



15 June 2020

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**BY POST/EMAIL** – MHC@hpw.qld.gov.au

Dear Mark,

**RE: HS 00764-2020 Letter - Input requested on project for improvements to dispute resolution**

Thank you for inviting the Urban Development Institute of Australia Queensland (the Institute) to provide commentary on the dispute resolution process along with other related matters affecting residential (manufactured home) parks and retirement villages.

The Institute understands the project will explore how disputes that arise in retirement villages and residential (manufactured home) parks are managed, from informal dispute resolution at the park and village level, through to mediation and resolution in the Queensland Civil and Administrative Tribunal (QCAT). It will also focus on identifying what helps or hinders the resolution of disputes at each stage of the process.

As an introductory point we would recommend that a workshop, or a series of workshops, be carried out which involve park owners, home owners and other interest groups to work through in more detail some of our experiences and look for innovative ways of simplifying and making the process more effective.

Please find the following specific comments on the areas that you requested. Comments are provided separately on residential (manufactured home) parks and retirement villages. Some comments do, however, overlap.

#### **Residential (Manufactured Home) Parks**

##### **The current dispute resolution system and members' experiences of the system**

Currently the process is built around negotiation, mediation, and then ultimately QCAT. Prior to the recent amendments to the *Manufactured Homes (Residential Parks) Act 2003 Qld* (MHRP Act) there was a focus on an internal dispute resolution process. This process is mentioned in fact sheets produced by the department, however is not actively promoted.

Before a Manufactured Homes Dispute negotiation notice (Form 11) can be delivered, there should be an acknowledgement by both parties that there has been an attempt to resolve the dispute by actively participating in an internal dispute resolution process. A robust internal dispute resolution process would potentially save a large amount of time and emotional distress. It would also avoid, as has occurred since the MHRP Act's recent amendment, a park owner being served with a Form 11 without having any prior knowledge of the subject of dispute.

The next step is execution and delivery of a Form 11 which commences the formal negotiation process. We believe the formal negotiation process could be improved as follows:

- Provide for a notice period which sets the negotiation meeting to have a minimum of 14 days and a maximum of 28 days after delivery. The initial 14-day period will give the parties sufficient time to prepare
- The Form 11 should be executed by all parties of the dispute who should provide their full name and contact details. Our members have experienced instances where parties are indicated as being a party to the Form 11, but it was later found that this was not the case. The most appropriate form of action is for all disputing parties to sign the form, removing any uncertainty.
- All parties (where practicable) should attend the negotiation meeting so they are able to have a clear understanding of all matters and resolutions offered, not rely on a third party as representative to pass on the information which may ultimately lead to a distortion of attempts to resolve the dispute
- If a resolution is achieved, the MHRP Act should prescribe a way for that resolution to be formalised (e.g. in writing and signed by all parties)
- If achievable, prior to a Form 11 being delivered an organisation such as Queensland Retirement Village and Parks Advisory Service (QRVPAS), provide legal advice to home owners about the purpose and appropriate content of a Form 11. This may significantly reduce angst and time wasted in clarifying issues. The emotional distress on home owners and park owners, and in particular their employees, during this process is significant
- Additionally, if a dispute has been previously resolved by negotiation between a park owner and the Home Owners Committee (on behalf of home owners), then there should not be any opportunity for a home owner to serve a Form 11 on the park owner for that same matter.

The next step after Form 11 is the Tribunal mediation process, and unfortunately the Institute has been unable to access data on the success rates of this process. Feedback from members indicates the success rate has not been high.

Presently, there is no timeframe for a dispute to proceed from an unsuccessful negotiation to mediation. A dispute could therefore sit in abeyance for an excessive period before being enlivened again. A clear timeframe should be given to promote certainty in the resolution of disputes.

If the dispute has been resolved during negotiation, the mediator should have powers to prevent the dispute from being subject to mediation and further action to QCAT.

Section 113 of the MHRP Act currently provides that a party cannot make a record of anything said in a mediation, which would prevent even the most basic form of notes being taken. Presumably, this

was not the intention of the provision and that it should instead prohibit the use of anything said at the mediation for evidential purposes.

There is currently no disincentive or incentive for parties to proceed and resolve the dispute as part of a mediation process. If the mediator was able to complete a report which was sealed and handed to the Tribunal member (should the matter end up with QCAT), this may ensure both park owners and home owners take the matter more seriously and consider the matters raised by the mediator.

Ensuring mediators understand the operations of a manufactured home park would also be invaluable.

### **The quality, availability, and affordability of expert pre-contractual advice**

The Institute believes the Queensland Law Society should be encouraged to establish a list of lawyers with expertise in seniors housing.

### **What pre-contractual advice should be provided to prospective residents to help prevent future disputes?**

From the experience of our members the disputes generally revolve around site rent adjustments (in particular, a lack of understanding with respect to market reviews and how they are performed), behavioural standards, and maintenance of facilities and infrastructure.

We believe a series of videos prepared by an organisation such as QRVPAS dealing with each of these issues would be incredibly useful. These videos could deal with all legal aspects of a relatively standard Site Agreement and the provisions of the MHRP Act. The legal information and fact sheets provided by Caxton Legal Centre Inc are also very useful.

We also believe the legal documentation, e.g. Form 2 Site Agreement and Form 1A and 1B Disclosure Documents, is overly complex and ultimately defeats what the department is trying to achieve in disclosure of important matters and these should be reviewed.

The Institute supports the preparation of a code of conduct, which can assist self-regulation by park owners somewhat similar to the retirement village system. Such a code could include a pre-contractual checklist for park owners.

## **Retirement Villages**

### **The current dispute resolution system and experiences of system**

#### ***QCAT resourcing***

The Institute is concerned the QCAT is under resourced. This leads to matters being determined 'on the papers' without any hearing. This often leads to a lack of understanding by the Members of what the issues are because there are no opportunities to ask questions. This is exacerbated as the written materials commonly do not properly deal with the issue or the law and often contain large amounts of irrelevant material, because it is often being prepared by lay people.

Ideally, QCAT would be given better resources to hold actual hearings, where possible and appropriate, to increase the quality of the dispute resolution process and to achieve clearer and fairer outcomes for all involved.

### ***QCAT decision making***

The Institute has been concerned that QCAT decision making has been inconsistent at times. This can be attributable to a number of factors including:

- The *Retirement Villages Act 1999* (RV Act) is complex. That complexity is heightened as the RV Act has some drafting issues, something which has been recognised by the Queensland Court of Appeal. During the recent review of the legislation, unfortunately many of the issues identified by the industry were not addressed (as the focus appeared to be on consumer protection measures)
- The prevalence of and preference by QCAT for self-represented litigants leads to QCAT being given little assistance through submissions and pleadings
- QCAT members rarely have background or experience in retirement villages law
- Operators in particular, do not appeal decisions that are inconsistent with the RV Act because of the relative cost of doing so (noting that often disputes are minor and limited to one village). Decisions that are inconsistent with the act then stand as precedent for the broader sector, increasing confusion and the potential for more disputes.

Often disputes are binary and there is no material likelihood of settlement. The current process has two formal mediations (the mediation required by the RV Act before proceedings are commenced and a mediation required by QCAT after the dispute is commenced). The last mediation is often of limited value and places further burden on QCAT's already limited resources.

### ***Disputes between residents***

One of the more prevalent areas for disputes are those between residents. The current systems, including the RV Act, do not adequately provide a mechanism to resolve disputes between residents. Fundamentally, residents live independently. However, operators are inappropriately being asked to take the role of a 'parent' or 'teacher' to resolve disputes between residents. This puts operators in a very difficult position both legally and practically, and there is very little support (legislative or otherwise) for operators in that role. The new behavioural standards go some way but are insufficient. It is proposed that further legislative changes are made to address these issues and to provide support for residents and operators in relation to these types of disputes.

We have heard through our members of one instance where an operator has been forced (by reason of s135(2)(b) and (c) of the RV Act) to spend over \$50,000 to get advice from forensic and legal experts and undertake surveillance in order to try to resolve and prevent disputes between residents at a village. The operator has very few powers to address disputes between residents, and the avenues that an operator has to enforce a contract are limited, heavily regulated, and require a high threshold of evidence. If that happened in any ordinary residential setting, the residents would be compelled to resolve the issues themselves through ordinary civil or criminal law.

### ***Disputes regarding matters affecting the broader village***

Under the current system, the service charges or budgets for a village can be materially impacted by a single resident bringing a claim against the operator (who say, objects to an increase in a particular line item). If the resident wins, it affects the outcome for the whole village, which the other residents may otherwise have been happy to accept (e.g. if they were happy with the increase). If the resident loses, the operator has incurred cost and the other residents' charges and budgets may have been impacted without cause.

It may reduce the incidence or magnitude of disputes about things that impact the broader village (such as general services charges and budgets) if a minimum number (or %) of residents were required before formal action can be brought against the operator on these issues.

### ***Quality, availability, and affordability of expert pre-contractual advice***

This question assumes, given its context, that the quality of pre-contractual advice has a material impact on the number of disputes. Many disputes concern budgeting, changes with respect to technology (for example, the impact of NBN on emergency response systems and electricity deregulation) and day to day village issues. Precontractual advice is unlikely to assist in resolving those disputes or the prevalence of those disputes arising.

It is acknowledged the RV Act is complex and there are very few solicitors with the requisite experience to advise residents effectively and cost-efficiently. There may be some disputes with residents, particularly those regarding exiting a village, which may be reduced if the resident has obtained proper pre-contractual advice.

It is recommended that the department works with the legal profession (including the Queensland Law Society) to implement ways in which to develop and promote lawyers with the requisite expertise in the area. Some relevant initiatives could include:

- an ongoing training program for retirement village lawyers
- a publicly available register of lawyers with retirement villages expertise that residents can access
- a referral system to put residents in contact with lawyers that have retirement villages expertise.

### **What pre-contractual advice should be provided to prospective residents to help prevent future disputes**

Please note our comments above about the leading causes of disputes in retirement villages.

The Institute notes that the level of complexity of the RV Act and, by extension compliant contracts, is a contributing factor in the number of disputes. In part, this is attributable to the level of overregulation. One example of this is fixed fee contracts. A contract that had fixed fees for life would be highly desirable in the market (by both operators and residents). It would result in simplified contracts, no budgeting disputes, and a high degree of consumer protection. However, the only way to introduce a "fixed fee for life" in a compliant contract is in an overly complex way (which then causes confusion and potentially leads to further disputes).

### **Conclusion**

The Institute appreciates the department's attention to residential park and retirement village issues and the proactive action taken to support residents and owners. The Institute recommends the above comments to assist your review of dispute resolution arrangements.

Should you have any wish to clarify or discuss this matter please contact Policy Manager, Martin Zaltron (mzaltron@udiaqld.com.au) (07) 3229 1589.

We appreciate the collaboration that occurs between your department and the property development industry. We look forward to continuing to engage with you on this important matter.

Yours sincerely,

**Urban Development Institute of Australia Queensland**

A handwritten signature in black ink, appearing to read 'Kirsty Chessher-Brown', with a long horizontal flourish extending to the right.

Kirsty Chessher-Brown  
**Chief Executive Officer**