



26 February 2021

Statutory Review of the Residential (Land Lease) Communities Act 2013
Policy and Strategy Division
Department of Customer Service
4 Parramatta Square
12 Darcy St
PARRAMATTA NSW 2150

Dear Policy and Strategy Division

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

Thank you for the opportunity to comment on this discussion paper.

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. EWON responds to complaints from customers on metering work and electricity supply interruption issues relating to retailer and distributor activities. Our comments are informed by our investigations into these complaints, and through our community outreach and stakeholder engagement activities.

We have only responded to those questions in the consultation paper that align with issues customers raise with EWON, or with our organisation's operations as they relate to this rule change.

If you would like to discuss this matter further, please contact me or Rory Campbell, Manager Policy and Research, on (02) 8218 5266.

Yours sincerely

A handwritten signature in black ink that reads "Janine Young".

Janine Young
Ombudsman
Energy & Water Ombudsman NSW

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Chapter 1 – Objectives of the Act

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

The objects of the Act are still relevant, however they are not effective in ensuring prospective home owners can make informed choices regarding utility services (electricity, gas, sewerage and water) within residential land lease communities. This submission addresses these issues in detail below.

Chapter 2 – Informed choices for prospective homeowners

Marketing and information disclosure – 5. Does the disclosure statement provide enough information to a prospective homeowner to allow them to make an informed decision about buying into the community? Why/why not?

Customers in embedded networks contact EWON seeking general information about embedded networks; consumer rights such as rebates and concessions, and access to retail competition. Most complaints arise after residents learn they are in an embedded network and not before they finalise their purchase.

Section 5 – Utilities of the disclosure statement should be expanded to provide the following additional information:

- whether the utilities are part of an embedded network and whether it is managed by the operator or a third-party organisation;
- utility rates and charges, including any applicable discounts such as electricity amperage;
- in cases that an authorised energy retailer manages the embedded network, where to find any relevant energy plan information and terms and conditions;
- referral to information on accessing retail competition; and
- referral to information on accessing relevant rebates and concessions.

Marketing and information disclosure – 6. Is the form of the disclosure statement easy for prospective homeowners to understand?

The disclosure statement is generally written in plain English and easy to understand for prospective homeowners. Consideration should be given to providing the statement in alternative languages for individuals of culturally and linguistically diverse (CALD) backgrounds.

Additional and prohibited terms in site agreements – 13. Should the requirements about additional terms be changed or improved?

The Department has noted the Regulation currently prohibits certain terms in site agreements, including a term requiring the homeowner to take out any form of insurance (except a term requiring a home to be insured in the case of certain voluntary sharing arrangements).



There is currently an authorised energy retailer that has been contracted by a residential park operator to manage its embedded electricity network and on-sell electricity to residents. The retailer has included a clause in its energy plan terms and conditions that requires customers within the embedded network to have home and contents insurance (see **Attachment 1**, Case Study 1). The retailer's rationale for this clause was to safeguard the customer and the retailer against damage caused by any potential supply quality events within the embedded network. As the authorised retailer is not the operator or owner, it is effectively sidestepping the prohibition on site agreement terms requiring insurance. Had the customer been billed directly by the operator, they would have received this consumer protection.

The requirements around prohibited terms within site agreements should also apply to third parties that an operator may contract to manage services within the community. While the above case study pertains specifically to the prohibition on requiring insurance, any expansion of the prohibitions to third party services should also include the prohibition on terms indemnifying the operator against any liability for damage, loss or injury arising from an act or omission of the operator (or their employees or agents). In this way, a third party such as an authorised retailer on-selling electricity could not indemnify itself from liability for damage, loss or injury because of its actions.

Community registration and the Public Register – 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?

The public Residential Parks Register presents multiple difficulties for consumers seeking to use it to search for information on land lease communities.

Unlike other pages on the NSW Fair Trading website, the Register lacks accessibility options such as audio transcript and translation features.

The database the Register relies upon appears to be significantly out of date in terms of the information it draws upon. For example, searches based on Local Government (LGA)/Council Area return no results when searching for LGAs formed or renamed during the extensive 2016 restructure. This forces customers to be familiar with older LGA names, such as Gosford or Wyong Councils instead of the current Central Coast Council.

The search function would also benefit from features that show results for nearby suburbs and postcodes. This is a common feature of modern geographic-based databases and would assist consumers in swiftly locating suitable communities.

Finally, many website addresses for residential parks in the Register are broken, pointing to inactive domains. A stronger requirement for up-to-date information from operators and regular data integrity auditing of the Register's database is required.

Community registration and the Public Register – 15. What information should be included on the public register and how should the information be presented?

The Register currently only provides details for a community's trading name, address, phone number and website. It would be helpful for consumers if the following were included on the Register:

- Name of operator and ACN
- Range of site fees
- Utilities that are charged.



Chapter 5 – Utilities

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

EWON has limited data on complaints from customers within residential land lease communities regarding gas and water utilities. While all electricity and gas embedded network operators are required to become members of EWON, this mandatory membership does not extend to water. Gas embedded networks are rare within residential land lease communities, as most communities utilise bottled gas from LPG retailers which are outside EWON's jurisdiction.

However, EWON receives complaints from customers of other embedded gas and water networks that can provide insight on the issues residents in Land Lease Communities may experience.

Like electricity customers, gas customers within embedded networks suffer significant hurdles in accessing retail competition. Customers without a Delivery Point Identifier (DPI) have no access to retail competition. Even if a customer within an embedded network obtains a DPI, they are reliant on retailer willingness to provide market offers to customers within embedded networks.

While EWON is not aware of authorised energy retailers being contracted by land lease community owners to on-sell gas to residents, the existence of these arrangements for electricity means that it is a valid consideration for gas. Considerations of amending the Act that address on-selling of utility charges by third-party retailers needs to cover all utility types.

EWON is aware that there are land lease communities where water utilities are managed by third-party retailers. While these customers occasionally contact EWON for assistance, we do not currently have jurisdiction over these complaints and therefore we lack meaningful case data. EWON is open to expanding its jurisdiction to include water on-sold by third party retailers.

Utility charging in a land lease community – 48. How well do the current provisions relating to accounts, access to bills and other documents work?

Condition 3 of the Australian Energy Regulator's (AER) *Exempt Selling Guideline* sets out requirements for exempt retailers issuing bills to customers within embedded networks, including frequency and information that must appear on energy bills, including meter readings.

In some residential parks, the same invoice combines the utility billing and the customer's site fees. This makes it difficult for customers to track all charges and payments.

Invoices for embedded network utilities should be issued as separate invoices distinct from site fees.

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

Prior to the enactment of the Act and Regulation on 2 November 2015, electricity charges for customers within residential land lease communities were limited by NSW Fair Trading's *Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks* to the cost per kWh and service availability charges of the local area retailer's standing offer, with discounts for supply below 60 amps.

Following the introduction of the *Residential (Land Lease) Communities Act and Regulation*, charges for all utilities became limited to an amount no more than the amount charged by the utility service



provider or regulated offer retailer providing the service for the quantity of the service supplied to, or used at, the residential site.

As noted by the Department, there have been divergent views on the meaning of section 77(3) and the provision has been the subject of multiple cases in the Tribunal, as well as the Supreme Court. The Supreme Court interpreted Section 77(3) to mean an operator is not entitled to charge a homeowner more than the energy provider's calculation of electricity consumption. Numerous methods of determining how this should be calculated have been argued.

This issue is further complicated by the emergence of third-party authorised retailers offering to manage electricity services for land lease communities and on-sell electricity to customers. As these entities are not classified as community operators, they are not bound by the constraints of section 77(3) of the Act. These entities can charge any amount they deem appropriate.

Given the significant difficulties for customers within embedded networks in seeking to obtain an NMI and access the competitive retail market, these entities have little to no market pressure to offer affordable energy to Land Lease Community residents. These entities are also not bound by the limits of the ACCC's Default Market Offer meaning customers within embedded networks can ultimately pay more for electricity than customers within the retail market.

There is an urgent need for clarity on electricity pricing in residential parks. The confusion and uncertainty for residents and community operators has increased since the *Reckless* Supreme Court decision¹. That decision has made the on-selling of electricity to residents by park operators confusing and challenging and as a result, park operators are engaging authorised energy retailers to take on the role of on-selling electricity to these residents. These issues are impacting residents now and a timely solution is needed to resolve the uncertainty.

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

As an independent industry-based Ombudsman scheme, it is not appropriate for EWON to directly recommend the adoption of one of the proposed options above another. Instead, we address the impacts of each below.

Option 1– Embed *Reckless* approach in the Act for both operators and authorised third-party retailers

The *Reckless* method devised by the Tribunal is a relatively simple method of calculating charges, though suffers multiple limitations. Primarily, it does not account for the fact that service availability charges are flat daily rates and consumption charges are based on kWh used. This means that customers who consume less electricity can pay a smaller portion of the service availability charges than customers who use more electricity. This is in contrast with typical network customers who pay a flat daily cost for service availability charges regardless of the amount of electricity used.

The *Reckless* method also means that community residents will ultimately pay for all costs levied by the residential park's retailer (ie the retailer which is selling bulk energy to the residential park operator at the parent meter for on-selling to residents) on the residential park operator through its business account. This includes costs arising directly from the actions of the residential park

¹ *Silva Portfolios Pty Ltd trading as Ballina Waterfront Village & Tourist Park v Reckless*



operator, such as late payment fees or lost pay on time discounts, should the residential park operator fail to pay its bill on time.

The primary benefit of the *Reckless* method is the provision of a 'simple' calculation of utility charges. However, the method requires manual calculation for each new bill, something that is open to error. Manual calculations may also be a barrier for authorised retailers to enter the land lease community sector, therefore reducing consumer choice through competition.

Option 2– Amend the Act to allow for electricity charging that includes network maintenance cost recovery and administration costs, but does not result in a profit for the operator

The primary difficulty with this option is that reasonable network maintenance and administrative costs may be difficult to calculate and would also be considerably difficult to verify. It is also unclear as to which body would be responsible for auditing whether a land lease community's charges for network and administrative costs do not result in a profit for the operator.

Option 3–Remove provisions that govern what can be charged for electricity from the Act and allow national rules to apply

Except for the ACCC's *Electricity Retail Code* and the Default Market Offer, there are no national rules that limit the amount electricity retailers may charge for costs per kWh or service availability charges. The energy industry within NSW is de-regulated and the intent is that market forces will allow retail competition to provide effective pricing. Despite the Default Market Offer determining a maximum amount chargeable for electricity plans, this consumer protection does not extend to customers within embedded networks. As noted earlier, retail competition within communities is also negligible and there is no market pressure on operators, or where outsourced to authorised retailers, to offer cheaper pricing.

Any decision to allow electricity charging to only be limited by national rules would therefore effectively remove the consumer protections that still apply to customers within land lease communities.

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

Default Market Offer

An alternative reform option would be to limit charges to the Default Market Offer for the community's electricity retailer. The Default Market Offer is set out in the ACCC's *Electricity Retail Code* and establishes the current price cap on what electricity retailers can charge customers on standing offer contracts.

Limiting prices to the Default Market Offer for the community's electricity retailer would effectively return price limitations to a method equivalent to the old *Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks* price cap which was based on the local area retailer's standing offer.

Utilising the Default Market Offer as a reference point would create a simple method that could easily be applied by community operators and eliminate some of the complexities of other methods, such as Option 2's need to determine reasonable maintenance and administration costs.

The approach carries significant drawbacks in that it recreates the previous issue of customers in land lease communities being able to be charged at the most expensive rates without any benefits of discounts applicable to market offers (refer to *Reckless* response above for the same issue).



Conversely the operator would still receive the benefits of its retail contract at the parent meter, enabling the operator to pass on electricity charges at a profit.

Adjustments to the *Reckless* method

The *Reckless* method provides a relatively simple although manual method to calculate charges for community operators. Adjustments to the *Reckless* method may be worthwhile to ensure a fairer calculation of charges. For example, separately calculating consumption and service charges, taking into account the amperage provided, while also excluding any fees levied under the operator's own energy plan at the parent meter that relate to the operator's actions such as late payment fees, lost pay on time discounts, payment dishonour fees, and payment method fees.

Amperage – 55. Are the current discounts in the Regulation appropriate?

Amperage is a significant issue for residential parks. Providing a discount on energy charges has been an important consumer protection for customers that do not benefit from the same electricity supply quality as customers connected directly to distribution networks. Amperage has been recognised as an issue requiring consumer protection for many years, with the discount for low amperage existing prior to the Regulation under Fair Trading NSW's *Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks*.

Historically, the entity on-selling electricity to customers within embedded networks in residential land lease communities has been the community operator. The emergence of third-party energy retailers managing embedded network retail services on behalf of operators has created a regulatory gap where this consumer protection is not mandatory. As retailers on-selling electricity are not classified as operators under the Act, third party retailers are not obliged to provide discounts to service availability charges where amperage is less than 60 amps.

The discounts that provide consumer protections to customers with amperage below 60 amps should be extended to include any third-party energy retailer that on-sells electricity to off-market customers on behalf of an operator. Alternatively, the retailer could be required to upgrade supply so that consumers are provided with the same quality of electricity they would receive in the retail market.

If Fair Trading does not intend to amend the Act to regulate the conduct of third parties (such as energy retailers selling to off-market customers) it would no longer be appropriate for low amperage issues to be addressed through electricity service availability charges. An alternative approach could place responsibility on the park operator to compensate the customer for low amperage through reduced site fees.

Sustainability Infrastructure – 59. What are the greatest barriers to homeowners installing solar panels?

EWON supports the Department's position that it is important all forms of housing can benefit from environmental sustainability. However, there are numerous practical difficulties surrounding the uptake of solar generation systems within embedded networks.

Feed-in tariffs

Feed-in tariffs contribute to a return on investment for customers who choose to purchase solar generation systems. However, feed-in tariffs are delivered primarily through retail competition because there is no obligation for electricity retailers to offer a feed-in tariff to customers (see **Attachment 1**, Case Study 2).



Exempt sellers and authorised retailers operating embedded networks may offer a feed-in tariff, though this would generally be based on the rate offered by the financially responsible market participant (FRMP) at the parent meter connection point. However, there is no requirement to pass those solar credits to off-market customers at child meter connection points. Accordingly, residents of land lease community may not receive those credits/the benefit.

Once a customer has a NMI for their child-connection point, they should have access to a retail market offer with a feed-in tariff. This depends on the availability and types of market contracts in the electricity market for embedded network customers. Few retailers currently provide market offers for customers in embedded networks, meaning customers are unlikely to receive the benefits of feed-in tariffs even they have an NMI and an authorised retailer offers a feed-in tariff.

Network upgrades

For embedded networks, Distribution Network Service Provider (DNSP) standards on maximum allowable capacity apply to the parent connection point rather than each child connection point. This means that only a small number of embedded network customers need to connect a 5kW rooftop solar system on their homes for the total generation capacity at the parent connection point to reach 30kVA ie capacity. Once this limit is reached, the DNSP may require the embedded network to install centralised protection at the parent connection point.

This can be an expensive upgrade for the embedded network and raises the question of who should fund the network upgrade (see **Attachment 1**, Case Study 3). It may not be fair for a community operator to fund this upgrade after residents have decided to install their own rooftop solar systems. However, it may similarly not be fair for the costs to be passed on to residents of the park through increases in site fees if not all residents have installed solar. Further, it may be unfair for residents who initially installed solar prior to capacity being reached to have to pay for network upgrades given they entered into a solar installation contract based on agreed costs at that time ie not expecting additional costs later.

Consideration should be given to an appropriate mechanism covering how to pay for network upgrades that may be required.

Metering upgrades

In most existing land lease communities, the installation of solar generation systems also requires the installation of a digital meter that has the capacity to register both the customer's electricity consumption and the amount of any electricity generation exported into the embedded network.

In the retail energy market, authorised energy retailers may provide customers with an upgrade to a digital meter free of charge as a method of retail competition. However, in a community within an embedded network, customers do not have the option to select a retailer offering a free meter upgrade. Accordingly, customers in embedded networks may be disadvantaged compared to other customers because they may have to pay for a meter upgrade that they did not initially anticipate.

Enquiries

Enquiries about this submission should be directed to Janine Young, Ombudsman on (02) 8218 5256 or Rory Campbell, Manager Policy and Research, on (02) 8218 5266.

Case Studies

Case Study 1

Residential park customer forced to obtain home insurance as a condition of energy supply by a third-party electricity on-seller

A customer contacted EWON to advise she was a permanent resident of a residential park with an embedded electricity network. The park operator had contracted a third-party authorised retailer to on-sell electricity to park residents. The customer advised that the service availability charges under the retailer's energy plan were more than double what she had paid to the park operator. The retailer also required customers to have home and contents insurance for electrical appliances to protect against any damages from supply events within the embedded network. The retailer had advised that customers who did not open an account would be disconnected.

Following legal advice from NSW Fair Trading, EWON advised the customer that as the retailer on-selling electricity to the park was neither the embedded network manager or the community operator, the protections under the *Residential (Land Lease) Communities Act* and *Residential (Land Lease) Communities Regulation* around utility charge limits and prohibited site agreement terms did not apply.

Case Study 2

Residential park customer not receiving credits for solar energy exported to the embedded network and the grid

A customer was a permanent resident of a residential land lease community and owned a home with an existing rooftop solar system installation. She had two electricity meters, one for the solar export and one to record her electricity usage. She complained to EWON that an authorised retailer recently took over responsibility for billing customers for their electricity accounts within the embedded network. Previously, the electricity charges for residents were administered by the residential park operator. The customer advised EWON that the retailer was refusing to provide residents with credits, or a reduction in charges, for the solar energy generated and exported from their rooftop systems into the embedded network and the grid. The retailer advised customers that a net electricity meter must be installed before solar credits would be added to the bills. The customer noted that the electricity meters were read by the park operator, who passed the meter readings to the retailer. She advised EWON that the park operator was attempting to resolve the issue, but she was now overdue on her electricity account.

We referred the matter to the retailer for resolution at a higher level, informing the customer she could return to EWON if an agreed outcome could not be negotiated. Following the referral, the retailer contacted EWON to advise that it had resolved the billing issue to the customer's satisfaction, using the meter data from the solar export meter to apply a credit for the past three months and ensuring that feed-in tariff credits would continue to be applied in future.



Case Study 3

DNBP issues defect notice to residential park residents due to non-compliant solar installations

A customer lived in a residential land lease community established as a retirement village. The customer's home had its own National Meter Identifier (NMI) for the National Energy Market and he held an account with an authorised energy retailer. Two years prior, the customer had paid for a rooftop solar system to be installed at his home. The customer advised EWON that there were 20 other homes within the residential park that also had rooftop solar systems installed. The customer complained to EWON that he recently received a letter from the local distributor advising that the total capacity of the solar generation within the residential park breached network standards. The distributor informed residents that if the solar generation capacity issue was not addressed, their rooftop solar systems would be disconnected from the grid. The customer complained that the distributor's actions were not fair as it had approved the installation of each rooftop solar system.

We received complaints from all 20 affected residents over a 10-day period. We were also advised by other residents that the park operator had issued all residents with a rooftop solar system a quote for \$1,952 (ex GST) to pay for new electricity meters to be installed at each home and for upgrades to the embedded network.

We contacted the distributor to clarify what actions were being taken in relation to the upgrade of the embedded network. The distributor confirmed that it had been in communication with park residents and the park operator after issuing a defect notice requiring a centralised protection system to be installed within the embedded network. The distributor clarified that the rooftop solar systems were installed with individual applications between 2010 and 2019. The applications made by the solar installers included the agreement of the park operator who was responsible for the parent connection point to the embedded network. The distributor explained that relevant Australian Standards and the applicable Network Standard required the installation of a centralised protection system if the export capacity of a site with multiple small generators (such as rooftop solar systems with an inverter) at a single grid connection point exceeded 30kVA.

The distributor also noted that all Accredited Service Provider (ASP) and solar installers are aware of the need for centralised protection for multi-metered sites. The application that solar installers must complete also direct the installer to identify any existing generation already installed at the point of connection. The applications the distributor received for this site did not identify any other existing installations. The distributor advised EWON that it had recently upgraded the online form for new solar installations which prompts solar installers to confirm if the connection is part of a multi-tenanted site so that the connection is checked before approval is given.

We also contacted the park operator and NSW Fair Trading to obtain information about the rights and obligations of each resident to pay for new metering and upgrades to the network. Fair Trading identified that it was the responsibility of each solar installer and ASP to provide accurate information to the distributor for each new solar installation. Residents could complain to Fair Trading, providing copies of the paperwork for the solar agreements, if solar installers had provided incorrect information to the distributor. We provided written advice to each affected resident about the information provided by the distributor and provided referrals to Fair Trading NSW and the NSW Civil and Administrative Tribunal for appeals against charges imposed by the park operator for upgrading the embedded network.