

Manufactured Homes (Residential Parks) (COVID-19 Emergency Response) Regulation 2020

Explanatory notes for Subordinate Legislation 2020 No. 222

made under the

COVID-19 Emergency Response Act 2020
Manufactured Homes (Residential Parks) Act 2003

General Outline

Short title

Manufactured Homes (Residential Parks) (COVID-19 Emergency Response) Regulation 2020

Authorising law

Section 8 of the *COVID-19 Emergency Response Act 2020*

Section 146A of the *Manufactured Homes (Residential Parks) Act 2003*

Policy objectives and the reasons for them

The COVID-19 public health emergency has had a significant impact on Queenslanders, including those living in manufactured homes in residential parks.

In residential parks, a person buys their manufactured home (commonly from the park owner or a departing home owner) and rents the land their home is sited on from the park owner. It is expensive and impractical to relocate a manufactured home to another residential park, which can create a power imbalance in favour of the residential park owner. The *Manufactured Homes (Residential Parks) Act 2003* (MHRP Act) aims to regulate, and promote fair trading practices in the operation of, residential parks, including by managing the relationship between park owners and home owners.

Owners of manufactured homes in residential parks are typically older Queenslanders of retirement age, with many living on a limited, fixed income such as the age pension. The capacity of manufactured home owners to absorb substantial increases in living costs such as the site rent that they pay, is low if the rate of increase outstrips the rate of pension increase.

In residential parks, site rent increases can only occur in accordance with the MHRP Act and the individual site agreements.

Manufactured home owners who have faced a 'market review of site rent' during COVID-19 have complained that these rent reviews have caused them significant difficulties including limits on the conduct of proper consultation processes for a market valuation of site rent and concerns about the availability for home owners to dispute site rent increases during COVID-19.

A market review of site rent is a method of undertaking a general increase of site rent paid by home owners in a residential park, the outcome of which is decided by comparing the site rent with the site rent payable for a site in one or more residential parks, or the rent payable for other residential accommodation. Market reviews of site rent commonly occur on 3 or 5-yearly intervals. Rent is increased in other years according to the basis set out in the site agreement which can, for example, be according to the consumer price index (CPI), a percentage, or some other basis.

The process of undertaking a market review of site rent involves:

- Nominating a day (the 'general increase day') when the site rent payable under the site agreements for all eligible sites in the residential park will be increased on the same basis.
- Consulting with the home owners committee (or 25 per cent of home owners where no home owners committee has been established) at least 63 days before the increase.
- Providing a notice of general increase to home owners at least 35 days before the general increase day.
- Providing a copy of a market valuation prepared by a registered valuer at least 35 days before the general increase day.

Home owners have 28 days to dispute the increase from the date they receive the general increase notice.

COVID-19 has had significant impacts on these processes, and both industry and consumer representatives have identified issues with market reviews occurring during the COVID-19 health emergency. These issues include:

- Home owners being unable to involve themselves in the consultation process during the preparation of a market valuation which identifies the increase amount for the market review.
- Home owners being unable to dispute site rent increases in the ordinary timeframes, either due to the public health restrictions or due to the stress and anxiety caused by the pandemic.
- Home owners feeling unable to meet, plan and organise themselves during the pandemic, significantly impeding their capacity to negotiate collectively.
- Home owners facing financial impacts due to the loss of income through COVID-19 impacts on employment.
- Home owners facing significant market rent review increases accompanied by park owner offers for reduced (but still significant) increases in exchange for giving up their rights to seek a review of the market rent review process and increase, during a period of great anxiety and stress.

- Increases in site rent despite reductions in services or amenity due to closures due to COVID-19.

On 25 May 2020, the *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020* (Justice Amendment Act) received assent and amended the MHRP Act to create a temporary emergency regulation making power to modify or suspend particular processes for COVID-19 response measures, including modifying or suspending the processes for increasing or reducing site rent, or modifying the processes for disputing a proposed increase in site rent.

On 23 April 2020, the *COVID-19 Emergency Response Act 2020* received assent and created a general regulation making power related to attendance at places or meetings.

The policy objective of this regulation is to address the problems faced by manufactured home owners identified above and ensure fairness for vulnerable home owners in residential parks during the COVID-19 pandemic.

Achievement of policy objectives

To achieve its objectives, the *Manufactured Homes (Residential Parks) (COVID-19 Emergency Response) Regulation 2020* will make the following changes to the market review process for increasing site rent in residential parks.

Market review increases imposed after COVID-19 and before the Justice Amendment Act

- Home owners who had a market review between **19 March and 24 May 2020** will have enhanced dispute resolution rights that take into account the disruption caused by COVID-19. These home owners have until 20 November 2020 to initiate a dispute on the basis that the market review was excessive. If the dispute reaches the Queensland Civil and Administrative Tribunal (QCAT), the tribunal is empowered to consider the circumstances of COVID-19 when determining if the market review of site rent was excessive.

Market review increases imposed within two weeks of the Justice Amendment Act

- If a park owner concluded a market review between **25 May 2020 and commencement of the regulation** and gave the general increase notice to home owners **before 8 June 2020**:
 - The market review stands and the increase is payable provided the park owner provides formal notice (a 'site rent increase continuation notice') within 14 days to home owners that the market review stands and refunds to home owners the increase amount (being the amount already paid and that would be paid until 31 December 2020) by 6 November 2020. This has the effect of deferring the market rent increase for these home owners until 1 January 2021.
 - These home owners will also have access to enhanced COVID-19 related dispute resolution considerations described above and may dispute the increase within 56 days of the site rent increase continuation notice being given.

- If the park owner does not provide a 'site rent increase continuation notice' within 14 days, the increase is suspended (for further requirements, see next entry below).

Market review increases imposed after the Justice Amendment Act and before this Regulation commences

- Market rent review increases which occurred between **25 May 2020 and commencement of the regulation** which are not the subject of a 'site rent increase continuation notice' (if eligible):
 - Are suspended and replaced by a CPI increase.
 - Any increase amounts paid by home owners over this CPI increase amount must be refunded to home owners by 6 November 2020.
 - Incomplete dispute proceedings relating to the market rent increases during this period are ended.

Market review increases after this regulation starts and up to 31 December 2020

- Market reviews between **commencement of the regulation and 31 December 2020** are prohibited.
- Park owners who have had their market review during this period can impose a CPI increase by providing a notice to home owners.

In 2021

- Where a market review has been suspended or prohibited in 2020, it can be undertaken in 2021, despite the schedule for the timing of increases that may be provided for in a site agreement. The market review must be done at least one year from the date the suspended market review would have taken place.
- To mitigate longer-term impacts on market review schedules, consultation for market reviews which are scheduled to occur in early 2021 can begin in late 2020.

Meeting requirements

- Requirements in the MHRP Act which ordinarily require a physical meeting of home owners, may be done using audio or audio-visual links.

Consistency with policy objectives of authorising law

The Justice Amendment Act provides particular measures to assist Queensland business and individuals suffering financial and operational stressed caused by the public health emergency.

Section 45 of the Justice Amendment Act inserted new section 146A into the MHRP Act which allows a regulation to modify or suspend the processes for increasing or reducing site rent, or the process for disputing a proposed increase in site rent.

The regulation implements response measures to support manufactured home owners who experienced a market review of site rent which was impacted by the circumstances of COVID-19. These measures are consistent with the scope of

section 146A of the MHRP Act, and the purpose of the amending legislation as described in the explanatory notes.

A regulation made under new section 146A of the MHRP Act may be inconsistent with an Act or law other than the *Human Rights Act 2019* to the extent necessary to achieve a purpose of the regulation and the Act; have retrospective application to a date not earlier than 19 March 2020; and impose a penalty that is not more than 100 penalty units for a contravention of the regulation.

Sections of the regulation apply retrospectively to 25 May 2020, reflecting the date industry and home owners were given notice of the Government's intentions to implement a moratorium on market reviews of site rent with the passing of the *Justice and Other Legislation (COVID-19 Emergency Response) Act 2020*.

Section 18 of the regulation is retrospective to 19 March 2020 to ensure any meetings which were held by audio or audio-visual links are considered valid meetings in accordance with the MHRP Act.

The regulation will apply retrospectively between 19 March 2020 and 25 May 2020, to ensure recourse is available to home owners who experienced a market review prior to the passing of the Justice Amendment Act, while limiting the impact on park owners who had acted before that date.

Alternative ways of achieving policy objectives

A range of alternative ways of achieving the policy objective of ensuring fairness for home owners who had gone through a market rent review or would go through a market rent review were considered during the development of this regulation.

This included a proposal which had a prospective moratorium on market reviews from commencement of the regulation, with enhanced dispute resolution for those who have experienced a market review prior to that date. This proposal was consulted on with stakeholders and it was determined that this would deny rapid and effective relief to those most affected during the peak of COVID-19. Moreover, those home owners, some of whom experienced significant rent increases, would be required to continue paying that increased amount until the dispute was resolved. As a result, the date of 25 May 2020, the date the Justice Amendment Act received assent, was determined to be a fair starting point for the moratorium. Moreover, the diversity of views received during consultation with stakeholders has enabled development of the regulation to ensure unintended consequences are mitigated as much as possible, but has impacted on the commencement date for the regulation and it would be unfair to deny home owners relief due to the consultation conducted.

Financial hardship measures, comparable to those applicable to tenants of residential tenancies under the *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Regulation 2020* in which home owners could make an application to QCAT where they experienced a loss of income due to COVID-19, was also considered. However, this method of addressing COVID-19 impacts does not recognise the collective bargaining done by home owners and the home owners committee and rent alignment between sites that occur with residential

parks. Such a method would also deny protection to home owners whose income hadn't changed, but were faced with a market review they regarded as excessive at a time they felt unsafe or unable to dispute the increase because of the circumstances of COVID-19.

Benefits and costs of implementation

The benefit of the regulation includes providing targeted relief to home owners who experienced a market review during the COVID-19 pandemic. This provides financial relief to affected home owners, but will result in costs to residential parks which would have had a market review during 2020 but for this regulation.

To mitigate the impact on park owners, the regulation includes a range of measures, including:

- Replacing suspended market reviews with a CPI increase, which allows the park owner to increase site rent in proportion to inflation.
- Allowing market reviews to stand where a general increase notice was provided to home owners between 25 May 2020 and 8 June 2020, and the park owner provides a site rent continuation notice within 14 days of commencement of the regulation, and pays home owners the increase amount already paid and is to be paid up to 31 December 2020 by 6 November 2020.
- An allowance to undertake a market review in 2021 despite any established schedules in the affected site agreements. This will allow site rent which was suspended during 2020 to be realigned with the appropriate market rate in 2021, mitigating any long-term impacts on site rent.
- Setting the start date for the moratorium as 25 May 2020, the date from which park owners had notice of the policy to address problems with market rent reviews during COVID-19.

These costs and benefits are the result of a fair and balanced approach which considers the impact of COVID-19 on both home owners and industry during the COVID-19 emergency period.

It is anticipated that government will incur only minor costs in communicating changes made by the regulation to home owners and industry.

Inconsistency with policy objectives of other legislation

No inconsistencies with the policy objectives of other legislation have been identified.

Consistency with fundamental legislative principles

Section 4(3)(g) of the *Legislative Standards Act 1999* requires legislation to have sufficient regard to the rights and liberties of individuals, including regard to whether the legislation adversely affects rights and liberties, or impose obligations retrospectively.

The moratorium on market reviews of site rent takes effect retrospectively from 25 May 2020, the date the Justice Amendment Act received assent.

The enhanced dispute resolution provisions take effect from 19 March 2020, the earliest date allowable under the Justice Amendment Act.

In the circumstances, the retrospective operation of these provisions is justified by the circumstances of COVID-19 which could not have been predicted but requires rapid intervention to ensure fairness for Queenslanders living in residential parks. The regulation seeks to reflect community expectations in achieving a fair balance between the rights of home owners and park owners in the circumstances arising from the COVID-19 Emergency.

Retrospective application of these provisions reflects the established and broadly communicated policy at the time the Act was passed by the Parliament, and is necessary to ensure fairness for home owners while enabling consultation to take place according to the commitment made to Parliament during the debate of the Justice Amendment Act.

Consultation

The Department of Housing and Public Works has consulted with stakeholders relevant to the residential parks industry and manufactured home owners including:

- Queensland Retirement Village and Park Advice Service (Caxton Legal Centre)
- Associated Residential Parks Queensland
- Manufactured Home Owners Association
- Urban Development Institute of Australia
- Property Council of Australia
- Caravanning Queensland

Consultation occurred with the above stakeholders in three separate stages in May, June and August 2020 including an issue identification stage; consultation on a proposed response; and consultation on a draft regulation.

Diverse feedback was received at all stages, with home owners and legal advocacy groups generally recommending a total freeze on all site rent increases during the emergency period of COVID-19 dating back to 19 March 2020, while acknowledging that market reviews during this period have been particularly problematic.

Some industry feedback was initially supportive of measures to address COVID-19 impacts, but later feedback notes that issues with consultation during the preparation of a market valuation for market reviews of site rent were alleviated due to the easing of social distancing restrictions in Queensland. Industry feedback expressed concerns about the long-term impacts and unintended consequences of a moratorium on site rent increases. Industry also noted that in mixed-use parks with a tourism component as well as manufactured homes, park owners were facing significant economic challenges due to the reduction in tourism as a result of the pandemic.

To mitigate some of the financial and logistical impacts identified by park owners, changes were made to the proposed regulation which recognise the innovative responses being implemented by some park owners to provide relief to home owners during COVID-19 by continuing with the market review but providing an upfront payment to home owners equivalent to a years' worth of the market review increase amount.

As noted above, the regulation seeks to strike a balance by providing fairness and consumer protection to affected home owners while minimising long-term impacts on industry by limiting the moratorium to market reviews for the period of the pandemic, recognising responsiveness by some park owner and allowing a replacement CPI increase.

Notes on provisions

Section 1 provides the short title of the regulation.

Section 2 provides that the commencement date for Part 5 (allowing home owners and home owners committees to meet using audio or audio visual links) is 19 March 2020.

Section 3 declares the regulation is made under section 8 of the *COVID-19 Emergency Response Act 2020* and section 146A of the *Manufactured Homes (Residential Parks) Act 2003*.

Section 4 specifies that the regulation modifies the *Manufactured Homes (Residential Parks) Act 2003*.

Section 5 provides additional rights to dispute increases of site rent for home owners who experienced an increase based on a market review of site rent between 19 March 2020 and 24 May 2020. This provision applies where the home owner considers the amount of the increase to be excessive, and that insufficient consultation was undertaken in preparation of the increase. Where this has occurred, home owners have until 20 November 2020 to provide a dispute negotiation notice to the park owner to dispute the increase in site rent. This will commence the ordinary staged dispute resolution process under the MHRP Act.

Section 6 provides explicit authority for QCAT to consider the circumstances of COVID-19 in deciding the application. These additional considerations include:

- public health directions
- the consultation which took place for the market valuation
- the extent to which interested entities (such as home owners committees or where there is not a committee, a certain number of home owners as specified in the MHRP Act) provided their views
- the nature of the arrangements for carrying out consultation,
- any circumstances that adversely affected the ability of the home owner to take part in the consultation

- whether the home owner was able to get legal advice within 28 days of the increase and
- whether the home owner was able to meet with other home owners to discuss the proposed site rent increase.

Section 7 ensures that where QCAT has already made a ruling in relation to the market review of site rent, home owners may make a new application for the matter to be considered with regards to the circumstances of COVID-19 without needing to go through the ordinary dispute resolution steps required by the MHRP Act. This reflects the fact that park owners and home owners have already attempted to resolve the matter through negotiation and mediation.

Section 8 requires that a home owner who wishes to initiate a dispute under this regulation must provide a dispute negotiation notice to the park owner. Where a dispute about the increase in site rent is underway, the new dispute must be considered at the same time as the dispute already underway.

If the matter is at the mediation stage, the home owner must notify the mediator in writing of the new dispute and give a copy of the dispute negotiation notice to the mediator.

If the matter is subject to a QCAT hearing that has not been resolved, the home owner must give a copy of the dispute negotiation notice to the registrar of the tribunal.

Section 9 applies where there was a market review site rent increase in the period between 25 May 2020 and the commencement of this regulation and the increase notice was given on or before 8 June 2020. Within 14 days of this regulation commencing, the park owner may give the home owner a notice (a 'site rent increase continuation notice') stating that the site rent increase in effect is continuing and that the home owner is entitled to a payment by the park owner of the weekly amount of the increase already paid, and payable till 31 December 2020. This payment must be made to the home owner by 6 November 2020.

Section 10 applies if a park owner gives a home owner a 'site rent increase continuation notice' under section 9, and the home owner considers the increase is excessive and that there was insufficient consultation undertaken in preparation of the increase. Where this has occurred, home owners have 56 days after receiving the site rent continuation notice to provide this dispute negotiation notice to the park owner.

Section 11 provides explicit authority for QCAT to consider the circumstances of COVID-19 in deciding the application about the site rent increase brought under section 10. These additional considerations are the same as those provided in section 6.

Section 12 ensures that where QCAT has already made a ruling in relation to the market review of site rent, home owners may make a new application for the matter to be considered with regards to the circumstances of COVID-19 without needing to go through the ordinary dispute resolution steps required by the MHRP Act. This

reflects the fact that park owners and home owners have already attempted to resolve the matter through negotiation and mediation.

Section 13 applies where a home owner has initiated a dispute under section 10 of this regulation in circumstances where a dispute about the increase in site rent is underway. In such a case, the new dispute must be considered at the same time as the dispute already underway, either at the mediation stage if the mediation underway has not concluded, or by the tribunal if the tribunal has started but not finished hearing the existing dispute.

If the dispute is still at the mediation stage, the home owner, at the same time as giving the park owner the dispute negotiation notice, must also notify the mediator in writing and give the mediator a copy of the dispute mediation notice. The new dispute and the existing dispute must be mediated together by the same mediator, and if the mediation has started but not ended, it should be mediated by the mediator for the existing dispute.

If the dispute is at the hearing stage the new dispute does not need to go through the ordinary dispute resolution steps required by the MHRP Act and new and existing disputes should be heard together by the tribunal. The home owner, at the same time as giving the park owner the dispute negotiation notice, must also notify the registrar of the tribunal in writing and give them a copy of the dispute mediation notice.

Section 14 suspends market reviews which occurred between 25 May 2020 and the commencement of this regulation where no site rent continuation notice has been given by the park owner to the home owner under section 9.

Market reviews captured under this section cease to have effect 14 days after the commencement of this regulation (referred to as the 'start day') and are automatically replaced by an increase based on the annual change in the CPI. CPI is to be calculated in accordance with the home owner's site agreement where a CPI increase is provided for or based on the annual change in CPI for the quarter published before the general increase day.

Park owners must refund home owners the difference between what they have paid in site rent, and what they would have paid if site rent was increased by CPI by 6 November 2020.

Within 14 days of the start day, park owners must provide a notice to home owners notifying them of the change in site rent, their entitlement to a refund by 6 November 2020, and that the park owner may undertake a new market review on the day that is at least one year from when the suspended market review would have occurred.

Section 15 ends any disputes for increases in site rent which have been suspended under section 14(2).

Section 16 prohibits increases in site rent based on market review from occurring between commencement of the regulation and 31 December 2020, even if consultation has occurred with home owners under section 69D of the Act or an

increase notice was given under section 69E. This section allows a market review of site rent to be undertaken at least one year from when the market review would have occurred (on the nominated general increase day). The consultation and notice requirements and dispute resolution processes applied by the MHRP Act will apply to the next general increase day.

Section 17 allows park owners who have a market review of site rent prohibited under section 16, to instead undertake an increase of site rent based on CPI by providing a notice to home owners which states:

- that the site rent is increasing on the basis of an increase in the CPI number under this regulation; and
- the amount of the site rent increase; and
- the day the site rent increase starts; and
- that the park owner may undertake a market review at least one year after the market review of site rent would have taken effect.

CPI is to be calculated in accordance with the home owner's site agreement where a CPI increase is provided for, or otherwise based on the annual change in CPI for the quarter published 14 days before notice of the increase is provided to home owners.

Section 18 is to ensure that meetings required under the MHRP Act, including dispute negotiation, dispute mediation, a meeting of the home owners committee (this includes meetings of home owners committees such as annual general meetings), or a meeting of the park liaison committee to consider an objection to a proposal to change a park rule, may instead be done using audio or audio-visual links instead of a physical meeting.