Outasite

TENANTS' UNION OF NEW SOUTH WALES

Land Lease Community News
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COOPERATIVE COMMUNITIES

By Julie Lee (Tenants' Union of NSW), with Jill Edmonds (resident and IPRAG President)

In New South Wales land lease community living appears to be flourishing. In recent years we have seen new communities being opened, others being expanded and an increase in the quality and availability of new homes. However, there is an undercurrent of discontent and some home owners believe the *Residential (Land Lease) Communities Act 2013* has undermined the rights of home owners in favour of operators. At the heart of this discontent is the power imbalance between operators and home owners.

Land lease communities (previously called residential parks) have long been considered and marketed as affordable housing. In some respects this is still a valid description. The cost of purchasing a home is generally lower by comparison than the local real estate market and home owners in land lease communities don't pay council rates. However, affordability is a concern to home owners and the biggest issue is the level of site fees and site fee increases. We recently heard about a community where site fees have reached $315 a week and others are heading that way. Home owners feel they have little say in site fee increases and that the system is weighted against them.

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Advertising for land lease community living is commonly targeted at older people and many communities are marketed as over 50's or over 55's lifestyle villages. It is the lifestyle and the sense of community that is attractive but what some find out later is the lifestyle they thought they were buying into does not exist. In its place can be a community governed through fear and retaliation where home owners feel they have to give up their rights in return for a quiet life. Operators hold and wield a great deal of power in land lease communities and when that power is abused it affects the lives of all home owners within that community.

The crux of the problem with land lease communities is that home owners don't own the land on which their home sits and the person or entity who does own the land holds significant power. So, what if that could change? What if home owners could become the owners of the land and manage their own communities?

The history of land lease communities in New South Wales is similar to that of the United States (US) where 'mobile home parks' are common and are considered an affordable housing option. Originally designed to be towed and used for holidays, mobile homes or caravans morphed into housing and eventually governments in both countries accepted and regulated this type of living. Over the years homes became less mobile and today manufactured homes are more the norm with older style homes being phased out as the owners move on.

Security of tenure has always been an issue in this type of living arrangement and in the 1990s New South Wales experienced a number of residential park closures resulting in the fracturing of communities and the displacement of residents. Home owners in mobile home parks in the US face the same issue but rather than simply moving on when a park is threatened with closure some home owners have formed cooperatives and bought their communities. Today approximately 1,000 communities in the US are resident-owned.

COOPERATIVE COMMUNITIES IN THE US

In the US resident-owned communities are known as 'Resident Owned Communities' (ROCs). A ROC comes about when the residents form a cooperative and purchase the land (community). Each resident becomes a member of the cooperative and owns an equal share of the land. The cooperative manages the business that is the community and therefore has control over site fees, community rules, common property and community repairs and improvements. The day-to-day management is undertaken by an elected board of directors.

Residents in the US who want to purchase their community do not have to go it alone. Advice, support and finance is available through organisations like ROC USA®. ROC USA® is an amalgamation of non-profit organisations that joined together in 2008 to assist making resident owned communities viable throughout the US. ROC USA® is assisted by grants from several foundations that enable it to provide loans to residents to purchase their community.

In New South Wales the sale or redevelopment of communities appears less of a threat today but affordability is a live issue. Could affordability be the catalyst for a move to resident owned communities in New South Wales and is that even possible?

Jill Edmonds, a home owner here in New South Wales, and president of IPRAG (Independent Park Residents Action Group), has conducted extensive research on ROCs and this is what she told us.

In 1984 the dilapidated Meredith Trailer Park in New Hampshire became the first resident-owned non-profit land lease community in America. By the year 2000 "The Meredith Centre Cooperative" had refurbished its park and developed additional sites, debts had been fully repaid and the park had the lowest site fees in the state.

ROC USA® uses a non-profit, limited equity model, which keeps membership shares low-cost and preserves affordability. Being equal owners of the entire property all members (households) repay an equal share of the purchase price through a percentage of their site fees. Any surplus each year is retained for the benefit of the community as decided by vote of the members who also decide appropriate site fees. Residents own their homes which can be sold at market value.

Opportunities for conversion to resident ownership arise when a park is available for sale and its low to middle income residents face eviction for redevelopment or extreme increases in site fees. A land trust ensures that if the members ever vote to sell their park proceeds go to supporting the ROC USA® enterprise.

A NSW CASE STUDY

While the problems of redevelopment continue in America, large scale redevelopments have abated in

Australia. However, back in 2002 a group of 200 Central Coast residents were confronted by a development application (DA) proposing construction of home units on two adjacent parks. At that time residents had zero protections in this situation and park owners had the right to terminate all site and tenancy agreements.

While fighting the DA residents formed Karalta Road Park Home Owners Incorporated. As such, they were successful in obtaining government grants to engage a consultant to research the feasibility of establishing a resident-owned cooperative park similar to ROC USA®'s successful model.

The 70 page report, "Feasibility of Home Park Cooperative Ownership", was completed in 2006. It included assessment of three options for securing affordable housing into the future. The residents realised their best option was to try for assistance to develop a new park to which their homes might be relocated. Also included was a spreadsheet for calculation of the financial viability of hypothetical parks of different sizes.

The report acknowledged some unhelpful realities. Being mostly pensioners, the residents realised they had no hope of raising a deposit for the massive loan that would be needed to purchase the land. Unlike the US, Canada, the Netherlands, Sweden etc, Australia has no cultural history of park resident owned cooperative housing. Also, Australia lacks America's philanthropic culture that is key to the success of ROC USA®'s non-profit parks.

Nevertheless, the possibilities of something to help ease the State's affordable housing crisis, at no cost to government, prompted a response from Government's Centre for Affordable Housing (CAH). The CAH offered to bring relevant organisations together with the residents committee to find a way forward.

Jill, who was a participant in this project, explains, as well as the CAH (who labelled the enterprise, the "Pilot Project"), our months of meetings included our consultant who had written the report and, variously, two Community Housing Providers, the Association to Resource Co-operative Housing, Foresters ANA (then) Mutual Society and a Federal MP with a personal interest in low cost housing.

Meanwhile Karalta Road Park Home Owners Inc was searching for land and had found acreage owned by Gosford Council. The zoning was wrong but Council withdrew it from sale while negotiations continued. The resident committee also met with Clayton Utz Lawyers who agreed to take on the committee as pro-bono clients should the project proceed.

One of the Community Housing Providers committed to the project. However, when their proposal arrived a crucial agreed-upon condition had been changed. In return for their expertise and ability to access funding they required perpetual ownership of the land.

Our operator's DA had long ago been refused and the residents were not desperate enough to swap one unpredictable park owner for another.

The other Community Housing Provider stepped into the gap, approved the model with minor concessions, but were unable to proceed for up to two years.

Much groundwork has been done and the opportunity is obvious. Jill believes reasonable site fees are more than enough to properly operate a park.


Karalta Road Park Home Owners

Site fees provide a guaranteed cash flow and cash flows can be financed. Homes can be bought directly from manufacturers and installed for much less than the amount charged by operators. (*Australian Financial Review, 7-8 September 2013. Humble home, smart profit.*) And if a co-op park's elected board members don't wish to handle day-to-day matters, they can employ a manager, just as investor-owners do. The same resources are available. Rent assistance would still be available to residents who currently qualify. In fact with lower purchase prices even more people may become eligible to receive rent assistance, increasing the viability of the community.

For a copy of the Feasibility report for this project (the financial calculations would require updating) contact: jilledmonds@dodo.com.au or phone 4365 4237. Other recommended reading is a report into how ROCS form in the USA by Damian Sammon in 2011. The report is available to download here: **www.churchilltrust.com.au/fellows/detail/3604/Damian+SAMMON**

Jill concludes 'No-one would expect it to be easy, but this can be done and it's long overdue'. •

ELECTRICITY

THE BATTLE OVER USAGE CHARGES APPROACHES RESOLUTION

When we published our last issue of *Outasite* (in July 2018) the battle over electricity usage charges was in the early stages and as most home owners will be aware, a great deal has happened since then. In this article we will attempt to bring you up to date.

Since the introduction of the *Residential (Land Lease) Communities Act 2013* park operators have disputed how electricity costs should be charged to residents.

In *Silva Portfolios Pty Ltd trading as Ballina Waterfront Village & Tourist Park v Reckless* [2018] NSWSC 1343 the Supreme Court determined that operators cannot charge home owners more for electricity than they are charged. The question then became about how those charges should be calculated.

In *Reckless v Silva Portfolios Pty Ltd t/as Ballina Waterfront Village and Tourist Park (No. 2)* [2018] NSWCATCD, the NSW Civil and Administrative Tribunal (NCAT, the Tribunal) accepted the evidence of an expert witness and determined that the calculation should be: the total amount billed to the operator divided by the total kilowatt hours (kWh) consumed in the community. This provides a kilowatt rate that home owners are charged for each kWh they consume. The charge includes supply and home owners no longer pay a service availability charge (SAC) when they are charged under this method. The method is commonly referred to as the 'Reckless' or 'Reckless No. 2' method.

Tribunal determinations on electricity charges have been inconsistent. In proceedings involving other parties, the Tribunal has accepted different methods of calculating refunds including applying the peak rate paid by the operator and also an 'averaging method'.

ROUNDTABLE

The uncertainty about electricity charging continued for residents. Seeking to reduce rumour and misinformation, the Government called a roundtable meeting of key stakeholders to work towards achieving clarity and consistency. The meeting was hosted by NSW Fair Trading and attended by the NSW Energy and Water Ombudsman (EWON), the Tenants' Union, the Land Lease Industry Association (LLIA) and the Affiliated Residential Parks Residents Association (ARPRA).

The Government was looking for agreement and the majority of stakeholders stated that they supported the 'Reckless' method. The Tenants' Union advised that while 'Reckless' was not our preferred method, where homeowners were happy to accept it we would not dissuade them.

There was an acknowledgment from all stakeholders that if home owners want to pursue other methods they are free to do so.

Access to operator accounts was discussed and there was agreement that operators should be providing home owners with a copy or reasonable access. The LLIA advised that many operators have started displaying their bills on noticeboards or in their offices so that home owners have easy access.

The issue of refunds for incorrectly charged electricity was more contentious and there was no agreement about what period may be considered reasonable. The Tenants' Union advised that we believe home owners should be refunded back to November 2015. However, we are aware that many home owners are willing to negotiate and we support negotiated settlements where it is possible.

Following the roundtable meeting NSW Fair Trading updated the information regarding electricity charges on their website and they have included a new Frequently Asked Questions (FAQ) section which is very informative. You can find this information at www.fairtrading.nsw.gov.au

THE CURRENT STATE OF PLAY

The feedback the Tenants' Union has received indicates the majority of operators are now changing the way they charge for electricity and the 'Reckless No. 2' method is being widely adopted. Some operators have not explained this change to home owners and have merely changed their method of invoicing.

What is disappointing is that many operators are refusing to offer any refund at all to home owners, even when they have made previous promises that

refunds would be given once the issues were settled. Home owners in these communities have no choice other than to make Tribunal applications if they want a refund.

There are currently numerous applications still to be determined by the Tribunal and we have been advised of home owners who intend to make applications because their operator has failed to refund any overpayments, or has made an offer residents don't consider to be reasonable.
We spoke to one such home owner from Kincumber Nautical Village where the operator initially offered only a three month refund to home owners. They rejected that offer and were then offered a refund back to April 2018 which they believe is just 14% of their entitlement.

In another community on the Central Coast the operator wrote to home owners many times stating that once 'Reckless' was determined their electricity bills would be recalculated and they would be refunded any overcharge since November 2015. That operator initially refused to offer any refunds but has now also offered refunds back to April 2018.

Further up the coast a home owner advised "We have been deceived and mislead for over two years. The company have now decided to ignore the previous negotiated agreement which was to apply the outcome of my Tribunal application to all residents on the embedded network in this community. The operator has told home owners they will all have to apply to the Tribunal if they want a refund".

In July, just before this issue of *Outasite* went to print, the Tenants Union was in the Tribunal representing 93 home owners in one land lease community at Parklea Stanhope Gardens who have made applications to the Tribunal. Collectively, our clients are seeking a refund of $126,000 for electricity overcharging.

Mary Preston is one of 93 home owners applying to the Tribunal for a refund for electricity overcharging and being represented by the Tenants' Union. Collectively they are seeking a refund of $126,000.

Mary says she feels misled by the operator. The operator in her community put up a notice in October 2018 advising there was "no need for home owners to lodge individual applications to the Tribunal." The operator failed to offer any of the home owners a refund.

Mary Preston, one of the home owners, says she feels misled by the operator. The operator in that community put up a notice in October 2018 advising there was "no need for home owners to lodge individual applications to the Tribunal." The operator failed to offer any of the home owners a refund.

These 93 matters were heard in the Tribunal on 8 July 2019, before Senior Member G Blake SC. This matter will serve as a test case because this was the first hearing where there was expert witness evidence before the Tribunal from all the parties.

Expert witness evidence was called on behalf of the home owners from Mr Rohan Harris of Oakley Greenwood. Expert witness evidence was also called on behalf of Parklea Operations (who are part of the Hometown Australia Group) from Ms Marija Petkovic of Energy Synapse.
The home owners also gave evidence of the methodology they used for their refund calculations based on the "off peak" per kWh rate.

The Tribunal decision is reserved. The Parklea home owners are optimistic of a successful

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ELECTRICITY: THE BATTLE OVER USAGE CHARGES

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outcome and a timely decision from the Tribunal. Whichever method for calculation of electricity charges is ultimately accepted by the Tribunal the home owners will be getting significant refunds for electricity overcharging from the operator.

Paul Smyth (TU Residential Parks Solicitor) and Ian Finlayson (Chairperson of Parklea Stanhope Gardens Residents Committee) working on refund calculations for the case.

TRIBUNAL APPLICATIONS

The problem that many home owners will face if they have to apply to the Tribunal for a refund is time. All applications to the Tribunal are required to be made within a certain period of time of the dispute arising. For electricity disputes the time period is 28 days because the Tribunal Rule 23(3)(b) applies. Home owners can seek an extension of time in which to bring an application, but the Tribunal has discretion on whether to allow the extension.

There have been many views about when time starts in electricity disputes but the Tribunal Appeal Panel recently answered this question in *Bavin v Parklea Operations Pty Ltd* [2019] NSWCATAP 120. The Appeal Panel found:

> "Accordingly, in this case and on the proper construction of rule 23(3)(b) of the NCAT Rules and s156 of the RLLC Act, time began to run from the time the appellants were in dispute with the respondent in regard to the alleged overcharging and not from the time the respondent issued an electricity bill the appellants allege to exceed what the respondent was entitled to charge under s 77(3) of the RLLC Act. The fact that the dispute between the appellants and the respondent involved bills that had been issued and paid for over an extended period of time prior to the date on which the dispute actually arose is, in our view, not material to the question as to when time begins to run for the purposes of rule 23(3)(b)."

In effect, this finding means that the dispute arises at the point where a home owner first sights a bill issued to the operator and is able to establish from that bill that they have been overcharged. This is good news for home owners who have not yet sought access to the operator's accounts. The decision provides much needed clarification on this very important issue.

The Tribunal directs applicants for refunds of electricity to have regard to the decision of *Reckless v Silva Portfolios (No.2)* case. If the applicants do not use the method set out in paragraph 39 of the reasons for decision in Reckless No.2, they must make submissions as to why they have followed another method of calculation.

WHAT IS FAIR?

There are many different opinions about electricity charges and refunds and what the future impact will be on the industry and home owners. The law says that operators cannot charge home owners more for electricity than the operators themselves are charged by their provider. Home owners who are seeking to be correctly charged are simply asking for the law to be rightly applied.

Operators are not electricity retailers. The sale of electricity is not their primary business, operating a land lease community is. On-selling electricity is a service some operators choose to provide and the law allows them to recover their costs for providing this service.

For many years operators have been purchasing electricity at low, commercial rates and selling it on to home owners at the highest rate possible. Since 1 November 2015 that practice has been in breach of the *Residential (Land Lease) Communities Act 2013*.

The law states that if a home owner has been overcharged for electricity as a mistake of law or fact they are entitled to recover that amount.

Those home owners who have taken action on this issue have done so because the site agreements were not properly followed by operators. Operators now having to pay money back to home owners may be upset that they are no longer able to make substantial profits from on-selling electricity to home owners. Was it fair that they were ever able to do that? •

FAIRNESS PREVAILS

By Barry Sanders, Terrigal Waters Village

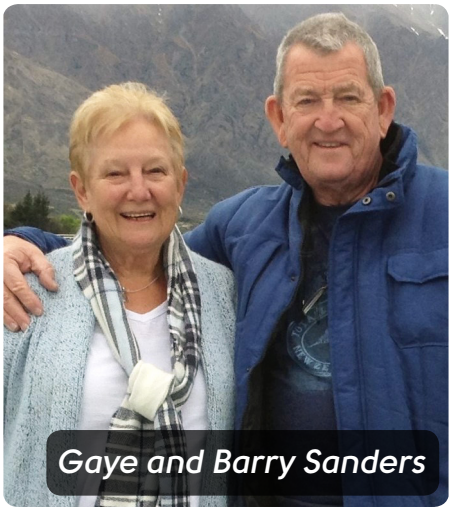
Good news stories seem to be few and far between in land lease communities so I think we should share positive outcomes and acknowledge those times when operators do the right thing. This is my good news story.

My wife Gaye and I have resided at Terrigal Waters Village since 2001. It was called Tingari Village when we first moved in. We purchased a home but we were not provided with a condition report for the site. We had been living there around 18 months when our house suddenly started coming apart at the seams because of severe subsidence within the site. Unbeknown to us the eastern side of our site sat on land that had been reclaimed in 1999 and the site contained large amounts of fill that began to compress and that is what caused the problems.

The management of Tingari Village attempted stop gap measures to arrest the subsidence on a few occasions but none of it worked.

In 2005 the park owner changed and so did the name, to Terrigal Home Park. The new owners encouraged the previous owner to continue to make restitution and fix the subsidence but they refused any further assistance. The new owners made some attempts to fix the problem but again, they were unsuccessful.

The next step was to get some expert advice and with the encouragement of the owners we located Urban Logic and Mainmark Uretek.



Gaye and Barry Sanders

Both companies inspected the premises and provided quotes for work they deemed necessary to fix the site. Unfortunately negotiations with the owner regarding liability failed.

The interior of our home was becoming more severely damaged and we needed a resolution. So we decided to go to the Tribunal to get a ruling on who was liable for the cost of repairing the site and damage to our home.

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After we had applied to the Tribunal the park changed hands again and the Marotta family entered as part owners and renamed the park Terrigal Waters Village. They joined the Tribunal proceedings and after a great deal of negotiation with the help of Central Coast Tenants Advice and Advocacy Service the new operator acceded to make restitution and the home was restored by the Under Pinner Urban Logic.

Fast forward to 2019 and we were back at square one. The fill on the front eastern section of the site has continued to break down causing more subsidence. We contacted the original Under Pinner who inspected the site again and explained the situation to all parties.

During talks with the operator of Terrigal Waters Village we acknowledged the initial problem was not caused by them, it was a previous owner who was responsible for putting the house on unstable ground. However, the problem had to be addressed and we did not believe we should have to bear the cost.

Fortunately for Gaye and I the Marotta family have agreed to cover the cost of repairs and for Urban Logic to undertake the appropriate action to remedy the problem. Hopefully this will be the last time, which I am assured by the Urban Logic will be the case.

Sometimes fairness prevails.

DIANNA EVANS
LAND LEASE COMMUNITY ADVOCATE

Di Evans has worked with residents of parks and land lease communities in various capacities since the late 1980's. She has seen permanent living in parks change from 'housing of last resort' to the upmarket over 55s lifestyle villages we are seeing today.

Di has witnessed the evolution of the legislation along with changes to the parks. From Local Government Ordinance No. 71 which gave people the right to live permanently in a park but did not provide tenancy rights, to a section in the *Residential Tenancies Act 1987*, to a separate *Residential Parks Act (1998)* and the current *Residential Land Lease Communities Act 2013*.

The history of Di's work with residents is also varied. She worked in Blacktown City Community Services Network and the Western Sydney Housing, Information and Referral Network (WESTHIRN) providing direct services to park residents. Di also worked for the Western Sydney and South Western Sydney Tenants Advice and Advocacy Services, the Park and Village Service (PAVS) and more recently she has been doing project work for the Hunter and Central Coast Tenants Services.

We interviewed Di for this issue of Outasite so she could share her vast knowledge and experience with all of us.

Di Evans

When did you first start working with park residents and what was your role?

I worked for Blacktown City Community Services Network as a community development worker for caravan parks. It had only recently become legal to live permanently on a park and at that stage there were no tenancy rights. Residents could be evicted with little or no notice and if they owned their own van it could be towed out of the park. Much of my time was spent searching for emergency accommodation for residents who had been evicted.

There were four parks in the Blacktown Local Government Area, all very different to each other in appearance, the type of housing provided and the demographics of residents.

I worked with residents to establish residents' committees and to organise groups and activities such as women's health, craft activities, breakfast clubs and holiday activities for the kids.

What were the key issues people wanted assistance with in the early years?

In the early days it was about fighting for some form of tenancy rights for residents. There was a state-wide caravan representative group called the United Caravan and Campers Association (UCCA) and the newly formed Park and Villages Tenant's Association (PAVTA) who took up the fight for tenancy rights.

Shelter NSW began convening a caravan park sub-committee with membership drawn from park resident groups and community organisations such as the Combined Pensioners and Superannuants Association (CPSA) and the Western Sydney Housing, Information & Referral Network (WESTHIRN). It was this group who were successful in having caravan park tenancies included in the Residential Tenancies Act.

Evictions were also common along with complaints about park owner's bad behaviour and attitude. It's funny how some things never change! Interestingly I don't recall anyone complaining about rent or site fees but that may be because you couldn't challenge rent increases in those days.

What are some of the most significant and challenging issues you have worked on?

Park closures were the most challenging. It was absolutely

horrid seeing peoples' lives uprooted and their beautiful homes badly damaged by forced relocations.

By the time the worst of the closures were happening legislation was in place that offered some protection to residents and covered the cost of relocating people's homes. The problem was there were more closures and people looking for somewhere to move their homes to than vacant sites. People had to move long distances from their family and friends and their dwellings weren't worth as much onsite in a little country town as they had been in their original spots in a beautiful beachside caravan park.

Tell us about some of the most rewarding projects you have been involved with

Overall, I think watching the increase in legislative protection for residents of parks and being involved in the shaping of that legislation has been the most rewarding.

However, there are numerous examples of rewarding projects mostly involving the community spirit that seems to be more pronounced in park communities. There isn't the space to talk about all of them but I will give you an example of one that's really memorable for me. It was a park closure situation at Ballina.

The park that was being closed was in the middle of town but the developer had purchased land to build a new park a few kilometres outside of town and was offering sites to residents of the old park. I was working with those residents and the developer to try to find a fair way of allocating the new sites. It was getting quite difficult because, of course, some sites were in more favourable locations than others. I was becoming quite frustrated by three women who insisted on being next to each other and in close proximity to a fourth woman. My frustration evaporated when they explained they needed to be next to each other because they shared many resources to save money – one woman had a phone that all three shared, another had a laundry and washing machine that they all used and the third had an outdoor setting that they all enjoyed. I was really humbled when they told me they needed to be close to the fourth woman because she had terminal cancer and they had organised a roster to provide her care.

How do you think the law change on 1 November 2015 has impacted on land lease community living?

The *Residential (Land Lease) Communities Act 2013* is the first time in almost 30 years of watching the legislation change that I have actually seen park residents lose rights. Yes, there were a few small gains but these were far outweighed by the losses.

I believe the most detrimental change in the current Act are the provisions around fixed method site fee increases. Having increases that can never be challenged as excessive and that can bind a home owner for the duration of residency is a trap for home owners. Fixed percentage increases that compound each year, or even worse, increases that are made up of a percentage of site fees plus CPI plus a share of the communities increased operating costs are totally unfair. They result in site fees increasing so much and so quickly that home owners cannot afford to stay in their community. In some cases home owners are paying more than half the single aged pension in site fees. What is perhaps worse is that they are trapped. They cannot sell their homes because prospective purchasers cannot afford the site fee either.

What three things would you change to improve the lives of land lease community residents?

That's easy. First, I would seek to change the behavior and attitudes of community operators. I'd ensure that operators took part in compulsory ongoing education and introduce some form of licensing or points system that could be lost for breaches, poor standards or bad behaviour.

Very importantly I would introduce some way of informing prospective residents of lifestyle communities of exactly what they were buying into, what rights they will have and what they will not be able to control. Current disclosure statements are nowhere near good enough.

I would also get rid of fixed site fee increases and allow existing agreements to be assigned to keep site fees at an affordable level.

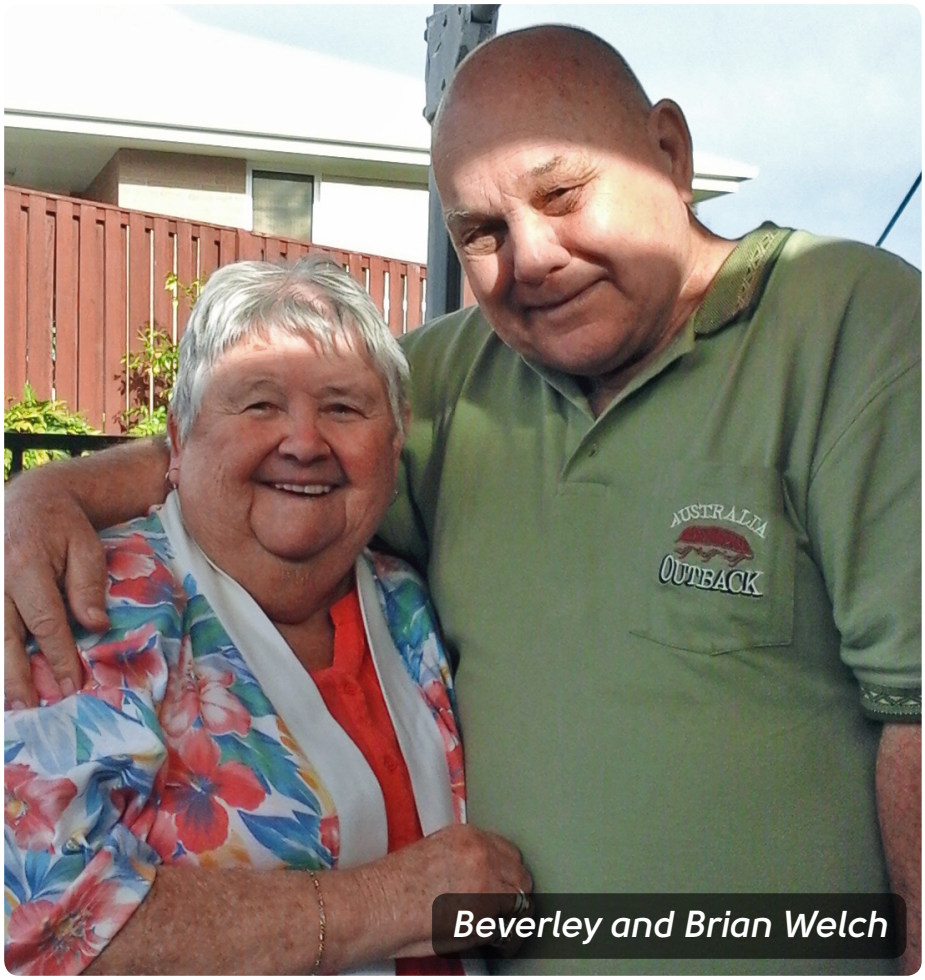
I would ensure that regulatory bodies such as NSW Fair Trading had sufficient resources to do the job they're supposed to.

In my ideal world, Tenants Advice and Advocacy Services would have enough funding to allocate sufficient resources to support and assist land lease community residents.

That's more than three... but I never was good at doing what I'm told. •

INTERFERENCE WITH SALE

The *Residential (Land Lease) Communities Act 2013* (the Act) provides home owners with the right to sell their home on site. The Act also states the operator must not cause or permit any interference, or any attempt to interfere with a home owner's right to sell the home. Similar provisions appeared in the (now repealed) *Residential Parks Act 1998* yet arguably park owners and operators have always interfered in home sales. Will a recent decision of the NSW Civil and Administrative Tribunal (NCAT, the Tribunal) bring a change in operator behaviour?



Beverley and Brian Welch

The Tenants Union and Central Coast Tenants Advice and Advocacy Service recently advised and represented in an important case on this issue.

Brian and Beverley Welch were home owners at Lake Munmorah Residential Resort from September 2006 until July 2018. In April 2018 the Welches advised the operator they were selling their home and had engaged a real estate agent. On 2 May the home owners accepted an offer from prospective purchasers and on 11 May those prospective purchasers paid a deposit.

COMPLIANCE WITH LOCAL GOVERNMENT REGULATIONS

On 8 May 2018 the manager of the community inspected the home and apparently discovered there was an unapproved awning. The operator alleged the home owners had not obtained permission for the awning and that a notice of completion had not been lodged with the local council. The home owners had in fact been given verbal approval for the awning and it was the operator who had failed to lodge the notice of completion. (We note that home owners require written approval to make changes to the home but it was the practice in this community, as it is in many others, for the operator to give verbal permission).

The operator advised the home owners via email that they would not enter into a site agreement with the prospective purchasers until compliance issues had been addressed. The specific compliance issues raised were removal of the awning, garden beds, items hanging on the fence and a concrete pad, pavers and pebbles from within a buffer zone. The buffer zone was to be replanted with native shrubs and mulched.

The operator had not raised these issues with the home owners prior to this email and section 107(2)(d) states that 'interference includes taking any action to require the home owner to comply with any requirement made by or under the *Local Government Act 1993* after becoming aware that the home owner is seeking to sell his or her home (unless the matter has been the subject of previous action).'

CONDITIONAL SITE AGREEMENT

The operator later agreed to enter into a site agreement with

"After the second sale fell through, the Welches applied to the Tribunal. They sought orders that the operator cease interfering with the sale of their home, orders for compensation because of interference that resulted in the loss of two sales, and the abatement of site fees until the home is sold."

the prospective purchasers on condition the purchasers agreed to rectify the alleged non-compliance issues.

After meeting with the community managers the purchasers withdrew from the sale citing the attitude of the managers and their unbending position regarding the compliance issues.

On acceptance of the offer and payment of the deposit the Welches had made alternative living arrangements and they were bound by the contract they had signed. They moved out of the community in July 2018.

In October 2018 a second offer to purchase was made and accepted. However, as on the first occasion the purchasers withdrew after meeting with the community managers.

TRIBUNAL APPLICATION

After the second sale fell through the Welches applied to the Tribunal. They sought orders that the operator cease interfering with the sale of their home, orders for compensation because of interference that resulted in the loss of two sales, and the abatement of site fees until the home is sold.

The Tribunal determined that the operator had interfered in the sale of the home: by raising compliance issues only after being advised the home was to be sold; by threatening not to enter into a new site agreement until non-compliance issues were addressed; and by insisting that prospective purchasers address non-compliance issues as a condition of any new site agreement.

Having found the operator had interfered in the sale, the Tribunal then had to decide whether the interference caused the loss and damage claimed by the home owners. The Tribunal found that on the balance of probabilities, had the operator not interfered the first prospective purchases would have settled on or about 20 June 2018 and the home owners would have been free to move to their new home and invest the proceeds of the sale. The home owners were awarded compensation of $8,379.21 for interest lost on the investment.

The Tribunal also found the home owners should not be liable for site fees they had paid between 20 June 2018 and the hearing date on the basis the operator's interference had caused the sale to be lost. Had it proceeded the home owners would not have been liable for site fees in that period. The operator was ordered to refund site fees of $6,671.71.

For the same reasons the Tribunal abated the site fees pending sale of the home thus relieving the burden on the Welches to continue paying site fees when they are not living in the home.

The home owners were also given the right to re-list the application at any time up to 30 June 2019 to quantify further compensation and losses that may accrue up to the point the home is sold.

This decision sends a very clear message to operators that if they interfere in the sale of a home and the home owners suffer a loss as a result of that interference the Tribunal is prepared to award compensation to the home owners.

"This decision sends a very clear message to operators that if they interfere in the sale of a home and the home owners suffer a loss as a result of that interference the Tribunal is prepared to award compensation to the home owners."

APPEAL

The operator has appealed the decision and at the time of writing the outcome of the appeal is unknown. However, we are hopeful the decision will be upheld by the Appeal Panel and that it will become the leading decision on this issue. •

THE BALANCE OF POWER

The main factor that affects affordability for home owners living in land lease communities is site fees. When they increase it can have a major impact. As mentioned in the article on cooperative communities (see pages 1-3), site fees are reaching extraordinary levels in some communities and many home owners are struggling. In this article we look at the three methods used to increase site fees and how home owners might dispute unfair increases.

INCREASE BY NOTICE

When site fees are increased by notice the notice must include an explanation for the increase. The rationale behind this provision was that if home owners are informed about the reasons for the proposed increase they are better able to make an informed decision about whether or not it is reasonable.

The majority of site fee increase notices contain a list of factors cited as outgoings or operating expenses that the operator claims have increased. There is generally no detail around the list and home owners are therefore unable to assess whether the proposed increase is reasonable.

The Tenants' Union is only aware of one challenge to the validity of a notice on the basis the list of factors did not constitute an explanation. That challenge was successful and the NSW Civil and Administrative Tribunal (NCAT, the Tribunal) found the increase was not payable.

The compulsory mediation process for site fee increase disputes was initially working well but recently we have seen an increase in failed mediations. The purpose of mediation is to bring the parties together to talk about the increase, put their positions forward, share their evidence and try to reach an agreement.

Home owners have told the Tenants' Union some mediations have failed because operators are unwilling to share their reasons or provide any evidence in support of the increase. This frustrates home owners and takes away their ability to properly assess the validity of the operator's claim. The Act provides that "A party must, if required by the mediator, disclose to the other party details of the party's case and of the evidence available to the party in support of that case". To the best of our knowledge no mediator has ever used this provision.

We are also aware that some operators simply refuse to participate in mediation despite it being compulsory. There are no consequences for non-participation by an operator.

When mediation fails home owners can apply to the Tribunal for an order that the increase is excessive. Over the past couple of years we have seen some positive decisions where the operator failed to provide sufficient evidence to support their case. In three matters the Tribunal awarded a lower increase than the operator was seeking and in another no increase was awarded.

The message that home owners can take from this is that if they are not happy with the explanation provided by the operator for the increase, or the operator refuses to participate in mediation or substantiate their claim, the Tribunal may provide a better outcome.

FIXED METHOD INCREASE

The Act prohibits home owners with fixed method increases from ever challenging the increase as excessive. That may seem reasonable given the home owner has signed an agreement to this effect, but when you look at the type of fixed method increase being used, it does become a concern. The increases we are talking about contain a number of components including percentages that will compound over the years and factors that can produce unpredictable results.

Site fee increase terms in site agreements are negotiable and home owners should attempt to negotiate better terms. In reality operators hold the power in these negotiations and site agreements are usually offered on a take it or leave it basis. Home owners can apply to the Tribunal for orders to settle a dispute about the proposed terms of a site agreement including the method of increase.

"A refusal by the operator to negotiate may be a breach of the rules of conduct and an application can also be made to the Tribunal on this basis."

A refusal by the operator to negotiate may be a breach of the rules of conduct and an application can also be made to the Tribunal on this basis.

Home owners with multi component fixed method increases may also have a claim that the term is an unfair term under Australian Consumer Law.

FAIR MARKET VALUE

Another way that site fees are increased is when a home changes hands. More often than not a purchaser is offered a new site agreement with site fees set at a higher level than the selling home owner was paying. The Act requires site fees to be set at fair market value and that means the higher of either what the seller was paying or the site fees payable for sites of a similar size and location within the community.

The difficulty for incoming home owners is awareness. The average purchaser does not know that site fees should be fair market value or how to work out what fair market value is. The operator has access to information about comparable site fees and if they don't share this information or deal fairly the home owner may end up paying more than they should.

Fair market value impacts the incoming home owner immediately but it eventually affects everyone. Over time site fees in the community are lifted higher and higher and the range and level of site fees in the community is one of the factors the Tribunal can consider when deciding whether an increase by notice is excessive. The higher the site fees get, the higher the increases for everyone else are likely to be.

A home owner can make an application to the Tribunal regarding whether site fees are fair market value. We are aware of two such applications and both settled before they got to hearing with home owners achieving favourable outcomes.

In the alternative, selling home owners can seek to assign (transfer) their site agreement to the purchaser. This enables the purchaser to take over the agreement under the same terms and with the same site fees as the selling home owner. Assignment requires the written consent of the operator but if they refuse an application can be made to the Tribunal.

THE BALANCE OF POWER

The key to challenging site fees or site fee increases is information. Home owners are disadvantaged from the outset because operators have the information they need and they don't always want to share it. There is a power imbalance but home owners are not powerless. The Act provides home owners with rights and if they are exercised, positive outcomes can be achieved.

"There is a power imbalance but home owners are not powerless. The Act gives home owners rights and if they are exercised, positive outcomes can be achieved."

Contact your local Tenants' Advice and Advocacy Service for further information and advice. Details on the back cover. •

TRAINING FOR ADVOCATES

During National Volunteer Week 2019, the Tenants' Union land lease community team provided Tribunal training to volunteer resident advocates from across NSW.

These advocates advise and assist residents to resolve disputes with operators, including representation at the Tribunal.

For more detail about Residents' Organisations, see: **thenoticeboard.org.au/factsheets/2019-residents-committees.pdf**

WHO IS THE OPERATOR?

This may sound like a silly question but the answer is not always as obvious as you may think.

The *Residential (Land Lease) Communities Act 2013* (the Act) defines an operator as being 'the person who manages, controls or otherwise operates the community, including by granting rights of occupancy under site agreements or tenancy agreements whether or not the person is an owner of the community'.

An owner is 'the owner of the land on which the community is located'. Sometimes the owner and operator are one and the same and sometimes they are different.

A number of operators carry on their business under increasingly complex corporate structures. This can at times complicate the question of who effectively runs or controls a community. One example of this phenomenon is The Pines Resort in Woolgoogla, which was previously part of Gateway Lifestyle Group prior to the takeover by Hometown Australia in October 2018.

A closer look at the corporate entities surrounding The Pines Resort reveals no less than six proprietary companies which are related through various subsidiary relationships and shareholdings. All of the companies that exist within the ambit of The Pines are effectively controlled by Hometown – through mutual officeholders and majority shareholdings, and yet it is Hometown Australia's position that they are not the operator of this community.

The question of who satisfies the definition of 'operator' under section 3 of the Act in relation to communities like The Pines, and in particular whether one of Hometown's entities would be found to meet that definition, is one which has not yet been tested by the NSW Civil and Administrative Tribunal (NCAT).

There can also be another layer in the hierarchy and that is the management layer. The operator of a community may appoint managers to handle the day to day operation of the community but that does not necessarily mean the managers become the operators.

If you don't know who your operator is but want to find out there are a couple of ways to check.

Firstly, if you have signed a site agreement under the Act you can find the operators' name on that agreement under the section headed 'Details of the parties'.

If you have an older site agreement it will refer to the park owner and manager so may not be helpful in determining who your operator is. However, all is not lost – you can ask NSW Fair Trading to provide you with the name of your operator.

The Act requires the Commissioner for Fair Trading to keep a register of all land lease communities in NSW and to make some of the information in the register available to the public. That includes the name of the operator of each community. The register is available on the NSW Fair Trading website but the names of operators are not yet available online. However, you should be able to call Fair Trading and ask who your operator is.

WHY YOU NEED TO KNOW

There are a few occasions when you are required to notify the operator before you do something, for example, before putting your home on the market or leaving your site vacant for more than 30 days. For most home owners this means notifying the person who does the day to management of the community even if they are not the operator. By notifying the manager you are in effect notifying the operator.

However, if you need to make an application to the Tribunal you need to properly identify the operator and their business address on the application form. The application from requests a copy of a business name extract or company extract from ASIC if the respondent (operator) is a company or business. The Tribunal has acknowledged in the past that this is not a requirement if you know the name and business address of the operator but if you are unsure it is best to do an ASIC search and provide a copy with your application.

CHANGE OF OPERATOR

From time to time the operator of a community may change but when that happens the Act requires the operator to inform all home owners within the community. The new operator must provide home owners with a notice stating their name and business address within 14 days of becoming the operator. Don't forget to keep a copy of any such notifications.

A change of operator has little immediate impact on home owners because the benefits and obligations under existing site agreements pass from the old to the new operator. •

ASSIGNMENT OF SITE AGREEMENTS

The assignment of site agreements has been an ongoing issue since the commencement of the *Residential (Land Lease) Communities Act 2013* (the Act) on 1 November 2015. The problem lies with a drafting error in section 45(3) and relates to whether an operator can unreasonably refuse a request for assignment of a site agreement.

In the *Residential (Land Lease) Communities Bill 2013*, site agreements could only be assigned during the fixed term. This bill passed the lower house and was then sent to the upper house.

The upper house approved an amendment to section 45 that removed the fixed term restriction and inserted a new sub-section that prohibited the operator from refusing a request to assign a site agreement except on reasonable grounds. Unfortunately, the drafters of the amendment inadvertently used the term 'tenancy agreement' where they meant to use 'site agreement' and it is this error that has caused the ensuing problems.

The Tenants' Union and others raised the drafting error with the government on a number of occasions, asking for it to be fixed. The then Minister for Innovation and Better Regulation, Matthew Kean MP indicated that the NSW Government was examining this issue with a view to rectifying and considering "options to address the issue, including repealing section 45(3)".

Those who have been campaigning to have the error fixed are concerned that this issue has not been resolved. Many are particularly concerned about the reference to removing section 45(3) altogether. At the time this amendment was put forward the Government accepted it and the Bill was amended. The right thing to do is to amend the Act to give proper effect to section 45(3) as was intended by Parliament.

The Tenants' Union will continue to advocate for the right for home owners to assign their site agreements and looks forward to arranging a meeting with the new Minister for Innovation and Better Regulation, Kevin Anderson to discuss this matter.

NSW FAIR TRADING ENGAGEMENT STRATEGY 2019

This year, NSW Fair Trading commenced a proactive engagement strategy on Residential Land Lease Communities, aiming to provide a holistic education program to both community and industry, followed by proactive compliance audits.

The strategy commenced with the delivery of webinars (web-based seminars) in February and will continue through to August 2019. The webinars are targeted at land lease community operators to educate and allow discussion regarding their obligations regarding running a land lease community.

A series of joint talks with the local Tenants Advice and Advocacy Services aiming to educate and empower residents also commenced with sessions conducted in the first half of the year at Tweed Heads, Ballina, Yamba, Port Macquarie, Hunter and the Central Coast. Further sessions took place in Nowra in June and Swansea in July.

Proactive inspections are also being conducted throughout the state beginning with Port Macquarie to the Far North Coast, including Tweed Heads and Ballina, with a focus on auditing the Residential Land Lease Communities level of compliance. •

Amanda Elgazzar (left) and Mary Flowers (centre), from Northern Rivers Tenants Advice and Advocacy Service, with Deyel Fallows (right) from NSW Fair Trading. Below: a land lease community engagement session.

Service NSW

Service NSW is a government agency established to simplify the way people interact with government. The agency provides a single point of contact for a range of government services and agencies. We took a look at the website and found the following information that could help you to save money.

COST OF LIVING

There are more than 40 rebates and savings available to assist people with the cost of living and you can make an appointment with a Cost of Living Specialist to help you check your eligibility and apply for these rebates and savings. Appointments are free and last for one hour.

You can book an appointment via the website at service.nsw.gov.au/cost-living-appointment-service or by visiting a Service NSW centre, or calling 13 77 88.

A home owner from a land lease community on the Central Coast advised the Tenants' Union that everyone in his community had met with a Cost of Living Specialist and almost everyone was able to access rebates or savings they didn't previously know about.

APPLIANCE REPLACEMENT OFFER

If you have an old fridge or television that you want to upgrade you may be able to get a discount on a replacement.

If you are eligible, you could save up to 40% off a new fridge and 50% off a new TV.

To qualify for the appliance replacement offer, your fridge must be at least six years old and your TV must be a plasma or cathode ray tube (CRT) display. The replacement fridges and TVs are restricted to certain energy efficient models and are provided through The Good Guys.

To be eligible you must be a NSW resident and hold one of the following cards:

- Pensioner Concession card
- Health Care or Low Income Health Care Card from Centrelink
- Veterans Affairs Gold Card

Applications can be made online at: www.service.nsw.gov.au •

MEET THE MINISTER

The Hon. Kevin Anderson

The Hon. Kevin Anderson was appointed as Minister for Better Regulation and Innovation following the re-election of the NSW Liberals and Nationals Government in 2019.

The Minister was elected as a member of the Legislative Assembly in 2011, representing the electoral division of Tamworth.

Prior to public life, Minister Anderson ran his own small business providing public relations and communications services to regional businesses. His passion for local issues stemmed from his many years working as a local television journalist and trusted news anchor covering the New England and North West regions.

As a father of three, Minister Anderson understands the importance of the policy decisions that are made by governments today and the effect they have on future generations.

Minister Anderson believes that good policy in government stems from the need to improve or protect the lives of those around us, and he aims to apply this philosophy in his decision making at a local level and more broadly in his portfolio responsibilities. •

Provided by Minister Anderson's office.

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 produces *Tenant News* – a general email bulletin with news and information focussed on residential tenancy law, sent about every two months.

You can subscribe to any of these emails at our website, at: eepurl.com/bYu-9D or using the form on the back of this magazine.

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

CAN YOU HELP?

WHAT IS THE TENANTS' UNION?

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

We are an independent, not-for-profit, community legal centre and also 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.

FUNDING

The Tenants' Union and the network of Tenants Advice and Advocacy Services have not received a funding increase since 2003, in real terms, despite an ever increasing workload.

Part of our funding comes from the interest earned on renters' bonds. The NSW Government chooses how to spend this interest, which amounts to around $60 million each year. A small percentage goes to Tenants Advice Services. Most of the money – more than two-thirds – is paid to NSW State Government agencies, primarily the NSW Department of Customer Service, and the NSW Civil and Administrative Tribunal.

The Tenants' Union also receives some funding from Legal Aid NSW, one-off grants from the Law and Justice Foundation (among others), and from residents like you.

WE NEED YOUR SUPPORT

There is a huge need for legal assistance, and our network struggles to help all those who need it. Printing publications, doing law reform work, and running strategic litigation are all very costly – for example the Tenants' Union underwrote the cost of the electricity expert witness report mentioned on page 5 of this magazine.

We would welcome your support in our work for safe, secure and affordable housing. Together we can achieve more! Please stay in touch using the form overleaf, and if you are able, make a donation using one of these methods:

- via our website: tenants.org.au
- via the giving platform: givenow.com.au/tenantsunionofnsw
- via cheque/money order made out to Tenants' Union of NSW
- via deposit into our bank account (please also email your details to contact@tenantsunion.org.au afterwards):
  Account name: Tenants' Union of NSW
  BSB: 062 004
  Account no: 802624

Please note that you do not need to make a donation, or 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 overleaf).

STAY IN TOUCH

We hope you will stay in touch – please fill in this form and return to the address below. We would also love you to spread the word among fellow land lease community residents. We welcome anyone to subscribe to our email bulletins online via our websites or at: eepurl.com/bYu-9D

Subscribe – it's free!

- ❒ Send me *Outasite* (land lease community print magazine).
- ❒ Send me *Outasite Lite* (land lease community email news).
- ❒ Send me general *Tenant News* 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

- ❒ I would like to make a donation. Please contact me to discuss how.

Please note that you do not need to make a donation, or 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).

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	9559 2899
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

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