TENANTS' UNION OF NEW SOUTH WALES

Outasite

Land Lease Community Newsletter • Issue 4 • July 2018

POWER TO THE PEOPLE
• AT A REASONABLE PRICE •

(Part of this article was previously published in Outasite Lite in April 2018.)

With the commencement of the *Residential (Land Lease) Communities Act 2013* (the RLLC Act) on 1 November 2015, the method for calculating consumption charges for electricity, gas and water changed. The Tenants' Union has published articles, a report and held discussions with home owners, Tenant Advocates, the NSW Energy and Water Ombudsman (EWON) and NSW Fair Trading to explain that operators should not and cannot charge more than they are charged by utility providers.

This is an important issue because the majority of operators purchase electricity at significantly reduced prices yet they charge home owners at the highest rate possible – the standing offer price published by the local area retailer. If home owners are charged correctly many would see considerable reductions in their power bills.

On the whole, since the RLLC Act commenced, operators have failed to change the way they calculate utility usage charges. Through Tenants' Advice and Advocacy Services the Tenants' Union has been advising and assisting home owners to take up the issue of electricity charges with operators. When negotiations failed to bring change, some home owners made applications

Continued on page 2

POWER TO THE PEOPLE: AT A REASONABLE PRICE

Continued from front cover

to the NSW Civil and Administrative Tribunal (NCAT). Margaret Reckless was one of those home owners and when she received an unfavourable decision, she appealed.

The Northern Rivers Tenants Advice and Advocacy Service assisted Mrs Reckless at the first NCAT hearing, with back-up from the Tenants' Union. Mrs Reckless was then represented by the Northern Rivers Community Legal Centre at the Appeal Panel.

The Appeal was heard on 20 November 2017, and the Appeal Panel handed down the decision on 3 April 2018.

Reckless v Silva Portfolios Pty Ltd t/as Ballina Waterfront & Tourist Park [2018] NSWCATAP 80 (Reckless) is probably the most important decision NCAT has made regarding the operation of the RLLC Act. The Appeal Panel made findings about utility usage charges and how the RLLC Act applies to site agreements signed under the repealed *Residential Parks Act 1998* (Parks Act).

APPLICATION OF ACT

When an Act is repealed and replaced by a new Act, the new Act sets out how it applies to arrangements that existed under the old Act. Mrs Reckless signed a site agreement with the operator in April 2014 when the Parks Act was in force. The Appeal Panel heard competing arguments about how the *Residential (Land Lease) Communities Act* applies to that site agreement.

The Appeal Panel found the RLLC Act applies to the site agreement and that it applies *despite the terms of the agreement*. This is an important finding because it makes clear that electricity usage charges must be calculated according to the RLLC Act.

UTILITY USAGE CHARGES

Having determined the site agreement is covered by the RLLC Act and that utility usage charges are therefore governed by section 77 the question for the Appeal Panel was the interpretation of section 77(3). It provides:

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

It was argued on behalf of Mrs Reckless that the operator cannot charge more than their utility service provider charges them. In contrast, the operator argued that they could charge at the same rate as the standing offer price set by the local area retailer.

The Appeal Panel firstly noted that *"although s77(3) is not drafted particularly well, it is clear that it is trying to prohibit overcharging of residents."* The Panel then said *"The position is simply this – the Park Operator cannot charge Mrs Reckless for her consumption of electricity any more than it is being charged by Origin Energy."*

To put this in context, the operator was charging Mrs Reckless the Origin standing offer price of 26.62 cents per kWh. Origin was charging the operator between 4.21 and 6.23 cents per kWh, a difference of at least 20 cents for every kWh used by Mrs Reckless. Her bill for electricity usage in December 2016 was $44.19 but should have been around $10 or even less had she been correctly charged.

If you would like to read the full decision of *Reckless* you can find it on the NSW Caselaw website: caselaw.nsw.gov.au. Use the Advanced search function and search decisions of the Civil and Administrative Tribunal (Appeal Panel) using 'Reckless' as the case name.

CALCULATION OF CHARGES

The Appeal Panel did not make a decision about how electricity usage charges should be calculated. It referred this question back to the Consumer and Commercial Division for determination. However, the operator has now appealed to the Supreme Court and the Appeal Panel orders are stayed (not to be acted upon) until the Supreme Court determines the Appeal.

NCAT will not determine how Mrs Reckless' usage charges should be calculated until the Appeal has been decided.

The Supreme Court Appeal does not prevent other home owners from asserting their right to be correctly charged for utility use. Home owners can still make applications to NCAT about electricity charges but it is likely that NCAT will hold back on any decisions until the appeal has been determined. Home owners should be aware

that applications to NCAT must be made within certain time limits and those who delay endanger their refunds should the Tribunal determine they have been overcharged.

OTHER NCAT APPLICATIONS

In an application brought by Robert Myles, which was heard in February 2018, NCAT handed down a decision on 1 May. Again NCAT found that s77(3) prevents the operator from charging more for electricity use than the operator is charged by the utility service provider. The parties have been asked for submissions on how the charges should be calculated.

In another case heard in May, NCAT decided that usage charges should be calculated using an averaging method. The operator was ordered to refund the home owner over $1,000 in overpaid charges. The operator has appealed this decision to the NCAT Appeal Panel.

Continued on page 5

"We commenced this fight almost a year ago on behalf of all of the 208 sites that are in the embedded network, we have no intention of giving up regardless of how difficult it may become.

We have to buy our power directly from the owner-operator – we don't get a choice – and they don't offer a senior's discount like mainstream energy providers. They're making a lot of money on-selling the electricity to us.

We only get 32 Amps. So on hot days in summer, when everyone wants to use their air-conditioners, we sometimes get power failures. It's also not very energy efficient – because we have to use small air conditioners for a longer period, and there are no separate meters (let alone smart meters) so we don't have much information about our individual energy usage.

A year ago the park owner increased the charge for electricity. We tried to talk to them about it but they wouldn't reconsider, so we decided to take a stand. It's been a long, slow process – we've been to the Tribunal 11 times now. It takes a lot of time to prepare the evidence. The Western Sydney Tenants' Service was very helpful with advice and with wording our submission.

Most of the people in these villages are aged pensioners. Having read the Act, we believe it was not the intention of the legislators to allow owner-operators to make money from on-selling electricity to residents. The section is clunky, and needs to be clarified to stop pensioners from getting ripped off. We need the politicians to get onto this.

The best advice we can give to other residents is to get involved in the process. Contact your local Tenants Advice Service or the Tenants' Union if you think you're being overcharged. Talk to fellow residents and write to your local MP. The Australian public doesn't like to see older folk being ripped off."

- Brian Bavin & Ellen Raczkowski, Stanhope Gardens residents.

SITE FEE INCREASE DISPUTES AT NCAT

Excessive site fee increases rarely make it to the NSW Civil and Administrative Tribunal (NCAT) since the introduction of the compulsory mediation process. However, in 2017 some home owners at Gateway Lifestyle Redhead could not reach an agreement with the operator and they did go to the Tribunal.

Pam Meatheringham is a long-time advocate who lives in the community. Pam was one of the applicants and she represented around 80 home owners with assistance from Ann Davy (home owner) and Jock Plimmer, an advocate from the Central Coast.

The operator was seeking a site fee increase of $6.50 per week and the home owners argued that it was excessive because the operator had failed to carry out any repairs or maintenance since the last site fee increase. Also, that maintenance had been inadequate and conditions in the community had deteriorated.

The operator said the increase was necessary due to an increase in costs. In evidence the operator provided a statement from its Chief Financial Officer and an extract from its accounting software comparing costs for May and June 2016 with those for May and June 2017. The operator claimed a 16% increase in operating costs.

One of the difficulties for home owners challenging excessive site fee increases has always been evidence – having to disprove the operators claims without access to the evidence

that operators refer to but rarely provide. This case was no different – the operator referred to an increase in costs and quantified it at 16% but did not provide any documentary evidence.

The home owners argued that the increase should not be granted because the operator failed to provide evidence of the actual costs in the site fee increase notice (which is required by law), nor sufficient evidence to support the contention that the costs had increased as claimed.

NCAT determined the site fee increase should be limited to CPI, an increase of 2.4%. In coming to the decision the Tribunal found "as the operator has not provided sufficient evidence to support the claimed increase in costs and outgoings, and has not carried out required maintenance and repairs until proceedings were taken and an order obtained, the Tribunal is satisfied that it would not be just and equitable for the site fees to be increased by any greater amount."

The actual increases for home owners are between $3.62 and $3.92 a week, which is a great outcome.

Home owners from Colonial Tweed Holiday & Home Park also went to NCAT regarding an excessive site fee increase when they were unable to reach an agreement with the operator. The operator was seeking an increase of $8.50 a week, which they claimed was "required to help maintain the continued viability of the community."

Home owners were represented by Ken Cummins (also an applicant) and Don Bennett of ARPRA (Affiliated Residential Park Residents Association).

Like Redhead, the operator presented a statement to the Tribunal, prepared by their accountant, that costs had increased. The claim was that the increase in outgoings and operational expenses was 8.38%. The operator did not present any figures or a breakdown of any of the costs. The Tribunal noted that "there are a number of issues with the case presented by the park owner, the most obvious is that there is no material before me that allows me to determine the increase needed to cover an actual or projected increase in the outgoings of the community."

On behalf of home owners Mr Cummins submitted the increase should be restricted to CPI (Consumer Price Index) of 1.9%. Also that "little has been done for the home owners" to warrant an increase.

In making the decision the Member said "It could be argued that no increase has been established because the evidence provided does not allow scrutiny or challenge. However, I am cognisant of the obligation to ensure the community can continue to operate in a financially viable manner." An increase of $6.90 a week, approximately 4.5% was allowed.

COMMENTARY

NCAT operates under the *Civil and Administrative Tribunal Act 2013*. One of the Objects of Act at section 3(e) is

> "to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality."

In the two decisions above the operators failed to provide evidence of their increases in costs and instead relied on financial statements showing percentage increases.

In one matter the Tribunal found the evidence was insufficient and allowed only a CPI increase. In the other the Tribunal found there were a number of issues with the case presented by the operator but an increase of 4.5% or $6.90 a week was still allowed.

It is arguable that the decision in the second case is not fair because it is not based on evidence, but on an assumption about what the operator may need to "continue to operate in a financially viable manner." A comparison of the decisions does not indicate consistency and so it appears NCAT may be falling short of this Object when it comes to site fee increase disputes. •

POWER TO THE PEOPLE: AT A REASONABLE PRICE

Continued from page 3

On 8 March the NCAT Appeal Panel heard a dispute about electricity usage charges in the matter of *Bavin v Parklea Operations Pty Ltd Trading as Gateway Lifestyle Stanhope Gardens* [2018] NSWCATAP 24. The decision was published on 24 May and follows *Reckless* in the interpretation of s77(3). The Appeal Panel remarked "We are of the view that the reasoning in Reckless is applicable to the issues in this appeal, and we respectfully agree with and adopt that reasoning as to the application and interpretation of s77(3) of the new Act."

ACTION AND ADVOCACY

The Tenants' Union believes the Tribunal and Appeal Panel have got the interpretation of section 77(3) right. However, as the Appeal Panel remarked in the *Reckless* case, section 77(3) is not drafted particularly well so we have now written to the Minister and requested an amendment that will provide clarity.

The Tenants' Union has asked for the removal of the words 'or regulated offer retailer' from section 77(3). If this occurs, it will read:

> *The operator must not charge the home owner an amount for the use of a utility that is more than the amount charged by the utility service provider who is providing the service for the quantity of the service supplied to, or used at, the residential site.*

The Tenants' Union has also asked that a 'note' is added to the RLLC Act explaining the intention of the section and that the Minister issues a Ministerial Guideline explaining section 77(3)and advising operators that compliance is required.

We are also working with other organisations and home owners to raise awareness about electricity usage charges. It is an important issue that potentially affects up to 30,000 people. Home owners, resident committees and resident groups can take action - meet with, or write to your local MP or write to the Minster and let them know this is important and you want to be charged for electricity at the same rate the operator pays – as the law intended. •

WRONG AGREEMENT?
DON'T PANIC – GET LEGAL ADVICE

Contract law and the rules for contract formation play a key part in everyday life and land lease communities are no different – everything flows from the contract.

Contracts or agreements are usually made in writing but what if you have an agreement that is not in writing, or the agreement is different to the one you should have been given?

Sometimes a dispute may arise from the terms of the agreement or about the agreement itself and the dispute can end up in the NSW Civil and Administrative Tribunal (NCAT).

Here we look at two matters that ended up at NCAT during late 2017 and early 2018. One where the home-owner had *no written signed agreement* and the other where the home-owners were given the *wrong type of agreement* applicable to their circumstances.

DODGY BEHAVIOUR

David Dodge is a home-owner who lives at Tweed River Hacienda Holiday Park in the Northern Rivers area of NSW. He has lived there permanently since March 2010 with his partner Beryl.

David offered to purchase a home that was advertised for sale at Hacienda in late 2009. The vendor (person selling the home) had a residential site agreement and lived at the home as their principal place of residence.

After making an offer on the home David contacted the park office, completed application forms to live at Hacienda and advised the park owner in writing that he was going to sell his home in Queensland to live in the park.

David got an approval letter from the park owner in October 2009 but he was not provided with a copy of the proposed site agreement. By 28 March 2010 David and his partner had completed the purchase and moved their possessions into their new home at Hacienda.

The following morning David went to the park office and on enquiring about the agreement he was handed an occupation agreement to sign. David took the agreement away to read and on realising it wasn't the same as the residential site agreement he had seen in the possession of the vendor David refused to sign it. Instead he asked to speak to the Hacienda park owner.

The request for a meeting was ignored. David and Beryl continued to pay rent and live permanently on-site and they were party to excessive rent increase challenges during 2012 and 2013. Following a 2014 excessive rent increase challenge where NCAT capped the rent increases at $5 per week the disgruntled operator appealed to the Appeal Panel questioning jurisdiction and asserting that there was an unsigned *Holiday Parks Act* (HP Act) long-term casual occupation agreement between the park and David.

Having no written agreement continued to irk David and during this time he lodged a complaint with NSW Fair Trading about it. The park owner didn't correspond with David and instead wrote to Fair Trading in a short reply stating there was a HP Act long-term casual occupation agreement between the parties. Nothing further occurred.

The law changed at the end of 2015 and there were further proceedings under the new *Residential (Land Lease) Communities Act* (RLLC Act) at the Tribunal. In these proceedings consent orders were made for a refund of overpaid site fees as a result of a previous excessive site fee increase.

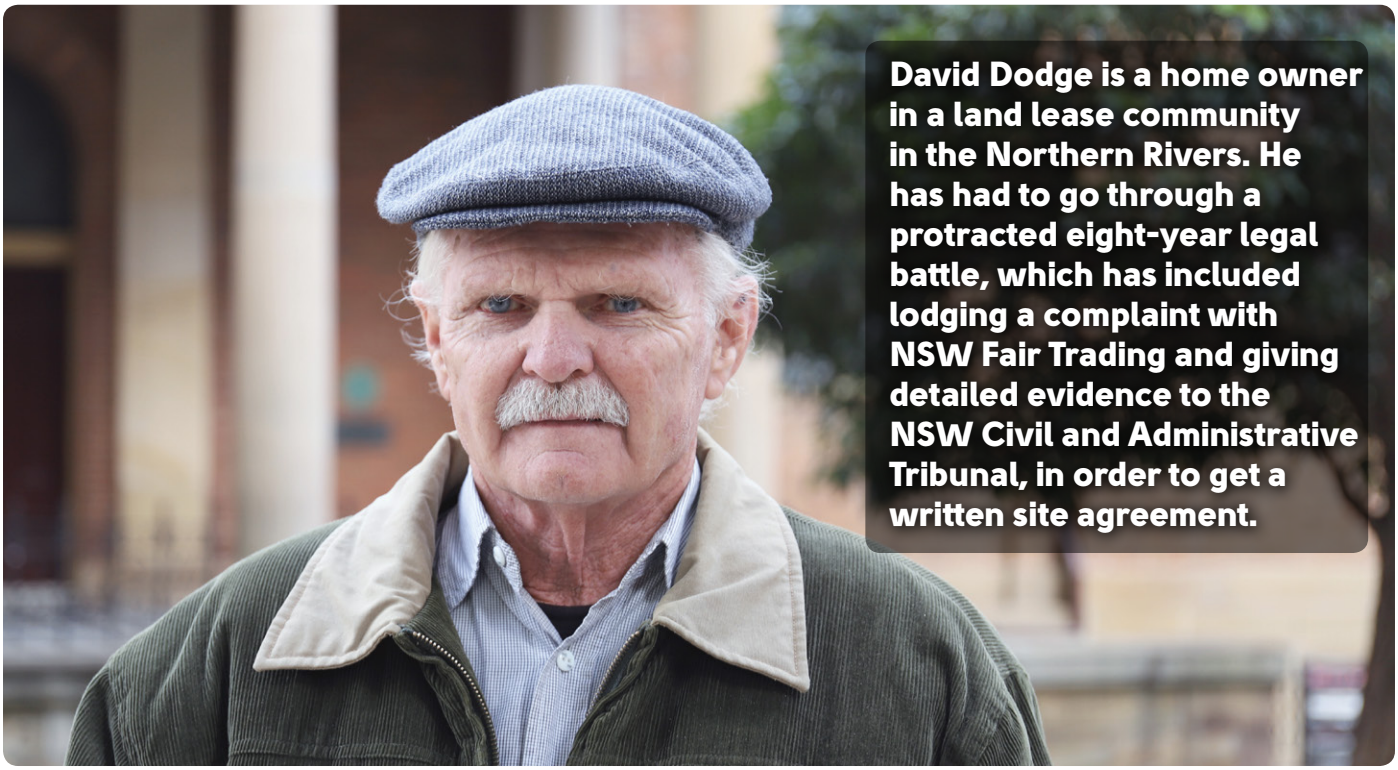
In 2017 David made an application to NCAT under section 26(4) of the RLLC Act for a written site agreement.

David was assisted by the Tenants' Union of NSW and was successful in his application. The Hacienda operator appealed but their appeal was dismissed following a formal hearing on 4 April 2018. After a protracted eight-year battle, which included giving detailed evidence to the Tribunal, David is finally set to get a written site agreement.

This is what can happen when prospective home-owners either (i) don't obtain independent legal advice or (ii) where a community operator evades their statutory obligations to provide proper disclosure.

David's case in the Consumer and Commercial Division was not reported. However the decision of the Appeal Panel can be found on the NSW Caselaw website: Hacienda Caravan Park Pty Ltd v Dodge [2018] NSWCATAP 108 see **www.caselaw.nsw.gov.au/decision/5aefe83ee4b074a7c6e1efdf**

In June 2018, Hacienda appealed to the Supreme Court of NSW against the decision of



David Dodge is a home owner in a land lease community in the Northern Rivers. He has had to go through a protracted eight-year legal battle, which has included lodging a complaint with NSW Fair Trading and giving detailed evidence to the NSW Civil and Administrative Tribunal, in order to get a written site agreement.

the Appeal Panel. So the final outcome of David's case will not be known until late 2018.

THE WRONG WRITTEN AGREEMENT

In another case where the Illawarra & South Coast Tenants Service assisted the home-owners the principal issue between the parties was the nature of the written agreement itself.

The prospective purchasers of a home in Milton Valley Holiday Park, a south coast residential land lease community, were shown a (blue) site agreement by the operator prior to purchasing a home. They checked the agreement, then proceeded with the purchase and moved in.

When the home owners went to the office to sign their agreement they were provided with a (green) long-term casual occupation agreement. They advised the manger it didn't look like the agreement they were previously shown by the operator. The manager told the home-owners they had run out of the blue agreements but that the green one was essentially the same. The home-owners signed the agreement without reading it or obtaining advice. The green agreement was a Holiday Parks Act agreement for long-term casuals.

The home owners lived at the community for two years and during this time their site fees were increased under the RLLC Act. After two years they decided to sell, but when they notified the operator of their intention the operator said the home could not be sold as a permanent home – it could only be used for holiday purposes.

The home owners made an application to NCAT for orders about interference with sale and a determination that they had a site agreement. The Tribunal found on the evidence that the home owners lived on-site permanently and had no other principal place of residence.

The Tribunal also found that the written agreement was not made in good faith and the home-owners were misled by the community operator into, *"entering a contract which was fundamentally different to that which they believed they were entering and which the operator had represented to them."*

All of the evidence indicated that at the time the agreement was entered into both parties treated it as a residential site agreement. The Tribunal declared the agreement to be a site agreement to which the RLLC Act applies.

Unfortunately, for these home owners this is not the end of their story. Unbeknown to them the site on which their home sits is designated as a short-term site under the approval to operate. This is now complicating the sale of the home. •

If you don't have a written agreement, or you think you may have been given the wrong agreement don't panic – get advice. You can apply to the Tribunal like these home owners did for a written agreement or a declaration that your agreement is a site agreement to which the RLLC Act applies.

ABANDONED AND ALONE

By Emma McGuire, Tenant Advocate, Mid Coast Tenants Service

Residential land lease community law recognises that people who purchase homes in these communities need to be compensated if the operator takes away the leasehold right on the land where their home is situated.

The *Residential (Land Lease) Communities Act 2013* (RLLC Act) provides for the termination of site agreements in certain circumstances including if a community is to be closed or there is to be a change of use of a particular residential site. If a termination notice is issued for one of these reasons, the home owner is entitled to compensation from the operator. However, the following case demonstrates that the law can fail home owners in this situation and when that happens they can find themselves abandoned and alone.

Leonie and Florent Grauls moved into a land lease community on the mid north coast in 2009. I first met the home owners in my capacity as a duty advocate at NSW Civil & Administrative Tribunal (NCAT) in July 2017 when they lodged an application seeking a resolution to a problem which had been on foot for over two years.

The Grauls found themselves in an incredibly unusual situation where they were the only people remaining in an otherwise abandoned land lease community. All other residents and management had left around 12 months earlier when the community was officially closed.

BACKGROUND

In mid-2015, the land lease community experienced some

Emma McGuire

upheaval when the local council advised of its intention to rescind the operator's approval to operate and residents were issued with termination notices.

Despite the Grauls being issued with an invalid termination notice in 2015, there had been numerous unsuccessful attempts between the home owners and the operator in 2015 and early 2016 to reach an agreement about compensation for them to move their home. However, by the time I encountered the Grauls at NCAT they had not had contact from the operator for around 18 months. All other residents had left, with or without compensation, along with all traces of the operator. After this extended period of isolation, the home owners sought to bring the matter to a head by lodging their application with NCAT.

NCAT PROCEEDINGS

By the time the Grauls' matter reached a final hearing before NCAT in December 2017, I had obtained some invaluable advice from the Tenants' Union and we sought to put two arguments to the Tribunal, although we had concerns about the strength of both. It was clear this would be a difficult case to resolve and there was a reasonably strong possibility the Tribunal would not be able to provide a remedy in the Grauls' favour.

Firstly, we argued the Tribunal could use its broad power under s 157(1)(j) of the RLLC Act to order the operator to give the home owners a valid termination notice. This would trigger the compensation provisions of the Act and entitle the home owners to compensation for the relocation of their home.

Secondly, we sought to argue the home owners could rely on the original (albeit invalid) termination notice issued to them in 2015 and directed the Tribunal to the savings and transitional provisions of the RLLC Act which state that any closure compensation matter which arose under the now repealed legislation but was not finalised under that Act, is to be determined under the provisions of the current Act.

As to the first argument, the Tribunal indicated it could not order the operator to issue a new termination notice as to do so would conflict with the discretionary nature of the operator's power to issue such a notice. The second argument was fraught with difficulties because of the time that had passed since the termination notice had been issued and because it would necessarily need to rely on the Tribunal exercising its discretionary power to cure the defect in the notice. The Tribunal

The Grauls' home

indicated the time delay (it had been over two years since the termination notice was issued) weighed heavily against this course of action. Further conciliation was suggested by the Tribunal Member before he made a final determination.

For the home owners, the alternative to a conciliated agreement was the likelihood of an adverse decision by the Tribunal and being financially powerless to move. Such an outcome would have been devastating for the Grauls. Although there was always the option of appealing a Tribunal decision, or perhaps to simply stay put and wait out the operator until they required vacant possession of the site and were compelled to issue a new termination notice, these were daunting and uncertain options. From the home owners' perspective, this issue had gone on long enough and they wanted to leave.

Fortunately, through further conciliation with the operator, we were able to reach an agreement which both parties were happy with – the operator agreed to pay the home owners $40,000 in compensation. The agreement was put into a consent order and the matter was (finally) brought to a close. Considering that without this agreement the likely outcome would have been a dismissal of the Grauls' application and them walking away with no compensation and no capacity to relocate their home, this was a wonderful outcome for the home owners.

Florent and Leonie deserve enormous congratulations for showing the tremendous tenacity to remain in their home in an otherwise abandoned community until they secured the compensation they needed. Understandably, they've decided they've had enough of land lease communities for now and have relocated their home to a family-owned block of land. •

"The Grauls found themselves in an incredibly unusual situation where they were the only people remaining in an otherwise abandoned land lease community. All other residents and management had left around 12 months earlier when the community was officially closed."

LOCAL GOVERNMENT REGULATIONS

When you live in, or operate, a land lease community the *Residential (Land Lease) Communities Act* (RLLC Act) is not the only legislation you need to know about. The *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation* (the Regulation) also has a significant role.

Some of the roads in The Grange are so narrow that home owners reportedly struggle to get in and out of their garages.

The Regulation is made under the *Local Government Act 1993* and it covers everything to do with structures and infrastructure in the community. It is primarily the operator who has compliance obligations under the Regulation, but home owners also have some responsibilities. These are related to the home and other structures on the site.

Compliance is complicated. Firstly, the Regulation has changed a number of times since the initial regulatory instrument, Ordinance No. 71. It was made under the *Local Government Act 1919 (NSW)* and came into effect on 1 December 1986. It is generally assumed that everything in a land lease community must comply with the current Regulation but that is a wrong assumption. Each Regulation contains transitional and savings provisions that protect things that have already occurred.

For example:

A home placed on site in a residential park in July 2001 was required to comply with the 1995 Regulation. In 2005 when the Regulation changed that home automatically became compliant with the new Regulation.

Secondly, responsibility for ensuring compliance lies with local councils and the Tribunal (NCAT) cannot deal with disputes. The Tenants' Union hears many complaints from home owners who have asked their council to address breaches of the Regulation by operators but the council is often not interested.

THE GRANGE

An important aspect of the Regulation relates to safety. Moveable dwellings are traditionally lightweight, constructed of combustible material and are not affixed to the ground in the way that traditional homes are. This makes them vulnerable to storms, fire and flood events and the Regulation seeks to address this by setting standards regarding structural soundness and separation distances. It is these very issues that have home owners at The Grange concerned.

The Grange is a well established community that was purchased by the current operator Ingenia Lifestyle in 2013. Ingenia wanted to expand the community and install new homes but to do so they had to infill a large area of land that was a flood plain. Once the infill land had settled the operator started installing homes and the existing home owners became concerned about potential compliance breaches.

The Regulation requires there to be a certain distance between homes, and between a home and another structure such as a carport or garage. The new homes in The Grange are so close they are almost touching, which also raises issues about whether the maximum two-thirds site coverage has been exceeded.

There are also drainage issues because some of the homes do not have down pipes connected to the storm water drains causing water to pool under the home when it rains. Some of these homes have been sold and are already occupied despite being incomplete.

Other issues include the failure to provide a space for garbage bins and roads being so narrow the home owners reportedly struggle to get in and out of their garages.

Home owners believe there are several aspects of the new development that do not comply with the Regulation and they have genuine concerns about the impact this may have on the safety of everyone in the community. The residents committee has contacted Council and raised these concerns to no avail – Council have advised they have no jurisdiction because the development is being signed off by a private certifier.

The residents committee is now considering a complaint to the NSW Ombudsman about the lack of interest and oversight from Council who, despite the private certifier, still has an obligation to ensure the community complies with the Regulation.

The residents committee has also contacted the local MP to see if he can assist in any way and may consider making a complaint about the private certifier, whose role it is to ensure the development complies with all of the legislative requirements before issuing a development certificate.

APPROVALS AND MAPS

The Grange is not the only land lease community where disputes about compliance issues exist. Another common issue that regularly comes to the attention of the Tenants' Union is site boundary disputes. These can be between the operator and home owner, or two home owners and they are not easily resolved.

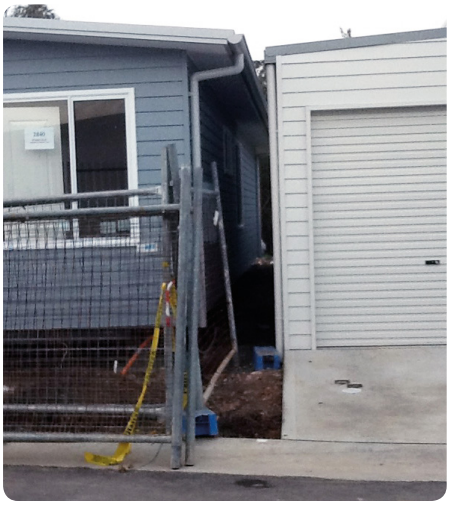
The first problem a home owner can face is knowing the size or dimensions of their site when they entered into the site agreement. Agreements signed under the (repealed) *Residential Parks Act 1998* (Parks Act) were required to say how big the site was. This is helpful but those with oral agreements, or with agreements where the information was not provided cannot easily get this information. Site agreements signed under the RLLC Act must include site dimensions and home owners should ensure the details are filled in.

It is important for a home owner to know the size or dimensions of the site for a number of reasons. It assists compliance with the Regulation when structures are being placed on the site; it can provide clarity in boundary disputes; and, it is what is contracted for in the site agreement. This means it cannot be altered without the home owners consent.

If the site agreement does not provide this information all is not lost, well not yet anyway! All operators are required to hold an Approval to Operate under section 68 of the *Local Government Act 1993*. This Approval is a good source of information because it must contain certain details including the number, size and location of long-term sites.

Operators are also required to produce a community map, which is a scale map of the community that accurately shows roads, amenities and sites. The map should be displayed within the community however, if not, the operator has to make it available for inspection without cost. This means home owners should be able to check the map at any time.

Like the Regulation, community maps will change from time to time and each time it does the operator should provide a copy of the updated map to council. This means council should have a copy of all the community maps for a community. And under section 113 of the *Local Government Act* they are required to make Approvals and maps available for public inspection.



"The Regulation requires there to be a certain distance between homes, and between a home and another structure such as a carport or garage. The new homes in The Grange are so close they are almost touching."

The bad news is many councils have not undertaken compliance activities in land lease communities for a number of years and their records are consequently poor. So although a home owner should be able to get information about their site dimensions at the point in time when they signed their site agreement this may not always be the case.

For more information about Local Government Regulations see the factsheets on our website: thenoticeboard.org.au. For specific advice contact you local Tenants Advice and Advocacy Service (details on back cover). •

RULES OF CONDUCT

Schedule 1 of the *Residential (Land Lease) Communities Act 2013* sets out the rules of conduct for operators and section 54 of the Act requires compliance with those rules.

The rules of conduct are comprehensive and if they are followed operators would: understand the laws relevant to operating a land lease community; act honestly fairly and professionally; and they would not engage in high pressure tactics, harassment or harsh or unconscionable conduct. But what happens if an operator doesn't comply with these rules?

ENFORCEMENT

There are two things a home owner can do if an operator breaches one or more rules of conduct – they can make an application to the NSW Civil and Administrative Tribunal (NCAT), or make a complaint to NSW Fair Trading.

At NCAT the home owner faces the difficult task of proving the operator breached a rule. They need evidence and this can sometimes be difficult to obtain. Other home owners often don't want to get involved so it comes down to oral evidence, and NCAT has to choose between the (usually contradictory) evidence of the home owner and that of the operator.

If the home owner does prove a breach NCAT may order the operator to comply in the future but how does the home owner enforce that order? They can't, and if the operator breaches the rule again, or breaches a different rule the home owner has to go back to NCAT and they face the same difficulties as the first time.

Home owners who have made complaints about operator conduct will know that Fair Trading also require 'hard evidence' before they will take action. Hard evidence includes documents from the operator that demonstrate a breach of the rules, or NCAT orders.

Taking action regarding operator conduct can be a difficult and stressful process and many home owners either don't try or give up. Home owners have told the Tenants' Union there is no way to enforce the rules of conduct and operators can behave in any way they want without fear of penalty. In this article we share two stories from home owners...

ROBERT & FAY

Robert and Fay (not their real names) bought their home and moved into the community in 2014. They were not given a written site agreement and although they weren't initially concerned about that, over time they did become concerned about the way the community was operated. When the law changed on 1 November 2015 Robert and Fay decided it might be an opportune time to get some information and advice.

Robert and Fay organised a meeting for home owners with their local Tenants Advice and Advocacy Service. The Tenants Service provided them with information about their rights and responsibilities and for many it was a real eye opener.

On hearing about this meeting the operators got some advice of their own including that home owners were entitled to written site agreements. They asked all home owners to sign site agreements under the new Act. The agreement offered included some new charges so Robert and Fay decided not to sign it – it was more beneficial for them to stay on their oral site agreement. The operators immediately began treating them differently.

NCAT APPLICATIONS

Robert and Fay realised they were being overcharged on their electricity service availability charge (SAC). They only receive 40 Amps of electricity but the operator was charging 100% of the SAC. They raised this with the operator and participated in mediation but the operator refused to reduce the charge. The home owners were left with no choice and applied to NCAT in early 2017.

The operator responded by also making an application to NCAT to try and force the home owners into a site agreement under the new Act and asserting that Robert and Fay were in arrears with their site fees. The application for an order about the site agreement was dismissed and NCAT found there were no grounds to make an order about the site fees because Robert and Fay were actually in advance with their site fees.

Following the NCAT hearing on electricity charges, but before a decision had been made, the operator approached the home owner on the site adjoining Robert and Fay's site and asked them to agree to have their power supply reduced to 20 Amps. This would enable the operator to increase the 40 Amp supply to Robert and

Continued on page 14

RULES OF CONDUCT FOR OPERATORS

1. Knowledge of Acts and regulations

An operator must have a knowledge and understanding of:

(a) the legislation, which in these rules refers to:

(i) the *Residential (Land Lease) Communities Act 2013* and regulations under the Act, each as in force from time to time, and

(ii) the *Local Government Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* (or its replacement), as in force from time to time, and

(b) such other laws relevant to the management of a community (including, laws relating to residential tenancy, fair trading, trade practices, anti-discrimination and privacy) as may be necessary to enable the operator to exercise his or her functions as operator lawfully.

2. Honesty, fairness and professionalism

(1) An operator must act honestly, fairly and professionally with all parties in a negotiation or transaction carried out as operator.

(2) An operator must not mislead or deceive any parties in negotiations or a transaction carried out as operator.

3. Skill, care and diligence

An operator must exercise reasonable skill, care and diligence.

4. High pressure tactics, harassment or unconscionable conduct

An operator must not engage in high pressure tactics, harassment or harsh or unconscionable conduct.

5. Confidentiality

An operator must not, at any time, use or disclose any confidential information obtained while acting on behalf of a resident (which in this rule includes a prospective resident or former resident) or dealing with a resident, unless:

(a) the resident authorises disclosure, or

(b) the operator is permitted or compelled by law to disclose.

6. Ensuring employees comply with the legislation

An operator must take reasonable steps to ensure persons employed in the operation of a residential community comply with the legislation.

7. Selling homes

An operator, when acting as a selling agent for more than one home in a community, must act fairly and advise prospective home owners of the details of all available homes in the community.

8. Soliciting through false or misleading advertisements or communications

An operator must not solicit prospective residents through advertisements or other communications that the operator knows or should know are false or misleading.

9. Insertion of material particulars in documents

An operator must not submit or tender to any person for signature a document, or cause or permit any document to be submitted or tendered to any person for signature, unless at the time of submission or tendering of the document all material particulars have been inserted in the document.

10. Representations about the legislation

(1) An operator must not falsely represent to a person the nature or effect of a provision of the legislation.

(2) An operator must not, either expressly or impliedly, falsely represent, whether in writing or otherwise, to a person that a particular form of agreement or any term of such an agreement is required by the legislation.

RULES OF CONDUCT

Continued from page 12

Fay to 60 Amps and therefore charge SAC at 100%.

In January 2018 NCAT determined the level of supply to Robert and Fay's site was 40 Amps. The operator was ordered to reduce the SAC to 70% and to refund $167.79 in overpaid charges.

Robert and Fay had also sought an order from NCAT that the operator provide copies of their electricity bills. They believed they were being overcharged for electricity usage as well as SAC and wanted to check. NCAT ordered the operator to provide the bills and awarded photocopying costs at commercial rates. The operator charged Robert and Fay $66.00 for copies of the bills before deciding not to provide them and refunding the money.

In the meantime the operator made another application to NCAT, this time seeking termination of Robert and Fay's site agreement. The operator alleges breaches of the Act and of the community rules but there is little substance to the application.

In January 2018 the operator issued a termination notice to Robert and Fay, again citing breaches of the site agreement.

In February 2018 the operator appealed the decision of NCAT regarding the service availability charge and provision of electricity bills. In May the Appeal was dismissed.

In April, Robert and Fay became aware that a petition was being circulated around the community asking other home owners to sign in support of their eviction.

Robert and Fay feel totally unprotected by the law and have decided that once the NCAT proceedings have finished they will put their home on the market and leave the community. They do not believe there is any other way to stop the harassment.

EVELYN

Evelyn lives in a different land lease community but she has also suffered at the hands of the operator. Evelyn has lived in her community for 18 years and in that time she has assisted many residents by providing them with information and representing them at the Tribunal. Evelyn believes it is this advocacy that has led to her recently being issued with a termination notice.

When Evelyn first moved into her community she purchased a home close to the managers office. She was happy for the first two to three years but when the manager changed the disputes started. There were rumours spread about Evelyn, and a Tribunal application made against her that was later withdrawn. Then without notice, her boom gate key was deactivated locking her out of the park and the manager said she couldn't provide another one.

Evelyn suffered a serous injury when the park owner slammed a door on her shoulder and she later received a compensation payment for this injury.

Evelyn decided to move out of reach of the manager and she purchased a different home in the community – as far from the office as she could get.

When she purchased this home Evelyn used to access one side of it by walking up and down the adjoining driveway. She needed access to reach her power box, clean her windows and tend to a garden. Evelyn did this for 10 years and always understood she had a right of access because there were several similar arrangements in place across the community.

When ownership of the home next door changed the new home owner parked a large vehicle in the drive making access difficult. Evelyn used the driveway as she had always done and was abused by the neighbour and told to get off the driveway. Evelyn approached the operator for support but instead they supported the other home owner and told her she could not use the driveway for access.

Evelyn took the dispute to NCAT in 2016 and the Tribunal made orders that she had the right to use the driveway for access. The neighbour however continued to abuse her for doing so and the operator continued to support the neighbour.

Evelyn went back to NCAT in 2017 and this time the Tribunal decided that she was not permitted to use the driveway for access.

Later in 2017 when the operator issued a site fee increase notice Evelyn assisted around 80 home owners to challenge the increase as excessive. When mediation failed Evelyn represented the home owners at NCAT and was successful in arguing the increase was excessive.

In the meantime the operator issued Evelyn with a termination notice because she used the driveway to water her garden. Evelyn has now installed a watering system and has not used the driveway again but the operator has told her they are still going to NCAT to press for termination of her site agreement.

Evelyn mentioned many more incidents of what she considers to be harassment by the operator that are not included in this article. She told us she has made complaints to Fair Trading but she doesn't believe she was listened to and as far as she is aware no action was taken.

WHAT YOU CAN DO

The Tenants' Union encourages home owners who believe their operator is breaching the rules of conduct to take action – it is the only way to improve operator behaviour. It is quick and easy to make a complaint to Fair Trading and even though Fair Trading may not act at the time, the complaint is stored on their database and if further complaints are lodged about the same operator Fair Trading may decide that action needs to be taken.

Home owners can also support each other. Those who witness an operator behaving badly towards another home owner can provide a statutory declaration or witness statement that can be presented as evidence at NCAT, or to Fair Trading.

There is no doubt that bad behaviour by operators is difficult to prove but nothing will change unless home owners take action – it is up to you. •

SANDY GILBERT
RESIDENT ADVOCATE

Sandy Gilbert is an advocate for residents of land lease communities in the Tweed area and a member of the Residential Parks Forum. She agreed to share her story with us for this issue of *Outasite*.

Sandy Gilbert

HOW LONG HAVE YOU BEEN AN ADVOCATE AND HOW DID YOU GET INVOLVED?

My journey with residential parks started back in 2009 when I retired from work and relocated to Port Macquarie. We moved into a park on the banks of the Hastings River, which consisted of homes for holiday-makers and permanent residents. We purchased our home from the operator who was manufacturing homes that could be put on to sites within the park.

It was only about three months after purchasing the home that I discovered it did not comply with the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation*. I arrived home one day to find someone had been on the roof cutting a section out of the roofline. It was this experience that eventually led to me becoming an advocate to assist other residents.

After many phone calls to NSW Fair Trading and the local council I was given the phone number for ARPRA (Affiliated Residential Parks Residents Association) in the Port Macquarie area. I had the assistance of Lesley Wakeling and the late Tom Johnson who were volunteer Advocates for ARPRA in Port Macquarie. Tom and Lesley swung into action to help fight the fight with solicitors, Tribunals and Council. They also passed on their knowledge and experience and inspired me to also become an Advocate.

I no longer live in a residential park but I have continued to advocate for residents and to fight for better residents' rights. I believe it helps to live in a park when you are an Advocate because this enables you to fully understand the issues. However, the experience and knowledge you gain through being a resident and Advocate stays with you.

After moving to the Tweed from Port Macquarie I was part of a team of residents and Advocates that formed ARPRA Tweed Coast. Then, in June 2014 a group of residents and I decided to form a local organisation just for the Tweed area. Along with Tom George, Len Hogg, Jim Creek, Faye Wilson and Denis May I was a founding member of the Tweed Residential Parks Homeowners Association (TRPHA).

Continued on page 16

SANDY GILBERT: RESIDENT ADVOCATE

Continued from page 15

TELL US ABOUT TWEED RESIDENTIAL PARKS HOMEOWNERS ASSOCIATION

We knew that the law was going to change. The new *Residential Land Lease Communities Act 2013* was set to replace the *Residential Parks Act 1998* and we saw a need for a local group that could assist residents, who would become known as home owners under the new Act. TRPHA offers a choice and a voice in helping to ensure home owner's rights are protected.

We are very fortunate to have Len Hogg as a current and founding member of our Association. Len is a true gentleman with many years experience in residential parks. Len has been an Advocate for a long time and he has battled operators at the Tribunal and at the Supreme Court. He gained legendary status standing up for his rights and representing other residents who were affected by the closure of Banora Point Caravan Park.

Len continues to work for home owners and passes on his knowledge and words of wisdom to all of us all at TRPHA.

The Advocates at TRPHA are just a phone call away for any problems that may arise at any time on any day. We are also available for a friendly chat to put a residents' minds at ease.

WHAT ISSUES IS TRPHA DEALING WITH AT PRESENT?

We are doing a lot of work with home owners who were given occupancy agreements when they should have had site agreements. This has led to a lot of jurisdictional issues being raised at the Tribunal (NCAT). We are also dealing with a number of site fee increases and some issues around disclosure statements.

WHAT IS THE ONE THING YOU WOULD CHANGE TO IMPROVE THE RIGHTS OF HOME OWNERS IN NSW?

Top of the list would have to be operator behaviour. We have some wonderful operators who are always open to meetings and negotiating site fee increases and other matters that arise in land lease community living. They understand the vulnerability of home owners and are reasonable and considerate. On the other hand, we have the total opposite with operators who have no consideration for home owners or their Advocates. These operators are unreasonable, they refuse to negotiate and prefer instead to use tactics such as intimidation.

I'm going to be cheeky here and say I would also like to see improved access to information for potential home owners. I know that NSW Fair Trading have a publication for potential home owners that operators are required to give to them but it isn't enough. The booklet does not advise people about the potential pitfalls and I think it should.

I would also like Fair Trading to hold regular information seminars for people who are considering moving into land lease communities. This would give people the opportunity to ask questions and if Fair Trading worked with local residents groups we could come along and talk with the participants as well.

WHAT IS GOOD ABOUT BEING AN ADVOCATE?

We are very fortunate at TRPHA to have the assistance of Julie Lee and Paul Smyth from the Tenants' Union. Our connection with the Tenants' Union provides the opportunity to attend forums in Sydney together with many other Advocates from across NSW. We meet and exchange knowledge, have workshops and share our experiences with each other. This enables us to work together for the benefit of all residents of land lease communities.

It is a wonderful experience being an Advocate but it also has its lows. It is heartbreaking seeing residents reduced to tears by the actions of operators.

The highs include getting good outcomes at the Tribunal for home owners and those occasions when you are able to communicate and negotiate with operators. Witnessing the smiles on the faces of home owners when you have helped them to get a positive outcome is gold!

For anyone thinking of being an Advocate for land lease community residents, the words of the late Christina Steel, (an Advocate in Port Stephens) will stay in my heart forever. She said "Never give up, one person can make a difference, especially when the one becomes many!" •

PERSEVERANCE PAYS OFF

By Mary Flowers, Tenant Advocate, Northern Rivers Tenants Advice and Advocacy Service

When Robyn Meyers decided to sell her home, she did not expect to have to make multiple Tribunal applications to do so.

Her home was located in a residential community in Byron Bay. Property prices in Byron Bay are at a premium, and many people working there cannot afford to live there.

The home belonged to Robyn's mother and after her death legal ownership was passed to Robyn, as well as the site agreement.

When Robyn's mother was alive she received a letter from the community operator advising that homeowners would not be permitted to sell their homes to anyone except the operator. The operator tried to impose this on Robyn, and offered her $180,000 to buy the home.

The *Residential (Land Lease) Communities Act 2013* (the RLLC Act) does not permit an operator to place such restrictions on the sale of a home. Every home owner has the right to sell their home on site to a buyer of their choice.

Robyn declined the operator's offer and engaged a local estate agent who valued the home at $315,000. Robyn and the agent entered into a contract to sell the home.

Robin Meyers

There was a lot of interest in the home, but the operator told the real estate agent he would not agree to the sale of the home to anyone but him.

On Robyn's behalf, the real estate agent made an application to the NSW Civil & Administrative Tribunal (NCAT) asking for orders that:

- the operator stop interfering with the sale
- the operator enter into new site agreement with the purchaser

At the Tribunal, the operator consented to these orders.

Three prospective purchasers came and

Continued on page 19

Mary Flowers

"Robyn showed great tenacity in enforcing her rights under the Residential Land Lease Communities Act. It was incredibly satisfying to see Robyn's huge smile when she secured an agreement for the purchase of her home, as previous Tribunal proceedings had been very stressful."

– Mary Flowers, Tenant Advocate, NORTAAS

VALE CHRISTINA

On 9 January 2018 Christina Steel passed away after a long illness, which she fought to her last day. She was hoping to see the end of Game of Thrones and she almost made it.

Christina had many roles in her life and she gave herself willingly and wholeheartedly to each and every one of them. We at the Tenants' Union came to know Christina when she took the role of advocate with the Port Stephens Park Residents Association (PSPRA) and began attending the Residential Parks Forum.

Janice Edstein, a long time friend and co-conspirator told us that Christina became involved in PSPRA quite by accident. She approached Janice for advice about a term of her site agreement and they became close friends. Janice then talked Christina into joining PSPRA and before long she took on the role of Tribunal Advocate.

Stepping up and representing park residents in front of the Tribunal is a daunting task for anyone who hasn't done it before. You are expected to know about the law, evidence and how the Tribunal operates and you also have to manage the hopes and aspirations of the people you are representing. Christina approached the role with enthusiasm and without fear. She was passionate about the rights of the people she was entrusted to represent and this carried her through.

Over the years Christina obtained some great results for the people she represented in the Post Stephens area. She

Christina Steel

"The knowledge and support she handed on to others was truly remarkable and I am so proud to have shared a part of her journey in life, not only through advocacy but also as a beautiful friend."

– Sandy Gilbert

negotiated when she could and when she couldn't she presented the evidence and legal arguments to the Tribunal.

In 2015 Christina took an application to the NSW Civil and Administrative Tribunal (NCAT) on behalf of herself and other home owners at Sea Winds Village. The residents were seeking orders that the rent increase was excessive and argued for a Consumer Price Index (CPI) increase. Christina also raised a legal point about a rent increase term in some of the site agreements. She lost on the legal point and the Tribunal awarded an increase of 5.2% whereas a CPI increase would have been around 2.8%.

Christina believed the Tribunal got it wrong and with the support of PSPRA, the Tenants' Union and the affected residents she appealed the decision. Some people advised her to get a solicitor to run the appeal and she was offered the services of a solicitor for free, but in true Christina style she took it on herself. Christina presented her arguments about the rent increase and the term of the site agreement to the two-Member Appeal Panel and she was successful on both points.

CAMPAIGNING

Christina did not limit her advocacy to the Tribunal. When the residential parks legislation was under review Christina worked with her colleagues Janice Edstein and Ron McLachlan from PSPRA and other organisations around NSW to try to secure some last minute improvements to the Bill before it became law.

And, when Christina found out the day before the new Act was being announced in Tweed Heads she immediately swung into action. She, Janice and Ron took an overnight train and then a bus to ensure their Association was represented at the event. Later that afternoon, they were back on the train to Port Stephens.

Sandy Gilbert of the Tweed Residential Park Homeowners

Association remembers that day and remarked "that is what I call dedication." She also said of Christina "the knowledge and support she handed on to others was truly remarkable and I am so proud to have shared a part of her journey in life, not only through advocacy but also as a beautiful friend."

WOMAN OF THE YEAR

In March 2016 at an event celebrating International Women's Day Christina was announced as Port Stephens 'Local Woman of the Year' by the Port Stephens MP Kate Washington.

Christina was recognised for her outstanding achievements supporting and advocating for the 3000+ park residents in the Port Stephens area, and for her campaigning to improve the rights of residents.

Christina also had a great sense of fun and the ability to laugh at situations that would make others want to cry. Throughout her illness she was able to relive the good times and laugh with her friends about their past antics. Janice visited Christina often during this time and said that they always ended up laughing at some silly thing. They had many adventures together over the years and Janice will remember Christina as "the most generous, kind, thoughtful and faithful friend one could ever have."

Those of us who were fortunate to know Christina through our work, or personal lives miss her immensely. She was a remarkable woman and she will be long remembered.

Farewell friend and colleague. •

PERSEVERANCE PAYS OFF

By Mary Flowers, Tenant Advocate

Continued from page 17

went, however, the operator's behaviour deterred all of them from proceeding with the sale. One prospective purchaser met with the operator and was told that a proposed bypass in Byron Bay would impact negatively on the value of the property. This was not a view shared by the real estate agent. The prospective purchaser also wanted to add solar panels to the home and was told that no alterations to the home would be permitted.

Robyn decided to renew the Tribunal proceedings seeking further orders that the operator stop interfering with the sale, and for assignment of the existing site agreement. It was at this stage she contacted the Northern Rivers Tenants Advice & Advocacy Service (NORTAAS).

Robyn was distraught when the operator made another offer to buy her home for $150,000. Robyn was concerned that if her Tribunal action was unsuccessful, she would be forced to sell to the operator. The operator said the reason for the reduced offer was because of 'the trouble Robyn was causing'.

The real estate agent was still trying to sell the property and even though Robyn reduced her asking price, the home remained unsold. After much frustration and considerable financial cost, Robyn decided to sublet her home. The real estate agent found a suitable tenant and the operator agreed to a 12 month subletting arrangement, and a tenancy began between Robyn and the tenant under the *Residential Tenancies Act 2010*.

Robyn proceeded with her Tribunal application and at the final hearing, the Member asked the parties to conciliate, believing this would provide a better outcome. After a lengthy conciliation, Robyn accepted an offer from the operator to buy her home. This offer was more than $100,000 higher than the original offer.

Following the Tribunal hearing, NORTAAS contacted the real estate agent to advise of the outcome. They acted immediately to begin the formalities of the sale process. Michele Jackson from Raine & Horne Byron Bay said of NORTAAS "Without your involvement, the sale would not have happened."

The sale was completed, the real estate agent received their commission, the operator took ownership of another home in the community, and the home owner received an acceptable price for her home.

The tenancy agreement with the new tenant was a fixed term agreement, which transferred with the sale. •

HOME SALES

RIGHTS, RESPONSIBILITIES AND RULES

When the *Residential (Land Lease) Communities Act 2013* commenced on 1 November 2015 all terms of existing site agreements that prohibited or placed restrictions on the sale of homes on site became void. The RLLC Act provides all home owners with the right to sell their home on site, including those in communities situated within a Crown Reserve.

In the second reading speech for the Residential (Land Lease) Communities Bill 2013 the then Minister for Fair Trading Anthony Roberts made specific mention of this right. He said "The bill gives all home owners a right to sell and to place a 'for sale' sign in or on the home."

The right to sell on site also applies to home owners who no longer occupy their home and to executors, administrators and beneficiaries of the estate of deceased home owners.

SELLING AGENTS

The easiest way to sell a home is to appoint an agent. The agent will organise signage, advertising and appointments for prospective purchasers to view the home and community. Home owners are entitled to appoint a selling agent to sell or negotiate the sale of their home and they have total freedom about who to appoint as the selling agent. The operator cannot require a home owner to appoint them or any other person as the selling agent, even if the site agreement contains such terms.

If a home owner appoints a selling agent other than the operator, the operator must not unreasonably hinder the agent's access to the community.

Selling agents charge commission for selling homes and there are usually other expenses home owners are required to pay. The selling agent must set out all of the fees in a written selling agency agreement, as well as the services they will perform in return for payment of the commission.

'FOR SALE' SIGNS

Prior to displaying a 'for sale' sign in or on the home a home owner is required to notify the community operator of their intention to offer the home for sale. The RLLC Act does not set any limits on the size of a 'for sale' sign and it does not set any other requirements.

The Tenants' Union is aware that in some communities operators are seeking to impose their own requirements on 'for sale' signs. This includes introducing new community rules, one of which seeks to limit the size of 'for sale' signs and prescribe text. The rule requires any 'for sale' sign to include the following words:

> "Any prospective purchaser must contact the operator before paying any monies for the purchase of this home. It is essential that you get a Disclosure Statement and have the operator's approval to live in the community."

This rule is problematic and possibly invalid. The RLLC Act provides that a community rule is of no effect if it is inconsistent with the Act and it is our view that this rule is inconsistent because it attempts to limit a home owner's rights where the Act provides a broad right.

The *Residential (Land Lease) Communities Act* does not set any limitations or restrictions on 'for sale' signs and had that been the intention, the legislatures would have prescribed restrictions in the Act.

Secondly, the exchange of monies between the vendor and purchaser is a matter for those parties and the selling agent (if there is one). Unless they are acting as the selling agent operators should not be concerning themselves with that transaction.

The RLLC Act does require a selling home owner to advise the purchaser to contact the operator prior to entering into a contract of sale but the contract is not invalidated if that doesn't occur. The purpose of the referral is to enable the operator to provide the prospective home owner with any necessary paperwork and as one operator puts it "to assess their suitability" for the community. It is not a breach of the RLLC Act for a contract of sale to be entered into prior to the purchaser contacting the operator.

Interference with the sale of homes is a long-standing issue

in land lease communities and this push to control 'for sale' signs appears to be an attempt by some operators to legitimise interference. Not only is the 'rule' possibly invalid, it is unnecessary. The RLLC Act sets out the process for engagement between prospective purchasers and operators – additional rules are simply not needed.

INTERFERENCE

The operator must not engage in or permit any interference with the sale of the home, or a home owner's right to display a 'for sale' sign. Interference includes restricting access for the agent or prospective home owners and making false or misleading statements about the community.

Home owners can apply to the NSW Civil and Administrative Tribunal (NCAT) if the operator interferes with their rights. NCAT can make orders preventing interference and for compensation where interference has been proven and the home owner has suffered a loss as a result.

PURCHASING

The RLLC Act also provides rights for purchasers of homes in land lease communities. They include the provision of information, inducement, fees and charges and site agreements.

DISCLOSURE STATEMENTS

The RLLC Act requires an operator to issue a Disclosure Statement to a prospective home owner at least 14 days before entering into a site agreement with that home owner. The Disclosure Statement must be in the approved form and include certain particulars prescribed in the Act.

The RLLC Act does not require the Disclosure Statement to be given in person and there will be times when personal delivery is not possible. Section 184 of the Act makes provision for the service of notices and documents required or authorised to be given to a person under the Act. When the Disclosure Statement cannot be given personally to the prospective home owner it can be:

- sent by post to them or to an agent, or
- given personally to an agent of the prospective home owner, or
- sent by email if the prospective home owner has agreed to documents being given by email.

When a Disclosure Statement is given using one of the above methods the RLLC Act sets out when delivery is assumed to have occurred. Section 184(2) provides:

- Service of a document sent by post is taken to be effected four working days after postage, as provided for by section 76 of the *Interpretation Act 1987*. (A working day means a day that is not a Saturday, Sunday, a public holiday or a bank holiday).
- Service of a document to an agent is effected on the day the document is given.
- Service by email is effected on the day the document is sent by email.

SITE AGREEMENTS

A purchaser needs a site agreement to occupy the home. They can have an agreement assigned (transferred) to them by the selling home owner or ask the operator to enter into a new agreement.

A new agreement must be written and in the standard form but it can contain additional terms. Additional terms must not conflict with the standard terms, the *Residential (Land Lease) Communities Act*, or any other Act.

The RLLC Act provides a 14 day cooling-off period for new site agreements. Purchasers can rescind, or withdraw from the site agreement without penalty within the cooling-off period unless they have taken up residence in the home, or if the agreement was for a site and they have installed a home on it – in those circumstances the cooling-off period ceases to apply.

INDEPENDENT ADVICE

The Tenants' Union advises all potential home owners to seek advice before purchasing a home or signing a site agreement. It is also a good idea to talk with home owners who already live in the community. •

BUYER BEWARE

"Buyer beware" appears to have become an unintentional theme in this issue of Outasite with various articles highlighting some of the pitfalls for home owners who purchase a home in a land lease community only to discover later that all is not as it should be.

Purchasing a home is a huge step in life that can involve an investment of several hundred thousand dollars. Like all decisions where such an investment is being considered, the buyer should exercise due diligence. A buyer should be sure that what they are purchasing is accurately described in any advertising materials and contracts. In the general community a solicitor usually advises of potential concerns but in land lease communities issues are not always immediately apparent and extra vigilance is therefore necessary.

APPROVAL TO OPERATE

In New South Wales a land lease community operator must hold an 'approval to operate' under the *Local Government Act 1993*. Despite this requirement there are a number of communities that continue to operate without a current 'approval' and homes are bought and sold in those communities, often without the purchaser being aware that there is no 'approval' in place. The *Residential (Land Lease) Communities Act 2013* (RLLC Act) requires an operator to disclose such information but compliance with the requirement is inconsistent. The Tenants' Union recommends that all potential purchasers contact the relevant local council prior to purchasing a home to check whether the operator holds the necessary 'approval to operate.'

> ***"The Tenants' Union recommends that all potential purchasers contact the relevant local council prior to purchasing a home to check whether the operator holds the necessary 'approval to operate.'"***

There will be occasions when an 'approval to operate' application by an operator is delayed because of minor issues that are easily remedied and council should be able to give an indication if that is the case. Councils can also issue an interim 'approval to operate' with conditions attached. However, if there are significant issues that are more difficult to overcome the community's future could be in jeopardy. Councils generally do not want to see communities close but ultimately that is what can happen if the operator cannot meet the requirements for an 'approval to operate' to be issued.

SITE DESIGNATION

Another pitfall that is more common than it should be is that a home may sit on a site that is approved for short-term occupation only (a short-term site). Homes to be used as a residence i.e. on a permanent basis should be located on long-term sites.

Site designation is a major issue because the RLLC Act provides that an operator can issue a termination notice to a home owner on the grounds the site is not lawfully usable as a residential site. There is a saving grace in that compensation is payable to the home owner but only if, unbeknown to the home owner, the site was unlawful when the agreement was entered into.

We advise buyers to be fully informed before purchasing a home, but in this situation is ignorance better? If a purchaser discovers a site is short-term and still enters into a site agreement, that agreement can be terminated by the operator and the home owner is not entitled to compensation. But, if the purchaser enters into a site agreement unaware that the site is short-term, they will be entitled to compensation if the agreement is terminated.

The Tenants' Union still advises due diligence. The decision to purchase a home should to be made with a full set of facts.

Some home owners have also been caught unawares when the operator has amended the 'approval to operate' during their tenancy and changed the site designation from long to short-term. Again, under the Act as it stands these home owners are not entitled to compensation if their agreement is terminated.

We believe the legislation needs to be amended to ensure that all home owners have access to compensation if their site agreement is terminated because the site is not lawfully usable as a residential site. We will be advocating for a change to the law when the Residential (Land Lease) Communities Act is reviewed – due in 2020. •

NEED MORE INFORMATION?

We hope you've enjoyed this magazine, *Outasite*. Unfortunately, due to limited resources, we are only able to publish it once per year. But never fear! You are able to access legal information and advice throughout the year in a number of other ways...

WEBSITE

You can find factsheets, articles and all the back issues of our publications on our website www.thenoticeboard.org.au – available 24 hours a day, 365 days a year.

EMAIL NEWSLETTERS

Stay up to date with news, stories and changes to the land lease community law with our free email newsletter: *Outasite Lite*. We send the *Outasite Lite* email newsletter approximately once every two months.

The Tenants' Union also has a general email bulletin with news and information focussed on residential tenancy law, sent approximately every month, and an email newsletter about our campaign: Make Renting Fair.

You can subscribe to any of these emails at our website or at: eepurl.com/bYu-9D

PHONE ADVICE

If you need specific help or legal advice, call your local Tenants' Advice and Advocacy Service. Your local service has expert advocates who are trained in land lease community law and will give you free, professional legal advice over the phone. Find the phone number for your local service on our website or on the back cover of this magazine.

TAKING ACTION

It may be necessary to take action to resolve an issue. It's always a good idea to start by getting advice from your local Tenants' Advice and Advocacy Service. After that, you may wish to contact the appropriate government agencies:

NSW Fair Trading

www.fairtrading.nsw.gov.au
Phone: 13 32 20

NSW Civil and Administrative Tribunal

www.ncat.nsw.gov.au
Phone: 1300 006 228

STAY IN TOUCH

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

The TU is a community legal centre and the resourcing body for the state-wide network of Tenants Advice and Advocacy Services.

The Tenants' Union has represented the interests of all renters in NSW since 1976. We have a proven track record of improving the law and providing legal assistance and training.

We encourage you to support us in our work for safe, secure and affordable housing. Please stay in touch and spread the word among fellow residents – fill in the form below and return to the address below. We also welcome donations via our website: tenants.org.au. Together we can achieve more!

The structure of the Tenants' Union is a membership-based co-operative. You can join on our website. However please note that you do not need to be a member to access advice. All permanent residents of land lease communities are entitled to free advice from your local Tenants' Advice and Advocacy Service – see contact details to the right.

Subscribe – it's free!

- ❒ Send me *Outasite* (land lease community resident magazine).
- ❒ Send me *Outasite Lite* (land lease community email news).
- ❒ Send me general *Tenants' Union* email bulletins.
- ❒ Send me ☐ additional copies of *Outasite* magazine to give to other residents.

Name:

Address:

Park or organisation:

Email:

Phone:

Please tick all that apply to you:

- ❒ Land lease community resident
- ❒ Land lease community home owner
- ❒ Land lease community tenant

Please return this form to:

Tenants' Union of NSW
Suite 201, 55 Holt St
Surry Hills NSW 2010

TENANTS' UNION OF NEW SOUTH WALES

Get free advice:

www.thenoticeboard.org.au

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	4704 0201
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	9833 3314
Western NSW	6881 5700
Southern NSW	1800 672 185
Northern NSW	1800 248 913

Outasite editor: Julie Foreman
Phone: 02 8117 3700
Email: contact@tenantsunion.org.au
Websites: tenants.org.au and thenoticeboard.org.au
Address: Suite 201, 55 Holt St, Surry Hills NSW 2010