



24 June 2014

The Honourable Paul Green MLC
Committee Chair
Legislative Council Select Committee on Social, Public and Affordable Housing
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Sir,

Inquiry into Social, Public and Affordable Housing

I refer to your letter of 4 June 2014 to the President inviting the Civil and Administrative Tribunal of New South Wales (NCAT) to comment on issues raised by evidence from the Independent Park Residents Action Group. The President has asked me to respond and provide such assistance as can be given.

As you will appreciate, NCAT is an independent Tribunal responsible for making decisions under a number of Acts of the New South Wales Parliament. It is not NCAT's role to comment generally on the policy decisions which underlie the legislation enacted by the Parliament.

As I understand it, you have sought specific comment on NCAT's ability to consider "*housing affordability when making decisions on residential park disputes and the use of penalties for non-compliance with orders*".

As to affordability and disputes concerning excessive rent, this issue is governed by the Act which regulates the operation of residential parks. At present this is the *Residential Parks Act 1998* (NSW). I understand that the *Residential (Land Lease) Communities Act 2013* (NSW), although it has been enacted, has not yet come into force as there been no proclamation of commencement under s 2 of that Act. Under cl 3 of Schedule 4 to the *Civil and Administrative Tribunal Act 2013* (NSW) the functions of the Tribunal in relation to both of those Acts are allocated to the Consumer and Commercial Division of NCAT. The Consumer and Commercial Division is largely the successor to the Consumer, Trader and Tenancy Tribunal (CTTT) which was abolished when NCAT was created on 1 January 2014.

Under ss 55 and 56 of the *Residential Parks Act*, the Tribunal may make an order declaring a rent increase or rent payable under a residential tenancy agreement or a proposed residential tenancy agreement is excessive. Section 57 sets out the matters which the Tribunal may consider and is in the following terms:

57 Matters to be considered in determining rent applications

The Tribunal may, in determining whether or not a rent increase or rent payable under a residential tenancy agreement or a proposed residential tenancy agreement for residential premises is excessive, have regard to each of the following factors:

- (a) the general market level of rents for comparable premises in the same residential park and in other residential parks in the locality or a similar locality,
- (b) the value of the residential premises,
- (c) the frequency and amount of past rent increases under the residential tenancy agreement or previous residential tenancy agreements between the same park owner and resident,
- (d) a general price index (such as the Consumer Price Index),
- (e) the conduct of the parties,
- (f) the amount of any outgoings in respect of the residential premises required to be borne by the park owner under the residential tenancy agreement or proposed agreement,
- (g) the estimated cost of any services provided by the park owner or the resident under the residential tenancy agreement or proposed agreement,
- (h) the value and nature of any fittings, appliances or other goods, services or facilities provided with the residential premises,
- (i) the accommodation and amenities provided in the residential premises and the state of repair and general condition of the premises,
- (j) any work done to the premises by or on behalf of the resident, to which the park owner has consented,
- (k) any other relevant matter.

As will be observed, housing affordability is not one of the express considerations to which the Tribunal may have regard when considering such applications. There is, of course, the general consideration in s 57(k) "*any other relevant matter.*" Whether those words in s 57(k) should be construed as permitting the Tribunal, or its predecessors, to take into account "*housing affordability*" or "*site rent affordability*" or "*the amount of the site rent as a proportion of the applicant's income when considering excessive rent applications*" has been considered in a number of cases in the Tribunal. In *Axisa v Jubato Pty Ltd* [2005] NSWCTTT 275 the CTTT held that "*affordability of rent is not per se part of the factors under s 57(k)*". The CTTT's reasons for doing so were given at some length in the reasons for decision in that case. Under the heading "*Any other relevant matter s 57(k)*" and the sub-heading "*Affordability*" the CTTT held in *Anslow v Kincumber Nautical Village P/L* [2006] NSWCTTT 547 that:

The applicants state that, as most of the residents within the park are pensioners, the rent increase is unaffordable. There have been numerous decisions of this Tribunal that the individual financial circumstances of residents and their capacity to pay are not matters relevant to a determination of whether the rent or a rent increase is excessive.

From this it can be seen that the CTTT took the view that on the proper construction of the *Residential Parks Act* it was not permitted to treat "housing affordability" as a relevant consideration under s 57.

The corresponding provision in the *Residential (Land Lease) Communities Act* is s 74 which (when it becomes operative) will provide:

74 Matters to be considered about excessive increases

- (1) The Tribunal may have regard to any or all of the following factors when deciding whether to make an order under section 73:
 - (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.
- (2) The regulations may require the Tribunal to disregard any specified matters (not being a matter referred to in subsection (1)), in any specified circumstances, when deciding whether to make an order under section 73.

You will note that s 74 does not contain an express reference to affordability and, unlike s 57 of the *Residential Parks Act*, does not contain a general provision such as "any other relevant matter". Section 74(k) is limited to "any other matters prescribed by the regulations".

As to housing affordability in the context of penalties imposed by the Tribunal, it should be noted that the Tribunal does not have the power to impose penalties under the *Residential Parks Act*. Section 148 of that Act provides that proceedings for an offence against the Act or the regulations are to be dealt with summarily by the Local Court, except that proceedings for an offence against section 122 may also be dealt with by the Supreme Court in its summary jurisdiction. Accordingly, the question of housing affordability does not arise in the Tribunal in this context.

In summary, the decisions of NCAT's predecessor, the CTTT, since about 2005 have consistently construed s 57 of the *Residential Parks Act* as not permitting considerations of affordability to be taken into account in excessive rent applications. It may be anticipated that a similar approach will be taken to s 74 of the *Residential (Land Lease) Communities Act* if that legislation comes into operation in its present form and if the regulations do not prescribe affordability as a relevant consideration for the purposes of s 74(k).

I trust that the above information is of assistance.

Yours sincerely

Sian Leathem
Principal Registrar