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## **Residential (Land Lease) Communities Bill – Consultation Draft.**

### **Submission.**

ARPRA NSW is the Affiliated Residential Park Residents Association NSW Incorporated. Throughout New South Wales, there are regional park residents associations that belong to ARPRA, and their combined activities result in a stronger voice for park residents.

ARPRA NSW has affiliates from Tweed Heads in the north to Bega in the south. ARPRA executives are volunteers who spend a lot of time lobbying various Government departments on behalf of their members. We lobbied the Government for a review of the Residential Parks Act, and the outcome of this lobbying, along with the input of many submissions from various stakeholders, has led the Government to introduce the Residential (Land Lease) Communities Bill – Consultation Draft.

Following is ARPRA NSW's response to the draft Bill.

### **1.3 Objects of the Act.**

A great number of ARPRA members has vigorously objected to the removal of the legislative protection for residents from the draft Bill. ARPRA has advised its members that the Government's intention is to bring the Bill into line with both the Residential Tenancies Act 2010, and the Retirement Villages Act 1999, neither of which contain the same legislative protections.

The Government has stated that it aims to establish a fairer system which protects the rights of all parties equally, rather than favouring one party over another. The legislative protection provided via Section 4A of the current Act means that the current Act can be referred to as 'beneficial' legislation, whose objective is to protect the rights of persons deemed to be at a general disadvantage when compared to the other party. These days, beneficial legislation can be more easily found in the social welfare categories of legislation, rather than the Fair Trading portfolio. 'Social Services' is about protection, whereas Fair Trading is about balance.

ARPRA recognises OFT's motivation for removing the protective objective, however, we bring to their attention the widespread distress among our members that this step has caused.

We urge Fair Trading to consider the reinstatement of Section 4A(b), "to establish legislative protection for residents".

## Definitions.

“**home owner** means:

- (a) a person who owns a home on a residential site in a community under a site agreement (whether or not the person resides at the site), or
- (b) a person who obtains an interest in a site agreement as the personal representative, or a beneficiary of the estate, of a deceased individual who immediately before the individual’s death was a person mentioned in paragraph (a), or
- (c) another successor in title of a person mentioned in paragraph (a),

but does not include any person or class of persons excluded from this definition by the regulations.”

The removal of the ‘principal place of residence’ test resolves concerns some residents have surrounding the restrictions placed on their heirs and executors regarding the disposal of their home. These restrictions were highlighted in the *Vivian* case. However, it has created new concerns for ARPRA members. Our members have advised us that the main reason they like living in a park is the sense of community and security that it engenders. Residents are surrounded, in the main, by like-minded people, the majority of whom are in the same age bracket. It is no secret that the majority of home owners in parks are of retirement age. This is why the *Vivian* case was felt so keenly in the first place. It is a reasonably imminent scenario for most park residents, and not something for which they can afford themselves the luxury of procrastination. However, removing the *PPOR* test altogether has forced residents to choose between the here, and the hereafter. They felt caught between a rock and a hard place.

Many residents feel that removing the obligation to reside in their own homes opens parks up to ‘infiltration’ by corporations, who will be able to purchase multiple homes in parks, and rent those homes out to whoever they choose. Notwithstanding the fact that Residential Park legislation does not allow for age discrimination, residents choose to live among other retirees, and do not wish to live among young families with young children. They also like the security and comfort of knowing who their neighbours are. Tenants come and tenants go, and the sense of community will be lost.

ARPRA’s members have told us quite clearly they wish to retain the *PPOR* rule, but simply have an exemption in place for their heirs, administrators, executors and assigns. Should the *PPOR* rule be reinstated, protective measures should also be in place to protect those residents who buy for the future – those who are almost of retirement age, but do not plan to move in ‘just yet’.

ARPRA seeks information on what class of person may be exempted from the Homeowner definition by the Regulations.



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**Operator.** Similarly, ARPRA seeks information regarding the exemptions for the Operator definition. ARPRA also notes the imposition of penalties against operators who are really only employees of the Owner, passing on decisions made by someone else, but who are then exposed to penalties should the actions they take at the direction of another not comply with the legislation. Our member advise they are not looking to shoot the messenger in most cases, but wish to look further into the causes of some problems that are endemic in some communities.

**“Residential site or site** means a site in a community for a home that is used, or is intended to be used, as a residence by an individual.”

The Oxford dictionary defines ‘residence’ as *“a person’s home”*.

The free dictionary has –

- “1. The place in which one lives; a dwelling.” And -*
- “2. The act or a period of residing in a place.”*

The current Act defines residential site as: "residential site" means a site within a residential park that is used, or is intended to be used, for the installation of a moveable dwelling.”

The current definition quite clearly intends to cover all sites in a park, whether or not the site is short term or long term according to the Park’s Approval to Operate. It does this by stating that a residential site only requires the (intended) installation of a moveable on the site for it to be considered as a residential site under the current Act.

The new definition is quite clearly restricted only to those sites whose intended use is for a residence. A holiday home is not a residence. The new definition is meant to be limited only to sites whose occupants live there, or intend to live there, and have no other home.

Neither definition is affected by the site’s designation in the park’s Approval to Operate. The new definition will still cover short term sites whose occupants reside on that site. It will provide protection to future residents who are not informed that their intended site is a short-term one.

**Site agreement** “means an agreement under which an operator grants to another person for value a right of occupation of a site in a community for the purpose of allowing the other person to use a home owned by the other person or a third party and located on the site for use as a residence by an individual.”

The term “third party” appears in only one other place in the Draft Bill -

### **“2.3 Application of Act to homes**

*(1) This Act applies to a home owned by its occupant (the home owner) and located or proposed to be located in a community owned by someone else.*

*(2) This Act applies to a home owned by **a third party** and located or proposed to be located in a community owned by someone else, and so applies in the same way as it applies to a home owned by its occupant. **A third party is a person who is neither the owner nor the operator of the community.***

*(3) Subsection (2) does not have effect in relation to a home if:*

*(a) the Residential Tenancies Act 2010 applies to the home, or*

*(b) the home is of a class or description prescribed for the purposes of this paragraph (whether by reference to the ownership or occupation of the home or otherwise). “*

The use of the phrase ‘third party’ is very unwieldy. Currently, Site Agreements are available only between park owners and home owners. Any other type of Agreement will be either:

- A) a tenancy agreement in which the parties are the park owner, as owner of the dwelling, and the resident, who is the tenant occupier and who rents both the dwelling and the site from the park owner, or;
- B) a tenancy agreement between a home owner acting as a landlord, and a resident who would be a sub-tenant to the Site Agreement, but also be a tenant in a Tenancy Agreement of their own.

The definition of Site Agreement appears to establish a contractual relationship between the Community Operator/Owner, and an occupant who would be the sub-tenant of the home owner.

The assumption is that Section 5.11 allows the Operator to unreasonably refuse consent to a sub-let. In this case, a sub-let can only proceed with the written consent of the Operator. In other words, the Operator directly grants to the sub-tenant, their consent to occupy. This creates and references, for the purpose of this Act, a contractual relationship between these parties that does not necessarily exist under the current legislation. Further, such sub tenancy arrangements are void if written consent is not provided, thus potentially leaving sub-tenants bereft of any legislative protection at all.

This is especially pertinent when consideration is given to the exclusion of sub tenancy arrangements under the Residential Tenancies Act 2010, in which sub tenants who have not been provided with written agreements of their own (Section 10, R. T. Act 2010) are exempt from the operation of that Act.

The Savings and Transitional Provisions on the Draft include amendments to the RTAct, so that its definition of 'premises' will include 'moveable dwelling' as defined by the Local Government Act.

The intention is obviously to include consented sub-tenancies to coverage under the RTAct rather than the R(LL)C Act. In which case, the inclusion of 'third party' in the Site Agreement definitions and in Section 2.3 as above, is confusing.

ARPRA suggest that the definition of Site Agreement be altered to state –

**site agreement** *“means an agreement under which an operator grants to another person for value a right of occupation of a site in a community for the purpose of allowing the other person to use the home located on the site as a residence by an individual.”*

And also that Section 2.3 be altered -

*“2.3 Application of Act to homes*

*(1) This Act applies to all homes located or proposed to be located in a community, that are not owned by the owner or operator of the community.”*

*(2) The Residential Tenancies Act 2010 applies to a home owned by either the owner or the operator of the community.”*

**Utility** (c) Sewerage should be altered to “(c) Sewerage Availability”

**2.4 Arrangements to which this Act does not apply (e)** – ARPRA seeks clarification on what other arrangements may be included in the Regulations, given that 'arrangement' is defined as including a contract or agreement. Is there an intention to continue with the “30/30 rule” in the Regulations?

**2.5 Places to which this Act does not apply (d)** – ARPRA feels that all exemptions should be included in the Act, rather than be allowed to expand under the Regulations. ARPRA feels this may allow Crown Reserve exclusions.

**2.8 Exemptions from operation of Act** – ARPRA feels that 2.8 should be removed entirely. To allow the Regulations to exclude any 'specified class of community' props the Crown Reserve door open even wider. If there are to be blanket exemptions, they should be in the Act, to provide certainty.

**2.9 Contracting out prohibited** – ARPRA supports the extended provisions. The inclusion of 'collateral agreement' provides residents under a shared equity contract extra protection against clauses in those contracts that may contract outside the R(LL)C Act. ARPRA envisages that shared

equity contracts will no longer be allowed to provide penalty terms that conflict with the Act. This is a great step forward for affected residents.

**2.10 Relationship of Act to other laws** – ARPRA supports this section as it clarifies for residents that their home is not located in a retirement village, no matter what the advertising may have called it.

**3.2 Information to be recorded in Register** – many of our members have queried why the details of a community’s residents’ representative has not been included in the publicly accessible information. We are advising our residents that this would be a breach of a resident’s privacy. A resident may join a committee to play an active role in his particular community’s lifestyle. It does not necessarily follow they are willing to have their name and address made available for all and sundry. Such lists may also be exposed to ‘spammers’. ARPRA believes that committee contact is to be provided in the Register mainly for Fair Trading’s use.

**4.1 Disclosure statements** - ARPRA has advised its members that disclosure documents are being prepared by the Fair Trading Advisory Council. ARPRA feels that 4.1(3) represents a diminution of the information currently provided by S.73 of the current Act. Disclosure Documents would need to include site size, site number, and any other restrictions specific for that site, for e.g. landscaping restrictions. There needs to be clarity concerning the document’s inclusions. ARPRA would like to see a specific and larger reference to any capital gains clause in the disclosure document (should it persist), and further, that if the Agreement contains a capital gains clause that has not been disclosed in this document, that the capital gains clause is subsequently void and unenforceable. In reference to 4.1(4), ARPRA asks if there are penalty units to be applied if the disclosure document is not provided.

**4.3 Time to read information and seek advice** – 4.3(1) ARPRA feels there should be provision made for a prospective purchaser to receive a full refund of any money paid as part of a sale contract to a seller, if either the community operator has not provided a disclosure document and a copy of the proposed agreement, or, if these documents have been provided, but the information provided in them is not acceptable to the purchaser (for example, a capital gains clause).

**4.4 False, misleading or deceptive information** – ARPRA feels that the penalty units to be applied in this section should reflect the penalty units applied in Section 3.5, that is –

*“(a) in the case of a corporation—100 penalty units, and  
(b) in any other case—50 penalty units.”*

**4.5 Site agreements generally** – (2)(a) should include the site number and the dimensions. ARPRA believes that all Site Agreements should contain a site map which clearly shows boundaries and boundary lengths.

**4.8 Prohibited terms of site agreements** – Section 19 of the Residential Tenancies Act 2010 concerns prohibited terms. The main difference between the two is that the RTAct specifies some of the terms

that are prohibited, whereas the Draft provides none. There is some room for duplication, for example, that the operator cannot require a resident to exempt them from liability.

**4.10 Duration of site agreement** – ARPRA supports the requirement that any fixed term must be more than 3 years. ARPRA notes there is no statutory requirement for these Agreements to be registered, merely that the opportunity exists for that option to be taken up.

**5.2 Home owner's responsibilities** – ARPRA has noted the removal of the phrase 'it is a term of every residential tenancy agreement that...' If a home owner did not comply with their responsibilities under a particular Section thus denoted, then that would be a breach of the Agreement as these sections are included in the standard form of Residential Site Agreement. Section 12.13 gives the parties the power to apply to the Tribunal (the current Section 16(1)). Section 12.14 is the new 'Section 16(6)'. ARPRA notes the new format is at its most confusing when compared to the current Act. It will take some time for residents to look directly to the Agreement rather than in the Act for a breach. Most of ARPRA's advice is provided over the phone, and reference is made to the Act to find the breach the caller alleges, rather than the Agreement itself. This is because ARPRA does not usually have a copy of the actual Agreement in front of them when providing advice. Section 5.2 embodies a number of currently individually identified clauses.

**5.5 Access to residential site by operator** – Some residents have raised concerns regarding the access provisions that operators will have in relation to the home, as opposed to the site only. Currently, a park owner has no right to access a home he doesn't own. This Section gives the operator the right to access 'in an emergency'. ARPRA has given consideration to this section, and has decided to support the inclusion of this section, as we believe it is there for safety of residents. We note with approval the removal of site inspections.

**5.6 Access to community by tradespersons and service providers** – (1) – insert 'at all times.' Some residents have experienced problems when tradespersons attempt to access the park for after-hours emergencies. There have been occasions on which they have been refused access, as the office is closed.

**5.7 Access to community by emergency and home care service vehicles** – replace 'or a map' with 'and a map'. Maps are required to be displayed under the provisions of the Local Government Regulations.

**5.8 Alterations and additions to, and replacement of, homes** – ARPRA suggests a checklist be developed for home owners to use, in the event they wish to make an additional or alteration to their home or site. The checklist should outline their obligations under the R(LL)C Act, as well as the little-known provisions of the Local Government Regulations. Currently, park owner consent is not dependent on Local Government compliance, although it is often used to refuse a work request. A checklist would give a home owner compliance direction, and make it more difficult for an operator to refuse consent.

**5.13 Mail facilities** – An operator must not interfere with individual mail facilities, yet is not obliged to provide individual mail facilities, only accessible mail facilities. What is a ‘reasonable’ mail facility? Some parks currently have only pigeon holes behind the office desk. Is this ‘reasonable’? This type of set-up is currently plagued by park owner interference. Some park owners insist on retaining a key to mailboxes. Individual mail facilities should be provided and maintained by the operator or owner, as the facilities are part of the community’s infrastructure, remaining in place no matter how often a home is sold. Mail facilities provided under this Section must be capable of taking a separate lock. If individual mail facilities are not currently provided, then a community operator should be provided 12 months’ grace to comply with this section, once the Act commences. (This is commensurate with the RTAct’s requirements regarding water efficiency measures when that Act commenced.)

**5.14 Maintenance of trees** – There was some discussion concerning whether or not a community operator should be made liable for trees planted by a resident. Splitting the two however, will have repercussions for future home owners who have purchased the homes and are not directly responsible for planting a particular tree. It may be that additional trees (not shrubs or low growing plants) are treated as a site fixture for which operator consent must first be obtained. If consent is given, then the tree is the operator’s responsibility. If consent is not sought, then the operator has 12 months to apply for its removal, otherwise it becomes their responsibility. ARPRA notes that community rules may now also allow for height restrictions to be imposed on any future planting.

**5.15 Services, facilities and improvements** – ARPRA’s members have advised us that they believe this section will be used so infrequently as to make it redundant. Any community will be able to mediate this type of arrangement without having to resort to legislation. ARPRA looks to Valhalla Village as an example. Members worry that some improvements will take so long to pay for, that by the time the money has been completely collected, the price will have increased. There is also the issue of what happens when a home is sold? The seller has paid money out for a facility they will now never use. How can they get their money returned? The purchaser may not support the levy, and cannot be forced to take over the payments. Nor can a purchaser be forced to refund payments made as part of the sale price, particularly if they do not support the levy in the first place. In the event this Section remains, (9) must be changed to 75% of home owners, not 75% of those who participate in the vote, which may be only a handful.

## **Division 2 Conduct and education of operators**

ARPRA supports the changes included in this Division. We accept that current operators cannot be forced into education or training. Schedule 1 of the Draft requires current operators to have immediate knowledge of all requisite legislation.

**6.4 Penalty site fee terms** - see 4.8 above. Penalty site fee terms are prohibited terms.

**6.7 How and where site fees to be paid** – ARPRA asks whether or not the R(LL)C Act should not mirror the RTAct, and require the provision of a fee-free payment method.

**6.11 How site fees may be increased** – Home owners (prospective purchasers) who are entering new agreements with brand new homes – no previous agreement on that site – should be given the opportunity to choosing which method they would prefer, fixed or by notice.

**6.17 Application following failed mediation** – (4) notice may state the reasons the mediation failed, for example, refusal of operator to disclose operating expenses, if operating expenses were the reason given in the notice.

**6.20 Orders as to excessive increases in site fees** – (4) – ARPRA supports the removal of ‘projected increases’. We feel that this section should be limited to actual operating expenses only.

**6.21 Matters to be considered about excessive increases** – (b) should be altered from –  
*“(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, “*

To

*“(b) any actual operating expenses for the community as provided by the operator since the previous increase (if any) in site fees for the community,”*

ARPRA supports the removal of 6.21(f). Land value has no impact on a site agreement.

ARPRA believes the use of the word ‘may’ here rather than ‘must’ is meant to limit the determining factors for the Tribunal to consider, to the ones listed in the original rent increase notice. For example, if the Operator has advised that the increase is necessary because of the repairs and improvements made since the rent was last set, then the Tribunal should confine it’s considerations to point (c) only. Otherwise, to include a reason in the notice would make no sense.

**7.2 Limit on amounts payable by home owner** – ARPRA seeks clarification on the types of fees and charges envisaged in the Regulations. We believe the types should be confined to the Act.

**7.5 Unpaid utility charges** – information is required on when a payment is determined to be late. This is an issue as the billing period across parks varies greatly. Some parks are billed as frequently as every fortnight, while others are billed once a quarter. The Disclosure Document provided to prospective purchasers should include information on the amount of late fee that can be charged, and when a charged is deemed to be late. While many residents are not thrilled by the inclusion of late fees, ARPRA recognises this as a better way of managing late payers than the current system of forcing residents into rent arrears, for which they may be terminated.

## Part 8 Community rules

Our members have told us they are quite happy that rules will now apply equally to operators and owners and their employees. Hopefully this will make rules less stringent and more tolerant.

Concern has been raised that there is no list equivalent to Section 62. The Commissioner may make model rules, which will be helpful, but members are concerned that the process to determine the fairness of a rule will be onerous as the phrase is so open to interpretation. Legal invalidity will be limited to 'contracting out' (7). ARPRA recognises that widening the scope of rule formation gives home owners more say in rule development.

**8.9 Applications to Tribunal about community rules – (2)(b) -** This is a reference to 8.1(4), which says '(4) A community rule cannot invalidate anything that has already occurred.'

Should a rule be made that conflicts with a right already provided, then the rule does not apply. The Tribunal can make an order that a particular rule does not apply to a particular home owner because of a previous right already provided.

**9.1 Establishment of residents committee – (3)(b)** to be expanded to include social clubs and other internal park organisations whose members are made up of home owners in a community.

### 10.3 "For sale" signage

"(1) A home owner is entitled to display a "for sale" sign in or on the home, but this is subject to the home owner first informing the operator of the community of the intention to offer the home for sale.

(2) A home owner is not entitled to display a "for sale" sign anywhere else in the community or on adjoining land without the consent of the operator. "

It is difficult to see how an operator has the right to prevent a home owner from advertising their home on adjoining land, when the operator may not own the adjoining land. ARPRA also notes how the Draft has no specific reference to notice boards. Residents currently have the right to use a park's notice board without interference from the park owner. (2) appears to remove a home owner's right to advertise on a notice board in the park. Home owners must ask for the operator's consent now. The removal of this right, together with the absence of any direct reference to notice boards, has caused concern among our members. ARPRA seeks to ensure that a home owner's right to advertise on a notice board continues. If a prospective purchaser is looking through a community with the idea of purchasing in the park, the notice board may provide information on what is available for purchase in the community. Further, ARPRA raises the concern that the restriction provided in 10.3(2) conflicts with the operator's obligation under Section (5)(3)(ii), which states that operators are to take all reasonable steps to ensure that home owners have reasonable access to the common areas. Notice boards within a community are part of the common areas.

**10.4 Interference with right to sell home** – (3) ARPRA seeks clarification on what is intended by ‘reasonable grounds’.

**10.5 Condition of home for sale** – Historically, residents have made alterations or additions to their dwellings without consent and in some cases without regard for the requirements set out in the Local Government Regulations. Park owners usually wait for a home sale, or specifically a purchase, to raise objections to alterations which have in some cases, been on site for over a decade. ARPRA has always questioned why the point of sale is so important in relation to non-compliance with Local Government requirements and Site Agreements. (1)(b)(ii) – if a home genuinely represents serious health and safety risks, it makes no sense to require such issues only be attended to when the home is sold.

10.5(1)(b)(ii) can be broken down into 2 options, as follows -

- “ (ii) \* any external feature of the home has been altered or added to, or;  
\* any fixtures on the residential site have been altered or have been added to the site by the home owner in such a manner as to be likely to cause serious health or safety risks to other persons. “

Example: Under the first option, a home owner may have installed a sunroom in the rear of the carport without consent. This may have occurred some years prior to when the home was placed on the market for sale. This option allows a community operator to interfere with a sale, using something he has been aware of for a number of years but chose to leave alone. Why is it so important then, when the home owner finally decides to sell? If there has been a breach, it should have been dealt with in a timely manner. A community operator should not be able to impose an obligation on either a seller or purchaser concerning an issue he has been quite happy to live with for a number of years.

**10.6 Referral of prospective purchaser to operator** – It is difficult to see how a home owner can have a statutory obligation imposed under (1) ignored under (2). ARPRA believes that if a prospective purchaser has paid a seller a deposit prior to the referral advice given under (1), then that deposit should be fully refunded in the event the purchaser decides to withdraw from the sale. As the Note says, this Section is to assist the operator in their obligation to provide a disclosure document. If a purchaser is advised by the operator of terms which are not acceptable, they should not lose any deposit paid. This represents a true ‘cooling off’ period. ARPRA is reminded that an operator is obliged not to enter into a site agreement with a prospective purchaser for 14 days after a copy of the Agreement has been provided to the purchaser.



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### **10.8 Payment of part of sale price to operator**

ARPRA has been quite unable to find any member who supports this Section. Most members tell us it is pointless to assume this Section will not affect current residents. Members believe that operators will have a statutory right to seek to include capital gains terms in new agreements, which drive down the achievable selling price of their home, as purchasers will be unhappy about losing money at a later date. It adds pressure to sellers who may already be finding it difficult to secure a buyer, for one reason or another. The right to be paid a premium where no capital gains have been made is even worse. This directly bites into a home owner's capital. A home owner who sells for exactly what they bought for could find themselves worse off for the experience. This is especially hurtful to those residents who use their operator as selling agent. The operator could get a premium on top of a commission. The two do not appear to be mutually exclusive, as they serve different purposes.

ARPRA's position on this Section is quite clear – it should be removed in its entirety. This is what we believe, and this is what our members are telling us.

When Fair Trading first gave consideration to the inclusion of a 'capital gains' clause into community agreements, they had regard for the methods utilised under the Retirement Villages Act 1999, in which residents may have such clauses written into their agreements.

The Retirement Villages Act 1999 requires residents to pay a management fee, in much the same way as community home owners pay a site fee. In order to reduce the weekly financial burden on the Village residents, the Retirement Villages Act allows residents to defer payment of a portion of their management fees until they leave the Village, that is, when they sell their home or unit. A portion of the capital gains is given to the Village Operator, to cover the cost of the deferred management fees.

Allowing residents to choose this option gives them greater flexibility and control in the management of their personal finances. In deferring payment of a portion of their management fees, residents find they have more disposable income available, more of their own money to spend on themselves or their loved ones, should they choose. Retirement Village residents have reported that this type of arrangement has the potential to open the door for residents to get more enjoyment out of their income from week to week, as it represents a real increase in their disposable income.

The Government wished to introduce such an option to Community home owners. They believed home owners should be allowed to enjoy as much as possible, all the benefits that a life of hard work entitles them. Sometimes though, on a limited and fixed income, this may not be possible.

Currently, the Draft Bill provides for the inclusion of an additional term to new agreements that a portion of the capital gains may be paid to the operator. The Draft Bill currently sets the threshold at

50%. The Draft Bill also allows for a 'site premium' to be paid to the operator if there is no capital gain. The threshold for a site premium has been capped at 10%.

However, the Draft Bill does not make clear that the inclusion of a capital gains clause is by agreement only, and must be included only if both parties agree. Nor does it make clear that the inclusion of this term is in exchange for a reduction in the site fees. Nor does it address the problem of what to do if the operator wants it included, but the purchaser does not. Currently, if the operator insists, then it is likely that the purchaser will withdraw from the sale and the seller has lost an opportunity.

ARPRA has contributed to some serious discussions with the Government on this highly contentious issue. ARPRA has impressed upon the Government the views of its members, which is that the capital gains clause in its current form, together with the site premium, no reduction in site fees, and no recourse for purchasers, makes the entire clause untenable.

ARPRA's position is for the removal of Section 10.8 in its entirety.

Should the Government insist on its inclusion though, ARPRA proposes the following amendments –

1. Reduction of the maximum threshold to 5%. Remember, this is a 'cap' and can be negotiated down from this maximum.
2. Complete removal of the 'site premium' option.
3. Site fees to be reduced by a percentage agreed to by the parties. The higher the capital gains share agreed, the higher the site fee reduction.
4. If a prospective purchaser does not wish to enter into any capital gains sharing, then the operator must provide the purchaser with a standard form of agreement with that clause removed. An operator who refuses to provide a standard form of agreement at this stage is deemed to be interfering with the sale, and is guilty of an offence.
5. Should a home owner whose agreement provides for a capital gains share to be paid to the operator, also elect to use the operator as their selling agent, then the operator is to receive the capital gains share and is not entitled to collect a selling commission on top of the share. If the parties wish, at the time the home is listed for sale, the parties may negotiate the payment of a selling commission to the operator, provided that the operator agrees to forego all capital gains share.
6. A capital gains clause is to be clearly and separately set out in the Disclosure Document provided to prospective purchasers before signing an Agreement.
7. If the capital gains clause information is not disclosed to the prospective purchaser prior to the signing of the Site Agreement, then the operator cannot rely on it at any future sale. (The prospective purchaser to sign that they have read and understood the conditions of the capital gains clause.)



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In the event the Government persists in its inclusion, ARPRA believes the provisions must be greatly reduced. ARPRA is aware that the UK legislation provides for a 10% capital gains clause, but UK agreements require planning permission which provides a level of security of tenure not enjoyed here.

#### **10.12 Disputes relating to sale**

(1) states that the terms of the proposed site agreement or the proposed site fees can be matters resolved by a tribunal hearing. For these two particular issues, it would make sense for the proposed purchaser to be allowed to apply, but the proposed purchaser is not listed as an eligible applicant.

It is advised that (2) have a Note included which advises that compensation may include rent paid and advertising fees.

**11.2 Termination notices** – (2) should contain an additional point (d) which states that a home owner's rights and obligations can be found in the Site Agreement, and that home owners should seek advice on the Termination Notice.

#### **11.6 Termination notice given by operator for breach of agreement**

(5) states – *“The Tribunal may make a termination order if it is satisfied that:”*

ARPRA believes this line should be changed to –

*–“The Tribunal, on application by a community operator, may make a termination order if it is satisfied that:”*

### **11.8 Termination notice by operator for closure or change of use**

This section has given rise to much concern. ARPRA believes that subsection (1) allows a community operator to close a park without the scrutiny provided by the current Act.

The current Act provides the following –

#### **“102AA Consent by Tribunal to notice of termination on ground of change of use**

(1) A park owner may apply to the Tribunal for consent to the issue of a notice of termination in respect of a residential site on the ground of a change of use of the land on which the residential site is situated, being a change of use for which development consent is not required under the Environmental Planning and Assessment Act 1979.

(2) Consent to the issue of the notice is not to be granted unless the Tribunal is satisfied that the park owner genuinely intends to use the land for a purpose other than that of a residential site.

(3) Before determining an application under this section, the Tribunal:

- (a) must ensure that both the park owner and the residents are given a reasonable opportunity to make submissions to the Tribunal with respect to the proposed change of use, and
- (b) must give proper consideration to any such submissions that are duly made.”

The Draft Bill at S.11.8 allows for -

1. termination because the contract for sale requires vacant possession.
2. termination because the operator wants to close the park.
3. termination because the site is required for another purpose, ie, a change of use.

Arguments have been made that the first 2 options are not changes of use, however –

- If the purchaser didn't intend to change the use of the park (site) on settlement of the sale contract, why would the contract have VP was required? He'd be losing money he didn't want to lose. Therefore, point 1 means that a change of use is (at least) in the wind. The buyer wants the park empty before settlement, presumably, because he does not intend to be an operator. “No use” may not be a change of use to a council, but “no use” is a change of use under the current Act, and under the Draft.
- The community is closing. It means the site is no longer to be used as a residential site. No use, again, is a change of use, for the purposes of the legislation.

Option 3 is quite clearly a change of use for which a DA may be required. Also implied here is that the operator does not intend to sell or otherwise dispose of the land or park. He intends to keep ownership, but wants to do something else with it, but will keep it running until his plans are approved, if necessary. ARPRA notes the following -

- If the intended change requires a DA, then the notice can't be served until the DA is approved.

- If the intended change does not require a DA, then the operator simply issues the notice giving 12 months' notice of the termination. This is the same as the first 2 options.

The Draft Bill has removed the requirement for CTTT orders before the termination notice is served, for those changes that do not require a DA.

In reference to a sale with vacant possession, or a closure, it can be said that the current Act requires CTTT orders, as neither of these require a DA, and in both of these, the intention is that the site will no longer be a site (Section 102AA). There is nothing in the current Act which would require the Tribunal to dismiss such an application from a park owner, if the park owner applied. There is no lack of jurisdiction for such matters.

S.11.23 quite clearly shows the Government's intent is to apply Section 11.8 to 3 different situations, in which the community is to be sold, or closed, or the site is to be used for a different purpose.

A park closure does not require a DA to be submitted, otherwise an operator may end up in the position of being denied the right to close his park, if the DA was refused.

A sale doesn't require a DA either, because if it did, then the council would have the power to say who he could sell his park to, and that would drastically effect the selling price.

A Council, when they have regard to the Local Government Regulations, is quite correct when they say a sale or closure is not a change of use. But when you have regard only for the Draft Bill, you must deal only with the definitions in it.

The only real change between the current Act and the Draft Bill is that the Draft Bill does not require CTTT orders for changes of use that do not require a DA.

On some occasions, a park owner has lodged development applications to upgrade current homes in a park. This does not change the use of a site. ARPRA understands that no consent for such an action has yet been granted by any council. ARPRA is not recommending the inclusion of termination on DAs where there is no change of use.

With reference to Section 5.8(1) and (2) of the Draft Bill. A home owner has the right to replace the home, with consent, and the operator must not unreasonably refuse consent. This right has carried over from the current Act. Operators don't have the right to terminate agreements to upgrade the homes.

However, the Draft Bill at Section 11.8 gives the operator the right to close the park, or part of it, without the necessity of development consent, to replace the homes with new ones and sell them off and make lots of money.

ARPRA believes that this was not the Government's intention.



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ARPRA believes that the reinstatement of Section 102AA from the current Act into the Draft Bill would prevent this situation from occurring. Operators would need to convince the Tribunal that they intended to close the community for a genuine reason. Home owners would be given an opportunity to present evidence to the contrary.

ARPRA submits the following for insertion into Section 11.8 -

“(2A) (a) An operator must apply to the Tribunal for consent to issue a Notice of Termination on the ground of sale, closure, or change of use if the change of use is a change for which development consent is not required under the Environmental Planning and Assessment Act 1979.

(b) Consent to the issue of the notice is not to be granted unless the Tribunal is satisfied that –

- (i) the sale contract genuinely requires vacant possession; or
- (ii) the operator genuinely intends to close the community or part thereof, or
- (iii) the operator genuinely intends to use the land for a purpose other than that of a residential site.

(c) Before determining an application under this section, the Tribunal:

- (i) must ensure that both the operator and the residents are given a reasonable opportunity to make submissions to the Tribunal with respect to the proposed change of use, and
- (ii) must give proper consideration to any such submissions that are duly made.”

Operators who simply intend the upgrade of homes will fail in their bid to issue notices under 11.8. They won't be able to prove closure, and upgrading the homes isn't a change of use, and remains the right of the resident, not the operator.

ARPRA thought long and hard about requesting the removal the sale and vacant possession section. Ultimately it may not matter if it is there or not. Even if the sale provisions are removed, it will not stop an operator from apply under the closure provisions, if they have a sale contract with a clause requiring vacant possession.

ARPRA has received submissions Section 102(4) of the current Act. This subsection has provisions relating to information to be contained in a termination notice issued under Section 102.

ARPRA believes that these provisions should be inserted into the Draft Bill, at Section 11.2, in the following manner -

**“11.2 Termination notices**

(1) A party to a site agreement may give the other party a termination notice for the termination of the agreement.

(2) A termination notice must be in the approved form, be signed by the party giving the notice or the party’s agent, and set out the following matters:

- (a) the residential site concerned,
- (b) the day on which vacant possession of the site is to be given,
- (c) the ground for the notice (if any).

(3) A termination notice that does not comply with this section is of no effect.

(4) A termination notice issued under Section 11.8 for a sale, closure or change of use must contain the following statements –

- (a) a statement to the effect that the resident is not required to deliver up vacant possession of the residential premises until ordered to do so by the Tribunal,
- (b) a statement to the effect that the resident may be entitled to be paid compensation under section 11.24 or 11.25 which, if payable, must be paid in full before the resident is required to deliver up vacant possession,
- (c) such other statements as may be prescribed by the regulations.”

**11.9 Termination notice by operator for compulsory acquisition**

ARPRA believes that (2) should provide 12 months’ notice, in line with the provisions for a change of use.

**11.11 Termination notice by operator for non-use of site**

ARPRA understands that this Section will be amended to 3 years, from 6 years, with an option to increase to a further 3 years.

**11.18 Enforcement of possession orders**

Subsection (4) needs some clarification concerning the extent of the Sheriff’s powers regarding Site Agreements. The home is not part of the rented premises. ARPRA believes that the enforcement needs to be completed at a higher level – given that the common areas of the park are also covered in a site agreement, a home owner’s access to the park as a whole should be restricted. The Sheriff should not be changing locks on a home that is not owned by the community operator, while access to the community as a whole is still possible. That does not make sense.



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**11.24 Compensation for relocation** – ARPRRA believes that subsection (1) should be amended to include relocation compensation to any community, whether or not it owned by a different owner or the same owner. The stipulation that relocation compensation is only available if the other community is operated by a different operator should be removed.

**11.25 Compensation in other circumstances** – (3) All options under (3) should be removed, except for “(f) the current on-site market value of the home”. A note should be added to (3) which states that the on-site market value is determined to be the value the home would attract if the home were sold to a purchaser with the same terms enjoyed by the existing resident. That is, without consideration to any imminent closure or development. ARPRRA is of the opinion that this section applies only when a suitable alternate site cannot be secured.

**12.13 Applications to Tribunal relating to disputes** – (1)(b) – ARPRRA applauds the inclusion of collateral agreements. Shared equity agreement disputes may be resolved in the Tribunal, should any of the clauses conflict with the requirements of the Act. We note also that the use of the word ‘breach’ has been removed. The Tribunal will have the jurisdiction to determine any matter relating to a dispute. Such disputes do not necessarily have to be a breach of the Agreement. ARPRRA believes this section should include prospective purchasers. Sale contracts are also collateral agreements over which the Tribunal will have jurisdiction. Prospective purchasers should also have the right to apply for the return of a sale deposit or purchase amount. ARPRRA also applauds the use of the Tribunal to determine disputes between home owners.

#### **14.1 Service of notices and documents**

Service of documents and notices into mailboxes remains a concern for communities which do not have individual mail facilities. Referencing 5.13(1) – the mail facilities are not required to be individual or lockable.

ARPRRA believes an exemption should be inserted into Section 14.1 so that operators whose communities do not have individual, secure and lockable mail facilities for home owners cannot use this method of service.

**Schedule 1 – Rules of Conduct for Operators.** ARPRRA applauds the inclusion of Schedule 1, which provides protection for home owners against harassment and intimidation. It also requires existing operators have knowledge of all legislation related to residential communities, including the Local Government Regulations.