TENANTNEWS
Newsletter of the Tenants' Union of NSW ■ Number 96 June 2011

Aboriginal community housing: where to next?

Since 2007 there have been major changes in Aboriginal housing policy at the national level. The Commonwealth has refocused its resources on providing extra housing in remote communities, while devolving responsibility for housing in urban and regional areas to state and territory governments under the general framework of the National Affordable Housing Agreement.

At the same time, it has driven a policy approach that involves substantially increased levels of government control over Aboriginal community housing.

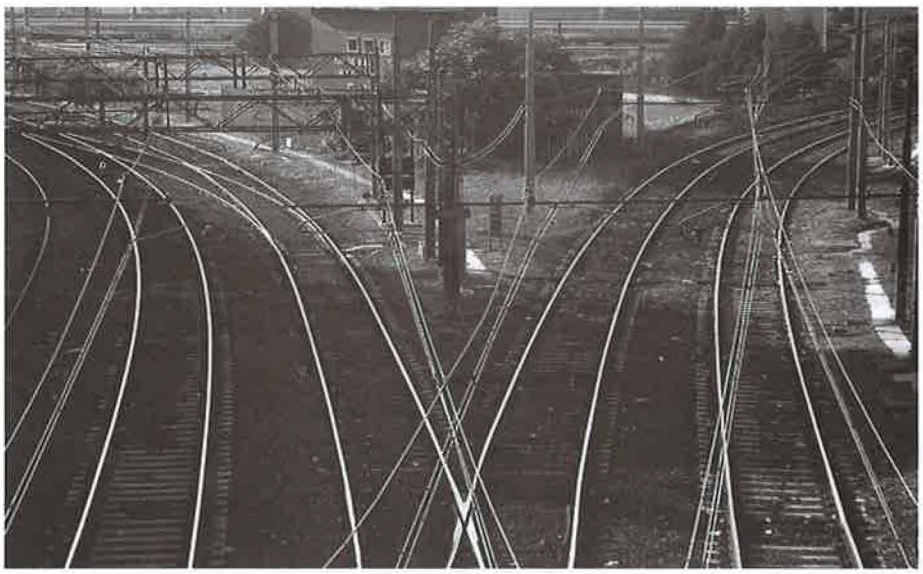

Photo by Domenico Nardone (domeniconardone.it) Used under a Creative Commons licence

In 2010, the NSW Aboriginal Housing Office (AHO) released the Build and Grow Strategy, providing for:

- a new registration process
- new, more stringent standards for Aboriginal community housing providers (the Provider Assessment and Registration System or PARS)
- a new rent policy
- a process of head-leasing properties to the AHO for organisations unwilling or unable to meet registration standards but still wishing to make use of AHO funds.

This strategy was developed at least partly as a way of implementing the Commonwealth-driven changes. Simultaneously, changes to the NSW *Aboriginal Land Rights Act 1983* (ALR Act) required the registration of social housing schemes operated by Local Aboriginal Land Councils (LALCs) and expanded the range of LALC activities that require NSW Aboriginal Land Council (NSWALC) approval.

What follows is a summary of research on the state of policy as it was in late 2010 (commissioned by the TU, NSW Aboriginal Tenants Advice Network, Shelter NSW and the NSW Council of Social Service and conducted by John Eastgate and Nicole Moore).

The Aboriginal community housing sector has an important role to play in meeting the housing needs of Aboriginal people in New South Wales. This role is important because:

- it contributes to self-determination and economic development in Aboriginal communities
- it provides an alternative, culturally appropriate option for Aboriginal households whose needs are not met by mainstream organisations
- it helps to meet the huge unmet housing need in Aboriginal communities.

Aboriginal community housing organisations have been in operation since the mid-1970s. They received a major boost in the mid-1980s when a considerable amount of housing was transferred to LALCs as part of the implementation of the ALR Act. They were further boosted in 1998 with the creation of the AHO.

There are slightly over 200 NSW Aboriginal community housing organisations, of which 112 are LALCs. They manage around 4,400 properties between them, an average of just over 20 properties each. They are typically small and localised, with 137 organisations managing fewer than 25 properties and 28 managing fewer than five.

The largest organisations in the sector are the Regional Aboriginal Housing Management Services (RAHMS) each of which manage over 200 properties on behalf of local organisations.

Recent policy changes are aimed at better managing the risks in the operation of the Aboriginal community housing sector. However, flaws in the design of some of the key policies threaten to undermine this. These include:

- the implementation of the PARS threatens to exclude an unacceptable number of organisations from registration
- the process of head-leasing to AHO for non-registered organisations is likely to put off many potential providers, including some that already have third-party management arrangements (such as through the RAHMS)
- the proposed funding arrangements provide little incentive for well-managed organisations to opt in to the system
- the proposed rent policy is widely seen as culturally inappropriate and financially unsustainable.

As a result, a large proportion of organisations are likely not to engage with Build and Grow and to manage their operations outside this system. However, these problems are not insoluble and a targeted set of policy changes will potentially lead to a significantly better result.

Changes to the ALR Act in 2010 require LALCs to have all existing and new social housing schemes approved by NSWALC and to seek NSWALC approval for a wider range of land dealings, including granting of long-term leases. These changes are not overly onerous in themselves. However, they appear to have been developed with minimal reference to Build and Grow and the two regulatory schemes may cut across one another.

It seems unnecessary for small organisations to have the same activity simultaneously regulated by two state bodies, and greater coordination between NSWALC and AHO can improve the regulatory environment.

The following recommendations outline the key improvements essential to improving this environment and moving towards a more positive engagement with the Aboriginal community housing sector.

1. That AHO and NSWALC work together to resolve the tensions and conflicts between their regulations, and to devise a joint process so that organisations only have to go through compliance once.

2. That both AHO and NSWALC continue to support the importance of Aboriginal community-controlled organisations as a means of meeting housing needs, preserving cultural ties and promoting self-determination.

3. That resources be dedicated to capacity building for all

Recent policy changes are aimed at better managing the risks in the operation of the Aboriginal community housing sector. However, flaws in the design of some of the key policies threaten to undermine this.

organisations to firstly engage them in the process of reform and quality improvement, and then to help them reach the PARS standards. In particular, organisations with 'conditional approval' need support to reduce the risk of being not approved on reassessment.

4. That PARS standards be reviewed to ensure their appropriateness, with particular attention to policies around communication, rent setting, tenancy succession and housing occupancy. The aim of such review would be to ensure that standards are culturally appropriate, while setting a comparable overall standard to that expected of mainstream organisations.

5. That non-approved organisations be permitted to head-lease directly to a registered organisation of their choice, rather than only to the AHO, and that there be a dedicated effort put into developing organisations in each region with the capacity to manage on behalf of others, along the same lines as the RAHMS, or using a different model if this suits local organisations.

6. That rent policy be reviewed to remove the intrusive element of organisations needing to check constantly on household makeup and income. This could involve either the use of a cost rent model or the modification of the income-based rent model to ensure that there is no need for continual supervision of household makeup, and that there is security of rental income for organisations.

7. That funding for backlog maintenance be retained, and that capital funds be made available to organisations with well-maintained assets to provide a better financial incentive to 'opt in'.

8. That a two-way communication strategy be implemented to ensure that the sector understands the new policies and the implications of decisions they make regarding head-leasing, PARS assessment and other key policy directions, and that AHO can hear and act on feedback regarding the appropriateness of these policies.

9. That AHO resource the development of an independent peak support and advocacy body for the Aboriginal community housing sector. ■

For the full report see **www.tenants.org.au/publish/social-housing**

Developments on the policy front since the research was conducted

NSWALC and AHO are working together more closely, including discussing possibility of mutual recognition, or tiered recognition, between NSWALC's forthcoming system for approving LALC social housing schemes (SHAPE) and AHO's PARS.

Limited capacity-building resources are available to assist organisations engage with the reform process and reach the PARS standards.

Work is currently underway to **review the PARS standards** following the pilot phase.

The **preference of owners as to who the provider should be is taken into account** where the AHO sub-lets properties of non-approved organisations to registered providers.

The **new standard for rent determination** is 'household rent' or 'property rent' – whichever is lower. Most tenants will pay household rent and will pay it to the provider that manages their property. To determine the rent a tenant pays, the provider will firstly set a property rent for each dwelling. This is the most a tenant pays in rent. In most cases this will be set according to the local market.

For areas with no reliable means of determining a private rent, the AHO will publish property rents. After setting the property rent the provider will calculate the household rent. Household rents are determined by family type and linked to the upper rent thresholds that attract maximum Commonwealth Rent Assistance, as published by Centrelink. Household rents do not require the tenant to declare the household's income.

Land council members found to have control over tenancies

Prudence Mewburn
Aboriginal Paralegal

A recent decision of the NSW Land and Environment Court concerned powers of a Local Aboriginal Land Council (LALC) to terminate a tenancy. From now on, members of LALCs will have greater control over the granting and termination of tenancies.

The TU acted for two tenants in the matters *Woods v Gandangara Local Aboriginal Land Council* and *Thatcher v Gandangara Local Aboriginal Land Council* where each was given a termination notice by the LALC.

The LALC passed a resolution at a meeting of its members authorising the CEO to pursue all tenants who failed to comply with their tenancy agreements.

Following this meeting, the LALC issued a termination notice without grounds to two of its tenants. The decision to terminate the tenancies was not put to the LALC's members at a meeting. Instead, the CEO authorised the terminations and carried out steps to end the tenancies.

The case centered around the provisions in the NSW *Aboriginal Land Rights Act 1983* (the Act), which requires LALCs to pass a resolution of the voting members concerning any dealing with land.

The TU argued that:

- the granting and termination of a residential tenancy agreement was a dealing with land and as such, it was necessary for the LALC to pass a resolution of its members for these to validly occur
- this function could not be delegated to any other person or body – even by the members passing a general resolution that gave their authority.

The court found that:

- the function of terminating a residential tenancy agreement was a dealing with land listed under section 52G(e) of the Act, and as such, requires a motion to be passed by the voting membership for it to validly be carried out
- the Act was designed to benefit Aboriginal people – not their LALCs. In this way, the participation of members in the dealings of the LALC, particularly concerning the land in which they have been vested, is essential to achieving the objects of the Act.

Housing provided by LALCs under the Act is an important means of providing Aboriginal people with long-term, low-cost, culturally appropriate housing. This decision increased the security of tenure that tenants of LALCs can enjoy. The process of requiring a majority of the voting membership to pass a motion to grant or terminate a tenancy has the potential to serve as a safeguard from arbitrary termination for LALC tenants.

It also means that members will have greater control over

Photo by Bennett V Campbell (bvcphoto.com) Used under a Creative Commons licence

the important dealings of the LALC. Where these functions were previously the responsibility of the LALC management, members will now have opportunity to ensure that houses are granted correctly and tenancies are only terminated when 80 percent of the voting membership agree that termination is warranted.

This decision serves to strengthen the control of Aboriginal people in their communities and supports self-determination by allowing people to make decisions about housing in their community. It reflects the overriding purpose of the Act by ensuring that Aboriginal people at a community level have authority to make decisions to positively benefit their community. ■

When the park owner is evicted

Paul Smyth
Residential Parks Legal Officer

Park residents have no way of knowing how healthy a park owner's finances are or if indeed the park owner owns the park outright or has a mortgage. What happens to residents if the park owner is in severe financial difficulty?

Photo Patrycja Arvidssen

This article outlines what a resident should do if the park owner cannot pay their debts and the mortgagee takes action against the park owner. This doesn't occur very often but residents need to act quickly if it does.

A park owner defaulting on their loan repayments will find that they are subject to a recovery-of-possession action by the lender (the mortgagee). The mortgagee (e.g. a bank) will want to take possession of the property subject to either a 'deed of charge' or a 'mortgage deed' in order to sell the property to recover its money.

Before becoming entitled to legal possession, the mortgagee should give written notice and commence proceedings in court for recovery. This is called mortgagee repossession.

The notice to vacate

Receipt of a 'notice to vacate' from the Sheriff may be the first time that a resident is made aware that the park owner is in financial difficulty. The resident may not have been informed that the park owner has been party to debt-recovery proceedings. They may also be unaware of any Supreme Court proceedings for orders for possession.

Supreme Court orders for possession are enforced by the Office of the Sheriff of NSW. The notice to vacate is addressed to the park owner and to the 'occupiers' of the park. A sheriff's officer will serve a resident with a notice giving at least 30 days to vacate the property. This notice from the Sheriff is given pursuant to the *Sheriff Act 2005*.

A resident should heed directions by the sheriff's officer who shows up on 'eviction day' to carry out the orders. If the resident does not move out, the sheriff's officer can remove them from the premises by force if necessary.

The legal process to take legal possession of the property and/or premises requires the mortgagee to obtain an order from the Supreme Court of NSW. If the court makes an order for possession, the resident should be notified. Ordinarily, a resident should get notice of the court proceedings but this does not always happen. The court can

make an order even if a resident was unaware of the proceedings.

Sometimes the park owner and the mortgagee are able to resolve the matter and the resident will not have to move out of the park.

What if a resident receives a notice to vacate?

They should speak to the Office of the Sheriff immediately and seek clarification about a planned 'eviction day' and tell the Sheriff whether or not they were given prior notice.

A permanent resident of the park can apply to the Consumer, Trader and Tenancy Tribunal (CTTT) and seek to have a 'tenancy vested' in them using the provisions of section 126 of the *Residential Parks Act 1998* (RPA).

A resident should ask the lawyers for the mortgagee and the CTTT to stay on at their site until an alternative long-term site is found or until the mortgagee sells the park. In this case, a resident could benefit from the compensation provisions of the RPA where they might not otherwise be entitled.

Owner must tell residents of recovery proceedings

If the Sheriff is satisfied that a resident is aware of recovery proceedings and that they have been give 30 days notice, they can proceed with recovery – unless the resident has applied under section 126 for an order vesting tenancy in them against a person with superior title.

Additionally, a resident might need to apply to the Supreme Court for an urgent injunction or a stay on the enforcement of the order for possession where the Sheriff is satisfied that the resident has been given adequate notice.

Application to have tenancy vested

The resident will need to show 'special circumstances' as to why a tenancy should be vested in them.

The CTTT will look to the age of the resident and the length of time they have resided in the park. It can also consider the availability of suitable alternative accommodation and its cost, and lost value of the resident's dwelling if it has to be moved (a dwelling is clearly worth more on site with a residential site agreement that can be assigned).

Historically, an order for tenancy against a person with superior title has never been made in New South Wales. Pursuant to section 76 of the (old) *Residential Tenancies Act 1987*, the CTTT was minded to make this order in *Halaseh v Citibank Ltd* [1996]. In this case, it held that section 76 was broad enough to permit it to vest a tenancy in a sub-tenant over the interests of a mortgagee in possession. However, it declined to make the order because of the tenant's delay in seeking relief.

Time is of the essence

In the above case, the CTTT noted that an application must be made "within a reasonable time" and would have made the order sought but for the seven months it took for the sub-tenant to make the application. ■

TENANCY Q&A

Paying rent owing to save your tenancy

Q **I had some trouble paying the rent recently. The agent took me to the Consumer, Trader and Tenancy Tribunal after sending me a termination notice.**

At the tribunal, he talked me into agreeing to orders ending my tenancy. Now I have paid up all the rent I owe. He says I still have to leave, because I agreed to. Is this true? What can I do?

A You can stay. Because you have paid all the rent owing under the tenancy agreement, the termination order is now of no effect and the agreement is restored.

Agreeing to the tribunal orders does not stop the operation of section 89(3) of the (new) *Residential Tenancies Act 2010* in restoring your agreement.

Paying all the rent owed under the tenancy agreement will restore the agreement up to the time the Sheriff enforces the order by removing everyone from the premises.

Ensure that the landlord or the agent tells the tribunal and/or the Sheriff that you have paid all the rent owing. Demand in writing

Photo by ShapeThings (shapethings.com) Used under a Creative Commons licence

that they inform the tribunal. Write to the Registrar of the tribunal to inform them that you have paid all the rent and so should not be evicted.

Include copies of documents proving the payments. Fax is best if urgent. Send a copy of this letter to the Sheriff.

Call to the registry to confirm it has received your letter and ask what the tribunal and Registrar will do to stop you being illegally evicted.

Grant Arbuthnot

Contacts

Your local Sheriff's office

See www.sheriff.nsw.gov.au or phone 8688 7333 to find your local office

Consumer, Trader and Tenancy Tribunal Registry

- phone 1300 135 399
- fax 1300 135 247

Retaliatory termination of tenancies: new legal provisions

Leo Patterson Ross
Legal Support Officer

The Consumer, Trader and Tenancy Tribunal (CTTT) has recently made several decisions using one of the new provisions of the *Residential Tenancies Act 2010*.

Under the previous Act, the CTTT could refuse to order termination of a tenancy if it was satisfied that the landlord giving a termination notice was wholly or partly motivated by the tenant asserting their rights.

This was a defence a tenant could raise in the CTTT when the landlord had applied for orders for termination and vacant possession of the premises. This defence was rarely successful however – the CTTT rarely refused to make the orders.

The current *Residential Tenancies Act 2010* gives a tenant the ability to apply to the CTTT about a termination notice before their landlord applies for termination of the tenancy. Section 115 allows the CTTT to make a declaration nullifying a notice if it is satisfied that the notice is retaliatory.

Tenants Advice and Advocacy Services (TAAS) have told about such cases where the CTTT has agreed with the tenant and made orders that a termination notice was retaliatory. These decisions may signify a positive change for pro-active tenants who feel that they have received a termination notice, for example, because they have sought repairs. ■

What makes a termination notice retaliatory?

Tenant asserting their rights

Examples include:

- applying to the CTTT for orders that the landlord comply with the residential tenancy agreement
- writing to the landlord asking them to stop breaching the agreement.

In one recent case, a tenant received a termination notice after asking the landlord to stop storing his scooter in the yard.

Proximity of notice

The notice generally needs to have come fairly closely after the assertion of rights so as to show a connection between the assertion of rights and the giving of the notice.

What to do

Be pro-active. Upon getting a termination notice without grounds, you have 30 days to apply to the CTTT for an order that the notice is retaliatory. For any other kind of termination notice – such as at the end of a fixed-term agreement or for alleged breach of agreement – you must apply within 14 days.

Ask your local Tenants Advice and Advocacy Service for help.

JOIN THE TENANTS' UNION

Support us in our work for safe, secure and affordable rental housing for people in New South Wales

Membership application

(Tax invoice ABN 88 984 223 164)

I apply for membership of the Tenants' Union of NSW Cooperative Limited as:

☐ individual tenant ☐ individual (non-tenant)

☐ tenant organisation ☐ organisation (non-tenant)

Name

Address

Suburb

State Postcode

Phone

Email

Fees (GST included)

Annual fee covers 1 January–31 December

- individual low wage / pension / benefit $ 8.00
- individual waged worker $16.00
- organisation $32.00

Payment

Membership fee $

Donation $

TOTAL $

Signed Date

Please return with a cheque or money order made out to:

Tenants' Union of NSW
Reply Paid 85479, Surry Hills NSW 2010

Tenants Rights Factsheets

Find out about:

- your legal rights and obligations
- how to deal with common tenancy issues.

Topics include landlord ending the tenancy, rent increases, rent arrears and repairs.

Read and download the factsheets at the Tenants NSW website **www.tenants.org.au**.

CONTACTS

NSW Tenants Advice and Advocacy Services

Inner Sydney		9698 5975
Inner Western Sydney		9559 2899
Southern Sydney		9787 4679
South Western Sydney	1800 631 993	4628 1678
Eastern Sydney		9386 9147
Western Sydney		8833 0911
Northern Sydney		9884 9605
North Western Sydney	1800 625 956	9413 2677
Blue Mountains	1300 363 967	
Central Coast		4353 5515
Hunter	1800 654 504	4969 7666
Illawarra and South Coast	1800 807 225	4274 3475
Mid North Coast	1800 777 722	6583 9866
Northern Rivers	1800 649 135	6621 1022
North Western NSW	1800 836 268	6772 4698
South Western NSW	1800 642 609	

Specialist services

Greater Sydney Aboriginal		9569 0222
Western NSW Aboriginal	1800 810 233	
Southern NSW Aboriginal	1800 672 185	4472 9363
Northern NSW Aboriginal	1800 248 913	6643 4426
Older persons (statewide)	1800 131 310	9566 1120

Tenants NSW website www.tenants.org.au

Tenant News
ISSN-1030-1054

Editor: Gregor Macfie

Views expressed by contributors are not necessarily those held by the Tenants' Union.

Disclaimer: Legal information in this newsletter is intended as guide to the law and should not be used as a substitute for legal advice. It applies to people who live in, or are affected by, the law as it applies in New South Wales, Australia.

Tenants' Union of NSW

The Tenants' Union of NSW is a specialist community legal centre that has been active in promoting the rights of over 1.5 million tenants in New South Wales since 1976.

The Tenants' Union is also the peak resourcing body for the NSW Tenants Advice and Advocacy Program.

Address:
Suite 201, 55 Holt St
Surry Hills NSW 2010

Phone: 02 8117 3700

Fax: 02 8117 3777

Email: tunsw@clc.net.au