Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Tricare v Allen and others [2016] NSWCATCD 25**
Hearing dates:	29 February 2016
Decision date:	06 April 2016
Jurisdiction:	Consumer and Commercial Division
Before:	S Westgarth, Deputy President
Decision:	(1) The residential tenancy agreements of each of the respondents is hereby terminated; (2) The respondents will deliver up vacant possession of their respective residential sites on or before 20 September 2016; (3) Notwithstanding order 2, the orders for possession are suspended until the respondents receive payment in full, of the amounts determined in these reasons to be the values of the dwellings (or until payment in full is tendered) namely: Site 39 $60,000 Site 51 $85,000 Site 54 $20,000 Site 58 $45,000 Site 59 $40,000 (4) Once payment in full is made or tendered by the applicant to the respondents then in respect of those respondents who have received payment in full or been tendered payment in full the suspension of the order for possession is lifted; and (5) Liberty to renew.
Catchwords:	Residential Parks Act – termination of residential site agreements, value of dwelling, agreement to buy dwelling
Legislation Cited:	Residential Parks Act 1998 Supreme Court Act 1970 Residential (Land Lease) Communities Act 2013 Interpretation Act 1987
Cases Cited:	Allan v Tricare (Hastings) Pty Ltd & Anor [2015] NSWSC

	416 Haraba Pty Ltd v Castles [2007] QCA 206 Pearce v Cocchiaro [1977] CLR 600 Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation [1981] CLR 297 Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd [2012] NSWCA 31 AB v Western Australia [2001] HCA 42 Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd and Anor [2013] VSC 344
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Tricare (Hastings) Ltd (Applicant) Susan Jane Allen (Respondent) Beryl Edith Anderson (Respondent) Judy Tucker (Respondent) Phillip Tucker (Respondent) Kevin and Lorraine Byng (Respondent)
Representation:	Counsel: S Berveling (Appellant) M McMahon (Respondents) Solicitors:Minter Ellison (Appellant) Paul Smyth, Tenants Union of New South Wales (Respondents)
File Number(s):	RP 13/34743, 13/34744, 13/34745, 13/34746 and 13/34741
Publication restriction:	Unrestricted

REASONS FOR DECISION

Introduction

1 The applicant is a park owner and operates a residential park at Hastings Point New South Wales. The applicant seeks the following orders against the respondent residents:

(a) An order terminating their respective residential tenancy agreements;

(b) An order that the respondents deliver up vacant possession on or before 20 September 2016; and

(c) A determination of value of the respondents' respective dwellings.

2 There are six respondents. There are five residential tenancy agreements in respect of five different sites. One of those sites is owned by two people. The sites are known as sites 39, 51, 54, 58 and 59. Each of the residential tenancy agreements are residential site agreements. Those agreements are defined in s 3 of the *Residential Parks Act*

1998 NSW (the RPA).

3 The Tribunal has jurisdiction to determine the applications by reason of the powers granted to it under the RPA.

4 The applicant has been granted development consent to develop the land on which the residential park is situated.

5 The applicant has given the respondents notices of termination of their residential tenancy agreements under s 102(1) of the RPA on the grounds that their sites are to be used for purposes other than that of a residential site.

6 The respondents accept that the notices of termination were given lawfully under s 102(1) and that the notices of termination are valid.

7 These applications were heard by the Tribunal previously and the Tribunal delivered a decision on 2 September 2014. The effect of that decision was to make an order under s 113 of the RPA terminating the residential site agreements and granting to the applicant vacant possession of the sites and, in addition, awarding the respondents compensation pursuant to s 128 of the RPA.

8 The respondents appealed the Tribunal's decision to the Supreme Court seeking judicial review pursuant to s 69 of the *Supreme Court Act 1970* (see *Allan v Tricare (Hastings) Pty Ltd & Anor* [2015] NSWSC 416). His Honour, Justice Beech-Jones upheld the appeal and set aside the decision of the Tribunal on the grounds of jurisdictional error. In brief, the error was that s 128 of the RPA was inapplicable on the facts of the case. The proceedings were remitted to the Tribunal for rehearing.

9 An appeal from the Supreme Court decision was filed in the Court of Appeal and heard by the Court of Appeal on 5 November 2015. The decision of the Court of Appeal was to dismiss the appeal as incompetent given that the appeal was an appeal in respect of paragraphs 35 and 39 of the primary Judge's decision rather than in respect of His Honours orders.

10 These proceedings constitute the rehearing following the remittal from the Supreme Court.

11 Following the remittal from the Supreme Court, the Tribunal held a directions hearing at which the following was noted, and the Tribunal made directions as follows:

> 3. The parties have agreed that the following questions (Issues for Determination) are the only questions that arise for determination by the Tribunal:
>
> (a) a. Whether, on the proper construction of s 113(3A) and 130A of the RP Act the Tribunal is precluded from making an order for possession in favour of the park owner in circumstances where:
>
> i. there is presently no proposed sale of the dwelling: and
>
> ii. s113(3A) (a) and (c) do not apply.
>
> b. On its proper construction, does a valuation under section 130A of the Residential Parks Act,1998 (RP Act) include those factors set out in paragraph 35 of the reasons for decision in the Supreme Court of New South Wales given 17 April 2015 in Allen & Ors v Tricare (Hastings) Pty and Anr [2015] NSWSC 416 (Supreme Court Decision).

c. If yes, what is the value of the dwelling of each of the respondents.

d. If no, what is the value of the dwelling of each of the respondent.

4. For the purpose of determining the question in 3b above, the parties agree that the factors set out in paragraph 35 of the Supreme Court Decision are:

(b) a right to quiet enjoyment;

(c) protection of defeasibility having regard to rights granted to a tenant under the RP Act;

(d) a right of the tenant to sublet and assign;

(e) rights of succession following the death of a tenant.

5. Subject to determination of the Issues for Determination by the Tribunal as provided by these directions and the value to be assigned to the dwelling of each of the respondents, the Tribunal notes the agreement of the parties as follows:

a. The Tribunal, by consent, is to makes the following orders:

i. each of the residential tenancy agreements is to be terminated on 20 September 2016;

ii. possession of each site is to be delivered up on 20 September 2016;

b. In the event an order for possession is made, the applicant will pay to each of the respondents an amount equal to the value of the dwelling as determined by the resolution of the Issues for Determination.

For the purpose of determining the Issues for Determination the Tribunal makes the following directions:

6. Within 7 days from the date of these orders each party is to appoint a valuer (Experts) to provide, in accordance with order 6, a joint report to value each of the respondents respective dwellings as at 29 January 2016 on the following bases:

a. that the dwelling is to be valued in accordance with the provisions of section 130A of the RP Act on the assumption that the factors set out in paragraph 4 above do apply; and

b. that the dwelling is to be valued in accordance with the provisions of section 130A of the RP Act on the assumption that the factors set out in paragraph 4 above do not apply.

7. For the purpose of the valuations:

a) The value to be assessed under order 6(a) and (b) having regard to section 130A (4) of the RP Act is to be determined on the following alternative bases:

i. No regard is had at all to the dwelling's location;

ii. no regard is had to any premium attached to the particular dwelling's location but having regard to it being located in the particular park; and

iii. it being located in a comparable park.

b) In respect of the valuations under 7(a), (i), (ii) and (iii) the values are to be assessed on the basis:

i. Of the current state of repair of the particular dwelling; and, in the alternative,

ii. That the particular dwelling is in reasonable repair.

c) In respect of the valuations under 7(a) (ii), the values to be assessed are to:

i. disregard the fact there is presently building works being carried out at the park; and

ii. assume that the park is in reasonable condition with access to reasonable amenities.

8. The Tribunal notes that neither party asserts any basis for valuation other than provided for in these orders.

9. On or before 12 February 2016 the experts are to prepare and file a joint report,

> prepared on the various bases set out in order 7 which must include the following:
>
> a. a statement of the agreed value of the dwelling for each respondent;
>
> b. for each dwelling for which a value is not agreed:
>
> i. a statement from each Expert as to the assessed value;
>
> ii. A succinct statement as to the reasons why the Expert asserts the value assessed by them is correct and why the value assessed by the other expert is incorrect; and
>
> iii. each expert opinion in respect of the assessed value.
>
> c. A separate folder containing any relevant evidence relied upon for the purpose of the valuations and expert opinions.
>
> 10. The opinions to be provided by the experts and the joint report must comply with Procedural Direction 3 - Expert Witnesses.

12 The above directions were made in December 2015 and amended in January 2016. The extract above contains the amendments.

13 Subsequently, on 17 February 2016, the Tribunal further amended the above orders so as to allow for the foreshadowed possibility that the applicant only and not the respondent would provide valuation evidence through an expert. The relevant orders made by the Tribunal on that occasion were:

> 2. The directions made on 17 December 2015 (modified and dated 13 January 2016) are amended as follows:
>
> 1) The date in order 9 of 12 February 2016 is altered to read 19 February 2016;
>
> 2) A new order 9A is made as follows:
>
> - Failing compliance with amended order 9 either party is at liberty to file and serve on or before 19 February 2016 any experts report which is to include a statement of the agreed value of the dwelling for each respondent, and to provide a separate folder containing any relevant evidence relied upon for the purposes of valuations and expert opinions;

14 Although the RPA has been repealed upon the commencement of the *Residential (Land Lease) Communities Act 2013*, the effect of the savings and transitional proceedings in that Act is that these applications are to be determined in accordance with the RPA. Both the applicant and the respondent agree that it is the RPA which is applicable to the resolution of the dispute between the parties in these proceedings. The applicant contends, and the respondents agree, that the agreements between the parties concern residential tenancy agreements in the form of residential site agreements. Section 3 of the RPA sets out the relevant definitions. These include the following definitions:

- **residential tenancy agreement** means any agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence:

  > (a) whether or not the right is a right of exclusive occupation, and
  >
  > (b) whether the agreement is express or implied, and
  >
  > (c) whether the agreement is oral or in writing, or partly oral and partly in writing,
  >
  > and includes such an agreement granting the right to occupy residential premises together with the letting of goods.

- **residential site agreement** means [excluding part of the definition not presently relevant] a residential tenancy agreement under which:

> (a) the park owner grants to the resident:
>
> > (i) a right to install, on a residential site, a relocatable home, or a registrable moveable dwelling with a rigid annexe attached to it (being a relocatable home or registrable moveable dwelling owned by the resident),
> >
> > (ii) a right to use the home or dwelling as a residence, and
>
> (b) the resident occupies the premises as the resident's principal place of residence, and
>
> (c) in the case of an agreement entered into after the commencement of section 5, the resident has the approval of the park owner or park manager to occupy the premises as the resident's principal place of residence.

15 Each of the agreements concerns a "*relocatable home*" being a "*moveable dwelling*". These expressions are also defined in s 3 of the RPA as follows:

- **relocatable home** means a moveable dwelling that is not:

> (a) a registrable moveable dwelling, or
>
> (b) a moveable dwelling of a type prescribed by the regulations for the purposes of this paragraph.

- **moveable dwelling** means [excluding part of the definition not presently relevant]:

> (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.

The applicant's contentions and evidence

16 The applicant submits that the following matters are in dispute:

(1) Whether an order terminating the residential site agreements should be made;

(2) Whether the Tribunal can be satisfied of at least one of the three matters set out in s 113(3A) of the RPA;

(3) The value of the respective dwellings determined pursuant to s 130A of the RPA;

(4) Whether the Tribunal can be satisfied that the applicant has agreed to buy the dwelling from the respective resident at a price no less than its value, as determined by the Tribunal under s 130A;

(5) Whether an order should be made that the residents give up possession of the site on which their respective dwelling is located; and

(6) The date on which orders for possession are to take effect.

17 The applicant contends that the residents have residential tenancy agreements in the form of a residential site agreement for moveable dwellings being a manufactured home or, in the case of Mr and Mrs Byng a caravan and rigid annex.

18 The applicant contends that there is no evidence of the individual written agreements between the applicant and the respondents. Section 16 of the RPA deals with the situation where there is no written agreement, in which case a residential tenancy agreement is taken to include standard terms as set out in the relevant prescribed standard form of residential tenancy agreement (see s 8 of the RPA, cl 5 of the Residential Parks Regulation, and Sch 1 and 2 of that Regulation).

19 The applicant contends that from the definition of residential site agreement it can be seen that the principle elements of such an agreement are:

(a) It provides a right granted to the resident:

(i) to install a relocatable home on a residential site, and

(ii) to use that home as a residence; and

(b) it imposes a requirement on the resident that the resident occupies that home as the resident's principal place of residence.

20 The applicant submits that the termination of any agreement terminates the subject of the agreement. The applicant contends that the subject of the agreements between the parties are the rights granted to the resident to install a relocatable home on the residential site, a right to use that home as a dwelling and the requirement for the resident to use that as his or her principal place of residence. The applicant contends that some additional rights are set out in the RPA and that these rights include rights referred to in paragraph 35 of the judgment of His Honour Beech-Jones. His Honour referred in that paragraph to the right of quiet enjoyment, rights of alienation and protections on defeasibility afforded by part 12 of the RPA.

21 The applicant contends that a residential site agreement merely conferred a right to place a manufactured home on the site upon payment of rental and otherwise complying with the terms of the agreement but it did not give to the resident any interest in land. The applicant relied for this contention upon a Queensland case dealing with similar legislation: *Haraba Pty Ltd v Castles* [2007] QCA 206, being a decision of the Queensland Court of Appeal.

22 Notices of termination were given by the applicant to the respondents and these were tendered and marked exhibits A to E. The respondents confirm that there is no dispute that the notices of termination were given and were valid.

23 It is necessary to set out in some detail the relevant scheme of the RPA as submitted by the applicant and this is done in the following paragraphs.

24 Section 113 is as follows:

> **113 Application to Tribunal by park owner for termination and order for possession**
>
> (1) If:
>
> (a) a park owner or a resident gives notice of termination of a residential tenancy agreement under this Part, and
>
> (b) the resident fails to deliver up vacant possession of the residential premises on the day specified, the park owner may, not later than 30 days after that day, apply to the Tribunal for an order terminating the agreement and an order for possession of the premises.
>
> (2) The Tribunal must, on application by a park owner under this section, make an order terminating the agreement if it is satisfied:
>
> (a) in the case of a notice given by the park owner on a ground referred to in section 98, 99, 100, 101, 102, 104, 105, 106 or 110:
>
> (i) that the park owner has established the ground, and
>
> (ii) if the ground is a breach of the residential tenancy agreement, that the breach, in the

> circumstances of the case, is such as to justify termination of the agreement, or
>
> (b) that the resident has seriously or persistently breached the residential tenancy agreement, or
>
> (c) that, having considered the circumstances of the case, it is appropriate to do so.
>
> (3) Except as provided by section 115, the Tribunal must not make an order terminating a residential tenancy agreement under this section unless it is satisfied that notice of termination was given and that it was given in accordance with this Part.
>
> (3A) The Tribunal must not make an order for possession as a consequence of an order terminating a residential tenancy agreement pursuant to a notice given by the park owner on the ground referred to in section 102 (Termination by park owner for change of use) unless it is satisfied that:
>
> (a) compensation for the cost of relocating the dwelling to its new location has been determined under section 128, or
>
> (b) the park owner has agreed to buy the dwelling from the resident at a price no less than its value, as determined by the Tribunal under section 130A, or
>
> (c) the park owner and the resident have reached an acceptable negotiated settlement, and that agreement is bona fide.
>
> (4) If the Tribunal makes an order under this section terminating a residential tenancy agreement:
>
> (a) the Tribunal must also make an order for possession of the residential premises specifying the day on which the order takes effect, and
>
> (b) the Tribunal may, if the circumstances of the case so justify, also make an order that the resident not be a resident under any other residential site agreement in relation to the park and not be a resident of any other residential premises in the residential park.

25 In summary s 113(3A) provides that the Tribunal must not make an order for possession as a consequence of an order terminating a residential tenancy agreement pursuant to a notice given by the park owner on the ground referred to in s 102 unless the Tribunal is satisfied of one of the three matters described in subsections (a), (b) or (c).

26 In the present case both the applicant and the respondents have accepted (as is reflected in the directions referred to earlier) that subparagraphs (a) and (c) do not apply. In other words the only relevant provision of s 113(3A) is subsection (b).

27 The applicant contends that both parties have accepted that compensation for the costs of relocating a dwelling to its new location is not possible to be determined under s 128 of the RPA.

28 It is necessary to say something briefly about the decision of the Supreme Court referred to earlier. It was common ground between the parties throughout the proceedings in the Tribunal and in the Supreme Court that the respondents' dwellings could not be relocated. His Honour held that it followed that, in a case such as this, where a dwelling is not to be relocated, then termination under s 113(2) on the grounds of a change of use to the park can only be ordered if either s 113(3A)(b) or (c) are satisfied. Subsection (a) could not apply because it was concerned with compensation for the costs of relocating the dwelling to its new location and the parties agreed that these dwellings were not able to be relocated. His Honour held that in the circumstances the calculation of compensation by reference to s 128 was inappropriate as that section was concerned with the costs of relocating a dwelling to its new

location. Subsection (c) was not relevant because the park owner and residents have not reached an acceptable negotiated settlement.

29 The applicant contends that the question for determination by the Tribunal in these proceedings is whether, on the proper construction of s 113(3A) and 130A of the RPA Act the Tribunal is precluded from making an order for possession in favour of the park owner in circumstances where there is presently no proposed sale of the dwelling (and where paragraphs 113(3A)(a) and (c) do not apply).

30 The applicant contends that the Tribunal is able to make an order for possession in favour of the park owner in circumstances where there is presently no proposed sale of the dwelling. The basis for this submission is set out in the following paragraphs.

31 The applicant contends that s 113(3A)(b) is dependent only on the following actions:

(a) an agreement by the park owner to buy the dwelling at a particular price;

(b) a determination by the Tribunal of the value of the resident's dwelling pursuant to s130A; and

(c) satisfaction by the Tribunal that the park owner's agreement to buy the dwelling is at a price no less than its value as determined by the Tribunal.

32 The applicant contends that s 113(3A)(b) does not require any action by the resident.

33 The applicant contends that in construing the RPA it is necessary to have regard to s 33 of the *Interpretation Act 1987* which requires preference to be given to a construction that would promote the purpose or object underlying the RPA. Section 4A of the RPA sets out the objects of the Act as follows:

> **4A Objects of Act**
>
> The objects of this Act are as follows:
>
> (a) to set out the respective rights and obligations of park owners and residents, including their rights and obligations under residential tenancy agreements,
>
> (b) to establish legislative protection for residents,
>
> (c) to establish procedures for resolving disputes between park owners and residents.

34 The above objects were inserted into the RPA in 2005 and the applicant contends that before that insertion, the RPA had unwritten purposes and objects including a mechanism for the making of orders terminating a residential site agreement. The applicant referred to two authorities namely *Pearce v Cocchiaro* [1977] CLR 600 at 607 and *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] CLR 297 at 320 in support of these submissions and further reference will be made later to them in these reasons.

35 The applicant submitted that s 4A confirms an interpretation of s 113(3A)(b) which sets out rights and obligations of the park owner and not only those of a resident. The legislative protection of which s 4A speaks must be read in the context of the RPA and all its purposes which include the facility for an order terminating a residential site agreement.

36 Section 4A of the RPA must be read in context of the whole RPA and should not be read so as to preclude the application of various sections of the RPA, thereby defeating

one of the RPAs purposes.

37 The applicant further contends that the capacity for a resident to make an offer for sale of his or her dwelling is accommodated by s 113(3A)(c). Accordingly, an interpretation of s 113(3A)(b) which is contingent upon the resident making an offer should not be preferred as there would be very little, if any, practical difference between the requirements set out in s 113(3A)(b) and s 113(3A)(c).

38 The applicant also contends that the order which the Tribunal would make is an order for possession, not an order that the residents' dwelling be sold. The order for possession is part of the legislative scheme relating to the termination of residential site agreements. The applicant relied upon paragraph 53 of the decision of His Honour Justice Beech-Jones where His Honour said that a valuation by NCAT under s 130A can be sought in proceedings under s 113. Once it (the valuation) is given, it is then a matter for NCAT to determine whether the park owner has agreed to buy the dwelling from the resident "*at a price no less than its value*" as determined under s 130A. A determination of that price will not bind the resident to accept it.

39 The applicant contends that the actual words used in s 113(3A)(b) do not require there to be any proposed sale of the residents dwelling. Further, that subsection was inserted as an amendment after the facility to make an order terminating a residential tenancy agreement had always been possible and is appropriate to have as a facility in the RPA and, further, the making of an order terminating a residential site agreement was, and is, dependent on an order for possession being made contemporaneously. Therefore, the applicant submits, it cannot be suggested that s 113(3A)(b) should be read in a way so as to thwart the entire legislative scheme relating to the termination of residential site agreements, especially when the factual matrix arising from the purported construction is already accommodated in s 113(3A)(c).

40 In addition to the notices of termination, the applicant tendered the following documents:

(1) Letter from the applicant to the Tribunal dated 24 February 2016 (identified as Exhibit F) which, in summary, states that the applicant agrees to buy each of the respondents' respective dwellings at the prices indicated in that letter. The letter states that contracts for the "*sale of land, between Tricare (Hastings Ltd) and each of the residents, are in the process of being prepared to reflect these offers, with the offers to remain open for acceptance until 1 August 2016*";

(2) The second reading speech made in the New South Wales Parliament made on the occasion of the reading of the Residential Parks Amendment (Statutory Review) Bill in November 2015 (Exhibit G);

(3) The Residential Park Amendments (Statutory Review) Act 2015 (Exhibit H);

(4) The affidavit of AE Southwell dated 26 February 2016 (Exhibit I); and

(5) The report of Andrew Hoolihan AAPI dated 19 February 2016 (Exhibit J).

41 Section 113(3A)(b) refers to the value of a dwelling as determined by the Tribunal under s 130A. Section 130A is set out below:

130A Tribunal may value dwellings to facilitate sale

> (1) The object of this section is to enable the Tribunal to assist a park owner and a resident to come to an agreement as to the value of the resident's dwelling where there is a proposed sale of the dwelling from the resident to the park owner.
>
> (2) The Tribunal may, by order, determine the value of the resident's dwelling and, for that purpose, may obtain a valuation of the dwelling, or seek advice as to the valuation of the dwelling, from one or more registered valuers.
>
> (3) An application for such an order may be made by the resident or by the park owner, or by both.
>
> (4) The Tribunal's determination may not have regard to the dwelling's location.
>
> (5) The Tribunal's determination of the value of the resident's dwelling is advisory only, and does not bind the resident or the park owner or affect any agreement between them for the sale of the dwelling.
>
> (6) Any costs payable to a registered valuer for any valuation or advice provided to the Tribunal for the purposes of proceedings under this section are payable by the Tribunal, except to the extent to which the regulations provide that the parties to the proceedings are to pay such costs.
>
> (7) The regulations may provide that the parties are to pay such costs:
>
> (a) in such proportions as are agreed between them or, failing agreement, as are ordered by the Tribunal, or
>
> (b) in any other manner prescribed by the regulations.
>
> (8) In this section:
>
> **dwelling** means a relocatable home or a registrable moveable dwelling with a rigid annexe attached to it.
>
> **registered valuer** has the same meaning as it has in the Valuers Act 2003.

42 The applicant submitted that s 130A has two functions:

(1) to assist a park owner and a resident to come to an agreement as to the value of a residents dwelling where there is a proposed sale of the dwelling from the resident to the park owner (as set out in the object in s 130A(1)); and

(2) to assist the Tribunal in becoming satisfied of the requirements set out in s 113(3A)(b).

43 Section 130A's object set out in s 130A(1) is relevant to both functions including, as in the present circumstances, where an order for possession is sought in which case s 130A would assist in making an order for possession because it would assist a park owner and a resident to come to an agreement as to the value of the residents dwelling.

44 The word "*dwelling*" is defined in s 130A(8) as meaning a "*relocatable home or registrable moveable dwelling with a rigid annex attached to it*". The valuation is not to have regard to the dwellings location – see s 130A(4). The applicant submits that the park owner is not required to pay value for regaining possession of the residential site already owned by it and in which the resident has no equity. That submission was said to be supported by paragraph 20 of the decision in *Haraba Pty Ltd v Castles* and by Exhibit G where the Minister for Western Sydney and Minister for Fair Trading said that the Bill makes it clear that the "*value of the residents home is to be calculated on its stand – alone value and will not include any component of the land which it stands upon*".

45 To understand the balance of the applicant's submissions concerning the appropriate

method of valuing the residents' dwellings it is necessary to turn to Exhibit J (the Hoolihan report).

46 The Hoolihan report states that Mr Hoolihan has been provided with and has read the "*expert code of witness*" which is Sch 7 of the *Uniform Civil Procedure Rules 2015* and the NCAT Procedural Direction 3 – Expert Witnesses. The report also states that Mr Hoolihan acknowledges that he has been instructed on an expert's duty to assist the Tribunal and that this duty overrides any obligation to any party to the proceedings or to any person who is liable for payment of the experts fees or expenses. The report also states that a site inspection was undertaken on 5 February 2016. Mr Hoolihan's CV is attached to the report as is a copy of the letter of instructions forwarded to him by the applicant's solicitors. Those instructions included a copy of the Tribunals directions referred to earlier in these reasons.

47 The Hoolihan report states that Mr Hoolihan has used a "*a direct comparison*" approach to valuation "*using recent market evidence to compare to the subject Hastings Point sites to those sales comparisons*". Mr Hoolihan states that he has "*used sales within surrounding localities within established Manufactured Homes Parks and the sales within this report are considered to be the most recent and relevant information available*". He describes the Hastings Point Holiday Park as being poorly presented with only a basic amenities facility in place and that the internal road ways are in poor condition.

48 The Hoolihan report includes a description of each of the five sites and some photographs.

49 The Hoolihan report describes evidence of thirteen other sales. These include two sales at North Star Park at Hastings Point, four sales a Drifters/Active Holidays Park at Kingscliff, two sales at Tweed Shores at Chinderah, four sales at Tweed Heritage, Chinderah and a sale at Pottsville North, Pottsville Beach.

50 The Hoolihan report contains Mr Hoolihan's comments on each of the thirteen sales referred to above and briefly describes the distinguishing features of those sales with the five sites which are the subject of these proceedings.

51 The Hoolihan report also states that Mr Hoolihan has had regard to the sale price of newly constructed homes to be pre purchased from the manufacturer.

52 The Hoolihan report says that Mr Hoolihan has "*initially assessed the value of each dwelling as per Basis 3 of the orders "it being located in a comparable park"*".

53 The reference to Basis 3 of the orders is a reference to the requirements of order 7a)ii referred to earlier in these reasons. The requirements of order 7a) included the following:

> (i) to value each dwelling on the basis that no regard was to be had at all to the dwellings location (**Basis 1**);
>
> (ii) to value each dwelling on the basis that no regard was to be had to any premium attached to the particular dwellings location but having regard to it being located in the park the subject of these

proceedings (**Basis 2**); and

(iii) a requirement to value each dwelling on the basis that it was located in a comparable park (**Basis 3**);

54 In addition order 7 required each of the above three valuations to be assessed on the basis of firstly the current state of repair of the particular dwelling and secondly on the basis that the particular dwelling is in reasonable repair.

55 Further, the requirement of order 7 was for the assessment under Basis 2 to be made disregarding the fact that there is presently building works being carried out at the park and secondly assuming that the park is in reasonable condition with access to reasonable amenities.

56 Furthermore, by reason of order 6 the valuation was required to value each dwelling on the basis of the factors set out in paragraph 4 of the directions being included as part of the valulation, and in the alternative, on the assumption that those factors set out in paragraph 4 of the directions do not apply.

57 The result of these directions, and the approach followed by Mr Hoolihan, was to value each dwelling on 12 different bases.

58 As stated above it was the opinion of Mr Hoolihan that initially valuing each dwelling on Basis 3 allowed him to make a direct comparison between the subject sites and the comparable sales having regard to the condition and the composition of the improvements and assuming that they are in a comparable park.

59 The Hoolihan report states that Mr Hoolihan, after assessing the value of each dwelling as per Basis 3, he then valued each dwelling as per Basis 1 (i.e. no regard was had at all to the dwellings location). He states that he allowed "*a monetary deduction to each dwelling to assess its value having regard to Basis 1 of the orders*". He states that he "*assessed the added value of the dwellings assuming that they were not located in a comparable park but were able to be purchased and relocated to an alternate park but not allowing any associated costs of relocation*".

60 The Hoolihan report states that "*finally I valued each dwelling as per Basis 2 of the orders (i.e.* "*no regard to the premium attached to the particular dwellings location but having regard to being located within the particular park*")".

61 The results of the above methodology recording the valuations of the dwellings in the opinion of Mr Hoolihan are set out below:

Basis 1

No regard is had at all to the dwelling's location

Valuation with paragraph 35 factors*	**Valuation without paragraph 35 factors***
(a) Current State of Repair Value	(a) Current State of Repair Value
Site 39 $75,000	Site 39 $60,000
Site 51 $100,000	Site 51 $85,000
Site 54 $30,000	Site 54 $20,000
Site 58 $55,000	Site 58 $45,000
Site 59 $50,000	Site 59 $40,000
(b) Reasonable State of Repair Value	(b) Reasonable State of Repair Value
Site 39 $75,000	Site 39 $60,000
Site 51 $100,000	Site 51 $85,000
Site 54 $40,000	Site 54 $30,000
Site 58 $55,000	Site 58 $45,000
Site 59 $55,000	Site 59 $45,000

Basis 2

2. No regard is had to any premium attached to the particular dwelling's location but having regard to it being located in the particular park

Valuation with paragraph 35 factors*	**Valuation without paragraph 35 factors***
(a) Current State of Repair Value Site 39 $50,000 Site 51 $80,000 Site 54 $20,000 Site 58 $45,000 Site 59 $40,000 (b) Reasonable State of Repair Value Site 39 $50,000 Site 51 $80,000 Site 54 $25,000 Site 58 $45,000 Site 59 $45,000	(a) Current State of Repair Value Site 39 $40,000 **[in the report this figure was $50,000.00 but was corrected by Mr Hoolihan during cross examination]** Site 51 $70,000 Site 54 $10,000 Site 58 $35,000 Site 59 $30,000 (b) Reasonable State of Repair Value Site 39 $40,000 **[in the report this figure was $50,000.00 but was corrected by Mr Hoolihan during cross examination]** Site 51 $70,000 Site 54 $10,000 Site 58 $35,000 Site 59 $35,000

Basis 3

3. It being located in a comparable park

Valuation with paragraph 35 factors*	**Valuation without paragraph 35 factors***
(a) Current State of Repair Value	(a) Current State of Repair Value
Site 39 $100,000	Site 39 $80,000
Site 51 $125,000	Site 51 $105,000
Site 54 $35,000	Site 54 $25,000
Site 58 $60,000	Site 58 $50,000
Site 59 $50,000	Site 59 $40,000
(b) Reasonable State of Repair Value	(b) Reasonable State of Repair Value
Site 39 $100,000	Site 39 $80,000
Site 51 $125,000	Site 51 $105,000
Site 54 $40,000	Site 54 $30,000
Site 58 $60,000	Site 58 $50,000
Site 59 $60,000	Site 59 $50,000

62 The applicant submits that the appropriate valuation under the RPA is the valuation provided by Mr Hoolihan on Basis 1 and without regard to the paragraph 35 factors. Furthermore, the applicant contends that the valuation should be based on the current state of repair of each dwelling.

63 The result of the applicant's contentions is that the appropriate valuations for each dwelling are those set out above under Basis 1 in the right hand column at the top. The relevant figures are as follows:

Site 39 $60,000
Site 51 $85,000
Site 54 $20,000
Site 58 $45,000
Site 59 $40,000

64 The applicant supports the submission described above by reference to the arguments which are described below.

65 Section 130A(4) provides that the valuation is not to have regard to the dwellings location. The applicant submits that it might be argued that the expression "*a dwellings location*" can relate to it being in a particular park, or being in a particular location within a particular park. The applicant submits that, either way, regard is not to be had to either of those locations by reason of s 130A(4).

66 The applicant further contends that what is being valued is the resident's dwelling. The applicant submitted that when one looks at Exhibit G (the second reading speech) it can be seen that the Minister described the Bill as making clear that the value of the

resident's home is to be calculated on its stand-alone value and is not to include any component of the land which it stands upon.

67 The applicant further contends that any valuation of the residents respective dwellings based upon the dwellings being in a comparable park is not relevant.

68 The applicant submits that the paragraph 35 factors should not be included in the valuations. These factors arise from paragraph 35 of the judgment of His Honour Justice Beech-Jones in the Supreme Court proceedings. Those statements were obiter and were not the subject of debate before His Honour. Those factors (being the right to quiet enjoyment, protection of the defeasibility, the right to sublet and assign and the rights of succession following the death of a tenant) arise from the RPA. They are rights which pertain to the residential tenancy agreement and not to the resident's dwelling. These factors may be described as either a term incorporated into a residential tenancy agreement or pertaining to or in relation to a residential tenancy agreement. They do not pertain or relate to the resident's dwelling and therefore do not affect the value of that dwelling.

69 The applicant further contends that the valuation of each dwelling must be a valuation having regard to the current state of repair of each of the dwellings. The RPA is silent about the state of repair of the dwellings in determining values under s 130A. The RPA provides for a lengthy period of time to occur between the issue of a notice of termination and the date specified for vacating the residential site – at least twelve months in the case of a change of use. The RPA could have, but did not qualify with respect to timing the determination of the dwelling's value pursuant to s 130A whilst providing for such a determination being possibly a step in the making of an order for possession pursuant to s 113.

70 The applicant contends that these applications have a very long history. The notices of termination were served on the residents in May or June 2012. At the commencement of the first Tribunal hearing in March 2014 the residents raised an argument that the use of their sites would not be changed to another purpose pursuant to the development consent. That resulted in the need for Land and Environment Court proceedings. The residents then appealed to the Supreme Court and judgment was delivered in April 2015. The applicant contends that any decrease in the state of repair during the two and three quarter years after the initial date for the delivery up of vacant possession is a matter caused solely by the residents themselves. Each of them could, and did, choose not to maintain the dwelling in an appropriate state of repair. For these reasons, the applicant contends that it is inappropriate for the residents to suggest that the applicant should pay a theoretical addition to the value of their dwellings. In short, the applicant contends that the valuations of the dwellings should be based on their current state of repair.

71 The applicant referred to a letter dated 24 February 2016 from the applicant to the Tribunal marked as Exhibit F which was tendered on the basis that that letter constituted evidence that the applicant had agreed to buy the respondent residents'

respective dwellings at a price set out in the letter and that its offer to buy remained open for a substantial period. The amounts for each site in Exhibit F equate with the valuations provided by Mr Hoolihan as per Basis 1, current state of repair without the paragraph 35 factors.

72 The applicant relies upon the fact that at the directions hearing on 11 and 17 December 2015 the parties reached an agreement reflected in the directions that:

(a) each of the residential tenancy agreements are to be terminated on 20 September 2016; and

(b) possession of each site is to be delivered up on 20 September 2016, conditional on the Tribunal making determinations on those matters which are referred to in paragraph 5 of those directions.

73 The applicant contends that the appropriate conclusions for these proceedings are:

(1) A determination that the value of the respondent residents' respective dwellings is as stated above (see paragraph 63);

(2) A notation that the Tribunal is satisfied that the applicant has agreed to buy the respondents' respective dwellings at an amount no less than the value of those respective dwellings set out in the determination above;

(3) An order that the residential site agreements between the applicant and each of the respondents including Mr Phillip Tucker on site 39 be terminated immediately; and

(4) An order that each of the respondent residents including Mr Phillip Tucker on site 39 give up vacant possession of the respective residential sites on which their relocatable home is located on or before 20 September 2016.

The cross examination of Mr Hoolihan

74 Mr Hoolihan was cross examined at some length. The tenor of his evidence in cross examination is summarised in the following paragraphs.

75 Mr Hoolihan was asked what comparative sales were considered by him in determining the value of the dwellings under Basis 1 (i.e. no regard is had to the dwellings location). It was put to him, and he agreed, that Basis 1 required a value of each dwelling as if it were not in a park but rather in a depot. He agreed that comparative values of the dwellings on that basis were not available. Therefore he had initially assessed the value of each dwelling as per Basis 3 (i.e. as if the dwellings were located in a comparable park) and including the paragraph 35 factors (the features of which the parties had agreed were those matters recorded in the Tribunal directions quoted earlier in these reasons). Having assessed the value of each dwelling on that basis, he then assessed the value of each dwelling without the paragraph 35 factors to produce another set of values for each dwelling but still under Basis 3. These values were generally $10,000.00 to $20,000.00 lower than the initial values under Basis 3. Mr Hoolihan acknowledged that in the case of the valuations of each dwelling the deductions of $10,000.00 or $20,000.00 were made without any particular reasoning or rationale.

76 In respect of the valuations of the dwellings under Basis 1 (i.e. no regard is had at all to

the dwellings location) Mr Hoolihan's evidence was that he assumed that this basis required him to assume that each dwelling could be located anywhere. He conceded that that assumption was not explicitly stated in his report. Generally (but not in all cases) the values under Basis 1 were lower than the values ascribed under Basis 3.

77 In respect of the values given by Mr Hoolihan under Basis 2 (no regard is had to any premium attached to any particular dwellings' location but having regard to it being located in the particular park) Mr Hoolihan said he took the term "*premium*" to refer to the proximity of a dwelling to the creek which was near the dwellings. He conceded that that meaning was not explicitly stated in his report.

78 In cross examination Mr Hoolihan stated that in valuing the dwellings under Basis 3 he interpreted the expression "*comparable park*" as meaning parks having the features like the park on which the dwellings were situated used to offer before it was allowed to become "*run down*".

79 Mr Hoolihan's report stated that after putting valuations on each dwelling as per Basis 3, he then valued each dwelling as per Basis 1, and then he valued each dwelling as per Basis 2. His report stated that he was of the opinion that the valuations of the dwellings, having regard to them being located in the Hastings Point park provided the "*lower value basis*" of the three bases. Mr Hoolihan confirmed in cross examination that in his view the dwellings had a higher value when no regard is had to the location of the dwellings than the values they had when valued on the basis of being located in the particular park in which they were situated. In short, Basis 1 values were higher than Bases 2 values. Mr Hoolihan conceded that this view was his opinion without regard to the comparable sales because such comparable sales were not available.

80 In cross examination Mr Hoolihan acknowledged that the information concerning comparable sales was limited. However, he did not agree that as a consequence his values were merely "*guestimates*".

81 Finally, Mr Hoolihan acknowledged that he had struggled with interpreting the orders which set out the valuations he was required to undertake.;

The respondents' submissions

82 The respondents did not lead any evidence but made the submissions set out in the following paragraphs.

83 A residential site agreement imports by statute, various rights and protections for residents in residential parks. These protections include:

(1) the right to quiet enjoyment (see s 20 of the RPA);

(2) the ability to apply to the Civil and Administrative Tribunal (NCAT) to dispute excessive rent increases (see s 55 of the RPA);

(3) the ability to sell their dwelling (including by an executor following the death of a resident (see s 80 of the RPA); and

(4) the right to assign rights and obligations (including the site agreement itself to a prospective purchaser) or to sublet the dwelling (see s 41 of the RPA);

84 The respondents submit that a further and important right and protection is the fact that residential site agreements can only be terminated in limited circumstances.

85 The respondents do not dispute the validity of the termination notices given under s 102 of the RPA or the change of use of the residential park. However, before the Tribunal has power or jurisdiction to make orders for termination and possession it is clear from the wording of s 113(3A) that the factors in subsections (a), (b), or (c) are necessary conditions precedent and that at least one of them must be satisfied before such an order for termination and possession is made.

86 The respondents contend that notwithstanding the fact that s 102(5) says that a resident is entitled to compensation under s 128 when an agreement is terminated for change of use, when one turns to s 113(3A), s 128 compensation only applies in a narrow sense where relocation is to occur. As relocation is not applicable to the factual matrix of this case, as far as it is a condition precedent for possession under s 113(3A) it falls away.

87 In addition s 113(3A)(c) falls away as no agreement could be reached between the parties.

88 This means that the only way in which possession can be granted, is if the applicant agrees to purchase the respondents' dwelling at a price no lower than its value as determined by the Tribunal under s 130A.

89 The respondents contend that the questions to be determined are:

(1) whether s 113(A)(b) operates to dragoon the respondents into a sale of their dwellings or otherwise operates to effect a compulsory acquisition of their dwelling without their consent;

(2) whether the construction of the term "*value of dwelling*" in s 130A provides for a valuation of the dwellings as mere chattels to be sold off in a parking lot or similar.

90 The respondents contend that s 113(3A)(b) cannot be used to dragoon residents into the sale or compulsory acquisition of their dwelling where they have made no offer to sell. As such, that section has no relevance and the park owner is unable to satisfy any precondition that would enable termination and possession given the factual circumstance in this case.

91 The respondents contend that the applicant's application for termination and possession should be dismissed given the inability of the applicant to satisfy any of the compensation requirements under s 113(3A).

92 The respondents note that the applicant could reissue termination notices and compensation can be determined in line with new procedures which are available under the legislation which has replaced the RPA, namely the *Residential (Land Lease) Communities Act 2013*.

93 The respondents contend that where a resident did agree to a valuation for sale under s 130A the valuation should include the rights attached to the dwelling. Any other approach would amount to a fire sale of the resident's dwelling, which would be

inconsistent with the objects of the Act. The respondents refer to s 4A of the RPA which sets out the objects of the Act and includes:

> (b) to establish legislative protection for residents

94 The respondents contend that the object quoted above together with the compensation regime for termination means that the compensation provisions for residents losing their home are remedial or beneficial in nature in that it seeks to provide a benefit to the respondents who find themselves about to be made homeless.

95 The respondents contend that the general rule with respect to remedial or beneficial provisions or statutes is that they are to be liberally construed. The respondents rely upon *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd* [2012] NSWCA 31 at [30] which decision confirms that beneficial and remedial legislation is to be given a liberal construction. However a Court or Tribunal is not at liberty to give the legislation a construction that is unreasonable or unnatural.

96 The respondents also relied upon *AB v Western Australia* [2001] HCA 42 where the High Court at [24] referred to the Courts as having a special responsibility to take account of and give effect to the statutory purpose which is of particular significance in the case of legislation protecting or enforcing human rights.

97 The respondents also referred to the decision in *Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd and Anor* [2013] VSC 344 in which the Court at [42] repeated the above approach to the construction of remedial or beneficial legislation.

98 The respondents referred to the decision concerning the parties in the Supreme Court in which His Honour Justice Beech-Jones held that the term value should include the rights attaching to the value (see paragraph 35 of that decision). The respondents also referred to His Honours comments at paragraph 39 where His Honour said that he considered that the respondent's expert valuations on a "*comparable dwelling on a comparable site basis*" would be consistent with s 130A.

99 The respondents submit that the construction of the term "*value*" is capable of including the meaning assigned to it by Beech-Jones J as this is how the respondents perceive the value of the dwelling themselves. Each dwelling is not a mere chattel as the applicant contends but is the respondent's home, secured with statutory rights and protections and capable of being sold onto a purchaser complete with the site agreement itself.

100 The respondents note that s 130A specifically excludes the dwellings location from being taken into account. However, no further mandatory exclusions are noted. This being the case, it is open to the Tribunal to include the rights attached to the dwelling and in doing so make good the intention and legislative purpose of the compensation provisions.

101 The respondents objected to the tender and/or reliance on the Hoolihan report. The respondents contend that the Hoolihan report is not a report which complies with the experts code of conduct and that it is a document which the Tribunal ought to reject.

102

The respondents also submit that subsections (b) and (c) of s 113(3A) of the RPA do not necessarily cover the same subject matter, with subsection (b) operating unilaterally and subsection (c) operating consensually. Rather, the subsections ought to be construed such that subsection (b) operates where there is a consensual sale and subsection (c) operates where there is an agreement between the parties which may deal with matters in addition to, or other than, the sale of the dwelling of the resident.

103 The respondents relied upon the second reading speech (Exhibit J) and to the statement contained in that speech to the effect that often residents only option is to negotiate with the park owner to take the dwelling off their hands and that in recognition of that position the legislation is designed to protect the residents.

104 The respondents contend that if the Tribunal is engaged in the exercise of determining the value of a dwelling under s 130A then that value must include the value of the site agreement itself and the matters pertaining to that agreement as identified by His Honour Justice Beech-Jones.

105 As stated above the respondents contend that the only evidence concerning valuation, namely the Hoolihan report, was evidence which the Tribunal should not rely upon and should reject. The respondents contend that the Hoolihan report was unhelpful, that it was not admissible in that it did not comply with the Tribunal's code of conduct. It was submitted that the author did not display any particular specialised knowledge and that his opinions were speculative. The further submission was made that the Hoolihan report did not set out the basis or assumptions upon which Mr Hoolihan based his opinions and that he did not appear to understand the various types of valuations he was instructed to prepare. The reasoning process by which he reached his opinions was not set out and therefore was not capable of scrutiny.

106 The respondents contend that the evidence from Mr Hoolihan discloses that he had consulted with people in formulating his opinions but the identity of those people was not mentioned in his report. Furthermore, he did not adequately look at the size of the dwellings used for comparative purposes for the purposes of assessing their true comparability.

107 The respondents contend if a valuation is to be considered, that the valuation to be undertaken in these proceedings should be a valuation in situ and in support of that submission the respondents refer to comments made by His Honour Tobias AJA as contained in the transcript of the hearing in the Court of Appeal on 5 November 2015. The transcript reveals that His Honour said:

> My own current view is that you do not have regard to its location within the park in terms of any advantages or disadvantages that that location may give rise, so you have got to put that out of your mind as the valuer, but you value it in situ, so to speak, and on that basis you are valuing it as if the park owner comes along, or anyone else comes along and said "I would like to buy your dwelling…".

108 The respondents contend that the applicant in effect seeks to have the Tribunal agree on a value for each dwelling which is tantamount to selling the dwelling "*on its stumps*" without any regard to the additional value which arises when one takes into account the

so called paragraph 35 factors.

Reply of applicant

109 In reply the applicant submitted that the Tribunal should be guided by what His Honour Justice Beech-Jones said at paragraph 53 of His Honour's decision. In that paragraph His Honour referred to the circumstance where a valuation under s 130A has been sought and obtained and that, once it is given, it is a matter for the Tribunal to determine whether the park owner has agreed to buy the dwelling from the resident at a price no less than its value as determined under s 130A. A determination of that price will not bind the resident to accept it but the Tribunal is then in a position where it may order termination.

Findings and decision

110 This applicant seeks an order to be made by the Tribunal under s 113(2)(a) of the RPA for the residential site agreements held by the respondents to be terminated.

111 In the circumstances of these proceedings an order cannot be made under s 102(2)(a) unless the Tribunal is satisfied that the notice of termination was given and that it was given in accordance with Pt 12 of the RPA (s 113(3)). Given the concessions made by the respondents in the proceedings and the absence of any evidence indicating otherwise, the Tribunal is satisfied that the requirements of s 113(3) have been complied with.

112 Section 113(4) provides that if the Tribunal makes an order under this section terminating a residential tenancy agreement the Tribunal must also make an order for possession of the residential premises specifying the day on which the order takes effect. However, by reason of s 113(3A) the Tribunal must not make an order for possession as a consequence of an order terminating a residential tenancy agreement pursuant to a notice given by the park owner on the ground referred to in s 102 (Termination by park owner for change of use) unless the Tribunal is satisfied, relevantly for these proceedings, that the park owner has agreed to buy the dwelling from the resident at a price no less than its value, as determined by the Tribunal under s 130A (s 113(3A)(b)).

113 A central issue in these proceedings is whether the Tribunal is able to be satisfied that the park owner has agreed to buy the dwelling from each resident at a price no less than its value as determined by the Tribunal under s 130A in circumstances where there is no proposed sale of any of the dwellings or no agreement for a sale involving the participation or consent of the respondents.

114 It is my view that s 113(3A)(b) refers to circumstances in which a park owner has satisfied the Tribunal that the park owner agrees to buy the dwelling from the resident at a price no less than its value (as determined under s 130A) even including where there is no evidence that the respondent will accept such an offer. In the context of this subsection, my view is that where the subsection states that the park owner "*has*

agreed to buy the dwelling" it is to be taken as meaning that the park owner has offered to buy the dwelling from the resident.

115 Although this interpretation of the RPA carries with it the conclusion that the resident may be "*dragooned*" (to use the language of the respondents) into selling their dwellings, the RPA, nevertheless, provides mechanisms to ensure that they are not required to deliver up vacant possession before payment in full is made. The form of notice required under s 102 must state the information contained in s 102(4). That includes a statement to the effect that the resident is not required to deliver up vacant possession until ordered to do so by the Tribunal. The Tribunal must by s 113(4) make an order for possession which specifies the day on which the order takes effect. That day could be a date after which compensation has been paid in full. In addition, s 114 of the RPA permits the Tribunal to suspend the operation of an order for possession for a specified period if it is satisfied that it is desirable to do so, having regard to the relative hardship likely to be caused to the park owner and the resident by the suspension.

116 The interpretation adopted by the Tribunal is consistent with the objects described in s 4A of the RPA. These objects include that fact that the RPA sets out the respective rights and obligations of park owners and residents. In other words both parties have rights and both parties have obligations.

117 In my view to interpret s 113)3A)(b) as requiring both the park owner and the resident to agree on a proposed sale could result in s 113(3A) being inoperative where the residents consent is not forthcoming. In *Pearce v Cocchiaro*, Gibbs J referred to the impossibility of supposing that Parliament intended legislation to be futile if given a particular interpretation. In *Cooper Brooks (Wollongong) Pty Ltd v Commissioner of Taxation* the High Court referred to the "*fundamental object of statutory construction*" which is to "*ascertain the legislative intention by reference to the language of the instrument viewed as a whole*" (p 320).

118 As stated above, in my view s 113(3A)(b) refers to the park owner agreeing to buy the dwellings from the residents in the sense of offering to do so. Where both the park owner and the residents agree on a sale the provisions of s 113(3A)(c) apply. This interpretation in my view reflects Parliament's intention and is consistent with the Second Reading Speech (Exhibit G). That speech acknowledged the park owner may have "*legitimate reasons to seek closure of his or her park for redevelopment purposes*" and that "*residents are granted the most dignified and helpful process that is possible in such circumstances*".

119 However, s 113(3A)(b) requires the Tribunal to be satisfied, as a condition of making an order for possession, that the park owner has agreed to buy the dwelling at a price no less than its value as determined by the Tribunal under s 130A.

120 In my view the applicant's submissions concerning s 130A are to be accepted, namely that one of the purposes of that section is to assist the Tribunal in becoming satisfied of the requirements set out in s 113(3A)(b). Section 130A enables the Tribunal to

determine the value of the resident's dwelling. In so doing the Tribunal may not have regard to the dwelling's location (s 130A(4)).

121 I further accept the applicant's submission that in determining the value of the resident's dwelling no regard should be had to the residential site. This view is supported by the decision in *Haraba Pty Ltd v Castles* in which the Queensland Court of Appeal stated that a site agreement confers no interest in land. This view is also supported by the Second Reading Speech quoted earlier in which the Minister said that the value of the resident's home is to be calculated on its stand-alone value and will not include any component of the land which it stands upon. In coming to this view I have had regard to the respondents' submissions that the RPA is remedial or beneficial legislation which seeks to provide a benefit to residents who find themselves about to be made homeless. In my view the intent of the RPA is not just to benefit residents: s 4A identifies the objects. They include protecting residents and in addition setting out the rights and obligations of park owners and residents.

122 In determining the value of the residents' dwellings an important consideration is whether the so called paragraph 35 factors are to be included as part of or as a component of the valuation. The applicant submits not and the respondents that these factors should be included. That was the view of His Honour Justice Beech-Jones. In paragraph 35 of the decision cited earlier His Honour said that s 130A(2) requires NCAT to make an assessment of the value of the resident's dwelling and that the valuation "*can be taken to include the rights attached to the dwelling under the RPA such as the right of quiet enjoyment, rights of alienation and the protections on defeasibility afforded by Part 12 itself*". That statement was obiter and was not, I was informed, the subject of debate before His Honour.

123 Given the above circumstances I am not bound to follow His Honour and with respect I hold a different view. In my view the valuation of the resident's dwelling under S 130A(2) is a valuation of the dwelling without regard to the above rights (which are termed by the parties as the paragraph 35 factors). The fact that the section specifically excludes the dwellings location confirms, in my view, that the section requires the valuation to be of the dwellings as a as a building. This view is, in my opinion supported by the Second Reading Speech. The paragraph 35 factors are rights which pertain to the residential site agreements and not to the dwelling. In my view this approach is consistent with the approach required for fixing compensation under s 128(3), (4) and (5) which concern compensation to be paid when a dwelling is being located to a new site. The various categories of costs to be considered do not include factors like the paragraph 35 factors. There is also a cap on the amount of compensation, namely the value of the dwelling: s 128(5).

124 I am of the view that the value of each dwelling is the value having regard to their current state of repair. I agree with the submissions of the applicant that there is no basis to support an argument that the dwellings should be valued at a hypothetical value, namely on the assumption that they are in reasonable repair. If residents choose

not to spend money on their dwellings allowing them to fall into a state of disrepair then given the minimum 12 month period of notice required (see s 102(2)), it would require clear language in the legislation to direct that the valuation of the dwelling is to be a value more than the dwelling's actual value. Such language is not present.

125 From my view as to the appropriate approach to valuing the dwellings under s 130A, of the three bases for valuing the dwellings undertaken by Mr Hoolihan, the following may be concluded:

(1) The values which incorporate the paragraph 35 factors and the values which are based upon the dwellings being in a reasonable state of repair (as opposed to their current state of repair) are to be disregarded. That leaves the values without the paragraph 35 factors and having regard to the current state of repair;

(2) Basis 3 is to be disregarded because it incorporates a component in the value of each dwelling which represents the value of the dwelling being in a park comparable to the Hastings Point park in the sense that the comparable parks have features which the Hastings Point park had before it was allowed to run down. Basis 3 incorporates some recognition for a dwelling being in a particular location;

(3) Basis 2 is to be disregarded because the values given under this basis reflect the current unfavourable features of the park;

(4) That leaves Basis 1. I am of the view that Basis 1 is the basis which reflects the intention of the legislation because this basis values each dwelling without regard to the dwelling's location.

126 The next question is whether the opinion and methodology of Mr Hoolihan can be relied upon. In my view Mr Hoolihan was a witness of expertise and integrity. He explained adequately his methodology and the bases for the variations in the values between the three bases. His approach which was to start by valuing the dwellings under Basis 3 (with the paragraph 35 factors) made sense because he had a body of comparable sales relevant to that basis. He had no or, considerably less information to rely upon when valuing the dwellings under Basis 1 and 2 and that explains why the changes in values under Basis 1 compared to Basis 3 were not able to be fully explained. However, his experience and expertise enabled him, in my view, to say that the Basis 1 values were less than the Basis 3 values by amounts which varied between zero and approximately $20,000.00.

127 I do not accept the contentions of the respondents that the Hoolihan report should be rejected or should be fully or partly disregarded. Mr Hoolihan was in my view able to explain the values he had given to the dwellings and adequately explain the differences between the dwellings and the comparative sales. In my view, Mr Hoolihan complied with the Tribunal's Code of Conduct for experts and his evidence was reliable.

128 I conclude that I am able to, and do, determine the values of the residents' dwellings. Those values are the values set out in paragraph 63 of these reasons.

129 The applicant has in my view agreed to buy each of the dwellings of the respondents as is evidenced by Exhibit F and I am satisfied that the applicant has agreed to buy the dwellings from the residents at a price no less than the values determined by me under

s 130A.

130 I am of the view that it is appropriate to exercise the power I have under s 114 of the RPA to suspend the operation of the order for possession until the residents are paid or have payment tendered to them. This is to protect the respondents against the hardship that would arise if they were required to vacate prior to payment being made or tendered.

131 Accordingly, I am able to make an order for possession as a consequence of my proposed order terminating the residential tenancy agreements. I therefore make the orders set out in the following paragraph.

132 I have included order (5) below in case there is any dispute between the parties as to whether the suspension on the order for possession is continuing or has been lifted by the operation of order (4).

Orders

133 The Tribunal makes the following orders:

(1) The residential tenancy agreements of each of the respondents is hereby terminated;

(2) The respondents will deliver up vacant possession of their respective residential sites on or before 20 September 2016;

(3) Notwithstanding order 2, the orders for possession are suspended until the respondents receive payment in full, of the amounts determined in these reasons to be the values of the dwellings (or until payment in full is tendered) namely:

Site 39 $60,000

Site 51 $85,000

Site 54 $20,000

Site 58 $45,000

Site 59 $40,000

(4) Once payment in full is made or tendered by the applicant to the respondents then in respect of those respondents who have received payment in full or been tendered payment in full the suspension of the order for possession is lifted; and

(5) Liberty to renew.

S Westgarth

Deputy President

Civil and Administrative Tribunal of NSW

6 April 2016

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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

Decision last updated: 20 May 2016