TENANTS' UNION OF NEW SOUTH WALES

Outasite

Residential Parks Newsletter • Issue 2 • November 2016

Gateway Lifestyle Stanhope Gardens

THE ACT: ONE YEAR ON

Yes it really has been a year since the law changed and residential parks became residential land lease communities, rent became site fees, residents became home owners and park managers became operators.

In the lead up to the change the then Fair Trading Minister The Hon Anthony Roberts said there was no question the Government needed to "protect vulnerable residents and support a viable industry" and that the new law would be "balanced and fair." So, has the Act delivered? Let's take a look at some of the impacts so far.

SITE FEE INCREASES

The new process for challenging excessive site fee increases by notice requires 25 percent of home owners who receive the notice to object to the increase, otherwise it cannot be challenged. Home owners can then make an application for compulsory mediation. NSW Fair Trading, who conducts the mediation, report that they have been largely successful in bringing the parties together to get agreements. To date only two attempts at mediation have failed and resulted in Tribunal applications.

Continued on page 2

THE ACT: ONE YEAR ON

Continued from page 1

Whilst mediation may be proving successful, other areas of site fee increases continue to cause concern for home owners. In our July issue of *Outasite Lite** we featured an article about operators failing to comply with their obligation to provide home owners with an explanation for site fee increases. We are aware of a number of breaches of the Act regarding site fees in new agreements. The Act requires these to be no higher than 'fair market' value but we have seen site fees set at $50 a week higher than what the law requires.

UTILITY CHARGES

There were some changes to water and electricity charges under the Act and a new sewerage usage charge was introduced (for people on new agreements). Many home owners still find utility charges confusing and uncertainty about whether they are being correctly charged remains an issue. On a positive note, we are aware of one operator that has provided copies of their accounts to a home owner on request.

The Government issued a draft amendment to the Regulation regarding service availability charges for electricity. At the time of writing the amendment has not been finalised.

SALE OF HOMES

Despite numerous new provisions in the Act increasing home owners rights and seeking to protect them from interference by operators when they are selling their home, this remains a very significant issue. The Tenants' Union is aware of sales that have collapsed because of unacceptable site agreements offered to purchasers by operators. At least one operator has interfered in a sale by requiring compliance with local government regulations only after being advised that the home was to be sold – a clear breach of the Act.

"Despite numerous new provisions in the Act increasing home owners rights and seeking to protect them from interference by operators when they are selling their home, this remains a very significant issue."

ASSIGNMENT

The right to assign a site agreement has been the subject of a number of Tribunal hearings and remains a key issue for home owners.

REPAIRS & MAINTENANCE

The Act clarifies and expands the obligations of operators regarding the maintenance of common areas and trees but unfortunately it is silent on site maintenance and this has caused difficulties for at least one home owner that we are aware of.

Under the *Residential Parks Act 1998* the operator was required to *provide and maintain* the residential site in a reasonable state of cleanliness and fit for habitation. However, under the new Act the obligation is only "to ensure the residential site is in a reasonable condition, and fit for habitation, at the commencement of the site agreement for the site." The failure of the Act to clarify that the operator has an obligation for maintenance could lead to confusion and disputes if issues arise with a site.

So, it looks like the Act has brought some improvements for home owners but a number of old issues remain and new problems have been created. There is still a great deal of work to be done to educate both home owners and operators about their rights and obligations under this Act, and the intention of some provisions has yet to be settled. It has been a busy year for those involved with land lease communities and 2017 is unlikely to be any different. •

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THE END OF THE ROAD?


TU community education session at Tweed Heads

Sadly the Tenants' Union (TU) community education project came to an end in June 2016. During the project we visited 107 land lease communities throughout the state. We also published and distributed 10,000 copies of our newsletter *Outasite*. That's about one for every 3.5 residents!

The community education project was funded by the NSW Law and Justice Foundation to ensure that home owners were provided with good quality, independent information about the *Residential (Land Lease) Communities Act 2013*, which commenced on 1 November 2015. The Act brought significant changes to the rights and responsibilities of home owners in land lease communities (residential parks).

The project involved us partnering with Tenants Advice and Advocacy Services to visit land lease communities and deliver free information sessions about the new Act. We provided 17 formal and two informal information sessions reaching close to 1,000 people in total. The majority of audience participants were home owners, but tenants, operators, Members of Parliament and even a real estate agent came along to hear what we had to say.

NSW Fair Trading partnered with us for some of the sessions and this provided added benefit for participants who also learned about the services that Fair Trading provide to land lease community residents.

Our travels took us as far as Moama on the Victorian border, Tweed Heads on the Queensland border and almost everywhere in between.

We talked with home owners and chatted with operators, we had tours of communities and were treated to fantastic morning teas. We saw and learned a great deal about the people and communities we visited and we also had a few surprises. One example is The Marine Museum at Seascape North Star Holiday Resort. The museum is a celebration of biodiversity and "the most comprehensive and unique marine education resource centre on the eastern seaboard." The museum founder is Ted Brambleby BSc. who is a Marine Biologist and a home owner in the community. The museum is incredible and a testament to Ted's knowledge, passion and dedication.

Not all of the surprises were good unfortunately. We did discover some communities in poor condition and home owners whose rights were being ignored or undermined. The local Tenants' Services were able to step in and offer assistance to these home owners, and in one case we visited with the local Member of Parliament to provide a joint service response.

The community education project provided a great opportunity for us to get out into communities and we apologise if we didn't get to yours – maybe we will see you next time. •

THIS IS MY COMMUNITY

Mary Preston, home owner at Gateway Lifestyle Stanhope Gardens

Mary has lived in the same residential park (land lease community) for 29 years. She is an active resident advocate and passionate about the lifestyle. We asked Mary to share some of her experiences with us.

AS A RETIREE, WHAT KEEPS YOU BUSY?

I am very involved in providing information and assistance to residents. This is now even more important because the *Residential (Land Lease) Communities Act 2013* (the Act) is so different from the Residential Parks Act and in my view the majority of the changes are not for the benefit of residents.

I also have a wonderful and large family, a big garden and I am very involved in politics. I wonder how I ever found the time to work!

WHY DID YOU DECIDE TO LIVE IN A LAND LEASE COMMUNITY?

I moved in to a residential park because it was convenient and I was able to pay cash for my home, which meant I didn't have the worry of a huge mortgage. It enabled me to have a good standard of living.

WHY DID YOU CHOOSE THIS COMMUNITY?

I chose Stanhope Gardens because it was close to where I worked. I had no intention of changing jobs so it was mainly for convenience. I did not think that I would stay here after I retired but after only a few years I decided the lifestyle suited me. I have a regular home in Parkes but I rent it out because I prefer to live here.

TELL US ABOUT STANHOPE GARDENS

We have a GP service just outside the gate and they do house-calls if required. Public transport is also very good. There is a community bus provided by the local council to take residents over the age of 65 to appointments or shopping. There is also a private bus provided from just outside the gate to take people to Blacktown, which is subsidised by the State Government.

Stanhope Gardens is close to 3 shopping centres, Blacktown and Westmead hospitals and all specialist medical services. The new driverless train line is also being built close by. All of these things are very important because none of us are getting any younger!

"When I came to live here our garden village was surrounded by a dairy farm called Stanhope. I know that progress must happen but I do often yearn for that lovely garden village where the stars, moon, and of course cows, could be seen."

WHAT CHANGES HAVE YOU SEEN AT STANHOPE GARDENS?

Stanhope Gardens was previously known as Parklea. It is between the great city of Blacktown and Castle Hill, north West of Sydney CBD (Central Business District). When I came to live here our garden village

was surrounded by a dairy farm called Stanhope. I know that progress must happen but I do often yearn for that lovely garden village where the stars, moon, and of course cows, could be seen.

We were a much closer community back then. Meetings were held by the social club and attended by a large number of residents. Votes were undertaken about activities we would do. The social committee was very democratic and held elections every year. A financial report was also tabled at the Annual General Meeting and we all voted on how to spend the money.

At that time there were 112 long-term sites. The park rules were fairly enforced and all sites and common areas were maintained to a high standard.

A previous park owner decided to turn a large section of the village into a tourist area but the current operator has converted the area back to long-term sites. There are now 360 residential sites and our community is not close like it used to be. I feel that will change over time and we will all come together again.

WHAT IS THE BEST THING ABOUT YOUR COMMUNITY?

We have excellent amenities including swimming pools, spas, a community hall, libraries, a large aviary, BBQ areas and beautiful gardens around the community hall. We also enjoy a fantastic location, as I mentioned earlier. •

CHRISTINA STEEL
A HARD WORKING ADVOCATE

Christina Steel (right) and Sandy Gilbert (left), from Tweed Residential Park Homeowners Association, enjoying a lighter moment together

Resident advocate Christina Steel recently retired from her role with Port Stephens Park Residents Association (PSPRA) and the Residential Parks Forum.

Christina was a hard working, passionate and skilled advocate who assisted hundreds of residents in negotiations with operators and at the Tribunal. One of her achievements was a successful appeal before the Appeal Panel of the NSW Civil and Administrative Tribunal (NCAT) on a point of law. Other advocates advised Christina to seek the services of a lawyer but she took the case herself and achieved a great outcome for the residents she was representing.

The Tenants' Union and other members of the Residential Parks Forum will miss Christina. She was a lively contributor to discussions and always willing to share her knowledge and tips with other resident advocates.

We wish her well in her retirement. •

A SHORT INTRODUCTION TO THE NSW CIVIL & ADMINISTRATIVE TRIBUNAL

Anyone who lives in a land lease community who has been concerned about something, or has had a dispute with the operator will, at some point have been advised that they can go to the Tribunal. This is good advice but what is the Tribunal and what is involved if you go there?

The Tribunal has changed many times over the years – it has been the Residential Tenancies Tribunal (RTT), the Residential Tribunal (RT), the Consumer Trader and Tenancy Tribunal (CTTT) and it is now the NSW Civil and Administrative Tribunal (NCAT).

NCAT was established on 1 January 2014 and is an amalgamation of a number of Tribunals. It has four divisions that deal with different types of issues or disputes. Tenancy and land lease community disputes are dealt with in the Consumer and Commercial Division.

The head of NCAT is the President and each Division has a Deputy President. Disputes are dealt with by Tribunal Members although the Deputy President often hears disputes in the Consumer and Commercial Division.

APPLICATIONS

For home owners in land lease communities the right to apply to NCAT to have a dispute resolved comes from the *Residential (Land Lease) Communities Act 2013* (the Act). The Act prescribes the rights and responsibilities of home owners and operators, who are expected to comply with these obligations. If a home owner or operator claims that the other party has not complied with an obligation, the Act enables them to apply to NCAT.

Applications must be made within specified time periods. Time limits differ and some are set out in the Act. If the Act does not set the time limit then NCAT Rules say that it is 28 days.

Applications to NCAT can be made on paper (by filling in an application form) or online. Paper applications can be submitted, or lodged, at Service NSW Centres or by post to

NSW Civil and Administrative Tribunal registries.

A fee must be paid when an application is lodged and this is currently $48 or $12 if you are on a pension or eligible for a concession for another reason.

REPRESENTATION

Generally parties involved in disputes represent themselves at NCAT but applications can be made for a party to be represented by an advocate or a lawyer. There has to be a good reason to be represented by a lawyer but advocates are usually allowed to represent.

Representatives argue the case in place of the person involved in the dispute based on the instructions given to them by the person they are representing.

INITIAL HEARINGS

When an application has been lodged NCAT sets a date and time for the 'hearing'. Hearing is the term used to describe how disputes are dealt with at NCAT. It is called a hearing because a Tribunal Member 'hears' what each party has to say about the dispute before making a decision.

The first time a dispute is listed for hearing the amount of time allocated is only 10 minutes. There are lots of disputes listed at the same time and the Tribunal Member calls everyone into the hearing room and explains the process. NCAT is required to give parties to a dispute the opportunity to come to an agreement so everyone is then asked to go and talk with the other party in their dispute. This is called conciliation.

CONCILIATION

The purpose of conciliation is to enable each party involved in the dispute to explain their side to the other party, to share their evidence and to try and come to an agreement. Sometimes NCAT provides conciliators to help people to reach an agreement but this is not always the case. If an agreement is reached the dispute is resolved on that day. The agreement is put before the Tribunal Member and 'consent orders' are made.

ADJOURNMENTS

If the parties cannot reach an agreement the dispute is usually adjourned. That means it is set aside until a later date. The Tribunal Member makes 'directions' about what each party must do before the next hearing. These directions are generally to provide evidence about the dispute so that at the next hearing everyone has seen all the evidence and is ready to argue their case.

FORMAL HEARINGS

The next hearing is a 'formal hearing'. NCAT is not as formal as a court but it does involve the presentation of evidence and legal arguments and sometimes the questioning of witnesses. The level of formality is dependent on the complexity of the dispute.

Formal hearings usually last at least an hour and can sometimes last for a whole day or even a couple of days. Recently the Tenants' Union was involved in a hearing that lasted five days because several home owners were involved and the case was very complex.

ORDERS

When a dispute has been heard the Tribunal Member makes a decision and issues 'orders'. The orders tell the parties what the Member has decided about the dispute and what, if anything they must do. The orders are legally binding which means that they must be followed.

"When a dispute has been heard the Tribunal Member makes a decision and issues 'orders'. The orders tell the parties what the Member has decided about the dispute and what, if anything they must do. The orders are legally binding which means that they must be followed."

The types of orders that NCAT can make in land lease community disputes are set out in the Act. They include orders that someone stops breaching the site agreement or the Act, an order for the payment of money or compensation, or orders about site fee increases. •

More information about the NSW Civil and Administrative Tribunal (NCAT) can be found on their website: www.ncat.nsw.gov.au

EMMA McGUIRE:

LAND LEASE COMMUNITIES TENANT ADVOCATE

Tell us about your role at the Tenants' Service

I work as a tenant advocate, which involves giving advice to clients under the relevant legislation, whether they are tenants, occupants in boarding houses or residents in land lease communities. It also consists of advocating on clients' behalf, representing them at the NSW Civil & Administrative Tribunal (NCAT) and carrying out community education.

My role this year has involved a specific focus on matters arising out of the *Residential (Land Lease) Communities Act 2013 (NSW)* and assisting home owners under the Act.

What are the top three issues you have been dealing with for home owners in land lease communities?

I have had quite a number of home owners contacting me with concerns over community rules. Some of these matters have been procedural issues, such as rules not being amended in accordance with the Act. I have assisted in resolving these matters in a couple of different ways depending on the home owner's wishes. I have written letters to operators on behalf of the resident, drawing their attention to the relevant provisions of the Act with a request they amend or introduce the community rules as required. I have also assisted home owners to lodge applications with NCAT and obtain an order setting aside the community rules.

More commonly though, I have had home owners questioning the substance of individual community rules, such as whether they fulfil the requirement under section 86(3) of the Act that they be 'fair and reasonable'. I have assisted some of these home owners in going to NCAT to challenge the rules in question. I have also obtained successful outcomes by engaging directly with operators on the issue as an alternative to the Tribunal, demonstrating that there are always multiple approaches to the same issue.

For example, I recently had a request for assistance in relation to a rule which regulated the opening hours for various facilities in the community. A number of home owners took issue with the restrictive access hours as they felt they were not getting the full benefit of the facilities, particularly those who worked long hours and found themselves outside the opening hours by the time they arrived home. I assisted the home owners by writing a letter to the operator which explained the basis for the home owner dissatisfaction with the rule and requested the operator review the community rule. This negotiation was successful and the operator agreed to amend the community rule, ensuring fairer and more open access to facilities for all home owners.

If you could change one section of the RLLC Act, which would it be and why?

Given the opportunity, I would definitely seek to change aspects of section 45 of the Act, which relates to assignment. This is an important right for home owners when they decide to sell their home and involves the assigning or transfer of their site agreement to the purchaser. I think Parliament has done a great disservice to home owners in the manner it has constructed section 45.

There have been a couple of conflicting NCAT decisions on assignment which has created a sense of uncertainty regarding whether an operator can refuse consent for assignment, even if to do so would be unreasonable. A lack of certainty is damaging for home owners, because it complicates what can

already be a stressful time, during the sale of their home. Uncertainty is also problematic for advocates because it can make it difficult to give clear and effective advice. Tenants Advice and Advocacy Services and the Tenants' Union are continuing to work hard on the concerns surrounding assignment, but for now it is clear there are significant issues with assignment under the new Act which need to be overcome.

What tips would you give to someone who is considering becoming a home owner in a land lease community?

As with most things in life, living in a land lease community is not for everyone. I've met home owners who have lived in a land lease community for two or three decades and who consider it one of the best decisions they have made. Equally, I've also met residents who have wondered what they have gotten themselves into not long after moving in.

I would advise prospective home owners about how important it is to do their research – on the land lease community itself, the operator, and on the legislation. I recommend speaking with some existing home owners to get a feel for the community before committing to anything. Of course, prospective home owners should always seek independent advice before entering into a site agreement – I would suggest they make contact with their local Tenants Advice Service where advocates can assist them by talking through these issues. •

For free, independent advice, contact your local tenant advocate. See the back cover for details.

LAND LEASE COMMUNITIES IN PROFILE

	May 2012	July 2016	Increase
Land lease communities	477	497	20
Permanent residents	33,632	34,297	665
Homes owned	19,451	20,364	913
Homes rented	3,027	3,115	88
Total number of homes	22,478	23,479	1,001

People may be aware that operators of land lease communities are required to provide certain details about the community to the Commissioner for Fair Trading. This information is kept in a 'Register of Communities' and some of it is publicly available through the Fair Trading website.

In May 2012 Fair Trading produced a report entitled 'Residential Parks, Profile of the Industry' based on information that was in the register at that time. The report said that there were 477 residential parks in NSW and a total of 33,632 permanent residents (home owners and renters).

The report also showed that there were 19,451 homes owned and occupied by residents and a further 3,027 were rented giving a total of 22,478 homes.

In July this year the Tenants' Union obtained some of the unpublished information from the register through a Government Information Public Access (GIPA) application. According to the current register there are now 497 land lease communities (residential parks) and 34,297 residents.

The current register also shows that there are now 23,479 homes in land lease communities. 20,364 homes are owned and occupied by home owners and 3,115 are rented from operators.

The new data does not necessarily mean that there are 20 new land lease communities, it could just be that some communities that were not previously registered have now gone through that process. Anecdotal evidence however does point to an expansion of the industry. When we were out visiting communities we saw a couple of new communities and lots of new development. We were also advised by home owners that a number of operators have been replacing holiday sites with residential sites.

One of the objects of the *Residential (Land Lease) Communities Act* is "to encourage the continued growth and viability of residential communities in the State" and although it's early days the signs are that the industry is growing. •

ELECTRICITY CHARGES

In our September 2016 issue of *Outasite Lite* (an electronic publication sent out by email) we explored electricity charges and the laws and regulations that govern them. Since publishing the article we have been advised that many home owners are being overcharged for electricity because some operators are not aware that the *Residential (Land Lease) Communities Act 2013* (the Act) changed the way that utility usage charges must be calculated. In this article we look again at those charges.

NATIONAL RETAIL LAW

Under the National Energy Retail Law (Retail Law), any person or business that sells energy to another person for use at premises must have either a retailer authorisation or a retail exemption. Operators of land lease communities who sell energy to residents have a retail exemption.

The Australian Energy Regulator (AER) issues guidelines for exempt sellers based on the retail customer protections provided under the Retail Law. It is likely that these guidelines are the source of some of the confusion about electricity usage charges in land lease communities because the maximum charge in the guideline differs from the maximum charge in the Act.

LAND LEASE COMMUNITY LAW

The Act and Regulation (Residential (Land Lease) Communities Regulation 2015) govern when and how operators can charge home owners for electricity. If the site agreement requires the home owner to pay utility charges to the operator, the use must be separately measured or metered and the operator must provide an itemised account and give the home owner at least 21 days to pay.

There are two separate charges for electricity – usage and availability. Usage is charged at a rate per kilowatt hour (kWh) and the service availability charge (SAC) is a daily charge.

USAGE CHARGES

The Act states that the maximum amount that an operator can charge a home owner for usage is "the amount charged by the utility service provider or regulated offer retailer who is providing the service for the quantity of service supplied to, or used at, the residential site." Put simply, the operator must charge a home owner no more per kilowatt hour than what the operator is being charged by the utility service provider.

However, the Exempt Selling Guideline requires that an exempt seller must not charge a customer more than the standing offer price that would be charged by the relevant local area retailer for new connections, if the local area retailer were to supply that quantity of electricity.

These two methods of calculating electricity usage charges provide very different results for home owners. The standing offer price is generally one of the highest rates charged but operators tend to pay much lower rates because they can negotiate with the provider.

Operators however must calculate usage charges according to the Act because that is primary legislation whereas the Guideline is secondary legislation. Whenever laws contradict each other the highest law is the one that has to be followed and in this case the Act trumps the Guideline.

WHAT YOU CAN DO

If you want to know whether you are being charged correctly for electricity the first thing you need to check is what the operator is being charged. Section 83 of the Act requires the operator to provide a home owner with reasonable access to bills or other documents in relation to utility charges payable by the home owner to the operator.

An operator who refuses to provide access to documents is in breach of the Act and a home owner can apply to the NSW Civil and Administrative Tribunal for an order requiring the operator to provide access. Operators can also be fined for non-compliance with this section of the Act.

The Tenants' Union is aware of home owners in one land lease community who are applying to the Tribunal regarding their electricity charges and the operators refusal to provide documents relating to those charges. They will also be seeking a refund of any amounts they have overpaid as a result of any incorrect charges.

SERVICE AVAILABILITY CHARGES: SAC

The way that service availability charges are calculated is set out in the Regulation. The charge is based on the level of amps supplied however the way in which it is calculated is currently under review and the Regulation will be amended on completion of the review. •

AGE DISCRIMINATION IS OK, SAYS NCAT

Age restrictions in land lease communities is an issue that has been a hotly disputed for many years. Home owners sit on both sides of the fence with some deliberately selecting communities with age restrictions and others supporting a completely open market. Surprisingly there are very few reported Tribunal decisions about age restrictions and we are only aware of one case being determined by the Anti Discrimination Board. However, there has been a development with a decision made by NCAT in June 2016.

This case involves a land lease community on the Central Coast – Broadlands Village. Broadlands was an open age land lease community but with the change of law on 1 November 2015 the operator decided to introduce new community rules and one of them was:

> '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'.

A long term Broadlands home owner was unhappy about the new rule and made an application to NCAT on the grounds that it was invalid. The applicant claimed that the rule was not 'fair and reasonable' as required by the *Residential (Land Lease) Communities Act 2013* (the Act) and that it was inconsistent with the *NSW Anti-Discrimination Act 1977* (NSW ADA) and the *Commonwealth Age Discrimination Act 2004* (Cth ADA).

Both the NSW ADA and Cth ADA make it unlawful to discriminate against another person regarding the provision of accommodation, services or facilities on the basis of age. In defending the rule one of the points argued by the operator was that Broadlands does not provide accommodation, services or facilities. The operator lost on this point with NCAT finding that sites are accommodation and the operator provides services and facilities in the nature of internet, telephone connection, electricity, pool, community hall and garbage disposal pick up.

Another point argued by the operator, and one that was critical to the decision is that the Act expressly contemplates that community rules can contain age restrictions. This appears in section 44 (regarding additional occupants), and it says that it is not unreasonable for an operator to withhold consent to an additional occupant on the ground that the person does not meet age restrictions set out in the community rules that were in force when the home owner entered into the site agreement.

So, on the face of it the Act conflicts with anti-discrimination law because one says you can have rules about age and the other says you can't discriminate on the basis of age. NCAT resolved this conflict by using exemptions in the Anti Discrimination Acts that permit exceptions for 'instruments' made under a State Act. NCAT found that "the Age Restriction Rule is not inconsistent with the NSW ADA or Cth ADA because each of those Acts permits conduct that would otherwise be discriminatory if it is done to comply with a community rule made under Part 8 of the Act."

If the logic of this decision is followed the door is open for further restrictions in land lease communities, for example based on gender, race or disability. This may sound extreme and people will say that it will never happen but if community rules are instruments under a State Act and therefore exempted from anti discrimination legislation, it could. Operators could introduce rules that prohibit the occupation of sites by women or people with a disability and so on. We wonder, would NCAT have made the same decision had the application been about race rather than age? •

NSW FAIR TRADING'S ROLE IN RESIDENTIAL COMMUNITIES

Complaints Team, New South Wales Fair Trading

INFORMATION DELIVERY FOR NEW LEGISLATION

In February 2016 officers from NSW Fair Trading's Real Estate & Property division Kathryn Tidd and Lynn Evans visited residential communities around NSW to speak with community operators about the new legislation which commenced in November 2015. Kathryn and Lynn also spoke with operators about the rules of conduct that now apply, as well as the services that Fair Trading provide. Since the commencement of the new legislation a number of other Fair Trading officers have also visited residential communities in regional areas to spread the word about the laws. A Fair Trading Compliance Program was also conducted in May 2016 which saw positive results in terms of compliance with new legislation; only a few re-visits were scheduled and verbal education provided to those operators across NSW.

A COLLABORATIVE APPROACH

Fair Trading officers accepted an invitation from the Tenants' Union's Julie Lee and Jemima Mowbray to participate in information sessions for home owners of residential communities. This invitation provided Fair Trading with the opportunity to inform the owners about Fair Trading's complaint handling service that is designed to serve as an alternative to the NSW Civil and Administrative Tribunal (the Tribunal) for resolving disputes. The complaint service is free and aims to finalise the matter through mutual agreement.

Fair Trading also has the capacity to work alongside the Tenants' Union, local tenancy advocacy services, industry support associations and other local govern-ment bodies to assist in dealing with issues that have the potential to cause significant consumer detriment to residents. Fair Trading's goal is to reach agreed outcomes for both the operator and residents to resolve any issues.

MEDIATION SERVICES

Under the *Residential (Land Lease) Communities Act 2013* compulsory mediation has been established as the first step in the process of resolving disputes about site fee increases within the community.

There is also the option available for mediation for a number of other issues under the new legislation.

Fair Trading provides formal mediation for home owners, residents and operators. Qualified mediators are able to meet with home owners, residents and community operators on site. The mediator's role is to facilitate conversation between the parties so they may explain their situation. Mediators encourage participants to take part in negotiation to try to reach an agreement. If an agreement cannot be reached then an application can be lodged with the Tribunal.

Fair Trading's Mediation Service team has conducted several mediations relating to site fee increases since the new laws began. The mediation process on these occasions has been mostly successful with the parties reaching mutual agreement and settling the matter 86% of the time. The mediation process has also managed to sort out a number of other community issues that were raised while the mediator was on site.

COMPLAINT HANDLING

Fair Trading have a team of dedicated customer service officers equipped to deal with the delivery of information and the management of complaints if disputes between home owners and community operators arise. Fair Trading takes an impartial approach and supports communication with all parties in an attempt to reach an agreed outcome.

Common complaints lodged by home owners include some about understanding their rights and responsibilities along with others about repairs and maintenance, site fees, utility charges, operator conduct and tree maintenance.

SOME EXAMPLES OF COMPLAINTS AND OUTCOMES ACHIEVED WITH THE ASSISTANCE OF FAIR TRADING

Tree maintenance

Fair Trading received a complaint from a home owner who had stated that a palm tree located next to his residence was causing damage to his dwelling. The home owner stated that he had attempted to settle the matter with the operator on several occasions since late 2015 but to no avail. Their desired outcome was for the operator to have the palm tree removed. Fair Trading provided intervention by contacting the operator and providing details of the matter and the requested outcome of the owner. The operator was also reminded of their obligations pertaining to tree maintenance in regards to the *Residential (Land Lease) Communities Act 2013*. The operator agreed to have the palm tree removed.

Repairs and Maintenance

Fair Trading received a group complaint (in excess of 10) from residents who had stated that a boundary fence between two communities needed replacing as the residents were concerned for their safety. The residents advised that they approached the operator on several occasions in an attempt to have the boundary fence replaced with no action being taken by the operator. A Fair Trading officer made contact with the operator and provided details in regards to the resident's desired outcome of having the boundary fence replaced. Upon the operator responding to Fair Trading it was agreed that the boundary fence would be replaced.

Electricity Charges

Fair Trading received a complaint from a resident who stated that he was being charged incorrectly for his electrical supply charge. Upon making contact with the operator to discuss the details of the matter, it was evident there had been an error. The operator reconciled the resident's electricity supply account and discovered that there had been a clerical area on behalf of the operator. The resident was provided a credit for the discrepancy.

Safety

An elderly resident from a residential community repeatedly requested a hand rail be installed in the common shower area within the community as she was concerned that slips/accidents would occur. An officer contacted the operator and discussed their obligations to ensure that the community is reasonably safe and secure. The operator complied by installing a hand rail in the common shower after receiving the call from Fair Trading. •

More information about NSW Fair Trading can be found at: fairtrading.nsw.gov.au

RECENTLY AT NCAT

The right of a home owner to be able to assign their site agreement to someone who purchases their home has become a key battle ground under the *Residential (Land Lease) Communities Act 2013* ('the Act'). Early in the year the NSW Civil and Administrative Tribunal (the Tribunal) made a couple of decisions that operators were required to consent to the assignment of site agreements because they could not unreasonably refuse a request. However, in May the Tribunal made a different decision.

Farraway v Galt Investments Pty Ltd was an application by the home owner (Farraway) that the operator consent to the assignment of his site agreement to the purchaser of his home. Mr Farraway had asked the operator to consent to the assignment and the operator had refused. The applicant put forward a number of arguments about why the operator could not unreasonably refuse the request to assign, but the Tribunal dismissed the application. Here we look at the decision and the reasoning behind it.

To properly understand the issues surrounding assignment it is necessary to go back to the repealed Residential Parks Act 1998 (the Parks Act). Under that Act a resident (home owner) had the right to assign their site agreement and the park owner (operator) could not unreasonably refuse a request to assign. These were also terms of every site agreement signed under the Parks Act.

Following the review of the Parks Act the Residential (Land Lease) Communities Bill 2013 limited the right to assign a site agreement to the fixed term only and there was no provision that the operator could not unreasonably refuse a request to assign. This Bill was passed by the Lower House and was then sent to the Upper House of Parliament.

In the Upper House, the assignment provision (section 45) was amended. The restriction on only being able to assign during the fixed term was removed and a new sub-section preventing the operator from unreasonably refusing a request for assignment was inserted. However, there was a drafting error in the new sub-section. It uses the term 'tenancy agreement' when it should say 'site agreement'. In Farraway the Tribunal applied a very literal interpretation of these words.

Section 45

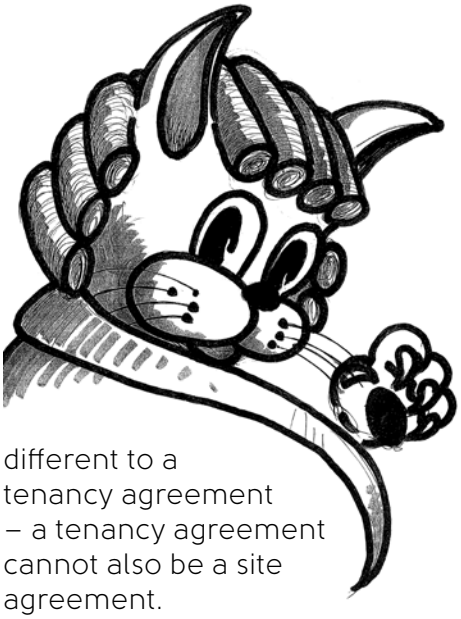
(1) A home owner may, with the written consent of the operator of the community:

(b) assign the site agreement

(3) The operator must not unreasonably withhold or refuse consent to the assignment of a tenancy agreement.

Mr Farrway's agreement was a 'Residential Tenancy Agreement for Landlords and Tenants of Moveable Dwellings or Moveable Dwelling Sites.' The Tribunal determined that this agreement was a site agreement and that, had the Parks Act still been in force the operator could not have unreasonably refused the request to assign the agreement.

The Tribunal went on to consider what a site agreement is under the Act and found that it is different to a tenancy agreement – a tenancy agreement cannot also be a site agreement.



Based on this finding the Tribunal determined that the 'reasonability test' applies only to tenancy agreements and not to site agreements. The Member cited the Second Reading Speech concerning the new Act (in the Lower House) but as we have pointed out – section 45 was amended in the Upper House. Had the Member looked to the speeches on the amendment they may have interpreted the words differently.

Further analysis of the decision highlights a number of other issues:

1. The *Residential (Land Lease) Communities Act 2013* does not cover tenancy agreements – they fall under the Residential Tenancies Act 2010. Section 45(3) cannot be about the assignment of an agreement that falls under another Act.

2. Section 45 grants a right to assign a site agreement, not a tenancy agreement. The title and subsection (1)(b) do not mention assignment of a tenancy agreement and it is therefore illogical that subsection (3) would deal with

the refusal of a right that is not provided.

3. Subsection (6) provides a right to apply to the Tribunal where a dispute arises, including a dispute about consent being withheld or refused. This right is only available to home owners and operators. If subsection (3) was about tenancy agreements then tenants would also have the right to apply to the Tribunal.

For these reasons we believe this decision should not be relied upon. Fortunately, it is not binding on other Tribunal Members and we therefore may see decisions in the future that interpret the assignment provisions differently. •

STOP PRESS: The Government recently considered an amendment to section 45 of the Act to change 'tenancy agreement' to 'site agreement' but the amendment also restricted assignment to the fixed term. Following advocacy from resident groups and the Tenants' Union the Government withdrew the amendment and has indicated further consultation will be undertaken with stakeholders before another amendment is put forward.

FAIR MARKET VALUE:

CHALLENGING SITE FEE INCREASES IN NEW AGREEMENTS

The Tenants' Union (TU) was one of the stakeholders in the consultation with the Government on the review of residential parks legislation during 2011 and 2012. A key area of difference between the industry and those of us representing the rights of residents was site fee increases.

The TU was well aware of resident concerns about high site fee increases and one of they key problems in this area was the increase in site fees when residents moving into a park signed a new site agreement. Park owners invariably offered new agreements with site fees higher than other residents were paying and this impacted on everyone when the next site fee increase came around. The park owner would argue that the higher site fee was the market value for sites in the park.

This practice of increasing site fees in new agreements was one of the main reasons park residents valued assignment so highly, and perhaps why park owners disliked it. If a resident assigned their agreement to the purchaser of their home, the purchaser took over that agreement and the site fees could not be increased at that point.

The Government did listen to these concerns and the *Residential (Land Lease) Communities Act 2013* (the Act) requires that when an operator enters into a new site agreement the site fees must not exceed fair market value. Fair market value according to the Act is the higher of either the site fees paid by the current home owner or the site fees payable for sites of a similar size and location within the community. This seems straightforward but unfortunately some operators have either misunderstood, or don't think this section of the Act applies to them.

In a community on the Central Coast two new home owners were given site agreements with site fees $43 a week above the fair market value for similar sites. These are extraordinary increases and clear breaches of the Act by the operator but getting a remedy is difficult for home owners. These two home owners did not become aware that they were paying much higher site fees than others in the community until a few months after they moved in and the time limit for a Tribunal application on this issue is 28 days.

The Tenants' Union has heard from home owners in other communities where the practice of increasing site fees for new home owners continues and in the examples we have been given, the increases have been above fair market value. It is disappointing that some operators continue to put profit ahead of their legal obligations and we urge all home owners that may have been affected by such practices to call NSW Fair Trading on 13 32 20. •

Residential (Land Lease) Communities Act 2013

Section 109(5)

The site fees under the new site agreement must not exceed fair market value.

TENANTS' UNION OF NEW SOUTH WALES

40th anniversary

The Tenants' Union is the peak non-government organisation advocating for the interests of tenants, renters and land lease community residents in NSW.

2016 marks 40 years of the TU. Four decades of working for housing rights is no mean feat! A number of events were held to celebrate, and to recognise the thousands of volunteers, staff, members, board directors, funders and supporters who have contributed to the TU's achievements.

We created two short videos and an online gallery of moments from the history of the TU and tenants' rights in NSW. You can view these via our website tenants.org.au, or our Youtube channel, or our Facebook page: facebook.com/TUNSW.

A wide range of community members and Members of Parliament also participated in the TU's celebrations, including Shayne Mallard MLC, Victor Dominello (Minister responsible for Fair Trading), Tanya Mihailuk (Member for Bankstown and Shadow Minister for Social Housing), Jenny Leong (Member for Newtown), Alex Greenwich (Member for Sydney), and Rod Stowe (Fair Trading Commissioner).

MPs cutting the cake

TU staff at the 40th celebrations

Get free tenancy advice

Tenants Advice and Advocacy Services

Eastern Sydney	9386 9147
Inner Sydney	9698 5975
Inner West Sydney	9559 2899
Northern Sydney	8198 8650
Southern Sydney	9787 4679
South Western Sydney	4628 1678
Western Sydney	8833 0933
Blue Mountains	4782 4155
Central Coast	4353 5515
Hunter	4969 7666
Illawarra South Coast	4274 3475
Mid Coast	6583 9866
Northern Rivers	6621 1022
North Western NSW	1800 836 268
South Western NSW	1300 483 786

Aboriginal Tenants Advice and Advocacy Services

Greater Sydney	9698 0873
Western NSW	6884 0969
Southern NSW	1800 672 185
Northern NSW	1800 248 913

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