

RESIDENTIAL LAND LEASE COMMUNITIES ACT – REVIEW

We refer to the current review of the RLLC Act and provide the following response on behalf of Hampshire Villages, to the matters raised:

CHAPTER 1 - OBJECTIVES

1. Are the objects of the Act still relevant to residential land lease communities?

Yes, we believe it is important that the objectives strike a balance between the needs and desires of home owners and community operators. It is important that prospective home owners have information and home owners have protections, but it is equally important that the objectives encourage the growth and viability of land lease communities as a housing choice in NSW.

2. Has the Act been effective in delivering its objects?

Yes. Although we did not see the need for wholesale change when the Residential Parks Act was reviewed prior to commencement of the RLLC, we believe that the rights and obligations of all parties are much clearer than they had been previously.

Over the past 5 years or so, there has been a growth in the number of communities providing this form of housing, so the objective of encouraging growth and viability has well and truly been satisfied.

The disclosure regime has been very good at informing prospective home owners and the mediation process within the legislation has decreased the amount of tribunal applications and internal conflict within residential communities.

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.

No.

CHAPTER 2 – INFORMED CHOICES FOR PROSPECTIVE HOME OWNERS

4. Is the ban on inducing a person to enter into an agreement through false, misleading or deceptive statements or promises working effectively?

As far as it is related to operators, we believe that it is working effectively. The difficulty is that it is not only operators that engage in the sale of moveable dwellings in residential land lease communities.

It is our very strong belief that the same obligations should be imposed upon real estate agents and individual home owners. If the purpose is to ensure that a prospective home owner can make an informed decision, we can see no basis for not expressly banning agents and home owners from engaging in false, misleading or deceptive statements or promises.

5. Does the disclosure statement provide enough information to a prospective home owner to allow them to make an informed decision about purchasing into the community?

Why/why not?

Yes.

6. Is the form of the disclosure statement easy for prospective home owners to understand?

Yes

7. Is the disclosure statement provided at the right time? I.e., should it be given earlier or later?

The 14 day period can be an issue for some prospective home owners. There have been a number of times where purchasers, because of their personal circumstances (eg divorce settlement, domestic violence) would like to purchase the home and move in before expiry of 14 days. We recommend a 7 day period, or alternatively an ability to obtain a Solicitors certificate if a prospective Home owner would like to reduce the disclosure period, akin to the type of certification that can be obtained to avoid the cooling off period in normal residential purchases.

There are times when a purchaser may have expressed an interest in a particular property, have received a disclosure document about that property but then changed their mind and switched to a different property. If there are some differences in the disclosure document between premises in the same community, then the period should be able to be shortened.

8. Does the disclosure statement form need to be improved? If yes, how would you improve it?

~~No.~~

The disclosure documents should be limited to reflecting the status of relevant matters at the time that the representations are made and should not be capable of being used as an argument to prevent future development or changes to amenities. For example, if the disclosure document says that there is a tennis court but that facility is rarely used, a park operator should not be prevented from repurposing that tennis court to something more useful. We note that under such circumstances, a home owner could seek relief under section 64.

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?

Yes

10. Are you aware of home owners not being provided with the correct written site agreement?

No

11. Does having a prescribed standard form site agreement work well?

Yes

12. Should the list of prohibited terms in site agreements be modified? If so, what type of terms should be included or removed?

Prior to the commencement of the RLLC Act, the Residential Parks Act allowed site agreements to provide that the resident must insure their home and have public liability cover. We believe such a term should again be permissible.

It is our view that the prohibition on such a clause under the RLLC is to the detriment of home owners and park operators alike. It is our submission that those drafting the RLLC Act, misunderstood the nature of such a requirement and the benefit to residents as a whole. The insurance requirement was a level of protection for neighbours and visitors to individual sites under the control of residents.

The reason behind having an insurance clause, was not to pass risk from a park operator to an individual resident, but to ensure there was cover for residents homes and to ensure there was cover should someone be injured on a residential site under the control of the resident.

There have been instances in the last couple of years where residents homes have had a fire (invariably because of an electrical appliance) and the fire has spread to adjoining residences of neighbours, causing damage. If a home is not insured, there is the risk that innocent third parties will suffer loss as a consequence of the conduct of their neighbour. This could result in homelessness for residents and potential costs for park operators, who would be required to engage contractors to demolish and remove badly fire damaged properties without insurance.

13. Should the requirements about additional terms be changed or improved?

Yes, as above.

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?

Not Applicable.

15. What information should be included on the public register and how should the information be presented?

I note there is a risk that some home owners or advocates may seek changes to a public register, so that it may be more actively used as a means of naming and shaming an operator. We would counsel against any such use, as it may be a subjective matter rather than an objective finding and may significantly impact the value of pre-loved homes belonging to Home owners within a community.

CHAPTER 3 – SITE FEES

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?

Yes, such an approach allows for maximum flexibility and ensures that rent increases can be tailored to community needs for upgrades and improvement. The ability to have fixed methods provides certainty for Home owners for a specified period, while the by notice allows for a review to catch increases in any statutory charges, newly imposed government fees or unusual increases in operating costs.

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?

The existing system is working well. Where we have used fixed method, we have used a very simple 2 part methodology which is easily understood by Home owners.

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

Although we have no issue with an increase once per year, we would prefer it is not once every 12 months. We would prefer to see increases limited to once every calendar year. In recognition of uncertainty caused by the COVID-19 pandemic, we deferred issuing rent increases in a number of parks for a period after the 12 month anniversary of the last increase. As a consequence, the anniversary date for subsequent years has now been also been pushed back resulting in an adverse impact to us in future years as a consequence of granting a concession to assist Home Owners in the current year.

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?

No. If the parties have freely contracted with each other and agreed to fixed increases, we can see no basis for a challenge.

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

Yes. Home owners are more likely to seek to resolve disputes outside of the Tribunal and are often keen to enter into multi-year arrangements, which gives parties certainty and results with ~~in~~-less conflict and stress for all parties.

21. Should there be changes to the grounds for challenging site fee increases by notice?

No

22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest?

This would depend on what other changes are proposed. After the review of the Residential Parks Act, there were significant changes made to the factors to be considered when determining site fee disputes. In particular market rents in comparable premises was removed. Although initially not happy with the change in factors, operators accepted the position on the basis that residents could not assign their agreements to a purchaser.

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

Yes

24. Have you entered into an agreement with an operator/home owner that included a voluntary sharing arrangement?

No

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?

N/A

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?

N/A

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

Yes. Neighbours often have petty disputes that involve only themselves. In such circumstances it is often a case of he said/she said and it is difficult for a park operator or its staff to know where the truth is.

Many of these petty disputes about noise or pets, should be capable of being resolved by mediation at NCAT without the intervention of the park operator.

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 Act is fairly clear on the obligations for maintenance of the site and whose obligation it is. The only place where there could be room for some clarification is in respect of trees, shrubs or vegetation planted by a home owner or their predecessor. Where these are planted by a Home owner and not the park operator, then the Home owner should be responsible for their maintenance and any damage resulting from the planting.

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?

The Act is relatively clear. The difficulty is where the park operator is trying to ensure continued compliance with the Local Government Regulations. In particular, trying to stop Home owners undertaking non-compliant works, for eg. Closing in an associated structure to make a habitable room or enclosing the sides of a carport. This is particularly difficult when Home owners, committee members and their advocates often have little or no understanding of the Regulations.

30. Should there be any changes to the provisions about repairs and maintenance of the home, and alterations, additions and replacement of the home?

The Act refers to serious dilapidation as an issue in seeking repair and maintenance, which can be used by a park operator to seek remediation. As the park operator has no right to inspect premises internally, it is virtually impossible for a park operator to establish that premises are seriously dilapidated.

The benchmark under the previous legislation was merely dilapidation. As there has been no cases outlining what serious dilapidation is, we do not believe that the current requirement is useful.

We recommend that the test be merely dilapidation and that park operators have the ability to serve notice on a Home owner, so they might undertake an inspection if dilapidation is suspected.

As dilapidation of adjoining premises may significantly impact the value of dwellings within a community, it would be to ~~for~~ the benefit of residents that a park operator could inspect and require works to be undertaken to repair and maintain premises.

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

We have not found the special levy provisions particularly useful. We have always found it better to reach an agreement for staged future increases with residents in return for upgrades and new facilities.

Although Home owners would generally prefer that their site fees never increased, they are also aware that upgrades and new facilities increase the value of their Home within the community.

The argument that a new facility is a one off cost and should not give rise to a permanent increase is nonsense and fails to recognise the ongoing costs of maintaining, repairing and upgrading facilities within a community.

32. Are the rules of conduct adequate and are they having the intended effect of ensuring appropriate conduct by operators?

The rules of conduct are adequate and set a good base for the conduct of operators and their staff.

We have only experienced a small issue in relation to the rules of conduct in one community that we manage. In that community, some members of the residents committee have ~~seen~~ fit to door knock and hold meetings with fellow residents in order to actively ~~solicit~~ teek complaints against the community managers.

We have received correspondence from a number of residents in the village who are unhappy with the conduct of that committee and who feel that this is a form of bullying and harassment of the managers.

It may be appropriate for there to be rules of conduct for Home owners and Resident Committee members, as park operators have an obligation to staff to provide a safe place of work.

33. Should the content of the rules be expanded to cover other issues?

See above at 32.

34. Are the operator education requirements effective?

Yes they are.

35. Can you suggest other educational resources or topics to facilitate a greater understanding of the role and responsibilities under the Act?

No, as stated above, we believe that the current education requirements are effective and there is no evidence that park operators and their staff generally do not understand their role and responsibilities and act accordingly. We believe that this view is supported by the absence of Tribunal decisions where Operators have been found to have acted contrary to their responsibilities.

36. What delivery methods could be used to improve mandatory education?

The online delivery modules are more than adequate, particularly having regard to COVID 19.

37. Before reading this discussion paper, were you aware of the option of communities having community rules?

Yes

38. Does your community have community rules?

Yes, all of our residential communities have community rules. These are largely modelled on the model retirement village rules which were developed by Fair Trading. Although we are not retirement villages, the demographic of our villages is predominantly 55 years plus. The rules set a good base line for setting expectations in a close living environment.

39. Does your community have a community rule regarding age restrictions? If so, does this impact your community?

No. There have been some communities where younger people with children have purchased in the community and Home owners over 50 years, which is the majority of our Home owners have not been happy. They see the needs of the different demographics as being very different.

40. Where residents committees are in place, should they be involved in the development of community rules? Why or why not?

No. It is better to operate from a set of model rules with some variation. Many residents have concerns about fellow residents on committees having a governing role over their lifestyles. Our experience in helping establish residents' associations and committees in our villages is largely positive, but there are always numbers of residents who feel the committees look after themselves, are dysfunctional and they do not want them telling them what to do.

We submit that section 95 of the Act should be amended so that any dispute about community rules should be dealt with in a similar fashion to disputes about site fee increases (ie. consistent with section 69). It is unreasonable that an individual resident may apply to have a rule impacting all residents amended or set aside based upon their views without the other residents having a right to be involved in the application process.

We refer to the decision Tribunal decision in RC 18/4890 where a single resident successfully applied to have a rule at Crystal Waters Estate changed to prevent any residents using electrical or mechanical power equipment at their sites for hobby purposes. We submit that it is unreasonable that the significant majority of residents at the park who are upset with this decision had no say in the Tribunal process.

41. If there is no residents committee in place, how could residents contribute to the development of community rules?

No response.

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

Yes.

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

Absolutely.

44. Should residents committees also be required to take part in mandatory education? If yes, what topics should be covered?

It is imperative that residents' committees take part in mandatory education. They should have a good understanding in the operation of the Act and the operation of the Local Government Regulations.

45. If your community has a residents committee, is it working effectively?

The majority of committees work well, there are of course some exceptions to the rule. Difficulties can arise where there are long standing residents and newer residents. Long-

standing residents can have a powerful grip on committees and actively door knock and lobby when any elections are due.

We have traditionally encouraged the establishment of incorporated associations, which we pay the establishment costs of.⁵ That way there is a model constitution which stipulates the basis upon which residents deal with each other and provide transparency and financial accountability. Disputes in relation to resident activities and or committees can be dealt with in accordance with clear rules.

46. Do you have any suggestions for changes to the way residents committees are established or run?

See above.

CHAPTER 5 - UTILITIES

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

We consider these provisions are satisfactory.

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

We consider these provisions are satisfactory.

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

We believe that it is appropriate for electricity charges by park operators to residents be regulated. However, the decision in Reckless has resulted in unfairness to park operators who have to have to supply and maintain network infrastructure for which they can no longer charge. In addition, as electricity usage by park operators is skewed towards off-peak periods relative to typical usage patterns of residents (especially those with solar generation systems), the averaging of usage charges the Reckless method entails results in them subsidising residents who do not have time-of-use metering. Further, the anomalies caused by Reckless act as a disincentive to investment by park owners to in renewable energy generation.

As noted in by the Court in the Reckless decision, the dispute arose because of the failure of legislators to consider the deregulation of the electricity market that occurred between the passing of the RLLC Act and its commencement. As a consequence the reference to a “regulated offer retailer” in section 77 has come to be meaningless with regard to electricity. We submit that the simplest solution to overcome this anomaly would be to add the words “or

the standing offer tariff of the relevant default retailer”. We note that, prior to the decision, it was the view of Fair Trading that standing offer was the correct tariff that should be used.

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

Option 3.

51. Are there other reform options which you think should be considered?

Park owners are currently limited to charging residents for electricity usage at cost. In practice, because of the prevalence of single rate meters in legacy embedded network, operators are generally incurring a loss for electricity supply. They also cannot charge any amount in respect of the cost of maintaining the embedded network. It is not reasonable to expect commercial operators to run an embedded network. We suggest that the government give consideration to how these embedded networks could be integrated into the grid so that residents are charged on the same basis as the majority of households in NSW.

52. What is your view on the impacts these options would have on electricity bills in your community?

These options would result in residents paying charges that are equal to or closer to those paid by NSW households generally.

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?

N/A

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

Costs can vary significantly depending upon age, size, configuration and condition. Generally, embedded networks have been in place for many years and maintenance costs will continue to increase over time and will ultimately require significant replacement costs. We believe that the regime in place prior to Reckless generally enabled operators to recover sufficient amounts to cover these costs. However, in the absence of any legislative change, these costs will need to be recovered by way of increased rents in the same manner as any other costs.

55. Are the current discounts in the Regulation appropriate?

When using the Reckless methodology the discounts are no longer relevant.

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?

Amperage supplied varies between parks and, in some instances between sites in parks. There is currently no incentive for a park operator to invest in upgrading the supply to an existing site. An operator is prevented by the legislation from recovering any net revenue from making such an investment.

57. What difficulties are operators facing in managing solar systems in communities?

-If residents instal a solar system that feeds excess electricity back into the embedded network through a single rate meter, they may be effectively receiving a feed-in tariff equal to the average tariff paid by the operator rather than the lower tariff than generally applies for the period during which this excess electricity is generated. In addition, we understand that significant numbers of systems feeding back excess electricity at the same time have the potential do damage the transformer servicing a park.

58. Are there other forms of sustainability infrastructure that are becoming common in communities?

Not that we are aware. The limitations in section 77 discourage investment by park owners and do not incentivise residents to invest.

59. What are the greatest barriers to home owners installing solar panels?

We are not aware of any such barriers

60. How can sustainability infrastructure be made more available in land lease communities?

Amend section 77 so that park owners are able to derive a financial return from investment.

CHAPTER 6 – THE END OF THE AGREEMENT

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

We find that they largely work quite well. The only real issue is where there are potentially multiple people who could satisfy the definition of Homeowner. For the most part this arises when there is a Deceased Estate.

We have been involved in a couple of cases where a person previously unknown to us appears with what they purport to be the Last Will and Testament of a deceased resident. They claim to have the rights of a home owner and demand the right to sell the home without going through the usual probate process.

If they are named as executor or beneficiary under the Will there have been occasions that they have attempted to argue the usual legal requirements do not apply.

This puts park operators in a very difficult position, as we often have no way of knowing whether it is in fact the Last Will, whether there are potentially other beneficiaries of the Estate.

Under the usual rules of succession in NSW, assets of a deceased vest in the Public Trustee until there is a Grant of Probate if there is a Will or Letters of Administration, if there is no Will

62. Is the Act's control over operators who act as selling agents appropriate?

Yes

63. Should operators continue to be able to act as selling agents?

Yes. Operators are generally in a better position than a real estate agent to attract prospective purchasers and inform them of about the living in the community. This is likely to result in new home owners being better informed about the community and current owners achieving a quicker sale as a higher selling price.

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

Section 107 restricts a park owner from requiring an outgoing resident to rectify breaches of the Local Government Act. However,

there is no proper reason that an incoming home owner should not be informed of such non-compliance, particularly when a park owner's silence on the matter could subsequently be construed as misleading or deceptive conduct. As a matter of practice, any issues of non-compliance often only become apparent when the condition of a dwelling is reviewed at the time it is offered for sale. Section 107 should be amended to make it clear that notifying a prospective home owner of a such a matter does not, of itself constitute an interference with the sale.

65. Should the Act be amended to also prevent an operator unreasonably refusing consent to assignment of a site agreement? Why or why not?

Definitely not. The provisions under the previous Act were deliberately changed in this regard for good reason and, as a trade-off park operators were required to limit bring in new home owners at the same rent as the outgoing home owner or the prevailing rent in the community. Since this change, we have never had a complaint that in incoming home owner has not been able to obtain an assignment of an existing site agreement.

The reasons for not requiring park operators to consent to the assignment of site agreements include:

- a) agreements may not be in writing and the documents may be incomplete or their authenticity may not be able to be established;
- b) agreements may have a lack of specificity and/or reflect requirements that existed under previous legislation; and
- c) agreements may include terms negotiated with an individual as a specific point in time which should not be available to a successor.

66. Are the provisions relating to the assignment of tenancy agreements working well in practice?

Yes.

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

-Yes. We note that most home owners have a strong preference for living in a community where homes are owner occupied as they feel that any significant level of sub-letting increases the chances of non-compliance with park rules. The current provisions strike a reasonable allowance between discouraging the purchase of homes as investment properties whilst still allowing for renting out a home for a reasonable period.

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

Yes.

69. Are the notice periods that operators are required to give for the different termination reasons appropriate?

Yes.

70. Are the compensation provisions working well?

Yes.

CHAPTER & - RESOLVING DISPUTES

71. Are there other ways that residents and operators can resolve disputes?

See above. Our experience since the introduction of the Act has been that most disputes have been resolved in a reasonable timeframe and without significant cost to the parties. The exception has been those situations where a home owner is experiencing cognitive impairment (for example the onset of dementia) and behave in a manner that interferes with the rights of other residents and staff. If these issues cannot be resolved by the intervention of supportive family members, the only practical recourse of a park operator is to seek termination once these behaviours have escalated to the point of serious or persistent breaches of the site agreement. We suggest that consideration be given to mechanisms that allow for more sensitive resolution of such issues. For example an ability for the operator to refer complex mental health issues to appropriate government authorities.

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?

We do not believe that there are any barriers to accessing mediation. We agree that digital communications should continue to be used wherever appropriate.

CHAPTER 8 – ADMINISTRATION AND ENFORCEMENT

73. Are the Commissioner's disciplinary powers adequate?

Yes.

74. Are there breaches of certain provisions of the Act that are currently not offences that should be offences?

No.

75. Are there any other offences that should be penalty notice offences?

No.

76. Are the powers of Fair Trading investigators appropriate?

Yes.

77. Would you be interested in attending a community information session via webinar?

Yes.

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.

No.

ADDITIONAL MATTERS

- a) Section 76 should be amended to remove the restriction on services for which a park operator may charge home owners. If the park operator is prepared to supply additional services on a basis that is acceptable to a home owner (for example Wifi, telephone, gardening, handyman) there should be no general prohibition on charging for such services.
- b) The Act should respect the privacy of home owners by requiring that they must opt in before operator is required to disclose their particulars to government agencies or the residents' committee

There should be a definition and a statutory test for a "carer" for the purposes of Section 44. Our experience has been that home owners may claim that an adult child is their carer without providing any evidence when it seems more likely that person is seeking to move into the site because of their own needs rather than those of the home owner. This has resulted in complaints by other home owners of a reduction in their amenity.

c)