Illawarra Legal Centre Inc. - Tenants Service
7 Greene Street Warrawong NSW 2502
PO Box 139 Warrawong NSW 2502
Phone: (02) 4274 3475 • 1800 807 225 • Fax: (02) 4274 3491
TTY NRS: 13 36 77
www.illawarralegalcentre.org.au
ABN 37 488 400 524

Submission in response to the Discussion Paper on the Statutory Review of the Residential (Land Lease) Communities Act 2013

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INTRODUCTION

The Illawarra South Coast Tenants Advice & Advocacy Service (ISCTAAS) endorses the submission from the Tenants Union of NSW and welcomes the opportunity to make submissions to the Review of the Residential (Land Lease) Communities Act 2013 (RLLC Act).

ISCTAAS is a project of the Illawarra Legal Centre (ILC) and has been operating since1985 providing free information, advice & advocacy to private and public tenants, and people whose principal place of residence is in a Land Lease Community. We provide the above advice and assistance throughout Wollongong, Shellharbour, Kiama, Wingecarribee, Shoalhaven, Eurobodalla, and Bega Valley areas to approximately 84 Land Lease Communities with over 3000 residents living in these communities as their principle place of residence.

We have confined our submissions to the parts of the RLLC Act that are having the greatest impact on affordability of Land Lease Community living. Additionally, we make comment on the Mandatory Operator Training provisions.

Our submissions will argue that in its current form, the operation of the RLLC Act is in fact eroding the opportunities for Land Lease Communities as a viable option for affordable housing. We will identify provisions of RLLC the Act associated with the sale of homes and transferring of a Home Owner's rights that are interconnected in their operation, and are having a negative impact on the availability of communities as an affordable housing option.

Contact:

Les Farrell
Tenant Advocate
Illawarra Legal Centre

Ph: 4275 4734
lesfarrell@illawarralegalcentre.org.au

We acknowledge the traditional custodians of the land we work and live on and pay our respect to Elders past, present and emerging

DISCUSSION

The operation of the Residential (Land Lease) Communities Act 2013 is eroding Land Lease Communities as an affordable Housing option, particularly for our aging population.

The following provisions are discussed below separately, while demonstrating that their interconnected application by Park Operators is collectively having the effect of eroding Land Lease Communities as a viable affordable housing option:

1. Assignment of Residential Site Agreements: (section 45):
The failure of the legislation to compel the Park Operator to assign agreements where the dwelling is sold on site sets the foundation for increasing site fees every time a home is sold within the park, with the new Home Owner required to enter a new agreement.

2. Enter New Site Agreement/Fair Market Value (section 109):
The Park Operator under this provision can ostensibly set their own higher level of fees every time a home is sold within the community, because the seller is unable to assign their agreement, therefore compelling the purchaser to enter a new agreement with higher fees. This increases the return on investment for the Operator but without any consideration of future affordability,

3. Fixed Fee Increases (section 66):
Interconnected with both of the above as the Operator increases the level of site fees in new agreements and includes fixed method increases that accelerate the level of fees exponentially; thereby increasing what may be constituted as Fair Market Value in future new agreements,

4. **Mandatory Operator Training (section 55):**
The extensive and robust mandatory training regime that was promised has not been provided, and as a result Operator training remains a substantial issue interconnected with the above and in the general operation of Land Lease communities.

Concerns

As outlined above, the second reading speeches of the Bill for the RLLC Act identified an intention to shift the balance of the legislation from one of consumer protection to one focusing on investment. However, the subject speeches largely implied a theme expressing intention to shift the balance in favour of investment whilst recognising and maintaining these communities as an important affordable housing option:

• *"I do not need to mention how important this form of housing is from a social services standpoint. Without this lower-cost alternative many of those who buy into residential parks and villages might otherwise be on the public waiting list. It is very much in the interests of government and the wider community to ensure that residential land lease villages remain a viable option, especially for those with limited financial means."*

• *"key distinction between the objects of the proposed Bill and the previous Act is the omission of the objective to 'provide legislative protection for residents" shifting the focus to operators".*

• *"Proposed section 109(2)(b) undoubtedly shifts the emphasis of the bill in favour of the park operators."*

The relevant sections of the RLLC Act having an adverse impact on the availability of Land Lease Communities as an affordable housing option are addressed individually below identifying the interplay between each section. We commence with the right of the Operator to refuse to assign an agreement when a home is sold within the community. We then look at how the aforementioned provides foundation and opportunity for the Park Operator to increase site fees every time a home is sold in the Community. We will discuss how the right of the Operator to refuse to enter a new agreement where the terms cannot be agreed upon further enhances the opportunity to increase site fees each time a new home is sold. We look at the adverse effect this has on affordability through the operation and reference in the RLLC Act to the notion of Fair Market Value, and through the incorporation of complicated Fixed Method rent increases that increase site fees exponentially into the future.

We will discuss the result of the collective application of the provisions above as being one of exponential fee increases over time, and the consequent creation of a false inflated market value over time that the Operator can then rely upon as "Fair Market Value" when entering future agreements. Thus, the continuation of a cycle of fee increases and inflated fees that will eventually completely erode the availability of Land Lease Communities as a viable affordable housing option for our most vulnerable and aging population.

1. ASSIGNMENT (Section 45)

Section 45 of the RLLC Act provides that the Home Owner may assign the Site agreement but *only with the written consent of the Park Operator.*

(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.

This section effectively takes away the opportunity for a Home Owner to assign their agreement when they sell their dwelling in a Land Lease community. This section effectively prevents the Home Owner from assigning their agreement by way of providing the Operator with unfettered ability to refuse to assign an agreement whilst providing an alternative for the Operator to enter a new agreement with higher fees upon commencement, and a built in fixed method of increase that will see their profits continue to rise throughout the life of the agreement. A fixed method increase that cannot be challenged later as will be discussed below. Why would an Operator ever consent to the assignment of a site agreement when they can enter a new agreement with inflated fees and legitimately refuse to enter the agreement if the potential Home

Owner will not agree with the increase in fees?
In the second reading speech, the honourable Ms Tania Mihailuk continued to highlight that the Home Owners right to assign should remain;

"The Bill should not prevent the right to assign an existing agreement".

Undoubtably, the Park Operators would argue that this right to refuse to assign an agreement is necessary for their control over the park. However, subsection 2 provides that the Park Operator must not unreasonably withhold consent to the assignment of a tenancy agreement, yet this same prohibition against unreasonably withholding consent does not apply to the assignment of a site agreement.

We submit that the inclusion of such a prohibition against the unreasonable withholding of a right to assign a site agreement would have no more effect on the operator's control in this respect than it does when applied only to a tenancy agreement. Further the inclusion of such would overcome many of the issues discussed in this paper, including the exponential increases in fees that will eventually reduce the availability of these communities as a viable affordable housing option.

If the legislation provided that the Park Operator could not unreasonably withhold consent to assign the whole of the site agreement, the Park Operator would be restricted from increasing site fees on every occasion a home is sold, and thereby maintain Land Lease Communities as a viable affordable housing option by removing the power of the Operator to exponentially increase site fees as under the RLLC Act in its current form.

2. ENTER NEW SITE AGREEMENT/FAIR MARKET VALUE (Section 109)

Section 109 authorises the Operator to refuse to enter a new agreement where the prospective Home Owner does not agree with the terms. This provides opportunity for the Operator to set the level of increased site fees in the new agreement, and legitimately refuse to enter the agreement if the potential Home Owner does not agree with the level of fees.

In our submissions the operation of this section provides the opportunity and authorises the setting of Fair Market Value by the Operator by virtue of the notion of Fair Market Value being confined by the RLLC Act to comparative reference of homes within that same community. There is no opportunity to compare other communities in making comparisons of amenities, services and quality of homes to determine what is Fair Market Value. Therefore, once the Operator increases fees for one Home Owner they can point to that fee level as being Fair Market Value regardless of the fee level in any other Land Lease Community.

We submit that the inclusion of the notion of "Fair Market Value" alongside the right of the Park Operator to refuse to enter a new agreement if the terms cannot be agreed upon, and the unfettered right of the Park Operator to refuse to assign a site agreement provides the opportunity for the Operator to inflate fees over time by offering new agreements with increased fees and including excessive fixed method increases. The Operator may then legitimately refuse to enter a new agreement where

the potential purchaser does not agree with the increased fees or excessive fixed method increases. The collective application of these provisions ostensibly authorises the manipulation of Fair Market Value by the operator, and has the effect of reducing the availability of Land Lease Communities as a viable affordable housing option over time as site fees are continually increased under this notion.

Section 109(2) does more than move away from a consumer protection focus; it in fact exponentially increases the power imbalance between the prospective Home Owner and the Operator when entering a new agreement. In many circumstances the prospective Home Owner will have limited options, particularly when they desire to stay in a particular area for various reasons that may include being close to the support of family and friends in their ageing years.

Prospective Home Owner now find themselves in a position where they must accept the inflated rent and fixed method increase offered by the Operator simply by virtue of having no other affordable option. When a Home Owner chooses a community in which to purchase they are unaware of the levels of fees being paid by other Home Owners, and without the ability to assign the current agreement they are then in a situation where they need to negotiate the fees and increases at the time of purchase, effectively finding themselves in a "take it or leave it" position.

Section 109(3)(b) provides that an Operator may legitimately refuse to enter a new agreement when the terms cannot be agreed upon and these terms include the amount of site fees payable. We submit, the result of this, is that the Operator may increase fees in any new agreement and later rely on the level of fees in those new agreements as being Fair Market Value. This situation is established by the legislation defining Fair Market Value solely by reference to other fees in the same park with no comparison to other Land Lease Communities.

It is our submission that the above situation identifies a significant downfall of the legislation's attempt to balance the interest of investors whilst maintaining Land Lease Communities as a viable affordable housing option, and demonstrates the legislation has moved too far in favour of commercial interest ignoring the vulnerabilities of those seeking these communities as an affordable housing option.

In the absence of the ability of the Home Owner to assign their agreement and make reference to other communities when determining Fair Market Value, the operator has almost unfettered discretion to inflate the site fees over time as homes change hands and new agreements are entered into. In these circumstances the reference to Fair Market Value serves no effective purpose in regulating fees to an affordable level in the long term and l maintain Land Lease Communities as a viable affordable housing option.

<u>Case Study (Bob)</u>

Bob purchased in a Land Lease Community in January 2018. At the time Bob entered the new agreement the Site Fees for the outgoing home owner were $203.71 per week. The Operator refused to enter a new agreement unless the amount of site fees were increased to $227.00 per week; *a 11.5% increase from the previous Home Owner.*

Further the new agreement included a Fixed Method Increase clause that would see the site fees increase from $227.00 per week to $242.00 per week by November 2018; a further increase of 6.5% in ten (10) months.

In Bob's circumstances the weekly site fee on the site agreement had risen from $203.71 in January 2018 for the previous owner when he purchased the dwelling, to $242.00 in November 2018. This is an increase of almost nineteen percent (19%) in less than 12 months from January 2018 to November 2018, solely as a result of the sale of the dwelling and the ability of the Operator to both refuse to consent to assignment of the agreement, and refuse to enter a new agreement if Bob would not agree to the increased site fees.

During this same period the All Groups CPI was less than 2%. (December 2017-December 2018 1.8%; See, Australian Bureau of Statistics, https://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/97DE913203378356CA2583E5001D660 C?opendocument at 1 June 2020)

When Bob entered the new agreement in January 2018 with the fees increased from $203.71 to $227.00, the Operator offered a separate agreement deferring part of the increase until November 2018, with the actual increase payable to be contained to $220.00 per week until that date. In November 2018 the Operator added the new fixed fee increase to the contract fee of $227.00. This increased the contract fee to $242.00.

As detailed above, in its current form the availability of fixed method increases is providing further opportunity for the Operator to excessively increase fees at the time when a home owner is entering the community and is ostensibly placed in a "take it or leave it" position by operation of the provisions discussed in this paper. Prospective home owners often have very few options, and at the time of entering the community they have very little information about the level of fees, or fee increases in other site agreements within the Community.

At ISCTAAS we have seen a number of fixed method Increases that are complex, with the actual levels of increase not easily ascertainable, and in some cases impossible to calculate as they include reference to calculation by way of the increased outgoings of the Operator, or other information that is unavailable to the current Home Owner, and/or potential Home Owner. This situation is particularly concerning in light of the fact that a Home Owner is prohibited from challenging the amount of fee increase under a fixed method increase arrangement included in their new agreement.

3. FIXED FEE INCREASES (Section 66)

Under these provisions a Home Owner is in the position where they are unable to challenge ever increasing fees after entering a new agreement on a "take it or leave it" basis that may include a complicated fixed method for fee increases, and/or one that cannot be calculated by the Home Owner.

Whilst the RLLC Act attempts to limit fixed method Increases to only one method, in reality Operators are including multi-faceted fixed method formulas purporting to be

all included in the one method. We again look at the experience of our Home Owner Bob that purchased his home in a Land Lease Community in January 2018.

Bob informed us that when he entered the new agreement for his home in the Land Lease Community, he had no idea what other home owners were paying, and he could not calculate how the fixed method increase would affect his fee levels into the future despite being a retired mathematics teacher of extensive experience. In Bob's agreement it was impossible to calculate the impact of the fixed method increase because some of the costing for components were not available; as outlined these costings would never be available to the Home Owner and in some cases are not even available to the Operator at the time of entering the agreement.

Bob advised that as a result of current Tribunal action challenging the method of increase, he has now obtained some of the information essential to be able to calculate the increase, including increases in operating costs. Bob has now calculated that his site fees will double every nine years. In the absence of Bob initiating Tribunal action he would still not have the information required for him to have any concept of how the fixed method increases would impact on the affordability of his site fees over time.

It is our submission that the above example clearly demonstrates that Operators are bypassing the single fixed method of increase prescribed in the RLLC Act by including one fixed method with multiple components. These multi-faceted methods are excessively increasing fees and have the potential to inflate fees to a level that will remove Land Lease Communities as a viable affordable Housing option.

4. OPERATOR TRAINING (section 55)

Mandatory Operator training was recognised by Parliament as being a key aspect of the Residential (Land Lease) Communities Bill to improve governance in Residential Land Lease Communities. The second reading speeches highlighted the need for mandatory training and its importance in communities that are made up of,
The mandatory training was espoused;
"…as a means of dealing with poor management and inadequately prepared staff…", and the second reading speech highlighted the *"…common issues of bullying and intimidation…"* in communities where Operators have,
"…precious little training particularly on issues of discrimination and privacy laws…" and where *"…existing governance contributes to the problem…"*

The honourable Chris Spence promised the mandatory training would be, *"…a robust briefing covering legislation rules and conduct."*

We submit that the government administrative has failed to deliver on this intention of Parliament. It is over five years since commencement of the legislation and the only training regime is a direction by Fair Trading NSW that Operators read the basic information provided on their website and complete a self-declaration that they have read the information. This is hardly the "…robust briefing…" promised.

The ISCTAAS has seen no decline in reports from Home Owners of circumstances where they are intimidated by the Park Operator, and for this reason will not speak up

about breaches of their rights or other unacceptable behaviour. Anecdotally we have seen no increase in understanding of the legislation or the conduct requirements by Park Operators, nor have we seen any decline in circumstances of bullying and intimidation.

We submit the current training regime does nothing to promote good governance or educate the Operators to their responsibilities, or the rights of Home Owners. Further, by ignoring this situation this power imbalance is perpetuated as the bullying and intimidation continues in the absence of an affective mandatory training and conduct provision in the RLLC Act. We further submit that allowing this state of affairs to continue in conjunction with a focus on increased profits to encourage investment has perpetuated the situation in which Home Owners entering the market face inflated site fees, and multi-faceted fixed fee increase methods that will eventually see these Land Lease Communities disappear as a viable affordable housing option.

In addition, we submit that the mandatory training must be for ALL park Operators not only those entering the industry for the first time. The current provision requiring only those new Operators entering the industry to complete training ignores the fact that it is the current Park Operators that are the reason this issue has been highlighted in the drafting and passing of the Bill. Any training and conduct regime must catch those that made such provisions necessary in the first place, or it is doing nothing but paying lip service to the real problem.

In the absence of a mandatory training regime linked to conduct rules and system of registration that provides sanctions including deregistration, the conduct of Operators will continue to be such that Home Owners are bullied and intimidated; Operators will remain safe in the knowledge that there can be no consequences for their actions.

Recommendations

1.) Section 45 is amended to include as a term of every Site Agreement:
that the Park Operator must not unreasonably withhold consent to the assignment of a site agreement.

2.) The notion of Fair Market Value (s109) be removed from the Act,
or
confined to the amount that the outgoing home owner is paying at the time the dwelling is sold and a new agreement entered into,
or
the amount the operator can increase the fees under a new agreement is capped to CPI or similar for the previous year.

3.) The fixed method increase (s66) be strictly limited to one method that cannot contain multiple components, and
when a new Home Owner enters an agreement they be allowed 90 days after moving into the community in which to submit their choice for fixed method or notice increase, and
the blanket prohibition on challenging fixed method increase is removed altogether or replaced with limited circumstances that allow the increase to

be challenged.

4.) That a robust mandatory training module is developed and implemented requiring completion by ALL Park Operators not only new Park Operators, and
the mandatory training must be completed within 6 months of becoming an Operator and/or 6 months of this amendment for current Operators, and
a system of registration of Park Operators is established requiring completion of the training in order to be registered, and
a system of deregistration of Operators in introduced to deregister Park Operators repeatedly in breach of the conduct rules and/or the RLLC Act.

We thank you for considering our submissions. We would be pleased to provide further information or clarification with regard to any of these submissions.

Les Farrell on behalf of the Illawarra and South Coast Tenants Service
A project of Illawarra Legal Centre

lesfarrell@illawarralegalcentre.org.au
Phone: 4275 4734