Outasite Lite

Land Lease Community E-newsletter

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IS IT OVER?

On 9 January 2019 the NSW Civil and Administrative Tribunal (NCAT) handed down the decision regarding electricity usage charges in *Reckless v Silva Portfolios Pty Ltd t/as Ballina Waterfront Village and Tourist Park (No. 2)* [2018] NSWCATCD 59.

Many operators and commentators have cited the latest 'Reckless' decision as being a defining and binding decision. As we have stated previously, that view is mistaken. It is possible that some of the confusion has arisen because of the history of 'Reckless', which is long and complex.

In this issue of Outasite Lite we look at the history of the 'Reckless' dispute, the latest decision ('Reckless No. 2') and the expert witness report that was provided in evidence by the operator.

THE HISTORY

Margaret Reckless made her original application to NCAT on 24 February 2017. In the application Margaret claimed she had been overcharged for electricity and the amount should be refunded. The operator was charging the standing offer rate in accordance with the site agreement (signed under the *Residential Parks Act 1998*). Margaret claimed that she should be charged according to section 77(3) of the *Residential (Land Lease) Communities Act 2013* (RLLC Act).

The dispute was heard on 29 June 2017 and the decision handed down on 3 August. NCAT found that the operator was entitled to continue charging according to the site agreement.

Margaret appealed the decision to the NCAT Appeal Panel. The points of appeal were that NCAT had made an error in finding that the terms of the site agreement prevailed over the RLLC Act, and in finding that s77(3) did not apply to her electricity usage charges.

The NCAT Appeal Panel heard the case on 20 November 2017 but the decision was not handed down until 3 April 2018.

The Appeal Panel found that section 77 of the RLLC Act applied to Margaret's site agreement and that the operator must comply with the section. The Appeal Panel then considered the meaning of s77(3) and found that "the Park Operator cannot charge Mrs Reckless for her consumption of electricity more than it is being charged by Origin Energy for the amount Mrs Reckless has consumed".

The findings of the Appeal Panel that (i) electricity usage charges must be calculated according the RLLC Act for all home owners, and (ii) that s77(3) prevents operators charging home owners more than they are charged for electricity consumption were binding on other NCAT Members and must be followed unless overturned in a higher jurisdiction.

What the Appeal Panel did not determine was how Margaret's electricity charges should be calculated under s77(3). This part of the application was sent back to the NCAT Consumer and Commercial Division to determine. However, the operator appealed the decision of the Appeal Panel to the Supreme Court of NSW and the hearing about the calculation of charges was therefore postponed.

The appeal to the Supreme Court did not challenge the finding that electricity charges must be calculated according to the Act. The single point of appeal was the interpretation of s77(3). Justice Davies heard the case on 17 August 2018 and handed down his decision on 4 September.

Justice Davies agreed with the Appeal Panel that s77(3) means an operator cannot charge a home owner more for electricity usage than the operator is charged by their service provider. This finding is binding on NCAT and any disputes must now be determined according to this interpretation of s77(3).

While the dispute was before the Supreme Court the orders of the Appeal Panel were stayed (put on hold). Once the decision was handed down the stay was lifted and the case was once again listed before NCAT to determine how Margaret's electricity usage charges should be calculated and whether she was entitled to a refund of overpaid charges.

That matter was heard by NCAT on 6 December 2018 and the decision was handed down on 9 January 2019.

THE CHARGES

The crux of this and all current electricity charge disputes is - which parts of the operator's bill can be passed on to home owners as a usage charge. Most people are aware that an operator's commercial electricity bill is divided or separated into a number of components including energy charges, regulated charges, environmental charges and network charges.

In three other disputes NCAT has determined that only energy charges can be passed on to home owners as usage charges. The decisions are:

- Marsh v Pines Resort Management Pty Ltd [2018] NSWCAT (RC 17/33313)
- Bavin & Raczkowski v Parklea Operations Pty Ltd trading as Gateway Lifestyle Stanhope Gardens [2018] NSWCAT (RC 18/23674)
- Myles v Holiday Retreats Australia Pty Ltd t/as Rivergum Holiday Park (No. 2) [2018] NSWCAT (RC 17/32008)

In 'Reckless No. 2' NCAT took a different approach and accepted a methodology proposed by an expert witness who authored a report and also provide oral evidence at the hearing. The methodology provides for a pass through of all of the operator's charges and combines usage and supply to come up with a single kilowatt per hour (kWh) charge that is passed on to home owners.

THE EXPERT WITNESS

The expert witness was asked to:

"Develop a methodology that will allow Silva Portfolios Pty Ltd (the Community Operator) to pass through its cost of electricity to individual

sites within the embedded network located in Ballina, NSW".

In the report the expert witness states that the aim of the methodology is to enable the operator to pass through the full cost of electricity it has incurred to the sites within its embedded network, and to divide the cost as fairly as practical among each of the sites. The report acknowledges that this methodology "relates to the total electricity cost i.e. it is the cost of the use and supply of electricity".

The expert witness proposed two methodologies and NCAT accepted the one whereby the operator's total bill is divided by the total amount of electricity consumed by the community. Each home owner is then charged this rate for each kWh of electricity they consume.

THE DECISION

Parts of the published 'Reckless No. 2' decision are difficult to interpret and the decision does not clearly explain how the accepted methodology was applied to determine Margaret's refund.

The RLLC Act provides for two separate charges for utilities – a usage charge and an availability charge (SAC). 'Reckless' was a dispute about usage charges under section 77(3).

In submissions Margaret said that the operator's network charges should not be included in the usage calculation because they relate to the cost of supply rather than consumption. NCAT rejected that submission.

Margaret also submitted that network charges and service availability charges are essentially the same thing and that she therefore already pays a 'network' charge and shouldn't be charged again. That submission was also rejected.

In deciding this matter NCAT did not appear to be concerned with the differentiation between usage and supply costs and determined that the total "cost of electricity" was applicable.

What is not abundantly clear in the decision or expert report is whether, under the accepted methodology, home owners should still be paying a service availability charge on top of the kilowatt rate. Paragraph 31 of the published decision relates to this point:

> "In other words, the total of the electricity charges imposed on the applicant, whether they be a combination of supply and usage charges and a service availability charge, or just supply and usage charges, cannot exceed what the respondent has been charged by Origin. As Davies J said in Silva Portfolios Pty Ltd t/as Ballina Waterfront Village and Tourist Park [2018] NSWSC 1343 at para 53 "On the proper construction of section 77 (3) of the RLLC Act, the plaintiff is not entitled to charge the defendant any more than the plaintiff has been charged for the supply or use of the electricity consumed by the defendant."

The Tenants' Union has since confirmed that the service availability charges paid by Margaret since 1 November 2015 were included in the refund ordered by NCAT.

Ken Beilby (Margaret's solicitor) told us "The methodology accepted by the Tribunal in Reckless (No. 2) provides for a single cents/kWh charge for supply and electricity used. There are no longer two separate charges for service availability and usage. Mrs Reckless received a refund for overpayment of electricity charges, which included a refund of a portion of the service availability charge that she paid."

THE METHODOLOGY

It is possible the methodology proposed by the operator and accepted by NCAT does not comply with the RLLC Act. However, it may result in a fairer price for electricity and therefore savings for home owners as long as they are not required to pay a separate service availability charge.

One of the issues we have with this methodology is that all home owners are charged the same rate regardless of the level of supply they receive. The *Residential (Land Lease) Communities Regulation 2015* provides for a discounted service availability charge for home owners who receive less than 60 amps but the methodology is inflexible – it is one rate for everyone.

Some operators have commenced using a similar methodology and home owners in those communities are reportedly content with the new system. They are charged a kWh rate based on bundled charges and no longer pay a service availability charge.

IS IT OVER?

For Margaret Reckless the answer to this question is yes. She has decided to accept the

decision of NCAT and has not appealed. That is a fair call. Margaret has been through four formal hearings in three jurisdictions over two years and it has not been an easy road for her. We congratulate Margaret for staying the course and, by her actions, encouraging others home owners to take up the cause.

For home owners who have yet to resolve their disputes about electricity charges 'Reckless No. 2' has further muddied the waters rather than providing the desired clarity. The decision conflicts with previous decisions made by NCAT and it is questionable whether the methodology accepted complies with the RLLC Act.

On a positive note operators appear to have accepted that they cannot continue to charge the standing offer rate and they have to adopt one of the new methodologies. So, while the question of what home owners can be charged for electricity usage has not be decisively determined, there has been progress. Perhaps the end is now in sight.

The methodologies
NCAT has accepted three methodologies to date.

Method 1
Usage charge = total of the three rates charged to the operator under the heading 'energy charges' (energy losses and GST inclusive) divided by three.

Supply charge = service availability charge (SAC) calculated according to the RLLC Regulation.

Method 2
Usage charge = total amount charged to the operator (excluding network charges) divided by the total number of kWh consumed in the community.

Supply charge = total amount charged to the operator for network charges divided by the number of sites in the community.

Method 3
Usage and supply charge = total amount charged to the operator divided by the total kWh consumed in the community.

Free advice from local services:

Tenants Advice and Advocacy Services

Eastern Sydney	9386 9147
Inner Sydney	9698 5975
Inner West Sydney	9559 2899
Northern Sydney	8198 8650
Southern Sydney	9787 4679
South Western Sydney	4628 1678
Western Sydney	8833 0933
Blue Mountains	4704 0201
Central Coast	4353 5515
Hunter	4969 7666
Illawarra South Coast	4274 3475
Mid Coast	6583 9866
Northern Rivers	6621 1022
North Western NSW	1800 836 268
South Western NSW	1300 483 786

Aboriginal Tenants Advice and Advocacy Services

Greater Sydney	9833 3314
Western NSW	6884 0969
Southern NSW	1800 672 185
Northern NSW	1800 248 913

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