Civil and Administrative Tribunal

New South Wales

Case Name:	YBOS Pty Ltd t/as BIG4 Tweed Billabong Holiday Park v Creek
Medium Neutral Citation:	[2020] NSWCATAP 284
Hearing Date(s):	18 June 2020
Date of Orders:	23 December 2020
Decision Date:	23 December 2020
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President M Gracie, Senior Member
Decision:	(1) The stay order made on 1 April 2020 be lifted. (2) Appeal upheld. (3) Set aside the orders of the Tribunal made on 13 March 2020. (4) The application of the respondent lodged on 21st October 2019 is dismissed.
Catchwords:	APPEAL — NCAT — fresh evidence - question of law - statutory construction - appeal from decision of Consumer and Commercial Division of NCAT COMMUNITY SCHEME - Residential (Land Lease) Communities Act 2013 (NSW) - residential and tourist sites - age restriction rule for residents - home owner - occupant - whether rule fair and reasonable and clearly expressed - age restrictions for additional occupants - whether rule inconsistent with another Act - anti-discrimination - age discrimination - whether operator under a site agreement provides goods and services - community rules - statutory and other instruments - application of community rule to tourists

Legislation Cited:	Age Discrimination Act 2004 (Cth) Anti-Discrimination Act 1977 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Government Information (Public Access) Act 2009 (NSW) Interpretation Act 1987 (NSW) Residential (Land Lease) Communities Act 2013 (NSW) Retirement Villages Act 1999 (NSW) Statutory Instruments Act 1989 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250 Evans v Broadlands Relocatable Homes Estate (unreported, RC15/68173, 22 June 2016) Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd (2010) 186 FCR 410 IW v City of Perth [1997] HCA 30; 191 CLR 1 Murphy v Trustees of Catholic Aged Care Sydney [2018] NSWCATAP 275 Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Texts Cited:	None cited
Category:	Principal judgment
Parties:	YBOS Pty Ltd t/as BIG4 Tweed Billabong Holiday Park (Appellant) James Creek (Respondent)
Representation:	Counsel: D Hughes (Appellant) N Eastman (Respondent) Solicitors: Corrs Chambers Westgarth (Appellant) Tenants Union of NSW Co-Op Ltd (Respondent)
File Number(s):	AP 20/15073
Publication Restriction:	Nil
Decision under appeal:	

Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	13 March 2020
Before:	W Priestley, Member
File Number(s):	RC 19/47807

REASONS FOR DECISION

Introduction

1 The appellant is the operator of a caravan park located at Tweed Heads, New South Wales known as the "BIG4 Tweed Billabong Holiday Park" (the Park). There are 66 sites in the Park that are occupied by permanent residents as their principal place of residence pursuant site agreements entered into with the appellant (residential sites). The respondent is a resident of one of the Park's residential sites pursuant to a site agreement entered into between the appellant and the respondent on 5 August 2002.

2 The Park is a residential "community" for the purposes of the *Residential (Land Lease) Communities Act* 2013 (the RC Act).

3 The appeal concerns a dispute with respect to a Community Rule (the Rule) introduced by the appellant in June 2019 which provided:

> Age Restriction
>
> The age restriction for the community is that a person must be at least 55 years of age to occupy a residential site. A homeowner must not allow a person to occupy a residential site unless that person meets the age restriction.

4 On 21 October 2019, the respondent lodged an application in the Tribunal to set aside the Rule on the basis that it was contrary to ss 86(3) and 87 of the RC Act. The Tribunal ordered that the Rule be set aside under s 95(2)(a) of the RC Act. The appellant appeals from that decision of the Tribunal.

5 A stay of the Tribunal's order setting aside the Rule was ordered on 1 April 2020, until further order.

Background

6 The essential facts are not in dispute.

7 The evidence before the Tribunal was that there are a total of 172 sites within the Park comprising the 66 residential sites and other sites for tourists and holiday makers.

8 The tourist sites are available for short term stays for tourists and holiday-makers. The tourist sites are generally separated from the residential sites by a series of hedges and have different access roads. The Tribunal noted at [7] that the Park's "Tourist Rules" provide that a person is regarded as a "visitor" if they stay on a site for up to two weeks continuously or up to three weeks cumulatively in any one year. Beyond that time, a person will be regarded as an "occupant". The Rule does not purport to apply to tourist sites.

9 Under the 66 residential site agreements, the homeowner leases the land on which the home is located in the Park. The evidence before the Tribunal was that there are 83 residents living in the 66 residential sites, of which there were between 5 and 10 residents under the age of 55, and only one of that number was under the age of 50. As we explain later, we have allowed some fresh evidence in the appeal that slightly revises some of those numbers.

10 The Tribunal accepted, although it was not expressly stated in the Rule, that "the respondent has advised the residents that the Rule only applies to those who become residents after the Rule was introduced": [7]. There is no challenge to that finding.

The Tribunal's Decision

11 The respondent as the applicant in the proceedings before the Tribunal contended that the Rule was objectionable and should be set aside on two bases:

(1) The Rule contravened s 86(3) of the RC Act because it was not "fair and reasonable" and not "clearly expressed";

(2) The Rule breached the prohibition on age discrimination in the *Anti-Discrimination Act* 1977 (NSW) (ADA) and was "of no effect" by reason of s 87 of the RC Act. We interpose here to record that although the respondent apparently sought to invoke the *Age Discrimination Act*

> 2004 (Cth) (the Federal AD Act) the Tribunal made no finding in respect of that Act.

12 We further interpose here to record the fact that no point has been taken by the parties that the Tribunal did not have jurisdiction to make a determination with respect to the Federal AD Act (see *Murphy v Trustees of Catholic Aged Care Sydney* [2018] NSWCATAP 275) and that, as we record later, the appellant has withdrawn any reference to or reliance on the Federal AD Act. Because of these matters recorded above and in the preceding sub- paragraph, we are of the view that the issues before the Tribunal were within the Tribunal's jurisdictional limits.

13 In the event that the application to set aside the Rule was unsuccessful, the respondent sought an alternative order by the Tribunal to have the Rule apply "consistently and fairly" so that it would also apply to any tourists wanting to use the Park.

14 In upholding the application and setting aside the Rule, the Tribunal found that the Rule was not "clearly expressed" and did not therefore comply with the requirements of s 86(3) of the RC Act. The Tribunal had regard to the fact that the Rule did not express the purported intention, based on the appellant's evidence that the Rule only applied prospectively. In response to the respondent's contention that the Rule was not clearly expressed for the reasons set out by the Tribunal at [12], the Tribunal held at [13]:

> I find the rule does not comply with the requirement in section 86 (3) of the RC Act that a rule must be clearly expressed. Section 86(5) merely says that a rule "cannot invalidate anything that has already occurred". In my view that does not prevent the rule in its current form preventing those who were residents before the commencement of the rule, being prevented from having someone "occupy" their site who is under the age of 55 in the future, and in that regard what the operator says it means, is not expressed at all. Nor does the rule say anything about what is meant by "occupy". There is no reference to the tourist rules which are said to give meaning to that term. The lack of clarity about these matter, is likely to lead to uncertainty, and possible disputes between residents and the operator. For these reasons the rule is not fair and reasonable, is not clearly expressed, and should be set aside.

15 The reference in [13] to the Rule not being fair and reasonable is apt to mislead. The Tribunal's finding was that the Rule lacked clarity leading to uncertainty and possible disputes. The conclusion was that "for these reasons" the Rule is not fair and reasonable and not clearly expressed. The appellant

appears to have taken the view that the Tribunal was in error in determining that the Rule was not clearly expressed and if that submission was to be upheld, the basis for the conclusion that the Rule was not fair and reasonable would be removed.

16 The Tribunal found that the Rule did not contravene the "fair and reasonable" requirement of s 86(3) on the basis put by the respondent that the Rule would have the effect of reducing the market value of home prices in the community: [11]. The Tribunal preferred the evidence of the appellant over that of the respondent in making that finding.

17 The Tribunal found, by having regard to s 44(6) of the RC Act, that although it was apparent that the intention of the legislature was to permit operators such as the appellant to make rules restricting residents on the basis of age, there was nothing to suggest that such rules could be made without first obtaining an exemption from the President of the Anti-Discrimination Board under s 126 of the ADA: [24]. Since no exemption was sought and there was no evidence that applying for such an exemption would be unduly burdensome for the appellant [26], the Tribunal found that the Rule was "inconsistent" with the ADA and "of no effect" under s 87 of the RC Act: [27]

Grounds of Appeal

18 In the Notice of Appeal filed on 27 March 2020, the appellant contended:

(1) The Tribunal made an error of law in finding that the Rule was "inconsistent" with another law within the meaning of s 87 of the RC Act, namely the ADA in that:

  (a) s 44 (6) of the ADA "expressly contemplated a community rule restricting age in precisely the manner effected" by the Rule;

  (b) "the act of making" the Rule did not of itself contravene the ADA;

  (c) "future conduct" by the appellant, taken in accordance with the Rule, would not contravene the ADA because the conduct would be done in accordance with the Rule, being "a rule or instrument" made under s 54 of the ADA.

(2) The Tribunal made an error of law in finding that the Rule was not clearly expressed within the meaning of s 86 (3) of the RC Act.

(3) Alternatively, the Tribunal should have exercised its power under s 95 (2) (a) of the RC Act and amended the Rule to overcome the Tribunal's concern with respect to its prospective operation and clarify the

meaning of "occupy". The Notice of Appeal contained a "potential form of wording" to amend the Rule.

Reply to Appeal

19 The respondent filed a Reply to Appeal on 4 May 2020 that supported all of the reasons and orders made by the Tribunal. An Amended Reply to Appeal was filed on 27 May 2020. The amendment stated:

> "The Tribunal could have also made the orders that it did on the basis that the same conclusion could have been reached under s 86 (3) of the [RC] Act".

20 As we discuss later in these reasons, the respondent's supplementary submissions explained that the purpose of the amendment was to raise a contention in the appeal that it was open to the Tribunal to have found that the Rule was not fair and reasonable under s 86(3).

Appellant's Submissions

21 The appellant filed written submissions on 1 May 2020 and submissions in reply on 29 May 2020. At the hearing of the appeal the appellant withdrew reliance on the Federal AD Act and confirmed that it confined its case to reliance only upon the ADA. The respondent did not respond and did not state that the respondent placed any reliance upon the Federal AD Act.

22 The appellant submitted:

(1) The age restriction rule is not inconsistent with the ADA. Having proper regard to s 44(6) of the RC Act, and the legislative background to it, Parliament "must have intended that a community rule could lawfully be made under the Act which discriminated on the basis of age";

(2) the Rule "itself" is not a violation of the ADA. Rather it would be the act of refusing goods and services that is the relevantly unlawful discrimination. The making of the Rule is not the provision of a good or service: relying on *IW v City of Perth* [1997] HCA 30; 191 CLR 1;

(3) the conduct to which the Rule is directed is not unlawful. Firstly, an act done in accordance with a community rule is done in compliance with the RC Act, being an Act within the meaning of s 54(1)(a) of the ADA. Secondly, an act done in accordance with a community rule is done in compliance with s 54(1)(b) of the ADA which provides that conduct which is necessary to comply with any "rule or other instrument" made under any other Act is not unlawful;

(4) The differently constituted Tribunal in an earlier decision in *Evans v Broadlands Relocatable Homes Estate* (unreported, RC15/68173, 22 June 2016) (*Broadlands)* identified the interplay of the various sections

of the RC Act and correctly found that the community rule was a rule or instrument within the meaning of 54 (1)(b) of the ADA;

(5) The Rule is "sufficiently clearly expressed" and is essentially the same rule that was upheld by the Tribunal in *Broadlands*. There is nothing "unduly unclear" about the word "occupy". It is used in the RC Act (eg s 44) without being defined in the Act.

(6) The Tribunal ought to have exercised its power under s 95(2)(a) of the RC Act to amend the Rule to remove any lack of clarity rather than set aside the Rule in its entirety.

(7) If the Appeal Panel upholds the Tribunal's reasons with respect to "lack of clarity", the Rule should be amended "to clarify the issues impugned by the Tribunal" and the Appeal Panel should consider adopting the "potential form of wording" suggested by the appellant in its Notice of Appeal.

Respondent's Submissions

23 The respondent filed written submissions electronically on 19 May 2020 (filed again on 25 May 2020 when hard copies were received by post). The respondent submitted:

(1) a community rule which authorises discrimination on the basis of age is "inconsistent" with s 49ZYN of the ADA which prohibits age discrimination in the provision of goods and services to a person. Section 87 of the RC Act therefore renders the Rule of "no effect";

(2) section 44(6) of the RC Act does not prevent the Rule being inconsistent with s 49ZYN of the RC Act. As found by the Tribunal, s 44(6) may apply but only after an exemption is first obtained under ss 126/126A of the ADA;

(3) the focus of s 87 is whether the Rule is "inconsistent" with the age discrimination provisions of the ADA and not whether the ADA prohibits rule-making which is discriminatory;

(4) a community rule does not meet the description of a statutory instrument and "absurd results would flow from such an expansively unconstrained approach [to] the construction of the word 'rule' in s54(1)(b)";

(5) even accepting that the Rule is a "rule" for the purpose of s 54 (1)(b) of the ADA, the Tribunal was correct to conclude as a matter of construction at [22] that it "would be an absurd result if sub-ordinate or delegated legislation, could be used to circumvent primary legislation, unless the Act enabling the making of such sub-ordinate legislation, specifically enabled it to do so";

(6) the Tribunal was correct in finding that the Rule was not clearly expressed notwithstanding s 86(5) which prevents retrospectivity. The Tribunal was correct to find at [13] that the Rule does not prevent those

who were residents before the Rule came into effect being prevented from having someone occupy their site who is under 55 years of age in the future and it does not define what is meant by "occupy". As found by the Tribunal at [13], there is no reference in the Rule to the Tourist Rules that are said to give meaning to that term "occupy."

24 The respondent filed a supplementary written submission on 27 May 2020 dealing with the amendment raised by the Amended Reply. There was no objection taken by the appellant to us allowing the respondent to rely upon the Amended Reply or the supplementary submission.

25 The respondent submitted in his supplementary submissions that the Tribunal misunderstood the nature of his complaint that the Rule did not operate uniformly so as to be unfair and unreasonable. The respondent submitted that the age restriction rule was "not fair and reasonable in this community because it effectively creates two sets of rules: one for permanent residents/home owners living side by side with inter alia, long term causal and or tourist/s on tourists sites. One group is subject to age restriction whereas others are not."

Appellant's Submissions in Reply

26 In its written submissions in reply, the appellant contended:

(1) the amended grounds relied upon by the respondent to contend that the Rule was not "fair and reasonable" within the meaning of s 86(3) of the RC Act were not supported by a proper construction of the RC Act. In particular, the appellant relied upon s 92(2) of the RC Act which provides that a community rule is only binding on the "residents, owner and operator" of a community. For the purposes of the RC Act, tourists are not residents;

(2) a different application of the Rule is contemplated by the RC Act. The Rule reflected the particular type of residential community within the Park. The evidence before the Tribunal was that the Park had been modified over time to separate the residential community from tourists and this included having different road networks and other measures such as the planting of hedges to separate residents and tourists.

Application to Adduce Fresh Evidence

27 The respondent sought to adduce fresh evidence. The appellant objected to the fresh evidence in its submissions in reply. The index to the respondent's appeal bundle listed 8 documents (identified as items 2-9) that he sought to tender on the appeal.

28 One item (item 9) was withdrawn.

29 Item 2 was a letter relating to a Notice of Decision by NSW Fair Trading dated 15 May 2014 under the *Government Information (Public Access) Act* 2009 (GIPA Act) granting access to the Tenants' Union of NSW to "registrable information" under the former *Residential Parks Act* 1998 (the RP Act). The relevance of that document was not explained to us and we were not taken to it. The letter appears to be of historical and background interest only and has no other apparent relevance. We reject the tender of that document.

30 The balance of the fresh evidence which the respondent sought to tender (items 3-8) comprised extracts of various "Residential Parks Public Registers" for the period 2014 to 2020. These were presumably obtained by the respondent pursuant to a GIPA application under the RC Act similar to that the subject of the Notice of Decision of 15 May 2014 referred to in the letter at item 2 of the index to the respondent's appeal bundle. The respondent's submissions do not refer to or seek to explain the relevance of all of these documents or why they were not available to tender at the Tribunal hearing.

31 On our understanding of the fresh evidence as it was explained to us at the hearing, the only relevant documents are the single page extracts of the Residential Parks Register for 2020 and 2018 (items 3 and 4 respectively).

32 While noting the appellant's submissions in opposition to the tender and its reliance on *Yuen v Thom* [2016] NSWCATAP 243 at [20]-[21], we have decided to allow the extracts of the Residential Parks Registers for the years 2020 and 2018 (items 3 and 4) into evidence. The statistical information in the extracts clarifies some of the evidence that was referred to by the Tribunal. Those extracts do no more than identify and confirm that across the years from 2018 and 2020, the Park comprised:

(1) a total of 182 residential and tourist sites;

(2) 66 sites occupied by permanent residents as their principal place of residence pursuant to residential site agreements;

(3) an additional 9 sites where the dwelling is rented directly from the appellant and occupied by permanent residents (tenants) as their principal place of residence;

(4) approximately 85 persons (including spouses and children) who permanently reside in the 75 sites comprising permanent residents.

33 There does not appear to be any prejudice in allowing this evidence and nothing turns on the fact these figures differ slightly to the figures accepted by the parties and the Tribunal. The fresh evidence is simply extracts from the official record maintained by the Commissioner for Fair Trading in accordance with s 14 of the RC Act. This fresh evidence confirms that the majority of sites within the Park are tourist sites. In addition to the 66 sites occupied by residents under site agreements governed by the RC Act, the fresh evidence identifies 9 sites occupied by permanent residents pursuant to a rental arrangement directly with the appellant.

34 The other extracts from the Registers for the years 2014 and 2016 (items 5-8) do not seem to be of any relevance and we were not taken to them for the purpose of submissions. We have not received those documents (being items 5-8) as evidence in the appeal.

Statutory basis of the appeal

35 An appellant may appeal from a Tribunal's decision as of right on any question of law or otherwise with the leave of the Appeal Panel: s 80(2)(b) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (the CAT Act). As this is an appeal from a decision made in the Consumer and Commercial Division of the Tribunal, the appeal grounds, other than those concerning a question of law, are regulated by cl 12 Sch 4 of the CAT Act.

36 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69, the Appeal Panel set out a non-exclusive list of questions of law at [13]:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question;

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

37 A question of law also arises where it involves consideration of whether a court or tribunal has identified or applied the relevant and correct legal test and whether the facts of a case "fall within a statute properly construed": *Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd* (2010) 186 FCR 410 at [13].

38 The appellant contended that both grounds of appeal raise questions of law. We agree.

39 The first ground of appeal raises for our consideration the question of whether the Rule was "inconsistent" with any law so as to be "of no effect" by reason of s 87 of the RC Act. That involves our determination of the effect and operation of the Rule in the context of the provisions of both the RC Act and the ADA.

40 The second ground of appeal requires a process of statutory interpretation of s 86 (3) of the RC Act in the context of the Tribunal's finding that the Rule was not "clearly expressed".

41 Leave to appeal is not required. The issues on appeal require our consideration and determination of questions of law as to whether the Tribunal erred in its construction and application of the RC Act and the ADA.

Key Provisions of the RC Act

42 The objects of the RC Act are described in s 3:

> **3**. **Objects of Act**
>
> The objects of this Act are as follows—
>
> (a) to improve the governance of residential communities,
>
> (b) to set out particular rights and obligations of operators of residential communities and home owners in residential communities,
>
> (c) to enable prospective home owners to make informed choices,
>
> (d) to establish procedures for resolving disputes between operators and home owners,
>
> (e) to protect home owners from bullying, intimidation and unfair business practices,
>
> (f) to encourage the continued growth and viability of residential communities in the State.

43 Section 4 of the RC Act provides a number of important definitions for the purposes of this appeal (of which the notes do not form a part of the Act itself: s 4(4)), including:

> ***community*** or ***residential community*** means an area of land that comprises or includes sites on which homes are, or can be, placed, installed or erected for use as residences by individuals, being land that is occupied or made available for occupation by those individuals under an agreement or arrangement in the nature of a tenancy, and includes any common areas made available for use by those individuals under that agreement or arrangement.
>
> **Note—**
>
> A community may be—
>
> (a) a caravan park (that is, land, including a camping ground, on which caravans, or caravans and other moveable dwellings, have been, are or are to be placed, installed or erected) ...
>
> ***community rules*** for a community means the rules made under Part 8 for the community.
>
> ***home*** means—
>
> (a) any caravan or other van or other portable device (whether on wheels or not) other than a tent, used for human habitation, or
>
> (b) a manufactured home as defined in the *Local Government Act 1993*, or
>
> (c) any conveyance, structure or thing of a class or description prescribed by the regulations for the purposes of this definition.
>
> **home owner** means—
>
> (a) a person who owns a home on a residential site in a community that is the subject of a site agreement (whether or not the person resides at the site), or
>
> (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 any person of a class, excluded from this definition by the regulations.
>
> ***operator*** of a community means a person who is—
>
> (a) the person who manages, controls or otherwise operates the community, including by granting rights of occupancy under site agreements or tenancy agreements, whether or not the person is an owner of the community, or
>
> (b) 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) a mortgagee in possession of a community for which site agreements are in force, or

(d) another successor in title of a person mentioned in paragraph (a),

other than a person, or a person of a class, excluded from this definition by the regulations.

owner of a community means—

(a) the owner of land on which the community is located, or

(b) 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) a mortgagee in possession of a community for which site agreements are in force, or

(d) another successor in title of a person mentioned in paragraph (a),

other than a person, or a person of a class, excluded from this definition by the regulations.

resident means a person who is a home owner or tenant in a community.

residential community—see the definition of ***community***.

residential 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.

site agreement means an agreement under which the operator of a community grants to another person for value a right of occupation of a residential site in the community.

Note: A site agreement gives rise to a tenancy.

tenancy agreement means a residential tenancy agreement within the meaning of the *Residential Tenancies Act 2010.*

tenant has the same meaning as in the *Residential Tenancies Act 2010.*

44 Sections 5 and 6 provide that the RC Act applies to communities and s 6 provides that the RC Act applies to site agreements (whether existing immediately before or coming into existence after the commencement of this section). Section 7 describes the arrangements to which the Act does not apply. These include "an arrangement for occupation of a residential site for holiday purposes".

45 For reasons which we will describe later, s 13 is also relevant. It provides:

13. Relationship of act with other laws

(1) This Act does not apply to tenancy agreements, except to the extent this Act provides otherwise.

(2) The Retirement Villages Act 1999 does not apply to communities occupied by retired persons or predominantly by retired persons (that is, persons who have reached the age of 55 years or have retired from full-time employment).

(3) Nothing in this Act limits any requirement imposed by or under the Local Government Act 1993 or the Environmental Planning and Assessment Act 1979 .

46 Part 5 of the RC Act deals with responsibilities. The operator's responsibilities are described in s 37 as follows:

37. Operator's responsibilities

(1) The operator of a community has the following responsibilities--

(a) to ensure that the community is reasonably safe and secure,

(b) to take reasonable steps to ensure that the home owners--

(i) always have access to their residential sites, and

(ii) have reasonable access to the community's common areas,

(c) to maintain the community's common areas in a reasonable state of cleanliness and repair, and so as to be fit for use by the home owners,

(d) not to intentionally or recklessly damage or destroy any property of the home owners, other occupants or their guests,

(e) to ensure that the times the operator or a representative of the operator is available to be contacted by the home owners are reasonable, having regard to all the circumstances, including the utilities supplied by the operator to residential sites,

(f) to the extent that it is within the operator's control, to ensure the continuity of supply of utilities to residential sites occupied by home owners,

(g) to take reasonable steps to keep the community's common areas reasonably free of weeds and vermin,

(h) to have in place emergency evacuation procedures and take reasonable steps to ensure that all residents are aware of these procedures,

(i) to pay all rates, taxes and other charges payable by the owner or operator of the community,

(j) to comply with all statutory obligations relating to the community,

(k) to ensure a residential site is in a reasonable condition, and fit for habitation, at the commencement of a site agreement for the site,

(l) otherwise, to comply with the site agreements and the community rules.

(2) With regard to the operator's obligation to maintain the community's common areas (in subsection (1)(c))--

(a) any necessary work must be carried out as soon as is reasonably practicable and in a way that minimises disruption to residents, and

(b) the work is to be carried out at an appropriate standard having regard to the age and prospective life of the community and to the level of fees and charges payable by residents, and

(c) if there is a failure to carry out the work at all or to an appropriate standard, the Tribunal may, on application by a home owner, make any of the following orders in respect of the failure--

(i) an order requiring work of a specified kind to be carried out,

(ii) an order that the operator pay compensation to the home owner and any other home owners,

(iii) any ancillary order that the Tribunal, in the circumstances, thinks appropriate.

47 Section 36 sets out the homeowner's responsibilities and these include the responsibility of complying with the site agreement and the community rules (s 36(l)). By reason of ss 36(l) and 37(1)(l), both homeowners and the operator are obliged to comply with the community rules. Section 92 contains the same obligation.

48 Section 44 deals with "additional occupants" and provides:

44. Additional occupants

(1) A home owner must not, except with the written consent of the operator of the community or unless the site agreement otherwise provides, allow additional persons to occupy the residential site.

(2) The operator must not unreasonably withhold or refuse the consent.

(3) The consent may be given with reasonable conditions.

(4) The Tribunal may, on application by the home owner, order that the home owner may allow other named persons to occupy the residential site without consent if the Tribunal finds that the withholding or refusal of consent was unreasonable or that unreasonable conditions were imposed.

(5) However the followings persons have an automatic right of occupation of the residential site without the need for the operator's consent, even if they are not named or referred to in the site agreement--

(a) a home owner's spouse or de facto partner,

(b) a home owner's carer.

(6) It is not unreasonable for an operator to withhold or refuse consent on the ground that the additional person does not meet age restrictions for occupancy set out in the community rules that were in force when the home owner entered into the site agreement.

(7) The Tribunal may, on application by the home owner or operator, make orders to settle a dispute arising under this section.

(8) The operator may give consent under this section, and the Tribunal may make an order under this section, despite any term of the site agreement that prohibits additional occupants or puts limits on the number of occupants.

49 It is also relevant to set out all the obligations contained in s 49 concerning the requirement of the operator to maintain services and facilities. That section provides:

> **49. Services, facilities and improvements**
>
> (1) The operator of a community must maintain all services and facilities required by the development consent for the community to be available for the life of the community.
>
> (2) The operator of a community must give at least 30 days' prior notice to the residents committee (or if there is no residents committee, to all residents) of any of the following proposals--
>
> > (a) a proposal to remove or substantially restrict a facility or service required by the development consent or otherwise available for a community,
> >
> > (b) a proposal to provide a new facility or service for a community.
>
> (3) Nothing in this section, or in any other provision of this Part, authorises an operator to take any action that is prohibited by law or that is inconsistent with a site agreement.

50 Part 8 of the RC Act deals with community rules from ss 86 to 95. Sections relevant to this appeal are set out in the following paragraphs.

51 Section 86 of the RC Act provides:

> **86. Subject-matter of community rules**
>
> (1) Written rules relating to the use, enjoyment, control and management of a community may be made in accordance with this Part.
>
> (2) Without limiting subsection (1), a community rule may be made with respect to any matter specified in the regulations as being a matter that may be the subject of a community rule.
>
> (3) The community rules must be fair and reasonable and must be clearly expressed.
>
> (4) There is a rebuttable presumption that a community rule is not fair and reasonable if it does not apply uniformly to all residents of the community.
>
> (5) A community rule cannot invalidate anything that has already occurred.
>
> (6) A community rule that prohibits a pet does not apply to a pet that is living with a resident of the community when the rule is made and that continues to live there after the rule is made.
>
> (7) A term of a site agreement or tenancy agreement has no effect to the extent the term would--
>
> > (a) make all or any part of the community rules part of the agreement, or
> >
> > (b) be substantially the same (or to the same effect) as a provision of a community rule or any part of a community rule.

> (8) A term of a site agreement or tenancy agreement prevails over a provision of the community rules to the extent of any inconsistency. This applies whether the provision of the community rules came into effect before, on or after the date of the agreement.

52 Section 87 provides:

> **87. Community rules to be consistent with other laws**
>
> A community rule is of no effect to the extent that it is inconsistent with this Act or any other Act or law

53 Section 90 provides that the operator may make written amendments to community rules but an amendment does not have effect unless each resident has been given notice of the amendment and, if the community has a residents' committee, the operator has advised and consulted with the residents' committee about the amendment before giving notice to residents.

54 Section 92 requires that the residents, owner and operator comply with community rules. Where there is a dispute about a community rule, s 95 provides that an application may be made by a resident or operator to the Tribunal. That section sets out the orders that the Tribunal may make. These include an order amending or setting aside the disputed community rule.

Consideration

55 In our view, for the reasons which we set out later, the Rule is both fair and reasonable and clearly expressed as required by s 86. We will consider the issue which we consider to be the significant issue raised in this appeal, namely whether the rule is inconsistent with the ADA. However, it is firstly necessary to consider whether the RC Act authorises the making of a rule containing provisions permitting discrimination on the basis of age.

56 The site agreement between the parties pre-dates the RC Act. Clause 2(5)(1) of Sch 1 of the RC Act provides that existing site agreements made under the RC Act "remain valid" and continue without the need for a new site agreement. Clause 5(3) provides that such agreements are taken to be a site agreement.

Section 44 RC Act

57 Section 44 of the RC Act deals with "additional occupants" who occupy the site and who are "additional" to a homeowner. The text of s 44 has been set out earlier. In our view, it is significant that the subject matter of s 44(6) is whether

an operator may withhold or refuse consent to an additional person occupying a site on the basis that the person does not meet age restrictions for occupancy set out in the community rules. In our view, that language indicates that the community rules may set out age restrictions for occupancy, but subject to s 44(5).

58 Our view concerning s 44(6) is supported by the language of s 13 (set out earlier). In particular s 13(2) provides that the *Retirement Villages Act* 1999 does not apply to communities occupied by “retired persons or predominantly by retired persons (that is persons who have reached the age of 55 years or have retired from full-time employment)”. This section clarifies that "communities" (as defined in s 4) that are occupied by retired persons or predominantly by retired persons, are regulated by the RC Act rather than by the *Retirement Villages Act*.

59 The Rule comprises two sentences. The second sentence requires the homeowner to not allow a person to occupy residential site unless that person meets the age restriction. Given s 44(5) of the RC Act which provides “an automatic right of occupation” for spouses/de facto partners and a homeowner’s carer without the need for an operator’s consent, an “additional person,” could not include a person described by s 46(5) but could include other additional persons.

60 The Tribunal implied into s 44(6) a requirement for an operator to first obtain an exemption under the ADA which would extend to age restrictions for additional persons notwithstanding the express wording of that subsection.

61 In our view, s 44(6) must be read on the basis of a statutory presumption that an age restriction may properly be the subject of a community rule either already in existence or to be brought into existence in the future without the need for an exemption under the ADA. In our view it is clear that s 44(6) reflects Parliament’s intent to permit age restrictions for occupancy to be set out in community rules provided that the rules were in force when the homeowner entered into the site agreement.

62 Accordingly, we are in agreement with the appellant’s submission that the provisions of s 44(6) make it clear that Parliament must have intended that a

community rule containing an age restriction could lawfully be made under the RC Act beyond the additional persons. If the position were otherwise, then it would follow that a rule could not impose an age restriction on a person having or wishing to have a site agreement (by refusing to enter into such an agreement with a person younger than the age restriction) but it would be reasonable for an operator to withhold or refuse consent on the basis of an age restriction in respect of a request by a resident to have an additional person occupy the residential site. In short, permitting the imposition of an age restriction upon an additional person but not permitting an age restriction on the resident wishing to have a site agreement would appear to be an anomalous outcome.

63 Section 44(6) on its face does not support an inference that an exemption for any age restrictions would be necessary under s 56 of the ADA and the operation and purpose of the RC Act suggests that it is not necessary. We do not see any conflict in the language of those particular provisions when considered together and we are of the view that in accordance with the intent of s 33 of the *Interpretation Act* 1987 (NSW) (Interpretation Act), the construction of s 44(6) that we prefer "would promote the purpose or object" of the RC Act, one of which is to set out the rights and obligations of operators and home owners: s 3(b).

64 Section 34 of the *Interpretation Act* permits the "use of extrinsic material" to assist in the interpretation of legislation in certain specified circumstances. We are satisfied that given the parties' competing submissions and the Tribunal's approach to s 44 (6), we would be assisted in ascertaining the meaning of that section by the use of extrinsic material, as did the Tribunal.

65 The Minister in the Second Reading of the *Residential (Land Lease) Communities Bill* 2013 (the Bill) in the NSW Legislative Assembly on 18 September 2013 acknowledged the following:

> The Government has totally rewritten the law ... [and it] represents a more appropriate title given the increasing community feel of parks and the permanency of residents ... They provide an attractive and affordable lifestyle choice for many retirees." (at 23,730)

66 The Minister further said at 23,730:

> Some residents who had their say on the bill raised the issues of introduction of voluntary sharing arrangements, provisions regarding the rights of additional occupants under the age of 55, the introduction of special levies for community improvements ..."

67 In conclusion, we are of the view that the RC Act which authorises the making of rules, includes authorisation to make a rule concerning age restrictions. In particular, it is our view that the Rule imposes restrictions contemplated and authorised by the RC Act.

68 We will now turn to s 87 of the RC Act and the question of whether the ADA renders the Rule unlawful or of no effect.

Is the Rule Discriminatory?

69 The appellant challenges the Tribunal's finding that by imposing an age restriction, the Rule is "inconsistent" with the age discrimination provisions in Part 4G of the ADA. If the Rule is inconsistent with the ADA, the Rule is of "no effect": s 87 of the RC Act.

70 The Tribunal had regard to s 49ZYA of the ADA which defines discrimination on the basis of age to be the treatment of a person of a certain age or age group "less favourably than in the same circumstances or in circumstances which are not materially different" than the treatment of a person of a different age group: [15]. The Tribunal observed that the appellant made no submission that the Rule does not fall within that definition of age discrimination. The Tribunal found that the Rule was "discriminatory against persons under the age of 55 years of age": [15]

71 Section 49ZYA of the ADA provides:

> **49ZYA. What constitutes discrimination on the ground of age**
>
> (1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of age if the perpetrator—
>
> (a) on the ground of the aggrieved person's age or the age of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who is not of that age or age group or who does not have such a relative or associate who is that age or age group, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not of that age or age group, or who do not have a relative or associate who is that age or age group, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

(2) For the purposes of subsection (1) (a), something is done on the ground of a person's age if it is done on the ground of the person's age or age group, a characteristic that appertains generally to persons who are that age or age group or a characteristic that is generally imputed to persons who are of that age or age group.

72 The Tribunal held that the Rule was "inconsistent" with s 49ZYN of the ADA which provides:

49ZYN. Provision of goods and services

(1) It is unlawful for a person who provides, for payment or not, goods or services to discriminate against another person on the ground of age--

(a) by refusing to provide the other person with those goods or services, or

(b) in the terms on which the other person is provided with those goods or services.

73 The Tribunal found that "there can be little doubt" that the appellant was providing goods and services "within the ordinary meaning of those terms": [14].

Good and Services: s 49ZYN of the ADA.

74 As we have stated, the appellant submitted that the Rule "itself" does not contravene the ADA. Rather, any unlawful conduct would be the refusal of a good or a service and not the mere making of the Rule which is not the provision of a good or a service to attract s 49ZYN of the ADA.

75 There is no definition of "goods" in the ADA but s 4 defines "services" as including:

(a) services relating to banking, insurance and the provision of grants, loans, credit or finance,

(b) services relating to entertainment, recreation or refreshment,

(c) services relating to transport or travel,

(d) services of any profession or trade,

(e) services provided by a council or public authority,

> (f) services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not.

76 Section 37 of the RC Act sets out the responsibilities of the operator in a community. These include the responsibility to ensure that the community is reasonably safe and secure, that homeowners have access to their residential sites and to common areas, to maintain common areas in a reasonable state of cleanliness and repair so as to be fit for use by homeowners. These responsibilities extend to ensuring that there is continuity of supply of utilities. Section 49 adds to these responsibilities by requiring the operator to maintain all services and facilities required by the development consent for the community to be available "for the life of the community".

77 In our view the operator's responsibilities include responsibilities to provide services. We note that "services" in s 4 in the ADA is an inclusive definition. We are satisfied that the operator's responsibilities include the provision of services having regard to the ordinary meaning of that word informed by the requirements of ss 37 and 49 of the RC Act.

78 As stated, the appellant submitted that the Rule itself is not a violation of the ADA, rather it would be the act of refusing to supply goods or services that is the potential unlawful discrimination. We are of the same opinion. Section 49ZYA describes conduct which is discriminatory on the basis of age but such conduct is not unlawful unless it is conduct that is rendered unlawful by reason of the provisions set out in the subsequent sections in Part 4G of the ADA. There has been no finding that such discriminatory conduct has occurred with respect to the provision of services by the appellant in contravention of the ADA. That is because the respondent has sought to impugn the Rule rather than any conduct which may follow from compliance with the Rule.

79 In *IW v City of Perth* [1997] HCA 30; 191 CLR 1, the High Court said that many anti-discrimination statutes defined discrimination and the activities which cannot be the subject of discrimination in a rigid and often highly complex and artificial manner and conduct that would be regarded as discriminatory in its ordinary meaning may fall outside the Act (ie. the *Equal Opportunity Act*, 1984 (WA) – per Brennan CJ and McHugh J, p 12).

80 In our view, the ADA is to be interpreted in this way: s 49ZYA defines discrimination on the ground of age. Section 49ZYN renders unlawful conduct of the kind described by s 49ZYA if that conduct involves a person who provides a service and who refuses to provide another person with those services or provides services but on terms which discriminate on the ground of age. This means that the appellant is correct that the Rule itself is not unlawful, rather conduct in conformity with the Rule may be unlawful. This interpretation may have the consequence that the operator may lawfully introduce the Rule and then, thereafter, seek the protection of s 54 of the ADA (which we will deal with later) so that conduct in conformity with the Rule is not unlawful. That consequence is, in our view, consistent with the structure and intent of both the RC Act and the ADA.

81 Accordingly, we are of the opinion that, but for our consideration of the effect of s 54 of the ADA, the Rule potentially contravenes the provisions of s 49ZYN of the ADA only if and when the appellant acts in accordance with the Rule.

82 Because of our view (expressed later in these reasons) that the Rule is not unlawful by reason of s 54 of the RC Act, it matters not that s 49ZYO was not considered by the Tribunal at first instance. Nor do we consider it necessary to consider s 49ZYO.

83 As we have set out above, the respondent's submissions emphasised that the Tribunal in the decision under appeal focused on the Rule in the context of the "broader" provision of "goods and services" under s 49ZYN rather than the offering or provision of "accommodation" under s 49ZYO of the ADA. The appellant did not challenge the Tribunal's finding on the basis that the Tribunal should have instead been concerned with the provision of "accommodation" under s 49ZYO of the ADA.

84 We are satisfied that on the basis of the approach taken by the Tribunal and the reasons given by it when finding that the Rule was inconsistent with s 49ZYN of the ADA, that a different outcome would not have been likely if the Tribunal had instead concerned itself with s 49ZYO of the ADA. From the point of view of the grounds of appeal therefore, nothing turns on this. The respondent does not suggest otherwise.

Is the Rule Inconsistent with the ADA?

85 The fact that the Rule itself is not in breach of the ADA is not the end of the matter. There is still a need to consider whether the Rule is "inconsistent" with the ADA and of no effect to the extent of any inconsistency (s 87). In our view, the Rule is not inconsistent if the Rule itself is not in breach of the ADA.

86 However, it is also appropriate to consider the position that might follow if we are wrong in our view that the Rule itself is not conduct falling within s 49ZYN and that the correct position is the Rule itself falls within s 49ZYN. In those circumstances, is the Rule inconsistent with ADA and would s 54 of the ADA make the passing of the Rule lawful?

87 Section 54(1)(a) of the ADA provides that the ADA does not render "unlawful anything done by a person if it was necessary" for the person to comply with the requirements of "any other Act" (in this case the RC Act). There is no requirement in the RC Act for an operator to pass a rule imposing an age restriction. Rather it is a matter of choice. Therefore, s 54(1)(a) is not relevant to our consideration. Only once the Rule has been made is it necessary to comply with the Rule in order to comply with the requirements of the RC Act (namely ss 37 and 92).

88 In our view, s 54(1)(b) raises a different issue for our consideration. It is relevant because it concerns conduct done by a person necessary to comply with a rule. Section 54(1)(b) provides that unlawful discriminatory conduct is not done by a person if it was necessary for the person to do it in order to comply with a requirement of "any regulation, ordinance, by-law, rule or other instrument made under any such other Act".

89 We now turn to the question of whether the Rule is a "rule or other instrument made under" the RC Act so that conduct in accordance the Rule would not be unlawful by reason of s 54(1)(b) and therefore the Rule could not be "inconsistent" with the ADA and not rendered of no effect under s 87 of the RC Act.

Is the Rule a "rule or other instrument" under s 54(1)(b) of the ADA?

90 The *Statutory Instruments Act* 1989 (NSW) (Statutory Instruments Act) concerns a regulation, bylaw, rule or ordinance made by the Governor or by a

person or body other than the Governor that is required by law to be approved or confirmed by the Governor. In our view, the reference to a rule in s 54(1)(b) is not limited to a statutory rule made in accordance with the *Statutory Instruments Act.* That is because s 54(1)(b) is not limited to a statutory rule and extends to a rule defined by s 3 of the *Interpretation Act* which provides:

> ***instrument*** means an instrument (including a statutory rule or an environmental planning instrument) made under an Act, and includes an instrument made under any such instrument.

91 Further, s 20 of the *Interpretation Act* provides that in any Act "rule" means a rule under the Act in which that word occurs.

92 As we have set out, s 54(1)(b) of the ADA refers to "any regulation, ordinance, by-law, rule or other instrument made under any such Act". As we have set out above, "instrument" is defined in the *Interpretation Act* to mean an instrument made under an Act and includes a statutory rule. Therefore, an instrument is not limited to an instrument within the *Statutory Instruments Act* because the use of the expression "other instrument" in s 54(1)(b) of the ADA suggests that the word "instrument" shares the same, or similar, characteristics as a regulation, ordinance, bylaw and rule (none of which necessarily requires the Governor's consent).

93 We were taken to and have considered a number of authorities relevant to the question of whether the Rule could be considered to be a rule contemplated by s 54(1)(b). In addition, we have considered the decision of the NSW Court of Appeal in *Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207. That case concerned the legal character of bylaws made by an Owners Corporation under the former *Strata Titles Act* 1973. McColl JA (with whom Mason P agreed) stated that there appeared to be at least two available, and not necessarily inconsistent, views on the proper characterisation of strata scheme bylaws. One is that such bylaws are delegated legislation being instruments "under an Act" (per s 3 *Interpretation Act* set out above). Her Honour quoted other authorities to the effect that a bylaw is a law binding on all persons to whom it applies in the nature of an agreement. Her Honour referred to the alternative characterisation of strata scheme bylaws, namely that they are a

statutory contract. Her Honour then stated at [71]-[72] (omitting full case references and citations):

> 71. The following propositions emerge from the foregoing discussion:
>
> 1. By-laws are the “series of enactments” by which the proprietors in a body corporate administer their affairs; they do not deal with commercial rights, but the governance of the strata scheme: Bailey;
>
> 2. By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate; cp, Parkin, Lion Nathan;
>
> 3. Exclusive use by-laws may be inspected by third persons interested in acquiring an interest in a strata scheme, whether, for example, by acquiring units, or by lending money to a lot proprietor; such persons would ordinarily have no access to the circumstances surrounding their making; their meaning should be understood from their statutory context and language: NRMA; Lion Nathan .
>
> 4. By-laws may be characterised as either delegated legislation or statutory contacts: Dainford ; Re Taylor ; Bailey ; North Wind ; Sons of Gwalia;
>
> 5. Whichever be the appropriate characterisation, exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person: Lion Nathan;
>
> 6. In interpreting exclusive use by-laws the Court should take into account their constitutional function in the strata scheme in regulating the rights and liabilities of lot proprietors inter se : Parkin; Lion Nathan;
>
> 7. Unlike the articles of a company, there does not appear to be a strong argument for saying exclusive use by-laws should be interpreted as a business document, with the intention that they be given business efficacy: cf NRMA (at [75]). That does not mean that an exclusive use by-law may not have a commercial purpose, and be interpreted in accordance with the principles expounded in cases such as Antaios Cia Naviera S.A, but due regard must be paid to the statutory context in so doing;
>
> 8. An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law: Re Taylor;
>
> 9. Caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning; a tight rein should be kept on having recourse to surrounding circumstances: Lion Nathan.
>
> 72. The question of whether the by-laws constitute delegated legislation or a statutory contract was not fully argued. As the foregoing discussion reveals, the decision on their characterisation may be a distinction without a substantial difference from the interpretative perspective. It is not appropriate to express a final view on these issues. It is sufficient to say that on either approach the interpretation of Special By-Law 21 had to be approached on a basis which

was consistent with the statutory scheme and that caution had to be exercised in considering surrounding circumstances.

94 Although the decision in *Tate* did not definitively determine that a strata scheme bylaw was delegated legislation rather than a statutory contract, it is our view that the decision gives guidance on the characteristics that a rule (or bylaw) would ordinarily require to achieve the status of delegated legislation or an instrument "made under" an Act.

95 In a decision of the NSW Court of Appeal delivered after the hearing of this appeal, *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250 (*Cooper),* Basten JA (with whom Macfarlan JA and Fagan J generally agreed) referred to a bylaw as being the result of a "statutory conferral of power*"* (at [56])*.* We are of the view, in light of our comments above and the reasoning in *Tate* that we have set out*,* that the rule-making power under the RC Act is analogous for present purposes. At [57] of *Cooper,* Basten JA referred to a "conferral of power" under an "instrument*"* executed by individuals or by statute: [56]. Consistent with the comments of Basten JA in *Cooper,* we are satisfied that the rule-making power in the RC Act is a statutory conferral of power to the appellant and the Rule is a rule (or other instrument) "made under" the RC Act within the meaning of s 54(1)(b) of the ADA.

96 In summary, and by reason of the above consideration, it is our view that the Rule is a rule made under the RC Act because it:

(1) has direct legal effect on the operation of the residential community the subject of this appeal.

(2) concerns an aspect of conduct affecting the residential community at large.

(3) is made pursuant to a conferral of power under the RC Act.

(4) is an instrument by which the operator and residents of the residential community administer their affairs.

(5) is made by the operator pursuant to the authority and in accordance with the procedures and requirements of the RC Act.

(6) is a rule that comes within the provisions of s 54(1)(b) of the APA.

97 In conclusion, it is our view that s 54(1)(b) of the ADA has the effect that any conduct done in compliance with the Rule made under the RC Act is not

unlawfully discriminatory and therefore, the Rule is not "inconsistent" with the ADA within the meaning of s 87 of the RC Act.

Tribunal's Finding that the Rule was not "clearly expressed" - Section 86 (3) of the RC Act

98 The next question is whether the Tribunal was in error in determining that the Rule was not "clearly expressed".

99 We agree with the appellant that there is nothing to suggest that the Rule was not clearly expressed. The Rule uses the term "occupy" in both the first and second sentence. It is a term used in s 44(6) - without the RC Act defining that term. If the RC Act uses that term in an undefined way then we cannot envisage how its use in a community rule could be regarded as lacking clarity so as to render it contrary to s 86 (3) for not being "clearly expressed".

100 The word "occupy" has no technical meaning and is easily understood to include "reside". We have discussed earlier in these reasons the fact that a "site agreement" as defined in s 4 of the RC Act is principally concerned with "a right of occupation of a residential site in the community." There cannot be any confusion with tourists or a need to refer to the Tourist Rules for further certainty because the Rule does not purport to apply to tourists and the RC Act cannot apply to tourists. We discuss this further below in these reasons.

101 We disagree with the Tribunal's findings that the Rule should be set aside under s 86(3) of the RC Act because it was not "clearly expressed". The lack of a definition of "occupy" and a failure to reference the Tourist Rules in the Rule are not matters sufficient to make a finding that the Rule was not clearly expressed.

Respondent's Amended Reply

102 As we have set out above, the respondent contended in his amendment to the Reply that it was open to the Tribunal to have reached the same outcome without finding under s 87 that the Rule was inconsistent with the ADA. The respondent submitted that the Tribunal could have otherwise found that the Rule was not "fair and reasonable" within the meaning of s 86(3) of the RC Act.

103 As we have set out earlier in these reasons, the Tribunal made its finding that the Rule was fair and reasonable for two reasons:

(1) first, although the Rule does not apply uniformly because it only applies to prospective and not existing residents, following the same reasoning in *Broadlands*, the prospective operation of the Rule meant that a person will have entered into a site agreement in the knowledge of the Rule "which cannot be said to be unfair, and rebuts the presumption in s 86(4) ...": [10];

(2) secondly, the Tribunal preferred the evidence of the appellant's General Manager to the effect that communities with age restriction rules makes the market for homes in those communities more attractive to certain prospective homeowners. Therefore, the Rule could not operate unfairly by reducing the market value of existing homes in the community: [11]

104 The respondent does not seek to challenge either of those two findings in this appeal in support of its contention made by the amendment to the Reply that the Tribunal could have otherwise found that the Rule was not fair and reasonable.

105 For completeness, and before we deal with the specifics of the respondent's amendment, we make the following remarks which follow from the decision in *Cooper* referred to above. In *Cooper*, Basten JA at [44] had regard to one of the findings of the Appeal Panel from which the appeal was made, which his Honour said "appears to be saying that a by-law of which a lot owner has notice when purchasing his or her lot is one about which no complaint can be made on the basis that it is harsh, unconscionable or oppressive (being the test then under consideration for validity of a bylaw under the *Strata Schemes Management Act* 2015 (NSW)]." Basten JA at [45] described that reasoning as focusing on the state of knowledge - actual or constructive - of any particular lot owner and not, as required, the "the character of the particular by-law" under consideration.

106 Applying that same approach, we are of the view that the Tribunal should not have approached one of its tests for unfairness on whether prospective homeowners might enter into a future site agreement in the knowledge of the existence of the Rule.

107 For this appeal, nothing turns on this and we do not raise this matter critically, since as we have said above, the Court of Appeal's decision in *Cooper* was

delivered after the hearing. Neither finding made by the Tribunal from which it concluded that the Rule was fair and reasonable was challenged on the appeal, so the second finding made by the Tribunal at [11], even given our comments above with respect to the first finding made at [10], remains unchallenged.

108 The amendment raised by the respondent in the Reply raises the substance of the claim for alternative relief that he sought from the Tribunal in the event it did not set aside the Rule. The respondent's supplementary submission makes it clear that the amendment to the Reply seeks to challenge the Rule if it is upheld because it will create "two sets of rules; one for the permanent residents/home owners living side by side with ... long term casuals and or tourist/son tourist sites."

109 Community rules under the RC Act relevantly only apply to residents, occupants and invitees of a resident: s 92. Further, s 44(6) only applies to additional persons who "occupy" a residential site. The RC Act does not govern the rights or seek to apply to classes of persons such as tourists.

110 We reject the respondent's contention that the Rule also contravened s 86(3) of the RC Act by being not fair and reasonable in that it only applied to community residents and not tourists using the Park.

Disposition of the Appeal

111 For the reasons set out above, we uphold the appeal.

112 Section 81 of the CAT Act sets out the orders we are empowered to make on an appeal:

> **81. Determination of internal appeals**
>
> (1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following--
>
> (a) the appeal to be allowed or dismissed,
>
> (b) the decision under appeal to be confirmed, affirmed or varied,
>
> (c) the decision under appeal to be quashed or set aside,
>
> (d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,

(e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance.

Should the Rule be Amended?

113 The appellant submitted that if we uphold the appeal, an alternative order would be to amend the Rule under s 95(2)(a) of the RC Act to resolve the concerns raised by the Tribunal at [13]. In view of our decision there is no need to consider the proposed alternative order.

114 We have determined that the Rule is valid and there is no need for us to further consider the wording of the Rule or any proposed amendments to the Rule.

Orders

115 We make the following orders:

(1) The stay order made on 1 April 2020 be lifted.

(2) Appeal upheld.

(3) Set aside the orders of the Tribunal made on 13 March 2020.

(4) The application of the respondent lodged on 21st October 2019 is dismissed.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar