Land Lease Communities Newsletter
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OutasiteLite

Michael Anderson, home owner at Kincumber nautical village.

ANDERSON'S WIN SETTLES MORE THAN ONE DISPUTE ON UNFAIR CONTRACT TERMS

While new land lease community laws have been in place for over a year banning the use of multiple elements in a fixed method of site fee increase, last year one case challenged the practice under provisions of the Australian Consumer Law.

Mr Michael Anderson, a home owner at Kincumber Nautical Village (KNV) moved into the community in early January 2020 and signed a site agreement with a fixed method of increase containing five elements.

He recently won his case in the NSW Civil and Administrative Tribunal (NCAT), making the wait worthwhile and the case an excellent resource for home owners who now have greater clarity around successfully challenging an unfair contract term under Australian Consumer Law (ACL).

In Mr Anderson's community there were about 160 home owners with site agreements that have a 'by notice' method of increase and 200 home owners with site agreements that had the now redundant multi-element fixed method of increase similar to Mr Anderson's. Over time a stark contrast in site

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fee increases arose between home owners on the 'by notice' method of increase and those on the excessive fixed method increase.

For a time, this was managed for Mr Anderson at least by the operator temporarily reducing the site fee increase. In November 2023 Mr Anderson was hit by a double whammy site fee increase when the operator withdrew the temporary site fee reductions.

Mr Anderson sought legal advice and assistance from the Tenants' Union of NSW. We prepared a letter of demand for the refund of all the extra site fees that Mr Anderson had paid since the increase took effect, asserting that the site fee increase term was void because it was an unfair contract term within the meaning of s23 of the Australian Consumer Law (ACL). Once this request was not met an application was filed with NCAT in March 2024 and the decision was finally delivered on 26th September 2025.

RELATED PROCEEDINGS IN NCAT

The residents of Kincumber Nautical Village have a protracted history of dispute with the former operator regarding both excessive site fee increases and the use of the multi-element fixed method of increase in their site agreements.

In earlier editions of *Outasite* and *Outasite Lite* we reported on some of the cases initiated by home owners from the community prior to Mr Anderson's application to the Tribunal. (*Outasite* magazine 6 and *Outasite Lite* edition 40).

Ordinarily the fixed method of increase cannot be challenged under the *Residential (Land Lease) Communities Act 2013* (RLLC Act). However, a group of 52 home owners applied to the New South Wales Civil and Administrative Tribunal (NCAT), for a determination that their multi-element fixed method was inconsistent with section 65 and section 66 of the RLLC Act and also sought orders that it was an unfair term under Australian Consumer Law (ACL).

The Tribunal initially agreed with home owners in Morris & Ors v Kincumber Nautical Village Pty Ltd (KNV), that their fixed method of increase was inconsistent with section 65 and 66 and the case was won.[1] However the Tribunal had not in that case accepted their submissions that the multi-element site fee term was an unfair contract term. Instead NCAT preferred the operator's submissions that their site agreements are not standard form contracts that engaged Australian Consumer Laws on unfair contract terms.

The operator appealed the Morris decision. The NCAT Appeal Panel subsequently reversed the decision, determining that the multi-element fixed method of increase was lawful and consistent with section 66 of the RLLC Act. In their view even though it had many elements it was still one fixed method. However without a cross appeal by the home owners, the Appeal Panel of the Tribunal was not required to consider whether the term was an unfair contract term.

Other cases from the same community also preceded Mr Anderson's, highlighting the persistence of home owners from Kincumber Nautical Village in challenging exploitative business practices.

MR ANDERSON'S CASE REEXAMINES THE ISSUE OF UNFAIR CONTRACT TERM

Mr Anderson's legal representatives argued in the letter of demand and before NCAT that the site agreement was a consumer contract and a standard form contract within the meaning of the ACL. In accordance with section 23 of ACL, establishing that there was a standard form contract was one part of Mr Anderson's case. The other part of his case was to show that the term being challenged was unfair.

The meaning of unfair is outlined in section 24 of the ACL

(1) A term of a consumer contract is unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The Tenants' Union submitted that the term fails to balance Mr Anderson's interests and the interests of KNV; the term is not reasonably necessary to protect the legitimate interests of

KNV and causes detriment to Mr Anderson if applied or relied on by KNV.

Evidence for Mr Anderson demonstrated that the site fee increase term in his site agreement was not transparent (it did not set a fixed price), and the operator has most, if not all, of the bargaining power when entering into a site agreement with homeowners. It was proven that the operator had already prepared the terms of the site agreement prior to the meeting or discussions that took place when he entered into the site agreement and therefore Mr Anderson was not afforded a genuine opportunity to negotiate any of the terms in it. In effect he was offered the site agreement on a 'take it or leave it' basis.

The Tribunal noted that when a person buys a home in a land lease community, they can't avoid the legal requirement to enter into a site agreement with the operator. This alone can significantly affect the balance of bargaining power.

THE DECISION

After the Tribunal had considered all of the evidence and submissions of the parties they determined that a site agreement is a standard form contract and the fixed method of site fee increase term was unfair and therefore void by operation of section 23 of the ACL. The Tribunal ordered that the Operator refund any overpaid site fees from 7th December 2023 and for parties to come to an agreement about the amount to be refunded.

Orders were also made that if an agreement couldn't be reached about the amount to be refunded, the parties were required to submit evidence about this. The Tribunal has since made the formal order for the refund amounts and issued a certified money order.

Mr. Anderson's NCAT decision has been published as *Anderson v Kincumber Nautical Village Pty Ltd [2025] NSWCATCD 90* and can be found on **caselaw.nsw.gov.au**. It is a useful reference for current and prospective homeowners negotiating terms of their site agreements, especially because it establishes that site agreements are a standard form contract as defined under the Australian Consumer Law and examines the fairness of terms that are included.

RIGHTS OF HOME OWNERS MOVING INTO LAND LEASE COMMUNITIES

When buying a home in a land lease community the site agreement that is offered must be in the standard form as provided in Schedule 1 of the *Residential (Land Lease) Communities Regulations 2015*. The method of site fee increase is specified as a negotiable term.

The Tenants' Union is aware of other instances where home owners were not given a genuine opportunity to negotiate terms that are supposed to be negotiable, especially when it comes to the growing trend of inserting long lists of 'Additional Terms' to site agreements before presenting them to prospective home owners to sign.

Home owners or parties to site agreements can rely on Australian Consumer Law provisions regarding unfair contract terms. If prospective home owners are not given an opportunity to negotiate on terms of site agreement that are intended by law to be negotiable then operators must ensure they do not constitute an unfair contract term.

There is a 14 day cooling off period from the date that a site agreement is signed which allows home owners who are unable to negotiate terms they are comfortable with to cancel the site agreement if needed, without paying any compensation (so long as they are not living there yet). Accordingly the contract for sale can be cancelled in the 14 day cooling off period as well without being required to pay any compensation. (See our **Factsheet: Moving into a Land Lease Community**.)

For any home owners in need of free and profession advice about whether you potentially have an unfair contract term, advice can be sought from your **local Tenants Advice and Advocacy Service** or **Legal Aid NSW / Law Access** (1300 888 529).

1. The KNV operator successfully appealed the home owners win in Kincumber Nautical Village Pty Ltd v Morris & Ors [2021] NSWCATAP 275 a subsequent appeal by home owners to the Supreme Court of NSW conducted as a class action in Rowe v Kincumber was unsuccessful. Rowe v Kincumber Nautical Village Pty Ltd [2022] NSWSC 1378; Rowe v Kincumber Nautical Village Pty Ltd [2022] NSWSC 533.

GOVERNMENT RESPONDS TO IPART REVIEW OF EMBEDDED NETWORKS IN NSW

In a previous edition of Outasite Lite we reported that the Government had accepted 36 of the 38 recommendations made by the Independent Pricing and Regulatory Tribunal's (IPART) in their review of embedded networks in NSW.

The IPART review covers all manner of embedded energy networks from electricity, gas, hot and chilled water so not all are relevant to residents in land lease communities. This article focuses on the Government's response to recommendations made by IPART relating to electricity services from an embedded network.

IPART AS THE REGULATOR FOR PRICING

A few recommendations from the review encouraged the Government to consider appointing IPART as the most appropriate regulator in the energy market to monitor and set benchmark pricing.

The Government expressed its support for the enactment of legislation that will authorise IPART to:

- Determine maximum price protections.
- Review and update maximum prices annually to reflect market conditions and to align the process for embedded network pricing with that for authorised retailers.

Amendments last year to the *Residential (Land Lease) Communities Act 2013* (RLLC Act) and *Residential (Land Lease) Communities Regulation 2015* (RLLC Regs) had already authorised IPART to perform these functions specifically for land lease communities.

IPART proposed to use a new methodology when setting the maximum price for electricity, and this has also been accepted by the Government. The new method will be based on the median of the lowest market offers generally available in each distribution area.

For residents in land lease communities this will be an improvement on the current pricing methodology used, which is based on the median market offers generally available in each distribution area.

IPART AS THE REGULATOR FOR COMPLIANCE

The Government expressed support for IPART being appointed as the regulatory authority who investigates and enforces compliance.

Legislation will be enacted to:

- Establish a statutory framework which allows IPART to request documents from the embedded network seller, for the purpose of monitoring and investigating compliance with maximum pricing.
- Authorise IPART to give directions to an embedded network seller to take an action within a specified timeframe around compliance issues.
- Allow IPART to consider any actions taken by an embedded network seller to address non-

compliance, without removing IPART's power to issue a directive or penalty.

- Make it an offence, which may attract a monetary penalty for:
  - failing to comply with IPART's maximum price determinations.
  - not supplying documents when asked.
  - not complying with a direction by IPART within a specified timeframe.

OTHER GAPS FOR EMBEDDED NETWORK CUSTOMERS AND EXEMPT SELLERS

The Government has acknowledged that improvements are needed to ensure customers in embedded networks have similar access to consumer benefits and protections as 'on market' customers when installing sustainability infrastructure such as roof top solar.

This was also one of the recommendations that came out of the statutory review of the RLLC Act in 2021 and we anticipate more clarity around how this will be implemented in 'phase two' of the amendments to the RLLC Act and other legislative reforms expected in 2026.

IPART proposed that exempt sellers should be able to apply time of use tariffs such as peak, off peak and shoulder charges. This was conditionally accepted so long as they do not exceed default market offer pricing.

The Government reasoned that if customers have the option of reducing their demand when the grid is busiest there would be a cost benefit for the customer.

Support was also expressed in principle for embedded network sellers to be given sufficient notice and opportunity to renegotiate their contracts at the parent meter after price reviews by IPART.

IPART did not suggest a notice period for embedded network customers when prices change due to an IPART review or other reasons.

Residents have been enquiring with the Tenants' Union about their rights to sufficient notice of price changes so they can budget accordingly and the Tenants' Union will continue to provide that feedback to Government.

The Government agreed with IPART's recommendation that exempt sellers should be required to publish information on their websites stating where they provide embedded network services and their pricing. Legislation will be enacted to ensure that this happens and where they do not have a website they will be required to provide that information to the regulator who will make it available on their website.

We know most operators are charging the maximum price that IPART sets and that is what we expect to see published on land lease community websites. Increased visibility of embedded networks is welcomed however it is unclear how publishing electricity charges for embedded networks would improve market choice or competition when the majority are charging the IPART maximum.

The Government responses indicated that more work may be needed to address concerns from stakeholders about the price setting process. This is particularly true for home owners in land lease communities who have been entitled to information about an operator's retail contract and charges at the parent meter due to the inclusion of section 77A in the 25th September 2025 amendments to the RLLC Act. That information has shown excessive profit margins many operators achieve from their unrestrained permission to charge residents according to the IPART maximum price caps.

Much of the legislation needed to progress the legislative framework for embedded networks has already been developed and introduced under the *Energy Legislation Amendment Bill 2025*.

THE GOVERNMENT'S ENERGY LEGISLATION AMENDMENT BILL 2025

The Energy Legislation Amendment Bill has many objectives including better preparing the energy market for sustainable energy projects and strengthening existing aspects of the energy market.

The NSW Bill amends 6 pieces of legislation including two 2 specific changes to the *Residential (Land Lease) Communities Act* in Schedule 6 of the Bill.

The first change is to ensure pricing protections and states that if there is any inconsistency with calculations under section 77(7) – (7A) of the RLLC Act and the National Energy Retail Law (NSW), then part 5, Division 6A of the National Energy Law NSW (NERL) charges must be used. The drafting of part 5, Division 6A of NERL was not shared publicly at the time the amendment was proposed.

The second change has been a cause for concern because it proposed to omit section 77A of the RLLC Act – this reduces transparency for residents around operator obligations to disclose their charges and share the outcome of reviews of their retail contracts at specified times for the parent meter.

"The second change has been a cause for concern because it... reduces transparency for residents around operator obligations to disclose their charges and share the outcome of reviews of their retail contracts at specified times for the parent meter."

The Tenants' Union made two recommendations in a briefing paper sent to Local MPS across NSW asking for the Bill to be amended.

1) *Ensure that the drafting of National Energy Retail Law (NSW) Part 5 Division 6A does not affect residents' ability to receive a discount on their daily supply charge when receiving low amps.*

2) *Remove Schedule 6(2) from the Bill to retain section 77A in the Residential (Land Lease) Communities Act 2013.*

The recommendations had attracted some support but not enough and within days the *Energy Legislation Amendment Bill 2025* was passed in the Legislative Assembly without amendments.

The Bill has since been assented to (on 26 November 2025) and it will bring a lot of positive change from the Government's consideration of the IPART review. One such change is contained in amendments to the *Electricity Supply Act 1995*. That Act makes it unlawful to apply a charge or provide $0 credit per kilowatt-hour for solar-generated electricity a customer supplies to a retailer or an exempt seller. Operators who have refused to offer any credit for electricity residents produce will be required to modify their approach. For any residents in this position it is advisable that they enquire with the Energy and Water Ombudsman NSW (EWON) about when this change comes into effect.

Despite the improved regulatory provisions from the Bill, we continue to hold concerns around the loss of section 77A from the RLLC Act, mentioned above. Without the transparency provided by 77A it is possible that the requirement to conduct a review of the electricity provisions in Part 7 of the RLLC Act within 3 years from the 25th September 2024 will not receive the proper scrutiny that it warrants.

SEASONS' GREETINGS!

As we wrap up 2025 many of us are looking forward to relaxing at home with family or friends, or going away and coming back to a stable and secure place we call home. But we know this isn't the case for everyone.

Our hearts go out to those living in crisis, without a stable home, and all those in our community affected by violence. It's a good moment to commit to standing with victim-survivors against all forms of violence, whether personal or systemic, whether motivated by racism, sexism, other forms of bigotry, or greed and power. Our homes must be safe and our communities welcoming. We commit to working together towards peace and justice for all.

We hope you have a lovely festive season, and we want to thank you for your support over 2025 – we really value our subscribers.

It's also a good time to recognise the tireless Tenant Advocates in the Tenants Advice and Advocacy Services who work extremely hard advising tens of thousand of tenants and land lease community residents every year. Many of them will be taking a well-earned break, but some stalwarts will step up to staff our Holiday Advice Line.

IF YOU NEED ADVICE OVER THE HOLIDAY PERIOD, PLEASE CALL:

8117 3750 or 1800 251 101

The Holiday Advice line will operate from Monday 22 December 2025 until Friday 9 January 2026 – everyday except weekends and the public holidays like Christmas day, New Year's day etc). Hours of operation are between 10am-1pm and 2-5pm.

And of course, you can always access all our factsheets, sample letters, blog posts, reports, and other resources on **The Noticeboard** at tenants.org.au.

Please note that apart from the Holiday Advice Line, the Tenants' Union office will be closed from Monday 22 December to Thursday 8 January 2026 (inclusive). See you next year!

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