TENANTS' UNION OF NSW

SUBMISSION ON THE RESIDENTIAL (LAND LEASE) COMMUNTIES REGULATION 2014

January 2015

Submission on the draft Residential (Land Lease) Communities Regulation 2014

The Tenants' Union (TU) welcomes the opportunity to make this submission on the draft Residential (Land Lease) Communities Regulation 2014 (NSW) (the draft Regulation).

This submission is made on our own behalf, and on behalf of the network of Tenants Advice and Advocacy Services.

As well as referring to the draft Regulation, this submission refers to the *Residential (Land Lease) Communities Act 2013* (NSW) (the Act), the *Residential Parks Act 1998* (NSW) (the 1998 Act) and the Residential Parks Regulation 2006 (the 2006 Regulation) and the *Residential Tenancies Act 2010*.

Clause 4 Publication on internet of particulars of enforcement and disciplinary action

We welcome the clarification provided by this clause and support the process for the publication of information.

Clause 5 Publication of information kept in Register about residents committee

We support the inclusion of this additional information to be published in the Register.

Clause 6 Standard form of site agreement

We support the prescription of a standard form of site agreement. See our discussion of Schedule 1.

Clause 7 Form of site condition report

We support the prescription of a standard form condition report.

Clause 8 Prohibited terms of site agreement

We support the prohibition of terms in a site agreement that remove an operator's liability for negligence or require a home owner to take out any form of insurance.

Clause 9 Exemption from requirement for mandatory education

We do not support this exemption. The effect of this clause is that that for two years following the introduction of the Act operators who have no knowledge of the new legislation could return to the industry without the need to be briefed on the new laws.

Further, operators of parks that provide accommodation for renters need to be briefed on the *Residential Tenancies Act 2010*. This will be the applicable law for renters and the majority of operators do not have any knowledge of this Act.

The requirement to attend an education briefing is not an onerous one and the benefits of having informed operators cannot be underestimated. Residents, NSW Fair Trading and the NSW Civil and Administrative Tribunal (the Tribunal) will bear the burden of disputes caused by uninformed operators and it is a far better use of resources to educate operators through a briefing rather than through a formal dispute process.

Clause 10 Retaliatory conduct

We support this addition to the retaliatory conduct provision.

Clause 11 Exemption relating to charges payable for sewerage

We do not support this clause. Sewerage charges have always been factored into site fees in residential communities and in our view it is unnecessary to change this system.

When the Tribunal is considering site fee increases the outgoings and operating expenses for the community are key factors that are taken into account. Sewerage charges are operating expenses.

The current system is not dissimilar to water charges being included in site fees where there is no separate metering in place. We note that the Act at section 81 specifically provides for site fee reductions when utility charges become separately measured or metered. This provision will apply to sewerage charges once they become measured (as a percentage of water usage) and site fees would therefore reduce. The end result is that the operator will receive the same amount of dollars from home owners as they currently receive.

We submit that the current system works well – it is simple and it enables operators to recover their costs. In contrast, the proposed system will unnecessarily burden operators, home owners and the Tribunal because it is complicated. It will be difficult to check whether the charges have been correctly applied.

There are a number of other problems with the proposed system regarding how the calculations would work in practice. In summary, the charge is calculated as follows:

1. The operator takes the total water bill for the community then has to work out what percentage of that bill applies to each area of the community including common areas, and to each site according to the metered amount of water used by that site.

2. The operator then takes the overall sewerage usage charge for the community and each site is billed for the same percentage for sewerage usage that they paid for water usage.

These are onerous calculations for the operator, particularly in larger parks, and they have to be undertaken every quarter because the percentage of water used by home owners will vary. In larger parks like Bayway Village, where there are 480 residential sites, the task of allocating percentages of water use to common areas and then to individual residential sites will be enormous and the percentages will be fractions.

There are also problems posed by the definitions of 'community', 'total sewerage charge' and 'total water charge'.

In the Act a community is:

> ***community*** or ***residential community*** means an area of land that comprises or includes sites on which homes are, or can be, placed, installed or erected for use as residences by individuals, being land that is occupied or made available for occupation by those individuals under an agreement or arrangement in the nature of a tenancy, and includes any common areas made available for use by those individuals under that agreement or arrangement.

This definition excludes holiday sites, operator residences, offices and other business premises and potentially shops and food outlets, all of which use water and all of which should be included as part of the community.

The draft Regulation uses the following definitions regarding sewerage charges:

> ***total sewerage charge*** means the total amount charged by a utility service provider for the use of sewerage at the community over the period.
>
> ***total water usage*** means the total amount of water used at the community over the period.

If this provision goes ahead, in order for it to be equitable it is essential that the total water and total sewerage are measured exactly the same. The current definitions of 'community', 'total sewerage charge' and 'total water charge' are incompatible and in our view do not ensure this. The regulations must ensure that the calculations come from the same base measurements of both water and sewerage use.

The regulations must also set out what is to be provided by the operator in the itemised account required by section 77(2)(b) of the Act. A home owner has to know how the charges were calculated. This would best be achieved by combining the water and sewerage usage account to provide the following:

1. Details of the water account received by the operator including the total amount of water used and the separate amounts charged for water and sewerage usage, or details about the total amount of water used and how it was measured (in communities where the supply does not come from the water supply authority).
2. The home owner's previous water meter reading.
3. The current meter reading.

4. The amount of water supplied during the billing period.
5. The charge per unit of water.
6. The total charge for water.
7. The percentage of water used in relation to the whole community and how this was calculated.
8. The amount being charged for sewerage usage.

We suggest that the regulations should provide a standard form water and sewerage usage account. This would simplify the process for operators, home owners and the Tribunal.

Clause 12 Maximum service availability charge generally

We support the retention of the status quo regarding the maximum service availability charge.

Clause 13 Maximum service availability charge – water and sewerage

We support the retention of the status quo regarding the maximum service availability charge for water and sewerage.

Clause 14 Discounted service availability charge where less than 60 amps of electricity supplied

We do not support this clause as it is written and are concerned that a subtle change in the wording could increase the financial burden on home owners. 'Capable of flowing' does not, in our view, have the same meaning as 'supply' and could lead to higher service availability charges for residents.

The 1998 Act and prescribed code (Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks (2006)), the Act (section 77(5) and draft Regulation (in 'Discussion of Proposed Regulation', the title of clause 14, and sub-clause (2)) all use the word supply or supplied. However, the wording in clause 14(2)(a), (b) and (c) moves away from this clear terminology and introduces a phrase that is open to interpretation and probable extensive legal argument.

A number of Tribunal cases have discussed the meaning of supply and *Batts v RV Parks Australia Ltd (Residential Parks) [2010] NSWCTTT 397 (16 August 2010)* and *Zova v Grasuelin Pastoral Company Pty Ltd t/as Macquarie Lakeside Village (Residential Parks) [2008] NSWCTTT 1404 (27 November 2008)* (attached) are two good examples. In both of these cases the Tribunal determined that 'availability' and 'supply' are not the same and we are concerned that 'capable of flowing' could be interpreted as 'availability'. *Batts* was appealed to the District Court and Blanch CJ upheld the Tribunal decision (Appeal case no. 2010/303758).

Under the Act home owners are already facing new fees and charges and enabling operators to charge a service availability charge for a supply that is not received should not be contemplated. The change would be unjust and unfair.

The regulations should continue the status quo, as is claimed in 'Discussion of Proposed Regulation' (page 14) and use the word supply instead of 'capable of flowing' throughout clause 14.

Clause 15 Maximum service availability charge - offence

We support the inclusion of this clause.

Clause 16

The penalty amounts set by clause 16 are disappointingly low and are unlikely to act as a deterrent.

Using section 21 of the Act as an example, the maximum penalty is 100 penalty units, which is a potential fine of $11,000 and a very strong deterrent. The draft Regulation sets this penalty at $550 or five penalty units, 5% of the maximum.

We suggest that the penalties in the draft Regulation be upgraded to closer reflect the maximum penalty units provided for in the Act.

Clause 17 Sale of homes – existing agreements

This is a good provision that provides clarity and protection for home owners with clauses in their site agreements restricting sales. However the clause relates specifically to section 82(1) of the 1998 Act and should also include section 80(1) which enables on-site sales to be prohibited.

The Act provides the right to sell on-site but home owners with agreements under the 1998 Act that prohibit on-site sales under section 80(1) will not have this right unless the Regulation deals with it in the same way as is proposed for section 82(1).

Clause 17 should be expanded to included section 80(1) of the 1998 Act and make it clear that any terms of the agreement prohibiting on-site sales cease to have effect after commencement of the Act.

Standard form of site agreement

Below we comment on the content of the standard form of site agreement provided by the draft Regulation. We also comment on a number of matters that should be dealt with by the Regulation, but currently are not: see under the heading 'Additional Regulation clauses'.

Important information

Point 3 in this section appears to support age restrictions in communities. The Anti-Discrimination Act 1977 makes it unlawful for a person, whether as principal or agent, to discriminate against another person on the grounds of age by refusing the person's application for accommodation. The Government, through

the standard form residential site agreement should not encourage operators to act unlawfully.

A point should be added that clarifies that a current home owner need not sign a new agreement when their fixed term expires. We acknowledge that this information is contained within the agreement under 'term of agreement' but it would be much clearer if it also appeared up front.

A further point should be added that any purchaser who has had a site agreement assigned to them does not need to enter into a new site agreement. One of the 'Objects of Act' is to enable prospective home owners to make informed choices and we suggest that setting out information early and clearly in the site agreement goes towards this.

Site fee increases

We support clear options for fixed method increases in the site agreement but are concerned that 'in accordance with variations in the CPI' and 'in accordance with variations in (single/couple) age pension' may be inconsistent with the intention of the Act.

The Act provides for 'a fixed calculation (for example, ***in proportion to*** variations in the Consumer Price Index or in the age pension' whereas the draft site agreement provides for increases '***in accordance*** with variations in the CPI and ***'in accordance*** with variations in (single/couple) age pension. We suggest that if the site agreement is to incorporate the examples from the Act, the best way of doing so is to use the same words: 'in proportion to'.

We submit that 'in accordance with' may mean something different. A variation in the age pension can be expressed either absolutely (for example, an increase of $23) or relatively (an increase of three per cent). The words 'in proportion to' clearly refer to variation in the relative sense, such that the rent would increase by three per cent (and so, if the rent was $400 per fortnight, the increase would be $12). We submit that it is not clear that 'in accordance with' refers to a variation in the relative sense, and may mean instead that the rent is increased by the absolute amount of the pension increase ($23).

This change in terminology from the Act to the site agreement is a major cause of concern because increases 'in accordance with variations in the age pension' has the potential to impoverish home owners and it could result in vastly unfair, unsustainable and unjust site fee increases.

The provision would result in pensioners on this fixed method never having an increase in their after-housing income, potentially for the duration of their occupancy, which could be 20 years or more in some cases. Without an increase in income people cannot keep up with increases in other cost of living expenses, for example food, medical, power and water.

It would also mean that rent increases for home owners receiving the couple rate of Age Pension would be higher than rent increases for those receiving the single rate of Age Pension. This means that over time couples will be paying much higher site fees than their single neighbours despite being provided with similar sites and the same services and facilities.

As an example of the effect of this provision we can look at Age Pension increases in 2014:

> In March 2014, the maximum rate of the Age Pension increased $15.70 a fortnight for single pensioners and $11.90 a fortnight for each member of a couple. This would result in site fee increases of $7.85 and $11.90 per week.
>
> In September 2014 the maximum rate of the Age Pension increased $11.50 a fortnight for single pensioners and $8.70 a fortnight for each member of a couple. That is a second site fee increase of $5.75 and $8.70 per week.
>
> Overall in 2014 site fee increases 'in accordance with variations' in the Age Pension would have been $13.60 per week for a single pensioner and $20.60 per week for a couple.

The secondary impact of this clause is that increases in site fees for everyone in the community will be higher because one of the factors to be considered by the Tribunal in increases by notice is 'the range and average level of site fees within the community'.

If it is not the intention of the Government to allow site fees to be increased in this way then, as suggested above, the terminology in the standard form site agreement should be the same as that in the Act. Or, as an alternative the Government could use terminology that reflects the intention of the Act to provide for site fee increases 'in proportion to' variations in the Age Pension, for example:

> 'by 33% of any dollar ($) increase in the rate of the single Age Pension'.

Not only would this provision reflect the intention of the Act, it would be equitable. It would provide for site fee increases that should be reasonable to all parties whilst ensuring that pensioners retained at least two-thirds of pension increases to cover other cost of living increases. If we again use 2014 as an example this provision would provide a site fee increase of $4.48 per week over the year.

We welcome and support the clarity around how long the fixed method increase will apply as there have been differing views on this for a number of years. We do however have concerns about some fixed methods of increase being locked in for extensive periods – these are discussed later under section 66 of the Act.

Utilities

Clause 8 of the site agreement references an itemised account but neither the Act nor the draft Regulation specifies what that itemised account should contain and this could produce great variations across communities.

All consumers should be entitled to certain information from their utility providers regardless of who the provider is. Consumers must be able to look at

their account and determine what they are being charged, over what period and that the charge is correct.

As exempt sellers under the National Energy Retail Law operators are required to provide particulars in electricity accounts for their customers. This requirement should be extended to all utility accounts.

The 1998 Act currently prescribes details to be included in itemised accounts and if the Act does not it is a step backwards. Home owners in residential communities should enjoy the same right to information as members of the general community.

Clause 10 of the agreement is a concern because again the phrase 'capable of flowing' rather than 'supply' is used (see earlier discussion). The terminology must be consistent with the Act and 'capable of flowing' must be replaced with 'supply'.

Sub-letting

Clauses 23 and 24 are about sub-letting but there is no mention of assignment despite assignment being part of the same section of the Act. Section 45 of the Act is entitled 'Sub-letting residential site or assignment of site agreement'. There is an error in this section in that sub-section (3) uses the word 'tenancy' instead of 'site' agreement but as this is clearly erroneous the site agreement should not repeat it.

We submit that the use of tenancy agreement instead of site agreement is an error for the following reasons:

1. There is no such thing as a tenancy agreement under the *Residential (Land Lease) Communities Act 2013*. All rentals will fall under the *Residential Tenancies Act 2010* on commencement of the Act.

2. The title of the section is 'Sub-letting residential site or assignment of ***site*** agreement'.

3. Subsection (1)(b) provides the right to 'assign the ***site*** agreement'.

In light of the operator's right to refuse to enter a new agreement if the potential home owner does not agree to the terms on offer it is essential that the home owner's right to assign is clear.

The error in the Act is easily fixed and this ought to be done prior to commencement. However, whether or not the error in the Act is fixed, the site agreement must set out the home owner's right to assign the agreement alongside the right to sub-let the premises.

Acknowledgement by Home Owner

Another section should be inserted for information that is required to be provided under Condition 2 of the Retail Exempt Selling Guideline of the Australian Energy Regulator.

Legal advice

The purpose of requiring a home owner to declare whether or not they have obtained independent legal advice is unclear. Having a person tick a box at the very end of a contract will not indemnify the operator against any unlawful or unjust terms in the contract and the item is therefore pointless and should be removed.

Additional Regulation clauses

There are a number of other sections of the Act that would benefit from clarification through the regulations. In some instances this is recognised by an enabling power in the relevant section of the Act. Where there is no specific reference to the regulations section 185 provides a general enabling power to make regulations where it is necessary or convenient for carrying out or giving effect to this Act.

Section 43 Dilapidation

The current wording of section 43 is vague and potentially enables operators to pursue home owners for rectification costs for the site for issues that are either beyond the home owner's control, for example subsidence, or for which they bear no responsibility, for example trees.

The regulations should clarify that the home owner is not liable for any dilapidation of the site due to natural phenomenon or infrastructure problems such as trees or pipes.

Section 66 Increase of site fees by fixed method

We support the clarity and security provided by fixed method increases but are concerned that some methods of increase will be locked in over extensive periods of ten years or more and that events and circumstances could change significantly in that time. The regulations must provide a safety net for such occasions so that home owners are not pushed deep into poverty or forced to abandon their home due to circumstances beyond their control.

The regulations must enable home owners to challenge a fixed method increase if there is a significant change of circumstances. Such an example could be if the method is CPI and the CPI increases to a level above 6%, but the trigger for a challenge should not be restricted to this example.

Section 74 Matters to be considered about excessive rent increases

The Act enables the regulations to require the Tribunal to disregard specified matters when deciding whether to make an order under section 73. We suggest that the regulations should require the Tribunal to disregard all expenses and outgoings not directly connected with the operation of the community with regard to home owners under residential site agreements. This would include:

- Costs to create, maintain or improve tourist sites and dwellings.

- Costs to create, maintain or improve operator or other private residences.
- Costs to create, maintain or improve any facilities for the exclusive use of tourists or where there is a separate user fee for home owners and/or their visitors.
- Costs to create, maintain or improve any buildings or structures for businesses operated from within, but not connected to the community, for example, gyms.

Section 86 Subject-matter of community rules

We are concerned that unless community rules are restricted to certain subject matters as they are in the 1998 Act we will see the introduction of large numbers of unfair and unnecessary rules and consequently an increase in Tribunal applications on this issue.

The regulations should be used to place some restrictions on subject matter for community rules.

Section 113 Selling agency agreement

The regulations should specify and limit what type of expenses can be included in incidental expenses'.

In many areas of the State real estate agents do not sell homes in residential communities and home owners therefore have little option other than to engage the operator as their selling agent. The regulations should set a maximum rate of sale commission to ensure that these home owners are not in position of disadvantage to other home owners and the general community when selling their homes.

Section 156(2) Limitation periods for Tribunal applications

The Civil and Administrative Tribunal Rules 2014 (23(3)(b)) prescribe the limitations for applications where the legislation does not. The default limitation period is 28 days and in some instances this is either inappropriate or an insufficient amount of time in which to bring an application. The following time periods should be prescribed in the regulations.

Section	Limitation
9(b) Declaration by Tribunal	At any time
26 Site agreements	At any time during the agreement
27 Site agreements	At any time during the agreement
28 Additional terms	At any time during the agreement
29 Prohibited terms	At any time during the agreement
37 (2)(c) Operator's responsibilities	90 days
47 mail facilities	At any time during the agreement
64 Power of Tribunal to reduce site fees	Any time during the agreement (same as Parks Act)
138 Tribunal may value home	At any time
140 Compensation for relocation	12 months because of iv, v & (b) not occurring until after the move and

	the potential for damage to show up later, for example, when it rains heavily for the first time
141 Compensation where home not relocated	90 days
142 Abandonment	90 days
143 Home or goods abandoned	Within 28 days of the operator gaining possession of the site (same as Parks Act)