

# Re-thinking Bundagen's Foundations:

## Is There a Need for Change in our Legal Structure?

### PREAMBLE

#### What does 'legal structure' mean?

The legal structure is the legal form of the arrangements we have in place about what and how we do things together. It is the basis for our community life and how we hold the land as a group. It is also what the Australian legal system rests its judgments on in cases such as the recent arbitration.

Ideally our legal structure should reflect our philosophy, vision, values and objectives. It should provide a good framework for what we want to do and how we want to do it, now and into the future. It

should also encourage active participation of members in its democratic decision-making.

The legal structure should also provide a reasonable way to manage and minimize risks and liabilities. While taking risks is often the basis of anything worthwhile, taking reasonable measures to manage and minimize risk is the basis of a solid legal structure to provide a long-lasting sustainable community.

#### Where does Bundagen stand now, in terms of its legal structure?

Bundagen is an Intentional Community (IC)<sup>1</sup> with a Development Consent (DA) as a Multiple Occupancy (MO)<sup>2</sup> based on NSW Environment & Planning Act, Circular 44, IDO 80 (now replaced by Sepp 15). Since 1984, Bundagen has been a non-trading co-operative registered under what was the Co-operatives Act 1992 (NSW) and which is now the Co-operatives National Law. A co-operative is a legal

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<sup>1</sup> **Intentional Community (IC):** A group formed by people (usually with a common interest) who intend to live together as a community. Typically, an intentional community operates according to a legal set of rules devised by members of that community, which incoming members agree to follow.

<sup>2</sup> **Multiple Occupancy (MO):** a type of rural development where a group of people not necessarily related to each other, live on a single property in several dwellings. These people usually have the desire to: live as a community and build a number of dwellings in a rural setting on un-subdivided land as their main place of residence; manage the land for communal purposes in an environmentally sensitive way; and pool their resources to develop communal rural living opportunities.

structure created under legislation under which a legal 'person', known as a co-operative is created. That legal person has individual members who control the actions of the co-operative through democratic decision-making whereby every member has one vote.

In most co-operatives, most day-to-day decisions are in the hands of a board or committee, made up of individuals (the directors /coordinators) elected by members. In the case of the Bundagen Co-operative,

under our rules a lot of decision-making is made by members in GMs and CMs, rather than at board or committee level, reflecting our preference for participatory democracy. Further, the principal

function of the Bundagen Co-operative is to hold and look after the land on which our community lives. As such, the Co-operative is the registered proprietor and legal owner of the land.

The other key aspect of the Bundagen structure is that quite separate to the existence of the co-operative, there are legal arrangements between the Co-operative and residential members living on Bundagen lands. Those legal arrangements arise under the by-laws of the Co-operative, under common law and by virtue of the simple fact that residential members are residing on land owned by someone else, that is, the Co-operative.

Under common law in Australia, as a general rule, anything affixed to the land belongs to the landowner, in our case, the Co-operative. In other words, the item affixed is considered to be part of the land. That being the common law position, the legal structure we have in place at the moment means that the Co-operative (as owner of the land and fixtures, including all buildings) provides a licence to each residential member (a Residency Licence to Occupy - RLTO) enabling them to reside on the property, provided they comply with the rules and by-laws of the Co-operative. That licence is conferred under our rules and by-laws and its terms, and is partly 'express' (that is, in our rules and by-laws) and partly 'implied' (that is, by custom and our history).

### EXPLORING DIFFERENT POSSIBILITIES

There will information sessions in March to discuss this paper and answer questions.

A Visioning Weekend will be held on 28<sup>th</sup> & 29<sup>th</sup> March to look at the big picture, our vision and hopes, before proposals are put to a GM, IF we decide there is a need to make any changes.

## Why consider a change in our legal structure?

Our current legal structure has served us well enough. However, the arbitration last year and the other legal challenges the community has faced in the last 10 years have pointed out potential legal vulnerabilities. Legal challenges might arise from accidents which our public liability does not cover (eg accidents in village areas, members' areas of responsibility and structures, and commercial activities). If such accidents were serious enough, it could potentially mean that the Co-operative would have to sell some or all of the land to pay compensation.

There is also potential for further legal challenges from members dissatisfied with the current system. These are some of the areas of legal vulnerability that we might consider improving to protect our people, the land and our homes.

## What are the changes that are needed to assure longevity to the community?

While investigation and discussions on risk-management, insurance and legal structures seems to complicate things, the aim of the process is to actually simplify our basic structure and clarify the rights and responsibilities of the members.

Some of these changes are already happening:

- An overhaul of our Co-op Rules and our By-laws & GM agreements is nearly complete. This has clarified some grey areas.
- A professional risk-assessment audit was conducted, where dangers were identified (Bundagen has a duty of care and safety is one aspect of this). Changes recommended in the risk-assessment are being implemented gradually.
- Our public liability policy has been discussed in detail with our broker, and increased this year to \$30 million. This policy now includes all communal land and structures including the external roads, **but not activities in villages and homes, nor commercial activities.**
- We are currently exploring the idea of upgrading our communal area to PUB (Public Use Buildings) status, to run cafes and workshops on a legal footing.

## What is this paper about?

The intention of this paper is to present the various main legal structure options that are available to

Intentional Communities (ICs), with a summary of the main points of each. The aim is to provide a basis for further discussion on how to protect our land and ensure our core values are reflected and supported by our legal structure. As well, it considers costs involved in such changes, and other issues eg. obtaining Owner Builder Permits, borrowing ability, members' rights and responsibilities, ease of withdrawal from the community, etc.

These are the various aspects to consider:

**Major structural changes** (if deviating from the cooperative structure):

1. Land-ownership structures (possible options are Cooperative, Company, Company Titles and Community Titles).
2. Asset protection structures (possible options are Community Land Trust, Separate Unrelated Entities for Ownership and Operation).

**Changes to the existing cooperative structure:**

3. Home ownership mechanisms (possible options are community ownership and chattel houses).
4. Occupancy arrangements (possible options are leasehold and Licence to Occupy - LTO).

There are other aspects of the legal structure such as Bundagen building agreements, decision-making, dispute resolution process, etc, which could be affected if changes are adopted, but these won't be discussed here. And of course there may be other options not presented in this paper, or alternative ways to look at the information offered. Everyone is encouraged to submit these so they can be included in discussions.

## Some points to consider

No legal structure is 100% perfect, nor will it protect a community from dispute and legal expense if the members are not like-minded and sharing interests and values, or if disputes cannot be resolved, even between like-minded individuals. Talking about legal structures is only one aspect of protecting our community. **Having shared ideologies, principles, intentions and values and a willingness to resolve conflict peacefully is the best way to protect our community.**

The Visioning weekend we held last year did show that a good part of the membership still share the original ideals and principles of the community. Strengthening our legal structure will give us a good base to continue to build a vibrant, solid community for future generations.

# 1. LAND OWNERSHIP STRUCTURES

To own the land as a group, we need a legal structure by which to do this. The main structures used for ICs are Co-operative, Community Titles, Company and Company Titles.

## 1.1 Co-operative (as we are)

A co-operative is a democratic organisation, owned and controlled by its members for a common benefit. Co-operatives are traditionally based on values of self-help, self-responsibility, equality and solidarity, and involve mutual assistance in working towards a common goal.

A co-operative structure maximises the freedom of members to take both personal and collective responsibility for their current and future lifestyles. They share in the group's investment and operational risks and losses, as well as its benefits, and benefit from the combined economic power or influence of the group.

A non-distributing co-op like Bundagen uses surplus funds to support its activities and objects. Funds are not distributed to members as dividends. Members can only get back, at most, the original value of their shares if the co-operative is wound-up (terminated).

### MAIN POINTS

- Members make their own rules and decisions, rather than being governed by an external body. It suits communities whose philosophies are based around self-governance, sharing and working as a community.
- There are membership criteria, which give some assurance that new members will be subscribing to a particular philosophy, pursuing collective aims, having compatible personalities and having defined levels of participation beyond financial contribution.
- There is a process for removing members who do not meet membership requirements.
- The co-operative holds title to the land, not the individual member. Buying land collectively means that the cost of land per member is as low as possible.
- A democratic principle of one-vote per member is required in a co-operative. However, co-operatives may define their own decision-making processes in their rules and by-laws.
- Resolving disputes is usually done internally according to the co-op's own standards and values, although co-ops are free to adopt external procedures if they wish.
- The Co-operative National Law provides a comprehensive safety net, through binding legislation, which covers common problems that may arise.

### SOME ISSUES

- Bundagen lands are owned by the Co-operative, not by members, so that any rights residential members have to any home or adjacent areas have to be created by separate arrangements. This is because a co-operative is not a structure designed specifically for land holding communities (in contrast, for example, to a community title structure). The separate arrangements we currently have in place (with Residential Members) is the Residency Licence to Occupy (RLTO) defined through our rules and by-laws. We are free, as a democratic organization, to alter these arrangements at any time.
- The RLTO we currently have in place also states that a residential member may sell their building to another approved member, but at a price reflecting the building cost, not the underlying land. As the price of houses is below that of the market (due to the land not being included in the price), there is arguably a disincentive for members who wish to leave, to do so.
- It may take a long time for a house to be transferred, when someone wishes to sell.
- Disputes can be difficult to resolve without an external body.
- As members don't have 'exclusive possession' of their houses, banks don't offer mortgages, and owner-builder permits are currently unobtainable.
- There are grey areas in the rights and responsibilities of both the members and the Co-operative and the impact of statute law.

### CONCLUSION

The Co-operative structure has served Bundagen well for over 30 years. The community began with ideals and principles of co-operation (although we started as a company), and these ideals and principles are still present on Bundagen. If we can improve on the grey areas (such as the rights and responsibilities of members, ownership of structures, etc) the Co-operative structure could continue to serve us well into the distant future.

## 1.2 Community Title (CT)<sup>3</sup>

Community Title is a form of strata title, in which residents have individual title for a rural residential lot. Residents own their own house blocks and houses, while the remaining land and internal roads are held in common ownership.

There are a number of communities set up with Community Title or equivalent, such as Crystal

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<sup>3</sup> Ref: <http://www.byron.nsw.gov.au/conversion-of-multiple-occupancies-to-community-title-between-2004-2009>  
<http://www.byron.nsw.gov.au/multiple-occupancies-to-community-title>

Waters. The Byron Shire has 18 former MOs that have changed to CT arrangements.

### MAIN POINTS

- Legal certainty of tenure.
- Borrowing ability.
- As each person has a separate legal title to a plot of land, they may sell their house at will on the open market, at prices that are usually close to other house prices in the area.
- The house price includes land, so depreciation of the buildings hasn't much influence on the price.
- People can afford to buy a similar house when they leave the community, so there is little incentive for disillusioned members to stay or to hang on to their houses.
- People's rights and the governance processes are clearly defined by law, so everyone knows where they stand and there is likely to be greater acceptance of these.
- Disputes can be handled by an external consumer tribunal, which issues enforceable orders at relatively low cost.
- The common land is still managed collectively through the body corporate/owners' corporation (the governing body) of the development.
- There are no membership criteria, apart from being able to pay the price of the house/block, so there is no assurance that the new person will be subscribing to a particular philosophy, pursuing collective aims, or having defined levels of participation beyond financial contribution.
- There is no official process for expulsion.
- Many CTs end up as ordinary subdivisions. Blocks and houses tend to be priced like similar blocks and houses in the area. Many of the strongest arguments used in favour of CTs do not officially relate to 'community spirit' and land sharing, but to home ownership.
- In Byron shire, MOs that converted to CT found it a long (10 years) and very expensive process (local authority development approvals, costs of doing subdivision & legal costs - drafting complex internal rules etc. - and registration expenses).
- The compliancy requirements of council are not less than those applicable to subdivisions. Every lot, and the commons, would be liable to land tax unless worth less than the exemption ceiling (currently \$160,000). For rating, land tax and resale purposes, the owner of each lot is treated as a single owner.

### CONCLUSION

CT suits communities whose philosophies are based around self-selection rather than selection of new members through community procedure.

The main reason many communities choose to change to CT is to enable families to be able to take out a mortgage, and legal security of tenure.

Note that a change from Coop to CT would be lengthy (it took up to 10 years for some communities) and costly.

### 1.3 Company

A company is a flexible structure that is common in ICs. It can be run as not-for-profit or commercial. Companies are very similar to co-operatives, except for a few aspects such as the fact that there can be different classes of shares, and voting can be according to the value of shareholding. However, a company's constitution can provide for democratic voting, as in co-operatives.

Companies are governed by the Corporations Act. Any surpluses (profits) are usually reinvested in the company or may be distributed to the members annually (like trading co-operatives).

Companies can be structured with similar rules and agreements to co-operatives. They can be relatively easy and affordable to set up. A transfer of shares and building rights could give rise to stamp duty. Land tax can be high as well, since companies do not have the same type of land tax exemptions as co-operatives.

Owner Builder Permits are possible in a company.

### CONCLUSION

Bundagen was a company at first. We changed to a Co-operative because the land tax was too high.

### 1.4 Company (or Co-operative) Title Ownership (CTO)

This usually refers to a special type of company ownership, similar to Strata Title Ownership, using a company as a vehicle. It is possible however to use a co-operative as the vehicle as well. It has been used mainly for blocks of flats and multiple-roomed buildings, rather than collective management of land. The company/co-operative owns the land (and possibly the buildings) and individuals can acquire specific share parcels. Each of these share parcels are linked to a specific 'site' or 'structure(s)'. The owner of a share parcel does not have a title deed but rather a Share Certificate. The owner of a share parcel essentially becomes the "owner" of the rights attaching to his/her shares to exclusive use of a particular site.

There is a board of directors, constitution and articles of association or rules (similar to our Co-op Rules and By-Laws). The structures that are on the area defined by the shares are the responsibility of the shareholder. The communal areas are the responsibility of all under the direction of the board.

### MAIN POINTS

- CTO tends to be more affordable than CT.
- It is relatively easy to deal with company/co-op management, when resolving disputes or addressing problems.

- Banks are unlikely to lend as much money for a CTO home.
- CTO homes are usually available on the open market, but can be subject to membership criteria, depending on rules. Nonetheless, such strict rules also inhibit the ability to borrow money by way of mortgage, since they would also limit the power of the Bank to sell the property in the event of a default.
- Unless there are strict rules placed upon share transfers, the sense of community can be lost as share transfer can become a private, commercial matter which could attract mere speculators.
- Land tax can be high in the case of companies and stamp duty can also apply on a transfer of building rights (in the case of companies).

### CONCLUSION

More research would need to be done to see if and how this model could apply to Bundagen. This is currently the suggested option by our solicitor: tying rights and entitlements under the LTO to the parcel of shares a residential member holds, so that those shares essentially confer the rights.

## 1.5 Tenancy in Common and Joint Tenants

This is a type of shared ownership where the name of all owners is on the title.

Each owner has an "undivided interest" in the property and all have an equal right to use the property, even if the percentage of interests are not equal or the living spaces are different sizes.

### CONCLUSION

Tenancy in common and joint tenants can be cumbersome and expensive (for example, each time a person sells or someone buys, the title of the land has to be changed and formal conveyancing done). Also without some form of agreement or deed between all the co-owners, there is no way of regulating common property etc. There are also likely to be stamp duty issues associated with this sort of arrangement. It is not at all an ideal structure for an intentional community.

## 2. LONGEVITY & SUSTAINING INTENTION: ASSET PROTECTION STRUCTURES

We, as a group, own a range of assets, the greatest being the land on which we live. As we interact with the outside world and are bound by the laws of society, there is always a risk that we could lose our assets. This section looks at how we can minimize the risk of losing the land.

## 2.1 Community Land Trust (CLT)<sup>4</sup>

A CLT is an organisation that provides ongoing affordable housing and other community benefits, usually set up as a private non-profit community organisation. In a CLT, the member owns the dwelling only and has a lease on the underlying land, which is held by the CLT under a different legal structure (usually a company, a co-op or an association).

### MAIN POINTS

- CLTs focus on lower income housing, and empower communities to have a say in the activities and objectives of CLT
- CLT's home residents have control of their home and can leave it to their inheritors
- The Resident owns the house but not the land, which is leased from the CLT.
- CLT is relatively new and untried in Australia. It would require a lot of effort and money to investigate.

### CONCLUSION

The model seems more suited for welfare housing, which might not work for an intentional community where the ethos is self-help and self-reliance rather than being part of the welfare system. It is also a fairly novel model that may or may not work.

## 2.2 Separate Unrelated Entities for Ownership of the Land and Operation of the Day-to-Day Activities

The idea here is to have a separate legal entity owning the land and another entity overseeing activities on the land, since it is the activities on the land which primarily give rise to risk.

For example, the first entity could be a co-operative, company or trust that holds the title to the land, and the second entity could be a separate incorporated association, a co-op or a company that is responsible for the day-to-day management of activities on the land.

This can be used as an asset-protection measure. For example, if the property is separately owned, the property itself is less likely to be put at risk if the community is sued should someone suffer an injury as a result of a community activity.

Trusts might not be the ideal for Bundagen (see below), but having two separate legal entities such as an association or company of members separate from the Co-operative (who would own the land) could work, without having to spend too much money to set it up.

However, for this to be the case it might not be possible for the property to be owned by the same people who control the activities on the property.

<sup>4</sup> Ref: the Australian Community Land Trust Manual

## CONCLUSION

Separate ownership may well be a way to successfully ensure the longer-term survival of the community and to ensure its original intention and purpose are maintained.

### 2.3 Trusts

Trusts are structures where one group of people (the trustees) manages the property according to guidelines or rules listed in a document (the Trust Deed) for the benefit of another group of people (the beneficiaries). Trusts can be useful mechanisms for ensuring that the original purpose and principles of a community are maintained in perpetuity.

The trust deed may not interfere with the day-to-day management of the community, which could still be undertaken by a members' co-operative, for example.

Difficulties with establishing trusts include anticipating likely future circumstances, wording the trust deed to ensure the community's intentions are accurately captured and readily interpreted at a later date, ensuring the continuing appointment of independent interested trustees into the future, and deciding whether to allow the trustees discretion in interpreting the trust deed.

The tax advantages trusts once had have nearly all been eliminated.

## CONCLUSION

Homelands is a Trust, and we can presently see the problems they are having. It might not be in the advantage of Bundagen to change to a trust.

## 3. HOME OWNERSHIP

### MECHANISMS

Currently we own the land as a group. Under Common Law this means that the Coop owns all buildings erected on the land. However, this could be arguable (see chattel ownership).

#### 3.1 Community Ownership

The alternative to private home ownership (whether through subdivision or chattel ownership) is ownership of the homes and other buildings by the community as a whole.

With this option, the community would assume full responsibility for each building, unless the respective rights and responsibilities of the community and the resident are spelt out in detail in an occupancy agreement or residential tenancy arrangement. Payment of fees or rent would need to be high enough to cover maintenance, insurance, etc.

## CONCLUSION

This option could be very onerous and an administration nightmare for the community. It

poses practical difficulties and privacy concerns as the entire community would have the right (and would need to have the right) to control each home. When we say the entire community would need to have the right, what we are saying is that because the entire community bears the risk, they need to know what those risks are.

#### 3.2 Chattel Ownership

In legal reality, the default position is that all structures belong to the coop. However, this position may be arguable.

A chattel is a possession such as a car or a caravan. The main point of determining if a structure can be considered as a chattel rather than a fixture, is the *intention*.

It has been Bundagen's practice since its beginning that if a member sells the structures they have built or previously bought, they can keep the proceeds of the sale, or they can choose (or be told) to take their material away, and we always agreed that people should have a sense of privacy and decision-making of what goes on in their homes.

We have always had the intention that the member is the real owner of their structures. This is supported by our practices of 30+ years, in which the Co-operative has never received any money from the sale of a structure.

One suggestion is to have a new coop rule that would make it clear that members own their 'chattel structures', while having a RLTO that would give them the right to reside on Bundagen's land. *Note that the RLTO has nothing to do with ownership of structures or land.* So the land would still be owned by the Co-operative (which still has the ability to control the use of its land, the building procedures, visitors policies, etc); yet the members would own their structures as chattels, and as such would have exclusive right of occupancy within its walls, and be totally responsible for these structures, just as they are for their cars.

## MAIN POINTS

- By clearly stating in our coop rules our intention that members' structures are chattels, this *may* reduce the liability for Bundagen, and protect the Co-op from lawsuits arising from incidents in these buildings (although it would have to be proven).
- Members might be able to obtain the Owner Builder Permits and loans from the bank against their chattel (this hasn't been proven yet).
- Members would clearly be responsible for maintenance and insurance.
- It may make it difficult for members to claim they are tenants and the Co-op is the landlord, thus avoiding falling under the Tenancy Act (see leasehold below).
- Bundagen would retain control of its land which

would still belong to the community. All our bylaws and policies would remain unchanged.

- The price of houses would remain stable, as our valuation policy through our by-laws and the land not being part of the sale would prevent this.

## CONCLUSION

From the beginning of the community we have acted as though members owned their structures. We have allowed members to buy and sell their structures (subject to membership & the valuation policy). We expect members to maintain and insure their structures, and prepare them for fire etc. We allow/ encourage them to demolish their structures and take them away should they wish to do so. This certainly looks like chattel. However, it can equally be argued that as the buildings are fixed to the land with foundations, it looks like a fixture and therefore belonging to the coop.

Tunable Falls Coop recently adopted this chattel structure, believing it will give them some protection. It is however unproven that it will.

## 4. OCCUPANCY ARRANGEMENTS

This relates to the legal relationship of how we occupy the land.

### 4.1 Leasehold

A leasehold arrangement on Bundagen would be one where Bundagen would be the 'landlord' and the members 'the tenants'. This means that the Co-op would own all the land and houses, and would rent them to its members.

The Tenancy Act and Regulations set out a standard written residential tenancy agreement that needs to be entered into in order to create a tenancy. This gives rights and obligations to the landlord (Bundagen) and the tenants (the members).

The Act also gives the NSW Civil and Administrative Tribunal (NCAT) power to hear and settle disputes about residential tenancies including evictions. This is relevant as, if the Co-operative/member relationship is found to be governed by the Act, the Supreme Court will have no jurisdiction to rule on disputes, and all matters would have to go through the NCAT.

Leaseholds can be short-term rental agreements or long-term leases, and there are significant differences between them. Presumably, they would be long-term leases on Bundagen.

## MAIN POINTS

- The rights and obligations under the Tenancy Act are not consistent with how Bundagen operates and would likely cause significant distress. For

example, it would mean that Bundagen could terminate a tenancy in accordance with the Act, residential members would need to get the approval of Bundagen for any alteration to their premises, Bundagen would have a right to inspect members' premises; Bundagen would be responsible for complying with health and safety obligations in connection with members' premises.

- Residential tenancy leases do not encourage a sense of collective responsibility, and they provide for very different rights and responsibilities for "landlord" and "tenant" (which may not align with community values and may also not suit either landlord or tenant).
- They also tend to create two separate and potentially adversarial classes within a community, which may not be in the community's overall interest.
- A long-term lease is essentially a de-facto subdivision, which becomes part of the Land Titles administration, where leases are registered on the title and stamp duty paid. While a long-term lease offers security of tenure for individual members, it undermines the capacity of the community to control its own land.
- Members could be eligible for Owner Builder Permits and other such grants, and to take out loans.
- The mentality of "my patch" might become more prevalent. This may create restrictive access to areas for other Bundagen members, and members may be able to carry on more activities on "their patch", without community interference.
- The land and the decision making process would be governed by the Tenancy Act.
- Significant decisions with government departments (such as our CA with NPWS) would require all leaseholders to reach agreement.
- The council may consider each leasehold as a 'stand alone dwelling' rather than part of an expanded house, therefore reducing the number of homes on Bundagen. It may also mean that Council could separately rate each building.
- Leaseholders could be allowed dogs, cats, and firearms on their site, given the "exclusive possession" and "dominion over", nature of leases, even with covenants.

## CONCLUSION

Leaseholds could potentially jeopardize Bundagen's financial stability and change our current social structure.

## 4.2 A Written Licence to Occupy

A Residency Licence to Occupy (RLTO) is what gives Residential Members the legal permission to build and live on the land. It is, simply put, an agreement for the right to access and use land. It is a personal right only, as members do not own the property, but they have a contractual right to occupy a particular 'area of responsibility' within an expanded house.

The RLTO that residential members have on Bundagen is not a written one; it is partly express (in our rules and by-laws) and partly implied (by custom and our history).

We could choose to continue as we are, or to have a written RLTO which may make clearer the rights and responsibilities of Residential members.

### MAIN POINTS

- Rights and obligations are clearly defined in by-laws and agreements (incl visitors, insurance, maintenance, codes of conduct, etc)
- Self governance: we make our own agreements about it.
- A written RLTO would satisfy some of our members who wish to have a written document of exactly what their RLTO implies.
- A RLTO cannot be sold or transferred.
- As this is not a lease, it hasn't got the advantage of a clear law to regulate it.
- It is arguable that the Tenancy Act may apply to an RLTO with the problems outlined above relating to leases applying; nonetheless it is possible we could apply for an exemption under the Act for our RLTOs.

### CONCLUSION

Residential members already have an implied RLTO on Bundagen (the recent arbitration has proven this).

NOTE: This paper is written in the awareness that it reflects the opinions of those who have contributed to it. Therefore, if you have any comments on the views expressed here and/or alternative points of view, please voice them, they are most welcome. Although a lot of care has been put into being accurate, there may be errors and elements lacking, so if you wish to contribute additional information, it would be very appreciated.

Further research would be needed to ascertain whether a written RLTO would pose an advantage over an implied one or not.

## WHERE DOES THAT LEAVE US?

We are definitely a square peg with only round holes to choose from. Without making too much of a drastic change in our legal structure, we could choose to add a few elements to the current structure of our Co-operative.

This is what is happening in Tuntable Community: they adopted a written LTO a few years ago; last year, they adopted a new coop rule about chattel house ownership; and there is now talk of two separate entities, ie keeping the co-op as land owner, which would then lease the land and communal buildings to an association or second co-op of members.

We could follow their example, or we could try to get together with other coops/communities to see if we can make changes to legislation to fit our cases.

### ONE POSSIBILITY...

We could start with a written RLTO to define rights and responsibilities of residential members, and do further research on other possibilities such as co-operative titles.

Meanwhile, the discussion with our solicitor and other communities continues, so new elements and arguments may be added to this paper...

*This paper was compiled by Rejane, with the input and great help of Mark Snell (Moora-Moora community), as well as contributions from Christobel Munson (Jindibah Community - now a CT), David Spain (Tuntable Community), Nigel Hill (our solicitor), Phil, Mick Pottage, Marijo, Roger, Jamie, Janelle, Dida and from search on the internet.*

# Newsletter 154 p26

## More on legal structures...

In the special NL 153, there was a discussion on various legal structures that could be considered for communities like ours. After the paper was distributed, our solicitor Nigel Hill sent information about another option that was not included in NL 153 and is now presented here. As mentioned previously, this is not a definitive paper on legal structures but a starting point to stimulate further discussion and research if necessary. Comments invited and welcome! Rejane.

### 4. Occupancy Agreements

#### 4.3 Co-operative Residential Title Share

This would involve creating a special class of shares in the co-operative that would be issued to Residential Members only. Here is a general description: please note there are details that would still need to be worked through at this point.

Co-operative Residential Title Shares would confer the right to build a home (approved by the Co-op), live in the home and sell/remove the structure (with the approval of the Co-op).

The rights, entitlements and obligations associated with this special class of shares could be set out in the rules and/or by-laws in much the same way as they are now, and they would be tied to the parcel of shares a residential member holds, so those shares essentially confer the rights and obligations.

The only significant difference to the existing arrangement is that the Licence to Occupy would effectively merge with the parcel of shares. This would avoid the need to have a separate LTO agreement.

#### MAIN POINTS

- The title would refer to a specific expanded house site or to a specific site number within an expanded house, but would not be a title on the land, nor it would permit subdivision. Members would hold the rights (tenure) as long as they hold the shares.
- Members would have exclusive right of occupancy within the walls of the structures they build/buy, but not on the land. Title to the shares and rights attached to them could improve the possibility of having a form of proprietary rights and hence obtaining the OBP and FHOG.
- Loans might be more likely as banks/financiers are more familiar with this structure (since it is a version of company title).
- The rights and obligations of members would be set out and therefore it would be clearer who is responsible for what. It would give indemnity to the co-op for negligence etc of members within their structures.
- The Co-op has less risk and it could require individual residents to insure their own interests.

A rule/bylaw could be included to oblige members with non-compliant buildings to indemnify the Co-op for any liability in connection with their home.

- The insurable interest would vest with the Co-op.
- Stamp duty, GST and CGT on any transfer could be avoided by a departing member having his shares forfeited and new shares issued to the new member. On the initial transfer, it would be unlikely to attract stamp duty and CGT since we would really just merging pre-existing interests and moreover there is no transfer involved.
- It would allow the benefits of the written LTO, but with a clear mechanism to transfer ownership (subject at all times to Board approval).
- It is much the same as an LTO, but members can point to their shares as giving them rights, as opposed to a separate written LTO (or collection of documents making up an LTO).
- This structure would be relatively easy to adopt and no survey would be required.
- It is more readily understood in the wider commercial world than existing arrangements and chattel arrangements.
- Cost - process would require solicitor's work: drafting of rule changes and by-laws, liaising with Registry of Co-ops and Bundagen, considering tax implications in detail, preparing papers for special GM. After the GM, we would need to register rule changes. Total cost (including legal and accounting fees and expenses) of approximately \$25,000.

This idea of co-op title shares – shares linked to rights to the buildings - is not that far removed from chattel ownership. Under both scenarios you can sell your rights to the building; it's just that chattel ownership involves saying that something that is self-evidently a fixture is not, while the co-op title share does not get involved in that issue.

Precedents of this structure include older buildings around Potts Point. Co-operative share ownership is also common in Manhattan apartment blocks too. The fact that it is being applied there to "vertical" building rights would not militate it being applied to horizontal building rights as is the case with Bundagen.