

July 2021

Community Living

A Quarterly publication by Amity Law

Contents

Chewing the fat with Kevin Tucker

Page 3

Is it a Manufactured Home by Matt Allen

Page 4

Restricting Communities to over 50s by
Matt Allen

Page 6

Legal Update by Matt Allen

Page 7

Tips for Managing Risks by Adam Geldard

Page 10

Contact us

W: www.amitylaw.com.au

A: Suite 5/54 Vernon Terrace, Teneriffe Qld 4005

E: info@amitylaw.com.au

P: 07 3220 0667 (Adam)



@amity_law

Editorial

by Matt Allen & Adam Geldard



The industry feed-back on first edition of Amity's Community Living has been excellent.

To be fair - a lot of it has been about the paucity of pro-LLC operator voices out there and its good to see someone else fighting for the cause (rather than our insightful prose) – but we are thrilled to receive it and as a result, now that COVID related spanners are hopefully heading towards being a thing of the past, have decided to recommence publishing Community Living.

In this edition we start a series of articles looking at the issue of whether a home design meets the legislative and planning scheme requirements for a LLC.

It is an issue we have advised a number of clients on and a key one for LLCs, particularly greenfield communities.

The legal position is different in each State. Our article in this addition summarises the criteria for a manufactured home in QLD and the judicial interpretation of those criteria to date. Future editions of Community Living will look at the requirements in the other States.

Focusing on QLD, we have also included an article on the anti-discrimination legislation and how that impacts communities targeting over 50s residents only.

In our chewing the fat interview we chat with Kevin Tucker about land lease communities in Australia compared to his country of origin in the US where this market is much more mature. Our tips section in this edition focuses on risk management in communities.

In our legal update we comment on the potential of vertical LLCs, summarise the recent changes to the legislation governing LLCs in Victoria and mention the ongoing Govt review of the land lease community legislation in NSW.

Outlook for the rest of 2021

Our view is – despite COVID – the outlook for the balance of 2021 is bright.

Anecdotally:

- clients are telling us their home sales are trending well; and
- agents are saying the level of inquiry from groups looking to buy both existing communities and greenfield sites is as strong as ever.

Let's hope the good news continues.

We would also like to congratulate Lucy Ross on her recent promotion in the firm to Associate. Well done Lucy!

Thank you for your feed-back on the first edition. We hope this edition of Community Living is informative.

Cheers,

Adam & Matt.



Chewing the Fat with Kevin Tucker



Adam caught up with Kevin Tucker, Joint Managing Director and CEO of Hometown Australia recently to talk about the differences between land lease communities (LLCs) in Australia and the US.

Why Kevin? Well, he's originally from California, Hometown Australia has its roots in the US through its parent company Hometown America, and Hometown Australia now owns and operates 53 land lease communities in Australia, following its takeover of Gateway Lifestyle in 2018.

Adam: LLCs have a well-established market in the US and Australia is relatively new to the game. Are the markets vastly different?

Kevin: The market is definitely more established in the US with about 6% of the population living in LLCs, compared to about 1 - 2% in Australia. The US market is also more institutionalised. Australia has historically been pre-dominantly privately owned, although this is fast changing.

Adam: Does that mean the LLC model in the US is quite different to Australia, given the fact that the US model has had more time to evolve?

Kevin: The models are not very different. The basic concept is the same – homeowners own their home, share common facilities, and pay ground rent in an environment that's safe and social. In the US, in addition to age-restricted LLCs for over 55s, there are more all-age communities offering affordable accommodation for both under and over 55s. In Australia, the industry is predominately focused on age-restricted communities for over 55s. Also, the common facilities tend to be more extensive in Australia.

Adam: What about the manufactured homes themselves?

Kevin: Manufactured homes in the US are always built off-site then transported and joined together onsite. A growing trend in Australia is to build the relocatable

HOMETOWN AUSTRALIA C O M M U N I T I E S

homes on-site due to customer preferences and cost considerations.

Home prices are generally higher in Australia, which is a reflection of the relatively high cost of housing here.

Adam: What about some of the financial aspects of owning and operating a LLC and how do they compare between countries?

Kevin: About one third of home buyers in the US obtain finance through a chattel loan. That doesn't happen in Australia as banks are reluctant to lend against the security of a home without the land. Site rents are more standardised in Australia (to some degree based around Commonwealth Rent Assistance), whereas in the US there are greater variations in site rent as the rent is not pegged to any specific form of social security. For instance, in Australia site rents normally sit at around \$175-200+ per week, whereas in the US site rents can range between around \$120 - \$500+ per week depending on the quality and location of the LLC.

Adam: What would you say is the most attractive feature of LLCs in Australia to a US investor?

Kevin: It is extremely difficult in the US to get approval for the development of new LLCs - it can take 10+ years to get development approval and it's often not possible to get approval in the first place. Development approvals in Australia are more easily obtainable, in part due to local governments understanding and appreciating the quality and benefits of these types of developments. The under supply compared to the growing long-term demand in Australia is quite attractive to a US investor.

Adam: And the big one, where's the surf better: California or Australia?

Kevin: In Australia, which is why I live here now!

Is it a Manufactured Home

By Matt Allen



Is it a manufactured home?

A lot of our clients have asked us for advice on this question. The context has usually been:

1. Do home designs they are considering selling for their community meet the requirements for a manufactured home in the State legislation and/or local planning scheme; or
2. There is a dispute in a mixed use community they operate over whether an existing structure (often a converted caravan) is a manufactured home giving the resident an entitlement to a site agreement and the associated security of tenure.

The legislation and the terminology governing what amounts to a manufactured home differs in each State.

This article discusses the legal framework in Queensland. We will follow up in future editions of Community Living with the position in other States.

If you are developing a greenfield land lease community or operating an existing community and you have any concerns over whether a home design or an existing structure meets the requirements for a manufactured home, please feel free to get in touch with us.

Queensland legislation

In QLD the Manufactured Homes (Residential Parks) Act 2003 (QLD Act) uses the term "manufactured home".

Section 10 says:

(1) A manufactured home is a structure, other than a caravan or tent, that —

- (a) has the character of a dwelling house; and
- (b) is designed to be able to be moved from one position to another; and
- (c) is not permanently attached to land.

(2) A manufactured home does not include a converted caravan.

The trend to better bigger homes

In response to consumer demand, the now long-term trend in LLCs in QLD (and Australia wide) is for manufactured homes to be more substantial, more sophisticated and less easily moved.

This was recognised by the former QLD Minister for Fair Trading during the second reading for the QLD Act in the State Parliament. When discussing the rationale for replacing the term "mobile home" used in the old legislation with "manufactured home" in the QLD Act the Minister stated:

"Manufactured homes are in essence permanent structures no easier or cheaper to relocate than ordinary site-built homes these homes are now more substantial and sophisticated are usually permanently or securely fixed to the ground and the costs involved in moving may be quite significant. In keeping with the changing trends in the industry,

and to better reflect the more substantial nature of these types of homes, the Bill introduces the term “manufactured home”.

In other words, the Minister’s view appeared to be the definition is flexible enough to allow for a modern manufactured home on a concrete slab.

On a closer look at each component of section 10 – the position is not so black and white.

Character of a dwelling house

The first limb is easily satisfied by the typical modern manufactured home. There is no doubt they are habitable structures with the character of a dwelling house.

1. A manufactured home being affixed to a concrete slab or piers does not mean it is permanently attached to the land;
2. The manner of affixation needs to allow detachment from the slab without substantial damage to the structure of the home; and
3. Having to dismantle parts of a home to remove it does not offend the definition (e.g. pulling up some flooring to access slab tie-downs or lifting part of the roof to cut through cyclone rods).

It appears the market expectation in QLD (particularly in higher end communities) is homes will be on slabs or piers.

Designed to be able to be moved

Whether modern manufactured homes are designed to be able to moved is less black and white.

The words “a home designed to be able to be moved” on the face of it suggests something more readily moveable than a normal dwelling house.

However to date, the judicial opinion in QLD has been (in general terms) this limb of the definition is not about relative degrees of moveability, but whether there is something inherent in the design which makes a home moveable (e.g. separation joints, a false floor or a detachable steel frame).

As more home designs become the subject of proceedings, there will be more clarity about what satisfies the designed to be able to be moved test. For now, we suggest there is enough ambiguity in QLD that operators should consider getting advice about a home design before using it.

Not permanently attached to the land

A lay person might consider a manufactured home on a concrete slab or piers is permanently attached to the land.

The general principles able to be taken from case law to date are:

Local planning scheme

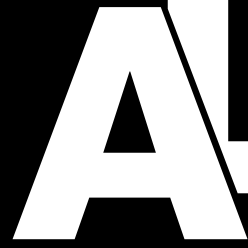
When considering if a home design qualifies as a “manufactured home” in QLD, it is also important to consider the local planning scheme and the terms of the development approval granted for a community.

The planning scheme may have its own definition/s for what amounts to a manufactured home or a manufactured home park (the QLD term for land lease community). The need to comply with the terms and conditions in the development approval and the local planning laws may impact home designs.

Engineering certificate

If you are developing a LLC in QLD, ideally the entity who is supplying the homes will provide you with an engineering certification (or certification from another suitably qualified expert) that the homes are “designed to be moved from one position to another”.

We may need to engage with your engineer to explain the legal framework, but ultimately if a Court was asked to consider if a design qualifies as a manufactured home, it is likely to call for (and/or be directed by) expert evidence on the design methodology and characteristics of the home.



Restricting Communities

To Over 50s

Almost all of the land lease communities (LLCs) we have been involved with in Australia are focused on the over 50s demographic.

We think Australia will ultimately follow the American market and “all age” LLCs will become popular.

But for now, the market seems to be somewhat limited to over 50s (or thereabouts).

Is it not lawful in QLD?

In QLD it may be a surprise to some owners and operators of LLCs – to discover it is not lawful to discriminate on the basis of age.

Unlike the retirement villages legislation, the Manufactured Homes (Residential Parks) Act 2003 (which governs LLCs in QLD) does not allow owners and operators to discriminate on the basis of age and limit their use of parks to older members of the community.

Operators need to be aware of this when marketing their LLCs to potential residents.

The law

In the absence of a statutory exception, restricting residency to a certain age group at a LLC is discrimination under section 7(1)(f) of the Anti-Discrimination Act 1991 (QLD) (ADA) based on age (there are other sections of the ADA which may also apply).

Enforcement

If an owner or operator discriminates unlawfully, there is a complaint process via the Anti-Discrimination Commissioner under the ADA.

The most likely complainant would be a potential resident denied entry because of his or her age. The Anti-Discrimination Commissioner may refer the complaint to QCAT if it cannot be resolved by the Commissioner. QCAT has quite broad powers to make various orders including orders requiring the respondent to pay compensation if the complaint is proven.

Exemptions

It is possible to apply for and obtain an exemption for a person or class of people from sections of the ADA. Applications must be made to Queensland Civil and Administrative Tribunal (QCAT) in the first instance.

QCAT has previously granted exemptions, including to owners and operators of LLCs. Whether QCAT does so is discretionary and there are no express criteria for the exercise of the discretion in the ADA.

QCAT will generally consider whether the exemption is necessary, whether it is appropriate to grant the exemption and whether the exemption is in the community interest (the general argument being summarised as the provision of accommodation and services at relatively low cost for a sector of the community with below average income and with special age-related needs).

If an exemption is granted, it will be for up to 5 years only. Exemptions are not automatically perpetual and must be re-applied for before the allowed period expires.

Your community

If you have concerns about this issue or your marketing material, please get in touch.

Legal Updates

By Matt Allen



National—Vertical LLCs

We think it is inevitable LLCs will evolve to include vertical communities (i.e. multi-level structures containing “manufactured homes” and central facilities).

There is industry momentum and the process of lobbying State and local governments to support vertical LLCs has begun.

Right now a handbrake is the existing State legislation, which makes the concept of manufactured homes being “moveable” central to LLCs. A recent decision in the Planning and Environment Court of Queensland demonstrates this (see – GTH Resorts No 5 Pty Ltd v Gold Coast City Council [2020] QPEC 20). The Court rejected out of hand a proposal for two and three story buildings containing manufactured homes – opining “it is highly unlikely, if not implausible, the proposed units may be moved from one position to another”.

We will be following developments in the vertical LLC space closely and will keep everyone updated in Community Living.

NSW—Residential (Land Lease) Communities Act 2013

The NSW Government is reviewing the Residential (Land Lease) Communities Act 2013 – the legislation which governs LLCs and permanent sites in caravan and mixed use residential parks in NSW.

It is a standard review that happens five years after the Act commenced in 2015.

A link to the discussion paper issued by the Govt is here: [discussion paper](#).

Submissions were due by 12 March 2021.

The NSW Government is now reviewing the submissions and say they will report on their findings by the end of this year.

Victoria—Sweeping changes to the tenancy legislation

Unlike most other States, Victoria does not have a stand-alone piece of legislation governing LLCs and caravan parks.

Instead, the Residential Tenancies Act 1997 (VIC) (RTA) provides the legislative framework for all residential tenancy arrangements in Victoria, including in caravan parks and LLCs (called ‘residential parks’ in Victoria).

On 6 September 2018 the Victorian Parliament passed the Residential Tenancies Amendment Act 2018 making sweeping reforms to the RTA, a significant number of which directly impact owners and operators of caravan and residential parks in Victoria.

The detail and roll out of the reforms was intended to be completed by 1 July 2020. This was delayed due to coronavirus (COVID-19) and the amendments came into effect on 29 March 2021.

Next Steps

A summary of some of the changes impacting operators of residential parks and caravan parks in Victoria is below. A full list can be accessed at <https://www.consumer.vic.gov.au/housing/renting/changes-to-renting-laws/guide-to-rental-law-changes>

If you are an owner/operator of a residential park in Victoria, you will need to consider (if you have not already done so) how your operations and proforma standard from site agreement, park rules, disclosure material and home sale agreements may need to be amended to comply with the amended RTA.

Please feel free to get in touch with us to discuss this.

Some of the key changes owners / operators in VIC should be aware of

1. New disclosure requirements — There are a number of new disclosure obligations on park owners including a requirement to (before entering into a site agreement) disclose to prospective residents:

(a) more information about any exit fees / deferred management fees charged;

(b) if the park operator does not own the freehold of the park land, the nature of the interest held and any limitations on the park operator's right to grant interests in the land to residents (e.g. if you own the park land in a trust structure and lease it to an operations entity, you will need to disclose that you cannot grant a site agreement for a term longer than the term of the head-lease to your operations entity (noting options in head-leases are discounted); and

(c) any current proposal to sell the park.

2. Prohibited terms — As is already the case in QLD, Regulations will be passed listing what the RTA will deem "prohibited terms" for site agreements. Once the Regulations are passed it will be an offence to include a "prohibited term" in a site agreement. Obviously, the devil will be in the detail here.

3. Rent increases — Rent under site agreements will not be able to be increased at intervals of less than 12 months. Site agreements will be able to specify rent increases are either by a fixed amount (according to a specified method of calculation (e.g. fixed %) or by a non-fixed amount (e.g. market review). If a fixed amount is used, the operator must give 28 days' notice of the increase in the prescribed form. Fixed rent increases cannot be subject to rent review by Consumer Affairs Victoria. Non-fixed rent increases will be subject to rent review by Consumer Affairs Victoria.

4. Removal of termination right — Park operators will no longer be able to terminate periodic site agreements for 'no specified reason'. Park operators will be able to issue a notice to vacate at the end of a specified period of occupancy under a residency right, or end of a fixed term site agreement.

5. New maintenance and repair obligations — There are a suite of new provisions placing specific maintenance and repair obligations on the park operator (in relation to communal facilities, sites and fixtures on sites owned by the park operator) and also on the site tenants in respect to their dwelling (including to rectify defects before the sale of dwelling where the site agreement will be transferred to the buyer).

6. Restriction on repair obligations in park rules — Park operators will be prohibited from making park rules that require park residents to undertake significant works on a dwelling other than for reasons of reasonable cleanliness, safety or good repair.



Risk Tips For Community Operators

By Adam Geldard



As lawyers we are trained to identify risk issues, sound the alarm bell and wait for a pat on the back. We don't want the fear of risk to hamper the efficient operation of our clients' businesses, so we are aiming for some common-sense practical tips to make it easier to live with risk in a land lease community.

First, it may sound obvious, but be honest with yourself

Risk is everywhere. Whether it's direct risk to an income stream, general reputational risk or exposure to unexpected liability. Ignoring it like it doesn't exist is the first trap.

Have you got a detailed risk management plan?

Essentially this process involves:

Assessing the risk

There may be unique risks associated with the particular characteristics of your land lease community or tourist park, or a particular group of occupants. Do a physical site inspection and identify all the potential risks on site (not just from a desktop). For example, consider personal injuries that could occur through the use of on-site common facilities like the pool or the community hall, or through uncontrollable events such as fires and falling tree branches. Assess those risks based on the age spread and other characteristics of the occupants of the community. Consider heightened risks associated with events involving alcohol or periods of extreme heat or cold.

Documenting the risk

Once the potential risks are identified, document them in a risk management plan with corresponding risk strategies to share with management personnel. We consider community rules, waivers, warning signs and disclaimers to assist with risk management.

Managing the risk

Have a clear and consistently applied risk management plan to reduce the occurrence of risk

events in the first place. But, if an event does occur, a thorough risk management plan will put you in a stronger position to argue that certain risks have been voluntarily assumed by residents (technical legal defence of *volenti non fit injuria*) or that reasonable steps were taken by you to discharge duties of care owed to residents or other potential claimants.

Why not engage with your insurer early?

Some risks are unavoidable – covid certainly demonstrated that. However, if you engage with a pro-active insurer early, they will work with you to develop a risk management plan to help minimise and manage risk.

Understand: (i) what risks can be covered by insurance (not all can be); (ii) what risks can be minimised by waivers/warnings/disclaimers; and (iii) what risks need to be accepted and managed sensibly and practically as best you can.

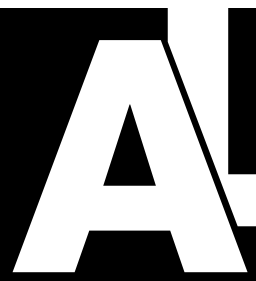
Consider engaging a health and safety consultant

Just like any other business, owners and operators of home and tourist parks are required to ensure employees and residents are not exposed to workplace health and safety risks relating to work carried out as part of the business operations. An older population (as with manufactured home parks) may be more susceptible to such risks.



We recommend you consider engaging a workplace health and safety consultant to assess your compliance under the relevant health and safety legislation (eg. the Work Health and Safety Act 2011 (Qld) and associated regulations).

These tips do not provide a cure-all, but we think it's safe to say (lawyer joke) they will help.



Upcoming Events

- 2021 Illawara Caravan Camping Lifestyle Expo (2-4 July 2021) at Kembla Grange Racecourse.
- VICParks Conference (16-18 August 2021) at Hyatt Place, Essendon Fields.
- Caravan Parks Association of Queensland Divisional Meeting (9 September 2021) at Brisbane/Gold Coast.
- 2021 Canberra Caravan Camping Lifestyle Expo (22-24 October 2021) at Exhibition Park Canberra.
- Let's Go Brisbane Caravan and Outdoor Sale (28-31 October 2021) at Brisbane Showgrounds.
- CCIA Member MEGA Day and Awards of Excellence (18 November 2021) at Fullerton Hotel Sydney.

Keep your eyes out for the next edition of Community Living!



The Team

Matt Allen || matt.allen@amitylaw.com.au || 07 3220 0621

Adam Geldard || adam.geldard@amitylaw.com.au || 07 3220 0667

Lucy Ross || lucy.ross@amitylaw.com.au || 07 3221 8590