TENANTS' UNION OF NEW SOUTH WALES

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5 years of the *Residential (Land Lease) Communities Act 2013*

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1. Introduction

The *Residential (Land Lease) Communities Act 2013* (RLLC Act) was assented to on 20 November 2013 and commenced operation on 1 November 2015. The Act requires the Minister responsible to review the Act to determine whether the policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. Following this review a report is to be tabled in each House of Parliament by 31 October 2021.

The Tenants' Union of New South Wales (TU) is a Community Legal Centre specialising in residential tenancy law and policy. We are the resourcing body for the state-wide network of Tenants Advice and Advocacy Services (TAASs), who have collectively handled more than 3,300 questions and requests for assistance from land lease community residents since the RLLC Act commenced.

The TU also assists home owners directly and through our work with resident organisations. Since the commencement of the Act we have provided over 1,200 services to home owners including representation in proceedings in the NSW Civil and Administrative Tribunal (NCAT), the NCAT Appeal Panel, the NSW Supreme Court, the NSW Land and Environment Court, and the NSW Court of Appeal.

Our experience and expertise, along with that of the TAASs' and resident organisations provides a significant body of knowledge to draw upon when considering the legislation and its aims. We are in a unique position to understand and demonstrate the functions of the Act, and how it operates, with a singular focus on the 35,000 people who live in land lease communities in New South Wales. We have produced this report to assist the Minister in reviewing the Act.

2. Report summary

Since the commencement of the Act the land lease living sector has been in a process of expansion. The industry today is also markedly different to the industry prior to the commencement of the Act. We have seen change in almost every aspect including the nature of communities, the style and price of homes, the type of operator and home owner, and the relationship between operators and residents. The RLLC Act has met the objective of encouraging the continued growth and viability of the industry however, moving forward it must rebalance the rights and responsibilities of operators and home owners in order to meet the other stated policy objectives.

The RLLC Act made a number of positive changes in key areas such as removal of the principal place of residence test, access to the community, the right to sell onsite, and

compensation for relocation or closure. However, in other areas the Act has fallen short of the expected outcomes. In this report we comment on the provisions that are working and appear to be achieving the desired outcomes, and those that need amendment to enable the policy objectives to be achieved.

The key themes of this report are:

- The governance of residential land lease communities
- Site fee increases
- Repair and maintenance obligations
- Dispute resolution processes
- Community rules
- Utility charges

3. Policy objectives of the Act

The review of the *Residential Parks Act 1998* commenced in November 2011 with the release of a discussion paper entitled 'Improving the governance of residential parks'. The Introduction in this paper confirmed that improved governance was a pre-election commitment along with strengthening the industry. The key commitments were:

1. Introducing a system of licensing park operators,
2. Mandatory education of new operators,
3. Improving the process for the resolution of 'excessive rent increase' applications.

On release of the draft *Residential (Land Lease) Communities Bill*, the Hon Anthony Roberts MP, Minister for Fair Trading at the time stated *"The purpose of the Bill is to modernise the regulatory framework for land lease communities and enhance protection for residents"*.

The policy objectives are as important today as they were back then. Arguably there is now a greater need to improve the governance of land lease communities, to educate operators, and to protect home owners from unfair business practices, bullying and intimidation.

4. The legislation in focus

4.1. The governance of land lease communities

Improving governance is essentially about improving operator conduct as it affects land lease community residents. It is about practices, standards, accountability and regulation. The Governments' stated intention was to improve the governance of land lease communities through a system of licensing park operators and mandatory education of all new operators.

4. 1.1 Operator licensing

Land lease community operators are not required to hold a license. There is no system to license operators and no clear regime to monitor or regulate conduct. A licensing system would enable the regulator to more effectively monitor and deliver operator education and engage with operators regarding non-compliant behaviour.

Within communities there is strong support for a licensing system with many believing it is the only way to improve operator conduct, hold operators accountable and thereby improve governance. The current system of 'negative licensing' has proven ineffective in achieving improved governance or protecting home owners from bullying, intimidation and unfair business practices.

The RLLC Act allows for a penalty notice to be issued for certain prescribed offences under the Act or Regulation. Where issued, an operator may simply pay the amount required by the penalty notice – in all cases substantially lower than the maximum penalty – and avoid having the matter considered for prosecution.

The penalty notice provisions are intended to make it easier for the regulator to resolve issues of non-compliance however, for penalty notices to be effective they must be utilised and they must impact the operator. Currently the Regulation prescribes penalties of between $110 and $1,100 for a corporation or $550 in any other case. The Act provides for much higher penalties and it is arguable higher penalties would be more effective as a compliance tool.

In his second reading speech Minister Roberts spoke about the information from the register of communities that is publicly available being expanded to include details of any enforcement or disciplinary action taken against an operator. Minister Roberts said *"The addition of these details should help improve accountability and transparency".* The TU agrees with the Minister on this point and we are disappointed that, approaching the statutory review, these details are still not publicly available.

Evidence demonstrates that the land lease industry is unable to self-regulate. Consideration should be given to introducing a licensing system, or improving and expanding the penalty notice regime. Both approaches require a properly resourced regulator and a pro-active approach to compliance.

4.1.2 Rules of conduct for operators

The Act provides a comprehensive set of rules of conduct for operators at Schedule 1. Operators are required to comply with the rules of conduct but in practice, the rules are of little or no effect. Many home owners have reported breaches of the rules of conduct to the regulator and been disappointed by the outcome. They report that no action was taken and the operator continues to breach the rules of conduct with apparent impunity.

The TU has provided feedback to the regulator regarding the experience of home owners complaining about operators breaching the rules of conduct. The regulator advised that if an operator denies alleged conduct and there is no "hard" evidence they cannot act. "Hard" evidence does not include statutory declarations by home owners, a common type of evidence accepted by the Tribunal. It is difficult to understand how operator conduct such as verbal abuse, threats and intimidation can be evidenced in any other way, and why the burden of proof required by the regulator is higher than that required by the Tribunal, a body with the power to make legally binding orders.

The TU is aware of situations where the regulator has accepted an operator has breached the rules of conduct but has decided to provide education rather than impose a sanction. Again, home owners report this is ineffective in improving the conduct of an operator, who is already required to understand their obligations under the relevant legislation.

The rules of conduct have manifestly failed to contribute to the improved governance of land lease communities and the review must consider a new approach to dealing with poor operator conduct.

4.1.3 Operator education

Another key reform to improve governance was mandatory education requirements for all new operators. The NSW Fair Trading website provides two options to operators:

1. *Read through all of the information contained in the land lease community operator pages on the Fair Trading website; or*

2. *Attend an information session or seminar on the laws given by Fair Trading or the Land Lease Living Industry Association. (If there is a session scheduled within the timeframe that you need to attend).*

Once you have completed the education briefing, let NSW Fair Trading know in writing within seven days.

The system is problematic for a number of reasons. The Act defines operator: "***operator*** *of a community is the person who manages, controls or otherwise operates the community, including by granting rights of occupancy under site agreements or tenancy agreements, whether or not the person is an owner of the community"*. The requirement for the operator to undertake mandatory education does not recognise the operational structures of many land lease communities.

Gateway Lifestyle, Ingenia Communities, Hometown Australia and Hampshire Property Group currently own and operate over 50 communities between them in NSW. These companies are the operators according to the Act but it is impossible to know which employees should, and have completed mandatory education. Employees in senior roles make decisions about communities and attend Tribunal proceedings, but other employees manage the day to day operations of the community including dealing with resident queries, selling homes, providing disclosure statements, and signing people up to site agreements.

The delivery and content of the mandatory education briefing is also in need of review. Whilst the information on the Fair Trading website is a useful overview, the rules of conduct require operators to have both a knowledge and understanding of the RLLC Act and Regulation plus the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* and this cannot be obtained from the Fair Trading website.

We acknowledge that NSW Fair Trading also delivers information through briefings and webinars and whilst we support this education program, again we do not believe it provides the knowledge and understanding operators are required to hold.

Additionally, the education of new operators cannot be said to be mandatory because participation is not monitored.

Many of the disputes that arise in land lease communities do so because the operator does not understand their obligations under the law and it should be noted that it is not only new operators who lack knowledge – many operators of long standing also have insufficient knowledge of the relevant laws and regulations.
A new system of ongoing education would be beneficial to both operators and residents.

4.2. Site fee increases

The RLLC Act provides that site fees can only be increased in accordance with Part 6 Division 3, which provides for two methods of increase: fixed method and by notice. In reality there is a third method that will be addressed later in the report.

4.2.1 Fixed method increases

Section 65 (2) (a) provides that a fixed method increase may be either fixed amounts or, a fixed calculation (for example, in proportion to variations in the Consumer Price Index or in the age pension). The standard form site agreement provided in the Regulation advises that under the fixed method site fees can be increased using ONE of the following options: a dollar amount; a percentage; a percentage of the age pension; other.

The TU believes the purpose of a fixed method site fee increase is to enable the parties to predict future increases with a reasonable degree of certainty. We further believe this is what Parliament intended in section 65 of the RLLC Act.

We are concerned about the type of fixed method increase that has become common, and the results such methods produce. We do not believe it was the intention of Parliament to grant operators an unfettered right to increase site fees to whatever level they choose without scrutiny, but that is what the Act has facilitated.

'Other' is now commonly used to prescribe this multi-component method of increase:

The sum of

1. Any positive change in the CPI, plus
2. 3.75%, plus
3. A proportional share of any increase in costs incurred by the operator since the calculation of the last site fee increase calculation for the following:
    - electricity and water (net of any amount that has been recouped from home owner), plus
    - gas, plus
    - communication, plus
    - insurance, plus
    - rates, plus
    - any other Government (federal, State or Local) charges or taxes other than company tax. Plus
4. The effect of any change in the rate of GST or similar tax that is included in the site fees.

Rounded up to the nearest dollar.

The site agreement states that a fixed method site fee increase is negotiable but that statement does not reflect reality. Site agreements are offered on a take it or leave it basis, a proposition supported by the Act through section 109 (2) (b). It provides that an operator can decline to enter into a new site agreement with a prospective home owner if they do not agree on the terms of the proposed agreement. The effect of the provision is to enable an operator to set the terms of the site agreement, and remove any rights of negotiation from prospective home owners. Fixed method increases are simply not negotiable.

A home owner who has signed a site agreement containing a fixed method increase has no right to challenge that increase under the RLLC Act. On one hand, it is not unreasonable for parties to a contract to be held to the terms they have agreed to, such as a fixed method site fee increase. On the other hand, it is notable that a fixed method increase can operate for the life of the site agreement and therefore has

the potential to place a significant burden on home owners where the increase becomes unreasonably substantial and also not commensurate with the general condition of the community or operator's outgoings.

It is also inequitable that the relevant considerations for the Tribunal in determining an excessive increase application under section 74 have no application to a home owner under a fixed method increase, and in particular, the considerations under section 74 (1) (b), (d), (i), (j). A home owner under a fixed method increase should still have recourse to argue the increase is excessive with reference to these and any other relevant factors. Further, NSW appears to be the only State that prevents a home owner from initiating an excessive increase dispute in relation to a fixed method increase.

4.2.2 Increase by notice

On the whole the provisions regarding site fee increases by notice appear to be working. Other than the issues regarding the provision of evidence outlined later in the report the only other frustration we hear regularly is that the explanations contained in the notices of increase are not actually explanations.

Generally speaking, the intention behind the requirement for an explanation under section 67 is a good one, but in practice operators just provide a generic list of costs which have purportedly increased. For example, Gateway Lifestyle provides the same explanation in site fee increase notices in all of their communities. Such 'explanations' have been found by the Tribunal to satisfy the requirements of the Act but in reality, they add nothing to the transparency of the increase. The Act needs to demand greater specificity of operators.

The Manufactured Homes (Residential Parks) Act 2003 (QLD) provides for greater clarity and transparency for home owners in that State. However, it is to be noted that the manner in which increases occur in QLD is quite different to NSW. Firstly, the 'regular' basis for site fee increases are required to be specified in the site agreement (section 69A). An operator that wishes to increase the site fees otherwise than in accordance with the site agreement can rely on sections 71-71A to implement a special cost increase for the following types of costs:

> the proposed increase in site rent is necessary to cover any of the following types of costs (each a special cost) that the park owner has incurred, or expects to incur, for a particular purpose—
>
> (i) significant increased operational costs in relation to the park, including, for example, significant increases in rates, taxes or utility costs for the park (an operational cost);
>
> (ii) the cost of significant repairs in relation to the common areas or communal facilities in the park that the park owner could not reasonably have foreseen (a repair cost);
>
> (iii) the cost of significant upgrades to the common areas or communal facilities in the park (an upgrade cost); and

Under 71A (1), the operator is required to issue an increase notice with a number of details, including the following:

> (b) the total amount of the special cost incurred, or expected to be incurred, and the proportion of the total amount proposed to be included in the site rent;
>
> (c) the amount of the proposed increased site rent including the proportion of the special cost mentioned in paragraph (b);
>
> (d) how the proposed amount relating to the proportion of the special cost has been worked out;

Although the context of the requirements under section 71A is different one to increases under section 67 RLLC Act, it must be said that the details and explanations required under 71A appear to be much more specific and fit for purpose. The QLD Act clearly puts a greater emphasis on furnishing home owners with information so they can determine for themselves whether the proposed increase is reasonable or whether it should be subject to a challenge, whereas the RLLC Act only pays lip service to such an objective.

Section 74 RLLC Act sets out the factors the Tribunal may consider when deciding whether a site fee increase is excessive. On the whole the factors are appropriate and enable the Tribunal to make a reasoned assessment of the proposed increased. The major concern has always been the ability for the Tribunal to consider claims of projected increases in outgoings and operating costs and planned repairs or improvements to the community. The reason for this concern is that operators can raise money through an increase for projected expenditure and simply not do the work, or not incur the expenditure, and the Act does not provide redress for home owners.

This very situation arose in a community on the Mid North Coast where a large projected increase in costs relating to new sewerage infrastructure was relied upon by the operator as a justification for a significant site fee increase. A number of years later, the operator has still not commenced work on the sewerage project despite securing an increase based partly on the projected costs.

When the Bill was being drafted, Industry representatives made claims land lease communities were not viable and operators needed greater freedom to raise funds. The industry today is flourishing and we suggest the ability to raise funds in advance based on projections is no longer necessary. In any case it is unfair to require home owners to pay in advance for something that may not eventuate and not provide a mechanism for reimbursement if that occurs.

Section 74 should provide that only those costs and expenses already incurred are recoverable though site fee increases. Alternatively, the Act should provide a mechanism for home owners to seek site fee reductions on the grounds the operator has not completed the improvements or upgrades, or that the projected expenditure did not occur within 12 months.

Section 74 should be further amended to remove the value of the land as a factor. It has no bearing on site fee increases and is rarely, if ever, raised in Tribunal proceedings.

4.2.3 Increases in new site agreements

Since the commencement of the RLLC Act the most significant increases in site fees have occurred in new site agreements following the sale of a home by a home owner. This is the third method of increase and the one that causes us the greatest concern.

The Act seeks to limit site fees in new agreements by providing they can be no higher than fair market value. Fair market value is the higher of: the site fees currently payable by the home owner who is selling the home or, the site fees currently payable for residential sites of a similar size and location within the community. This provision has failed principally because prospective home owners are not informed that site fees in the site agreement offered must be fair market value, and operators have taken advantage.

The disclosure statement does not assist. It requires the operator to provide the current site fees payable by the selling home owner and the range of site fees within the community, but there is no reference to fair market value. Invariably the site fees in the site agreement offered are the highest amount paid in the community but that is often not fair market value.

The TU first became aware of this issue in late 2016 when a prospective home owner purchased a home in a Central Coast community from a home owner who was paying site fees of $151.00 week. The site fees in the new agreement were $194.00 a week, an increase of $43. After receiving advice, the home owner made an application to the Tribunal challenging the new site fees. Eventually the matter settled, the site fees reverted to $151.00 a week and the home owner was refunded more than $2000 in overpaid site fees.

Since 2017 the TU has been made aware of numerous similar examples, including some recent cases that were before the Tribunal and Appeal Panel, where the home owners successfully challenged the site fees in their new agreements.

In a Northern Rivers community, a local real estate agent has informed the Tenants Service that prospective purchasers are walking away from sales because the operator routinely tells them site fees will increase significantly under any new site agreement. In 2019 there were 35 homes for sale in this community but home owners could not lock in a purchaser.

A home owner in a Central Coast community was advised her site fees would be $215 a week when she enquired about the purchase of a home. When she went to sign her new site agreement the site fees were actually $242 a week. Numerous other home owners report this same experience when purchasing homes in this community.

The practice of increasing site fees above fair market value is widespread and the impact unmeasured. The issue must be addressed and the simplest way is to amend sections 109 and 111 to provide that site fees in a new site agreement must be the site fees payable by the current home owner who is selling the home. This is a fair provision that causes no disadvantage to operators. The RLLC Act provides operators with mechanisms for increasing site fees and these mechanisms result in the operator receiving fair market value for the site, and for that value to be reassessed and increased at least annually. Additional, unfactored site fee increases in new site agreements are unnecessary and opportunistic.

4.3. Repair and maintenance obligations

This is an issue that has only arisen since the commencement of the RLLC Act because under the repealed *Residential Parks Act 1998* it was clear that the park owner was responsible for the repair and maintenance of residential sites. Whilst it seems obvious the operator would be responsible for repairing and maintaining land they own, ambiguities in the RLLC Act have led to many instances of home owners being required to repair or replace infrastructure owned by the operator.

Section 37 sets out the operator's responsibilities and includes an obligation to "provide the residential site in a reasonable condition". What it fails to provide is an ongoing obligation to maintain the site, or repair any damage not caused by the home owner. We believe this is an oversight, but it must be remedied.

The second provision that is problematic is section 43. It rightly provides the operator with a remedy to address dilapidated homes. However, it also enables the operator to pursue the home owner regarding repairs to the site, regardless of the reason for the damage.

The third element of this problem is the Land Lease Industry Association (LLIA) site agreement used widely by operators. Through additional terms numbered 55, 56 and 57 home owners agree: that community rules can set out requirements regarding the preservation of the site including hardscape and landscape; to comply with any landscaping or building code that the operator may publish from time to time; that any dwelling, associated structure, shed, driveway, pathway, retaining wall or any structure or

fixture including but not limited to any hardscape (for example, concrete slabs) or landscape on the site is their property.

These terms operate to transfer responsibility for operator owned infrastructure to home owners. Our principle concern is with retaining walls and hardscaping. Home owners purchase only the home and associated structures such as a shed or carport. Retaining walls essential to the integrity of the site, concrete driveways and concrete slabs are all part of the site. Essentially anything that cannot be taken away by the home owner at the end of the agreement is part of the site.

The standard form condition report, under the heading "condition of residential site" provides a list of items that make up the residential site. They include driveway and site slab (concrete).

It is unacceptable for the Act to enable operators to pass on to home owners the cost of repairing, maintaining or replacing essential infrastructure. The Act must clarify that the operator is responsible for maintaining the residential site, that hardscaping such as concrete driveways and slabs and walls that support the integrity of the site are part of the site, and notices of dilapidation can only be issued regarding the home.

4.4. Dispute Resolution

When a dispute arises between an operator and home owner, or a group of home owners, independent arbitration is sometimes necessary. The RLLC Act provides for three options when a dispute arises: community dispute resolution arrangements; mediation by application to the Commissioner; and, application to the Tribunal.

4.4.1 Community dispute arrangements

The TU is not aware of any community with established dispute resolution arrangements.

4.4.2 Mediation of site fee increase disputes

Mediation is primarily used for site fee increase disputes and is a mandatory part of the process. However, it is only mandatory for home owners - if the operator does not participate there is no penalty or adverse outcome other than failed mediation. If mediation is mandatory, it should be mandatory for both parties.

Anecdotal evidence suggests that mediation is largely successful in site fee increase disputes, with the majority of applications resulting in agreements. However, the TU is concerned that home owners are reaching settlement without access to evidence and information and they may therefore be paying higher increases than are warranted.

The RLLC Act at section 151 (2) enables a mediator to require a party to disclose details of their case and evidence in support of that case, however NSW Fair Trading (the mediator) has advised they never have, and never would, require a party to disclose evidence.

The mediation process provided for by the RLLC Act is robust. It deals with confidentiality and inadmissibility in proceedings of things said and done in mediation. There really is no valid reason for the non-disclosure of information by any party.

If mediation fails and the site fee increase dispute goes to the Tribunal the operator must provide the evidence or risk not being allowed to increase the site fees. In *Laing v Yamba Operations Pty Ltd* [2018] (unpublished) the Tribunal set aside the full increase sought because the operator failed to provide evidence in support of their claim.

In 2019 the operator of Sunrise Property Holdings Pty Ltd appealed against a decision of the Tribunal to award an increase of 2% rather than 5.32%. At first instance the operator provided a document regarding the outgoings and operating expenses but declined to provide any evidence in support. The Appeal Panel found no error in the decision and dismissed the appeal.

The TU supports the use of mediation to resolve site fee increase disputes but the process must be balanced and fair. If one party holds all of the information and there is no requirement to disclose that information to the other party it is questionable whether the making of any agreement is proper.

4.4.2.1 Opting out

Section 69 (5) provides that a home owner may opt out of mediation, and agree to pay the increase, but only if they do so in accordance with the process set out in the Regulation. The Regulation does not set out a process and this has led to confusion about how home owners can opt out, and whether they have opted out. The Regulation should prescribe the process for opting out.

4.4.3 Mediation of other disputes

Part 12 enables mediation applications to be made for any dispute where orders can be sought from the Tribunal but which is not currently the subject of proceedings. The TU sees value in the use of mediation as an alternative to the Tribunal.
There are situations where mediation would be beneficial and could void the need for Tribunal applications, in particular, where a group of home owners are seeking to have an issue resolved. Over the past couple of years many electricity disputes could potentially have been resolved through mediation had the service been more widely available. Other examples of disputes involving groups of home owners include: maintenance of common areas and facilities; safety and security; community access arrangements; and, emergency evacuation procedures.

The TU also sees value in mediation being available for disputes where Tribunal orders are not available. Often parties in dispute become entrenched and are unable to resolve the dispute without third party involvement. Mediation could be of great assistance in such circumstances.

The TU supports a well-resourced and expanded mediation service. We encourage the Commissioner to develop a specific application form for the mediation service and to include information about the service on the NSW Fair Trading website.

4.4.4 Applications to the Tribunal

When mediation is not available, or has failed to resolve a dispute, either of the parties may apply to the Tribunal. The RLLC Act provides access through specific provisions or more generally through section 156. Whilst the Act provides appropriate access to the Tribunal in most instances, there are two issues we are raising through this report - limitation periods and group applications.

4.4.4.1 Limitation periods

All applications to the Tribunal must be made within a specific period of time (limitation period) prescribed by the enabling legislation. Where the enabling legislation does not specify a limitation period the application becomes subject to NCAT Rule 23, which provides a default limitation period of 28 days.

Whilst it is often desirable to have a dispute resolved quickly, in many instances 28 days is insufficient time for a party to become aware of a point of dispute, communicate with the other party and lodge an application with the Tribunal. The Act must provide appropriate limitation periods for Tribunal applications.

The TU has, in conjunction with home owners and resident representatives identified a number of provisions in the RLLC Act that should provide a limitation period. We wrote to the Minister on 29 March 2019 setting out our suggestions for limitation periods to be included in the RLLC Act and we have attached the schedule to this report.

4.4.4.2 Group applications

Land lease community home owners often share similar values and concerns about their community and through residents committees or other less formal structures, act in a collective way. This collective process is sometimes extended to Tribunal applications but, site fee increase disputes aside, this is an expensive and burdensome process.

The Tribunal has an appropriate process for handling group applications but, other than in site fee increase disputes, when multiple applicants are seeking the same orders every home owner must make an individual application and pay an application fee. In one community where home owners sought a reduction in site fees the 80 plus home owners paid over $1000 in application fees and the Tribunal initially advised that every home owner had to submit a bundle of evidence despite the evidence being common to all applications. The matter was eventually dealt with in a single hearing with all home owners relying on a single bundle of evidence, but only after strenuous advocacy by the home owners' representative.

The Tribunal cannot make orders in favour of home owners who are not a party to proceedings, hence the current need for multiple applications. The RLLC Act should contain a provision that enables a group application to be made regarding any dispute arising out of facts or circumstances that are the same or similar for each individual. Alternatively group applications should be specifically available for disputes regarding: maintenance and repair of common areas and facilities; safety and security; community access arrangements; emergency evacuation procedures; reduction of site fees; refund of overpaid site fees; utility charges and refunds; review of utility cost and reduction in site fees; community rules; and, rules of conduct for operators.

Group applications will significantly reduce the administrative burden on the Tribunal and home owners as well as ensuring the fee is appropriate to the service.

4.5. Community rules

The RLLC Act made significant changes regarding park/community rules. Many of the changes were positive in that rules apply to everyone in the community, the operator must enforce them fairly and consistently and residents can take action regarding enforcement. Residents have however raised concerns regarding:

- the interpretation by operators about the application of community rules, and

- the expansion and restrictive nature of community rules due to the broadening of criteria about which rules can be made, and
- the ability to challenge community rules at the Tribunal.

4.5.1 Subject matter

Under the repealed *Residential Parks Act 1998* park rules could be made regarding a prescribed list of subjects: noise; speed limits; parking; rubbish disposal and recycling; pets; games and sports; the use and occupation of communal facilities; maintenance of homes and sites; safety; storage and repair of cars, boats and trailers; and transportation within the park. This was a comprehensive list that enabled operators to manage the community without overly restricting the freedom or rights of residents.

The RLLC Act enables community rules to be made about "the use, enjoyment, control and management" of a community. Prima facie this appears to cover the same subjects, however the lack of specificity has led to unnecessary and restrictive community rules that do impinge on the freedom and rights of residents. Some examples include:

"A maximum of three in total of the following items shall be permissible in the home owner's house or site, visible from the road (including their front yard, patio/s & garden): garden gnomes, statues, water features, bird baths, wall art pieces or any other decorative items".

External window coverings, canvas blinds and/or shade sales "must meet the Operator's colour criteria".

A prescribed list of subjects for community rules should be reintroduced to better balance the rights and freedoms of residents with the operator's need to manage the community.

4.5.2 Compliance with community rules

In our view the Act is clear that everyone in the community, including the operator and their employees, must comply with the community rules. However, many operators appear to hold a different view and this is particularly the case in mixed communities where operators have a set of rules for residents and another set for holiday makers. This is a major source of dispute in those communities.

The community rule that is most obviously problematic is the 'age restriction rule' introduced by many operators since the commencement of the Act. This rule usually provides "The age restriction for the community is that persons must be at least 50 years of age to occupy a residential site. A home owner must not allow a person to occupy a residential site unless that person meets this age restriction". The TU has always believed such a rule is contrary to anti-discrimination law and following a challenge by a home owner, the Tribunal recently set aside a community rule for that reason (the decision is under appeal).

We recognise that many home owners prefer to live in an 'over 50's' community and therefore do not want to challenge an age restriction community rule. However, home owners in mixed communities find themselves living next door to, and sharing common facilities with younger people and children, whilst not being permitted to have anyone under the age of 50 live with them. This is patently unfair and a constant source of frustration for these home owners.

One operator has been a little more obvious with a community rule that provides "With the exception of community management staff and their partner or spouse, no person who is less than 50 years of age with a partner or spouse aged less than 50 years may live in the premises. Proof of age is required".

Section 44 (6) of the RLLC Act has encouraged the introduction of age restriction community rules. It has been read by operators to mean that any community can introduce an age restriction community rule without having regard to anti discrimination law. Consideration should be given to amending or adding a note to this section that an age restriction community rule can only be made in a community that has obtained an exemption under anti discrimination law.

Many home owners and operators have sought advice from NSW Fair Trading on compliance with community rules, particularly in relation to the age restriction rule and that advice has been inconsistent.

The Act should be amended at section 92 to clarify that a community can have only one set of community rules and that those rules apply to everyone in the community including residents and their guests, operators and employees, holiday makers and long-term casuals.

4.5.3 New and amended rules

Home owners have reported feeling disconnected from the process of the introduction of community rules. Currently, there is only a limited obligation on operators to involve home owners in the process of amending or introducing community rules, in accordance with section 90 (2) (b).

The requirement on operators to advise and consult with residents committees under section 90 (2) (b) is, in practice, a hollow provision. For example, where a residents committee exists, operators can fulfil this obligation by writing to the committee and seeking comment on the proposed rule amendments. Often, however, operators proceed to introduce the rules as planned regardless of the perspective of the residents committee.

Although the intention behind section 90 (2) (b) is clear - that residents should have the opportunity to play an active role in community rules which will affect their day-to-day lives - in practice this is not occurring. Broadly speaking, the inadequate community rules processes are a result of two issues. Firstly, the obligation of consultation by operators prior to the introduction of community rules under section 90 (2) (b) does not benefit communities where there is no committee, thereby depriving home owners in a majority of residential communities from active involvement in the process. Secondly, as outlined above, even where a committee does exist, the provision has no teeth and requires reform in order to be effective.

The impact of community rules on the lives of residents is significant and the Act should provide a meaningful process that requires their engagement and acquiescence to new or proposed amendments to community rules. A simple way to achieve this is to require 75% of all residents to agree to any new or proposed amendment to a community rule. The Act already has a similar requirement for the introduction of a special levy and consequently such a concept is not new.

4.5.4 Disputes about community rules

Home owners also believe that challenging the fairness of community rules has become more difficult under the RLLC Act. One operator introduced a rule which prohibited home owners from installing ornaments or statues of any size or type on their site. A home owner challenged the rule at the Tribunal on grounds including that it was not fair and reasonable, but was unsuccessful with the Tribunal finding the rule was lawful under section 86.
Under the *Residential Parks Act 1998* the Tribunal had the power to declare a park rule to be unfair. The RLLC Act should provide that same power.

Residents of a community should also be able to make an application to the Tribunal to have a community rule set aside if 75% of the residents of the community support the application. The Tribunal could be given a list of factors for consideration, including health and safety.

4.6. Utility charges

The most contentious provision of the RLLC Act is perhaps Part 7 Utility and other charges. In particular electricity charges have been the source of disputes at the Tribunal, the Appeal Panel and NSW Supreme Court. Whilst water and gas charges are subject to the same provisions, as far as the TU is aware, these charges have not been litigated.

Prior to the commencement of the RLLC Act operators charged for electricity by reference to the relevant Code (Customer Service Standards for the Supply of Electricity to Permanent Residents of Residential Parks). The Code set a maximum price for use and supply charges, referenced to the standing offer rates of the local area retailer, with a discounted supply charge for lower levels of supply. This led to residents being charged the highest possible price for usage and enabled operators to make significant profit on electricity.

The RLLC Act brought in a fairer charging regime, however, operators rejected it and this led to home owners taking action through the Tribunal. A number of matters were heard by the Tribunal prior to 'Reckless' and the outcomes varied. In *Myles v Holiday Retreats Australia Pty Ltd t/as Rivergum Holiday Park (No. 2)* [2018] NSWCAT (unpublished) the Tribunal determined the operator could charge the peak rate (billed to the operator) for electricity use and continue to charge the service availability charge (SAC) for supply. In *Marsh v The Pines Resort Management Pty Ltd* [2018] NSWCAT (unpublished) the Tribunal determined the usage charge should be the average of the three energy use rates charged to the operator and the SAC would remain a separate charge.

The TU believes there is merit in both these methods because they enable the operator to recover usage charges; they are simple to calculate and understand; home owners who receive less than 60AMPS pay a discounted SAC; and, operators can rely on a stable, calculable income from the SAC.

We note that a considerable amount of analysis of embedded networks has been undertaken by the Australian Energy Market Commission (AEMC). Whilst the final report makes beneficial recommendations for embedded network customers, embedded networks in land lease communities will be largely unaffected as the majority are 'legacy' networks. The AER will continue to set maximum prices for electricity but that price will be the standing offer price of the local area retailer. The RLLC Act should continue to provide a more equitable price for electricity rather than facilitating a reversion back to standing offer rates.

Additionally, the review provides an opportunity to consider how tenants in land lease communities are charged for utilities. Currently the payment of utilities by tenants falls under the *Residential Tenancies Act 2010* (RT Act). The RT Act presumes tenants purchase electricity from an energy retailer and further protections are unnecessary in tenancy legislation. However, tenants on embedded networks in land lease communities are in a different and unique position. They cannot purchase electricity on-market but do not benefit from the pricing or other protections within the RLLC Act, which puts them in an inferior consumer position to home owners. This lack of coverage means tenants can be charged standing offer prices for the use and supply of electricity while their home owner neighbours are charged according to section 77 (3).

4.7. Further recommendations

The Tenants' Union makes additional recommendations that will improve the Act and ensure it better meets its policy objectives.

Section 21 needs improvement to enable home owners to make informed choices. If a disclosure statement is not provided as required, section 21 (4) should also enable a current home owner and the prospective home owners agent to apply to the Tribunal.

In terms of the disclosure statement itself, if section 109 is not fixed as recommended earlier in the report, the disclosure statement must contain information regarding fair market value. It should also state whether the operator is the utility provider and the current rates payable for each utility, including availability charges.
At the time the disclosure statement is provided the operator should also be required to provide: copies of the current approval to operate and community map; the proposed site agreement; and, the community rules. The prospective home owner can seek copies of these documents and must be provided with the community rules upon signing the agreement – they will be better informed if the documents are provided up front.

Section 26 (4) should specify the Tribunal can, in ordering the parties to enter into a written site agreement, relieve the parties from the obligation to comply with a particular term of the standard agreement, where it is warranted in the circumstances, and particularly where the home owner would not have been subject to the term if the parties had a written agreement under the repealed Act as required at the time. It is noted that the Tribunal already has this power under s 157 (1) (c) so it is not a significant amendment to explicitly include its use under s 26.

Section 32 should specify a timeframe in which the written agreement must be provided to the home owner.

Section 37 (h) should require emergency evacuation procedures to be displayed in an accessible place within the community.

Section 42 should be broadened to enable home owners to make additional minor alterations without consent including; fitting security alarms and installing locks, screens and shutters on windows and security screens on doors.

Section 44 (5) should be extended to include children who the home owner is a 'guardian' for in accordance with the definition of that term under s 79A *Children and Young Persons (Care and Protection) Act 1998* (NSW). This is an appropriate measure to ensure that home owners who unexpectedly become the guardians of children, can have the children live with them in their home.

Subsection (6) should be amended or repealed. Age restrictions in land lease communities unnecessarily impact the freedoms and rights of home owners and are contrary to anti-discrimination law. On the whole, home owners tend to be retirees seeking a particular lifestyle and arbitrary rules about age are unnecessary.

Section 45 is entitled "Sub-letting residential site or ***assignment of site agreement***". Subsection (1) provides that a home owner may, with the written consent of the operator of the community sub-let the site or home or, ***assign the site agreement***. (Our emphasis). There can be no doubt regarding what the section is about.

Despite the clear wording in the title and subsection (1) a drafting error in subsection (3) has led to the denial of assignment rights to home owners. In the Residential (Land Lease) Communities Bill 2013 section 45 read:

(1) A home owner may, with the written consent of the operator of the community:

(a) enter into a tenancy agreement for, or otherwise sub-let, the residential site or the home located on it, or

(b) assign the site agreement **if it is for a fixed term that has not expired.**

When the Bill went to the Upper House section 45 was amended. The limitation in (1) (b) restricting assignment to the fixed term was removed and the current subsection (3) inserted. However, the drafters of the amendment used 'tenancy' rather than 'site' agreement and that terminology was incorporated into the Act.
The effect of the drafting error is that the right of home owners to assign their site agreements has been, in practice, abolished. Although the ability to assign a site agreement remains theoretically achievable as a result of s 45 (1) (b), because there is no (properly drafted) restriction on the operator's ability to refuse, in practice this means operators will not consent to assignment.

The limitation on tenancy duration and frequency for which the operator cannot unreasonably withhold consent – a 12 month term or less once during any 3 year period – should be reconsidered. There is no valid basis for the restriction. Considering the home owner is ultimately responsible for the conduct of the tenant and could be held liable for a breach of their obligations under section 36 it is unreasonable to restrict their ability to sub-let their home.

Section 56 should be broadened to permit the Tribunal to consider retaliatory conduct in circumstances where the operator lodges an application and the home owner wishes to contest the application itself as constituting retaliatory conduct. In such a scenario, it would be appropriate for the Tribunal to deal with the operator's application and the allegation of retaliatory conduct at the same time without the need for two separate applications.

Section 56 should also include an additional subsection addressing the issue of onus of proof. It should be specified that where a home owner has satisfied the Tribunal that they have taken one of the actions specified under s 56 (1) (a)-(e), the onus then shifts to the operator to prove their conduct was not wholly or partly motivated by the home owner's relevant action under s 56 (1) (a)-(e).

Section 64 is too restrictive and places too high a burden of proof on home owners. It should be expanded to include a reduction or withdrawal by the operator of any goods, services or facilities provided by the operator under the site or any other agreement, contract or arrangement. If an operator agrees to provide something but provides less than what is agreed site fees should be reduced.

Section 68 should enable the recovery of any overpaid amounts that result from and unlawful increase. If an increase is invalid under the Act, then it should not become valid or beyond reproach solely because of the passage of time due to the operation of this section.

Section 83 should be amended to 'paid or payable' to prevent operators circumventing the requirement to provide home owners with reasonable access to bills and documents relevant to their utility charges.

Section 107 should be expanded to include a failure by the operator to issue a disclosure statement in compliance with section 21 as specific interfering conduct.

Section 116 contains language that could be problematic in that only in very rare circumstances is vacant possession of the residential site delivered when a site agreement is terminated. Vacant possession implies removal of the home, but homes almost always remain and are sold on-site.

Section 117 should enable a joint home owner to sever their interest in a site agreement. Sometimes relationships break down and in that circumstance one of the parties should be able to release themselves from future liabilities under the site agreement if they are no longer living in the home.

Section 127 is inequitable in its current form. If a site agreement is terminated, compensation is only payable to the home owner if, unknown to them, the site was unlawful when they entered into the agreement. The designation of sites (long-term or short-term) is not fixed and can be changed by operators at any time without justification or question. Any operator seeking to terminate an agreement without paying compensation to the home owner can simply re-designate the site to short-term and issue a termination notice.

In its current form section 127 essentially opens up 'no grounds' terminations against home owners, something which has never been, and should not be available. Compensation must be payable in all circumstances where a site agreement is terminated under this section.

Additionally, the 'Note' is unhelpful and should be removed. It is questionable whether a short-term site makes a site unlawful, as suggested by the 'Note' and whether termination is appropriate in that circumstance.

Section 128 serves no real purpose and should be repealed. Lack of occupation may arise due to personal choice, such as where a home owner decides to go travelling or overseas for an extended period of time, or other factors such as poor health or hospitalisation. Provided the site agreement is otherwise being complied with, particularly with respect to site fees, utilities and maintenance of the site and home, there is a question as to why a vacant home alone should be grounds for termination.

Additionally, the restrictions on sub-letting should be lifted to enable home owners to sub-let their premises when they need or want to be away for extended periods. The Act provides remedies to address any problems with tenants.

Section 130 again refers to vacant possession of the site.

Section 136 should provide that if a home owner agrees to the relocation the costs payable by the operator are those found in section 140 (2).

Section 140 (1) should apply regardless of the operator of the community to which the home owner relocates. It is inequitable to have two systems of compensation where the impact on the home owner is the same.

Section 141 (2) could significantly disadvantage home owners and leave them with inadequate compensation. It should be repealed.

Section 144 should be expanded to cover correspondence between the operator and a resident or residents committee. It is a common complaint that some operators simply ignore correspondence. The Act should require operators to respond to all written correspondence from a resident or the residents committee within a certain period.

Section 154 contains confidentiality requirements that are too broad. Although confidentiality provisions in relation to a mediator are commonplace, section 154 extends the obligation to 'any other person' which would naturally capture parties to the mediation including home owners. It is reasonable to expect home owners involved in mediation may need or wish to discuss their mediation with other home owners who have a vested interest or could be impacted by the outcome. The section should be amended to remove the reference to 'any other person'.