SUBMISSION

Statutory Review of Residential (Land Lease) Communities Act 2013 Discussion Paper

Caravan & Camping
INDUSTRY ASSOCIATION NSW

Manufactured Housing
INDUSTRY ASSOCIATION NSW

Land Lease Living
INDUSTRY ASSOCIATION NSW

12 March 2021

CCIA NSW Submission
Statutory Review of the Residential (Land Lease) Communities Act 2013 Discussion Paper

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12 March 2021

Statutory Review of the Residential (Land Lease) Communities Act 2013
Att: [redacted]
Policy and Strategy Division
Department of Customer Service
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By email: *rllcreview@customerservice.nsw.gov.au*

Dear [redacted]

Submission on *Statutory Review of Residential (Land Lease) Communities Act 2013 Discussion Paper, December 2020*

The Caravan Camping & Touring Industry & Manufactured Housing Industry Association of NSW Ltd (CCIA NSW) is the peak industry body in this State representing the interests of holiday parks, residential land lease communities (residential parks, including caravan parks and manufactured home estates), manufacturers, retailers and repairers of recreational vehicles (RVs, including caravans, campervans, motorhomes, camper trailers, tent trailers, fifth wheelers and slide-ons), camping equipment suppliers, manufactured home builders and service providers to these businesses.

We currently have as members over 720 businesses representing all aspects of the caravan and camping and land lease living industry. Over 470 of these members are operators of holiday parks and residential land lease communities located throughout New South Wales (NSW) as follows:

Region	Number of Businesses
Far North Coast & Tweed	54
North Coast	75
New England (North Western NSW)	14
Manning/Forster	29
Newcastle & Hunter	62
Central Coast	32
Sydney & Surrounds	23
Leisure Coast (Illawarra and Shoalhaven)	51
South Coast (Eurobodalla and Sapphire Coast)	68
Central NSW	21
Murray & Riverina	30
Canberra & Snowy Mountains	14
Outback NSW	3

As a major stakeholder in the regulation of residential land lease communities in NSW we welcome this opportunity to respond to the *Statutory Review of the Residential (Land Lease) Communities Act 2013 Discussion Paper* (Discussion Paper).

Our decades of experience, in-depth knowledge of the industry and ongoing, direct interaction with residential land lease community operators across the State provides the

Government with an important source of information, insights and expertise to assist with ensuring these communities have a fit for purpose regulatory framework.

In developing this submission, we have sought feedback from our members over many months via online consultation sessions, targeted discussions, email, phone and a survey to inform the issues raised and our recommendations for legislative improvements.

ABOUT RESIDENTIAL LAND LEASE COMMUNITIES

There are approximately 495 residential land lease communities in NSW. The total number of residents is around 33,912. There are 26 residential land lease communities within the Sydney metropolitan area, and of all residential land lease communities 95% are located in rural and regional NSW.[1]

There are communities that are exclusively comprised of residential sites or those that have a mixture of residential sites and tourist sites. Home owners usually own their moveable dwelling, either a manufactured home or a caravan, and lease the land (the site) from the operator. These arrangements are regulated by the *Residential (Land Lease) Communities Act 2013* ("RLLC Act") and the *Residential (Land Lease) Communities Regulation 2015* ("RLLC Regulation").

Those who rent both the site and the home are tenants under the *Residential Tenancies Act 2010* ("RT Act") and *Residential Tenancies Regulation 2019* ("RT Regulation"). A "resident" is defined as either a home owner or a tenant (see section 4(1) of the RLLC Act).

Given the demand for more housing in NSW, and the changes to population and other factors influencing housing as identified in the NSW Government's recent discussion paper on *'A Housing Strategy for NSW,'* [2] residential land lease communities play an important role in providing diversity in housing choices in NSW and Australia.

Accordingly, there is great opportunity for the Government to continue to develop policy that supports the supply of housing in NSW through facilitating the ongoing growth and viability of residential land lease communities.

Residential land lease communities are a good housing choice because of the lifestyle they offer residents. They are neither retirement villages nor aged care facilities. They are a form of community living, providing the opportunity to live in a modern home in sought-after locations, that encourages an active lifestyle and socialising with likeminded individuals. Importantly, because they are not limited to being retirement housing, they provide greater diversity in housing choices for the people of NSW.

Site fees charged vary depending on the size and location of a site, but generally cover the cost of operating a community, which includes maintaining and repairing facilities (e.g. pools and spas, BBQ areas, libraries, bowling greens, tennis courts, meeting rooms/social halls) common areas, upkeep of roads and lighting, lawns and gardens, wages for onsite management and service staff, security costs, government fees and taxes, insurance, etc.[3] Home owners may also receive Commonwealth Rent Assistance.

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[1] NSW Fair Trading, *Residential Land Lease Communities Profile of the Industry*, November 2015, https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0011/369983/Residential_land_lease_communities_industry_profile_Nov_2015.pdf

[2] NSW Department of Planning, Industry and Environment, *A Housing Strategy for NSW*, May 2020, https://www.planning.nsw.gov.au/Policy-and-Legislation/Housing/A-Housing-Strategy-for-NSW

[3] Estimates are that 35% of a site fee is directed to the provision of the land and 65% to the provision of community facilities.

In the context of this 5-year statutory review of the RLLC Act, it is important to note that long gone are the days when residential land lease communities were considered a 'last resort' housing option. Due largely to regulatory improvements brought about by the RLLC Act, these communities have come a long way since the initial regulatory reforms of the late 1980s and early 1990s to form an important part of the housing mix in NSW.

They offer excellent housing choices for retired persons, and also downsizers, smaller families, first home buyers and single person households. And with the recent launch of the first land lease home loans[4] we expect even more people will be able to opt for land lease living as a housing choice.

With greater flexibility available under the RLLC Act operators have been able to invest in and improve communities, building the successful and sustainable developments that home owners desire. The flow on effect has been higher demand from new purchasers of homes, and existing home owners are benefiting from improvements to their living standards while getting capital appreciation of their land lease arrangements.

We have always maintained that a focus on provisions in the regulation of residential land lease communities that seek to effect 'rent control' are short-sighted. Inappropriate regulation can seriously hamper the growth and viability of the industry.

After extensive consultation with stakeholders the RLLC Act was passed by Parliament in November 2013, commencing in November 2015, and home owners and operators were given some flexibility to reach agreements that are informed, fair and help them share in the benefits of residential land lease living.

The RLLC Act has provided a legislative framework that has rejuvenated the industry and encouraged participation from current and new investors. It has also led to a reduction in matters progressing to the NSW Civil and Administrative Tribunal (NCAT) through a mediation process that gives parties more of a say in the outcome of their dispute. As such, the RLLC Act is working well overall and it has made a positive difference.

It is therefore critical for the industry that this statutory review of the RLLC Act does not reverse or erode the regulatory improvements that have been made for communities across NSW. In undertaking the review the Government should seek to:

- refine the existing rights and responsibilities of operators and home owners to ensure the objectives are being achieved,

- address some issues that have arisen since the commencement of the RLLC Act in 2015, and

- make changes that will facilitate further innovation and investment in new communities and revitalise old ones.

Our recommendations on how this can be done, so that the industry can continue to grow and contribute to housing choice in NSW while still ensuring appropriate protections for home owners, are set out below.

[4] Visit: https://www.landleasehomeloans.com.au/

SUMMARY OF RECOMMENDATIONS

The recommendations set out in this submission are as follows:

1. Expand the objects of the RLLC Act to establish procedures for resolving disputes between home owners and between operators and home owners, and to protect home owners and operators from bullying, intimidation and unfair practices.

2. Reduce the amount of information in the disclosure statement so it is not overwhelming for readers and consider translation into other languages to assist multicultural communities.

3. Amend the RLLC Act to reduce the 14-day waiting period set out in section 21(1) to 3 days, and allow prospective home owners the option of waiving that 3-day waiting period. A 'certificate of waiver' or similar document could be signed by a new home owner and operator and form part of the site agreement.

4. Amend the first question in Part 8. SAFETY & SECURITY of the disclosure statement to *"Is the community situated on flood liable land as notified by the local council to the operator?"*

5. Review the disclosure statement in its entirety, in further consultation with stakeholders, to remove any unnecessary information and to revise other key questions to ensure consistent terminology is used and operators have an ability to answer those key questions accurately.

6. The maximum penalty amount for failing to provide a disclosure statement should be reviewed so that the punishment is commensurate with the offence.

7. NSW Fair Trading to provide additional information resources, education and training for operators regarding site agreements.

8. In the interest of protecting persons and property in residential land lease communities, a term requiring a home owner to take out reasonable insurance cover should be permitted as an additional term in a site agreement, as agreed between the parties. At all times home owners would have their choice of insurer.

9. Maintain the rules and protections regarding additional terms.

10. Amend the RLLC Act to allow an operator to receive a site agreement preparation fee from a prospective home owner.

11. Maintain the existing particulars of the public register.

12. That the RLLC Act continues to allow for both the fixed method and the by notice method of site fee increases, for the benefit of operators and home owners and the continued growth and viability of residential land lease communities.

13. Amend the RLLC Act to allow site fees payable under a site agreement to be increased using a combination of the fixed method and the by notice method of site fee increases by agreement between the parties.

14. Maintain the existing flexibility of the RLLC Act regarding the fixed method of site fee increases, for the benefit of operators and home owners and the continued growth and viability of residential land lease communities.

15. Amend the RLLC Act to remove the requirement that site fees can only be increased once per year, whatever method is used.

16. The current policy remains that there are no grounds under the RLLC Act on which a site fee increase that is based on a fixed method is able to be challenged in the NCAT.

17. In relation to disputes over site fee increases by notice:

    a. amend the provisions of the RLLC Act regarding compulsory mediation, and application to the NCAT following failed mediation, to provide an appropriate process for increasing the transparency of NSW Fair Trading.

    b. amend the provisions of the RLLC Act to require that the 25% threshold is consistently maintained in order for an application to proceed in the NCAT following failed mediation.

18. The existing grounds for challenging site fee increases by notice to remain unchanged.

19. Address the distortion of the dispute resolution process whereby operators are being required to carry the evidential burden in site fee disputes and convince the NCAT Member that they are entitled to the increase.

20. Amend section 73(4) of the RLLC Act to remove the words *"established to the satisfaction of the Tribunal*" as they are unnecessary and indicate that the operator must satisfy some additional and unknowable test to convince the NCAT Member of the actual or projected increase in the outgoings and operating expenses for a community.

21. The Government set aside any suggestion that section 73(4) of the RLLC Act be amended to exclude non-recurring expenses or that the RLLC Act should allow for a reduction in site fees commensurate with community cost reductions.

22. Amend the RLLC Act to make it clear that a withdrawal of a communal facility or service due to a government directive and no fault of the operator is exempt from applications regarding site fee reductions under section 64.

23. Amend the RLLC Act to allow communities to phase out cash payments if they wish and place an obligation on home owners to comply.

24. The provisions governing site fees for new agreements, which are fair and effective, to remain unchanged.

25. The provisions regarding voluntary sharing arrangements to remain available for home owners and operators.

26. Amend the RLLC Act to enable home owners to enforce their rights regarding home owner to home owner obligations through compulsory mediation and seek appropriate orders from the NCAT.

27. Amend section 36(f) of the RLLC Act to require home owners not to intentionally or recklessly damage or destroy, or allow other occupants living with the home owner or guests to intentionally or recklessly damage or destroy, *"another home owner or resident's property,"* or the community's common areas.

28. Amend section 36(d) of the RLLC Act to *"not to interfere with, and to ensure as far as practicable that other occupants living with the home owner or guests do not interfere with, the reasonable peace, comfort or privacy of ~~the community's residents~~ anyone lawfully in the community."*

29. Amend section 36(i) of the RLLC Act to "*~~to respect the rights of the operator, and agents and employees of the operator~~, not to interfere with, and to ensure as far as practicable that other occupants living with the home owner or visitors or guests do not interfere with, the reasonable peace, comfort or privacy of the operator, and agents and employees of the operator, and their rights to work in an environment free from harassment or intimidation,"*

30. Recognise unacceptable behaviour by home owners and others towards operators as a serious issue to be addressed and amend the RLLC Act to:

    a. ensure there are repercussions for home owners who behave badly, and

    b. establish a mechanism for NSW Fair Trading to intervene, at the request of an operator, to investigate and issue penalty notices and make enforceable orders, in relation to harassment and intimidation by home owners, their occupants, visitors or guests.

31. Amend the RLLC Act to make it clear that the repair and maintenance of the residential site, including any landscaping and hardscaping such as garden beds or paths, retaining walls, driveways, or other things, are the responsibility of the home owner, and this responsibility is passed to a purchaser when a home owner sells their home on site.

32. Amend section 48 of the RLLC Act to ensure that the operator is responsible for the maintenance of only those trees within the common areas. In the alternative, the RLLC Act should permit an operator to access a residential site for the purpose of tree maintenance and remove any tree from a residential site by providing 2 days notice, without needing an order from the NCAT, and that such removal shall not be a cause for any action against the operator.

33. Amend section 42 of the RLLC Act to make it clear that there must not be alterations or additions to or replacements of homes that would be in breach of the *Local Government Act 1993,* the *Environmental Planning and Assessment Act 1979* or any approval, consent or certificate under either or both of those Acts.

34. Amend the RLLC Act to provide mechanisms for 'urban renewal' in residential land lease communities, including an amendment to allow an operator a first right of refusal in a sale, with appropriate provisions in place for determination of a fair sale price.

35. Amend section 43 of the RLLC to:

    a. remove the word "significantly" wherever it appears,

    b. amend the timeframes to:

i. allow an operator to issue a written notice requiring the home owner to carry out work within 30 days to rectify the defect concerned, and

ii. allow a home owner to apply to the NCAT for an order that the period of 30 days be extended by a further period on the ground that 30 days provides insufficient time to rectify the defect,

c. reinstate an operator's ability to issue a termination notice on the ground that the dilapidated condition of a home installed on the residential site is a breach of the site agreement.

36. Amend the RLLC Act to define the following terms as:

a. a "guest" is a day visitor,

b. a "visitor" is a guest who stays overnight, and

c. an "occupant" is a person who has a right to occupy the residential site under section 44 of the RLLC Act.

37. The provisions regarding special levies to remain available to home owners and operators.

38. The provisions of the RLLC Act regarding operator rules of conduct and education requirements to remain unchanged.

39. That NSW Fair Trading work more closely with stakeholders in developing further voluntary educational resources and programs.

40. The Government set aside the suggestion of a licensing system for operators and instead focus on improvements that could be made to the current regime.

41. Reflecting the outcomes of NCAT cases, amend the RLLC Act to make it abundantly clear that age restriction community rules are permitted in residential land lease communities.

42. The provisions regarding the development of community rules to remain unchanged.

43. Amend the RLLC Act so that the community-wide approach that applies to disputes about site fee increases by notice also applies to disputes about community rules. That is, at least 25% of home owners must support an application to challenge a community rule before the matter can proceed to mediation and, should mediation fail, the NCAT.

44. Amend the RLLC Act to reinstate the policy that community rules form part of the site agreement and an operator may issue a termination notice for serious or persistent breach.

45. Amend the RLLC Act to require residents committees to:

a. take part in mandatory education about the basics of their functions, how to run establishment meetings, developing procedures and serving as an effective communication channel between residents and the operator, and

b. comply with a code of conduct to ensure their dealings with operators remain civil and respectful and they continue to act in the interests of all home owners.

46. Amend NSW Fair Trading's model residents committee rules to encourage more participation from new members.

47. Amend the RLLC Act to allow home owners who are concerned about their privacy to instruct the operator in the site agreement not to provide their details to the residents committee.

48. Amend the RLLC Act to provide that residents committees may not request information from the operator under section 97(3) more than 4 times in a calendar year.

49. Amend the RLLC Act to make it clear that operators will not be considered to be in breach of their obligations to residents committees if they are unsure which residents committee they should be dealing with.

50. Amend the RLLC Act and RLLC Regulation to allow an operator of a community to receive from a home owner a fee, charge or deposit for additional services provided to the home owner as agreed in a site agreement.

51. Amend the RLLC Regulation to provide that the service availability charges payable by a home owner to an operator of a community for water and sewerage is not to exceed $50 for each of those service availability charges.

52. Subject to our submissions in response to discussion question 50, the provisions of the RLLC Act relating to accounts, access to bills and other documents for electricity should be amended to align with the AER's Retail Guideline.

53. Amend section 77(3) of the RLLC Act, as a matter of urgency, to address the problems regarding electricity charges in embedded electricity networks within residential land lease communities. Refer to our response to discussion question 50.

54. Amend the RLLC Act in accordance with Option 3 to remove provisions that govern what can be charged for electricity from the RLLC Act and allow national rules to apply.

55. The Government to undertake further consultations with stakeholders on required policy and legislative changes to make the RLLC Act less obstructive and more facilitative in relation to the up-take of sustainability infrastructure in residential land lease communities.

56. Amend section 107 of the RLLC Act to make it clear that an operator disclosing an issue of non-compliance to a prospective home owner and, if the sale proceeds, requiring the incoming home owner to remedy the non-compliance, is not an interference with a home owner's right to sell a home.

57. Amend the RLLC Act to allow an operator to:

a. notify a home owner in writing of issues of non-compliance within 14 days of the operator being notified of the home owner's intention to offer the home for

sale, regardless of whether or not they have been the subject of previous action,

b. complete and issue to the incoming home owner a form outlining the outstanding compliance issues and/or payments that need to be settled before a new site agreement is entered into.

58. Amend section 115(1)(c) of the RLLC Act to allow a home owner or prospective home owner to apply to the NCAT for the resolution of any dispute *"about the reasonableness of an amount of a sale commission, incidental expense or other fee or charge payable or paid to the operator or agent in relation to the sale of the home"* and remove the words *"(including a claim that a sale commission is excessive when compared to sale commissions charged by local real estate agents)."*

59. Amend the RLLC Act, and any other Act, to:

    a. require real estate agents selling homes in residential land lease communities to undertake mandatory education as relevant to their functions and comply with section 108(1) of the RLLC Act, and

    b. provide operators with a formal means of reporting non-compliance of real estate agents to NSW Fair Trading for investigation.

60. The current provisions regarding assignment of tenancy agreements, operator consent to assignment of site agreements, and entering new site agreements to remain unchanged.

61. The provisions regarding sub-leasing by home owners to remain unchanged.

62. Amend section 129 of the RLLC Act to give operators better protection from, and a means of dealing with, serious misconduct of visitors and guests of home owners and occupants.

63. The notice periods that operators are required to give for the different termination reasons to remain unchanged.

64. Amend the compensation provisions of the RLLC Act so that:

    a. the compensation payable in respect of relocating a home, installing a home at a new residential site (including the cost of connecting available services and landscaping and hardscaping) and/or repairing any damage to a home does not exceed the value of the home, and

    b. there is a 500 kilometres cap placed on the compensation payable for distance of travel.

65. The Government increase the resources of NSW Fair Trading to:

    a. raise awareness of the mediation services provided by NSW Fair Trading,

    b. improve and provide additional mediation services – in person and via digital means – with mediators having expertise in residential land lease community disputes.

66. Amend the RLLC Act to make it mandatory for parties to try and resolve certain disputes through mediation before an application to the NCAT can proceed (e.g. disputes about community rules and disputes between home owners, as well as objections to site fee increases by notice). This would require a notice from a mediator stating mediation has failed before a party can apply to the NCAT for orders (as currently in section 71(4) of the RLLC Act with respect to excessive site fee increases).

67. The Government review penalty amounts under the RLLC Act for appropriateness, particularly those that apply to a failure to perform an administrative task.

68. That NSW Fair Trading work closely with stakeholders on delivering community information sessions digitally and in-person around the State.

69. The RLLC Act be amended to include appropriate provisions on the rights and obligations of relevant parties following the death of a home owner and to provide clear timelines and processes for addressing the issues that can arise.

OBJECTS OF THE ACT

Discussion Questions

1. Are the objects of the Act still relevant to residential land lease communities?
2. Has the Act been effective in delivering its objects?
3. Should the objects of the Act be expanded or updated to reflect the changing nature of land lease communities? Please identify how they should be expanded or updated and why.

Yes, the objects of the RLLC Act are still relevant to residential land lease communities and the RLLC Act has been effective in delivering its objects (save for a few exceptions).

The industry has progressed in many ways in the years since the RLLC Act commenced in 2015. To reflect these changes we submit that the objects should be expanded, highlighted red as follows -

"3 Objects of Act

The objects of this Act are as follows—

(a) to improve the governance of residential communities,
(b) to set out particular rights and obligations of operators of residential communities and home owners in residential communities,
(c) to enable prospective home owners to make informed choices,
(d) to establish procedures for resolving disputes between home owners and between operators and home owners,
(e) to protect home owners and operators from bullying, intimidation and unfair ~~business~~ practices,
(f) to encourage the continued growth and viability of residential communities in the State."

The Discussion Paper enquires if there should be neighbour to neighbour obligations that are able to be enforced by other home owners (discussion question 27). We strongly agree that this would be a positive change for facilitating harmonious living in land lease communities. If such progress is made, then the above amendment to section 3(d) of the RLLC Act should follow.

In our responses to discussion questions regarding operator conduct and education and enforcement of the RLLC Act we raise the issue that operators should be better protected from bullying, intimidation and unfair practices from home owners, occupants and their visitors and guests, who behave badly.

Sometimes confusion and miscommunications can arise, and disputes can boilover when fuelled by emotion. Unfortunately, the existing responsibility of home owners to *"respect the rights of the operator, and agents and employees of the operator, to work in an environment free from harassment or intimidation*" under section 36(i) of the RLLC Act has been ineffective in preventing unacceptable behaviour on the part of some home owners and others.

In line with our recommendations set out later in this submission the amendment to section 3(e) of the RLLC Act, as set out above, should also be made.

Recommendation

1. Expand the objects of the RLLC Act to establish procedures for resolving disputes between home owners and between operators and home owners, and to protect home owners and operators from bullying, intimidation and unfair practices.

INFORMED CHOICES FOR PROSPECTIVE HOME OWNERS

Discussion Questions

4. Is the ban on inducing a person to enter into an agreement through false, misleading or deceptive statements or promises working effectively?
5. Does the disclosure statement provide enough information to a prospective home owner to allow them to make an informed decision about buying into the community? Why/why not?
6. Is the form of the disclosure statement easy for prospective home owners to understand?

Our Association has not received any reports, nor are we aware of any evidence, that the ban on inducing a person to enter into an agreement through false, misleading or deceptive statements or promises is not working effectively. The process for operators to provide prospective home owners with a disclosure statement before entering into a site agreement is effective in ensuring an informed home buying decision.

In providing information about the community, the operator and ownership, site fees, any voluntary sharing arrangements, utilities, services and facilities, special levies, safety and security, dispute resolution, the residents committee and flagging the availability of other documents such as the community map, community rules, sample site agreement, etc, the disclosure statement is a comprehensive document. It provides more than enough information for a prospective home owner to compare different land lease communities and make the best decision for themselves.

While we believe the form of the disclosure statement is easy for prospective home owners to understand, it may be the case that containing so much information could make it overwhelming for some readers. There may also be a need for the disclosure statement to be translated into other languages and made available on the NSW Fair Trading website to assist multicultural communities.

Recommendation

2. Reduce the amount of information in the disclosure statement so it is not overwhelming for readers and consider translation into other languages to assist multicultural communities.

Discussion Questions

7. Is the disclosure statement provided at the right time? I.e., should it be given earlier or later?
8. Does the disclosure statement form need to be improved? If yes, how would you improve it?
9. If an operator of a community fails to provide a disclosure statement to a prospective home owner before entering into a site agreement with them, a penalty will apply. Do you think the maximum penalty of 100 units ($11,000) is appropriate?

Under section 21 of the RLLC Act an operator of a community must give a prospective home owner a disclosure statement:

- within 14 days after a request for the disclosure statement is made and a residential site in the community is available for occupation by the prospective home owner, and

- at least 14 days before entering into a site agreement with the prospective home owner.

The industry has no issue with the timeframe for providing a disclosure statement. However, we have received feedback that some prospective home owners are wanting the option of not having to wait until 14 days have passed before entering into a site agreement.

For new home owners wanting to move into a community quickly, this prohibition under the RLLC Act is a hindrance. It is also a hindrance for existing home owners wanting to proceed with their move. For example, they are not able to pay a deposit with any certainty, which means they may miss an opportunity to purchase elsewhere.

If all parties in a sale are ready and willing to move forward they should have the option of doing so.

We recommend that the Government consider an amendment to the RLLC Act to reduce the 14-day waiting period set out in section 21(1) to 3 days, and allow prospective home owners the option of waiving that 3-day waiting period. A 'certificate of waiver' or similar document could be signed by a new home owner and the operator and form part of the site agreement.

Further, to improve the disclosure statement form we recommend a change to the first question in Part 8. SAFETY & SECURITY *"Is the community situated on 'flood prone' land?"* This question requires an operator to make an assessment that they are not qualified to make.

The wording of this question needs to be amended to be consistent with the wording used in the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* (LG Reg), which refers to "flood liable land." The question should be worded *"Is the community situated on flood liable land as notified by the local council to the operator?"*

In line with this and Recommendation 2 above, the disclosure statement should be reviewed in its entirety, in further consultation with stakeholders, to remove any unnecessary information and to revise other key questions to ensure consistent terminology is used and operators have an ability to answer those key questions accurately.

In response to discussion question 9, we do not believe that the maximum penalty of 100 units ($11,000) if an operator of a community fails to provide a disclosure statement to a prospective home owner before entering into a site agreement is warranted.

We agree that a prospective home owner should have a disclosure statement prior to entering into a site agreement. However, the information that is critical to the tenancy relationship between an operator and home owner is also set out in a site agreement (an equally important document) and other information in a disclosure statement is generally available by alternative means.

Currently, the kinds of offences that attract a penalty of $11,000 in NSW include those that put the wider public in danger, such as a serious breach of COVID-19 restrictions issued under the *Public Health Act 2010* or tossing a cigarette butt out of car window on total fire ban day. We do not believe a failure to provide a disclosure statement is of the same magnitude, and to our knowledge there have not been any such prosecutions for failure to provide a disclosure statement since the commencement of the RLLC Act.

The maximum penalty amount for failing to provide a disclosure statement should be reviewed so that the punishment is commensurate with the offence.

Recommendations

3. Amend the RLLC Act to reduce the 14-day waiting period set out in section 21(1) to 3 days, and allow prospective home owners the option of waiving that 3-day waiting period. A 'certificate of waiver' or similar document could be signed by a new home owner and the operator and form part of the site agreement.

4. Amend the first question in Part 8. SAFETY & SECURITY of the disclosure statement to *"Is the community situated on flood liable land as notified by the local council to the operator?"*

5. Review the disclosure statement in its entirety, in further consultation with stakeholders, to remove any unnecessary information and to revise other key questions to ensure consistent terminology is used and operators have an ability to answer those key questions accurately.

6. The maximum penalty amount for failing to provide a disclosure statement should be reviewed so that the punishment is commensurate with the offence.

SITE AGREEMENTS

Discussion Questions

10. Are you aware of home owners not being provided with the correct written site agreement?
11. Does having a prescribed standard form site agreement work well?
12. Should the list of prohibited terms in site agreements be modified? If so, what type of terms should be included or removed?
13. Should the requirements about additional terms be changed or improved?

We are aware of some isolated reports of home owners not being provided with the correct written site agreement, an agreement containing incorrect terms or no written agreement. However, it is our understanding that this is infrequent and, in most cases, happens through mistake or misunderstanding. Assistance and education should be the first response when this occurs.

Otherwise, the conduct of an operator who is deliberately not complying with their obligations regarding site agreements is a matter of appropriate compliance and enforcement activity, such as an application by a home owner to the NCAT for orders or investigation by NSW Fair Trading. There is no failing of the legislation in this regard.

The RLLC Act contains a number of protections for home owners including:

- an ability to apply to the NCAT for an order that directs the operator to provide a correct, written site agreement in the standard form (section 26(4)),

- where a site agreement is not in the relevant standard form, an ability to apply to the NCAT for an order that directs the operator to prepare and enter into a site agreement that is in the relevant standard form (section 27(5)),

- rules regarding additional terms and prohibited terms, and an ability to apply to the NCAT for orders to deal with additional or prohibited terms (sections 28 and 29),

- explicit provision that the RLLC Act applies to all site agreements (section 6), and a site agreement that is entered into on or after the day a relevant standard form is prescribed is taken to include the terms of the standard form to the extent they are not included in the site agreement (section 27(3)(b)).

If mistakes and misunderstandings are continuing, we submit that the issue is not due to lack of regulation. Instead, there may be a need for NSW Fair Trading to provide additional information resources, education and training for operators regarding site agreements.

Having a prescribed standard form site agreement does work well for the parties and our Association has made the process of producing compliant disclosure statements and site agreements, incorporating the terms of the standard form and appropriate additional terms, easy for members via our online system.

Our system data indicates a very high (98%) completion rate of disclosure statements produced by our members. The non-completion rate of 2% arises only from the difficulty in answering questions that are not technically accurate and require an operator to make an assessment they are not qualified to make (e.g. see our response to discussion question 8 regarding the first question in Part 8. SAFETY & SECURITY of the disclosure statement - *"Is the community situated on 'flood prone' land?"*).

In accordance with section 29(1) of the RLLC Act, clause 8 of the RLLC Regulation prescribes the types of terms that are prohibited in a site agreement. We submit that the list of prohibited terms is appropriate save for clauses (1)(b) and (2) regarding terms requiring a home owner to take out insurance.

Operators have reported to us that home owners have concerns their neighbours do not hold insurance should the uninsured neighbour do, or fail to do, something that results in injury or property damage to people and property around them.

While this is a matter of public liability insurance, it is also important to note that homes that are adequately insured against theft, fire and other disasters is beneficial for all persons living in land lease communities, particularly given the majority of communities are located in regional and rural NSW, and some are located in bushfire prone areas.

In the interest of protecting persons and property in residential land lease communities, a term requiring a home owner to take out a form of insurance should not be a prohibited term. Reasonable insurance cover is something that should be allowed to be set out in a site agreement as an additional (and therefore negotiable) term that can be agreed between the parties. At all times home owners would have their choice of insurer.

This is an important issue providing protection for a home owner whose home is destroyed. Without insurance there could be long periods where homes are left unable to be occupied with no real opportunity for them to be rebuilt. This will impact significantly on other home owners because the values of their homes in the community will be diminished.

The ability for parties to insert additional terms in a standard form site agreement, so long as they do not contravene the RLLC Act or any other Act, are not inconsistent with the terms prescribed in the standard form, and are set out in a separate and clearly labelled part of the site agreement (section 28(1)), is vital for well-functioning relationships between home owners and operators.

Every residential land lease community is different, and it would be impossible for the standard form site agreement to take account of every issue that would be better managed if included in the additional terms of a site agreement. As such, the rules and protections regarding additional terms, as set out in section 28 of the RLLC Act, are effective and appropriate.

Additional Issue

There is an additional issue regarding site agreements that requires review.

Section 30(1) of the RLLC Act provides that an operator of a community must not *"request, demand or receive any fee or charge from a prospective home owner before entering into a site agreement with the prospective home owner."* This section is akin to section 23(2) of the RT Act, which was enacted to protect tenants with limited financial resources when entering into a tenancy agreement.

However, in the original *Residential Tenancies Act 1987*, clause 12(1) provided for the costs of preparing a written residential tenancy agreement to be payable in equal shares by the landlord and the tenant.

A home owner renting a site from a community operator under a site agreement is distinguishable from a tenant renting premises from a landlord under a residential tenancy agreement. Home owners have chosen their preferred community, they have committed financial resources to purchase their home and the tenancy arrangement is different in many respects.

In addition, the time and resources involved in operators preparing disclosure statements, site agreements, site condition reports and ancillary paperwork, conducting reference checks, and undertaking negotiations, etc, is over and above what is required for tenancies under the RT Act. Costs can reach up to $100 - $150 for an operator and the time involved can take up to 4 hours.

It is fair and reasonable that the RLLC Act be amended to allow an operator to receive a site agreement preparation fee from a prospective home owner. However, disclosure statements should remain free of charge.

Recommendations

7. NSW Fair Trading to provide additional information resources, education and training for operators regarding site agreements.

8. In the interest of protecting persons and property in residential land lease communities, a term requiring a home owner to take out reasonable insurance cover should be permitted as an additional term in a site agreement, as agreed between the parties. At all times home owners would have their choice of insurer.

9. Maintain the rules and protections regarding additional terms.

10. Amend the RLLC Act to allow an operator to receive a site agreement preparation fee from a prospective home owner.

PUBLIC REGISTER OF COMMUNITIES

Discussion Questions

14. Have you accessed the communities register? If so, was the register easy to navigate? Did the information on the register inform a decision you made regarding a community?
15. What information should be included on the public register and how should the information be presented?

The Association is not in a position to comment on whether the public register of communities is informing decisions made by home owners regarding particularly communities, however operators' views are that the public register is easy to navigate.

We submit that the information that should be included on the public register is that which is necessary to provide consumers with information about a community. However, it is important that the register does not become a quasi-disclosure statement. The existing particulars as set out in the RLLC Act are sufficient.

Recommendation

11. Maintain the existing particulars of the public register.

SITE FEES

Discussion Question

16. Should the Act continue to allow for both the fixed method and the notice method of site fee increases? Why or why not? If not, what method should be allowed?

It is essential for the benefit of operators and home owners, and for the continued growth and viability of residential land lease communities, that the RLLC Act continues to allow for both the fixed method and the by notice method of site fee increases.

Both methods have their advantages and are suitable depending on the circumstances. Accordingly, flexibility under the RLLC Act is needed for parties to agree to terms that reflect the nature of their individual circumstances. Limiting the options to create a value proposition simply denies opportunities for all parties. Home owners and operators must be able to continue to structure their relationships as they see fit.

Some of the primary deficiencies of the previous *Residential Parks Act 1998* (RP Act) were:

- the preoccupation with controlling site fees as the sole significant variable in site agreements,
- the framework that ensured virtually all site fee increases were reviewed by the NCAT (formerly Consumer, Trader and Tenancy Tribunal (CTTT)),
- the prohibition against the parties reaching agreements tailored to their needs, and
- no certainty that any properly reached agreement could be relied upon.

This greatly increased the levels of disharmony, anxiety, delay and uncertainty for home owners and operators in land lease communities.

Thankfully, the RLLC Act has changed this for the better by allowing for both the fixed method and the by notice method of site fee increases. Greater focus has been placed on facilitating upfront and informed consent, via the disclosure statement and the site agreement, of how site fees will be increased during the course of the relationship between a home owner and an operator.

The fixed method of site fee increases allows operators and home owners to understand and agree at the start of a site agreement how and when the site fee will be increased. Even if the timing of increases is specified in the site agreement, under the RLLC Act the operator must still give the home owner at least 14 days written notice of an increase in the approved form and include the following information:

- amount of the increased site fees (section 66(5)(a),
- how the increased site fees have been calculated (section 66(5)(b), and
- the day on and from which the increased site fees are payable (section 66(5)(c).

Many home owners prefer and want a fixed method of site fee increases. Home owners have the comfort of knowing, at the time of entering into the site agreement, how and when site fees will be increased and this cannot be changed by the operator without agreement from the home owner.

The ability to agree on future site fee increases by a fixed method has also been a mainstay of negotiated settlements at the NCAT and the CTTT for decades. Home owners often want to agree to a fixed method of site fee increases for a certain number of years, which provides an effective method for parties to chart a way forward in NCAT disputes. It would be nonsensical to remove it as an option for parties who are not in dispute.

The fixed method of site fee increases is working well and should remain as an option.

The by notice method of site fee increases should also remain as an option because it gives operators the flexibility to increase site fees (subject to acceptance by home owners or confirmation from the NCAT) as required from time to time.

This can be beneficial for home owners and operators in many ways. For example, the by notice method allows for site fee increases to be negotiated each year.

Although site fees increased by notice can be an 'unknown' for home owners and operators, this is managed by the provisions in the RLLC Act regarding challenges to site fee increases and the powers of the NCAT to make orders resolving disputes. For these reasons, the by notice method of site fee increases should also remain as an option.

It is important to remember that the provisions in the RLLC Act regarding site fees are intended to provide a flexible environment in which parties can, by agreement, make adjustments to meet their needs and circumstances and permit operators to be flexible and innovative in their endeavours to expand the market. As a result, the level of interest from home owners, as well as operators, in the residential land lease living industry has grown and investments are being made.

By having both methods available, operators are empowered to dynamically meet the market and engage in tailored relationships with new home owners. Meanwhile, the disclosure and information provisions of the RLLC Act mean home owners can have confidence in the arrangements they make with an operator.

The Government should continue to develop policy that facilitates opportunities in residential land lease communities. Flexibility should be a cornerstone of the governance framework – allowing parties to make informed choices and agreements, thus allowing communities to be responsive, agile and attractive places to live.

Additional Issue

Section 65 of the Act provides that site fees payable under a site agreement can only be increased by ***either*** a fixed method or by notice.

We recommend the Government consider an amendment to the RLLC Act that would allow site fees payable under a site agreement to be increased using a **combination** of these methods by agreement between the parties, as there could be benefits.

For example, if both methods were used in combination, a site agreement could specify that site fees are to increase by, say, 3% in years 1-4. Then in year 5 site fees are increased by notice and subject to the provisions in the RLLC Act regarding challenges to site fee increases. Then from years 6-9 site fee increases could revert back to 3%, or another amount or calculation to which the parties have agreed, and so on.

Currently the standard form site agreement only allows for a fixed method to apply for a certain number of years (as nominated in the site agreement) after which the by notice method will apply, unless another fixed method or a new site agreement is agreed between the parties. With additional flexibility, parties could agree on a way of increasing site fees that uses both these methods in combination, alternating between one and the other, if that is preferred.

Inadequate site fees can be a major issue for communities that are locked into very restrictive fixed methods (like adjustments only in accordance with CPI or very low percentages) because they are not a true reflection of the costs of doing business.

The law must continue to recognise that residential land lease communities need to operate as successful businesses if they are to provide a positive place for residents to live. This is consistent with the legal concept of "*fair and equitable in the operation of the community"* in section 74(1)(k) of the RLLC Act.

Placing unnecessary restrictions on methods of site fee increases is also inconsistent with the object of the RLLC Act *"to encourage the continued growth and viability of residential communities in the State*" (section 3(f)).

Recommendations

12. That the RLLC Act continues to allow for both the fixed method and the by notice method of site fee increases, for the benefit of operators and home owners and the continued growth and viability of residential land lease communities.

13. Amend the RLLC Act to allow site fees payable under a site agreement to be increased using a combination of the fixed method and the by notice method of site fee increases by agreement between the parties.

Discussion Question

17. Should there be any restrictions on the method that can be used for fixed method fee increases, or is the existing flexibility working well and/or necessary for operators?

It would be extremely damaging for residential land lease communities in NSW if any restrictions were placed on the method that can be used for fixed method site fee increases. We strongly oppose any such change to the RLLC Act.

Currently, the RLLC Act provides that site fees payable under a site agreement can be increased either at specified intervals or on specified dates by a "fixed method" (section 65(2)(a)), or "by notice" (section 65(2)(b)). A "fixed method" may be either increasing site fees by "fixed amounts" (section 65(2)(a)(i)) or by a "fixed calculation" (section 65(2)(a)(ii)).

Aside from the requirement that an amount or calculation be "fixed", there are no definitions in the RLLC Act of the terms "fixed method," "fixed amount" or "fixed calculation" and the RLLC Act places no limit on what an amount can be, nor how a calculation may be made or what it should comprise. This is entirely appropriate, and based on the ordinary meaning of these terms, a "fixed method" under the RLLC Act is simply a predetermined way of increasing site fees.

Page 12 of the Discussion Paper states, *"some stakeholders have claimed that some site agreements that choose the 'other' method of site fee increase provide for complex, multi-component methods of calculating site fee increases, that are difficult for residents to understand and do not provide enough certainty to enable residents to plan their financial commitments."* We question the validity of this claim.

Certainty does not come from whether a fixed method comprises a single component or if it is a multi-component method. Fixed method site fee increases, whatever form of calculation they take, provide certainty at the time a site fee increase becomes payable. In *Greater London Council V Connolly* [1970] 2 Q.B. 100 at 109 (C.A) Lord Denning MR held *"the rule that the rent must be certain does not mean that it must be certain at the date of the lease:*

rent is sufficiently certain if it can be calculated with certainty at the time when payment comes to be made."

As outlined in our earlier submissions, the provisions in the RLLC Act regarding site fees intended to provide a flexible environment in which parties can, by agreement, make adjustments to meet their needs and circumstances, and permit operators to be flexible and innovative in their endeavours to expand the market.

There is currently an increased level of investment in residential land lease communities because the RLLC Act allows for this flexibility. Having the ability to design and offer home owners the most appropriate fixed method of increasing site fees for a particular community, and knowing it cannot be changed without mutual consent, operators are better able to forecast revenue and growth. This in turn improves operators' ability to secure finance with lenders, which then allows for reinvestment and further land lease living development in NSW.

If the Government wants to encourage new land lease communities and new facilities in older developments, operators must be allowed to make a commercial return. They will be unable to do this efficiently if restrictions are placed on the method that can be used for fixed method fee increases.

We do not believe that the claims expressed by some stakeholders, as set out on page 12 of the Discussion Paper, are enough to warrant a dismantling of the legislative framework regarding site fee increases. There must be evidence of a widespread market failure and we do not agree there is one. Quite the opposite - the industry is progressing, with fair market value being applied and the existing flexibility of fixed method site fee increases is working well for the vast majority of home owners and operators.

While site fee increases are always subject to tolerances of the market, no matter what method is used, appropriate protections are provided to home owners via operators' obligations to provide a disclosure statement, a written site agreement and a home owner's ability to seek legal advice about a particular fixed method of site fee increases (or any other issue associated with a community) ***before*** entering into site agreement.

In addition, a cooling off period applies under section 23 of the RLLC Act, allowing a home owner to rescind the site agreement by serving a notice in writing to that effect on the operator.

To ensure home owners have certainty at the time a site fee increase by fixed method becomes payable, section 66(2) of the RLLC Act also requires that a site agreement must not provide that site fees may be increased by *"more than one fixed method."* If a site agreement does specify more than one fixed method of increasing site fees, then the method that results in the lower or lowest increase of site fees is the applicable method.

The purpose of this provision is to prevent an operator including alternative fixed methods of calculating site fee increases in a site agreement and seeking to rely upon that which provides the greatest increase.

Any legislative changes that seek to constrain the types of fixed method calculations that can be used for site fee increases will be inappropriate regulation and not supportive of a vibrant industry.

Prescribing fixed method calculations would essentially reduce an operator's incentive to reinvest and carry out important operations, maintenance and upgrade programs. This is an important consideration for the continuing renewal of land lease communities. The flow on

effect will be a decline in community living standards and a reduction in the availability of housing.

The ability to select the option *"other (specify)"* in the standard form site agreement gives operators and home owners the opportunity to design, negotiate, and most importantly, agree on a fixed calculation that is most suitable for them, rather than being restricted by particular fixed method examples.

This helps ensure the ongoing growth and viability of the community, while the home owner has the comfort that the calculation has been fixed at the time of entering into the site agreement and cannot be unilaterally amended by the operator. If a home owner does not understand the fixed method of increasing site fees, they have ample opportunity to seek clarification, obtain legal advice and negotiate with the operator ***before*** entering into the site agreement.

We reiterate, the law must recognise that residential land lease communities need to operate as successful businesses if they are to provide a positive place for people to live. If their continued growth and viability is to be encouraged, then the existing flexibility of the RLLC Act needs to continue to allow for fixed method site fee increases to be determined as agreed between the parties, rather than prescribed by legislation.

Recommendation

14. Maintain the existing flexibility of the RLLC Act regarding the fixed method of site fee increases, for the benefit of operators and home owners and the continued growth and viability of residential land lease communities.

Discussion Question

18. Should there be a requirement that site fees can only be increased once per year, whatever method is used? Why or why not?

We do not support a requirement that site fees can only be increased once per year, whatever method is used.

In relation to the fixed method of site fee increases, as set out above, the RLLC Act allows operators and home owners to agree at the start of a site agreement how and when the site fee will be increased. Even if the timing of increases is specified in the site agreement the operator must still give the home owner at least 14 days written notice of an increase in the approved form and include the following information:

- amount of the increased site fees (section 66(5)(a),
- how the increased site fees have been calculated (section 66(5)(b), and
- the day on and from which the increased site fees are payable (section 66(5)(c).

Some stakeholders espouse that limiting the frequency of rent increases to not more than once per year gives home owners 'peace of mind' and helps with budgeting. However, home owners with site agreements that specify fixed methods of increasing site fees already know, from the outset of the site agreement, how increases will be calculated and when they will occur – therein lies their certainty for budgeting purposes.

If operators and home owners wish to negotiate and agree to site fee increases by fixed method occurring more frequently than once per year, they should be able to continue to do so. We see no policy reason as to why this flexibility in the RLLC Act should be changed, particularly as the Discussion Paper gives no indication or evidence of a market failure.

If an operator wishes to increase site fees by notice they must comply with specific controls designed to protect home owners. They must give all home owners notice at the same time (section 67(3)). The notice must specify the amount of the increased site fees, the day on and from which the increased site fees are payable, include an explanation for the increase and be in the approved form (section 67(4)) and there is a 60 days notice period (section 67(5)). Site fee increases by notice are also subject to compulsory mediation and may be challenged in the NCAT, which has wide powers to determine whether or not a site fee increase is excessive.

As all of these controls would apply regardless of whether site fee increases by notice occur once per year, or more frequently, we question whether the limitation of one increase per year is really necessary.

It is worth noting that the Poverty Inquiry considered any rent increase to a maximum of once every six months appropriate.[5] The Poverty Inquiry was the genesis of the residential tenancy law reforms in Australia. This is supportive of our argument that yearly increases should not be the only option for site fee increases.

Recommendation

15. Amend the RLLC Act to remove the requirement that site fees can only be increased once per year, whatever method is used.

Discussion Question

19. Should there be any grounds on which a site fee increase that is based on a fixed method is able to be challenged in the Tribunal?

We strongly advocate that there should be no grounds under the RLLC Act on which a site fee increase that is based on a fixed method is able to be challenged in the NCAT. Allowing this to occur would completely undermine the core benefits of fixed method site fee increases.

Contract law is premised on parties fulfilling promises made to each other pursuant to a legal agreement entered into by consent. If an operator and a home owner wish to negotiate and agree, from the outset of a site agreement, on a fixed method for increasing site fees they should be able to do so, and they should both be able to take comfort in knowing that agreement cannot be challenged or changed without further agreement.

Disclosure statements draw attention to key aspects of a site agreement for home owners, including the method of increasing site fees, and if a prospective home owner does not understand a fixed method set out in a site agreement they have ample opportunity to seek clarification, obtain legal advice and negotiate with the operator ***before*** entering into the site agreement.

[5] Commonwealth Commission of Enquiry into Poverty – reports Bradbrook, A. J. 1975 *Poverty and the Residential Landlord Tenant Relationship,* AGPS, Canberra and Sackville, R. 1975, *Law and Poverty in Australia*, AGPS Canberra

After a site agreement is entered into the RLLC Act must give effect to the intention of the parties and reduce the number of disputes between home owners and operators over site fee increases. This is the legislative intent behind the provisions regarding fixed method site fees increases.

We reiterate that if the Government wants to encourage new land lease communities and new facilities in older developments, operators must be allowed to make a commercial return. Operators are able to do this more efficiently, and with more certainty, if they can rely on fixed method site fee increases to forecast their revenue and growth. This in turn improves their ability to secure finance with lenders, which then allows for reinvestment and further land lease living development in NSW.

Allowing challenges to fixed method site fee increases under the RLLC Act beyond existing rights under Australian Consumer Law would cause immense uncertainty, injuring business confidence and reducing the appetite for reinvestment and future planning.

Such a move to increase disputes about site fees would also lead to greater costs for the Government, with taxpayers needing to foot the bill for additional resources at the NCAT.

It would be far more beneficial for communities if additional resources were directed to increasing access to NSW Fair Trading mediation services for other types of disputes that need additional resourcing, as set out in this submission, and NCAT services to allow resolution of disputes between home owners.

It is fair and appropriate, and consistent with legislative intent, that there should not be any grounds under the RLLC Act on which a site fee increase that is based on a fixed method is able to be challenged in the NCAT.

Recommendation

16. The current policy remains that there are no grounds under the RLLC Act on which a site fee increase that is based on a fixed method is able to be challenged in the NCAT.

Discussion Question

20. Is the process for resolving disputes over site fee increases by notice working effectively?

Our Association supported the introduction of compulsory mediation under the RLLC Act and we believe that the process for resolving disputes over site fee increases by notice has improved since the RLLC Act commenced in 2015. There is, however, an opportunity for further improvement.

Currently, where one or more home owners object to a notice of a proposed increase in site fees (other than by fixed method) because they believe it is excessive, compulsory mediation is the first step. For a compulsory mediation application to be made, it must be signed by at least 25% of the home owners who received the notice within the first 30 days of the notice period, and not otherwise (section 69(2)).

The role of the mediator is to bring the parties together with the aim of reaching an agreement about the proposed increase. If an agreement cannot be reached at mediation, one or more

of the home owners can apply to the NCAT within 14 days of the mediation failing, with a letter from the mediator specifying the date the mediation was unsuccessful.

Although a proposed site fee increase can only be challenged as excessive if at least 25% of home owners who received the increase notice agree to challenge it and attend mediation, there is no real transparency around the mediation process. As a result, operators have no way of knowing whether the threshold in section 69(2) of the RLLC Act has actually been met, and that an application for mediation of the objection has been made in accordance with section 69 (section 71(1)(b)) and mediation was unsuccessful (section 71(1)(c)).

There are a number of communities where not all home owners are a party to a site agreement that provides for the increase of the site fees by notice. Without conferring with the operator on the correct number of home owners who received a notice of a proposed increase in site fees (other than by fixed method), how does NSW Fair Trading verify that *"at least 25%"* of those home owners object to the increase and are applying for mediation? How are the identities of home owners verified?

Issues are also created by home owners' ability to opt out of mediation and the subsequent application to the NCAT should mediation fail. A dispute about a site fee increase by notice may begin with at least 25% of home owners who received it wanting to challenge it, but if enough home owners opt out as the matter progresses, those that remain come the time of the NCAT hearing can be well below 25% of home owners.

We are aware of one example in a community where 100 home owners received notices and at least 25 wanted to object. After mediation by NSW Fair Trading all home owners, except one, were satisfied with the mediated result. However, that single home owner was able to take the operator to the NCAT on the basis mediation had failed. Situations like this undermine the efficacy of mediation and place an unreasonable time and costs burden on operators.

Consequently, the new approach to dispute resolution introduced in the RLLC Act, which is supposed to helping communities avoid time and effort being wasted on disputes about site fee increases by notice that are broadly accepted by the home owners, is not working as effectively as it could.

<u>Recommendation</u>

17. In relation to disputes over site fee increases by notice:

    a. amend the provisions of the RLLC Act regarding compulsory mediation, and application to the NCAT following failed mediation, to provide an appropriate process for increasing the transparency of NSW Fair Trading.

    b. amend the provisions of the RLLC Act to require that the 25% threshold is consistently maintained in order for an application to proceed in the NCAT following failed mediation.

Discussion Questions

21. Should there be changes to the grounds for challenging site fee increases by notice?
22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest?

Currently there is no restriction on which site fee increases by notice can be challenged, including small increases, so long as 25% or more home owners who receive the notice object to the increase (section 69(2)).

Otherwise, an individual home owner may apply to the NCAT for an order under section 73 of the RLLC Act if the home owner objects to an increase in site fees on the ground that the increase is substantially excessive when compared with increases for similar residential sites in the community (section 72(1)).

In the second reading speech on introduction of the *Residential (Land Lease) Communities Bill 2013* (RLLC Bill) on 18 September 2013 The Hon Anthony Roberts MP, Minister for Fair Trading, said:

> *"The difficult burden of challenging excessive site fee increases is one of the major issues with the current law for home owners. These disputes account for the bulk of the tribunal's workload in this area. Looking at ways to simplify the process was one of the three key parts of our election commitment. The new collective approach to site fee increases in the bill delivers on that commitment. If an operator wants to increase the site fees by notice they will need to give all home owners notice at the same time. This will not be able to occur more than once per year. Under the bill, the home owners can object to the increase if at least 25 per cent of them do not agree that the increase is warranted. The matter then goes to compulsory mediation. Should mediation fail, a collective application can then be made to the tribunal. The bill has simplified the factors for the tribunal to consider in such cases to relieve much of the evidentiary burden from home owners. This new collective approach should help to reduce the number of disputes over site fee increases and make them easier and quicker to resolve when they do occur."*

As such, the current grounds for challenging site fee increases are fair and wide-ranging and were designed to simplify the process for home owners through a new "collective approach."

There should not be any changes to these grounds. Apart from the issues identified in our response to discussion question 20, they are generally working well and have contributed to the majority of disputes about site fee increases reaching a settlement.

In relation to factors the NCAT may have regard to when determining disputes about excessive increases in site fees, there are certain issues with proceedings that need to be addressed.

Under section 73(1)(a) of the RLLC Act, the NCAT may make an order declaring that an increase in site fees is excessive and may have regard to any or all of the factors set out in sections 74(1) (a) – (k) when deciding whether to make an order under section 73. Those factors include -

> *"(a) the frequency and amount of past increases in site fees for the community,*

(b) any actual or projected increase in the outgoings and operating expenses for the community as provided by the operator since the previous increase (if any) in site fees for the community,

(c) any repairs or improvements to the community—
(i) carried out by the operator since the previous increase (if any), or
(ii) planned by the operator for the period covered by the increase being reviewed,

(d) the general condition of the community including its common areas,

(e) the range and average level of site fees within the community,

(f) the value of the land comprising the community, as determined by the Valuer-General,

(g) the value of any improvements to the community (including common areas) paid for or carried out by home owners,

(h) any explanation for the increase provided by the operator by notice in writing to the affected home owners,

(i) variations in the Consumer Price Index (All Groups Index) for Sydney,

(j) whether the increase is fair and equitable in the operation of the community,

(k) any other matters prescribed by the regulations."

While the purpose of section 74(1) was to simplify the factors for the NCAT to consider in such cases *"to relieve much of the evidentiary burden from home owners"*[6] that is not to say that applicants in an NCAT dispute do not need evidence and arguments to prove their case.

The issue to be determined is whether a site fee increase is **excessive**, not whether a site fee increase is justified. The burden is on home owners to satisfy the NCAT Member that a site fee increase is excessive, having regard to any or all of the factors set out in section 74(1).

Yet, most operators are carrying the evidential burden in site fee disputes and are being forced to convince the NCAT Member that they are entitled to the increase. This is a distortion of the dispute resolution process that needs to be addressed. Our Association is also raising this matter with the NSW Department of Communities and Justice.

An amendment is also needed to section 73(4) of the RLLC Act, which provides –

"73 Orders as to excessive increases in site fees

(4) The Tribunal cannot make an order that would result in an increase lower than that needed to cover any actual or projected increase (established to the satisfaction of the Tribunal) in the outgoings and operating expenses for the community since the previous increase (if any) in site fees for the community."

[6] New South Wales, Parliamentary Debates, Legislative Assembly, 18 September 2013, Mr Anthony Roberts, Minister for Fair Trading,
https://www.parliament.nsw.gov.au/bill/files/1523/2R%20Residental%20(Land%20Lease).pdf

The words *"established to the satisfaction of the Tribunal"* should be removed from the section. At best, they are unnecessary, and at worst, they indicate that the operator must satisfy some additional and unknowable test to convince the NCAT Member of the actual or projected increase in the outgoings and operating expenses for a community.

Additional Issues

There are additional issues regarding site fee reductions and payment of site fees that need to be included in the review.

Site Fee Reductions

We are aware of some stakeholder concerns about site fee increases being used to cover the cost of 'non-recurring' operating expenses for a community, and that section 73(4) of the RLLC Act should either exclude such expenses or the RLLC Act should allow for a reduction in site fees.

The view is that home owners should not have to pay for these expenses 'over and over again.' There is also a view that where an operator has made cost reductions in a community there should be proportionate reductions in site fees.

An example of a 'non-recurring' expense might be a community operator undertaking a repair program on roads, costing $100,000. Pursuant to section 73(4) of the RLLC Act the NCAT may make an order confirming the next site fee increase for the community, part of which covers the expenses of the road repair, as it is an actual increase in the operating expenses for the community since the previous increase. The road repair is paid for by that site fee increase, yet home owners continue to pay the increased amount of site fees.

Unfortunately, this view of non-recurring expenses is oversimplifying the business' expenses and fails to take account of the overall task of operating a residential land lease community. It also fails to take account of the increased amenity and value afforded to home owners that stem from non-recurring expenses, ongoing ancillary costs, opportunities for reinvestment and due compensation to an operator for undertaking the business.

In addition, if an operator successfully reduces costs to gain a competitive advantage and increase earnings, they should (like any other business owner) be entitled to enjoy the fruits of their own labour. To suggest that operators should forfeit these efforts in site reductions for home owners is absurd.

Obviously, some stakeholders feel that residential land lease community operators should not be able to turn any profit. We do not understand this position, as it is in the interest of everyone in a community for that community to be successful. It is impossible to have a community that is well run, has good facilities, ongoing investment and increasing home values without a decent return on investment for the operator.

Any attempt to curtail an operator's ability to recover operating expenses of a community via site fees would result in a reluctance to incur those expenses until it becomes absolutely necessary. This will mean limited and delayed repairs, maintenance and upgrade programs in land lease communities. It will also mean greater costs for the Government in administering the law and providing additional resources to the NCAT to make the determinations.

We urge the Government to set aside any suggestion that section 73(4) of the RLLC Act be amended to exclude non-recurring expenses or that the RLLC Act should allow for a reduction in site fees commensurate with community cost reductions.

We are also aware that some home owners in some communities are intending to apply to the NCAT to seek a reduction in site fees because of the closure and/or reduction of capacity of certain facilities (e.g. community halls, swimming pools, etc) due to the NSW Government's public health directives to stop the spread of COVID-19.

Section 64(1) of the RLLC Act allows the NCAT, on application by a home owner, to make an order that the site fees payable under a site agreement be reduced by an amount the NCAT considers appropriate if it is satisfied -

"(a) the amenity or standard of the community's common areas has decreased substantially since the agreement was entered into, or

(b) a communal facility or service provided at the community when the agreement was entered into has been withdrawn or substantially reduced, or

(c) a communal facility or service as follows has not been provided at the community—
(i) a communal facility or service described in advertising, done by or for the operator, of which the home owner was aware before the site agreement was entered into,

(ii) a communal facility or service described in a document made available to the home owner by the operator before the site agreement was entered into."

While the NCAT may consider *"any other document that the Tribunal considers is relevant"* (section 64(2)(d)), and this could be a copy of a relevant NSW Public Health Order, the COVID-19 pandemic has thrown into sharp relief that the RLLC Act does not make it clear, as it should, that a withdrawal of a communal facility or service due to a government directive and no fault of the operator is exempt from an application under section 64.

Residential land lease community operators should not be penalised for following the directions of the NSW Government during the COVID-19 pandemic, or in any other situation, requiring the withdrawal or substantial reduction (albeit temporary) of a communal facility or service. We recommend that section 64 of the RLLC Act be amended to clearly exempt such circumstances from applications to the NCAT regarding site fee reductions.

Payment of site fees

Section 61 of the RLLC Act sets out how and where site fees are to be paid, and operators must permit a home owner to pay site fees by at least one means for which the home owner does not incur a cost (other than bank fees or other account fees usually payable for the home owner's transactions) and that is reasonably available to the home owner (section 61(2)).

As the COVID-19 pandemic continues, we are advised that some home owners continue to insist on paying cash, which is in conflict with the advice from NSW Health for businesses to limit the use of cash transactions by encouraging contactless payment options.

However, even before the pandemic the use of cash as a means of payment was in decline and projections are that it will continue to decline. We recommend the Government review and amend section 61 to allow communities to phase out cash payments if they wish and place an obligation on home owners to comply.

Recommendations

18. The existing grounds for challenging site fee increases by notice to remain unchanged.

19. Address the distortion of the dispute resolution process whereby operators are being required to carry the evidential burden in site fee disputes and convince the NCAT Member that they are entitled to the increase.

20. Amend section 73(4) of the RLLC Act to remove the words *"established to the satisfaction of the Tribunal"* as they are unnecessary and indicate that the operator must satisfy some additional and unknowable test to convince the NCAT Member of the actual or projected increase in the outgoings and operating expenses for a community.

21. The Government set aside any suggestion that section 73(4) of the RLLC Act be amended to exclude non-recurring expenses or that the RLLC Act should allow for a reduction in site fees commensurate with community cost reductions.

22. Amend the RLLC Act to make it clear that a withdrawal of a communal facility or service due to a government directive and no fault of the operator is exempt from applications regarding site fee reductions under section 64.

23. Amend the RLLC Act to allow communities to phase out cash payments if they wish and place an obligation on home owners to comply.

SITE FEES UNDER NEW AGREEMENTS

Discussion Question

23. Are the provisions governing site fees for new agreements fair and effective?

Our position is that the provisions governing site fees for new agreements are fair and effective. Under section 109(5) of the RLLC Act site fees under a new site agreement must not exceed fair market value. Section 109(6) provides that fair market value is the higher of the following—

"(a) the site fees currently payable by the home owner who is selling the home,

(b) the site fees currently payable for residential sites of a similar size and location within the community."

Section 109(5) of the RLLC Act was introduced to allow fair market value to be charged to a new home owner on the sale of a home. This was in conjunction with the change to no longer allow the assignment of site agreements (except with the consent of the operator). This was not a drafting error as suggested by other stakeholders. It was a deliberate legislative change made for a number of reasons, including:

- The previous system of assigning existing site agreements upon the sale of a home was complex and confusing.[7]

[7] *New South Wales, Parliamentary Debates, Legislative Assembly, 18 September 2013, Mr Anthony Roberts, Minister for Fair Trading,* https://www.parliament.nsw.gov.au/bill/files/1523/2R%20Residental%20(Land%20Lease).pdf

- Old site agreements are often lost or damaged by home owners, which means incoming home owners receive incomplete or incorrect information about what is being assigned to them.

- For various reasons, the site fees being paid by many existing home owners who have been living in communities for a number of years are well below what is being paid for other sites in the relevant community. This means that other home owners in a community (who are paying site fees at fair market value) are subsidising the use of community facilities and services by those home owners who are paying site fees well below the amount they should be.

- Entering into a new site agreement provides complete and up to date disclosure to the incoming home owner and gives them a better understanding of the community's operation.

- An operator is able to undertake appropriate reference checks of an incoming home owner and can refuse to enter into a site agreement with a person who has a history of not paying site fees. The operator has to act reasonably.

These issues are still relevant today, and the policy response of removing the right to assign a site agreement (except with the consent of the operator) and replacing this process with an obligation on the operator to enter into a new site agreement with the purchaser (subject to the protections of section 109(5) of the RLLC Act) is fair and appropriate.

Section 109(5) ensures transparency, because the correct amount of the new home owner's site fees can be easily verified, and facilitates a sale on site that is fair and equitable for all parties as follows:

- The existing home owner can sell on site under fair terms.

- The incoming home owner receives up to date information, a site agreement in their name and will pay their fair share of site fees.

- Other home owners in the community will not be required to subsidise the incoming home owner.

- The operator will receive fair market value for operating the community.

We are aware that some stakeholders have claimed that some operators are charging incoming home owners site fees that exceed fair market value, in breach of section 109(5) of the RLLC Act.

We have not seen any evidence of this occurring, but if it is, then it is a matter of appropriate compliance and enforcement activity, such as an application by the home owner to the NCAT for orders or investigation by NSW Fair Trading. It is not a failing of the legislation justifying a reversal of the policy decision.

<u>Recommendation</u>

24. The provisions governing site fees for new agreements, which are fair and effective, to remain unchanged.

VOLUNTARY SHARING ARRANGEMENTS

Discussion Questions

24. Have you entered into an agreement with an operator/home owner that included a voluntary sharing arrangement?
25. If you have been party to an agreement with a voluntary sharing arrangement, were there any problems with parties understanding or meeting the terms of the arrangement?
26. If you have been party to an agreement with a voluntary sharing arrangement and are a home owner, did the arrangement assist you to afford to live in the community?

Since the RLLC Act commenced in 2015 the number of site agreements entered into that include a voluntary sharing arrangement has been low. We understand that negotiations have taken place, but in most cases prospective home owners have opted to not proceed with having a voluntary sharing arrangement provision in their site agreement, as is their choice.

Although take-up of voluntary sharing arrangements has been minimal thus far, the reasons for introducing such arrangements and the benefits they offer remain. Voluntary sharing arrangements are designed to *"encourage investment, improve viability and take pressure off rising rents,"*[8] and after extensive stakeholder consultation, protections for existing and prospective home owners were included in the RLLC Act.

The introduction of voluntary sharing arrangements was a significant advancement for the industry, moving away from the outdated view of the relationship between an operator and a home owner as simply 'landlord' and 'tenant.' Voluntary sharing arrangements offer the chance for collaboration and mutual benefit. These provisions allow for flexible arrangements where the parties want them.

Recommendation

25. The provisions regarding voluntary sharing arrangements to remain available for home owners and operators.

RIGHTS AND RESPONSIBILITIES

Discussion Question

27. Should there be neighbour to neighbour obligations that are able to be enforced by other home owners? Why or why not?

We fully support that there should be home owner to home owner (rather than limited to neighbour to neighbour) obligations that are able to be enforced by other home owners under the RLLC Act.

Under section 36 of the RLLC Act, home owners have a range of responsibilities. This includes a responsibility *"not to interfere with, and to ensure as far as practicable that other occupants living with the home owner or guests do not interfere with, the reasonable peace, comfort or privacy of the community's residents"* (section 36(d)).

[8] Ibid.

As noted in the Discussion Paper, this obligation is aimed at addressing a home owner's (and their occupants and guests) conduct towards the community's residents, but the obligation to enforce this responsibility rests with the operator, which places them in a very difficult position.

How does an operator know who is right or wrong in a dispute? They have no powers to request evidence, or bring the parties together, and quite often disputes are merely disagreements between home owners, rather than breaches of rights or obligations under the RLLC Act. Yet, operators are often pressured to 'take sides' and respond to unrealistic expectations for resolution.

Operators also have no real powers of enforcement other than to rely on the terms of a site agreement and apply to the NCAT for orders against a home owner. This incurs considerable time and costs in lost productivity for an operator, and a home owner's conduct has to be especially injurious for the NCAT to order a termination of the site agreement.

The Act should be amended to enable home owners to enforce their rights regarding home owner to home owner obligations through compulsory mediation and seek appropriate orders from the NCAT.

As part of this, section 36(f) of the RLLC Act should be amended to require home owners not to intentionally or recklessly damage or destroy, or allow other occupants living with the home owner or guests to intentionally or recklessly damage or destroy, *"another home owner or resident's property,"* or the community's common areas.

Additional Issues

To improve home owner responsibilities under the RLLC Act, we also request the following amendments to sections 36(d) and (i) -

> *"(d) not to interfere with, and to ensure as far as practicable that other occupants living with the home owner or guests do not interfere with, the reasonable peace, comfort or privacy of ~~the community's residents~~ anyone lawfully in the community,"*

In communities that are a mixture of residential and tourist accommodation there is an ongoing problem with some home owners behaving badly towards tourists, long term casual occupants, contractors and other visitors to the community. This can be extremely damaging for a community's customer relationships and reputation. We are also informed that some contractors are refusing to continue work because of such behaviour.

> *"(i) ~~to respect the rights of the operator, and agents and employees of the operator,~~ not to interfere with, and to ensure as far as practicable that other occupants living with the home owner or visitors or guests do not interfere with, the reasonable peace, comfort or privacy of the operator, and agents and employees of the operator, and their rights to work in an environment free from harassment or intimidation,"*

It is not enough to require home owners and their occupants and guests to merely "respect" the operator's, and their agent's and employee's, rights to work in an environment free from harassment or intimidation. A person cannot be forced to feel respect.

A positive obligation should be placed on home owners, their occupants, visitors and guests, not to harass or intimidate or to interfere with the reasonable peace, comfort and privacy of operators, their agents and employees. This is especially important for community managers who live onsite.

Under work health and safety legislation in NSW, community operators have a responsibility to ensure, so far as is reasonably practicable, the health and safety of everyone in the workplace, including visitors. This includes identifying hazards and risks to workers' health and safety (including mental health) and undertaking corrective actions in a timely manner. Yet, operators are hamstrung by very limited remedies under the RLLC Act.

Currently, operators feel there is no real deterrent for home owners and they can behave as badly as they want with no repercussions. As operators' only real option for remedy, section 129(2)(d) of the RLLC Act requires an operator to prove they are being *"seriously or persistently threatened or abused"* in order to get a termination order from the NCAT. We would argue that this threshold sits far above what is acceptable under work health and safety law, and based on the feedback we have received from the industry operators are receiving very limited support from the NCAT.

The fact of the matter is that operators are regularly abused by home owners and others and this situation is leading to issues of mental health and wellbeing for operators, and high staff turnover in communities. Ongoing disputes about site fee increases, electricity charges and other related matters have also caused anguish between operators and home owners.

One operator has reported to us that their manager was constantly harassed and slandered by a particular home owner over certain issues and they eventually left their employment. They felt no confidence in receiving support from NSW Fair Trading or the NCAT.

Another operator has reported that their manager suffered a nervous breakdown following a drawn-out NCAT dispute with a home owner, including offensive treatment by the home owner's advocate. We are advised of two other operators forced to sell their communities because they suffered breakdowns due to stress and ongoing harassment and intimidation from particular home owners during the course of running the community.

Stories such as these are extremely concerning to us. Unacceptable behaviour by home owners and others needs to be taken up by the Government as a serious issue to be addressed. Operators are required to be educated and comply with the Rules of Conduct under the RLLC Act. At the very least, home owners, their occupants, visitors and guests, should be required to act in a civil manner towards operators, their staff, agents and contractors.

In the words of one operator who provided feedback during our consultations with members, *"If you want to encourage good managers, you need a framework that creates a good working environment."*

Our Association is taking steps to provide access to programs for supporting mental health and wellbeing for operators and their staff, however, the RLLC Act needs amending to ensure there are repercussions for home owners who behave badly. No one in a community should have to put up with any amount of threatening or abusive behaviour.

The RLLC Act also requires a mechanism for NSW Fair Trading to intervene, at the request of an operator, to investigate and issue penalty notices and make enforceable orders, in relation to harassment and intimidation by home owners, their occupants, visitors or guests.

<u>Recommendations</u>

26. Amend the RLLC Act to enable home owners to enforce their rights regarding home owner to home owner obligations through compulsory mediation and seek appropriate orders from the NCAT.

27. Amend section 36(f) of the RLLC Act to require home owners not to intentionally or recklessly damage or destroy, or allow other occupants living with the home owner or guests to intentionally or recklessly damage or destroy, *"another home owner or resident's property,"* or the community's common areas.

28. Amend section 36(d) of the RLLC Act to *"not to interfere with, and to ensure as far as practicable that other occupants living with the home owner or guests do not interfere with, the reasonable peace, comfort or privacy of ~~the community's residents~~ anyone lawfully in the community."*

29. Amend section 36(i) of the RLLC Act to "*~~to respect the rights of the operator, and agents and employees of the operator~~, not to interfere with, and to ensure as far as practicable that other occupants living with the home owner or visitors or guests do not interfere with, the reasonable peace, comfort or privacy of the operator, and agents and employees of the operator, and their rights to work in an environment free from harassment or intimidation,"*

30. Recognise unacceptable behaviour by home owners and others towards operators as a serious issue to be addressed and amend the RLLC Act to:

    a. ensure there are repercussions for home owners who behave badly, and

    b. establish a mechanism for NSW Fair Trading to intervene, at the request of an operator, to investigate and issue penalty notices and make enforceable orders, in relation to harassment and intimidation by home owners, their occupants, visitors or guests.

Discussion Question

28. Should the Act be clearer on whether ongoing maintenance of a residential site or certain aspects of a site is the responsibility of an operator or a home owner? Why or why not?

The RLLC Act could be made clearer regarding ongoing maintenance of a residential site and certain aspects of a site being the responsibility of the home owner.

As set out in the Discussion Paper, operators have a responsibility under section 37(k) to ensure that a residential site is in a reasonable condition, and fit for habitation, at the commencement of a site agreement for the site. After that point, it is the home owner's responsibility to repair and maintain the residential site.

To prevent unnecessary disputes, the RLLC Act should be amended to make it clear that any landscaping and hardscaping such as garden beds or paths, retaining walls, driveways, or other things are the responsibility of the home owner. This responsibility is passed to a purchaser when a home owner sells their home on site.

There are sites in residential land lease communities where there are retaining walls and it is unreasonable that the operator should be required to maintain and repair these, as this would force an unknowable and potentially costly liability onto operators.

Retaining walls and other landscaping and hardscaping are owned by and are the responsibility of the home owner and all subsequent home owners, a delineation that is in

keeping with the dilapidation and compensation provisions of the RLLC Act. Section 43 operates in the context of a home owner's responsibility to ensure their site, as well as their home, does not become "significantly dilapidated" and under section 140 the operator is required to pay the home owner for landscaping the new residential site so as to bring it up to the condition of the old residential site.

Also in line with this delineation, we request an amendment to section 48 of the RLLC Act to ensure that the operator is responsible for the maintenance of only those trees within the common areas. It is not appropriate that the operator maintain trees on the sites of home owners, over which the operator has no control, and which should be the responsibility of the home owner.

Alternatively, the legislation should permit an operator to access a residential site for the purpose of tree maintenance and remove any tree from a residential site by providing 2 days notice, without needing an order from the NCAT, and that such removal shall not be a cause for any action against the operator.

Recommendations

31. Amend the RLLC Act to make it clear that the repair and maintenance of the residential site, including any landscaping and hardscaping such as garden beds or paths, retaining walls, driveways, or other things, are the responsibility of the home owner, and this responsibility is passed to a purchaser when a home owner sells their home on site.

32. Amend section 48 of the RLLC Act to ensure that the operator is responsible for the maintenance of only those trees within the common areas. In the alternative, the RLLC Act should permit an operator to access a residential site for the purpose of tree maintenance and remove any tree from a residential site by providing 2 days notice, without needing an order from the NCAT, and that such removal shall not be a cause for any action against the operator.

Discussion Questions

29. Is the Act clear about rights and responsibilities relating to repairs and maintenance of the home and alterations, additions and replacement of the home?
30. Should there be any changes to the provisions about repairs and maintenance of the home, and alterations, additions and replacement of the home?

As set out in the Discussion Paper, section 36(g) of the RLLC Act places an obligation on a home owner *"to maintain (subject to fair wear and tear) the home located on the residential site in a reasonable state of cleanliness and repair, and so as to be fit to live in, and to keep the residential site tidy and free of rubbish."*

In addition, section 42 stipulates that unless the site agreement otherwise provides a home owner must not make alterations to the exterior of a home (other than painting or minor repairs), add a fixture to the residential site or replace the home with another home without the consent of the operator (which cannot be unreasonably withheld).

These provisions are reasonably clear about rights and responsibilities relating to repairs and maintenance, alterations, additions and replacement of the home. However, a major issue for operators of residential land lease communities is requiring alterations, additions or replacements of dwellings to comply with planning requirements.

We note that section 42(5) of the RLLC Act prevents the NCAT from making an order under section 42(4) if a home owner's alteration, addition or replacement is or would be designed, constructed or installed in breach of the *Local Government Act 1993*, the *Environmental Planning and Assessment Act 1979* or any approval, consent or certificate under either or both of those Acts.

Operators can also apply to the NCAT for orders dealing with a dispute about a home owner's obligations under the RLLC Act (section 156(1)(a)), including an order that requires a home owner to comply with their obligation (section 157(1)(b)). Sufficient power is given to the NCAT to order changes to or removals of non-compliant alterations, additions or replacements of homes, but it is a matter of ensuring that the NCAT is actually providing operators with the remedies they need.

It would assist in resolving such disputes if an amendment was made to section 42 of the RLLC Act to make it clear that there must not be alterations or additions to or replacements of homes that would be in breach of the *Local Government Act 1993*, the *Environmental Planning and Assessment Act 1979* or any approval, consent or certificate under either or both of those Acts.

Additional Issues

Urban Renewal and Dilapidation

There is an issue in more established communities regarding homes that are extremely old. Some communities have within them homes that were built 50 or more years ago, which were not designed to still be in operation today. Painting or re-cladding these sorts of homes is not enough to fix the problem.

Unfortunately, the provisions regarding 'significantly dilapidated' in section 43 of the RLLC Act are of no use to operators and these sorts of homes can lead to a community being perceived as run down, which then causes other aspects of a community to decline over time, including the value of other home owners' homes.

We recommend the Government consider further mechanisms for 'urban renewal' in residential land lease communities. For example, the RLLC Act should be amended to allow an operator a first right of refusal in a sale, with appropriate provisions in place for determination of a fair sale price.[9]

Dilapidation was not identified in the Discussion Paper, however we wish to raise it for consideration in the review. Section 43 of the RLLC Act contains provisions for operators to try and deal with run-down sites and homes but only if a residential site or home located on it is "significantly dilapidated."

This wording is confusing (it is our view that something is either dilapidated or not, there is no gradation of dilapidation) and the section has set an unattainable threshold, much higher than the previous section 99 of the RP Act. This has rendered the section inoperable.

The current timeframes in section 43 are also unreasonable and lead to continual delays. The reality is that with a dilapidated home or site, the home owner is well aware of the issue long before an operator issues a notice because the operator has been communicating with the home owner at length.

[9] We note mobile home laws in Ontario, Canada, provide a right of first refusal.

If a home owner is refusing to act, an operator should be able to issue a written notice requiring the home owner to carry out work within 30 days (as opposed to 60 days) to rectify the defect concerned. Through a corresponding amendment, a home owner would still have the ability to apply to the NCAT for an order that the period of 30 days be extended by a further period on the ground that 30 days provides insufficient time to rectify the defect (section 43(3)(b)).

The RLLC Act has also removed an operator's ability to issue a termination notice on the ground that the dilapidated condition of a home installed on the residential site is a breach of the site agreement, which should be reinstated.

As a result of all these shortcomings, operators no longer have any meaningful way of dealing with run-down homes and sites in residential land lease communities. Section 43 requires amendments in line with our below recommendations, in addition to a consideration of 'urban renewal' mechanisms in communities.

Additional Occupants

We also wish to raise an issue regarding additional occupants.

Under section 44 of the RLLC Act, unless the site agreement otherwise provides, a home owner must not allow additional persons to occupy the residential site, except with the written consent of the operator of the community (which cannot be unreasonably withheld or refused).

There is some confusion in the industry about when a long-term visitor or guest of a home owner becomes an "additional occupant." This arises when operators receive complaints from other home owners about long-term visitors taking up visitor parking spots (another example of operators being caught in home owner to home owner disputes).

When operators question whether these persons are actually additional occupants, the home owner often insists they are a guest or visitor.

Although an operator may apply to the NCAT for orders to settle a dispute arising under section 44, clarification of this issue would be of assistance. Amendments could be made to the RLLC Act to define these terms as follows:

- a "guest" is a day visitor
- a "visitor" is a guest who stays overnight, and
- an "occupant" is a person who has a right to occupy the residential site under section 44 of the RLLC Act.

<u>Recommendations</u>

33. Amend section 42 of the RLLC Act to make it clear that there must not be alterations or additions to or replacements of homes that would be in breach of the *Local Government Act 1993,* the *Environmental Planning and Assessment Act 1979* or any approval, consent or certificate under either or both of those Acts.

34. Amend the RLLC Act to provide mechanisms for 'urban renewal' in residential land lease communities, including an amendment to allow an operator a first right of refusal in a sale, with appropriate provisions in place for determination of a fair sale price.

35. Amend section 43 of the RLLC to:

    a. remove the word "significantly" wherever it appears,

    b. amend the timeframes to:

        i. allow an operator to issue a written notice requiring the home owner to carry out work within 30 days to rectify the defect concerned, and

        ii. allow a home owner to apply to the NCAT for an order that the period of 30 days be extended by a further period on the ground that 30 days provides insufficient time to rectify the defect,

    c. reinstate an operator's ability to issue a termination notice on the ground that the dilapidated condition of a home installed on the residential site is a breach of the site agreement.

36. Amend the RLLC Act to define the following terms as:

    a. a "guest" is a day visitor,

    b. a "visitor" is a guest who stays overnight, and

    c. an "occupant" is a person who has a right to occupy the residential site under section 44 of the RLLC Act.

SPECIAL LEVIES

Discussion Question

31. Are the special levy provisions useful or are upgrades usually funded by site fee increases?

We are not aware of any community where a special levy has been successfully agreed and implemented. This may be due to the same reason that take-up of voluntary sharing arrangements has been low thus far – the benefits remain, but it is taking some time for awareness to grow.

The special levy provisions should remain available as an option for home owners and operators, as they give them flexibility and opportunity to work together to fund future upgrades within a community.

Recommendation

37. The provisions regarding special levies to remain available to home owners and operators.

OPERATOR RULES OF CONDUCT & EDUCATION

Discussion Questions

32. Are the rules of conduct adequate and are they having the intended effect of ensuring appropriate conduct by operators?
33. Should the content of the rules be expanded to cover other issues?
34. Are the operator education requirements effective?
35. Can you suggest other educational resources or topics to facilitate a greater understanding of the role and responsibilities under the Act?
36. What delivery methods could be used to improve mandatory education?

The Rules of Conduct for operators set out in Schedule 1 of the RLLC Act are comprehensive, fair and appropriate for a person responsible for running a residential land lease community. As the peak industry body in NSW we supported the Rules of Conduct, which form part of the 'negative licensing system' that governs the industry.

In order to be a member of our Association operators are required to comply with our Code of Ethics to:

- Act ethically and responsibly towards the community, customers, staff and the environment,
- Strive to meet the expectations of customers, the aspirations of staff and the needs of future generations,
- Be a good neighbour and contribute to the benefit and wellbeing of the community,
- Comply with the legislation, regulations and codes of practice that apply to the industry,
- Strive to achieve the best practise standards that apply to the industry,
- Practise and foster sustainable economic, environmental and socially responsible management,
- Act honestly,
- Accurately represent all offerings of goods and services,
- Fulfil all warranties, guarantees and professional obligations promptly and faithfully,
- Deal with all complaints with a view to resolution and report to the complainant the outcome of the investigation,
- Respect the confidentiality of personal information,
- Treat staff fairly and encourage professional development and the improvement of personal skills,
- Cooperate with other members of the Association to develop the industry,
- Support the Association's official position on legislative matters at all levels of government,
- Do nothing that is prejudicial to the standing or reputation of any other member or of the Association.

In addition to their obligations under section 54 of the RLLC Act, new operators are also required to undertake an education briefing approved by the Commissioner. At the moment, operators have two options:

- *"Read through all of the information contained in the land lease community operator pages on the NSW Fair Trading website; or*

- *Attend an information session or seminar on the laws given by NSW Fair Trading or the Land Lease Living Industry Association. (If there is a session scheduled within the timeframe they need to attend)."*[10]

While we consider the existing operator education requirements to be effective, the Association provides ongoing training and education because operators (new and experienced) are keen to attend information sessions on a continual basis to refresh and improve their understanding of the Act and their obligations.[11] We would not support any additional bureaucratic burden in this respect, as it is unnecessary.

Our suite of programs include information sessions, Q&A briefings, masterclasses, our online eAgreements portal and best-practice policy and procedure manual and templates. A combination of face-to-face and online delivery methods work well and, depending on the topic, sessions can be a full day, in person workshop or a short, 30-minute webinars.

We are also in the process of developing further on-demand educational resources and programs and would be happy to share our plans with NSW Fair Trading.

We are aware that some stakeholders are advocating that the Government should introduce a licensing system for community operators. We strongly oppose this as an unnecessary regulatory burden for the industry.

Traditionally, occupational licensing is used to ensure that people who work in occupations or professions deemed as having a public risk meet the determined competency requirements, which reduce the public risk factors for that particular industry or occupation. Where persons do not meet such competency requirements or engage in conduct that is in breach of their licensing requirements, the Government has power to take action, including suspending or cancelling a person's licence. A compensation fund is also usually available.

Our Association rejects the argument that there is a need for and a justification of licensing of community operators. Operators are not required to hold monies in controlled trust accounts (like real estate agents or motor dealers) and, despite assertions to the contrary by some stakeholders, there is no evidence of market failure or widespread harm, such as bullying or unfair practices, being suffered by home owners. On the contrary, it is operators that need additional protections in this regard under the RLLC Act (see our submissions in response to discussion question 27).

Introducing a licensing system would impose an unnecessary layer of regulation on operators, increasing costs for the Government in having to administer the licensing regime and ultimately for home owners. Additional compliance costs for any business will almost always flow through to its customers. Most community operators would not absorb these costs. Rather, they will be passed onto home owners through increased site fees.

Operators are already required to comply with the Rules of Conduct and other obligations under the RLLC Act. They must undertake mandatory training on entering the industry and it is clear that the industry is being proactive in providing training on an ongoing basis (see our submissions above).

Where an operator does do something wrong, home owners have extensive rights to seek orders from the NCAT (at very little cost) and, as set out in the Discussion Paper, the

[10] NSW Fair Trading, *Education for new operators,* https://www.fairtrading.nsw.gov.au/housing-and-property/strata-and-community-living/residential-land-lease-communities/education-for-new-operators
[11] *Operators also provide ongoing training to their staff. For example visit https://www.ingeniacommunities.com.au/sustainability/our-stakeholders/our-people/*

Commissioner has wide powers of investigation and can take disciplinary action against operators who breach the RLLC Act. This includes prohibiting a person from carrying on all or specified activities in the management of a particular community during a specified period and requiring the appointment of another person as operator during that period (section 174(2)(b)(v)). This outcome is no different to suspending a licence.

In serious cases, the Commissioner can also apply to the NSW Supreme Court Supreme Court for an order appointing a specified person as an administrator of a community (section 164).

We do not believe that adding an additional layer of regulation, just so NSW Fair Trading can administer and enforce the RLLC Act through a licensing system as opposed to the current regime, would produce outcomes significant enough to justify the additional costs that will result for communities. Such a move would also be inconsistent with the Government's policy of reducing red tape for NSW businesses.

Recommendations

38. The provisions of the RLLC Act regarding operator rules of conduct and education requirements to remain unchanged.

39. That NSW Fair Trading work more closely with stakeholders in developing further voluntary educational resources and programs.

40. The Government set aside the suggestion of a licensing system for operators and instead focus on improvements that could be made to the current regime.

COMMUNITY RULES

Discussion Questions

37. Before reading this discussion paper, were you aware of the option of communities having community rules?
38. Does your community have community rules?
39. Does your community have a community rule regarding age restrictions? If so, does this impact your community?

Most residential land lease communities that are members of our Association have community rules, which serve many important purposes. They cover the use, enjoyment, control and management of a community, facilitating a harmonious community living environment and they help to uphold the preferred lifestyle of a community.

Some communities also include within their community rules a rule restricting the age of residents, most commonly to over 50 or 55, as their core offering is a lifestyle for 'over 50s.'

'Over 50s' residential land lease communities offer benefits for home owners, a major one being the opportunity to be part of community of like-minded individuals at a similar stage of life. This helps to make life more enjoyable for them, as it facilitates social interaction, companionship and support networks, which become more important as people get older.

Home owners who are over 50 choose to live in these communities because they want the lifestyle they offer. Therefore, the impact of having a community rule regarding age restriction is crucial for these communities in order to preserve that lifestyle.

In October 2019 a home owner of BIG4 Tweed Billabong Holiday Park sought to challenge a community rule restricting the age of home-owners and occupants to 55+ years. The NCAT determined the rule was invalid. The operator appealed and after written submissions, the appeal was heard in May 2020. On 23 December 2020 the NCAT Appeal Panel upheld the appeal and determined the community rule was valid.

We note an age restriction community rule had also previously been affirmed in *Barbara Evans v Cabana Holdings Pty Ltd trading as Broadlands Relocatable Homes Estate NCT RC 15/168173 on 22 July 2016.* This decision upheld the right of an operator to make an age restriction community rule under the RLLC Act.

These were important and positive decisions for the industry, protecting the interests of thousands of people living in 'over 50s' residential land lease communities in NSW who value the lifestyle. If the age restriction community rules were removed, the home owners' lifestyles would be threatened and the sale prices of their homes might also have been detrimentally affected.

The *Anti-Discrimination Act 1977* makes exceptions for acts done under statutory authority, such as by-laws, rules or other instruments made under other Acts. Constant attempts to try and dismantle age restriction community rules is damaging to home owners and operators and it needs to stop. We recommend the Government amend the RLLC Act to make it abundantly clear that age restriction community rules are permitted in residential land lease communities.

Recommendation

41. Reflecting the outcomes of NCAT cases, amend the RLLC Act to make it abundantly clear that age restriction community rules are permitted in residential land lease communities.

Discussion Questions

40. Where residents committees are in place, should they be involved in the development of community rules? Why or why not?
41. If there is no residents committee in place, how could residents contribute to the development of community rules?

We note that residents committees are already involved in the development of community rules.

Under section 90(2)(b) of the RLLC Act an operator must advise and consult with the residents committee about any amendment to community rules before giving written notice of the amendment under section 90(2)(a), otherwise the amendment has no effect. The RLLC Act also has provisions for residents to deal with prohibited or inappropriate community rules.

This process should continue as is, because it is working well in communities. We envisage that problems would arise if residents at large were to contribute to the development of community rules in the absence of a residents committee for the same reason that ASX listed companies should limit the size of their board of directors.

The ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (4th Edition) 2019 provides the following guidance at page 35:

"The board needs to be of sufficient size so that the requirements of the business can be met and changes to the composition of the board and its committees can be managed without undue disruption. However, it should not be so large as to be unwieldy."

While we recognise that all residents are important stakeholders in community rules, it would not be desirable to have a very large number of residents involved in their development. Sufficient consensus (or at the very least acceptance) is needed to settle the drafting of or an amendment to a community rule so a community can move forward.

The fact of the matter is operators have no interest in establishing community rules that are onerous or draconian, as these are not in anybody's interest and they will not be held up by the NCAT. Disseminating information about the consultation should remain a role for the residents committee.

We also advocate that the community-wide approach that applies to disputes about site fee increases by notice should also apply to disputes about community rules. That is, at least 25% of home owners must be required to support an application to challenge a community rule before the matter can proceed to mediation and, should mediation fail, the NCAT.

We believe this would be a fairer dispute resolution process for all parties and would reduce unnecessary disputes about community rules. Community rules that are broadly accepted by home owners should not be able to be dismantled by a few dissenters.

Recommendations

42. The provisions regarding the development of community rules to remain unchanged.

43. Amend the RLLC Act so that the community-wide approach that applies to disputes about site fee increases by notice also applies to disputes about community rules. That is, at least 25% of home owners must support an application to challenge a community rule before the matter can proceed to mediation and, should mediation fail, the NCAT.

Discussion Question

42. Is the system of enforcement of community rules appropriate?

Breaches of community rules is an issue to be addressed. Given the importance of community rules, having a system in place to properly and efficiently enforce community rules would be beneficial for all communities. Unfortunately, the current system of enforcement of community rules is not appropriate, as it is not providing operators with any meaningful avenue of remedying a breach of community rules.

If an operator believes a person has breached a community rule, they can issue the person with a written notice to remedy the breach within a period of at least 30 days (section 93(2) of the RLLC Act). If the breach has not been remedied, the operator can then apply to the NCAT within 30 days for an order (section 93(3)).

The NCAT has the power to order that a person comply with the rule, or terminate a site agreement or tenancy agreement if the NCAT thinks that the breach is sufficient to justify this.

There are two problems with this process:

1. If the NCAT makes an order that a person comply with the community rule and they continue to do the wrong thing, the only option the operator has is to reapply to the NCAT. This can happen multiple times. This means more time and costs for the operator, which are usually higher that any costs borne by the person who is continually breaching the community rule.

2. The reality is that the NCAT will not make an order terminating a site agreement or tenancy agreement except in the most serious circumstances. We are not aware of any site agreement being terminated because of a breach of community rules.

As such, the current system does not encourage compliance and operators are not getting remedies for breaches of community rules in a timely or cost-effective manner.

This is extremely frustrating for the industry. Section 93(1) of the RLLC Act provides that an operator *"must ensure that the community rules are enforced and interpreted consistently and fairly,"* and residents can issue a written notice under section 94(1) of the RLLC Act to the operator to take action, yet operators have no meaningful way of doing so.

The way to improve this situation is to restore previous policy that community rules form part of the site agreement and an operator may issue a termination notice for serious or persistent breach. This would give more weight to community rules and any disputes about such termination notices would still be subject to jurisdiction of the NCAT.

If community rules *"play a key role in ensuring community living is happy and enjoyable for all involved in a community,"* as recognised in the Discussion Paper, then they should be able to be enforced efficiently and effectively.

Recommendation

44. Amend the RLLC Act to reinstate the policy that community rules form part of the site agreement and an operator may issue a termination notice for serious or persistent breach.

Discussion Question

43. Are community rules being used to improve life in residential communities?

Community rules are being used to improve life in residential land lease communities. As stated above, most communities that are members of our Association have community rules and they serve important purposes.

They facilitate a harmonious community living environment by governing the use, enjoyment, control and management of a community and this helps to uphold the preferred lifestyle of a community. Examples of such rules include:

- behaviour in and use of common areas
- age restrictions for occupancy of a site
- the keeping of pets
- issues of safety
- speed limits and parking, etc.

When given a copy of the community rules either at the time of receiving a disclosure statement or entering into a site agreement, prospective and new home owners can get a good understanding of what to expect from community living.

RESIDENTS COMMITTEES

Discussion Questions

44. Should residents committees also be required to take part in mandatory education? If yes, what topics should be covered?
45. If your community has a residents committee, is it working effectively?
46. Do you have any suggestions for changes to the way residents committees are established or run?

Under Part 9 of the RLLC Act, residents committees have certain functions, procedures and rules to follow regarding establishment, membership and office bearers.

Under section 97(1), the functions of a residents committee for a community are—

> *"(a) to represent the interests of the residents, and to consult regularly with residents or the operator or both, in connection with—*
>
> > *(i) the day-to-day running of the community, and*
> > *(ii) any complaint or proposal about the operation of the community raised by a resident, and*
>
> *(b) to call meetings of all the residents of the community for the purpose of considering and voting on any matter relating to the community."*

It would be beneficial for the smooth running of residents committees if members were required to take part in mandatory education. Topics could cover at least the basics of their functions, how to run establishment meetings, developing procedures and serving as an effective communication channel between residents and the operator.

Residents committees should also be required to comply with a code of conduct to ensure their dealings with operators remain civil and respectful (refer to our submissions in response to discussion question 27) and they continue to act in the interests of all home owners.

Other changes suggested by operators of communities that have residents committees are:

- **Encouraging new membership** - an amendment to NSW Fair Trading's model residents committee rules to encourage more participation from new members. For example, making provisions regarding the maximum number of consecutive terms of office for members and office-bearers. Residents committees can still choose whether or not they wish to use the model rules.

- **Privacy** - some home owners have expressed concern that under section 97(3) of the RLLC Act, residents committees can request a list of the names of all current residents of the community, their site numbers and their postal addresses (if different from their site numbers) and the operator must comply. There are also no obligations on residents committees to have privacy policies and keep private information secure.

This can be particularly difficult for people who want to retain their privacy and distressing for others, like domestic violence victims.

It is recommended that home owners who are concerned about their privacy be allowed to instruct the operator in the site agreement not to provide their details. They can always opt in to provide their details to the residents committee at a later date.

- **Reasonable access to information** - some residents committees are asking for information from the operator under section 97(3) of the RLLC Act on a weekly or monthly basis, which is an abuse of the process. It is recommended that a cap be placed on requests for information. It is our understanding that most residents committees meet on a quarterly basis. There should not be a requirement to provide information more often than this.

- **More than one residents committee** - currently, if more than one residents committee claims to exist, the operator or any resident can apply to the NCAT for an order as to which is the rightful one. Until this happens, operators can sometimes find themselves in a difficult position and not know what to do when competing residents committees are trying to engage with the operator, are requesting information, etc.

  As operators have obligations to residents committees, we recommend that the RLLC Act make it clear that operators will not be considered to be in breach of their obligations if they are unsure which residents committee they should be dealing with.

Recommendations

45. Amend the RLLC Act to require residents committees to:

    a. take part in mandatory education about the basics of their functions, how to run establishment meetings, developing procedures and serving as an effective communication channel between residents and the operator, and

    b. comply with a code of conduct to ensure their dealings with operators remain civil and respectful and they continue to act in the interests of all home owners.

46. Amend NSW Fair Trading's model residents committee rules to encourage more participation from new members.

47. Amend the RLLC Act to allow home owners who are concerned about their privacy to instruct the operator in the site agreement not to provide their details to the residents committee.

48. Amend the RLLC Act to provide that residents committees may not request information from the operator under section 97(3) more than 4 times in a calendar year.

49. Amend the RLLC Act to make it clear that operators will not be considered to be in breach of their obligations to residents committees if they are unsure which residents committee they should be dealing with.

UTILITIES AND OTHER CHARGES – GENERAL

Discussion Question

47. What are your overall views on utilities charging provisions under the Act, other than electricity charging in embedded networks, which is discussed below?

Aside from addressing issues related to electricity charging in embedded networks, there are changes that need to be made to the utilities and other charges provisions under the RLLC Act.

Fees and Charges for Additional Services

Section 76 of the RLLC Act places strict limits on the fees and charges that may be required or received by an operator of a community from a home owner in connection with the occupation of a residential site or the use of any of the facilities of a community. The only fees and charges that are allowed are:

- Site fees
- The cost of registering or recording the site agreement under the *Real Property Act 1900* if any fixed term period exceeds 3 years
- Refundable deposit for a key or any other opening device to access the community (capped at $25)
- Usage and service availability charges for electricity, gas, water and sewerage (service availability charge for both water and sewerage is capped at $50 each calendar year).
- Fees under voluntary sharing arrangements (e.g. entry fee, deferred site fee, specified sale amount, exit fee, shared cost of insurance).

Restricting the type of fees and charges that can be paid by a home owner in this way is stifling innovation in residential land lease communities. It is also denying home owners the opportunity to receive additional services they may want, and are willing to pay for, to enhance their lifestyle or wellbeing.

At the moment, there is no clear provision in the RLLC Act or the RLLC Regulation for communities to be able to offer and charge for additional services like vehicle or goods storage facilities (e.g. boats, caravans), telecommunications or streaming services, services like garden maintenance, bulk waste pick up and disposal, cleaning, laundry, meal delivery, etc.

If an object of the RLLC Act is to *"encourage the continued growth and viability of residential land lease communities"* then it should contain provisions that allow for innovation and for home owners to 'opt in' for additional benefits. If communities wish to expand their services on a user pays basis to meet demand from home owners they should be able to do so. Allowing this could take some pressure off site fees.

We recommend that the RLLC Act and RLLC Regulation be amended to allow an operator of a community to receive from a home owner a fee, charge or deposit for additional services provided to the home owner as agreed in a site agreement.

Water and Sewerage

Clause 12 of the RLLC Regulation provides that despite clause 11, *"the service availability charges payable by a home owner to an operator of a community for both water and sewerage must not exceed $50 in total for all those service availability charges payable by the home owner in any calendar year."*

This $50 cap was last assessed as being appropriate in 2006, based on an assessment of service availability charges for water and sewerage at that time.

Further, when the RLLC Bill was being debated in 2013 stakeholders agreed that the service availability charges payable by a home owner to an operator of a community for water and sewerage was not to exceed $50 for ***each*** of those service availability charges in any calendar year.

It is time the RLLC Regulation was amended to align with the increase in charges for water and sewerage services over the last 15 years.

Recommendations

50. Amend the RLLC Act and RLLC Regulation to allow an operator of a community to receive from a home owner a fee, charge or deposit for additional services provided to the home owner as agreed in a site agreement.

51. Amend the RLLC Regulation to provide that the service availability charges payable by a home owner to an operator of a community for water and sewerage is not to exceed $50 for each of those service availability charges.

Discussion Question

48. How well do the current provisions relating to accounts, access to bills and other documents work?

The current provisions relating to accounts, access to bills and other documents are fair and reasonable, though there are some aspects of inconsistency with national requirements for electricity.

In relation to electricity on-selling via embedded networks in residential land lease communities, we note the Australian Energy Regulator's *AER (Retail) Exempt Selling Guideline, Version 5, March 2018* (Retail Guideline) sets out a number of conditions, based on the retail customer protections provided under the National Energy Retail Law (Retail Law).

These conditions apply under rule 153 of the National Energy Retail Rules (Retail Rules) to the sale of energy to exempt customers by exempt persons (which includes customers in embedded networks in residential land lease communities), and the requirements regarding information provision, billing and payment arrangements and receipts are more comprehensive.

We also note there is an inconsistency between Condition 5 of the Retail Guideline and the RLLC Act. Condition 5 provides that the pay-by date for a bill must not be less than 13 business days from the date on which the exempt person issues the bill, whereas section

77(2)(b) of the RLLC Act requires an operator to give the home owner an itemised account and allow at least 21 days for the payment to be made.

Recommendation

52. Subject to our submissions in response to discussion question 50, the provisions of the RLLC Act relating to accounts, access to bills and other documents for electricity should be amended to align with the AER's Retail Guideline.

UTILITIES AND OTHER CHARGES – ELECTRICITY

Discussion Question

49. What are your views on the operation of section 77(3) as it applies to an embedded electricity network in a community?

Put simply, the operation of section 77(3) of the RLLC Act as it applies to an embedded electricity network in a community is an aberration. It is not the result of considered government policy informed by careful analysis and robust public consultation. In fact, due to an error in drafting, the section flies in face of government policy that operated well for the industry for 30 years prior to the current situation.

We also believe the section is inconsistent with the objects of the RLLC Act to *"improve the governance of residential communities"* and *"encourage the continued growth and viability of residential communities in the State."*

In the last few years, section 77(3) has caused an immense amount of confusion, angst and discord in residential land lease communities. Operators are unsure of what they can charge home owners for electricity and home owners are unsure of what they should be paying.

In addition, a number of operators who thought they had been doing the right thing have had to issue refunds to home owners amounting to hundreds of thousands of dollars, causing unforeseen issues for their businesses.

History of NSW Government Policy on Electricity Charging in Communities with Embedded Electricity Networks

The history of NSW government policy on electricity charging in communities with embedded electricity networks can be summarised as follows:

- **From 1986**

  Legislation was passed which legalised long-term occupancy of sites and set minimum standards for caravan park residency.[12] The Energy Authority of New South Wales's 1986 *Code of practice for electricity supply to long term residents of caravan parks EA86/20* provided for amounts payable by long term residents to be calculated in accordance with the local electricity supply authority's domestic tariff.

[12] Ordnance 71 under *Local Government Act 1919*

- From 1989

  The *Residential Tenancies Act 1987* extended to permanent residents occupying movable dwellings in residential parks. Term 4 of the standard form agreement under the *Residential Tenancies Regulation 1989* provided for a resident to pay for charges in respect of electricity at a rate not greater than the published domestic tariff by the electricity supply authority.

- From 1995

  The *Residential Tenancies Act* was amended by the *Residential Tenancies (Caravan Parks and Manufactured Home Estates) Amendment Act 1994*. Term 5 of the standard form agreement under the *Residential Tenancies (Moveable Dwellings) Regulation 1995* provided for a resident to pay for charges in respect of electricity at a rate not greater than the published domestic tariff of the electricity supply authority.

  The Department of Energy published the *Code of Practice for Electricity Supply to Long-Term Residents of Caravan Parks* as called up in the *Local Government (Caravan Parks and Camping Grounds) Transitional Regulation 1993*. The first Code of Practice, published as EA86/20 in July 1986, was superseded by this document. The new Code provided that the amount payable by a resident with respect to each meter reading period shall be calculated in accordance with the local electricity distributor's domestic tariff.

  The *Local Government (Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 1995* and *Local Government (Manufactured Home Estates and Manufactured Homes) Regulation1995* came into effect. The regulations provided that if a dwelling site is provided with electricity otherwise than by way of direct connection to the local electricity supply authority's electricity main, electricity must be supplied at a rate no greater than the electricity supply authority's domestic tariff.

- From 1999

  The *Residential Tenancies Act* in its application to moveable dwellings was replaced by the RP Act. Charges for the supply or resupply of electricity to the resident are calculated in accordance with the relevant code.

  Under the *Residential Parks Regulation 1999* the prescribed code in relation to electricity is the code published by the Department under the title *Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks*, as published in March 2006. In the second reading speech on introduction of the *Residential Parks Bill* on 28 October 1998 Mr Paul Crittenden stated:

  > *"This provision makes the position of park residents consistent with other tenancies and effectively means residential park residents will pay the same rate as that of other households."*

- From 2005

  The *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* comes into effect. The maximum amount that may be charged for the supply of electricity during a particular period is the amount that the standard retail electricity supplier for the relevant district would

have charged under a standard form customer supply contract for that supply during that period.

- From 2006

Clause 22B of the *Residential Parks Regulation 1999* was re-enacted in clause 17 of the *Residential Parks Regulation 2006* with the publication date of the code titled *Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks* amended to August 2006.

The Customer Service Standards provided that where the park owner supplies electricity to the resident and the resident has agreed to pay for electricity, two types of charges can be made: a charge for electricity consumption expressed as a cost per kilowatt hour (kWh) of electricity consumed, and a network access charge expressed as a cost per day that electricity is supplied.

> *"3.1.1 Maximum charge per kWh*
> *The charge for electricity consumption, expressed as a price per kilowatt hour (kWh), can be no more than the standard or default regulated retail tariff that would have been charged by the local standard retail supplier under a standard form contract for the same level of consumption.*
>
> *3.1.2 Maximum Service Availability Charge (SAC)*
> *The service availability charge (SAC) is a component of the regulated retail tariff determined by the Independent Pricing and Regulatory Tribunal (IPART) for each standard retail supplier in New South Wales.*
>
> *Where electricity is supplied to the park resident by the park owner, the park owner may charge the SAC at a rate no greater than that charged by the standard retail supplier in whose supply district the premises are located, except where electricity is supplied to the park resident's site at a rate of less than 60 amps. Where supply is less than 60 amps, the maximum rate for the SAC is according to the following table:*

Level of Supply to Site	*Maximum level of SAC*
less than 20 amps	*20% of local standard retail supplier's SAC*
20-29 amps	*50% of local standard retail supplier's SAC*
30-59 amps	*70% of local standard retail supplier's SAC*
60 amps or more	*100% of local standard retail supplier's SAC"*

- From 2014

In July the *National Energy Retail Law (Adoption) Amendment (Retail Price Deregulation) Regulation 2014* removed reference to "regulated offer retailer" and provided for a standing offer to a small customer for whom it is the designated retailer.

The *Customer Service Standards* were amended to reflect the changes in terminology:

> *"3.1.1 Maximum charge per kWh*
> *The charge for electricity consumption, expressed as a price per kilowatt hour (kWh), can be no more than the standing offer price that would be charged by the relevant local area retailer for new connections, if the local area retailer were to supply that quantity, or estimated quantity, of energy directly to the premises of the resident.*
>
> *3.1.2 Maximum Service Availability Charge (SAC)*

Many of the costs in supplying electricity to retail customers are fixed, such as the cost of providing access to the network infrastructure. The service availability charge (SAC) recovers these fixed costs and ensures all customers contribute to the overall cost of making the supply of electricity available.

Where electricity is supplied to the park resident by the park owner, the park owner may charge the SAC at a rate no greater than that charged by the relevant local area retailer, except where electricity is supplied to the park resident's site at a rate of less than 60 amps. Where supply is less than 60 amps, the maximum rate for the SAC is according to the following table:

Level of Supply to Site	*Maximum level of SAC*
less than 20 amps	*20% of relevant local area retailer's SAC*
20-29 amps	*50% of relevant local area retailer's SAC*
30-59 amps	*70% of relevant local area retailer's SAC*
60 amps or more	*100% of relevant local area retailer's SAC"*

- From 2015

The RLLC Act was assented to on 20 November 2013 but did not commence until 1 November 2015. Section 77 (3) provided:

> *"77 Utility charges payable to operator by home owner*
> *…*
> *(3) The operator must not charge the home owner an amount for the use of a utility that is more than the amount charged by the utility service provider or regulated offer retailer who is providing the service for the quantity of the service supplied to, or used at, the residential site."*

Unfortunately, section 77(3) was not amended to replace the words "regulated offer retailer" with "local area retailer" following deregulation of the energy market in 2014. However, these changes were adopted in the *Customer Service Standards* in July 2014 and the words "local area retailer" were also adopted into clause 13 of the RLLC Regulation.

Operators of communities continued to charge for electricity as they always had, in line with long-standing government policy and supported by guidance from NSW Fair Trading.

- From 2017

NSW Fair Trading's Factsheet *Utilities and other charges* (updated April 2017) provided that operators cannot charge a home owner usage charges for utilities more than a home owner would otherwise be charged if they were a direct residential customer of a local utility service provider. Operators were advised to check their local provider's website to see what the standard rate for usage is.

- From 2018

In the case of *Silva Portfolios Pty Ltd trading as Ballina Waterfront Village & Tourist Park v Reckless [2018] NSWSC 1343* ("*Reckless*") the Supreme Court of NSW finds on the proper construction of section 77(3) of the RLLC Act, the plaintiff (operator of the community) is not entitled to charge the defendant (the home owner Ms Reckless) any more than the plaintiff has been charged for the supply or use of the electricity consumed by the defendant.

Current Situation

The Supreme Court's decision in the *Reckless* case was that the concept of a "regulated offer retailer" no longer existed, and under section 77(3) of the RLLC Act Ballina Waterfront Village is not entitled to charge Ms Reckless any more than the village has been charged for the supply or use of the electricity consumed by Ms Reckless.

At paragraph 39 of his judgement Justice Davies says:

> *"I am firmly of the opinion that the Legislature overlooked the fact that the RLLC Act, which had been passed and assented to in 2013, was not amended to take account of the changes made by the 2014 Regulation before the RLLC Act was proclaimed to commence."*

Following the *Reckless* case, the interpretation of section 77(3) is that, now, residential land lease community operators in NSW cannot charge a home owner for the supply and use of electricity more than the operator has been charged for the electricity supplied to and used by the home owner.

Consequently, the Government's policy on energy charges in residential land lease communities, which had been working well for the industry for decades, has been fundamentally altered. The current policy outcome of section 77(3) has been distorted from its original intent merely due to a drafting error by the legislature following deregulation of the energy market in 2014.

Not only has this case left community operators with a legislative provision that prevents them from charging for electricity in accordance with intended, long-standing government policy, what remains of the provision fails to take account of the infrastructure limitations in communities that prevent accurate calculation.

Most residential site meters within embedded networks in residential land lease communities are not 'smart meters' and they do not 'communicate' with the parent smart meter (or meters) for the community. Site meters are accumulation meters that measure how much electricity has been consumed at the site. They cannot discern when the electricity has been used, so home owners are charged the same rate for electricity regardless of the time of day that they use power.

What this means is that operators cannot accurately calculate what a home owner should be charged based on what the operator has been charged for the electricity supplied to and used by the home owner at the site. If an operator is receiving electricity at the parent 'smart meter' under commercial time-of-use tariffs, the total of the operator's bill will be an amalgamation of multiple tariffs and it is not possible to accurately calculate how much electricity a home owner used for which the operator was charged at the off peak rate, rather than the peak rate or shoulder rate.

The best that is available to operators is a 'method of approximation', as set out in the case of *Reckless v Silva Portfolios Pty Ltd t/as Ballina Waterfront Village and Tourist Park (No. 2) [2018] NSWCATCD 59*. Operators divide the community's total kilowatt hour usage into the total the utility service provider has charged the operator to produce an overall cents per kilowatt hour rate. This rate is then be applied to the total kilowatts used by a resident (the "*Reckless* method").

In terms of complying with their obligations, the only assistance NSW Fair Trading can currently offer operators is the following:

"If you need assistance to comply with the Supreme Court decision, and to calculate how much to charge home owners for their electricity usage, you may consider contacting:

- *your energy supplier,*
- *an industry association, or*
- *one of the many businesses that specialise in providing billing and other services to operators of embedded electricity networks.*

Please note, this information supersedes and replaces previous Fair Trading Fact Sheets dealing with the same subject matter. It does not constitute legal advice and you should seek such advice independently, if required."[13]

This situation is unacceptable and requires urgent rectification. This Association has been advocating for change since the *Reckless* case. To our knowledge, no other embedded electricity network type in Australia is in such a position as NSW residential land lease communities.

Not only has section 77(3) of the RLLC Act created a situation that flies in face of government policy that operated well for decades prior to the *Reckless* case, it is imposing a charging method that is unworkable for most communities and a pricing cap that is out of step with the pricing conditions that apply to the majority of other embedded electricity networks.

This review presents an opportunity for the Government to 'right the wrong' of section 77(3) and develop a fairer, more suitable regulatory framework for electricity charging in residential land lease communities. In the interest of helping the industry move forward, we urge the Government to resolve this issue through appropriate legislative change as soon as possible.

Recommendation

53. Amend section 77(3) of the RLLC Act, as a matter of urgency, to address the problems regarding electricity charges in embedded electricity networks within residential land lease communities. Refer to our response to discussion question 50.

Discussion Question
50. Which reform option for electricity charging do you support and why?

Options 1 and 2 are unworkable for the industry and so we do not support these options.

Option 1

Embedding the *Reckless* approach into the RLLC Act for both operators and authorised third-party is an inappropriate way of solving the problems created by section 77(3) of the RLLC Act. At best, the *Reckless* method of calculating energy charges has provided NSW residential land lease communities an interim solution until appropriate amendments to the Act can be made.

[13] NSW Fair Trading, *Utilities and other charges,* https://www.fairtrading.nsw.gov.au/housing-and-property/strata-and-community-living/residential-land-lease-communities/utilities-and-other-charges, accessed 1 February 2021

The *Reckless* approach does not allow for operators to recover the costs of actually maintaining and operating the embedded network in providing electricity (see our response to discussion question 54).

It also falls short of the reasonable and accepted method of charging that had previously been in place for NSW residential land lease communities since 1986, and codified in legislation, which allowed operators to charge for consumption of electricity capped at the local retailer's standing offer. This is no different to the pricing cap that applies to other embedded networks under the AER's Retail Guideline.

We acknowledge that the *Reckless* approach has had a positive outcome for home owners in terms of electricity prices. Where operators have secured competitive commercial electricity rates in the past, they are currently being passed through using the method of approximation. However, the *Reckless* approach also means operators are no longer incentivised to obtain the best commercial electricity rates.

There is also now an incentive to outsource the operation of the embedded network to authorised third-part retailers, which has given rise to new issues. These issues, however, can be better addressed in reforms to the national legislation (which would also benefit other embedded network customers) – not embedding the *Reckless* approach in the RLLC Act for both operators and authorised third-party retailers.

Option 2

Amending the Act to allow for electricity charging that includes network maintenance costs recovery and administration costs, but does not result in a profit for the operator or third-party retailer, is also an inappropriate way of solving the problems created by section 77(3) of the RLLC Act.

On page 24 the Discussion Paper states:

> *"This option would allow the operator/third-party retailer to pass on the direct costs charged by their electricity provider as well as the costs of maintaining the embedded network within the community and administration costs, provided they could be transparently identified as part of cost-recovery."*

When operators refer to the costs of 'maintaining' an embedded network they are referring to the ongoing operational costs of actually supplying and on-selling electricity. This involves not only repairs and maintenance to the embedded network infrastructure (i.e. costs of parts and materials, paying contractors,) but also the time and costs involved in meeting their obligations under the RLLC Act and RLLC Regulation, the AER's Retail Guideline and the *Electricity Network Service Provider - Registration Exemption Guideline, Version 6, March 2018* (Network Guideline), safety standards, etc (compliance and administrative costs).

Tasks like reading meters, calculating energy charges, issuing bills, processing payments, following up late payments, complying with notification & information requirements, attending to customer enquiries, maintaining membership of EWON, dealing with complaints, etc, all incur time and costs. There are also other costs to consider, like taxes and other charges, consultants fees or legal expenses, insurance costs, etc.

As these costs will be different for each community, we do not understand how they could possibly be measured and determined under Option 2 in a way that sends clear pricing signals and applies equally across the industry.

What is meant by "transparently identified?" Will the NCAT have review powers? Will operators be required to justify their ongoing operational costs every year? How would they do this? As technology constantly changes, will the legislative provisions allow for new products and services to come online? How will they be charged for? These are just some of the questions that arise.

Our concern is that Option 2 will leave the door wide open for ongoing angst and disputes about electricity charges in land lease communities because operators and home owners will not be given clear direction on **what and how** to charge for electricity. Instead, Option 2 would require delving into the operating costs of each and every embedded network within communities to determine what the 'recovery cost' amount is in order to determine what to charge.

In terms of *"passing on the direct costs charged by their electricity provider",* the Discussion Paper is unclear whether Option 2 would take the same approach in relation to electricity usage charges as Option 1 (i.e. embed the *Reckless* approach into the RLLC Act).

If that is the case, then like Option 1, Option 2 (in terms of usage charges) falls short of the reasonable and accepted method of charging that had previously been in place for NSW residential land lease communities since 1986, which allowed operators to charge for consumption of electricity capped at the local retailer's standing offer. This is no different to the pricing cap that applies to other embedded networks under the AER's Retail Guideline.

The *Reckless* approach also means operators are no longer incentivised to obtain the best commercial electricity rates.

Consequently, Option 2 is unworkable. The only way to solve the problems caused by section 77(3) of the RLLC Act is to provide operators with clear direction on **what and how** to charge for the supply and use of electricity.

Option 3

Out of the 3 options presented in the Discussion Paper, Option 3 is the simplest and most preferred option for the industry.

Removing provisions that govern what can be charged for electricity from the RLLC Act and leaving the AER's Retail Guideline to apply (as it already does) would alleviate all the confusion surrounding electricity charges in communities.

It would also remove legislative duplication and result in a charging framework that is fairer for all parties and more appropriate for the ongoing growth and viability of communities than embedding the *Reckless* approach in the RLLC Act.

If concerns remain that authorised third-party retailers servicing embedded networks are not subject to the prices controls of the AER's Retail Guideline, then that is an issue better addressed in reforms to the national legislation. We note, however, that Option 3 would reduce the incentive for operators to outsource the operation of the embedded network in the first place.

The National Energy Customer Framework provides that customers should receive the same level of consumer protections, regardless of where they live. However, home owners in NSW residential land lease communities are currently at a significant advantage in relation to pricing than other customers in the electricity market simply because of where they live. This is not fair and equitable and must be addressed.

Electricity is an essential service, but this does not absolve a person from paying their fair share for this resource. Like other embedded electricity network operators, retailers and distributors, community operators should be allowed to charge home owners for electricity usage and service availability.

Recommendation

54. Amend the RLLC Act in accordance with Option 3 to remove provisions that govern what can be charged for electricity from the RLLC Act and allow national rules to apply.

Discussion Questions

51. Are there other reform options which you think should be considered?
52. What is your view on the impacts these options would have on electricity bills in your community?

The impact of Option 2 and Option 3 on electricity bills in communities is that electricity charges would increase from the reductions imposed by the *Reckless* case.

We note, however, that prior to the *Reckless* case there were a number of communities that did not charge home owners for electricity up to the maximum cap of the local retailer's standing offer. This needs to be acknowledged, as does the fact that operators understand the benefits of offering value in community living to their customers.

Nevertheless, in response to concerns regarding an increase (or more accurately a return to previous levels) in electricity charges, since the *Reckless* case there have been a number of reforms in the National Electricity Market (NEM).

One of these is the new *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019*, which sets out the legislative framework for the Default Market Offer (DMO) that came into effect in NSW, SA and south east QLD on 1 July 2019.

The DMO is a rule that limits the price that retailers can charge electricity customers on default contracts, known as standing offer contracts, and the AER determines the maximum price that a retailer can charge a standing offer customer each year. Energy retailers can set supply and usage charges however they want, as long as the total bill is equal to or less than the DMO reference price. Retailers must also refer to the DMO when advertising or promoting offers.

Although the DMO does not directly apply to embedded networks, embedded network customers serviced by exempt sellers are indirectly protected. Condition 7 of the AER's Retail Guideline regulates pricing in embedded networks as follows -

> *"Condition 7 – Pricing*
>
> *1 An exempt person must not charge the exempt customer tariffs higher than the standing offer price that would be charged by the relevant local area retailer for new connections, if the local area retailer were to supply that quantity, or estimated quantity, of energy directly to the premises of the exempt customer.*[45]

2 *An exempt person must provide notice to the exempt customer of any change in the exempt customer tariff as soon as practicable and no later than the exempt customer's next bill.*

3 *An exempt person must not impose any charge on an exempt customer that is not charged by the relevant local area retailer for new connections under a standard retail contract. A 'charge' includes, but is not limited to, account establishment fees, late payment fees, debt collection fees, disconnection and reconnection charges and security deposits.[46] The amount of any allowable charge must not be greater than that charged under the relevant local area retailer's standard retail contract.*

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45 The standing offer price includes the supply price and the usage price. Exempt sellers must ensure that the price they charge for each of these parts does not exceed the price charged for the equivalent part of the standing offer.

46 The fees and charges allowable under a standard retail contract are governed by Division 6 of the National Energy Retail Rules (which sets out the requirements for charging a security deposit under a standard retail contract) and may also be governed by jurisdictional legislation."

The DMO has resulted in decreases in standing offer prices, which should be reflected in electricity pricing in embedded networks operating in accordance with Condition 7.

Following further discussions with the policy team at the Department of Customer Service (DCS), we understand that in considering possible options for reform there is a delicate balancing act involved in the Government taking account of all stakeholder concerns and interests.

The *Reckless* case resulted in substantial refunds to home owners initially, and a decrease in electricity charges in residential land lease communities. This has created new expectations for home owners. They want transparency and certainty they are not paying too much for electricity.

Meanwhile, those initial refunds had huge financial impacts for operators. The sudden change to 30 years of government policy sent shock waves through the industry and now, communities have no means of recovering their costs of supplying electricity nor an ability to receive revenue for the benefit of the community from electricity charges. Accordingly, operators also have expectations that this unacceptable situation will be resolved as a matter of priority and in a way that is fair and reasonable for all parties.

The Association is keen to commit our resources and work with the Government and other stakeholders to meet as a collective group to discuss all the issues and come to an agreement on a reform option that is fair and reasonable for all parties.

Discussion Question

53. If your community uses another method other than the Reckless method to calculate electricity charges that has not been considered in this paper, can you describe your experience with this?

The Association is not in a position to respond to this discussion question. Our advice to operators has been to apply the *Reckless* method until legislative changes are made.

Discussion Question

54. As an operator, what costs do you incur due to maintaining an embedded network and to what extent do you recover these?

We reiterate that when operators refer to the costs of 'maintaining' an embedded network they are referring to the ongoing operational costs of actually supplying and on-selling electricity. This involves not only repairs and maintenance to the embedded network infrastructure (i.e. costs of parts and materials, paying contractors,) but also the time and costs involved in meeting their obligations under the RLLC Act and RLLC Regulation, the AER's guidelines, safety standards, etc, (compliance and administrative costs).

As these costs will be different for each community, reference should be made to any feedback provided directly to the Government by operators in response to the Discussion Paper.

In addition, we have provided an estimate of some transitional and ongoing costs of residential land lease communities in the context of the Australian Energy Market Commission's proposals to update the regulatory frameworks for embedded networks to the NSW Department of Planning, Industry and the Environment in October 2019. Some of these ongoing costs are already being incurred:

AEMC Recommendations for Updating the Regulatory Framework for Embedded networks
Cost estimates (current and future) for NSW Residential Land Lease Communities - Full or partial transition

Activity	*Cost (upfront)*	*Notes*
ENSP registration with AEMO	*Unknown*	*AEMO not yet in a position to advise. Page 36 of the Final Report says "Electricity networks eligible for network exemptions under the current framework may incur minor additional costs in preparing applications for network registration with AEMO as a result of the removal of deemed exemptions and narrowing of eligibility for registrable exemptions. AEMO has indicated it would make fees proportionate."*
Off-Market Retailer authorisation with AER	*Unknown*	*Assuming this will also be proportionate. However, the process may also pose costs in the form of external consultant assistance. For example, we're advised that the application papers for a retailer authorisation can be 700 - 1000 pages long.*
NEM Compliant Metering	*$300 - $400*	*Per meter*
Infrastructure & wiring upgrades	*$600 - $700*	*Per site/child connection point*
Labour (electrical contractor)	*$80 - $100*	*Per hour*
Obtain/Upgrade Systems & Software	*Unknown*	
Staff training	*Unknown*	

	Cost (ongoing)	
EWON Membership fees (2018/19)		
Joining & Annual Fees		
Joining Fee	*$125 - $2500*	*Annual fees based on the number of residential customers in embedded network*
Base Fee	*$150 - $2000*	
Customer Number Fee	*$150 - $1000*	
Total Base Fees (First Year)	*$425 - $5,500*	
Casework Fee Per Case		
Enquiry/Complaint Enquiries	*$196.92*	
Refer Higher Level	*$255.98*	
Level 1 Investigation	*$493.95*	
Level 2 Investigation	*$1,334.53*	
Level 3 Investigation	*$3.77 per minute*	
Embedded Network Manager	*$12 - $50*	*Per child connection point per annum. Charges can vary between suppliers and is dependent on size of sites, whether services are bundled with other services or not, etc.*
Metering Coordinator	*$9*	*Per child connection point per annum*
Administrative & Compliance Costs	*$70,000 - $100,000*	*Per annum costs (estimate wages, consultants fees & business costs to manage day-to-day functions & compliance tasks such as dealing with customer enquiries, billing, EWON matters, comply with notification, disclosure & information requirements, connection services & obligations, maintaining 24 hour telephone line, perform B2B requirements, market interface functions, comply with AEMO procedures and AER reporting requirements, data management, record keeping, etc).*
Review & maintain Systems & Software	*Unknown*	
Staff training	*Unknown*	
Sundries	*$500 - $1000*	*Per annum*

NOTE: Cost estimates do not include taxes and other charges, e.g. potential embedded network tariffs imposed by distributors, legal expenses, insurance costs, etc.

It is clear that the costs associated with operating an embedded electricity network are not insignificant, especially for small businesses.

Unfortunately, the *Reckless* approach prevents operators from recovering their costs of providing electricity via an embedded network through usage charges or service availability charges. Therefore, unless they are able to recover these costs through site fees, operators would be providing electricity to home owners at a loss to the business.

Such a policy is unreasonable and detrimental to residential land lease communities and requires urgent rectification.

Discussion Questions

55. Are the current discounts in the Regulation appropriate?
56. Are you an operator or home owner with less than 60 amps? Are there any steps which could be taken to increase this level?

We would not say that the current discounts for service availability charges (SAC) in the RLLC Regulation are "appropriate" per se, because they were arbitrarily determined and introduced in 2006 as a policy response to address the issue of sites with amperage lower than 60 amps.

In the second reading speech on introduction of the *Residential Parks Amendment (Statutory Review) Bill* on 8 November 2005 Ms Diane Beamer, Minister for Western Sydney, Minister for Fair Trading, and Minister Assisting the Minister for Commerce, said:

> *"The supply of electricity to park residents has particularly been a bone of contention, as residents often receive a far smaller capacity of supply than do other members of the community, yet they pay the same rate. Through a new customer services standard, park residents will pay for any supply charges—as distinct from consumption charges—proportionate to the capacity provided by the park owner. In practice, this will mean that residents who receive less than 30 amps of power to their home will only pay 50 per cent of the normal availability charge. If they receive 30 to 59 amps they will pay 70 per cent of the availability charge. Park owners will be obligated to agree to the terms of the customer service standards, which have been developed through extensive consultation, including the Energy and Water Ombudsman's Office."*

It is important to note that the costs of supplying electricity to a site in a residential land lease community are the same whether the site is receiving 20 amps or 60 amps or more, and the levels of amperage supplied to sites are determined by planning and supply authority laws at the time. In communities established many years ago, the provision of lower amperage to sites was normal development.

It is also important to note that in communities where some home owners are retailed electricity by an authorised retailer ***the full SAC is charged by the retailer*** even if the amps supplied (via the embedded network) to the home owner's site is less than 60amps. This amount is ***not*** passed on to the operator like network charges in the NEM. Meanwhile, for other home owners in the same community who are on-sold electricity by the operator, they receive the discounts if their site receives less than 60 amps.

In order to assist in determining how widespread the issue of low amperage is, and what steps could be taken to increase amperage that is less than 60 amps, the Association has undertaken a survey of members with embedded networks in residential land lease communities.

Responses to the survey produced a sample size of 2492 residential sites. Of those,

- 168 (7%) have more than 60 amps
- 1225 (49%) have 31 – 60 amps
- 656 (26%) have 21 – 30 amps
- 443 (18%) have less than 20 amps

Extrapolating these figures across the estimate of all residential sites in NSW it appears the vast majority of sites do not have very low amperage.

Whether anything could be done to increase amps, most respondents to the survey advised that infrastructure upgrades would be needed (such as wiring/cable sizes, distribution/switch boards, transformers, etc) and costs estimates were in the hundreds of thousands of dollars.

SUSTAINABILITY INFRASTRUCTURE

Discussion Questions

57. What difficulties are operators facing in managing solar systems in communities?
58. Are there other forms of sustainability infrastructure that are becoming common in communities?
59. What are the greatest barriers to home owners installing solar panels?
60. How can sustainability infrastructure be made more available in land lease communities?

The difficulties that operators face in managing solar systems in residential land lease communities are not dissimilar to the issues being experienced in the NEM.

These mainly relate to technical and operational challenges, such as embedded network capacity to deal with the impacts of additional energy being generated by home owners' solar panels (e.g. reverse flows, voltage spikes,) visibility, safety and compliance, impacts on the security and reliability of the embedded network, changes needed to network configuration, and of course, fit for purpose rules and regulations to manage access, connections and the rights and responsibilities of home owners and operators.

There is also the issue of cost recovery in facilitating sustainability infrastructure in communities. Currently, the RLLC Act makes no allowance for this.

Apart from the upfront costs of installing solar panels, these issues do create a barrier to home owners installing solar panels. It is our understanding that, at the moment, the installation of solar panels in communities is either being declined or managed as best as possible through curtailment.

In terms of other sustainability infrastructure that are becoming common in communities, we envisage that demand will rise for battery storage and batteries in electric vehicles used to export power.

If the Government wants the industry to be able to keep up with advances in energy generation and supply, then the RLLC Act will need to be less obstructive, particularly in relation to fees and charges (including electricity usage and supply charges), and appropriate policies will need to be developed to help communities accommodate sustainability infrastructure in a way that is beneficial for all parties.

Recommendation

55. The Government to undertake further consultations with stakeholders on required policy and legislative changes to make the RLLC Act less obstructive and more facilitative in relation to the up-take of sustainability infrastructure in residential land lease communities.

SALES OF HOMES

Discussion Question

61. Are the Act's provisions about the sale of a home and interference with a sale working well in practice?

The provisions about the sale of a home and interference with a sale are generally fair and reasonable and working well, however there are some issues regarding operators being accused of interfering with a sale when trying to address non-compliance of a home or site with planning laws.

Section 107(2)(b) of the RLLC Act provides that interference includes *"taking any action to require the home owner to comply with any requirement made by or under the Local Government Act 1993 after becoming aware that the home owner is seeking to sell his or her home (unless the matter has been the subject of previous action)."*

It is rarely possible for an operator to know of every single non-compliance in a community at any one time. Issues are usually identified when homes are sold on site.

Nevertheless, section 107(2)(b) of the RLLC Act causes an issue for an operator where a home owner has made an alteration or addition to a home that is in breach of a requirement made by or under the *Local Government Act 1993* right before issuing a notice of their intention to offer the home for sale or sale itself.

There needs to be a better process for dealing with issues of non-compliance that come to the attention of an operator when a home is sold on site. We recommend an amendment to the RLLC Act that makes it clear there is an exception for an operator disclosing the non-compliance to a prospective home owner and, if the sale proceeds, requiring the incoming home owner to remedy the non-compliance.

An operator should have 14 days in which to notify the existing home owner of issues of non-compliance, regardless of whether or not they have been the subject of previous action, and there should also be a form that an operator can complete and provide to the incoming home owner outlining the outstanding compliance issues and/or payments that need to be settled before a new site agreement is entered into.

<u>Recommendations</u>

56. Amend section 107 of the RLLC Act to make it clear that an operator disclosing an issue of non-compliance to a prospective home owner and, if the sale proceeds, requiring the incoming home owner to remedy the non-compliance, is not an interference with a home owner's right to sell a home.

57. Amend the RLLC Act to allow an operator to:

    a. notify a home owner in writing of issues of non-compliance within 14 days of the operator being notified of the home owner's intention to offer the home for sale, regardless of whether or not they have been the subject of previous action,

b. complete and issue to the incoming home owner a form outlining the outstanding compliance issues and/or payments that need to be settled before a new site agreement is entered into.

Discussion Question

62. Is the Act's control over operators who act as selling agents appropriate?
63. Should operators continue to be able to act as selling agents?

Operators should continue to be able to act as selling agents. However, we are informed that a number of operators are opting not to act as selling agents for home owners.

This is because under section 115(1)(c) of the RLLC Act a home owner or prospective home owner can apply to the NCAT for the resolution of any dispute *"about the amount of a sale commission, incidental expense or other fee or charge payable or paid to the operator or agent in relation to the sale of the home (including a claim that a sale commission is excessive when compared to sale commissions charged by local real estate agents)."*

Putting aside any instances of ridiculously high commissions, unless an operator knows what the sale commissions are for every single local real estate (which is highly unlikely and probably impossible) there is no way for them to be certain that their sale commission will not be considered excessive by a home owner or prospective home owner and subject to a claim.

Consequently, many operators feel that acting as a selling agent is not worth the effort or risk, which is a shame because they are the ones with expert knowledge about community living, can answer questions raised about the community and they know the value of homes in their community within the context of the market.

A more appropriate protection for home owners or prospective home owners would be that they may apply to the NCAT for a review of whether the operator's commission is reasonable, as applies to real estate agents under the new *Property and Stock Agents Act 2002.*

Recommendation

58. Amend section 115(1)(c) of the RLLC Act to allow a home owner or prospective home owner to apply to the NCAT for the resolution of any dispute *"about the reasonableness of an amount of a sale commission, incidental expense or other fee or charge payable or paid to the operator or agent in relation to the sale of the home"* and remove the words *"(including a claim that a sale commission is excessive when compared to sale commissions charged by local real estate agents)."*

Discussion Question

64. Do you have any other suggested changes to the provisions about the sale of homes?

There are concerns in the industry regarding real estate agents' knowledge of and willingness to act in accordance with the provisions in the RLLC Act that are relevant to the sale of homes in residential land lease communities.

For example, operators have reported to us that some real estate agents are not advising the operator of a purchaser until the sale of the home has already been made. This causes problems for the operator when they undertake the appropriate reference checks and negotiations with the purchaser as part of issuing disclosure statements, drafting up site agreements, etc, as they are accused by the existing home owner of trying to interfere with the sale.

While the obligation under section 108(1) of the RLLC Act, *"to ensure that a prospective home owner of the home is advised to contact the operator of the community about the proposed sale before a contract for the sale of the home is entered into"* lies with the home owner, real estate agents are acting **as agents** for home owners and should be bound by the same obligation.

At a minimum, real estate agents selling homes in residential land lease communities should be required to undertake mandatory education as relevant to their functions, comply with section 108(1) of the RLLC Act and operators should have a formal means of reporting non-compliance to NSW Fair Trading for investigation.

Recommendation

59. Amend the RLLC Act, and any other Act, to:

    a. require real estate agents selling homes in residential land lease communities to undertake mandatory education as relevant to their functions and comply with section 108(1) of the RLLC Act, and

    b. provide operators with a formal means of reporting non-compliance of real estate agents to NSW Fair Trading for investigation.

ASSIGNMENTS AND SUB-LEASING

Discussion Questions

65. Should the Act be amended to also prevent an operator unreasonably refusing consent to assignment of a site agreement? Why or why not?
66. Are the provisions relating to the assignment of tenancy agreements working well in practice?

The RLLC Act should not be amended to also prevent an operator unreasonably refusing consent to assignment of a site agreement.

Currently, under section 45 of the RLLC Act a home owner may, with the written consent of the operator enter into a tenancy agreement for, or otherwise sub-let, the residential site or the home located on it or assign the site agreement.

Section 45(2) provides that an operator *"must not unreasonably withhold or refuse consent for a tenancy agreement or other sub-lease that is proposed to be entered into or granted once during any 3-year period in which the site agreement has effect and is for a term of 12 months or less."* Section 45(3) provides that an operator *"must not unreasonably withhold or refuse consent to the assignment of a tenancy agreement."*

Following extensive consultation with stakeholders prior to RLLC Bill being passed in Parliament, the Government made the policy decision that an automatic right of assignment

of site agreements should be removed from the legislation and replaced with an ability for operators and purchasers to enter into a new agreement.

In the second reading speech on introduction of the RLLC Bill on 18 September 2013 The Hon. Anthony Roberts, Minister for Fair Trading, said:

> *"The current system of assigning existing leases upon the sale of a home was seen as complex and confusing.*
>
> *The bill replaces this process with an obligation on the operator to enter into a new site agreement with the purchaser, unless it would be reasonable to refuse.*
>
> *The site fees under the new agreement must be no greater than the current fees payable for the site or the fees payable for comparable sites within the community."*

Accordingly, section 109(5) of the RLLC Act was introduced to allow fair market value to be charged on the sale of a home in conjunction with the change to no longer allow the assignment of site agreements (except with the consent of the operator).

The provisions of section 109 require the operator to act reasonably and they:

- Address the complexity and confusion of the previous system of assigning site agreements.
- Address the problem of old site agreements being lost or damaged by home owners, which means incoming home owners no longer receive incomplete or incorrect information about what is being assigned to them.
- Deal with the problem of site fees being paid by existing home owners who have been living in communities for a number of years that are well below fair market value. This means that other home owners in the community (who are paying site fees at fair market value) are subsidising those home owners' use of communal facilities and services.
- Ensure, by entering into a new site agreement the incoming home owner is provided complete and up-to-date disclosure. They are also given a site agreement in their name and a better understanding of the community's operation, and they pay their fair share of site fees.
- Allow an operator to receive fair market value, undertake appropriate reference checks of an incoming home owner and to refuse to enter into a site agreement with a person who has a history of not paying site fees, which is beneficial for existing home owners.

These issues remain relevant, and the policy response of removing the right to assign a site agreement (except with the consent of the operator) and replacing this process with an obligation on the operator to enter into a new site agreement with the purchaser (unless it would be reasonable to refuse) is the fair and appropriate approach for all parties.

We suspect that those stakeholders who want an automatic right of assignment want it so that existing home owners who are paying site fees well below fair market value can sell their home on site at a premium because of their very low site fees. However, we believe many prospective home owners value good facilities and services in a community more so than very low site fees.

Creating a situation where the outgoing home owner takes a personal windfall, and the incoming home owner continues to pay site fees below fair market value, at the expense of the other home owners in the community is not fair and equitable in the operation of a community.

The reality is that assignment of site agreements can still happen under the RLLC Act, so long as the site fees are at fair market value. Section 109(5) of the RLLC Act provides sufficient protection and transparency to the outgoing and incoming home owners in this regard.

As noted earlier, we are aware that some stakeholders have claimed some operators are charging incoming home owners site fees that exceed fair market value, in breach of section 109(5), though we have not seen any evidence of this occurring.

However, if it is occurring then it is a matter of appropriate compliance and enforcement activity, such as an application by a home owner to the NCAT for orders or investigation and disciplinary action by NSW Fair Trading. It is not a failing of the legislation justifying a reversal of the policy decision regarding assignment of site agreements.

Recommendation

60. The current provisions regarding assignment of tenancy agreements, operator consent to assignment of site agreements, and entering new site agreements to remain unchanged.

Discussion Question

67. Are the provisions about sub-leasing by home owners working well?

The provisions in the RLLC Act regarding sub-leasing by home owners are also considered to be working well. They should remain.

Section 45 gives flexibility to home owners to be temporarily absent from the community (such as for the purpose of an extended holiday) and to enter into a tenancy agreement or otherwise sub-let their home or site, and the operator must not unreasonably withhold or refuse consent (unless the sub-let is for a term of more than 12 months and granted more than once during any 3-year period in which the site agreement has effect).

This helps to create some parameters for sub-letting in communities, particularly as the definition of a "home owner" in section 4 of the RLLC Act contains no requirement that a home owner occupy the home and/or site.

Recommendation

61. The provisions regarding sub-leasing by home owners to remain unchanged.

TERMINATION OF SITE AGREEMENTS

Discussion Question

68. Are the grounds on which operators can terminate a site agreement appropriate? Should any other grounds be added?

We refer to our earlier submissions in response to discussion question 42 regarding restoring the ability of an operator to issue a termination notice for a serious or persistent breach of a community rule. We believe this would help to give more weight to community rules and improve enforcement, whilst still ensuring that any disputes about such termination notices are subject to jurisdiction of the NCAT.

Section 129 of the RLLC Act should also be amended as follows –

> *"129 Application by operator for termination for serious misconduct*
>
> *(1) The operator of a community may apply to the Tribunal for a termination order on the ground of serious misconduct, without the need for a termination notice to be given.*
>
> *(2) The Tribunal may make the termination order under Division 3 if it is satisfied that a home owner, ~~(~~or any person who is occupying or jointly occupying the residential site~~)~~, or any guest or visitor of a home owner or a person occupying the residential site, has intentionally or recklessly caused or permitted—*
>
> *(a) serious damage to any property in the community, or*
> *(b) injury to any person when lawfully present in the community, or*
> *(c) the residential site to be used for any purpose that is illegal at common law or under an Act, or*
> *(d) the operator (or the operator's agent or an employee or contractor of the operator or operator's agent) or any resident to be seriously or persistently threatened or abused."*

Operators should be given protection from, and a means of dealing with, serious misconduct of visitors and guests of home owners and occupants.

Recommendation

62. Amend section 129 of the RLLC Act to give operators better protection from, and a means of dealing with, serious misconduct of visitors and guests of home owners and occupants.

Discussion Questions

69. Are the notice periods that operators are required to give for the different termination reasons appropriate?
70. Are the compensation provisions working well?

The notice periods for different termination reasons are considered appropriate.

In relation to compensation provisions under the RLLC Act, they have been bolstered considerably from provisions that previously applied under the RP Act.

For example, in deciding how much compensation to award a home owner for loss of residency who does not want to relocate to another community, or who is unable to relocate to another community, the NCAT may consider the current on-site market value of the home determined as if the termination were not to occur (section 141(4)(c)). This is a significant protection for home owners.

In increasing the protections for home owners, we are concerned that some of the compensation provisions in relation to homes that are very old and/or dilapidated are not fair and reasonable for all parties.

A lack of maintenance or refurbishment by a home owner means there can be limited value in an old/dilapidated dwelling, most of its value is attributable to its location in the community and its ability to be easily moved is compromised. Yet the compensation provisions in section 140 of the RLLC Act do not take account of this. We reiterate our earlier submissions regarding 'urban renewal' in communities and submit that the compensation provisions of the RLLC Act should encourage home owners to maintain their homes.

Further, the previous RP Act provided that in fixing the amount of compensation to which a resident is entitled in connection with the relocation of a dwelling to a new residential site, or otherwise than in connection with the relocation of a dwelling to a new residential site, the Tribunal must have regard to *"the reasonable costs of repairing any damage to the dwelling arising from its relocation"* (sections 128(3)(d) and 128(4)(d)).

However, section 128(5) of the RP Act provided that *"compensation is not payable under subsection (3) (d) or (4) (d) for an amount in excess of the value of the dwelling."* There is no similar provision in the RLLC Act.

In addition, regarding compensation for the reasonable costs of transporting the dwelling to its new location or disposing of the dwelling, or the reasonable costs of transporting the possessions of the residents of the dwelling to their new place of residence (whether at the dwelling's new location or some other location), section 128(6) of the RP Act provided that compensation is not payable *"for a distance of travel of more than 500 kilometres."*

We recommend that the compensation provisions of the RLLC Act be amended so that the compensation payable in respect of relocating a home, installing a home at a new residential site (including the cost of connecting available services and landscaping and hardscaping) and/or repairing any damage to a home does not exceed the value of the home, and there is a reasonable cap placed on the compensation payable for distance of travel.

<u>Recommendations</u>

63. The notice periods that operators are required to give for the different termination reasons to remain unchanged.

64. Amend the compensation provisions of the RLLC Act so that:

    a. the compensation payable in respect of relocating a home, installing a home at a new residential site (including the cost of connecting available services and landscaping and hardscaping) and/or repairing any damage to a home does not exceed the value of the home, and

b. there is a 500 kilometres cap placed on the compensation payable for distance of travel.

RESOLVING DISPUTES

Discussion Questions

71. Are there other ways that residents and operators can resolve disputes?
72. Are there barriers to accessing mediation provided by Fair Trading? Should mediation continue to be provided by digital means after social distancing measures end?

Our Association is fully supportive of the RLLC Act incorporating a compulsory alternative dispute resolution process into resolving disputes in communities, as it offers many benefits.

Alternative dispute resolution is less confrontational than proceedings in the NCAT, the parties involved have a greater say over the outcome of the dispute, and the process (whether it is a community's internal dispute resolution process or external mediation) can be tailored to the needs of a particular community.

Rather than contemplating other ways residents and operators can resolve disputes, we recommend that consideration be given to:

- projects to raise awareness of the mediation services provided by NSW Fair Trading,
- making it mandatory for parties to try and resolve certain disputes through mediation before an application to the NCAT can proceed (e.g. disputes about community rules and disputes between home owners, as well as objections to site fee increases by notice - refer to our submissions in response to discussion questions 40 and 41), and
- increasing the resources of NSW Fair Trading to improve and provide additional mediation services – in person and via digital means – with mediators having expertise in residential land lease community disputes.[14]

Page 33 of the Discussion Paper notes that few applications received for mediation *"may be due to a misconception about the range of disputes that can be the subject of mediation."* We agree with this statement, hence our suggestions above.

However, we believe another reason is it is easy and relatively cheap for home owners to proceed straight to the NCAT to resolve a complaint or dispute. Many are also encouraged to do so by particular advocates with a vested interest in bringing such proceedings.

Home owners who are concession holders can file an application in the NCAT for a very low fee, and if they do not have a bona fide claim (or are seeking to cause unnecessary cost and disruption for the operator) there is no real or effective costs disincentive for such actions. This is exacerbated by the NCAT not having a triage system in place to vet applications.

On the contrary, operators pay significantly higher fees for all matter types in the NCAT. They often have to seek costly advice when responding to claims (particularly those that are

[14] We note the QLD Residential Tenancies Authority (RTA) launched a new Tenancy Dispute Resolution Web Service in January 2021, which offers customers a digital way to request dispute resolution from the RTA. https://www.rta.qld.gov.au/online-tenancy-dispute-resolution

vexatious or unsubstantiated) and operators also suffer lost productivity due to employees being required to attend the NCAT on multiple occasions before a final hearing.

Most operators' ability to deal with costly and time-consuming NCAT disputes, without adverse impacts on their operations, is extremely limited. Having a dispute resolved 'quickly' and 'cheaply' through the NCAT is rare for businesses. Delays are a regular occurrence, as is the requirement to attend the NCAT on multiple occasions for the same matter, and in most cases, the costs of participating in the NCAT system are much higher for operators than home owners.

We have raised these issues in our response to the Department of Communities and Justice's review of the *Civil and Administrative Tribunal Act 2013* and recommended that a 'triage' system be implemented at the preliminary stage of the application process, to sort and allocate applications according to appropriate criteria.

This would greatly assist in streamlining the NCAT's dispute resolution services, making more efficient use of resources and limiting the time and cost burden on parties, particularly small business respondents. Only after triage should a matter be listed requiring the appearances of parties.

Coupled with a greater role for mediation, we believe communities would greatly benefit from such changes.

Recommendations

65. The Government increase the resources of NSW Fair Trading to:

    a. raise awareness of the mediation services provided by NSW Fair Trading,

    b. improve and provide additional mediation services – in person and via digital means – with mediators having expertise in residential land lease community disputes.

66. Amend the RLLC Act to make it mandatory for parties to try and resolve certain disputes through mediation before an application to the NCAT can proceed (e.g. disputes about community rules and disputes between home owners, as well as objections to site fee increases by notice). This would require a notice from a mediator stating mediation has failed before a party can apply to the NCAT for orders (as currently in section 71(4) of the RLLC Act with respect to excessive site fee increases).

ADMINISTRATION AND ENFORCEMENT

Discussion Questions

73. Are the Commissioner's disciplinary powers adequate?
74. Are there breaches of certain provisions of the Act that are currently not offences that should be offences?
75. Are there any other offences that should be penalty notice offences?
76. Are the powers of Fair Trading investigators appropriate?

We consider the Commissioner's disciplinary powers and NSW Fair Trading investigators' powers to be adequate in investigating and responding to contraventions of the RLLC Act on

the part of operators, however we refer to our earlier submissions in response to discussion question 27.

There needs to be a mechanism for NSW Fair Trading to intervene, at the request of an operator, to investigate and make enforceable orders in relation to harassment and intimidation by home owners, their occupants, visitors or guests.

We are concerned about mental health and wellbeing for operators and staff in communities. They are people too and should be treated with civility. Their access to efficient and effective remedies needs to be improved.

In line with our recommendations regarding home owner obligations, there should also be penalty notice offences attached to those obligations concerning behaviour towards other persons and property (sections 36(d), (f), (i) and (j) of the RLLC Act).

Furthermore, as part of reviewing the penalty amount for failing to provide a disclosure statement, all other penalty amounts should also be reviewed for appropriateness, particularly those that apply to a failure to perform an administrative task (e.g. operator fails to notify the particulars of a community (section 16(5), $1,100 for a corporation and $550 for an individual)).

Recommendation

67. The Government review penalty amounts under the RLLC Act for appropriateness, particularly those that apply to a failure to perform an administrative task.

COMMUNITY ENGAGEMENT

Discussion Questions

77. Would you be interested in attending a community information session via webinar?
78. Do you have any access issues preventing you from attending a community engagement session digitally? For example, internet access, computer or smartphone access, digital literacy etc.

Community operators are keen to attend information sessions on an ongoing basis to refresh and improve their understanding of the RLLC Act and their obligations. The COVID-19 pandemic has accelerated the industry's take-up of digital communication tools and so there are no issues with operators attending community information sessions via webinar or other digital means.

Our Association has, for many years, provided education and training to operators via webinars and our online meetings and Q&A sessions for members have increased exponentially since March 2020. We would be happy to partner with NSW Fair Trading to deliver community information sessions digitally and in-person around the State.

Recommendation

68. That NSW Fair Trading work closely with stakeholders on delivering community information sessions digitally and in-person around the State.

ADDITIONAL MATTER - DECEASED ESTATES

Another matter that we wish to raise for consideration as part of the statutory review is what happens following the death of a home owner.

Currently, when a home owner passes away the site agreement does not terminate. Section 4(b) of the RLLC Act has the effect that a home owner's personal representative or beneficiary of the estate becomes the home owner with all the rights and responsibilities under the RLLC Act and the site agreement.

This is very different to what happens pursuant to section 108 of the RT Act, which provides that on the death of a sole tenant either the landlord or the legal personal representative of the tenant may give a termination notice to the other person, and the NCAT can make orders for termination where vacant possession is not provided in accordance with a termination notice.

The difficulties faced by operators when home owners pass away are:

1. Until a deceased estate is settled, multiple persons purporting to be representatives or beneficiaries may be entitled to exercise rights as the home owner, including taking up occupation of the home/site. This can be anyone from next of kin, to extended family members, ex spouses, friends, lawyers, the NSW Trustee and Guardian, etc.

2. The representatives or beneficiaries do not make their intentions known to the operator in a timely manner.

3. Operators have no rights to request and be provided with particular documents to verify entitlements of representatives or beneficiaries, such as wills, letters of administration, grants of probate, etc, or the progression and status of administering the estate.

4. Site fees, utilities and other charges often go unpaid for months and even years incurring significant amounts of debt.

5. Operators incur further delays and costs trying to seek appropriate orders from the NCAT, a process that is riddled with inefficiencies.

If it remains that a site agreement does not terminate on the death of a home owner, then provisions on rights, obligations, clear timelines and processes are desperately needed in the RLLC Act to address the issues outlined in points 1-5 above.

<u>Recommendation</u>

69. The RLLC Act be amended to include appropriate provisions on the rights and obligations of relevant parties following the death of a home owner and to provide clear timelines and processes for addressing the issues that can arise.

CONCLUSION

We reiterate that the RLLC Act has provided a legislative framework that has rejuvenated the industry, encouraging participation from current and new investors, and overall it is working well. It is therefore critical for the industry that this statutory review of the RLLC Act does not reverse or erode the regulatory improvements that have been made for communities across NSW.

The recommendations we have made seek to refine the existing rights and responsibilities of operators and home owners, address some issues that have arisen since commencement of the RLLC Act in 2015 and facilitate further innovation and investment in new communities, and revitalising old ones, whilst still ensuring appropriate protections for home owners.

Thank you for taking into consideration the issues we have raised. We would like to meet with DCS officers to provide further feedback on the Discussion Paper, discuss our questions and concerns and assist in the development of appropriate solutions.

We would therefore be grateful if a DCS policy officer could please contact Shannon Lakic, Policy, Training and Executive Services Manager on (02) 9615 9940 or email shannon.lakic@cciansw.com.au to make arrangements.

Yours sincerely

Lyndel Gray
Chief Executive Officer