Report on the *Residential (Land Lease) Communities Act 2013*
February 2017

The *Residential (Land Lease) Communities Act 2013* (the Act) commenced on 1 November 2015. It has now been in operation for just over a year and it is timely to consider what is working, and what needs to be improved or fixed.

The Tenants' Union of NSW (TU) is the peak body representing the interests of tenants in New South Wales. We are a resourcing body for the statewide network of Tenants Advice and Advocacy Services (TAASs), and a Community Legal Centre with specialist knowledge in residential tenancy law, including land lease communities.

In compiling this report we have consulted with resident advocates who live in land lease communities and TAASs working with land lease community residents. The Tenants' Union is well placed to analyse the Act's impact on home owners, and to comment on its operation in general.

The introduction of the Act has generated questions for those affected resulting in TAASs advising 43% more land lease community residents in 2016 than in 2015.

Summary

After reviewing the operation of the Act, analyzing TAASs advice work and liaising with land lease community residents we believe the Act has failed to strike the desired balance between enhancing the protections of home owners and encouraging the continued growth and viability of the industry. It has however improved on the *Residential Parks Act 1998* (the Parks Act) in a number of areas. In particular the Act has:

- Provided more equitable coverage for home owners
- Improved access to dispute resolution processes
- Is more user friendly and easier to navigate

Some aspects of the Act however have failed to bring the anticipated improvements, mainly because of the lack of a robust and effective compliance regime. Prior to commencement, one of the key messages about the Act was that it would improve the governance of residential communities and lift operator standards. We have seen little or no improvement in this area to date.

Other aspects of the Act that are not working or have caused problems include:

- Site fees in new site agreements are rarely set at fair market value
- Utility usage charges are not understood and home owners are being overcharged
- Maintenance and repair of sites has created a new area of dispute with operators pursuing home owners for the cost of repairs to what is essentially infrastructure

Objects of Act

Residential land lease community living is a small but important part of the housing system in New South Wales. It is unique in that the majority (around 87%) of people who live in land lease communities own their homes but not the land on which the home is situated. Both operators and home owners have significant investment in land lease communities and the Act seeks to balance the interests of both parties.

When considering the operation of the Act we must remember that the interests of the parties to site agreements are not aligned. On the whole operators are interested in profit and home owners want a safe and secure place to live. There is imbalance in the relationship both before and after the signing of a site agreement. Site agreements are offered on a take it or leave it basis, usually following an agreement to purchase a home. Once in the community a home owner may find it is not what they thought it would be yet moving can be both difficult and costly.

Whilst it is necessary and desirable to encourage the growth and improve the viability of the land lease community industry the investment made by home owners must be recognised and their rights and protections improved. With this in mind, we offer the following comments of the *Residential (Land Lease) Communities Act 2013*, a year after commencement

Improvements

The Act improves on the Parks Act in a number of areas. Firstly, the Act is set out more logically, is easier to navigate and the language has been simplified.

Application of Act to site agreements

The removal of the principal place of residence requirement has ensured that those with site agreements do not lose coverage of the legislation until the agreement is legally terminated under the Act.

It has also fixed the issues regarding coverage by the Act for beneficiaries of deceased estates.

Coverage for all home owners

The removal of the old 30/30 rule for campervans and caravans without a rigid annexe has provided equality of legislative coverage for all home owners in land lease communities.

Cooling off period

The 14 day cooling off period is beneficial to prospective home owners who sometimes make decisions they later regret.

Prohibited terms of site agreements

That operators can no longer require home owners to take out any form of insurance has alleviated an unnecessary financial burden for home owners. The majority of home owners will still do the sensible thing and insure their homes but they now have more freedom about what type and level of insurance to take out.

Access to the community by emergency vehicles

These are small but important changes that could help to save lives.

Additional occupants

The new provisions around additional occupants recognise that by and large homes are self contained and home owners should be able to determine, within reason who lives in their home with them. This provision is undermined by the operator being able to refuse permission for an additional occupant on the grounds of age restrictions within the community.

Right to sell on site

Removing the restrictions and prohibitions on the sale of homes on site brought relief to the many home owners who were facing the loss of their investment if they chose to leave their

community. Clarification around what constitutes interference with sale and a specific provision for compensation when interference occurs is also helpful.

Mediation of site fee increases

The mediation process for site fee increases has been successful in bringing the parties to an agreement in the majority of cases the Tenants' Union is aware of. We do however remain concerned that the threshold of 25% is too high and should be reduced to ensure that home owners have reasonable access to this process.

Compensation for closure or change of use

For those home owners who are unfortunate enough to face the loss of their home due to the closure or change of use of their community, the compensation provisions appear to be much fairer. However, as they are yet to be tested we will reserve further comment until such time that we can see clearly how these particular provisions will work.

Dispute resolution

One of the big failings of the Parks Act was that it did not always provide access to the Tribunal when provisions were breached. The Act has remedied this and has also provided improved dispute resolution processes.

What isn't working

There are some provisions in the Act that have failed to achieve what was intended and others that are presenting difficulties.

Assignment

The primary issue with the assignment provision relates to a drafting error when the Act was amended in the Upper House. In section 45(3) the word 'tenancy' is used when it should be 'site'. This has caused confusion, created problems for home owners and resulted in disputes going to the Tribunal unnecessarily.

The Government has twice indicated a desire to amend this provision but each time, rather than simply changing the one problematic word the amendment has also sought to restrict the assignment of a site agreement to the fixed term. The effect of this is to render the provision redundant because many site agreements do not have fixed terms. We believe that it was not the intention of the movers of the amendment, or the Government that accepted it to insert a provision into the legislation that is inoperable.

Assignment is a valuable right and essential bargaining tool for home owners who are selling their home. Without it sales can fall through and the value of homes can decrease because some operators do not offer fair terms in new site agreements to prospective purchasers. Many operators are simply ignoring the requirement that site fees in new agreements should be set at fair market value and the higher fees have resulted in prospective purchasers walking away from sales or seeking a reduction in the sale price because of the extra costs they are facing.

Case study 1

A clear example of the impact of unclear assignment rights is demonstrated in the case of Mrs P.

Mrs P, is a single aged pensioner who put her house on the market in March 2016. Her site fees were $151 per week. In June, her agent accepted a holding deposit of $1,000. The operator advised the purchaser that the new site fees would be $194 increasing to $204 in July.

Mrs P asked the operator to consent to the assignment of her site agreement to protect the purchaser from this extraordinary increase in site fees. The operator refused so Mrs P applied to the Tribunal claiming interference with the sale of her home. On 8 June the Tribunal ordered the operator not to unreasonably refuse assignment, and, not to engage in conduct that indirectly amounts to a denial of home owner's rights (File No: RC 16/23326).

Believing the operator would comply with the Tribunal orders, Mrs P arranged for a retirement village to hold a unit for a short period until her home sale was finalised. On 14 June the operator emailed Mrs P stating that he had obtained legal advice and would not be assigning the site agreement to the purchaser. The purchaser withdrew.

The situation was damaging Mrs P's health, there was no resolution in sight, and the retirement village required payment to secure the unit. Mrs P's only practical solution was to sell her home to the operator for $40,000 less than her buyer had agreed to pay.

A straightforward amendment will fix the assignment provision and give effect to the intention of the Act - to protect home owners from unfair business practices. Our recommendation is to amend section 45(3) as follows:

Change 'tenancy' agreement to 'site' agreement.

This will resolve all of the issues around assignment and restore the intent of the original amendment.

Site fees in new agreements

The Act provides that site fees in new site agreements must not exceed fair market value. It then sets a method for determining fair market value. These provisions are failing home owners and resulting in the escalation of site fees way above fair market value. The impact of this is broader than the affected home owners who have signed the agreements – the market is perversely distorted and this impacts all future home owners. Site fees are being increased outside the operation of the Act and in direct contravention of the relevant provisions intended to protect home owners from such practices.

The second issue with these provisions is that there is no remedy for affected home owners unless they become aware almost immediately after signing the site agreement. NCAT rules dictate that unless the enabling legislation sets a limitation period for making an application then it must be made within 28 days. Most home owners affected by this issue do not become aware until weeks after they moved in when they have got to know their neighbours and feel comfortable discussing financial matters such as site fees. By this time the time limit for a Tribunal application has expired.

The two case studies from Terrigal Waters demonstrate the failure of these provisions:

Case study 2

On 5 January 2016, Ms S, a single pensioner, entered into a site agreement with a fixed method increase, knowing the selling home owner was paying site fees of $151 per week. When she was about to sign, Ms S asked the operator why the amount on her agreement was $194, an increase of $43 per week. In previous conversations with the operator, he had not mentioned his intention to increase the site fees, thereby costing Ms S an additional $2,236 per year from her pension.

Ms S's Disclosure Statement noted the highest site fee in the community as $194. Ms S believed the operator would not have set her site fees at that amount unless he was legally permitted to do so and she was now in a position where she had nowhere to live if she didn't move into the community. She signed the site agreement.

It was at least two months before Ms S knew her neighbours well enough to learn they were all paying $151 per week.

Case study 3

On 8 March 2016, the next incoming home owner, Ms C (also a single pensioner) was aware the selling home owner was paying $151 per week. Ms C also asked the operator why her site fees were $194.

Ms C, like Ms S before her, believed the operator would not have set her site fees at $194 unless the law permitted him to do so. As in Ms S's case, it was at least two months before she learnt, by word of mouth, that she was paying $43 a week more than her neighbours, including those on much larger and better located sites.

Ms C lodged a Fair Trading property complaint form, requesting an investigation. Fair Trading replied that nothing could be done unless the Tribunal found a breach of section 109.
After Ms S and Ms C, two more new site agreements were entered into at $194. By annual fixed method, the site fees for these four home owners were increased in July 2016 to $204. Since then, at least three more new agreements have commenced at $204 per week artificially inflating the average site fees for the community.

Terrigal Waters is not the only land lease community where the Act is being disregarded in this way, but these examples demonstrate the significant impact on home owners. One of the objects of the Act is to protect home owners from unfair business practices and we suggest this practice challenges that objective.

We suggest that there is a simple remedy for this problem - amend sections 109(5) and (6) and 111(3) and (4) so that site fees in new agreements are required to be the same as the current home owner pays. This is a fair amendment - site fees are largely determined either by agreement between the home owners and operator or by the Tribunal. Logically therefore the site fees paid by current home owners are 'fair market value' and there is no need for a second system within the Act to determine 'fair market value'.

We recommend that section 109(5) and (6) and section 111(3) and (4) are deleted and replaced with:

> 'The site fees under a new site agreement must not exceed the site fees currently payable by the home owner occupying the residential site.'

Site fee increases by notice

The Act requires that site fee increases by notice include an explanation for the increase in the notice. The purpose of this explanation is to provide home owners with information about the increase in the cost to operate the community, the cost of improvements etc. so that home owners can assess whether the increase is reasonable. This provision has largely been unsuccessful with operators either providing no explanation or a generic statement not specific to that community (many communities have used an identical statement).

For this provision to be effective and reduce the number of applications for mediation the Government could prescribe a site fee increase notice that requires operator to comply with the requirement to provide an explanation.

Utility usage charges

Changing the way that utility usage charges are calculated has resulted in those charges being fairer. In most situations there should have been a decrease in electricity usage charges for home owners, however water usage charges have increased in some areas.

Unfortunately there is still a great deal of confusion about the calculation of usage charges. Information available to operators and home owners regarding electricity usage charges is contradictory. This has resulted in some operators reducing charges for home owners and others continuing to charge according to the standing offer price set by the local retailer. The Act provides that:

'77 Utility charges payable to operator by home owner

(3) The operator must not charge the home owner an amount for the use the use of a utility that is more than the amount charged by the utility service provider or regulated offer retailer who is providing the service for the quantity of the service supplied to, or used at, the residential site.'

When the *Manufactured Homes (Residential Parks) Act 2003* was amended in Queensland in 2011 similar confusion arose. The Queensland Act provides:

'99A Separate charge by park owner not to be more than cost of supply for use of utility

(1) This section applies if—

(a) under a site agreement, the home owner is required to pay the park owner for the use by the home owner of a utility at the site; and

(b) the use is separately measured or metered.

(2) The park owner must not charge the home owner an amount for the use of a utility that is more than the amount charged by the relevant supply authority for the quantity of the service supplied to, or used at, the site."

In May 2015 the Director-General (Department of Housing and Public Works) (Queensland) issued an important message to park owners about the policy intent of the new provision and making it clear that the price the park owner pays is what can be passed on to home owners.

Section 99A of the Queensland Act was also interpreted by the Queensland Civil and Administrative Tribunal (QCAT) in an appeal decision – ***Emmetlow Pty Ltd t/as Colonial Village v Pomroy [2015] QCATA 131.*** In this decision QCAT found that 'It is quite clear from the words of s99A that the retailer's charge for the supply must not be exceeded. The home owner must not be charged any more than this amount for the use of the utility.'

Currently in NSW there are hundreds, possibly thousands of home owners being overcharged utility usage charges and this needs to be addressed.

Service availability charges for electricity are also a concern and it is disappointing that an opportunity was missed to improve these provisions and make them fairer when the Regulation was amended in 2016. Many home owners pay upwards of $1.00 a day for availability when the supply is over 30 amps and this is causing financial hardship for some.

Section 83 is also not working well and we are aware of home owners having to seek orders at NCAT that the operator provide documents about electricity charges so that they can check whether they are being correctly charged.

Age restrictions

Age restrictions in land lease communities have been a hotly debated for many years. Home owners sit on both sides of the fence with some deliberately selecting communities that advertise age restrictions and others supporting a completely open market. It is our view that hard and fast age restrictions in land lease communities breach anti discrimination law and should not be encouraged through the Act.

We are aware that NCAT heard a matter in 2016 regarding age restrictions in community rules and found that they are permissible because rules are instruments under a State Act. We hold concerns about the soundness of this decision and the potential implications – it opens the door to have community rules that discriminate on any ground because instruments under a State Act enable conduct that would otherwise be discriminatory.

One of the key findings in the case was that the Act contemplates age restrictions in section 44:

> '(6) It is not unreasonable for an operator to withhold or refuse consent on the ground that the additional person does note meet the age restriction for occupancy set out in the community rules that were in force when the home owner entered into the site agreement.'

An experienced real estate agent has advised the Tenants' Union that age restrictions are impacting those selling homes because the pool of buyers is restricted. He also advises that some operators are not allowing spouses and carers to move into homes if they do not meet the age restrictions in the community.

A further point the real estate agent makes is that in some communities where age restrictions have been introduced tourists of all ages are staying just a couple of meters away from the home owners. Age restrictions make even less sense in these communities.

The majority of home owners in land lease communities are older people who are attracted to the lifestyle and this is likely to remain the case regardless of age restrictions. However, arbitrary age limits for occupancy can cause difficulties for home owners and have devastating impacts on families. They can prevent home owners from offering a home to an adult child or grandchild that has nowhere else to go and is facing homelessness. Home owners should be able to accommodate their family in times of need regardless of age.

Age restrictions may be reasonable if they are advisory and flexible but outright bans on people below a certain age should not be permitted or encouraged. We suggest that section 44(6) should be repealed.

Repair and maintenance of sites

The Act, through omission has transferred responsibility for the maintenance of sites to home owners and we do not believe this was the intention. Home owners only lease the land and so, like tenants, they have a general responsibility to look after the site and keep it clean and tidy but that is where the responsibility should end.

The Parks Act was clear – the park owner had a responsibility to provide and maintain the residential site in a reasonable state of repair. However the Act only requires the operator to

ensure the site is in reasonable condition and fit for habitation at the commencement of the site agreement.

Prima facie it may appear appropriate to make a home owner responsible for site maintenance because their home is situated on that piece of land. In reality the impact of this can be huge. In the Hunter, a home owner was advised that they had to pay for water pipes that had cracked and were leaking within the boundary of their site. Water pipes are community infrastructure and the responsibility of the operator. Had the leak occurred outside the site boundary there would have been no doubt that the operator was responsible for the repair.

In a community on the Central Coast a home owner is currently being pursued by the operator for the cost to repair a retaining wall that the operator claims is on the site and therefore the home owners responsibility. The retaining wall has been in place for a number of years and is an essential support to the structure of the site (the land slopes and the wall keeps the site level). The wall has been deteriorating for a few years but the operator only commenced pursuing the home owner for the repair after the commencement of the Act. The cost to repair this wall is in excess of $2000. Again, this is infrastructure and ought to be the responsibility of the operator – this should be clear in the Act.

Disclosure of information

Operators are required in the Act to provide pre contractual disclosure to prospective home owners. The Act requires the disclosure statement to be in the approved form yet we are aware of operators who do not provide a disclosure statement and others who do not provide it in the approved form. One operator refers only to obligations that home owners have under the *Local Government Act 1993* (NSW).

A real estate agent who is very active in land lease community sales advises that disclosure is one of the biggest issues for purchasers. He has seen a wide range of disclosure statements ranging from three to nine pages long. He also advises that operators often hold back disclosure statements until after the 'application for tenancy' has been processed but purchasers would prefer them to be provided on request. This fits with the objects of the Act, one of which is 'to enable prospective home owners to make informed choices.'

We suggest that more needs to be done to educate operators about the requirement to provide the disclosure statement in the approved form. Also, penalties should be imposed on operators who continue to ignore this requirement.

Operator conduct

The numerous new provisions in the Act about operator conduct, including the rules of conduct were welcomed by the Tenants' Union and home owners across the state. Unfortunately operator conduct remains one of the most common complaints we hear. Almost 50% of the advices given to residents by TAASs in 2016 related to either operator conduct or operator responsibilities. Complaints about operator conduct are now coupled with complaints about the lack of enforcement action when those complaints are reported.

Many home owners have advised that they have reported conduct that appears to be in breach of the Act only to be told that the operator denied the conduct so no further action could be taken. In one community the home owners provided 11 statutory declarations regarding an incident of intimidation and they were advised that this was insufficient evidence and no action would be taken.

The provisions around operator conduct were introduced for very sound reasons but they are ineffective if they are not enforced. One of the objects of the Act is 'to protect home owners from bullying, intimidation and unfair business practices' but the feedback we have received is

that this has not been achieved. Consideration should be given to improving compliance and taking enforcement action against those operators who breach the Act through prohibited conduct. Improving the behaviour of operators will lead to better managed and more harmonious communities and that will benefit all parties.

Limitation periods for Tribunal applications

Whilst the Act provides limitation periods for some applications and others have been added through the Regulation there are many provisions where a fair and sensible limitation period is lacking, as demonstrated by the examples from Terrigal Waters. We suggest that limitation periods should be set rather than left to NCAT rules and recommend the following additional limitations be added through the Regulation:

Section 39(3)	Access to site by operator			30 days
Section 40(4)	Access to community by tradespersons and service providers		30 days	
Section 41(2)	Access to community by emergency and home care vehicles		60 days	
Section 42(4)	Alterations, additions to and replacement of homes			60 days
Section 44(4)	Additional occupants		60 days	
Section 44(7)	Additional occupants		60 days	
Section 45(6)	Sub-letting site or assignment of site agreement		30 days	
Section 50(5)	Special levy		30 days	
Section 78(2)	Unpaid utility charges		30 days	
Section 85(3)	Recovery of amounts mistakenly paid		60 days	
Section 95(1)	Application about community rules			30 days
Section 101(2)	Only one residents committee	60 days		
Section 115(1)	Disputes relating to sale		60 days	
Section 121	Disputes about termination notices			30 days
Section 122(5)	Termination by operator for breach	30 days		
Section 130(1)	Termination orders		30 days	
Section 142(1)	Abandonment of residential site	30 days		
Section 143(2)	Home or goods abandoned after termination of agreement	30 days		
Section 156(1)	Applications to Tribunal		90 days	

Other small fixes

Some minor corrections to the following provisions will alleviate potential issues, provide clarification and improve the Act.

Termination and possession

In section 16(f) one of the ways in which the site agreement terminates is when occupation of the home is given over to another person following the sale of the home. This conflicts with the right to assign a site agreement and produces unintended consequences. If an agreement is assigned, under s16(f) this agreement terminates upon the purchaser taking up occupation of the home.

The Act deals with termination and possession orders at sections 130 and 131. The terminology in 130 is problematic in that it refers to vacant possession of the residential site. When site agreements are terminated the home on the site is almost never removed, rather it is later sold to another home owner or the operator.

Section 131 refers only to possession of the site and we suggest that this same terminology should be used in s130 to clarify that the granting of possession of the site to the operator following termination of the site agreement does not require removal of the home.

Site fee increases

In section 74 the factors that the Tribunal may consider in challenges to site fee increases include projected increases in costs and planned repairs or improvements. These two factors unnecessarily complicate what is already a complex calculation. If an amount is awarded by the Tribunal for one or both of these factors but the projected costs are lower, or the improvements do not occur the system is not geared up to deal with this when the next increase comes around. Removing these factors does not disadvantage the operator – the costs can be claimed retrospectively, as they were prior to the commencement of the Act.

Standard form site agreement

The standard form site agreement should set out all of the rights under section 45 rather than just those related to sub-letting.

Land lease community register

The register is a valuable source of information on land lease communities and it is disappointing that it has not been updated in accordance with the Act more than a year after commencement.