



Residential (Land Lease) Communities Regulation 2014

Consultation Draft

Submission from:

Council on the Ageing NSW (COTA NSW)

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The Aged-care Rights Service (TARS)

The Aged-care Rights Service (TARS) is a specialist community legal centre providing advocacy in New South Wales for residents of Commonwealth subsidised nursing homes, hostels and recipients of Community Aged Care Packages.

TARS provides advice and representation to residents of self-care units and services apartments in Retirement Villages relating to matters arising out of the Retirement Villages Act 1999 (NSW).

TARS services include the Older Persons Legal Service (“OPLS”) which provides legal advice, assistance and education for older people throughout NSW in areas of law such as: consumer rights, human rights, social security/welfare, and planning ahead.

Council on the Ageing NSW (COTA NSW)

COTA NSW is the peak body representing people over 50 living in NSW. We are an independent, non-partisan, consumer-based, non-government organisation. We work with politicians, policy makers, providers of services and products as well as media representatives to make sure wherever possible our constituents’ views are heard and their needs met.

1. SUMMARY

TARS and COTA NSW share a mutual interest in protecting the rights of people living in residential communities in New South Wales. Residential communities are one of the few remaining affordable housing options (outside of the government funded social housing market) left in the marketplace for older people on low incomes living in New South Wales. The primary interest of both TARS and COTA NSW is in protecting the rights of those residents.

This submission is supported by the experiences and anecdotal evidence compiled by TARS solicitors and advocates in the course of their work and feedback from residents gathered by COTA NSW in community meetings, consultations and consumer surveys.

2. INTRODUCTION

We congratulate the Minister for Fair Trading for initiating these much needed changes to the legislation and subsequent regulations. Many of the reforms are similar to those made for retirement villages in New South Wales and should improve the lives of residential community residents. In particular, we support the introduction of the new standard form of site agreement. However, there are still some concerns in the regulations and agreement that need to be highlighted. This joint TARS/COTA NSW submission seeks to address these concerns.

3. COMMENTS

From information collected by Older Person's Legal Service (OPLS) solicitors when providing advice to callers on the state wide legal advice line, it would appear there has been a significant increase in older people choosing residential communities in their retirement. This is supported by consumer research COTA NSW has conducted through its consumer reference groups and from the COTA NSW 2014 housing survey.

As housing becomes less affordable in New South Wales, particularly in the Sydney basin, there are a dwindling number of affordable housing options left in the marketplace. Many are forced to move to Sydney's fringe suburbs or out of Sydney altogether.

An increasing number of older people, particularly women, reach retirement with little superannuation and few assets. They may have low savings that prevent them from being able to live in suburban areas because of high housing costs and an inability to raise mortgage finance. In some cases however, they may have sufficient savings to purchase a relocatable home. Many older women in particular end up in this accommodation due to the shortage of public housing and social housing for emergency accommodation and ongoing accommodation. It is important therefore to enable

residential communities to continue to provide affordable housing options to older people on low incomes and ensure they are treated fairly and transparently by owners and managers.

4. RECOMMENDATIONS

a. A committee of stakeholders should be formed to review submissions

An advisory committee comprised of key stakeholders was established for the development of the standard retirement village's contract in 2011. We believe that a similar committee is needed to review the submissions from stakeholders around the regulation and standard form of site agreement. We recommend that the Tenants Union or similar should have a representative on such a committee.

We recommend that the submissions from this consultation on the regulation and proposed standard form of site agreement be reviewed by a committee of stakeholders representing consumers and industry, including the Tenants Union.

b. The term 'home owner' should be clearly defined

The form of home ownership in a residential community is unique. COTA NSW and TARS believe that because the term 'home owner' is a term more commonly associated with ownership of both the land and the dwelling, the term 'home owner' as it applies to residential communities, the regulation and standard form of site agreement, should be clearly defined.

We recommend that the term 'home owner' be changed in the regulation and standard form of site agreement or defined to cover the unique circumstances in residential parks where the home dwelling is owned (in the sense of a chattel) but the land that the dwelling is on is not owned by the home owner.

The Regulation

c. Clause 9 - Exemption from requirement for mandatory education

We believe it is important that *all* operators have regular mandatory education. Further, we believe that this requirement should be retrospective to include *all* operators of communities, not just new operators. It is not sufficient for an operator to be exempted from training because they were the operator of a community "at any time" within the period of two years before becoming the operator. In addition, it is not clear who should be trained under the clause. The term 'operator' needs to be clearly defined. Indeed, COTA NSW and TARS believe mandatory training should apply to not just the 'operator' but also the on-site manager and any senior staff.

In our view, where disputes arise due to the fact that the operator has not complied with the legislation, the issue of staff training is always raised. These communities are not regulated, they are not audited, and they are not accredited, yet the day to day lives of residents can be negatively impacted by staff behaviour that does not meet minimum reasonable standards and behaviours that are not proportionate to the issue or circumstances that give rise to the behaviour. All key managers and senior staff (as opposed to, for example, receptionists) should be required to have annual training. If they don't, they will not understand the requirements of both the legislation and the new standard form of site agreement.

We recommend that clause 9 be removed.

d. Clauses 12 and 13 – The maximum service availability charge

This charge is not adequately defined in the Regulation. It is not clear what the charge is and what services it covers. Currently in clause 13 it is not clear whether the charge is for \$50 per service or \$50 altogether. This needs further clarification.

TARS clients have reported being charged various additional fees by operators for 'administrative costs' associated with bulk metering. For example, one operator charged an 'administration and network maintenance fee' per quarter, despite the fact that there was no provision for such a fee in the residents' contract. When the client complained, they were told that although the fee was not in their contract it was still payable and that the TARS advice was wrong. This type of additional fee impacts on pensioners, particularly when they are given no warning.

We recommend that there be NO service availability charge where there is bulk metering and that the services are provided pursuant to the standard form of site agreement.

Schedule 1- Standard form of site agreement

a. Clauses 6 & 7 - Site fees

Many older people object to being told that their only option is to pay operators by direct debit. Many are pensioners and often don't trust operators to debit the correct amount. Secondly, many prefer to pay by cash or bank deposit. It is their right to choose their method of payment. If the operator chooses to encourage residents to pay by direct debit, then that encouragement should not be a contractual term. In that regard, we refer the NSW Office of Fair Trading to similar arrangements for mobile phone contracts and similar consumer contracts.

We recommend that clauses 6.2 and 7.1 be removed.

b. Clauses 8 & 9 – Utilities

Clause 9.4 - As previously mentioned, this clause is not clear whether the “amount more than \$50 each calendar year” covers both water and sewage services or whether up to \$50.00 can be charged separately for water and then also for sewage service availability.

We do not approve of this charge and we recommend that clauses 9.3 and 9.4 be removed.

c. Clauses 16 & 17 - Access to residential site

Clause 16.3 - This clause refers to access to the site ‘or your home’. As currently written it appears that the operator has the right to access the site at any time without notice. If this access is not limited, some operators could use this clause as an excuse to access the site and the home whenever they wish to do so, which would be an invasion of privacy.

We recommend that clause 16.3 should allow for a notice period of seven days in relation to entry to the home and two days in relation to ‘inspect, service, repair or replace any electricity, water or gas meter located on the residential site’. We also recommend that the ‘no notice’ provision of 16.3 be limited to reading the meters.

d. Clauses 19 & 20 - Maintenance of residential site and common areas

While it is clear in clauses 19 & 20 that the maintenance of the residential site is the responsibility of the home owner and the maintenance of the community’s common areas are the responsibility of the operator, it is not clear whether the cost of general maintenance of the common areas and removal of trees in clauses 20.5 and 20.6 (which can be quite costly) are included in the agreed site fees or charged to the home owner at additional cost.

We recommend that both 20.5 and 20.6 clearly state that the operator will pay the costs of this maintenance work. If this is not clearly stated, the cost of maintenance work could be passed on and changed to residents in addition to their site fees.

e. Clause 25 - Services and facilities

Clause 25.2 - COTA NSW and TARS do not believe it is enough, “to notify you or a residents committee (if there is one)” if an operator is removing or substantially restricting a facility or service. Every resident should be notified of any changes to services and facilities, as they may not necessarily communicate with a residents committee. If a resident’s committee exists then it should be given notice as well.

We recommend the clause be changed “to give you and the resident’s committee...”

f. Clauses 26 & 27 - Sale of Home

Clause 26.4 - The purpose of clause 26.4 is not clear.

We recommend that, in the interests of the consumer, clause 26.4 be amended to read, "... to enter into a new site agreement with the purchaser of your home, unless we and the purchaser do not agree to the terms of the proposed agreement."

g. Clauses 28 & 29 - General obligations

Clause 28.2 - Interference with mail has been reported by some residents and therefore the operator should obtain consent in writing first from the home owner.

We recommend that clause 28.2 be amended to read, "...to not access or interfere with your individual mail facilities, except with your written consent, and..."

h. Notes - Termination of agreement

In our view, the most acute problem faced by consumers is the closure of residential communities by operators in both metropolitan areas and in coastal communities for the purposes of redevelopment and change of use.

Often consumers are unaware of their rights and as a result are "turfed out" often having never had the opportunity to seek legal advice in relation to their contractual rights, let alone to have the opportunity of making an application to the NCAT in relation to the change of use or closure of the residential community. Many are pensioners and have no alternative place to go.

Some residents have reported to COTA NSW that they have been intimidated by operators to accept certain termination conditions while facing the very real risk of becoming homeless once they have left their community. For many, the money invested in their home was the only money they have.

We understand that the regulations and the standard form site agreement are not intended to solve this broader housing dilemma. However if the NSW government is to continue reducing availability of public housing and social housing, it should ensure vulnerable consumers of the best possible outcome if they face eviction.

At the very least consumers should be made aware of their contractual rights under the new standard form of site agreement at the time of entry into that agreement. They will then be able to revisit their contract at the time they are (often verbally) told the site is closing. They will be able to seek advice and assistance or file an application at the NCAT (Consumer and Commercial Division) with or without legal representation, as is their right.

The section 'Notes – Termination of agreement' should be amended and introduced as a new clause 28 of the standard form of site agreement. The new clause should then sit after clauses 26 & 27- Sale of Home. There is no reference in the current Notes to the terms of section 125 of the *NSW Residential (Land Lease) Communities Act 2013* (the Act).

We recommend that a new clause 28 of the standard form of site agreement should be entitled 'Termination of Agreement.' It should clearly summarise the requirement for a termination notice if there is to be a change of use, and the requirements of 125 (2) (a) and (b), 125 (3), 125 (4), 125 (5), 125 (6), 125 (7) and 125 (8) of the Act.

Conclusion

We again thank the NSW Minister for Fair Trading for the invitation to comment on these important reforms. We congratulate the NSW Office for Fair Trading for initiating some very good amendments to the legislation which we are sure will reduce disputes and improve the lives of those in many residential communities in NSW.



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