



NCAT DECISION ON COMMUNITY RULE

A summary of NCAT Orders made 22 June 2016: *Barbara Evans (Applicant) v Cabana Holdings Pty Ltd T/as Broadlands Relocatable Homes Estate (Respondent)* NCAT:RC:15/68173

On 22 June 2016, the NSW Civil and Administrative Tribunal (NCAT) handed down an important decision, which **affirms the right of an operator of a residential community to make an age restricting Community Rule** under Part 8 of the *Residential (Land Lease) Communities Act 2013* (NSW) (Act). In this case the age restriction rule had the effect that only persons over the age of 50 years could be occupants in the residential community.

The NCAT decision reinforces the objectives of the Act in improving the governance of residential communities providing affordable retirement living to seniors (over 50's). More importantly, an age restricting Community Rule is not inconsistent with the *Anti-Discrimination Act 1977* (NSW) and the *Age Discrimination Act 2004* (Cth) (ADAs), provided that such rules are validly made under the Act, are clearly drafted and are fair and reasonable in their application.

In this case before NCAT, the age restriction rules apply, prospectively and uniformly, to all existing

residents. However, any persons seeking to become new residents of the community would also be affected by the age restriction rule.

It is doubtful whether NCAT would have reached this conclusion if the age restriction rules had retrospective or immediate application on existing residents.

NCAT also clarified that an operator of a residential community under the Act **does** provide 'services', 'accommodation' or 'facilities' within the meaning of the ADAs, which includes accommodation at its sites and in its caravan park, and that it also provides services and facilities such as internet and telephone connection, electricity, swimming pool facilities, community hall and garbage disposal pick-up. However, irrespective of the application of the ADAs, the age restriction rule was held to be **not inconsistent** with the ADAs because each of the Acts permits conduct that would otherwise be discriminatory, if it is done to comply with a legislative instrument (which includes a Community Rule made under Part 8 of the Act).



Practical implications

The upshot of this for operators of residential communities is that:

- They need to ensure that Community Rules apply uniformly. One way to do this is to ensure that they apply to future home owners who willingly join the community with notice of the Community Rules.
- The Community Rules should be validly made under Part 8 of the Act so as to become legislative “instruments” within the meaning of the ADAs and that they are upheld (and enforced) in direct compliance with such “legislation”.

Holman Fenwick Willan can assist operators of residential communities with these issues.

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