Outasite

Land Lease Communities Magazine • Issue 7 • July 2021

LIGHT AT THE END OF THE TUNNEL?

Electricity charges in land lease communities

Also in this issue:

- The Review of the *Residential (Land Lease) Communities Act*
- Local government regulations impact on home owners
- Site fee increase methods
- And much more...

The long-running dispute over electricity charges in land lease communities continues. Just over 12 months ago we became aware of, and reported on, operators relinquishing their right to on-sell electricity to home owners and passing that responsibility to Hum Energy, or another energy retailer. At that time the Energy and Water Ombudsman of NSW (EWON) and NSW Fair Trading had both determined that neither the operator nor Hum Energy had broken any rules or laws regarding this arrangement. However, some home owners were resisting the transfer and the Tenants' Union was working with Tenants Advice & Advocacy Services and the Tweed Residential Park Homeowners Association (TRPHA) regarding options for those home owners to resolve their disputes. We can now report on two developments.

Continued on page 2...

Ros Chapman, home owner at Nambucca River Tourist Park, went to the Tribunal after the operator outsourced electricity provision. The Tribunal found in Ros's favour – her site fees have been reduced (see pages 3-4).

Photo: Grace Saad Photography, Mid North Coast.

TENANTS' UNION OF NEW SOUTH WALES

Acknowledgement of Country

We acknowledge that **Aboriginal and Torres Strait Islander Peoples** were the first sovereign Nations of the Australian continent and its adjacent islands, and that these lands were possessed under the laws and customs of those Nations. The lands were never ceded and always remain Aboriginal and Torres Strait Islander Country. Our office is on the Country of the Gadigal People of the Eora Nation.

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About the Tenants' Union

The Tenants' Union of NSW is the resourcing body for Tenants Advice & Advocacy Services (TAAS) and a community legal centre. We are an independent, secular not-for-profit membership-based co-operative. We receive principal funding from the TAAS Program administered by NSW Fair Trading, and the Community Legal Centres Program administered by Legal Aid NSW.
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Continued from front cover...

Explicit Informed Consent

Along with EWON and NSW Fair Trading, the Australian Energy Regulator (AER) had been consulted about the arrangements between operators and Hum Energy and they could see nothing wrong either. However, when home owners took a stand and refused to sign contracts with Hum, and were subsequently threatened with disconnection of their supply, Sandy Gilbert from TRPHA went back to the AER with a new set of questions and issues.

Sandy Gilbert, Tweed Res. Park Homeowners Assn.

One of the questions the Tenants' Union had concerning Hum stepping into an operators' shoes to supply home owners in an embedded network was regarding consent from home owners. It was our understanding that an energy retailer must obtain explicit informed consent (EIC) from a customer before they could become their retailer. EWON had determined that Hum became the 'deemed' supplier under these arrangements and could provide energy, bill home owners, and disconnect them if they didn't pay. Sandy Gilbert put the question of consent to the AER when she met with them and they confirmed the position under the National Energy Retail Law, saying:

"An energy retailer must obtain your explicit and informed consent before creating an agreement for the sale of electricity.

When obtaining a customer's consent, the National Energy Retail Law requires the consent to be both explicit and informed. The requirements are summarised as follows:

- *A customer's consent must be given either in writing, verbally or electronically.*
- *An energy retailer must maintain a record of each EIC provided by the customer, which includes information that will enable the AER to verify the retailer's compliance with its EIC obligations.*
- *An energy retailer must produce a satisfactory record of the informed consent if a customer asserts that EIC was not obtained.*

The National Energy Retail Rules includes a protection that prohibits a customer from being disconnected

if the issue of whether the customer consented to the transfer remains unresolved.

If a retailer does not obtain a customer's EIC to a transfer (which includes cases of customer transfers without consent) the transfer and the contract with the retailer is void."

This clarification is heartening for Margaret Reckless (see page 8) and other home owners who refused to sign contracts with Hum Energy or give their consent to be transferred. It confirms that operators cannot simply step out of supplying electricity to home owners and invite an energy retailer to take over the embedded network. Electricity charges for home owners on embedded networks are governed by the *Residential (Land Lease) Communities Act* but, if a home owner signs with an external energy retailer, they lose the benefit of that protection and charges may increase significantly.

A win at the Tribunal

The second development is that the NSW Civil and Administrative Tribunal (NCAT) has recently handed down a decision regarding an application by a home owner that the operator was breaching the site agreement by ceasing to supply electricity to the site. Ros Chapman (the home owner) sought orders that the operator recommence supply and pay compensation to her, or in the alternative that her site fees be reduced.

The operator outsourced the embedded network to Hum Energy in February 2020. This resulted in higher charges for Ros including a Daily Supply Charge of 151.25 cents per day.

The crux of the application to the Tribunal was that the site agreement contained terms that the operator was the supplier of electricity to the site and the home owner was to pay the operator for electricity used at the site. Ros argued that by withdrawing from being the electricity supplier the operator was in breach of the site agreement and was making an impermissible attempt to unilaterally vary the terms of the site agreement.

Ros further argued that electricity was a service the operator had contracted to provide and that they had withdrawn that service.

The Tribunal was satisfied that Ros' site fees should be reduced. It found "a communal facility or service provided at the community when the agreement was entered into has been withdrawn or substantially reduced for the purposes of section 64 of the Act, by the operator ceasing to on-sell electricity to the home owner." The Tribunal said that although the service had been replaced by a different service, the supply of electricity was on different terms. Those different terms included the new Daily Supply Charge, and the resulting increase in electricity charges for the home owner.

The Tribunal determined that Ros' site fees should be reduced by $10 per week, which is the approximate amount of additional electricity charges she has been paying since Hum started supplying her with electricity. The site fee reduction was backdated to February 2020 and the operator was ordered to refund Ros the sum of $520.

The site fee reduction will remain in place until a group application challenging a site fee increase is heard by the Tribunal. Ros' site fees will be considered in the context of that application.

What will come out of the Act review?

As we mention in our article on the review of the Act (see page 5), the Government will be fast-tracking changes to electricity charges for home owners on embedded networks. That work has already started and the Tenants' Union, along with other key stakeholders, have been in discussion with the NSW Fair Trading Policy Team regarding how those charges should be calculated. We are hopeful that home owners will not have to wait too long for a more stable charging system that is fair to them and also to operators.

"The residents of our park were all dismayed when told the operators had withdrawn from electricity provision, and without discussion, prior notice or consent, had appointed an external electricity provider who implemented a renewal of the Daily Supply Charge.

"Fortunately, the excellent assistance from the Mid Coast Tenants Advice & Advocacy Service enabled our individual Tribunal application, which was, in part, successful. The remaining 38 residents, in the same situation, have now written to the operator seeking the same outcome.

"This has highlighted for us the importance of the Residential Land Lease Communities Act, the Tribunal, and the Tenants' Union in supporting the rights of residents in residential communities such as ours. We hope the review of the Act will further support our rights"

– Ros Chapman

Ros Chapman.
Photo by Grace Saad Photography, Mid North Coast.

REVIEW OVERVIEW

At the end of 2020 the NSW Government released the Discussion Paper on the Statutory Review of the *Residential (Land Lease) Communities Act 2013*. Individuals and organisations were invited to provide feedback via a survey on the NSW Fair Trading website or by making a submission. Consultation was initially scheduled to close on 26/02/2021 but the deadline was extended to 12/03/2021.

The Tenants' Union had been preparing for the review by consulting with home owners and Tenant Advocates over the preceding two years. We wanted to be certain we were fully informed and across the key issues of concern to home owners by the time the review came around. We published our report *5 Years of the Residential (Land Lease) Communities Act 2013* in August 2020 setting out our key issues for reform and recommendations for change.

The Tenants' Union would like to thank all the home owners who took the time to participate in our survey and those who contributed through our forums and meetings. Your views and ideas are important to us and are a valuable contribution to the work we do.

The Discussion Paper was comprehensive, asking a total of 76 questions about the Act covering everything from the objectives to administration and enforcement. We were particularly pleased to see questions on all of the key issues we had raised with the Government in stakeholder meetings and through our 5 Year Report. In our submission the Tenants' Union emphasised the need for a rebalancing of fairness and power in the Act, which we believe can be brought about through improving operator education and conduct, and addressing issues related to fees, charges and community rules.

Governance

The way in which a community is operated impacts all aspects of home owners' lives from happiness to financial wellbeing. Throughout our consultation with home owners, the behaviour of operators and community employees was raised as a major concern. We heard everything from operators not understanding the law, to allegations of disrespect, bullying, harassment and intimidation. The Discussion Paper asked five questions about operator conduct and education in Chapter 4, which facilitated focused feedback on these very important issues.

In our submission we recommended an expansion of mandatory education to all key personnel in the operating company. This includes decision-makers and on-site employees engaged in the day-to-day operations of the community, dealing with resident queries and disputes.

The Tenants' Union meets regularly with senior staff at NSW Fair Trading and we have been engaged in a number of discussions with them about complaints and compliance. We believe the current complaints process could be improved and that a more transparent process should be developed. The Tenants' Union would like to see a pro-active regulator that has the necessary tools to enable it to monitor operator conduct, encourage improvement, and take appropriate enforcement action where necessary.

Community Rules

Also in Chapter 4, the Discussion Paper asked questions about community rules. Those who live in land lease communities will be acutely aware that community rules can have a huge impact on the freedoms of residents yet they have little to no input into the creation of those rules. The Tenants' Union has argued for a new rule-making process involving residents of the community, and for the Act to enable rules to be set aside if supported by a prescribed percentage of residents. We also recommended that the Act improve clarity around compliance requirements for community rules, particularly in communities with both residential and holiday sites.

Continued on page 6...

"I support the submission by the Tenants' Union wholeheartedly. We are lucky in NSW to have our own legislation for administering land lease communities, and an affordable process (NCAT) for helping residents to have their problems heard. If the legislation is amended to address the shortcomings identified in the submission, residents and operators alike will benefit and the job of administering the legislation will be so much easier for Fair Trading and NCAT."

– Lynn Harvey, Secretary, Ingenia Lifestyle Lake Munmorah Residents Committee

Continued from page 5...

Fees, charges and affordability

When it comes to money there is a great deal more to consider and the Discussion Paper contained a number of opportunities to comment on the financial arrangements and obligations in the Act. The first, and most obvious, is site fees and site fee increases. Chapter 3 asked questions about fixed method increases, increases by notice, site fees in new agreements and voluntary sharing arrangements.

Fixed method site fee increases

Outasite and *Outasite Lite* readers will be aware of the Tribunal decision regarding the fixed method increase used at Kincumber Nautical Village, and the subsequent appeal of that decision by the operator (see also article on page 37 in this *Outasite*). This dispute shone a light on what can happen when there is perceived ambiguity in a legislative provision and one party is willing to take advantage of that, to the detriment of the other party.

The Tenants' Union struggled with the question of whether fixed method increases should be permitted under the Act. We acknowledge a fixed method provides certainty to home owners but a percentage increase that has effect for the duration of a site agreement can produce high increases not commensurate with operating costs for the community. We are aware of fixed methods in recent site agreements ranging from 3.5% to 5.5% at a time when the Consumer Price Index is very low. Ultimately, we recommended that if fixed methods are retained in the Act home owners should be given a choice of fixed method or increase by notice, and a fixed method should apply for no more than 12 months (one increase) at which point it can be renewed, renegotiated or the home owner can move on to the increase by notice method. We also recommended that the option of 'other' is removed so that methods like the one at Kincumber Nautical Village are no longer possible.

Site fee increases by notice

Through the review the Tenants' Union has argued for more transparency around site fee increases by notice, clarity regarding the operating expenses that can be included in a site fee increase, and for the Tribunal to have complete discretion when considering whether an increase is excessive.

Fair market value

Again, our readers will be aware that we consider the third method of site fee increase to be the most significant and challenging issue. That is, the increases that occurs when a home changes hands. We are pleased to see a question on this point in the Discussion Paper. The Tenants' Union has rarely sighted a new site agreement with site fees at

Fair Market Value since the Act commenced. Just at the time of writing this article, we received an email from an advocate in the Tweed where a real estate agent is questioning site fees in a new site agreement on behalf of his client. The selling home owner was paying $310.78 a fortnight but site fees for the prospective home owner are $382 a fortnight, an increase of almost $72 or 23%. The operator advised the agent the increase was because 'the park has established a new market rent.'

Maintaining the residential site

Whilst not directly related to financial arrangements or obligations, another ambiguity in the Act has led to operators transferring the costs of maintaining and repairing community infrastructure to home owners. The Act requires an operator to provide a residential site in reasonable condition and fit for habitation at the start of a site agreement. However, it does not specify who should maintain and repair the site once the agreement has started. We think the answer is obvious – the operator owns the site and the home owner leases it so the operator is responsible. However, some operators have used the lack of specificity to make home owners responsible for structural retaining walls, slabs and driveways and subsidence. This issue was covered in Chapter 4 of the Discussion Paper (see also article on page 14 below.)

The Tenants' Union made two further recommendations regarding arrangements that benefit operators but provide little or no benefit to home owners. We said that voluntary sharing arrangements and special levy provisions should be removed from the Act.

Utility charges

The other big issue regarding charges is of course utility charges. This is particularly important for home owners who are supplied with electricity through an embedded network. The Tenants' Union has met with the Government three times as part of the review and we have also held discussions with other key stakeholders specifically about electricity charges. It is a complex area but we are hopeful the Government will settle on a charging method that is fair to both home owners and operators.

The end of the agreement

Chapter 6 of the Discussion Paper covered issues such as interference with sales, assignment (transfer) of site agreements, sub-letting and termination.

The ability to assign a site agreement is an important right for home owners and prospective home owners. When a site agreement is assigned the incoming home owner moves into the community on the same terms as the exiting home owner, including site fees. The right to assign a site agreement provides enhanced protections for incoming home owners and places them in a better bargaining position if they choose to enter into a new site agreement with the operator.

Termination provisions in the Act are generally appropriate in our view, except section 127. It enables a site agreement to be terminated when the site is not lawfully useable for residential purposes, including when the site is approved as a short-term site. An operator in the Illawarra has recently issued termination notices to all home owners in the community on the basis it doesn't have an approval to operate under the *Local Government Act 1993* (see article on page 18 below). The Tenants' Union does not believe operators should be able to terminate site agreements in these circumstances, where alternative remedies are available.

What next?

The Government will consider the submissions and survey responses to determine whether and how the Act should be amended. It is likely there will be further consultation with stakeholders before the Government settles on a final position regarding the changes.

The Government has indicated changes to electricity charges will be fast-tracked so we will see those changes first.

Keep an eye on our website **tenants.org.au/thenoticeboard** or sign up for *Outasite Lite* email newsletter at **tenants.org.au/thenoticeboard/news** to stay up to date with the review.

RECKLESS RETALIATION?

The electricity charges saga continues. Is the operator's conduct retaliatory?

Many *Outasite* readers will know the name Margaret Reckless. She is the home owner whose name was given to the method to calculate electricity charges for home owners on embedded electricity networks because Margaret's dispute with her operator went right up to the Supreme Court of NSW. The decision of the Supreme Court on 4 September 2018 in *Silva Portfolios Pty Ltd trading as Ballina Waterfront Village & Tourist Park v Reckless* [2018] NSWSC 1343 defined the parameters for electricity charges. When the dispute went back to the NSW Civil and Administrative Tribunal (NCAT) to determine exactly how the charges should be calculated, the 'Reckless' method was born.

Margaret Reckless, home owner at Ballina Waterfront Village

In January 2019 we published issue 33 of *Outasite Lite* (our email newsletter) featuring Margaret's long battle for fair electricity charges under the headline 'Is it over?'. At that time, Margaret thought it was. She had battled the operator for two years in the Tribunal, Appeal Panel and Supreme Court. Her fight led to fairer electricity charges for all home owners on embedded networks, and provided a pathway for home owners to seek refunds for the amounts they had been overcharged.

Once all the proceedings had been finalised Margaret was looking forward to a rest. All she wanted was to sit back and enjoy life in her community. Unfortunately, it appears the operator is unwilling to let that happen.

In our 2020 issue of *Outasite* we reported that a number of operators had outsourced electricity supply within their embedded networks to Hum Energy following the 'Reckless' decision. Ballina Waterfront was one of those operators so, despite all Margaret's efforts for a fairer price, she and all the other home owners in the community were immediately facing large price increases. Once again Margaret stood up for what is right and refused to accept a transfer to Hum Energy. Margaret believes that it is important to take a stance on issues of importance, but that doing so makes home owners vulnerable to retaliatory conduct from operators.

Retaliation?

Margaret has recently been issued with a termination notice for alleged breaches of her site agreement, which she now has to defend at the Tribunal. She believes the termination notice is another instance of retaliatory conduct by the operator, which started when she commenced proceedings regarding electricity charges.

Margaret told us:

"Most of my experiences regarding bullying and harassment began when I started proceedings against the operator regarding electricity charges, and it progressively worsened – not against me but my daughter who also had a home in the community. The operator was aware that she suffered with mental health issues but that did not stop them from pursuing her. After being admitted to Lismore Hospital on suicide watch she had to abandon her home and move out. Eventually she found a buyer for her property but at a substantial financial loss to her.

"The power of operators is absolute. Home owners have no rights. I have been accused of transgressions in this community which are allegedly on my file. Operators can put anything on our file without our knowledge or evidence of the alleged transgression. The operators have never approached me either in person or in writing regarding anonymous allegations and now they have issued me with a termination notice. The first Tribunal hearing was dismissed because they lodged it before the termination date stated in the notice. They have now made a second Tribunal application and the hearing is in July.

"Home owners in land lease communities need to take a stand regarding this harassment and intimidation. Most of us are elderly and have a right to respect which is sadly lacking. Operators should be held accountable for their actions – there should be protection built into the Act. If a home owner does the wrong thing, we are held accountable, but if an operator or manager is found in breach of their obligations nothing happens. Operators and their employees need to be evaluated regarding whether they suitable to hold their position within the community.

"I have taken my concerns to the local State Member and requested representation of the Member to Fair Trading and the State Government. Anyone who has been subjected to unfair treatment, bullying or harassment by an operator should do the same. If the voices are loud enough, we can make a difference and regain our dignity."

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– Margaret Reckless, Ballina Waterfront Village home owner

COMMUNITY BY DEFINITION

By Emma McGuire, Tenant Advocate, Mid Coast Tenants Advice & Advocacy Service

In the vast majority of land lease community cases that we encounter, it is generally clear and accepted by all parties that there is a land lease community in operation and subsequently that the *Residential (Land Lease) Communities Act 2013* (RLLC Act) applies to the relationship between operator and home owner.

In 2020 something a little out of the ordinary came to our attention. Our Service encountered a number of permanent home owners living in pop up communities who were unsure of what rights they might have and what legislation applied to their situation. An example of these communities are homes established in a number of showgrounds and similar multi-use community venues, amongst others. In some cases, the operator may have received an approval to operate as primitive camping grounds from the local council, so really are only permitted to cater for short-term tourists and not long-term permanent home owners. While in other cases there has been no approval to operate issued of any kind under the *Local Government Act 1993*.

For home owners who find themselves living in a community without an approval to operate, the situation can be a precarious one. In some cases, council intervention and/or termination of site agreements can follow for home owners in these communities (see also 'Local Government Complications' on page 14).

Emma McGuire

"In one particular community where we assisted residents, there was no approval to operate of any kind. We received a number of calls from residents being threatened with arbitrary eviction."

It is often the case that residents in these types of communities are extremely vulnerable and may not have the ability to move or, if they do, have nowhere else to go. They may not have any written agreement with the operator and may have little understanding of their rights or the complexities around relevant local government regulations.

In one particular community where we assisted residents, there was no approval to operate of any kind. We received a number of calls from residents being threatened with arbitrary eviction and also from concerned third parties. There was an escalation of events when some residents were forcibly evicted from the community by the operator and with the assistance of NSW Police. This occurred without any orders from the NSW Civil and Administrative Tribunal (NCAT). Of course, where the RLLC Act applies, a site agreement can only be terminated in accordance with the Act and it is an offence to recover possession of a

site unless there is a warrant issued by the Tribunal and executed by the Sheriff's officers. However, the operator in this instance sought to deny the application of the RLLC Act, including by asserting that because there was no approval to operate, this was not a land lease community and as such they were able to evict residents at will.

Helpfully though, section 5(c) and the section 4 definition of 'community' in the RLLC Act specifically accounts for the situation where a land lease community does not have an approval to operate as required under the *Local Government Act 1993*. The RLLC Act makes it clear that it captures and applies to all communities regardless of their compliance with local government legislation and regardless of any descriptors used in relation to the community. This approach is important to ensure vulnerable home owners are not left without the protections of the Act merely because an operator has failed to comply with their obligations to obtain an approval from the relevant Council before commencing to operate.

Our Service assisted some of the home owners in this situation to apply to the Tribunal for an order under section 9 of the RLLC Act declaring that there was a community to which the Act applied and also that there was an oral site agreement in force between the parties.

The proceedings before the Tribunal involved consideration of the question 'when is a land lease community a land lease community?' The Act naturally provides guidance on this issue. Section 5 states that the RLLC Act applies to 'all communities' and we can find the definition of 'community' or 'residential community' under section 4 of the Act.

Despite descriptions used by the operator in an attempt to categorise the place as something other than a land lease community, the community in this particular case had many of the usual indicators you would expect. There was of course an area of land (in this case owned by the operator). There were 'sites' (although in some cases unmarked) where people placed their homes (that term is defined under section 4 of the Act). Additionally, there was evidence of the operator advertising the leasing of sites and site fees were paid fortnightly to the operator in exchange for use of the sites along with rudimentary common facilities.

Also relevant was the fact that the home owners we assisted lived in their homes in the community permanently and had done so for a number of years. They had no principal place of residence other than in the community. There was also no restriction, ever indicated or enforced, on how long the home owners could live in their homes for any stretch of time (and therefore this was clearly not an agreement under the *Holiday Parks (Long-term Casual Occupation) Act 2002*.)

These factors demonstrated that there was a land lease community in operation within the meaning of the RLLC Act. Further, they demonstrated the home owners in question had a site agreement under the Act and were protected accordingly. For those living in such an uncertain situation, the Act's protection can be the difference between a safe and secure home on one hand and potential eviction by police and homelessness on the other.

Overall, the question of whether a land lease community exists and whether the RLLC Act applies is always one of substance over form. Regardless of how the operator may describe the community, how it may look or present itself, or how strongly the operator attempts to classify it as a different arrangement which lies beyond the application of the Act, it is an objective question to be answered by the Tribunal. The Tribunal will always have regard to the definitions contained in the Act and the facts of each matter. If in essence an operator is leasing sites to people to place their homes on and live in permanently, then it is likely a land lease community is in existence. With respect to issues which may arise such as non-compliance with local government legislation, a failure to be included in NSW Fair Trading's Register, or other regulatory issues – these failures cannot be relied on by an operator as a means of evading the application of the RLLC Act.

DAMAGE, LOSS AND ABANDONMENT

By Emma McGuire, Tenant Advocate, Mid Coast Tenants Advice & Advocacy Service

A number of land lease communities were impacted by the floods in the Mid North Coast in March 2021.

Some homes in those communities were significantly damaged by flood waters, leaving home owners unable to sell their homes to incoming prospective purchasers.

In an overwhelming majority of cases, a home owner's site agreement is terminated following the sale of the home after possession is given over to the purchaser. The *Residential (Land Lease) Communities Act 2013* reflects the importance of the home owner's right to sell by providing strong rights to sell the home on-site and a prohibition against operators interfering with the sale of a home.

Due to the fragile nature of many homes and the expense involved in moving them (along with the difficulties in finding vacant sites on which the home could be installed), home owners place a significant reliance on being able to sell their home on-site as a means of recouping (or growing) their financial investment in their home, and also as a means of bringing their site agreement to an end.

There are a variety of circumstances, however, where a home owner is not able to sell their home and as a result can face limited and difficult options regarding how to end their site agreement and what to do with their home. Homes which are significantly damaged or dilapidated or otherwise unsellable for some other reason can cause

Flooding at a Mid North Coast land lease community in 2021. *Photo by Emma McGuire.*

Flooding at a Mid North Coast land lease community in 2021. *Photo by Emma McGuire.*

significant stress and hardship for home owners. We have seen these types of issues arise most recently in relation to the March 2021 floods across the Mid North Coast, where a number of land lease communities were impacted by the natural disaster. Some homes in those communities were significantly damaged by flood waters, leaving home owners unable to sell their homes to incoming prospective purchasers (home owners) as would ordinarily occur. In some of these situations the only practical choice for home owners may be to either sell to the operator for what would likely be a nominal amount, or alternatively simply abandon their home on the site and leave the community.

Homes that are abandoned (which is something the Tribunal can determine under s 142 of the Act) are now required to be dealt with in accordance with the *Uncollected Goods Act 1995*. The rights and obligations of the operator in dealing with and disposing of homes under that Act will vary depending on the value of the home itself. For example, a home worth more than $20,000 can only be dealt with in accordance with an order of the Tribunal, whereas a home worth equal to or more than $1,000 but less than $20,000 can be disposed of by the operator by way of public auction or private sale without an order from the Tribunal.

We have seen cases where the Tribunal has made an order authorising an operator to demolish and remove the home of a home owner who was held to have abandoned their ageing home on the site, with the operator permitted to recover the costs associated with the demolition and removal from the home owner (the home owner in that case did not attend Tribunal and the matter was heard in their absence.) In a contrasting matter, one which demonstrates a sympathetic and more collaborative approach, one operator, in consultation with the home owner, covered all of the costs associated with the demolition and disposal of a dilapidated home which it was agreed could not be sold and in circumstances where the home owner was unable to return to the home for health reasons. That approach resulted in arguably the best outcome for all parties involved.

Issues around damaged and dilapidated homes, abandonment & termination of site agreements can be complex. As such, it is important for home owners to seek advice from their local Tenants Advice & Advocacy Service should these matters arise.

UNSTABLE GROUND

Land lease living is often talked about as an affordable housing option, particularly for retirees who want to downsize and free up funds. New, modern homes can be expensive but, when compared to the cost of traditional house and land options, even the top end homes are often cheaper. Other contributors to affordability include the ability to claim Commonwealth Rent Assistance to help meet the cost of site fees, no stamp duty is payable when purchasing a home, and home owners do not have to pay council rates.

Information on the Land Lease Industry Association of NSW (LLIA) website focuses heavily on the affordability aspect spruiking "the opportunity to downsize the home while supersizing the lifestyle", the ability to "enjoy all the facilities and services without any of the work to maintain them" and "the opportunity to release funds tied up in the family home to fund a retirement lifestyle free of financial insecurity".

The question we have is: if you are not the landowner, how can you be responsible for fixing problems such as soil or ground subsidence and structural retaining walls?

Additionally the LLIA website advises potential home owners they don't have to buy the land – "You buy a new or established house within a secure community and instead of buying the land you pay a weekly or fortnightly site fee to lease the land where your house is".

All of this is true and these are some of the reasons people choose land lease living. The question we have is: if you are not the landowner, how can you be responsible for fixing problems such as soil or ground subsidence and structural retaining walls? The short and obvious answer is that you are not, but that is not the experience of a growing number of home owners who are facing large bills to fix problems with the land under or around their homes.

Subsidence

Simply defined, subsidence is a downward shifting of ground. It may occur as a result of water erosion, tree roots and other vegetation, or a failure to properly compact the ground to create stable footings. Whatever the cause, the outcome is the same – the home sitting on land that is subsiding will be impacted. Those impacts may include walls bowing and cracking, door frames detaching from walls or cracking, and floors moving and sloping.

In mid-2020 a home owner in a land lease community in the Tweed area contacted the operator regarding subsidence issues on the site she was leasing. She had contracted a building consultant to carry out an inspection of her home and site and his report confirmed there had been some soil settlement on the site that had caused damage to the home including cracks to walls and door frames and significant sloping of floors inside the home and on the verandah. The home owner asked the operator to "kindly make arrangements to rectify the issues".

The operators' response came in the form of a letter from a solicitor advising the home owner that she had been advised previously "that subsidence was a matter for you to deal with".

Home owners in another community, owned and operated by Hometown Australia, have been dealing with similar problems. In September 2020 they noticed that subsidence was occurring to the ground surface beneath their home. They wrote to the operator and asked for an urgent response to subsidence issues occurring on the site.

The home owners spoke with Ms Lauren Toussaint for Hometown in October 2020 and the operators' position was that further consideration was required to 'determine responsibility' for the subsidence occurring on

site. The matter dragged on for another month and it became clear to the home owners that the operator was not going to rectify the subsidence problems and was avoiding responsibility. The ground surrounding and below the central footing had subsided by up to 150mm over an area of approximately 1 metre in diameter.

The home owners applied to the Tribunal. Hometown instructed a geo technical engineering company to prepare an expert report for the Tribunal proceedings. The expert report confirmed that ground soil subsidence had occurred, however the focus of the report was placed primarily on some footings of the home 'no longer supporting the steel beam bearers'. The home owners could not afford the exorbitant cost of obtaining an expert written report and whilst the Tribunal noted in a Notice of Order in April 2021 that the core issue for determination is the cause of subsidence under the site, the proceedings became too stressful for the home owners and they decided to withdraw their application prior to the hearing.

Stress cracks in the walls of a land lease community home – caused by subsidence in the site.

The operators' written submission to the Tribunal included an assertion that the footings to the home are the cause of the subsidence and recommended that the footings be designed to suit the subgrade. The home owner says, "the subsidence came first, the footings did not fail until such time as the site subsidence occurred. There are other instances of significant subsidence around the community that can be seen in carports, yards and in common areas. I've spoken with another home owner, a retired architect, and he's aware of some subsidence under his home."

In March 2021 Brigadoon Holiday Park at North Haven became flooded following a huge storm that affected much of the mid north coast of NSW. Mark, a home owner at the community for 16 years became concerned when a sink hole appeared on the site he rents, affecting three of the piers supporting his home. Mark approached the community operator for assistance. The operator responded by telling Mark he had 90 days to remove his home, at his own expense, if the site is to be repaired. Mark told us "I have always been a good tenant and nobody

Continued on page 16...

Continued from page 15...

deserves to be treated like I have been treated since I raised this problem".

Structural integrity

Structural integrity is about the ability of a structure to hold together under a load without breaking, or excessively distorting. It's about the structure being able to perform the function for which it was designed.

There are numerous structures within land lease communities with a clear delineation between those owned by the operator and those owned by home owners. We think it's fair to say that the owner of a structure is the person responsible for maintaining the structure to ensure that it is fit for purpose. However, some operators and the LLIA see things differently. A number of home owners have contacted the Tenants' Union regarding responsibility for structural retaining walls.

In all cases these walls are essential to the integrity of the site i.e. they stop it collapsing, and all are made from wood. When home owners have approached operators with concerns the walls are deteriorating and may no longer be doing the job for which they were designed, the home owners have been told fixing or replacing the walls is their responsibility.

In November 2020 prospective home owners were viewing a home in a community on the Central Coast when they noticed a structural retaining wall looked like it was starting to come apart. They asked the operator who was responsible for the wall but it wasn't until after they had paid the deposit for the home the operator responded and advised they (the home owners) were responsible. By that time it was too late to pull out of the sale without losing their deposit so the (now) home owners sought quotes for the repairs, which ranged between $10,000 and $12,980.

The home owners wrote to the operator and suggested they had failed in their obligation to provide the residential site in reasonable condition at the commencement of the site agreement. The operator rejected this claim saying there are no immediate safety issues and that the wall has "moved/ bowed most probably as a result of settlement of the site after the wall was built".

While there may not be an immediate concern in this case, there is a concern that down the track this wall will need to be replaced, and that it is the home owners who will have to foot the bill. Despite the statements on the LLIA website that home owners only lease the land and can enjoy all the facilities without the any of the work to maintain them, the 2017 site agreement provided by the LLIA for use by its members (community operators) contains the following additional term:

"Acknowledgement of your property

You agree

58.1 that any dwelling, associated structure, shed, driveway, pathway, retaining wall or any structure or fixture including but not limited to any hardscape (for example concrete slabs) or landscape on the site; and

58.2 that any plumbing or wiring that connects your dwelling or any of your structures to the utility services provided by the residential community is your property; and

58.3 that any item identified in cl. 58.1 or 58.2 are your responsibility to maintain in a condition satisfactory to us, having regard to their condition at the time they were installed on the site."

Not only does this term purport to transfer ownership of site infrastructure from the operator to home owner, the home owner is then additionally required to maintain that infrastructure to the standard determined by the operator. This is done without reference to the *time it was installed* on the site, regardless of how long ago that was, or even the actual *condition at the time* the home owner entered into the site agreement. The question is whether this term is valid, or whether it is an attempt to contract out of the *Residential (Land Lease) Communities Act.*

The Act is silent on whose responsibility it is to maintain a residential site, or what structures form part of the site. However, the standard form condition report in the *Residential (Land Lease) Communities Regulation 2015* provides some clarity. It states "This form is only for use in relation to a residential site and not the home or any fixtures on the site". In the section "condition of the residential

Above: Mark's home.

Right: Underneath Mark's home you can see the separation distance between the sinking pier and the support beam for the home. Also visible is fill dumped by the operator while Mark was out.

site" which is to be completed by the operator and home owner the items listed are: landscaping/garden; driveway; lawn; site slab (concrete). It is clear from this that the slab, driveway, and other items that are not fixtures, are part of the residential site.

The Tenants' Union believes the Act needs to provide greater clarity regarding an operator's responsibility to maintain community infrastructure including residential sites and that the transfer of ownership and responsibility for maintenance of structures such as slabs and structural retaining walls should be prohibited. Only then can home owners be certain that when they purchase the home, they are free to enjoy a "retirement lifestyle free of financial insecurity."

Mark has been a home owner in the community for 16 years. He became concerned when a sink hole appeared on the site he rents, affecting three of the piers supporting his home. Mark approached the community operator for assistance. The operator responded by telling Mark he had 90 days to remove his home, at his own expense if the site is to be repaired. Mark told us "I have always been a good tenant and nobody deserves to be treated like I have been treated since I raised this problem."

LOCAL GOVERNMENT • COMPLICATIONS •

Roles, responsibilities, compliance

It was difficult to know where to start this article because the list of issues surrounding the interaction of local councils and local government regulations with land lease community operators and home owners is long. To bring some of these issues into focus we have decided to highlight the plight of home owners in four land lease communities in the Illawarra. All of these communities are within the Wollongong local government area.

Approval to operate

The *Local Government Act 1993* (LG Act) provides the legal framework for the system of local government in NSW. Amongst other things the Act sets out the responsibilities and powers of councils and councillors. Section 68 of the LG Act prohibits certain activities from being carried out without the prior approval of the council and those activities include operating a caravan park and operating a manufactured home estate. Although the terminology is outdated, section 68 essentially requires all land lease community operators to hold an approval to operate.

The *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* (the Regulation) is made under the LG Act and it provides that the council must not grant an approval to operate a caravan park or manufactured home estate unless it is satisfied that it will be designed, constructed, maintained and operated in accordance with the relevant requirements of the Regulation. Compliance with the Regulation is the issue impacting home owners in the four communities in the Illawarra.

Figtree Gardens

Figtree Gardens Caravan Park sits in the Wollongong suburb of Figtree. It has 200 residential sites accommodating 380 residents. Figtree Gardens operated without an approval for over seven years before Wollongong City Council (WCC) started working with the operator, requiring action to address the issues of safety and non-compliance. The problem is that over this seven year period the compliance problems had become extensive.

WCC inspected the community and produced a report setting out a list of issues to be addressed before the operator could be issued with a new approval to operate. These issues are not restricted to the operator – according to council, almost every site at Figtree Gardens contains at least one structure that is in some way non-compliant. This has raised a number of concerns for affected home owners, many of whom bought their homes as they currently stand, on-site.

There has been debate about WCC's interpretation of some separation distance requirements and their

At Figtree Gardens, many home owners feel they are now being asked to pay to fix problems that arose because Wollongong City Council and the operator failed to meet their obligations over a number of years.

approach to the compliance problems at Figtree. Many home owners feel they are now being asked to pay to fix problems that arose because WCC and the operator failed to meet their obligations over a number of years. Not only do home owners believe this is unfair, the costs associated with making a site compliant could be significant and some home owners simply do not have the money.

Currently there appears to be a stalemate at Figtree. WCC issued a restricted conditional approval to operate in December 2018 subject to the completion of a staged program of works. In order to obtain an unconditional approval the compliance issues need to be addressed. The operator can and should do what council is requiring of them, but making all of the sites compliant is not going to be easy, and at present it appears there is no clear pathway to ensure it happens.

Oasis

South of Figtree, Oasis Caravan Park sits on the eastern shore of Lake Illawarra. It has around 43 sites and 55 residents. Oasis does not have a current approval to operate, and has not had one since 31 August 2006 when the last one expired. Like Figtree Gardens, there are a number of compliance issues that WCC have advised must be addressed in order for a new approval to be issued. However, unlike Figtree, the operator of Oasis appears not to want a new approval. Rather than dealing with compliance issues, the operator has issued all home owners with 90 day termination notices under section 127 of the *Residential (Land Lease) Communities Act 2013* (RLLC Act) on the basis the sites are not lawfully useable for the purposes of a residential site. This action has placed the home owners in a very precarious position and highlighted a major flaw in land lease community legislation.

Oasis Caravan Park does not have a current approval to operate, and has not had one since 2006 when the last one expired.

Rather than dealing with the compliance issues, the operator has issued all home owners with 90 day termination notices.

This action has placed the home owners in a very precarious position and highlighted a major flaw in the legislation.

The Act is supposed to provide enhanced protection for home owners against termination because of the significant investment home owners make to live in a community. Sections 124 and 125 enable an operator to issue a home owner with a termination notice when a community is going to close, or when a residential site is to be used for a different purpose. Both circumstances require the operator to take certain steps before issuing a termination notice, for example, obtaining development consent if it is required, or being authorised by the Tribunal. The termination notice must give a home owner at least 12 months to vacate the site, and the operator is required to pay compensation to the home owner prior to them vacating the community.

The operator of Oasis Caravan Park has indicated the community will be closing but, rather than follow the process set out in section 124 of the Act, it is using section 127 which affords home owners less time to vacate and could leave some without a right to compensation.

Home owners at Oasis are covered by the RLLC Act because it applies whether or not the community has an approval to operate under the

Continued on page 20...

Jean, home owner at Gateway Lifestyle Oaklands

"We'd like to work with Council and come to an agreement. We're willing to make reasonable changes, but some of the demands they are making are impossible to comply with."

– Jean, resident at Gateway Lifestyle Oaklands

Continued from page 19...

Local Government Act. The question is whether the lack of a current approval to operate makes the sites unlawful. If it does, the home owners' site agreements can be terminated.

When the draft *Residential (Land Lease) Communities Bill* was released for consultation in 2013 the Park and Village Service (PAVS) raised concerns that certain provisions weakened security of tenure for home owners. PAVS were shouted down and accused of misleading residents and wilfully misinterpreting the Act. Unfortunately for a number of home owners, including those at Oasis, the Act has weakened security of tenure for home owners and undermined the rights of some to seek compensation when their site agreement is terminated.

If home owners at Oasis have their site agreements terminated in these circumstances, the Act will have failed them. It will be a double and devastating blow to those who do not have a right to compensation. The

At Jettys By the Lake, home owners were recently advised that within five years they will need to raise their homes to three metres above sea level because of the predicted flood level for 2050. Now they're questioning how the condition can be met and, if homes can be raised, who will pay? Photos by Jeremy Kerbel

majority of these home owners are pensioners with no assets other than their home in the community. This course of action should simply not be available to a land lease community operator.

Gateway Lifestyle Oaklands

Further south, also on the shore of Lake Illawarra is a community known locally as Oaklands. It has 245 residential sites and is home to around 370 residents. The community has been operating as a land lease community since the beginning of the 1990s. On 31 August 2019 the approval to operate expired and when the operator applied to WCC for a renewal it was declined because of issues of non-compliance with the Regulation.

Jean and Ralph bought their home at Oaklands in 1993. They purchased the home from the operator who installed it on the site and it has not been moved or added to since that time. In a report authored by WCC in April 2020 Jean and Ralph discovered their home is too close to an access road and is therefore not compliant with the Regulation. The home cannot be moved and they, like many other home owners at Oaklands, don't understand how something that has been in place since 1993 only became an issue in 2020.

Jean says, "We'd like to work with Council and come to an agreement. We're willing to make reasonable changes, but some of the demands they are making are impossible to comply with."

Jettys By The Lake

Between Oaklands and Oasis is Jettys By the Lake. It has approximately 180 residential sites occupied by 284 residents. Home owners at Jettys are facing a different issue – they were recently advised that within five years they will need to raise their homes to three metres above sea level because of the predicted flood level for 2050.

This requirement came out of an agreement made in a conciliation conference arranged by the Land and Environment Court between the operator and WCC on 27 November 2020. The operator has said they felt they had little choice but to accept the condition as it became

Continued on page 22...

The situations faced by home owners in these communities highlight the complexities of land lease community living and the disconnection in the legal relationships between local councils, operators and home owners.

What is required is a whole of government approach. The regulatory regime must be modern and fit for purpose. Operators and home owners should not be overburdened by compliance requirements that cannot realistically be met.

Continued from page 21...

clear court proceedings may jeopardise the rights of existing residents to remain in the community.

Home owners are now questioning how the condition can be met and, if homes can be raised, who will pay? In the meantime they are concerned that anyone wanting to leave will be unable to sell their home.

The situations faced by home owners in these communities highlight the complexities of land lease community living and the disconnection in the legal relationships between local councils, operators and home owners.

Many of the issues related to land lease communities are historic and finding appropriate solutions will not be easy. What is required is a whole of government approach. The regulatory regime must be modern and fit for purpose. Operators and home owners should not be overburdened by compliance requirements that cannot realistically be met. Land lease communities are an important component of the NSW housing structure. Long-established communities, like the ones in the Illawarra, should be enabled to remain safe and viable so that operators and home owners have certainty about the future.

AN INDEPENDENT VOICE

By Jill Edmonds, Independent Park Residents Action Group (IPRAG) founder

The Independent Park Residents Action Group (IPRAG Inc) began to take shape in 2013 when twenty-two home owners' representatives travelled to the Central Coast for an urgent meeting. The meeting was prompted by two issues.

The *Residential Land Lease Communities Bill* with its controversial provisions still in place was scheduled for Parliament's assent in November. At the same time Government was to discontinue its funding for the Park and Village Service (PAVS).

For seventeen years Government had funded PAVS to advocate on behalf of park residents. It has always been the case that the majority of home owner residents have little knowledge of the legislation that governs their lifestyle or where to turn to for help when things go wrong.

During those seventeen years as the legislation evolved, PAVS assisted residents and their communities by providing free information and education -- in person and via published material -- as well as training volunteer residents to prepare and present cases for the Tribunal. By publication of reports and other interactions PAVS kept Fair Trading informed about problems in parks and where there was need for improved consumer protections for residents.

Jill Edmonds, Independent Park Residents Action Group

An independent report had recently found that PAVS was exceeding its funding obligations and concluded that continuation of such a service was clearly necessary. Regardless of that, Government went on to indicate that it would no longer fund any specialist advocacy service specific to residential parks.

Continued on page 24...

"Most of problematic issues being examined in the current review are the same that we fought for in the previous review. Are we allowed to say we told you so?"

– Jill Edmonds, Independent Park Residents Action Group

Continued from page 23...

The loss of PAVS meant the loss of the Residential Parks Forum.* Since its beginning PAVS had convened the Forum four times every year. Residents' representatives were brought together with legal advisors for the sharing and noting of current information from around the state: problems caused by inadequacies of the Act, unethical behaviour by operators, Tribunal cases won and lost were analysed.

By maintaining the Forum PAVS had created an informal network of residents who functioned as a mutual support group and were equipped to coordinate in lobbying together for improved protections for residents.

At our initial meeting on the Central Coast it was decided that the network was too valuable to be disbanded. We would continue it under the IPRAG title when PAVS was defunded. A committee was elected and, funded by donations from within the group, IPRAG was registered as an incorporated association.

With November looming IPRAG conducted a media campaign. We focussed on the most unfair and exploitative provisions of the proposed Act and the extraordinary power of operators to control the financial and personal wellbeing of their residents. We met with our local MPs and numerous key Members of Parliament as did other concerned entities. Consequently, when the day arrived almost thirty amendments were proposed. All but one were defeated. The powers-that-be were sticking to the claim that this was a fair and balanced document.

Between then and now electricity charges have emerged as a major problem. Apart from that, not surprisingly, most of problematic issues being examined in the current review are the same that we fought for in the previous review. Are we allowed to say, "We told you so?"

Over the years people have come and gone from IPRAG. (None of us are spring chickens.) Today we describe ourselves as follows.

"Established in 2013 IPRAG Inc is a volunteer network of land lease community home owners. We are comprised of individual activists, residents' committees, regional incorporated associations and experienced Tribunal advocates. IPRAG has an elected committee but otherwise is not a 'fee for membership' organisation.

Our committee members, with up to thirty years experience, live in or have lived in land lease communities from the Queensland border to Western Sydney. We have extensive knowledge of the legislative framework supported by specialist legal advice on call. Because we have minimal administration costs we are able to provide cost free information and general assistance for residents as well as Tribunal advocates when appropriate.

IPRAG consults with relevant organisations, engages with the media and lobbies Government and Members of Parliament regarding issues that impact the wellbeing of home owners. IPRAG is not allied in any way with any sector of Government or the land lease industry.

We are confident in stating that currently we represent the prevailing views of approximately five thousand home owners.

Our objective is to ensure mutual respect and a workable balance of rights and responsibilities between home owners and community operators."

IPRAG is often asked, what are our main issues for reform? That's a difficult question. So many issues have been dissected and debated over so many years. Putting aside the problems of electricity charges and looking at things broadly, probably most problems arise from the appalling behaviour of far too many operators and the failure of the Fair Trading regulator in its duties of compliance and enforcement.

The Act is clearly at fault for provisions that facilitate hugely unwarranted site fee increases that residents

struggle to pay. This also impacts their ability to sell their homes when they need to leave the community. There is the additional power granted to operators to interfere in the sale of homes by refusing consent for assignment of the seller's site agreement to a prospective buyer. The Act also gives encouragement to operators to transfer to residents a range of costs that actually increase the value of the operator's assets. The "we told you so" line returns to mind.

The indicator that things would go wrong for residents can be found in Part 1 of the Act where the previous objective, to provide legislative protection for residents was replaced by the objective to encourage the growth and viability of the industry.

To add a personal note, I would be thrilled if people who are somewhat fearful could be convinced that their operator cannot simply evict them from their homes if they do or say something that might upset him or her.

In July last year IPRAG was pleased to be consulted as a stakeholder in the formulation of the review discussion paper. The final consultations that produced the Bill for the 2013 Act were conducted in strictest confidence without inclusion of anyone who actually lived in park, who had firsthand knowledge of the realities and the most to lose. There was much controversy around the lack of transparency and questions were asked in Parliament. Without resident home owners there is no land lease industry. There will be a repeat of controversy if residents are excluded again from the final process.

Having said all that, it must be acknowledged that the 2013 Act did provide a number of significant improvements for residents along with some innovative strategies. These were important steps in the right direction that we should remember. We should also acknowledge all ethical operators who manage to run a profitable business without using the shortcomings of the Act to exploit their resident homeowners.

IPRAG Inc can be contacted after 1pm, any day of the week:

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**In 2014 the Tenants' Union received additional funding for parks work and assumed responsibility for convening the residential parks forum (now the Residential Land Lease Communities Forum).*

"IPRAG is often asked, what are our main issues for reform? That's a difficult question. So many issues have been dissected and debated over so many years. Putting aside the problems of electricity charges and looking at things broadly, probably most problems arise from the appalling behaviour of far too many operators and the failure of the Fair Trading regulator in its duties of compliance and enforcement.

"The Act is clearly at fault for provisions that facilitate hugely unwarranted site fee increases that residents struggle to pay. This also impacts their ability to sell their homes when they need to leave the community. There is the additional power granted to operators to interfere in the sale of homes by refusing consent for assignment of the seller's site agreement to a prospective buyer. The Act also gives encouragement to operators to transfer to residents a range of costs that actually increase the value of the operator's assets."

– Jill Edmonds, Independent Park Residents Action Group

INTERFERENCE WITH SALE OF HOME

By Paul Smyth, Tenants' Union Residential Parks Legal Officer

Allan and Lynn Reece's home at Site 10, Emerald Tiki Village.

Allan and Lynn Reece are home owners and age pensioners. They live in a land lease community called Emerald Tiki Village Caravan Park at Anna Bay in NSW.

In early June, 2017 the Reece's met Mr John Frost, the owner/operator of Emerald Tiki Village. The operator was selling the home on site 10. On that day Lynn says "we saw two homes that were advertised for sale, on sites 7 and 10."

The home on site 7 was being sold by the current home owner and Mr Frost explained there was a site coverage issue regarding the carport. The Reece's decided that because of this it would not be a suitable home for them to purchase. They were then shown to site 10 by Mr Frost. The home on site 10 was actually owned by John and Janette Frost. The Reece's liked the look of the home. They discussed the sale price and we were told by Mr Frost there were no compliance problems with the home on site 10. The home and carport had been in situ for almost 30 years. Lynn Reece told the operator "I am not interested in purchasing this home because it does not have a laundry". However, Mr Frost assured them that this was not a problem and said: "You

can build a garden shed and put your laundry in it." Lynn says, we didn't know at the time that Mr Frost had actually demolished an existing shed on site 10 after he acquired it from the previous owner.

Mr Frost then offered the Reece's vendor finance to cover the price difference between the homes on sites 7 and 10. Allan and Lynn Reece decided to proceed with the purchase from the operator. On 20 June 2017 Mr Frost loaned the Reece's one of his utes to pick up the flat-pack shed from the local Bunnings. On 23 June 2017 they paid a deposit on the home and signed the loan agreement for the vendor finance.

Between 23 and 25 June 2017 the shed was assembled in the position on site 10 suggested by Mr Frost. Mr Frost assisted the Reece's by holding and positioning walls and lending them specialist power tools to erect the shed. A plumbing company connected the water and drainage pipes to the laundry shed on 28 June 2017.

After the works were completed the Reece's entered into a written site agreement for site 10 on 1 July 2017 with the operator. Allan and Lynn enjoyed living in their new home and the first few years were largely uneventful.

Home For Sale

However, things started to go awry because of the operator's conduct and the Reece's decided they would sell their home and move out of Emerald Tiki.

On 5 January 2020 the Reece's contacted the Emerald Tiki operator and advised they were going to list their home for sale, by giving a notice of intention to offer the home for sale as required by the *Residential (Land Lease) Communities Act 2013*. The Reece's sought advice and were assisted by Trevor Sullivan (advocate from Port Stephens & Affiliated Park Residents Association – PSAPRA) with back up provided from the Tenants' Union of NSW.

The home was being sold privately with advertising through the website HomeParks.com.au. That company went out of business during the COVID-19 pandemic so Lynn says "we put our home sale in the hands of Mr Neil Simon, of Neil Simon Real Estate of Nelson Bay."

Emerald Tiki wrote to the Reece's on 23 January 2020 and said the carport needed to be removed in full from site 10. Further correspondence from Emerald Tiki on 17 June 2020 stated that, "the garden shed was allowed as a TEMPORARY structure" and further that the Reece's "had NO APPROVAL to build or to install plumbing in the shed". Allan Reece says "these statements by the Frosts (Emerald Tiki) are completely contradictory or a blatant lie!" The operator had previously sent notices addressed to all home owners advising about site coverage issues under Local Government Regulations but had not raised any issues specifically with the Reece's.

The June 2020 letter to the Reece's from Emerald Tiki went on to claim that the compliance of the carport would not be an issue if the laundry shed was removed. However, the operator clearly approved the laundry shed as part of and to secure the initial sale and Mr John Frost even helped build and install it. The Reece's have photos showing Mr Frost on site 10 assisting them with construction of the laundry shed.

From January 2020 to October 2020 the Reece's say at least 10 potential purchasers were informed by the Frosts and Emerald Tiki that a sale could not proceed because of the alleged "compliance issues surrounding the carport and laundry/shed."

The Reece's felt that if they wanted to be able to sell their home they had to take action. They made an application to the NSW Civil and Administrative Tribunal (NCAT) regarding interference with the sale of their home by the operator. On 6 October, Emerald Tiki agreed to an order, by consent, that they would not interfere in the sale of the home. However, things took a new turn. On the afternoon of 6 October 2020 Mr Frost erected an orange mesh and star picket barricade opposite site 10 on the edge of the internal community roadway. Lynn and Allan say this was "a wholly unnecessary and spiteful action" by the operator and was done to increase the difficulty of going in and out of their carport.

Continued on page 28...

The operator agreed to a Tribunal order that they would not interfere in the sale of the home.

However, on the same day they erected an orange mesh barricade opposite the home on the edge of a community roadway.

The home owners say this was "a wholly unnecessary and spiteful action" done to increase the difficulty of going in and out of their carport.

The next day the operator entered the site without notice and without the home owners' permission. He dug a substantial hole near the back wall of their home, exposing the water and drainage pipes.

The operator was also taking photos of the home owners, including where they parked, monitoring them through CCTV, harassing them and issuing notices for various alleged breaches of community rules.

Continued from page 27...

The following day, on 7 October, 2020 Mr Frost entered site 10 without notice and without the Reece's permission. He dug a substantial hole abutting the back wall of the home. The unsightly hole exposed the water and drainage pipes and it was left untouched for a total of six days. Emerald Tiki were also taking photos of the Reece's, including where they parked, monitoring them through CCTV, harassing them and issuing notices for various alleged breaches of community rules.

Prospective Purchaser

On 5 January 2021 Neil Simon Real Estate advised the Reece's that a genuine prospective purchaser was interested in buying their home. Dave (not his real name) made an offer that the Reece's accepted. Dave was introduced to the office of Emerald Tiki by Neil Simon, the Reece's agent.

A Disclosure Statement was emailed to Dave by Mrs Louise Thomas, the office manager and daughter of the Frost's.

In the Disclosure Statement the operator inserted a condition which required that the laundry shed be totally removed within 30 days of the signing of a new site agreement. The Disclosure Statement also stated that the site fees for the purchaser would $190.00 per week. The Reece's were paying $165.50 per week. Dave advised the agent, that he would not go ahead with the purchase because of the condition that the laundry shed would have to be removed and the higher site fees proposed by the operator in the site agreement.

On or about 13 January 2021 Trevor Sullivan (advocate from PSPRA) advised the Reece's to write to the operator to seek their consent to the assignment of their site agreement to Dave. The letter advised that if such consent was unreasonably withheld by Emerald Tiki the Reece's would make an application to the Tribunal and seek other relevant Orders.

At the Tribunal on 17 March 2021 the following Tribunal orders were made:

"By consent, the operator agrees to comply with Section 107 RLLC Act and not make it a condition of the sale of the premises or any proposed assignment, that the allegedly offending laundry/shed will need to be removed to comply with the Local Government Act. However, they will comply with their own disclosure obligations to any prospective tenant (regarding site coverage)."

The Tribunal noted and reproduced two important paragraphs from an Appeal Panel decision in *ZW2 Pty Ltd v Welch* that the Reece's advocate Trevor Sullivan had

provided. It read as follows;

"There is no reason to conclude that indirect action, namely including a provision requiring work to be carried out as a condition of entering into a new site agreement would not similarly constitute interference. In this regard, the vice the legislator is intending to prevent is an operator taking steps to compel a home owner to carry out work as a condition of allowing a sale.

This is not to suggest that disclosure obligations of the operator need not be met concerning advising a purchaser about compliance of the site and home with relevant local government and other regulations. However, it seems to us a contravention can occur where the effect of the conduct is to require compliance as a condition of approving any assignment or entering into a new site agreement."

Emerald Tiki were now on notice that requiring works to be carried out as a precondition of entering into a new site agreement constituted interference and they consented to the making of the Tribunal order(s).

Dave, the prospective purchaser, completed an application for tenancy to live at Emerald Tiki. He also provided two character references and over 100 points of personal identification. Emerald Tiki also asked Dave to provide a NSW Police check. There was significant delay experienced by Dave in getting this from the police and obtaining a Police check was used by Emerald Tiki to hold up the making a decision on his application until late March/ early April 2021. A clean police check report finally arrived and was provided to the operator. However, there was no immediate response. Following more delaying tactics Emerald Tiki finally wrote to the agent Neil Simon and the Reece's and advised that Dave's application had been declined, without reason.

The Reece's were devastated because they had paid a no-refundable deposit on a home in another land lease community and they had paid site fees in advance. Rather than lose this money the Reece's have borrowed money for their new home. They are so determined to leave Emerald Tiki that they have purchased a new home without completing the sale of their home at Emerald Tiki.

A renewal of proceedings at the Tribunal regarding interference with sale of their home and seeking compensation is being contemplated by the Reece's as they weigh up their options. Trevor Sullivan, their advocate from PSAPRA, says,

"The Reece's have certainly had a tough time with this matter over 17 months. They have sunk a great part of their equity into their home(s). In many cases residents have moved into a land lease community after selling their own homes, usually real estate, having never lived in a mixed community environment like a RLLC. They are not used to living under an owner/ operator who has set rules. Home owners need time to adapt to circumstances and should not be confronted with operators like Emerald Tiki who bully and victimise residents and show little regard for the Rules of Conduct for operators. Operators also need to understand that residents are their customers who in effect pay their wages and keep them in business". ●

"Home owners should not be confronted with operators like Emerald Tiki who bully and victimise residents and show little regard for the Rules of Conduct for operators. Operators also need to understand that residents are their customers who in effect pay their wages and keep them in business"

– Trevor Sullivan, Port Stephens & Affiliated Park Residents Association

AGE RESTRICTION RULE ALLOWED

Tribunal decision overturned by Appeal Panel

In our 2020 edition of *Outasite* we reported on the challenge by a home owner to a new community rule introducing an age restriction at Tweed Billabong Holiday Park. The operator wanted to introduce the following rule:

Age Restriction

The age restriction for the community is that a person must be at least 55 years of age to occupy a residential site. A homeowner must not allow a person to occupy a residential site unless that person meets the age restriction.

Home owners at Tweed Billabong did not want the rule introduced for a number of reasons: (i) they believed it to be discriminatory; (ii) home owners should have the freedom to choose who lives with them; and (iii) Tweed Billabong is a holiday park used mainly by families with young children. Home owners thought the rule unfair and nonsensical in such a situation.

The Tribunal agreed with the home owners and found the rule was inconsistent with the *Anti Discrimination Act 1977 NSW* (ADA) and that it was not fair nor reasonable nor clearly expressed as required by the *Residential (Land Lease) Communities Act 2013* (RLLC Act). The rule was set aside.

The operator appealed the decision of the Tribunal and the Appeal Panel heard the matter on 18 June 2020. The decision of the Appeal Panel was handed down on 23 December 2020.

The Appeal Panel decision

In a long and complex decision, the Appeal Panel determined the rule was not inconsistent with the Anti Discrimination Act (ADA) and that any conduct done in compliance with the rule is not unlawfully discriminatory.

Firstly, the Appeal Panel interpreted the relevant provision of the ADA to mean that conduct is unlawful "if that conduct involves a person who provides a service and who refuses to provide another person with those services or provides services but on terms which discriminate on the ground of age." The Appeal Panel said "This means that the Rule itself is not unlawful, rather conduct in conformity with the Rule may be unlawful."

Section 54 of the ADA provides that anything done by a person is not unlawful if it was necessary for the person to do it in order to comply with a requirement of any other Act, any regulation, ordinance, by-law, rule or other instrument made under any such Act.

The Appeal Panel considered whether a Rule made under the RLLC Act was a rule for the purposes of section 54 of the ADA. It determined that it was and that consequently "any conduct done in compliance the Rule made under the RC Act [RLLC Act] is not unlawfully discriminatory and therefore, the Rule is not "inconsistent" with the ADA within the meaning of s 87 of the RC Act".

The second question the Appeal Panel considered was whether the Tribunal was wrong to find the rule was not clearly expressed. The Tribunal had made this finding because home owners had argued the meaning of "occupy" was unclear. The Appeal Panel disagreed and said that "the word "occupy" has no technical meaning and is easily understood to include "reside"."

Finally, the Appeal Panel considered whether the rule was fair and reasonable. The home owners had argued that it was not because it applied only to home owners. The

effect of the rule would be that home owners could not allow anyone under the age of 55 years to occupy their site but there could be a family with small children in a holiday cabin next door, or in the next street. The home owners said that, to be fair and reasonable, the rule had to apply to everyone in the community. Once again, the Appeal Panel disagreed with the Tribunal. In reaching this position the Appeal Panel said "Community rules relevantly only apply to residents, occupants and invitees of a resident: s 92". The Tenants' Union respectfully disagrees with this finding because s 92 also requires the operator to try to ensure compliance with community rules by "any employees of the operator and any other persons who are in the community at the operator's invitation". The Act would not contain this additional requirement if it was intended that community rules apply only to residents.

The home owners were very disappointed with the decision of the Appeal Panel, but after seeking legal advice on the merits of a further appeal they decided to accept it.

What does this mean for residents?

The new rule does not apply to home owners who were already living at the community when it was introduced; the challenge to its introduction was to protect future home owners. Unfortunately, the challenge failed and new home owners and their occupants must be over 55 years of age despite the community being a holiday park marketed at families with young children. We agree with the home owners, an age restriction rule in such communities is nonsensical.

Lizzie's Lagoon

Jumping Jellyfish

Chopper Go Karts

'School's Out' Kids Club

These photos are from the Tweed Billabong Holiday Park website. They show the range of recreational activities, and the popularity of the park with families with young children.

Unfortunately, the challenge to the age restriction rule failed and new home owners and their occupants must be over 55 years of age despite the community being a holiday park marketed at families with young children. We agree with the home owners, an age restriction rule in such communities is nonsensical.

RETIREMENT UPHEAVAL • UPDATE •

In the 2020 issue of *Outasite* we reported on the case of *Commissioner for Fair Trading v Jonval Builders Pty Ltd, Hacienda Caravan Park Pty Ltd and John Allan Willmott* [2019] NSWSC 1893. When we went to print the Supreme Court of NSW had ordered compensation to be paid to home owners and Jonval, Hacienda and John Willmott had appealed the decision of the Supreme Court to the NSW Court of Appeal.

What the case was about

Between 2009 and 2012 each home owner purchased a 'Marina Villa' at Tweed River Hacienda Holiday Park from Jonval Builders trading as Tweed Relocatable Homes. The villas had been installed in 2005 or 2006. Each home owner entered into two contracts: a sale agreement with Jonval for the purchase of their home and an occupation agreement with Hacienda. The occupation agreements contained terms requiring Hacienda's prior permission for occupation of the villas for any period greater than 28 days, and limiting occupation to no more than 180 days per year in any circumstance. These terms corresponded with a condition of development consent that the sites not be used for permanent accommodation.

The Commissioner for Fair Trading brought proceedings in 2015 in the Supreme Court of NSW seeking orders for compensation payable to the home owners under the former s 72 of the *Fair Trading Act 1987 (NSW)* and s 237 of the Australian Consumer Law. The claim alleged that the home owners had only purchased the villas because of misleading or deceptive or unconscionable conduct by Jonval, Hacienda and John Allan Wilmott. Mr Willmott is a director of both Jonval and Hacienda. The alleged contravening conduct was that prior to the purchase, the appellants told the home owners that the terms of the agreements restricting occupancy, and the planning conditions, would not be enforced. Most of the home owners gave evidence in the Supreme Court proceedings that they had intended to live in the villas permanently. All gave evidence that they would not have purchased the homes had they known of the restrictions on occupation.

The outcome

The primary judge found that Jonval, Hacienda and John Wilmott had engaged in misleading and deceptive and unconscionable conduct and that this conduct had caused the home owners to enter into the contracts. The Supreme Court ordered that Jonval,

Hacienda and John Wilmott were jointly and severally liable to pay compensation to the home owners, in amounts ranging from $224,380.63 to $387,883.62. The amounts were calculated as the sum of (a) the purchase price of the home, (b) 85% of the cost of renovations and improvements undertaken by the home owners and (c) interest.

The Court ordered that the compensation should be paid into, and held by, the Court. Each home owner provided a written undertaking to the Court that upon receipt of the compensation they would transfer ownership of their villa to Jonval.

NSW Court of Appeal

The appeal of from the Supreme Court decision to the Court of Appeal challenged the compensation orders and the primary judge's findings of unconscionable conduct engaged in by John Wilmott. On 25 September 2020 the appeal was dismissed by all three Court of Appeal judges with a costs order; in *Jonval Builders Pty Ltd v Commissioner for Fair Trading* [2020] NSWCA 233.

The High Court of Australia

Jonval Builders, Hacienda and Mr Willmott made a final throw of the dice and filed an appeal application with the High Court. However the special leave application was dismissed with costs on 25 February 2021.

Compensation paid

Between 25 February and June 2021 the home owners were awaiting the release of the funds held by the Court. Even at this late stage Hacienda was using delaying tactics rather than consenting to the release of the compensation funds. However, on 21 June The Honourable Justice White made an order for the Court of Appeal to release the Judgement Sums (compensation) to each of the home owners. On receipt of the Judgement Sum each home owner was required to transfer their Marina Villa to Jonval Builders Pty Ltd and vacate the Marina Villas on site within 3 days.

The Marina Villa home owners say that no amount of compensation can truly put right the detrimental impact that the Hacienda operator's misconduct has had on their lives, on their health and wellbeing. They question why an operator like Mr Willmott and his daughter Ms Tanya Hickling are permitted to continue as directors of Hacienda (operating a land lease community) given the findings made in Court. The Marina Villa home owners would advise all prospective purchasers to get independent advice and to carefully scrutinise the documents they are given to sign before committing to buy a home in a land lease community. A very harsh lesson has been learned.

Some of the Marina Villa home owners will now move to live locally in other land lease communities and others have moved to live interstate. Housing affordability is a huge issue for them. They thank the local **Northern Rivers Tenants Advice and Advocacy Service** and the **Tenants' Union of NSW** and the **Tweed Residential Park Homeowners Association** for their invaluable assistance provided over the past ten years including at Tribunal proceedings. In particular, the Marina Villa home owners say that they are very thankful that the **NSW Commissioner for Fair Trading**, through its Legal Services Branch, finally commenced the Supreme Court of NSW proceedings in 2015 and instructed barristers to appear. Fair Trading as Regulator assisted those Hacienda home owners facing the greatest consumer detriment in vindicating their rights and righting a wrong, and achieved a very significant outcome.

A great deal has been done but much more is needed to deal with misconduct by rogue operators like Hacienda in the residential land lease industry.

Fair Trading as Regulator assisted the home owners in vindicating their rights and achieved a very significant outcome.

A great deal has been done but much more is needed to deal with misconduct by rogue operators.

CONTEMPT

It is generally understood by most people who have been involved in proceedings before the NSW Civil and Administrative Tribunal (NCAT) that orders made by the Tribunal are legally binding. That is, if the Tribunal makes an order that a person must do or must not do something, that person must comply with that order.

It is also general knowledge that sometimes Tribunal orders are not complied with. When that happens the party in whose favour the orders were made may need to take further action if they want the other party to fully comply with the orders. Further action may involve speaking with or writing to the other party to remind them about the orders, or renewing proceedings at the Tribunal. But what if you take these steps and the other party still doesn't comply with a Tribunal order? In this article we look at two cases where that happened and learn what action the home owners took against the operator.

Case 1: Wilful disobedience of provisions of Tribunal order

On 28 June 2019 the Tribunal ordered the operator of Homestead Holiday Park to provide a signed standard form site agreement to Jacques Fontainas, a home owner at the community. The site agreement was to be provided within 14 days from the date of the decision and had to comply with Schedule 1 of the *Residential (Land Lease) Communities Regulation 2015*. The fees, charges, and site fee increases stipulated in the site agreement were required to be consistent with equivalent sites within the community that were the subject of current site agreements.

The operator did not agree with the decision of the Tribunal and applied to the Supreme Court of NSW for a judicial review of the decision. Those proceedings were dismissed on 11 October 2019.

The operator then filed an appeal against the Tribunal decision on 19 November 2019 and the Appeal Panel placed a stay on the order until the appeal was determined. On 3 February 2020 the appeal was withdrawn and dismissed and the stay was lifted. That meant the operator had 14 days in which to comply with the original Order and provide a site agreement to Mr Fontainas.

Again, the operator did not provide a site agreement as required by the Tribunal Order. Instead, it sent a long letter to Mr Fontainas with a disclosure statement, site condition report, NSW Fair Trading 'Moving into a land lease community' brochure, sample site agreement and community rules. The letter referred to the requirement imposed on the operator to ensure that structures on residential sites complied with local government regulations. It then went on to assert a number of structures on the site breached the regulations and set out extensive requirements Mr Fontainas must meet as pre-conditions to the operator entering into a site agreement with him.

Mr Fontainas sought assistance from Legal Aid who attempted to resolve the issues with the operator. When that course of action proved fruitless, Legal Aid lodged an application to the Tribunal on behalf of Mr Fontainas asking the Tribunal to refer proceedings to the Supreme Court under section 73 (5) of the *Civil and Administrative Tribunal Act* (CAT Act) on the question of contempt.

Contempt of the Tribunal

Contempt of the Tribunal is similar to contempt of the court. A person can be in contempt if they are disrespectful to legal authorities in the courtroom or Tribunal, or if they wilfully fail

to obey an order of the court or Tribunal. The application to the Tribunal in this case alleged the operator had wilfully failed to obey the Order of the Tribunal to provide Mr Fontainas with a site agreement in the standard form.

The case was heard on 4 December 2020 by The Hon F Marks Principal Member. One of the considerations was whether the operator was able to refuse to issue Mr Fontainas with a site agreement if the pre-conditions set out in the letter they had sent to him were not complied with. The Hon F Marks concluded that the Tribunal Order did not permit the operator to refuse to provide a site agreement in those circumstances. The operator made further assertions about the Tribunal Order lacking specificity and that the Order precluded it from complying with its lawful requirements. Those submissions were rejected.

The Tribunal found the operator had *"failed to comply with the plain terms of the Order, it has consistently persisted in seeking to compel the applicant to provide evidence of compliance with matters which have already been addressed, it has persisted in raising arguments about matters where there are findings contrary to its position, it has failed to produce any evidentiary material in support of its position and has demonstrated a general unwillingness to provide the applicant with a long-term residency."* The Tribunal concluded that the operator had not established that it had a reasonable excuse for failing to comply with the Order.

David Dodge, home owner at Hacienda Caravan Park

The Tribunal further determined that there was no *"casual, accidental or unintentional excuse for its (the operator's) wilful disobedience of the provisions of the Order."*

The Tribunal found the operator's conduct was capable of amounting to contempt and then considered whether to refer the matter to the Supreme Court. In conclusion the Tribunal said, *"Enforcement of orders made by this Tribunal is limited by the provisions of the CAT Act. In the circumstances which have prevailed to date in these proceedings referral of the respondent to the Supreme Court for determination as to whether it should be held guilty of contempt of this Tribunal and if so the fixing of an appropriate penalty appears to be the only course of action now available to the applicant to enforce rights which have been afforded to him by an order of this Tribunal. I propose to make an order for referral accordingly."*

Case 2: Same operator, different home owner

On 23 December 2019 the same operator was again

Continued on page 36...

Contempt of the Tribunal is similar to contempt of the court. A person can be in contempt if they are disrespectful to legal authorities in the courtroom or Tribunal, or if they wilfully fail to obey an order of the court or Tribunal.

In these two cases, the Tribunal found that the operator had stubbornly refused to obey clear orders of the Tribunal.

The Tribunal then considered whether to refer the matter to the Supreme Court of NSW and reached the same conclusion in both cases: referral to the Supreme Court for determination as to whether the operator should be held guilty of contempt of the Tribunal appears to be the only course of action available to the home owners to enforce their rights.

Continued from page 35...

involved in enforcement proceedings on the same issue. David Dodge is a home owner at Hacienda Caravan Park and he was assisted by Paul Smyth, Residential Parks Legal Officer at the Tenants' Union.

On 17 January 2018 the Tribunal ordered the operator to prepare and enter into a written site agreement in the standard form with Mr Dodge within 7 days of the Order. The operator appealed to the Appeal Panel and Supreme Court of NSW. Both appeals were dismissed.

Again, the operator alleged that structures on the home owners' site were non-compliant with local government regulations, and set a number of pre-conditions that must be met before the operator could issue a site agreement. At the enforcement hearing the operator argued that it could not comply with the Tribunal Order because of statutory obligations imposed on it and the home owner.

The Tribunal constituted by The Hon F Marks found that, *"the respondent has demonstrated a contumacious disregard for the clear terms of the Orders and has consistently declined to comply with them."*

The Tribunal concluded that, *"there is, on the evidence, and having regard to the relevant statutory context no impediment to the respondent having complied with the Orders at least by 29 October 2019 being 14 days after the respondent's appeal to the Supreme Court was dismissed, and no reasonable excuse for it having failed to do so. It follows that the respondent has not established that it has a reasonable excuse under section 73 (2) of the CAT Act for having failed to comply with the Order."*

Referring the matter to the Supreme Court

Next, the Tribunal considered whether to refer the matter to the Supreme Court of NSW and reached the same conclusion as in the Fontainas case – that referral to the Supreme Court for determination as to whether the operator should be held guilty of contempt of the Tribunal appeared to be the only course of action available to the home owner to enforce rights which had been afforded him by orders of the Tribunal.

At the time of going to print neither Mr Fontainas nor Mr Dodge have a signed site agreement with the operator and there has not yet been an outcome from the Supreme Court.

DAVID VS GOLIATH

By Bob Morris, Kincumber Nautical Village

Bob Morris is a land lease community home owner and resident committee member. He also became an advocate for other home owners in his community when they decided to challenge the legality of the fixed method site fee increase that is a term of their site agreements. Bob wrote this article to share his experience and to highlight some of the difficulties facing home owners when they want to assert or protect their legal rights.

Bob Morris, revealing the strength of David in a battle with Goliath.

The balance of power in land lease communities rests squarely in the hands of the operator. The introduction of the *Residential (Land Lease) Communities Act* (RLLC Act) in 2015 strengthened their ability to dictate the terms which affect the residents. This was clearly demonstrated after the NSW Civil and Administrative Tribunal (NCAT) handed down its decision in favour of the 51 residents who challenged the legality of the multiple fixed method site fee increase being used by Kincumber Nautical Village (KNV). This series of calculations was producing increases of between $13 and $18 per week in 2018, with a compounding formula which meant site fees would double from $300 per week to $600 per week over 9 years for those at the top of the scale.

The decision was handed down by Senior Member Ross on 3 September 2020. On 16 September 2020 we (the applicants) were informed an Appeal had been lodged by the operator. On 1 October, the 51 residents involved in the case received a letter from the operator stating he was seeking leave to have the Appeal questions of law referred to and heard by the Supreme Court of NSW. For a group of pensioners, this was a daunting prospect, with the possibility of considerable costs involved. This is part of the power game from those with the resources to hire the best lawyers and where legal fees can be written off against taxes. Residents were asked to "clarify how they would be represented" and were asked to inform the operator if they "do not wish to participate in the appeal at all." Despite initial fear, the 51 remained solid and decided to stay in the fight and to oppose the referral to the Supreme Court of NSW.

The decision on the referral was made by the Appeal Panel constituted by Deputy President S Westgarth,

Continued on page 38...

Continued from page 37...

after written submissions were filed by both sides. On 10 December 2020 this decision was published on NSW Caselaw website, where the Appeal Panel refused the request for referral and set in train the processes in which the Appeal was finally heard by the Tribunal Appeal Panel on 25 March 2021. A significant consideration in the judgement was a letter sent on 4 November 2020 to all home owners on the fixed method informing them of an increase in site fees from 27 January 2021. This was in contempt of the existing Tribunal orders, and at a subsequent directions hearing, an order prohibiting any increase until after the Appeal is determined was put in place.

The Appeal Panel at the Appeal hearing consisted of Senior Members Kay Ransome and David Robertson SC. The operator was represented by a barrister, Adam Hochroth, instructed by Corrs Chambers Westgarth Lawyers, while I represented the respondents to the Appeal.

As a retired teacher, it was a huge learning curve for me, and it was most certainly a David versus Goliath scenario. However, with the support of Julie Lee and Paul Smyth from the Tenants' Union, I felt confident in presenting the case on our behalf. The Tribunal is less formal and more flexible, and with thorough preparation, I am very hopeful the Appeal will be dismissed.

The defence of the multiple fixed methods used, evolved from a "formula" to a "series of calculations" to finally "3 separate fixed methods" which added together to become "one fixed method" despite the Act saying only one method could be used. To me that defied all logic and I did point out that when 4, 9 and 16, all of which are perfect square numbers are added together, the result is 29 which is not a perfect square!

The Act offers an operator four options when using the fixed method, with only one to be chosen. There is a fifth provision of "other" if none of the four are selected. Our agreement involved crossing out the first four, selecting "other" but then going back and choosing two of the four and adding another to make three fixed methods. I used an analogy involving my 4-year-old granddaughter to demonstrate the absurdity of this position. As a treat, I would offer her a list with instructions to select one only. On the list there might be an ice cream, a chocolate bar, a meringue, a cream bun or other (specify). Using their example, she could reject the first four, select "other" and then proceed to include all the first four treats. This was the "logic" of the appellant's argument and seemed well at odds with the intent of the Act.

The decision has been reserved and as this is a landmark case, it may be a while before it is published. The lesson to be taken from this case is that individuals can stand up for their rights and be proactive in their endeavours.

On 11 November 2020 the local Liberal Member for Terrigal, Adam Crouch and the Labor Member for Gosford, Liesl Tesch, both spoke in Parliament supporting our case. Hopefully that bipartisan support will translate into significant changes to the Act which is currently under review. Now is the time for residents to regain certainty, fairness and equity in land lease communities.

"The operator was represented by a barrister, Adam Hochroth, instructed by Corrs Chambers Westgarth Lawyers, while I represented the respondents.

"As a retired teacher, it was a huge learning curve for me, and it was most certainly a David versus Goliath scenario. However, with the support of Julie Lee and Paul Smyth from the Tenants' Union, I felt confident in presenting the case on our behalf. The Tribunal is less formal and more flexible, and with thorough preparation, I am very hopeful the Appeal will be dismissed."

– Bob Morris, Kincumber Nautical Village home owner

STOP PRESS!

PALM LAKE RESORT APPEAL • DISMISSED •

On 30 June 2021 the NSW Civil and Administrative Tribunal (NCAT) Appeal Panel handed down the decision in *Palm Lake Resort P/L v King and Metcalfe* NSWCATAP 195. The proceedings were an appeal by the operator against a finding by the Tribunal at first instance that the site fee increase term in the home owners' site agreements contained more than one fixed method. This case is similar to the one at Kincumber Nautical Village (see preceding article 'David vs Goliath' on page 37) however the fixed method terms being disputed were different.

The site agreement term provided that sites fees would be increased by 3% or CPI, whichever is the greater. The Tribunal determined the term breached section 66 (2) of the *Residential Land Lease Communities Act* and that the method that results in the lower increase is to be applied.

The operator appealed on two grounds or error of law, only one of which was pressed at the hearing: Sections 65(2) and 66(2) were wrongly construed and applied because, on the proper construction of those provisions, the site agreements did not provide for a site fee increase "by more than one fixed method" and so complied with s 65(2)(a) and s 66(2) of the Act.

At the 16 February 2021 hearing Senior Counsel for the operator argued that the term of the site agreement did not offend the Act because site fees would only be increased by one of the methods, not both.

Home owners were represented by Paul Batley barrister of Frederick Jordan Chambers, instructed by Paul Smyth, Residential Parks Legal Officer at the Tenants' Union. Wendy Sotera, the home owners advocate, also appeared at the appeal hearing.

It was submitted on behalf of the Respondent home owners that the Tribunal had not erred in law or fact, that the meaning of s 66(2) is clear and that there is no ambiguity or constructive choice in the provision.

The operator argued that the term of the site agreement did not offend the Act because site fees would only be increased by one of the methods, not both.

The Tribunal Appeal Panel rejected this argument.

Further submissions were made on the specifics of the term of the site agreements and why they offended the Act, and that the order at first instance is supported by section 12 of the Act, which prohibits contacting out.

In reaching a decision the Appeal Panel said "We agree with the reasoning of the primary member supported by the additional matters raised in the residents' reply to and written submissions on appeal."

The appeal was dismissed. •

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 website or at: **eepurl.com/bYu-9D**

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We welcome donations, but 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 (and may get Tribunal appearance assistance) from your local Tenants Advice & Advocacy Service (see contact details at right).

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The Noticeboard
for land lease community residents

We regularly update *The Noticeboard* – our website for land lease communities. You can find over 20 factsheets, back issues of *Outasite* magazine, and *Outasite Lite* email newsletter. The address is:

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