Article 67 of the Act prescribes the conditions under which a By Notice increase in site fees can occur. One of those conditions is the provision of an **explanation** for the increase. Article 67 (4) (c, d, and e) refers.
5. The Act makes the requirement for the provision of an explanation clear. However, by failing to prescribe the content and form of the explanation in the regulations to the Act, homeowners have been left impotent in accessing from the operator, the financial information envisaged by this provision. It is the clear intent of the Act that the explanation should reveal to the homeowner the **evidence** supporting a 'by notice' site fee increase.
6. Compounding the impact on homeowners of that omission, a situation has now been created where operators have stepped in and created their own form of explanation. This form of explanation can be characterised as being a model of concealment and not one of being open, informative, and transparent as envisaged by the objective of the Act. Their model continues to exist only by lack of challenge, and by some Tribunal members taking a very broad overview of the requirement, failing to grasp the significance of the intended purpose of the explanation, and accepting the operator's model. The Act provides no authority to support the operator's 'explanation' model.

**The impact on homeowners**

7. An explanation is meant to make something clear, to provide justification for an action.
8. The explanation provided by operators is incapable of scrutiny as to,
   a. evidence of cost increase,
   b. evidence the included costs are payable by homeowners under their site agreements,
   c. whether the increases are recurring or non-recurring in character, or if the cost increases are limited to increases since the last site fee increase,
   d. or even if the operator just plucked an amount, he thinks he can get away with, out of the air.
9. An example of the form of explanation offered almost universally by operators follows.

> ["*Explanation for the increase.*
>
> *The following are some of the issues that have been assessed in determining the increased site fees: Government rates and charges, sewage and drainage, telecommunications, insurances, gardening and landscaping, wages/salaries, waste disposal, building and grounds maintenance, machinery upkeep, accounting and administration, site management and vehicle expenses.*
>
> *These costs as well as the commercial reasoning associated with these issues impact directly upon the operation and sustainability of the community.*
>
> *The site fee increase of $7.00 is required to ensure the impacts of these issues are accounted for and help maintain the continued viability of the community"*].
>
> Source: Riverbend Village *By Notice* site fee increase dated 30th August 2019

10. The format of the operator's notice is generic in construct, concocted by the operator's lobby group, and has found almost universal use within RLLC villages. Using this form of explanation, operators claim, *'costs however incurred in operating a village contribute to the assessment and inclusion in site fee increases'*. Coupled with some Tribunal Members rulings supporting the operators form of explanation, it is virtually impossible for homeowners to challenge that concept, faulty as it is.
11. A valid fit for purpose explanation is fundamental to the homeowner's ability to administer their site agreement (contract).
12. To administer that contract, the parties are entitled to equal access to critical information bearing on a contractual matter. In principle, if one party because of a privileged position withholds information relevant to an issue from the other party, procedural fairness may be breached - in this case access to evidence of costings that support site fee increases incurred in operating a park. These costings are central evidence in determining site fee increases that a homeowner is responsible to pay under their site agreement. The Act recognises this principal in its requirement for an explanation. However, failure to be definitive as to what is required by the explanation, has allowed operators to create their own form of explanation and corrupt the intention of the Act, for fair dealing. Their form of explanation is the reverse of everything an explanation is.

**Recommended changes to the Act**

13. It is recommended that Article 67 (4) (c) and (d) be amended by removing reference to the regulations and inserting in the Act, requirements for the content and form of the explanation.
14. The amended explanation content should have the following characteristics. The explanation for each expense item contributing to the 'by notice site fee increase' should contain the following information: -
    - the date or date range over which the expense was incurred,
    - A description identifying the nature and purpose of the expense',
    - A statement of the amount in $ of the expense,
    - A mechanism to trace the expense back to source documents evidencing the expense.
15. If an expense is included as a justification for all or part of a site fee increase, then evidence of this expense should be mandatory. [*Refer also paragraph 11 above and Part C. recommendations*]. If the operator does not want an expense examined, then he need not include that expense in the calculation of the increase. The explanation should show mathematically, how the site fee for a homeowner site was calculated based on the expense data outlined in the foregoing paragraph.
16. Like expenses could be grouped for reporting purposes in a summary format, **provided always**, if required by the homeowners, verifiable detail of the group component items shall be provided to the homeowner by the operator. Verifiable, meaning presentation of original source documents supporting grouped items. In other words, be capable of audit.
17. Reasonable and private access is required to be provided at the homeowner's village for homeowners and their advisers to examine financial evidence supporting site fee increases. The operator should be available, but not present during examination of the

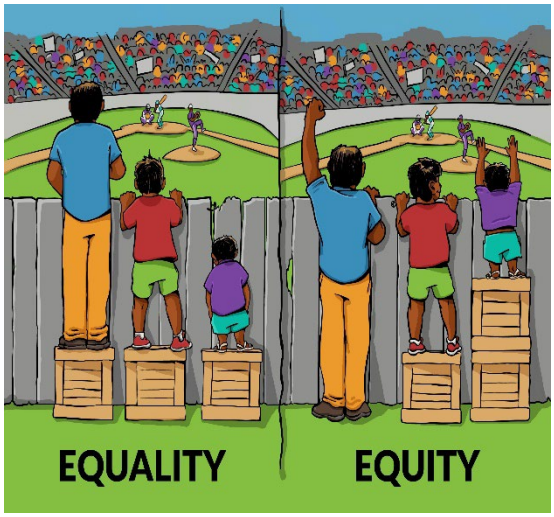
financial evidence, to answer questions that may arise or provide, on notice, a response. In essence an open book review process regarding evidence for by notice site fee increases.

18. The timing and period of examination of financial evidence should be agreed between the parties but the examination period should be no less than two working weeks from the financial evidence being handed to the homeowners or their representatives. If additional financial information is to be provided, then the period for review recommences from receipt of that evidence.

19. The process of reviewing financial evidence for a By Notice site fee increases should occur prior to any need for mediation or tribunal hearings. The whole process should be designed to permit **informed decision making** by homeowners prior to accepting or rejecting a site fee increase.

20. No paragraph.

21. The writer is aware this may be a difficult assignment for the legislation drafters and political decision makers, but it cannot be ignored as was done when the Act was introduced in 2013, and ignored again in the regulations in 2015, with the subsequent abuse by operators of this inaction. Unless addressed carefully to provide balance and equity between homeowner and operator interests, and that balance includes consideration of the relative financial and technical imbalance of resources available to homeowners as compared to operators, a major defect will remain in the Act.




22. In the foregoing discussion the term site fee **increase** is used. As discussed in following Part C. that process must also include **decrease** where applicable.

# Part C. Non-Recurring expenses

**Synopsis**

*An anomaly exists in the procedure for determining site fee increases where non-recurring expenses or any other expenses of fleeting duration are included. The problem is, that once a new expense is added to the retiring site fee, it stays there for ever, even after the cost, for which that expense was originally included, has been recovered and justification for its inclusion long gone. It becomes a classic 'fee for no service' issue.*

*The inclusion of non-recurring expenses in site fee increases is exacerbated by the form of explanation provided by operators, that format conceals any useful financial information revealing the existence of such non-recurring expenses and their treatment. To deal with this and other site agreement administration issues, mandated access to relevant financial data via a fit for purpose 'explanation' is required.*

*A similar issue arises when services are reduced, or an otherwise recurring expense is reduced. Unless these reduced expenses are reflected as a reduction in calculating a new site fee, another 'fee for no service' situation arises.*

*The Act makes no provision for treatment of this type of fleeting non-recurring expenses, allowing only a ratcheting up of site fees but no reduction when an intermittent cost recovery, or a recurring cost reduction has occurred. This anomaly in the Act requires correction.*

*Statutory Review – Discussion Paper*

21. Should there be changes to the grounds for challenging site fee increases by notice? Yes, Act should provide for adjustment to site fee for non-recurring expenses previously paid.

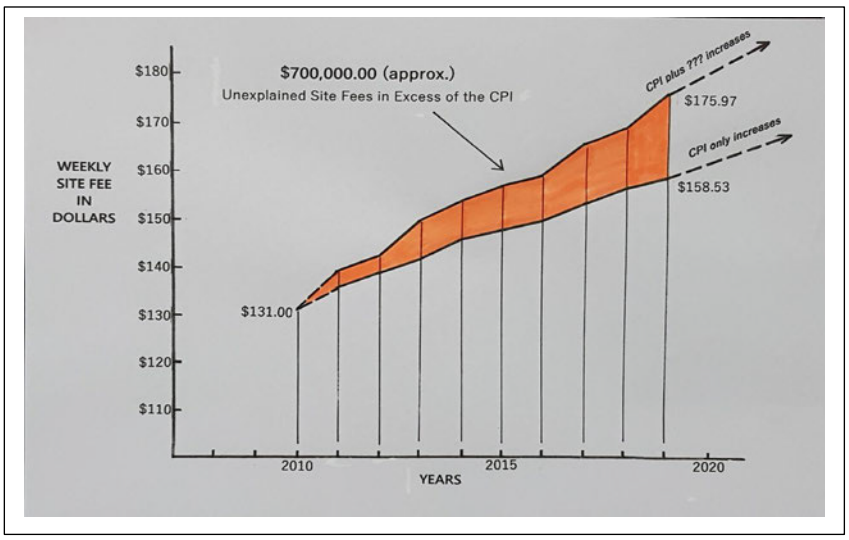
22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest? Yes, the Act should allow for reductions in site fees where costs have reduced or are no longer applicable.

*Page 14*

**Introduction - The Issue**

1. For example, in Riverbend Village over the past nine-year period, site fees are noted to be escalating at a rate considerably exceeding CPI increase. In the graph below, these increases are illustrated.
2. Viewed from an individual homeowner's perspective it is difficult to understand why these increases should be occurring. While the operator is claiming cost increases are occurring there seems to be no corresponding increase in site workload or increase in services that general cost inflation as described by CPI, could not explain. As new homes were coming online, the additional homeowner site fees contribute to the cost new homes create. Meanwhile, common community facilities and services remain unchanged, but their cost is shared by more homeowners. So, a reduction per homesite should follow.

3. The explanation for a site fee increase provided by the operator provides no useful information to enable homeowners to understand these increases. The following graph based on Riverbend Village experience, illustrates the unexplained increases. It shows actual site fee increases, and site fees if only increased by CPI.




4. For the nine-year period prior to 2019, the unexplained difference between what the village was charged in site fees and what it would have been charged if increased by CPI alone, was more than $700,000.

5. How can this cost increase be explained? We submit there can be three likely reasons for actual site fees charged exceeding CPI increases.

   (i) Non-recurring expenses included in a site fee increases as a cost recovery, are rolled over into the next period and compound period on period,

   (ii) Increases based on expenditure for the preservation of village community assets, not the responsibility of homeowners, are included and

   (iii) Increases without specific justification, just because the operator could.

   While noting items (ii) and (iii), this section of the submission focuses on item (i). Item (ii) is dealt with in Part D and item (iii) is self-evident.

6. Site fees are subject to adjustment as prescribed by the Act and Site Agreements. In general terms a *new By Notice site fee* is arrived at by adding an increase, to the value of the *retiring site fee*. This process occurs when a notice of site fee increase, is issued. The date specified in that notice, as the effective day, signifies the date the *retiring site fee* terminates, and the *new site fee* becomes effective.

7. In this submission we argue that in the case of By Notice site fee increases, when calculating the $ amount of the new site fee, non-recurring expenses included in the *retiring site fee* as a 'cost recovery' must be **deducted**. If not deducted the already paid non-recurring expenses will be included again in the *new site fee*. Further, and if occurring, recovery of these non-recurring expenses compound into each future site fee increases, for ever.

8. A non-recurring cost included in a site fee increase 10 years ago, remains there to the present day and into the future. As each period passes more non-recurring expenses are added even though they too have been paid long ago. This, to permit such transactions to occur, and additionally when coupled with the operator's concealment

of useful cost evidence in the 'explanation', is behaviour that could be classed as unconscionable commercial conduct.

**The impact on homeowners**

9. Consider the following real-life example for Riverbend Village Ballina NSW.

*A preceding site fee for 2018/19 was $168.97/homeowner/week.*

*The equation for the new site fee following the preceding site fee was.*

*$168.97/homeowner/week (2018/19)*

***plus***

*2019/20 increase ($7.00/homeowner/week) comprising (non-recurring expenses ($A) + recurring expenses ($B))*

***equals***

*retiring site fee of $175.97/homeowner/week.*

10. Recurring expenses ($B) - these are an ongoing expenses type that occur year on year. Such as grass cutting, electricity, wages, insurance and like recurrent expenses.

11. Non-recurring expenses ($A) - these are intermittent expenses that once incurred, do not recur on a routine or annual basis. For example, re-tiling a swimming pool, refurbishment of a community building floor, re-mulching garden areas, repairing damaged or failed road pavement. These are intermittent non-recurring expenses.

12. Now*, provided payment for such an expense by the homeowner was provided for in the homeowners site agreement (and that is an issue discussed in Part D of this submission*), that cost could contribute to the calculation of the site fee increase for the next period. Then, over that next period, say the period between site fee notices of increase, that cost is recovered by the operator as part of the site fee for that period. In effect a cost recovery.

*Note also, that the period within which an expense contributing to a site fee increase can be considered is defined by the Act as being between the previous increase and a new increase (Act article 73 (4) and that period is not less than 12 months (Act article 67 (6).*

13. It follows then, that if unjust and unconscionable commercial conduct is **not** to occur, an adjustment is required in determining the magnitude of the new site fee (2020/21) to account for non-recurring expenses already recovered (paid for) during the retiring 2019/20 period. In other words, the equation for striking a new site fee, becomes:

*In our example, from the value of the retiring site fee*

*175.97/homeowner/week*

***deduct***

*the value of **non-recurring** expenses included in the retiring site fee $A (now paid)*

***plus***

*a valid* cost increase incurred during the retiring site fee period.*

***equals***

*the new site fee for next period 2020/21.*

** a cost the homeowner under the terms of his/her site agreement is contracted to pay.*

14. If this adjustment for non-recurring expenses is not made, then these expenses forming part of the retiring site fee roll over into the new site fee. **This compounding process repeats each site fee period thereafter, and unless halted, continues compounding forever**.

15. Consider also the following hypothetical example e.g., from our day-to-day commercial life.

    - *A homeowner calls in a plumber to unblock a drainpipe.*
    - *The plumber arrives and performs the work.*
    - *In due course he presents his invoice for the work.*
    - *As the homeowner is a bit short on funds, he arranges with the plumber to pay the invoice in monthly instalments over the next 12 months at 1/12th of the invoice amount per month.*
    - *However, to the homeowner's surprise, having paid the last instalment, the plumber issues to the homeowner a demand for payment for exactly the same service (already performed and paid for), and demands that same service be paid for again over the next year. The following year the same demand is repeated.*

16. What law of the land entitles the plumber to a second and forever recurring payment for a service already performed and paid for? 'Fee for no service' comes to mind.

17. The foregoing example expresses exactly the action an operator is imposing on homeowners when the cost of non-recurring expenses, having been recovered by the operator in the retiring site fee, are included again as a component of new and subsequent site fees. In a similar way, any expenses claimed as actual or projected increases, article 73 (4) of the Act, of a non-recurring nature, must be considered.

18. A similar cost reduction may also occur in what may normally be a recurring expense. For example, a reduction in staff levels, ending of a government levy, withdrawal of a service or some other reduction in what would normally be a recurring expense. That too requires an adjustment (reduction) in the level of site fee to account for the reduced cost of those services in the same way as if there is a valid increase in a recurring expense, where an increase is permitted. Else again, homeowners would be paying for a service they were not receiving.

**Recommended Corrective Action**

19. The Act be amended to require the operator to include, in the explanation, a statement (with evidence) of

    (i) non-recurring expenses (cost recovery) included in a retiring site fee, and

    (ii) cost reduction associated with a reduction in services. [*Refer also to Part B paragraph 14*].

20. The Act be amended to require retiring non-recurring expenses and cost reduction associated with a reduction in services to be credited (deducted) from the site fee before any new increase is added.

21. The Act, Division 2 – "Reduction of site fees", be amended to allow a site fee reduction for retiring non-recurring expenses and other reductions in expenses, additional to those presently listed in article 64 of the Act, without first requiring a tribunal direction.

# Part D. Asset Preservation Costs

**Synopsis**

*Park operators are increasingly attempting to include the cost of preservation of park capital assets into site fee increases. It is the homeowners understanding that under the standard site agreement such costs are the operator's responsibility not the homeowners.*

*The homeowner leases a site upon which to place his home. That lease includes the right of access to partake in the village services and amenities presented to him by the operator when entering into a site agreement. At that time there is normally no suggestion or disclosure by the operator to the homeowner that, over time, the homeowner will be required to pay the cost of preserving village amenities and services, the property of the operator. Potentially a serious financial commitment and one not disclosed to the homeowner.*

*This is another case where the explanation of a site fee increase must clearly explain what costs go to justifying an increase, so homeowners can be assured cost of preserving park capital assets are not included.*

*Statutory Review – Discussion Paper*

4. Is the ban on inducing a person to enter an agreement through false, misleading, or deceptive statements or promises working effectively? No. Example, that homeowners would be liable to fund the cost of preservation of the operator's assets is not disclosed. There are no requirements for Sinking Funds or the like payments.

20. Is the process for resolving disputes over site fee increases by notice working effectively? No, Tribunal jurisdiction scope narrow and legalistic and not capable of dealing with issues involved.

21. Should there be changes to the grounds for challenging site fee increases by notice? Yes, Act should define that the costs of preserving Capital Assets (asset preservation) are not costs that contribute to Site Fee increases. The village infrastructure does not belong to the homeowners and they have no say in how it is managed, site agreements just include the use of it.

22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest? (a) Explanation content be made fit for purpose, (b) Capital asset preservation cost be excluded from assessment of increases. The dispute settlement process to be made accessible to homeowners within their financial and experience capacity to use it.

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## Introduction - The issue

1. In assessing site fee increases operators claim that *"any expenditure, for whatever purpose incurred in operating the park, contributes to the calculation of site fee increases".* This position is challenged.
2. The site agreement and the Act require the Park Owner to maintain all common assets in good working order for the benefit of the Homeowner. The Park Owner is also required to keep the grounds and gardens clean and tidy, cut the grass, remove all rubbish, control weeds and vermin and pay all statutory charges relating to the park. The Park Owner is required to maintain the common areas, amenities, utilities and village security in the condition presented and described to the Homeowner, and specified in the site agreement, at the time of entering into a site agreement. That is what the Park Owner, for the receipt of a site fee, has contracted to do.
3. To provide these services, the Homeowner is aware that site fees may be subject to review. When undertaking this review what is not explained in the site agreement or the Act is, what cost increases are to be considered the responsibility of the Homeowner and potentially contribute to a site fee increase, and what costs are attributable to the Park Owner in maintaining and preserving the capital assets of the park.
4. The Homeowners contend that not all expenditures incurred in operating the park contribute to the calculation of site fee increases. There are five main expense groups to consider.

    a. Sales and Marketing
    b. Capital Development
    c. Preservation of Capital Assets
    d. Additional Facilities
    e. Outgoings and Operating expenses

### Impact on Homeowners

The Homeowner's position is that, of these five groups, only Recurring Outgoings and Operating expenses can be included in the calculation of site fee increases. The Act in the 'explanation' should make it clear that only those increased expenses, for which the Homeowner has a contractual responsibility to pay via site fees, are included in the site fee increase calculation.

5. **Sales and Marketing costs** - The Park Owners' model for calculation of increases in site fees includes costs relating to sales and marketing. These costs are recouped through sales commission. These are costs (direct and indirect) we, as Homeowners, do not accept as our responsibility. They are a Park Owners' commercial expense unrelated to the Homeowners' occupancy of a site or site agreement responsibilities and precede a homeowner's occupation of a site.
6. **Capital Development Costs** - Costs in creating the park or its expansion are a commercial matter for the Park Owner and precede any Homeowner site agreement. There are also other development costs that should not be included in site fee increase calculations. For example - delayed capital works, part of an approved development but delayed in being provided, such as a car wash facility, or security fencing.
7. **Cost of Preserving Capital Assets** - What do we mean?

    We mean any expenditure incurred in maintaining or extending the life of an asset to keep that asset in its near new condition including repair, refurbishment, or

replacement of the asset as required or necessary, to provide the services contracted for in the site agreement.

**What are these Capital Assets?**

A capital asset is property that is expected to generate value over a long period of time. Capital assets form the productive base of an organization. Examples of capital assets are infrastructure, buildings, computer equipment, machinery, and vehicles. Expenses in respect to maintenance and refurbishment of capital assets will tend to be intermittent non-recurring expenses. Such expenses are normally managed through a sinking fund or similar financial provisions, including owner simply financing on an as required basis.

For example, following is a list of capital assets belonging to the owners of Riverbend village, the maintenance and refurbishment of which are not the homeowner's responsibility to finance. They are the facilities that provide the services the operator has contracted to provide as a component of the site lease.

| | Item |
|---|---|
| 1 | The land occupied by the village |
| | |
| | **Built infrastructure** |
| 2 | The built roads, road substructure, road surfaces, road kerbs, and road drainage pits, pipes, grates, covers, and subsoil drainage system. |
| 3 | Rainwater (stormwater) detention basins and channels and associated engineered structures. |
| 4 | Paths, including substructure and path surface treatment. |
| 5 | Retaining walls and associated drainage provided to create the landform of the leased site. |
| 6 | Security gates and fencing |
| | |
| | **Services and utilities** |
| 7 | Sewer drainpipes connecting more than one house sewer to the sewer collection system and sewers external to a leased site. |
| 8 | Sewer pumping station structures and equipment including all associated pipework, valves, electrical and ancillary equipment connecting the pumping station to the ultimate council or other collection and disposal system including onsite septic systems and treatment plants. |
| 9 | Water reticulation system up to and including water meters, or if not individually metered to the homesite potable water isolating valve. |
| 10 | Fire service water system including all pipes valves, hydrants, and fire hoses. |
| 11 | Car washing facility |
| 12 | Village electrical installation up to homeowner electricity supply meters. |
| 13 | Street lighting system including all ancillary components. |
| 14 | Village fixed line telephone system up to house junction box. |
| | |
| | **Recreational facilities** |

| | |
|---|---|
| 15 | Swimming pool and pool water treatment and water quality monitoring equipment. |
| | |
| 16 | Bowling greens, tennis courts and other sporting and recreational installations and their related facilities. |
| 17 | Community hall and associated ancillary common area structures including, floors, roof system, internal and external walls and wall surfaces including, windows, doors, and window and door operating systems, and protective and decorative coating systems. |
| 18 | Community hall ancillary facilities including shower and toilet facilities, kitchen fit out, hall furnishings, pool table, gym equipment, TV and PA system, window dressings, hall lighting, air conditioning and ventilation systems, and all associated electrical and plumbing systems. |
| | |
| | **Landscape and plantings** |
| 19 | Landscape shrubs and trees |
| 20 | Common area garden beds and their plantings. |
| 21 | Lawns, and ground cover plantings, mulching. |
| 22 | Irrigation and garden drainage systems. |
| | |
| | **Management, Workshops, Equipment and Store** |
| 23 | Operators site office and administration buildings including workshops, garages, and storage sheds. |
| 24 | Office and workshop equipment, and tools used to maintain village assets. |
| 25 | Motor vehicles, and other mobile maintenance equipment. |
| 26 | Village bus used as a mobile advertising platform and as a service to homeowners. |

**8. Additional Facilities**

Should additional facilities be required or improved, articles 50 and 51 of the Act require the creation of a special levy for the purpose. This levy is separate from site fees and therefore these costs do not contribute to site fee increases.

**9. Outgoings and Operating expenses**

What are Outgoings and Operating expenses?

There is no direct requirement under the site agreement or the Act for payment of operating cost increases. However, there is a reference, in the Standard Form site agreement and the Act at article 67, enabling the operator to increasing site fees By Notice, but only if the increase is accompanied by an **explanation** for the increase. There is also a reference in article 73 (4) of the Act regarding orders the Tribunal may make relating to excessive increases in *outgoings and operating expenses*.

In the context of a RLLC village a reasonable understanding of increases in 'outgoings and operating expenses' would be a reference to **recurring** expenses that are incurred on a daily, weekly, monthly, or yearly basis, including minor repairs and

maintenance performed by on-site staff in running the village. A schedule of such expenses, again based on Riverbend village, follows.

| | Item |
|---|---|
| | **Labour costs** |
| 1 | Salaries and wages for administration and on-site operating staff. |
| 2 | Salaries and wages on costs. |
| | |
| | **Statutory Government charges and Insurance** |
| 3 | Statutory government fees and charges other than Municipal Council rates |
| 4 | Insurance including public risk, and property damage. |
| 5 | Vehicle insurance, registration. |
| | |
| | **Utilities and services** |
| 6 | Solid waste collection and disposal charges. |
| 7 | Domestic sewerage disposal charges. |
| 8 | Septic pump-out services. |
| 9 | Water supply usage for common areas, including swimming pool makeup water for splash, evaporation and filter washing, but excluding recharge water following pool emptying. |
| 10 | Electricity supply charges for village common area usage (i.e., non-leased areas, the property of the operator), excluding electricity utility charges for separately metered homesites. |
| 11 | Telecommunications and business purposes internet usage costs. |
| 12 | Materials used for minor servicing and maintenance undertaken by village site staff. |
| | |
| | **Consumables** |
| 13 | Consumables including, swimming pool chemicals, fuel, lubricants, garden fertilisers, weed control chemicals, stationary, printing. |
| 14 | Routine servicing (excluding rectification of damage and/or mechanical failures) of equipment. |
| | |
| | **Administration** |
| 15 | Account keeping and statutory reporting costs. |

**10. Disclosure of Cost Liability to potential Homeowners -**

a. The Park Owner's argument that *any expenditure, for whatever purpose incurred in operating the park, contributes to the calculation of site fee increases* must be tested against the provisions of Consumer Law in relation to disclosure.

b. Consider this at time of entry into a park, were potential homeowners made aware, that through site fee increases, homeowners would be required to fund expenditure relating to the preservation of park capital assets? Because that is what the Park Owner's stated policy for the calculation of site fee increases implies. Such additional costs could be significant.

c. Were these future cost liabilities, that were clearly known to the Park Owner at the time of entering into a site agreement, disclosed to the potential Homeowner? If not, then such behaviour would clearly be a breach of Consumer Law if, in practice, expenditure relating to preservation of park assets was included in site fee increase determinations.

d. In effect under the Park Owner's calculation policy, Homeowners would be providing by default, a 'sinking fund' for funding the costs of preserving park assets. In the case of Riverbend village, the operator has clearly stated such a fund is none of the homeowner's business. With this we would agree.

Quote: Letter to Riverbend Residents Committee dated 16th May 2018 paragraph no #3

*....Residents own their own homes and pay for their site upon which it is sited. Under RLLC there are no Strata Titles, Sinking Funds, Deferred Management Fees etc. Therefore the Residents do not have a say in how the owners of the village wish to execute their business.*

*Signed* [redacted] *on behalf of Riverbend Ballina P/L*

e. The Act in Schedule 1 prescribes Rules of Conduct for Operators. Section 1 (b) of Schedule 1 of the Act requires an Operator to have a knowledge and understanding of, among other laws, Fair Trading, and Australian Consumer Law. These laws have relevance at the time of entering into site agreement contracts.

11. The Department of Fair Trading summarise relevant aspects of Consumer Law as follows.

*Business conduct is likely to break the law if it creates a misleading overall impression towards the intended audience about price, value or quality of consumer goods or services. Whether a business intends to mislead or deceive is irrelevant; what matters is how their statements and actions, the business conduct, affect the thoughts and beliefs of a consumer.*

*A business can break the law if it fails to disclose relevant facts to you. Silence can be misleading or deceptive when:*

- *One person fails to alert another to facts known to them, and the facts are relevant to the decision.*
- *Important details a person should know are not conveyed to them.*
- *A change in circumstance meant information already provided was incorrect.*

*Whether silence is misleading or deceptive will depend on the circumstances of each case.*

12. Until very recently, the operator has not disclosed to perspective homeowners that they would be responsible, through site fee increases, for the cost of preserving village assets. There was no information provided to the prospective homeowners that would affect the thoughts and beliefs of incoming homeowners that this would be the case. That silence clearly breaches consumer law if site fee increases include the cost of asset preservation.

13. Now recently in Riverbend village, following a mediation conducted in September 2019, site agreements presented to new entrants have included a term under the heading 3. SITE FEES - Notes on Site Fees, as follows.

*Fees will, as agreed by mediation, increase on the 1st November 2020 by CPI and on 1st November 2021 by operating expenses and again on the 1st November 2022 by CPI*

*Some of the items your site fee covers are – Repairs and Maintenance of all community areas, facilities and amenities, roadways, village lighting, Council Rates, seasonal pool heating, lawn mowing and edging of your yard, repairs and maintenance of village machinery, wages, insurances and the everyday operating expenses of the village. **

*In even more recent cases this latter paragraph has been moved to a modified disclosure statement. By what authority is not known.

14. This is clearly a back-door attempt to give legal authority to the Operators claim that "*any expenditure, for whatever purpose incurred in operating the park, contributes to the calculation of site fee increases*". However, as the homeowners understand the Act, the operator is not entitled to modify the Standard Terms and if he does, such modifications are null and void. **This again, is an example of an operator attempting to manipulate the Act to the disadvantage of homeowners and reinforces the need for the Act to be explicit regarding the requirements for clear financial disclosure in the 'explanation'.**
15. In summary, the Act seems to allow for site fee increases in respect to outgoings and operating expenses, that is, increases in recurring expenses. The Act does not provide for expenses related to preservation of village capital assets, owned by the operator, to be included as an operating expense.
16. The distinction between the two classes of expense needs to be made much clearer, especially in legal terms, to avoid needless time consuming and costly legal challenges.
17. This distinction is a further reason why a clear and informative explanation of site fee increases is of paramount necessity in changes to the Act. On this hinge the viability of leasing a site in a RLLC village.

### Allocation of Whole of Park cost increases to individual Homeowners.

18. The 'explanation' does not provide a statement of how the total site fee increase in outgoings and operating expenses for the park is distributed across the total number of site fee paying Homeowners in arriving at the increase per Homeowner.
19. In Riverbend Village we have noted increased operating costs (without explanation) have been quoted as a percentage increase for the whole village. Then, that percentage increase is applied to each homeowner's retiring (previous) site fee to determine a new site fee, notwithstanding, that as part of expansion of the village over the period of increase, additional homes have been added to the village total.
20. Of course, the additional homes may have added to operating costs, but so too is the additional revenue from the additional homes available to meet those costs. This is another example of unethical manipulation of site fee increases hidden to homeowners by failure to supply open and transparent financial information.
21. This process also has the same implications as the issue of non-recurring expenses included in site fees [Refer also following part C.]. Once the manipulation has occurred it remains permanently imbedded in the site fee.

### Recommended Corrective Action

22. The Act should make it clear that expenditure required to preserve the operator's capital assets in a village is not the homeowner's responsibility and does not contribute to increases in site fees.
23. The changes to the Act recommended in Part B of this submission should be implemented to permit the homeowner a clear understanding of what expenses are being claimed, and the evidence for increases that contribute to a site fee increase under a site agreement and the Act.
24. **The implementation of these changes will reduce the need for homeowners, with limited resources, the need to apply to tribunals and courts to preserve their rights against the predatory actions of major corporations supported by their lobby groups, accounting firms and legal teams.**

Final 7/02/2021

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7th February 2021

# Submission

## To Statutory Review

Residential (Land Lease) Communities Act 2013 No 97 NSW

**Prepared by** - T.C. Coster

## Imbalance of Power or in Pursuit of Fairness

Part A. Introduction

Part B. Act Objectives

Part C. Compliance Authority

Part D - Lodging a complaint

# Part A Introduction

There exists, as between Homeowners and Operators, a serious inequity of power and resources in the administration of site agreements. The Act mandates worthy objectives but fails to provide the tools or administrative stewardship to implement those objectives. Homeowners find themselves defenceless in defending themselves against the predatory control and business practices of large cashed up owner corporations and their management teams. We are in a David and Goliath relationship. To address this issue: -

We examine the need to upgrade the Compliance Authority to provide it with the resources, power and skill set to professionally administer the Act and implement the Acts objectives. Make the compliance authority accessible to homeowners. Provide, where necessary, additional tools for this purpose.

The need as a compliance tool, to licence owners to own and operate RLLC villages is examined. It is considered qualifications and licencing of line managers and on-site managers engaged in operation of RLLC villages is required, as is a licence to operate.

And finally, there is a need to establish a fund, financed, it is suggested, by licence fees and fines for licence breaches, to finance the Compliance Authority and, where necessary, provide a source of funding for homeowner's legal actions at tribunal and superior courts.

# Part B Act Objectives

**Synopsis**

*The Act contains a set of worthy objectives. However, these objectives have not been achieved. A common element of the Acts objectives is a requirement for Fair Dealing as between Operators and Homeowners in the operation of site agreements.*

*While these objectives are clearly enunciated, they are not in practice being implemented. Issues exist in governance, in pursuit of remedies by homeowners and in communications with the compliance authority.*

*In reviewing the Act and its operation we ask that these issues to be carefully examined and remedied in any new revisions to the Act.*

**Introduction - The issue**

1. The Act proclaims lofty and worthy objectives.

    i. *To improve governance of residential communities.*
    ii. *To set out particular rights and obligations of operators and homeowners.*
    iii. *To enable prospective homeowners to make informed choices.*
    iv. *To establish procedures for resolving disputes between operators and homeowners.*
    v. *To protect homeowners from bullying, intimidation and unfair business practices.*
    vi. *To encourage the continued growth and viability of residential communities.*

2. Of the six objectives, only the last - To encourage the continued growth and viability of residential communities - has been achieved as evidenced by the rapid growth of large purpose built manufactured (relocatable) home villages (estates). For example the Antegra, Big4, Hometown, Discovery Parks, Gateway Lifestyle, Palm Lake, Reflections and ZW 2 Pty Ltd to name a few. Most, if not all, are affiliated with the Land Lease Living Association with Theo Whitmont as its leader.
   Figure 1 next page provides an overview of the business model of these enterprises. RLLC villages are a vehicle that transfers money from Government age pensions and self-funded retires to enterprise shareholders. In return affordable aged housing is offered. But, because of unregulated rising site fees, the component of **affordable housing** in the model, is now broken.

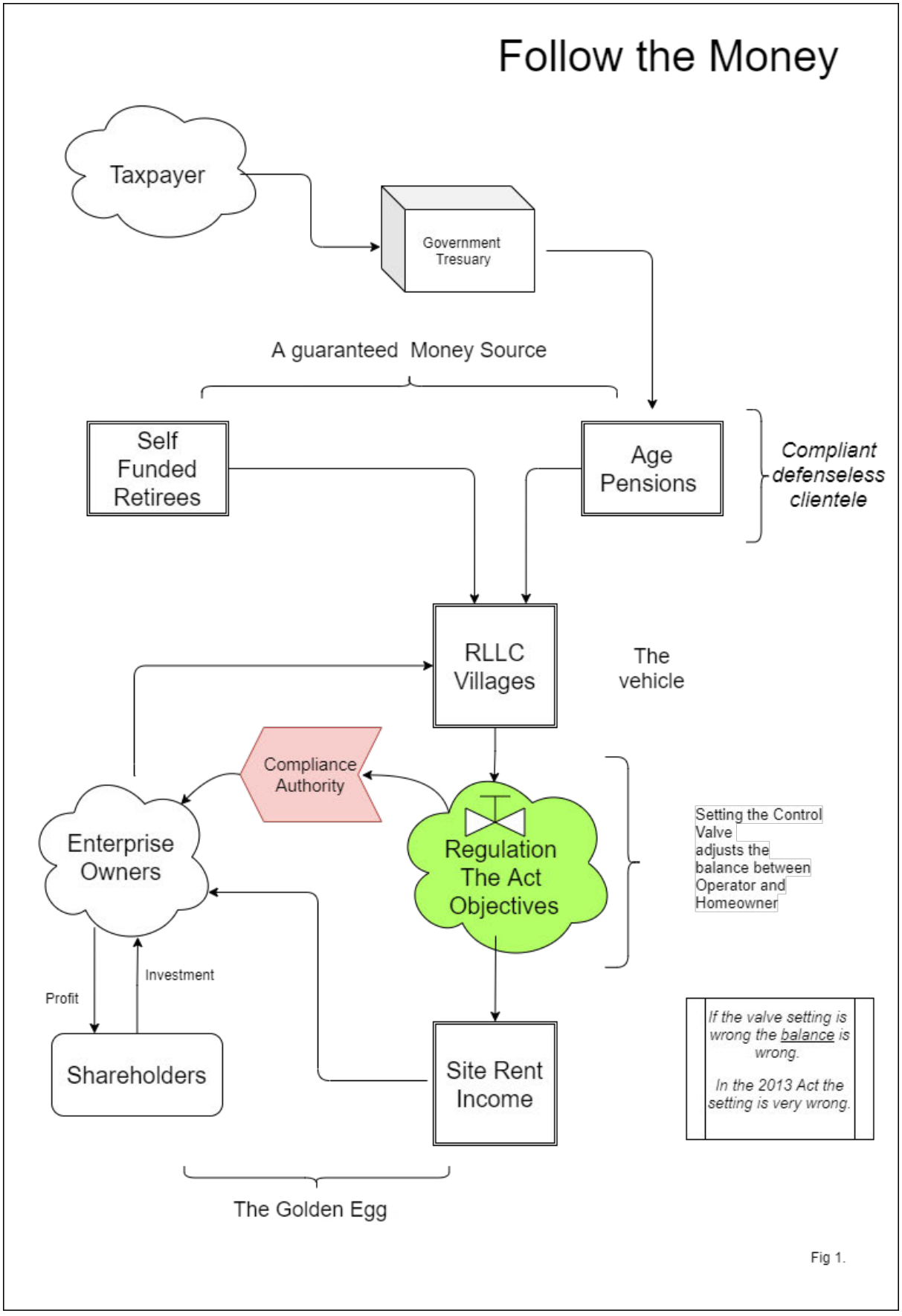
Follow the Money
Taxpayer
Government Tresuary
A guaranteed Money Source
Self Funded Retirees
Age Pensions
Compliant defenseless clientele
RLLC Villages
The vehicle
Compliance Authority
Enterprise Owners
Regulation The Act Objectives
Setting the Control Valve adjusts the balance between Operator and Homeowner
Profit
Investment
Shareholders
Site Rent Income
If the valve setting is wrong the balance is wrong.
In the 2013 Act the setting is very wrong.
The Golden Egg

Fig 1.

Statutory Review – Discussion Paper

*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? Absolutely not. We discuss further in this section limitations and failures in implementation and Inability to enforce.*
*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. Yes. To provide equity between homeowners and operators in access to dispute resolution dealings. The gross imbalance of resources be compensated for.*

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3. The first five objectives have either not been fulfilled, or under the watch of Fair Trading, have proven to be unenforceable. It is useless to have objectives when:

   i. **To *improve governance of residential communities,*** inadequate tools or skills are provided within the Compliance Authority to make this happen. *Set and forget is not good enough.*

   ii. **To *set out particular rights and obligations of operators and homeowners,*** those *rights and obligations are not enforced or are incapable of enforcement.*

   iii. **To *enable prospective homeowners to make informed choices,*** conditions precedent to making such choices are not disclosed or disclosure is not enforced.

   iv. **To *establish procedures for resolving disputes between operators and homeowners,*** those procedures are so restrictive and legalistic as to be out of reach, intellectually and financially, of most homeowners.

   v. **To *protect homeowners from bullying, intimidation and unfair business practices,*** when such practices occur there is no accessible and effective redress or penalty available to the homeowner.

4. To ensure these first five objectives of the Act are enforceable, Fair Trading as the Compliance Authority must be given both the **power** and the **obligation** to enforce through provisions in the Act, the Act's objectives. As presently provided in the Act, enforcement relies on action through NCAT. Fair Trading as compliance authority seems limited to mediation procedures. A process

operators, except perhaps for some minor matters, largely ignore thereby forcing homeowners into the arena of courts for resolution.

5. Operators have access to significant financial resources and expensive legal teams. So, when pitted against a retiree or pensioner homeowner in court procedures, including NCAT proceedings, the playing field is tilted so far against the homeowner, as to be unplayable.

6. Most homeowners have entered RLLC villages to retire and to see out the remainder of their lives in a peaceful environment among friends. Not having to fight complex legal battles with operators to maintain the affordability necessary to remain in a village.

7. In terms of equity, another factor worthy of noting is the average village homeowner has a capital investment of maybe some $450,000 in their home, usually their last remaining asset. In Riverbend Villages' case that is some $86,000,000 skin in the game. This must be recognised alongside the operators' lesser investment in building the facility when considering rights, responsibilities, and sustainability.

8. The imbalance of resources and support available to homeowners does not meet any of the first five objectives of the Act, and we the homeowners seek significant changes to the Act and its operation to level that playing field, to redress this imbalance of power and in pursuit of fairness.

## We now look at each Objective

**(i) To *improve governance of residential communities***

*Inadequate tools or skills sets are currently provided within the Compliance Authority to make this happen. Set and forget is not good enough.*

9. The Act in Part 13 Division 3 'Complaints and disciplinary action' refers to a 'person'. There is no alternative definition of 'person' in the Act, so it is taken to refer to an individual. This definition should be expanded to include where applicable, corporate Owners and Operators together with their workforce. This change is required to respond to present trends for complex corporate structures of owners/operators and managers of RLLC villages [see footnote p11].

10. Fair Trading as the compliance authority should be given the statutory **power**, **obligation**, and **resources** to enforce the requirements of the Act. In particular the obligations of the operator in the care and running of a village. See also following comments regarding the Compliance Authority.

**(ii) To *set out particular rights and obligations of operators and homeowners.***

*The rights of homeowners and obligations of operators are not presently enforced or are incapable of enforcement.*

11. As noted above, Fair Trading is understood to be the Compliance Authority exercising all or some of the powers of the Commissioner. One set of tools presently not available to the Compliance Authority, is a licencing regime.

12. Park owners should be licenced to own and operate a RLLC village on their land. As with many other business, trades and professions, operators should also be licenced to operate a RLLC park. So too, a park manager. The compliance authority should be empowered to issue licences at the appropriate compliance levels and to cancel, for breaches of duties and responsibilities, those licences.

13. There should be a licence:
    i. To erect and maintain a RLLC village on the Owners land.
    ii. For the owner or another related party (the operator) to operate a standalone RLLC village, on the Owners land, or within a mixed site, an RLLC village section on part of the land.
    iii. To be a village manager (either fulltime residential or part-time visiting) of a RLLC village.

14. An owner/operator would require both licences. And an Owner/Operator/Manager all three.

15. Each licence would carry licencing qualification requirements and obligations relevant to the level of licence. For example, the Owner licence would have a provision that only Currently Licenced Operators are permitted to perform the duties of 'operator' under the Act. Operators under their licence may engage only Licenced Managers.

16. The licence should contain a set of mandated obligations to be performed and observed by the licence holder at each level of licence.

17. An Operator licence should attract an annual non-refundable licence fee based on the number of leased sites in a village, payable by the operator, to the Compliance Authority. The fund created by the licence fee to be used to resource the compliance authority activities and obligations. Substantial enforceable fines (commensurate with level of licence) should apply for breaches of licence conditions up to loss of licence by the Owner to operate a RLLC village. Fine revenue should also be paid into this fund.

18. There are many precedents for such licences eg, licence to operate a hotel, homes for aged care, licence to operate as a real-estate agent, licence to drive a vehicle or operate machinery, plumbers' licence, chartered accountants, and many more. Licences are required to ensure only persons and organisations that are qualified and accountable, conduct business with government and the public, especially the vulnerable public. Exactly the public cliental RLLC

operators deal with. If they fail to meet licence requirements, they can be removed from conducting that business.

19. Loss of an operator licence would immediately result in suspension of site fees payable to the operator. The village fees then payable into a suspense fund for use in ongoing operation of the village and the village going into administration generally as provided for in Part 13 of the Act.

20. Exposure to loss of licence is a powerful incentive to conducting business legally and ethically, reducing and simplifying the need for expensive court intervention by and at the expense of homeowners.

21. Licence requirements for managers should include a qualification system, leading to a Certificate IV or similar certification for both offsite line managers, and on-site managers.

(iii) **To *enable prospective homeowners to make informed choices***

*if conditions precedent to making such choices are not established and enforced.*

-

22. When a perspective homeowner is considering a purchase, what are they required to be told by the operator? What information must be disclosed to them? At present they are required to be given the Standard Form Site Agreement, a Disclosure Statement in standard form, the Community Rules, and a publication titled Moving into a Land Lease Community?

*Statutory Review – Discussion Paper*

*4.Is the ban on inducing a person to enter into an agreement through false, misleading or deceptive statements or promises working effectively? No. It does not include disclosure information known to the operator that could have a bearing on the homeowner's financial decision to enter a contract.*
*5. Does the disclosure statement provide enough information to a prospective home owner to allow them to make an informed decision about purchasing into the community? Why/why not? No. See item 4 above.*
*6. Is the form of the disclosure statement easy for prospective home owners to understand?*
*7. Is the disclosure statement provided at the right time? I.e., should it be given earlier or later? It should be given at same time as all other prescribed information before commitment.*

Cont/....

*8. Does the disclosure statement form need to be improved? If yes, how would you improve it? It should include the contact details of the Residents/Homeowners Committee if one exists, and more clearly define future liability for site fee increases in glossy advertising.*
*9. If an operator of a community fails to provide a disclosure statement to a prospective home owner 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? Yes, but it must be reviewed from time to time and be enforceable and be enforced. All documentation provided to perspective purchases should set out procedures to enable a homeowner to lodge a complaint.*

*Page 9*

23. In the site agreement (mandatory Standard form of residential site agreement) at clause 20.4 it records "We (the operator) agree to maintain the community's common areas in a reasonable state of cleanliness and repair", and clause 25, "We (the operator) agree to maintain all services and facilities required by the development consent for the community to be available for the life of the community".

24. No Paragraph

25. Having read all that good information required to be provided and feeling confident there is not, as far as you (and your solicitor) can determine, there are no hidden liabilities, you enter into the site agreement. Especially you note there is no requirement in the Act or site agreement for payment through increases in site fees for the cost of repair or refurbishment of capital assets. There is nothing in the agreement to suggest that provisions for that form of expenditure lie within the agreed site fee and so as there are no hidden financial traps you enter a negotiated contract between you and the operator.

26. But what now, if the operator has not told you (disclosed) the full story and you get a thumping big site fee increase in 12 months' time. Where is the explanation (or disclosure) that is supposed to alert you to an understanding that you are responsible, through site fee increases, to pay for the preservation of capital assets? Did the operator explain to you before signing the site agreement, that all increases in operating costs, however arising, contribute to the site fee increase? Of course not, if he had done so, would you have still signed up? Did you know that site fee increases would include the cost of repair and refurbishment of his capital assets? Was that explained to you before you signed up. Do you remember seeing that piece of information in the lovely TV ads and brochures explaining how lucky you will be when you move into the village? No. *[Elsewhere in our submission on "Site Fee Increases Searching for an Explanation" dated 20th January 2021, we argue preservation of capital assets is not a homeowner responsibility*].

27. The law has something to say about this type of business behaviour. The Department of Fair Trading summarise relevant aspects of Consumer Law as follows.

i. *Business conduct is likely to break the law if it creates a misleading overall impression towards the intended audience about price, value or quality of consumer goods or services. Whether a business intends to mislead or deceive is irrelevant; what matters is how their statements and actions, the business conduct, affect the thoughts and beliefs of a consumer.*

ii. *A business can break the law if it fails to disclose relevant facts to you. Silence can be misleading or deceptive when:*

iii. *One person fails to alert another to facts known to them, and the facts are relevant to the decision*

iv. *Important details a person should know are not conveyed to them*

v. *A change in circumstance meant information already provided was incorrect*

vi. *Whether silence is misleading or deceptive will depend on the circumstances of each case.*

28. The Act needs to be changed to ensure costs not clearly and openly enunciated to a homeowner at time of entering a site agreement, are not subsequently recoverable as a site fee increase.

*Statutory Review – Discussion Paper*

*11. Does having a prescribed standard form site agreement work well? Yes. Must be maintained and remain under control of Compliance Authority.*

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

*13. Should the requirements about additional terms be changed or improved? Yes. Terms that are appropriate to village rules should be in those rules. Additional Terms should only be added if approved by the Compliance Authority following a consultation process with existing homeowners. Additional terms should not be permitted at the operator's discretion. In our village additional terms now run to 5 pages including gag clauses. All those additional terms are either neutral or favour the operator.*

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29. Further it should be mandatory for any Additional Terms or Further Additional Terms proposed to be attached to a site agreement be provided to a

prospective homeowner with, and at the at the same time as, the Standard Form Site Agreement.

**(iv) To *establish procedures for resolving disputes between operators and homeowners***

*if those procedures are so restrictive and legalistic as to be out of reach, intellectually and financially, of most homeowners.*

30. The Tribunal is the legal option available to homeowners to enforce provisions of the Act and their site agreements. But it turns out matters the tribunal can deal with, and the findings it can make, are very limited in scope. Further, what scope it does have is of little practical help to homeowners, because it is so heavily weighted in the operators' favour by its legalistic framework.

31. Many homeowners, while physically and mentally alert, are not able to understand the complexity and complications of the legal minefield of site agreements and the Act. Seeking redress for breaches of the Act or improper operator behaviour, through Fair Trading and NCAT, is laboriously slow, legalistic, and consequently a process virtually unavailable to homeowners. To engage expert assistance in this process is also normally beyond their means, a situation not lost on operators. Even support groups like Tenants Union or other self-help groups are so under resourced as to be unavailable for all but the most significant of issues.

32. The real issues of fairness and equity enunciated in the Act seem to lie outside the Tribunal's jurisdiction. Homeowners (and note homeowners are in the main aged retirees[1]) are then forced into the superior court system to have a case determined. And this against an operator with, for all practical purposes, unlimited financial and legal resources. Considering the costs and financial risk involved, these legal processes leave homeowners with effectively nowhere to go.

33. A much simpler and effective dispute settlement mechanism must be found that is accessible to homeowners. Perhaps some form of ombudsman or making existing administrative processes understandable and accessible to the homeowner community are essential options. Even the process of lodging a complaint with Fair Trading is obscure, designed more for the department operatives than homeowners that need to access it. See further discussion on this issue below in section titled Compliance Authority.

(v) **To *protect homeowners from bullying, intimidation, and unfair business practices***

[1] Source: Submission to Commonwealth Treasury 2017 consultation paper on Stapled Structures by Land Lease Living, Caravan & Camping and Manufactured Housing Industry Association.

*if when such practices occur, there is no effective redress or penalty available to the homeowner.*

34. Any action that can be taken in respect to **bullying and intimidation,** at a minimum, requires hard evidence. In this area such evidence is hard to establish because it is spread over numerous events and manifestations not readily documentable or witnessed. Residents can become ostracized and scapegoated, without any substantiated evidence.

35. Under the present Act the Compliance Authority can only convene a mediation session at which the operator typically denies everything even in the face of reasonable substantiation. The mediation fails, so off to the Tribunal.

36. The outcome is inevitably that no remedial action is taken apart from maybe a light slap on the wrist.

*Statutory Review – Discussion Paper*

*32. Are the rules of conduct adequate and are they having the intended effect of ensuring appropriate conduct by operators? No. because there is no satisfactory means of enforcing them.*

*33. Should the content of the rules be expanded to cover other issues? There is a need to find a practical, expedious and effective way of enforcing the ones already there.*

*34. Are the operator education requirements effective? No. Operators and managers should have to hold recognised educational qualifications appropriate to their field of operation. Eg certificate IV or better. They should also be licenced, and Compliance Authority have power and authority to cancel a licence if breached.*

*35. Can you suggest other educational resources or topics to facilitate a greater understanding of the role and responsibilities under the Act? There must be existing educational standards available that can be adapted covering interpersonal relationships, conflict resolution, the law as it applies to contracts and lower court proceedings, and specifically the Act and Site Agreements we operate under. The operators may wish to add knowledge of office procedures, record keeping, gardening, trades maintenance etc.*

*36. What delivery methods could be used to improve mandatory education? Formal Certificate IV or similar courses. Definitely not a couple of hours on the internet with no regulated examination process. These are serious management positions affecting a lot of senior citizens. In respect to members of Resident Committees, periodic face to face seminars by the Compliance Authority would be useful in understanding its role as the resident representative before the Operator. A Resident Committee handbook could also be helpful.*

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# Part C - Compliance Authority

**Synopsis**

*When it comes to a failure of the operator to comply with the provisions of the Act and site agreements, the processes in the Act for enforcement of its provisions are ineffective.*

*Remedies that do exist lead to expensive legal actions usually beyond the resources of the homeowner. It is suggested the Act should provide remedies for breaches of operator obligations that are within the means and whit of homeowners to have applied.*

*In terms of balance between the power and resources of homers and operators, the role and power of the Compliance Authority to create that balance requires serious review. This is especially the case where large local and multinational corporations are buying out the small local operators and imposing themselves on existing communities using their power to bully homeowners into submitting to their will.*

*The present imbalance is causing serious concern among homeowners and threatens the viability of RLLC parks as a viable solution to housing low income retires and pensioners.*

## The issue

1. The Commissioner is defined in the Act as *the Commissioner for Fair Trading, Department of Finance and Services or in the absence of this position the Director-General of the Department of Finance and Services*. The Commissioner may delegate his functions under the Act [Article 163 (2)]. That delegation would seem to be to NSW Department of Fair Trading and in turn to the Tribunal.

2. The function of the Commissioner is, among other duties, to investigate suspected contraventions of the Act or the regulations and to take appropriate action to **enforce** the Act or the regulations [Article 163 (1) (b) of the Act].

*Statutory Review – Discussion Paper*

*73. Are the Commissioner's disciplinary powers adequate? No. It may not be the powers that are a problem, it is the timely exercising of those powers.*

*74. Are there breaches of certain provisions of the Act that are currently not offences that should be offences? The short answer is any breach of the Act should be an offence, and if not an offence becomes an offence if not rectified. It is the current process and time it takes to deal with offense issues that is the problem. We are suggesting a licencing system to provide financial resources to the Compliance Authority, and cancellation of licence if breached.*

*75. Are there any other offences that should be penalty notice offences? Failure to supply a fit for purpose explanation in support of a rent increase could be one. Monitory Penalties are not a solution unless exceptionally large. We are dealing with rich cashed up operators that ignore minor fines as an operating expense and probably recover them in rent increase.*

*76. Are the powers of Fair Trading investigators appropriate? What are those powers? They seem not appropriate because if the operator is not cooperative (and noncooperation is the normal stratergy) it is back into the court system. A very slow, cumbersome, and expensive process to get resolution of a complaint.*

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3. Who then is the Compliance Authority? The Act defines the Commissioner as the compliance authority. The Commissioner, as is permitted by the Act, has a power of delegation, and seems to have delegated that authority to Fair Trading. Fair Trading for its part limits its role to one of mediation, and if mediation fails suggests the homeowner enter (with legal advice) the court system via the Tribunal.

4. Quote from Fair Trading web site:

   *[If we cannot help the parties to agree to a resolution, either party may take their dispute to the Tribunal. Go to the Tribunal Website for more information. We may also recommend for complaints to be forwarded to our Mediation Services Unit for formal mediation, or that you seek independent legal advice.]*

5. But then the Act decrees the Tribunal has limited jurisdiction, so if the issue is outside the Tribunals limited jurisdiction, the next step is to the various higher courts. This process forces the responsibility and cost for resolution back onto the homeowner. With a starting cost of perhaps $15,000 - $20,000 and upwards plus respondents' costs if case lost.

6. NSW Fair Trading seems to not have, or has not been delegated, the Commissioners power to **enforce** the Act or the regulations [Article 163 (1)

(b) of the Act]. It may seek mediation and negotiated agreement between parties but has no authority to make directions. The power to make directions seems to inevitably lead back to the Tribunal or higher courts.

7. The Act says the Commissioner has the authority to take Action. If that power is delegated, then that means Fair Trading is required to exercise that power. If not, there is a serious flaw in the system. That flaw requires prompt rectification in the Act.

**Recommended Action**

8. There is need for a complete overhaul of the Act in this area so that homeowners are placed on the same footing (financially, legally and accessibility to justice) as the operators.

9. The compliance process is, in every practical sense, beyond the reach of homeowners.

10. The homeowners are further disadvantaged by the operators Lawyers, QC's and creative Accountants trawling through the existing Act to find weakness and loopholes (of which there are plenty) to advance their control and financial position.

11. We also refer the Act review panel to our submission on the need for licencing owners, operators, and managers.

# Part D - Lodging a complaint

**Synopsis**

*The Compliance Authority has an online facility for lodging complaints. However, it is designed for the tech savvy. It also seems to be a one-size fits all service covering a range of client types.*

*Many homeowners are neither competent in the use of computers for this purpose or have the equipment to be able to do so. For most, their equipment is a smartphone or maybe a tablet. There is rarely a printer or scanner within reach.*

*The means of communication between the Compliance Authority and the homeowner should be competently investigated, and a specific user-friendly methodology established and implemented for homeowner use.*

*Coupled with this is the need for prompt responses and resolution of complaints and issues.*

**The Issue**

1. When intervention on a matter relating to the behaviour of an operator or some other Act or Site Agreement issue is required, there is a need to closely examine the mechanisms available to homeowners to communicate with the Compliance Authority.

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*77. Would you be interested in attending a community information session via webinar? Yes but No. I explain in this section a major problem with shifting communications to the internet and suggest some actions that need to be taken to resolve this form of communication with aged homeowners.*

*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. Yes, see following discussion.*

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2. As outlined above, the present system of communication is mired in legalistic process. The complaint process should focus on how, within their competence, a homeowner can communicate with the Compliance Authority and get swift action. The present processes seem designed for the convenience of the authority and its bureaucratic environment, not the homeowner, and because

of its complexity, works in favour of the operator. This needs to be turned around by providing a simple understandable means of communicating a complaint to the Compliance Authority without the need to be computer and internet literate.

3. For its part, the Compliance Authority must respond, and have the **power** to respond, promptly to a complaint and advise the homeowner how the complaint could be resolved or what further action is required or recommended by the Authority. Not stand aloof and have the homeowner go to NCAT for a resolution.

4. A review of Fair-Trading complaint log will not reveal a true picture of the pent-up issues now developing in the RLLC world. There is a natural reluctance to complain, but more importantly a communication problem in doing so.

**Recommended corrective action**

5. This reviewer suggests a competent study should be commissioned to determine the appropriate form communications that is required between a homeowner and the Compliance Authority. The outcome should be a way to allow a homeowner to communicate effectively with the Compliance Authority.

6. At present the Compliance Authority (Fair Trading) seems to be relying on third parties to be the residents point of contact with the Regulator. While not excluding this channel, it should not be necessary and needs to change. There is limited scope and resource for voluntary third parties to fill this role.

7. Division 3 of the Act - Complaints and disciplinary action, should include a requirement for the Commissioner to publish simple procedures for a homeowner to lodge a complaint against an operator. That procedure should not rely on the internet or smart phones (while such means may be included) and be in a plain English format and understandable to aged retirees unfamiliar with bureaucratic language.

8. A suitable publication of presenting these procedures on a routine basis would be "Moving into a Land Lease Community? Brochure, published by NSW Fair Trading", a document required to be provided to all new village entrants. Additionally, a hard copy fact sheet describing the procedures for complaint notification could be issued to all resident support groups and Resident Committees for distribution.

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That concludes this submission.