

Response to the

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

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Combined Pensioners & Superannuants Association of NSW Inc (CPSA)

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CPSA receives funding support from the New South Wales and Australian Governments

CPSA is a non-profit, non-party-political membership association founded in 1931 which serves pensioners of all ages, superannuants and low-income retirees. CPSA's aim is to improve the standard of living and well-being of its members and constituents. CPSA receives funding support from the NSW Government Departments of Communities & Justice and the Australian Government Department of Health.

CPSA welcomes the opportunity to comment on the statutory review of the Residential (Land Lease) Communities Act 2013 (RLLC Act, or the Act). CPSA's members and constituency are for the most part older low-income retirees. As land lease communities are, under this Act, portrayed as affordable living arrangements, CPSA has a strong interest in ensuring legislation protects the interests of land lease residents many of whom live on low, fixed incomes such as the Age Pension¹.

Recommendations

Recommendation 1: That an operator licensing system is embedded within the Residential (Land Lease) Communities Act.

Recommendation 2: That a cap is set on site fee increases which are tied to the pension so they cannot exceed more than one third of pension indexation increases

Recommendation 3: That the Residential (Land Lease) Communities Act is amended to allow residents to challenge unfair fixed method fee increases at the NSW Civil and Administrative Tribunal.

Recommendation 4: That details about how tenants in land lease communities are charged for utilities be incorporated into the Residential (Land Lease) Communities Act.

Recommendation 5: That the Reckless approach is embedded into the Residential (Land Lease) Communities Act.

¹ 2016 Census data stated 18,221 permanent residents of residential parks, camping grounds and manufactured homes were aged over 65.

Objectives of the Act

The objectives of the Act have been achieved at differing levels. The objective to facilitate growth in the sector has arguably been the most successful of all objectives. Since the RLLC Act assented in 2013, the residential parks register shows a growth in the number of residents, the number of sites and the number of communities in the land lease industry. However, the other objectives such as the improvement of the governance of residential communities, protecting home owners from bullying, intimidation and unfair business practices have fallen to the wayside. This may be because the objectives of the Act appear to be managing competing interests. CPSA is of the opinion that the Act in its current form favours operators and encourages growth more so than it protects residents. This must change. A place to begin to improve governance and protection for residents would be to implement an operator licensing system. Requiring an operator to hold a license would allow the regulator to hold operators to account by opening the possibility for education and engagement to occur between the regulator and operators when wrongful, non-compliant behaviour takes place. Currently, the Residential (Land Lease) Communities Regulation 2015 (the Regulation) can only enforce financial penalties on non-compliant operators, the maximum penalty being \$1,100. This is not sufficient in preventing bullying, intimidation and unfair businesses practices.

Recommendation 1: That an operator licensing system is embedded within the Residential (Land Lease) Communities Act.

Site fees

Fee increases tied to pension indexation

On 30 January 2015, CPSA issued a media release titled '*Pensioners risk losing future pension rises under new park rules*'. Shortly after the RLCC Act was introduced CPSA feared that tying site fee increases to Age Pension increases would allow operators to take a pensioner's entire pension increase. CPSA's fears were met and, in some cases, exceeded. Anecdotal evidence from park residents suggests that some fees were increased at rates up to double that of pension indexation increases.

Tying site fee increases to pension increases with no cap in place, allows operators the opportunity to undermine the pension indexation mechanism. The pension indexation mechanism is used to ensure pensions maintain their purchasing power. Pensions are indexed according to the higher of the Consumer Price Index (CPI) or the Pensioner Beneficiary Living Cost Index (PBLCI). For people on the couple pension rate, the newly established pension rate is benchmarked to 41.76% of the Male Total Average Weekly Earnings (MTAWE) whilst the single rate is benchmarked to 66.33% of the couple rate². If the pension rate is below MTAWE it is brought in line to the respective benchmark. The use of these indexes and benchmarks ensures the pension increases in line with living costs and is benchmarked to growing levels of wealth. PBLCI, CPI or MTAWE do not account for only housing expenses, they measure the change in price of a range of consumer goods and services. It does not make sense to allow the cost of site fees increases to match the entire pension indexation increase, doing so would undermine the pension indexation mechanism, reducing the purchasing power of the pension.

Recommendation 2: That a cap is set on site fee increases which are tied to the pension so they cannot exceed more than one third of pension indexation increases.

Fixed method site fee increases

The Act, in its current state, allows for operators to increase fees to whatever rate they see fit. Section 65 (2) (a) states that site fees may be increased by fixed amounts or by a fixed calculation (for example, in proportion to variations in the CPI or the Age Pension). The standard form residential site agreement provided in Schedule 1 of the Regulation states that site fees will be increased by one of the following: in proportion to variations in the CPI; by a fixed dollar amount; by a fixed percentage; by a percentage of the increase in the Age Pension; or other. It is the 'other' option that causes significant issues.

It may be fairly argued that an incentive for choosing a fixed site fee increase is the predictability such an increase should produce. For people on low fixed incomes such as Age Pension recipients the ability to budget is essential to making ends meet. However, the 'other'

² Klapdor, 2020:

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/August/Pension_and_JobSeeker_indexation>

option has been used by operators to create a calculation made up of several components and passed onto residents that could not be readily calculated and accurately budgeted for, diminishing a significant incentive of fixed fee increases and producing large site fee increases. An example of such a method can be found in the NSW Civil and Administrative Tribunal (NCAT) case '*Morris & Ors v Kincumber Nautical Village*' in which 52 park residents raised complaints with the operator's fixed method site fee increase calculation that is as follows:

Site fees shall be increased by the sum of:

1. Any positive change in the CPI; plus
2. 3.75%; plus
3. A proportional share of any increase in costs incurred by the Operator since the calculation of the last site fee increase calculation for the following:
 - electricity and water (net of any amount that has been recouped from Home Owners); plus
 - gas; plus
 - communication; plus
 - insurance; plus
 - rates; plus
 - any other government (federal, state or local) charges or taxes other than company tax.plus
4. The effect of any change in the rate of GST or similar tax that is included in the site fees.

This calculation hardly seems fixed and cannot be reasonably calculated ahead of time by residents, rendering the ability to budget for site fee increases impossible.

NCAT ruled in favour of the applicants (although, at the time of writing, there is an appeal process underway) but was only able to do so because the Tribunal acknowledged that they believed the above calculation is not a fixed method. As is stated in the discussion paper for this statutory review, an agreed upon fixed method fee increase may not be brought to the Tribunal to be challenged. Negotiation between the two parties is possible but the power imbalance between resident and operator made possible through section 109 (2) (b) of the

Act means operators hold significant power during negotiations, rendering fixed method fee increases essentially non-negotiable.

Considering a fixed method increase may be in place for the entirety of a site agreement, placing significant burden on a resident if the fee increases become unreasonable, it is unacceptable that the Act does not afford any right to challenge such an increase.

Recommendation 3: That the Residential (Land Lease) Communities Act is amended to allow residents to challenge unfair fixed method fee increases at the NSW Civil and Administrative Tribunal.

Utilities

Utility charging in a land lease community

CPSA views section 77 (3) is an important basic protection for home owners. Operators should not be able to make a profit by on selling electricity, as this is an essential service, which in an embedded network means residents are drastically restricted in their ability to change energy retailers. That being said, this section only applies to home owners, tenants living in land lease communities fall under the jurisdiction of the *Residential Tenancies Act 2010* (RT Act). The RT Act assumes tenants purchase electricity from an energy retailer, affording tenants market offers and potentially cheaper deals. However, this is not the case in an embedded network, tenants are not able to switch energy retailers and as a result are often forced onto a standing offer. So, tenants renting in a land lease community may be charged a more expensive energy deal whilst neighbouring home owners are charged according to section 77 (3) of the RLLC Act.

Recommendation 4: That details about how tenants in land lease communities are charged for utilities be incorporated into the Residential (Land Lease) Communities Act.

Electricity reform charging option

CPSA supports option 1 of the possible reform options for embedded network electricity charging. The Reckless method provides an easily calculatable method of charging for electricity use which would significantly improve understanding around charging costs in

embedded networks and allow for easier budgeting to take place. The Reckless method also ensures operators and third-party energy suppliers cannot charge residents more than the electricity they have consumed. CPSA is of the opinion that the other options listed within the discussion paper would not fairly suit residents. This is because the resident is already paying site fees which should cover the cost of maintenance and administration of their electricity supply. Currently land lease residents are offered few protections and become ineligible for certain concessions or rebates such as the pensioner water rebate that would make energy costs more affordable. The Reckless method offers the best deal for consumers.

Recommendation 5: That the Reckless approach is embedded into the Residential (Land Lease) Communities Act.