



# ***Residential (Land Lease) Communities Act 2013*** **Statutory Review**

**NSW Department of Customer Service**

November 2021



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# Executive Summary

The *Residential (Land Lease) Communities Act 2013* (the Act) provides the regulatory framework for the management of permanent sites in residential land lease communities and outlines the rights and obligations of community operators and home owners.

The Act is administered by the Minister for Better Regulation and Innovation. Section 187 of the Act requires the Minister to review the Act within 5 years of its commencement to determine whether the policy objectives of the Act remain valid and its terms remain appropriate for securing those objectives. A report on the outcome of the review is due to be tabled in both Houses of Parliament by November 2021.

On 30 November 2020, the Department of Customer Service (DCS) released a discussion paper for an approximate 14 week public consultation period. The discussion paper asked a range of questions to elicit feedback on whether the Act effectively balances the rights and interests of home owners and operators. The public consultation period ended on 12 March 2021.

DCS received 386 submissions from stakeholder groups and the general public. DCS also consulted using a digital consultation tool. The tool enabled stakeholders to respond to an online survey as well as a quick poll question. In addition to the formal submissions, DCS received 87 survey responses and 157 responses to the quick poll question. The survey responses have been treated as submissions to the review.

In addition to the three-month public consultation on the statutory review, a targeted four-week public consultation was undertaken from 19 July to 16 August 2021 on further policy options for regulating electricity charging in residential land lease communities. There were 100 survey responses received, along with 11 emails providing more detailed feedback.

DCS also undertook face-to-face consultation with a number of internal and external stakeholders on the broad range of issues arising as part of the statutory review, and separate targeted consultation on electricity charging, including a roundtable with key stakeholders.

All feedback received through the public consultation has made a valuable contribution to the review and has been carefully considered and analysed. Following this analysis, this report makes 48 recommendations to improve the operation of the Act.



# Recommendations

- Recommendation 1:** A mandatory 'Sale Information Sheet' be prescribed and be required to be prepared prior to the sale of any community home and provided to all prospective purchasers. This sheet would include information on:
- the process for sale and leasing under the Act,
  - proposed sale price and site fees,
  - an explanation of documents a buyer should expect to receive and when.
- Recommendation 2:** Require a home owner to provide a community operator with at least 14 days notice of an intention to sell their home and request the operator to provide confirmation of the proposed site fee.
- Recommendation 3:** Require an operator to provide the disclosure statement and the proposed site agreement to a prospective purchaser within 5 days of it being requested.
- Recommendation 4:** Review the currently prescribed content of the disclosure statement in light of the above reforms to streamline and amend it as required.
- Recommendation 5:** Introduce a prescribed waiver form that will allow a prospective home owner to choose to enter into a site agreement less than 14 days after the receipt of the disclosure statement and proposed site agreement.
- Recommendation 6:** Further consider and seek stakeholder input on whether there should be further specific regulation of the contract of sale for the home.
- Recommendation 7:** Enable the 'transfer' of site fees by requiring that the site fee under a new site agreement be the same as the existing site agreement, unless it is substantially below the site fee payable for comparable sites in the community.
- Recommendation 8:** Refine the application of voluntary sharing arrangements (VSAs) to focus on:
- requiring that an operator cannot refuse to enter a 'rent-only' agreement if preferred by a prospective home owner,
  - providing that VSAs cannot include entry or exit fees,
  - any use of VSAs needing to be accompanied by information to illustrate the costs of the VSA compared to a standard 'rent-only' agreement.
- Recommendation 9:** Review the use and content of the residential land lease communities register to ensure it meets modern regulatory requirements.
- Recommendation 10:** Make the fixed method of increase simpler to understand and easier to predict by limiting the number of variables that can be used in the 'other' option to a single variable.

**Recommendation 11:** Existing site agreements that are subject to multi-variable fixed method increases must be reviewed within three years from the commencement of the amended Act so that they comply with the single variable requirement.

**Recommendation 12:** Limit site fee increases using the fixed method to once per year, except where the increase is pegged to the age pension in which case it would be limited to twice per year.

**Recommendation 13:** A site fee increase by notice be required to include further information about the reason for an increase including:

- the specific cost increases that have led to the site fee increase,
- how much these costs have increased since the last fee increase, and
- how these costs are being apportioned in the site fee increase.

**Recommendation 14:** Amend section 49 of the Act so that each year an operator of a community must advise residents of any major capital expenditure works, or major repair projects, undertaken in the past 12 months and those that are planned for the next 12 months (if any).

The overall costs of the works, the timelines, any expected ongoing maintenance costs, and any proposed contribution from site fees should also be clearly set out by the operator.

**Recommendation 15:** Where a site fee increase is contributing to the cost of a community upgrade, this be clearly set out in the site fee increase notice.

**Recommendation 16:** Where part or all of a site fee increase is to pay for a community upgrade, enable the Tribunal to consider:

- the need for the upgrade in the context of the facilities available in the community,
- the operator's contribution to the total cost of the upgrade,
- the reasonableness of the amount included in the site fee increase as a proportionate contribution to the community upgrade, and
- whether this amount is a reasonable inclusion in the site fee as an ongoing charge to contribute to the maintenance of the community upgrade.

**Recommendation 17:** Where part or all of a site fee increase seeks to recover projected costs, enable the Tribunal to consider:

- the need to recover these projected costs,
- whether the amount proposed to be included in the site fee is reasonable and
- whether previous projected costs that were used as the basis for a site fee increase became actual costs and, if not, whether the funds collected for these costs could be used to cover the new projected costs.

- Recommendation 18:** Remove section 74(1)(f) from the Act. This provision enables the Tribunal, when considering whether a by-notice site fee increase is excessive, to consider the value of the land comprising the community, as determined by the Valuer-General.
- Recommendation 19:** Amend section 73(4) to remove the reference to projected costs. This provision prevents the Tribunal making an order that would lead to an increase less than the amount needed to cover actual and projected cost increases since the previous site fee increase, and should be amended to align with Recommendation 17.
- Recommendation 20:** For electricity supplied through an embedded network, undertake further work on the potential price impacts of the introduction of a maximum price cap based on the median market price. This should include consideration of whether there is a need for any mitigation strategies, and any additional mechanisms to promote competition and transparency of electricity prices offered by land lease operators.
- Recommendation 21:** Give consideration to applying any amended electricity pricing provisions in the Act to the community operator and any contracted third party provider who is providing electricity to residents through an embedded network.
- Recommendation 22:** Give consideration to extending the pricing protections provided to home owners in the Act to tenants who rent directly from the operator of a land lease community.
- Recommendation 23:** Review any new electricity pricing provisions in the Act within 3 years of their commencement, including an assessment of any changes to the national electricity framework or other regulatory changes that affect embedded networks.
- Recommendation 24:** Clarify that all energy billing by operators (or contracted third-parties) must occur in line with requirements under the National Energy Customer Framework, being the National Energy Retail Rules for authorised retailers, and the Australian Energy Regulator’s Retail Exempt Selling Guidelines for exempt sellers.
- Recommendation 25:** Introduce new provisions, consistent with the requirements for energy billing, which specify the minimum information in, and frequency of, bills issued by operators (or contracted third parties) for the use of other utilities.
- Recommendation 26:** Undertake further work to consider the complexities, barriers and costs associated with enabling the effective installation of sustainability infrastructure, notably solar panels, in communities. This work should occur in partnership with the Department of Planning, Industry and Environment and engagement with the broader land lease communities sector.
- Recommendation 27:** Introduce, following further consultation with the sector, changes to the community rule development and dispute process including:
- a process for residents to propose new rules or changes,
  - a consultation and voting process for new or amended rules,

- a minimum percentage of the community to support an application to the NSW Civil and Administrative Tribunal (NCAT) to challenge a rule, and
- enabling group applications to NCAT for such disputes.

- Recommendation 28:** Clarify that age restriction community rules are allowed under the Act subject to support by residents and the introduction of relevant exemptions.
- Recommendation 29:** Review the application of Part 8 of the *Residential (Land Lease) Communities Act 2013* to long-term casual occupants covered by the *Holiday Parks (Long-term Casual Occupation) Act 2002*.
- Recommendation 30:** Clarify that operators should be required to ensure a site is safe, in a reasonable condition and fit for habitation, and that operators are responsible for maintaining infrastructure that forms part of the structure of the site and cannot be removed.
- Recommendation 31:** Require home owners to keep the site they occupy in a clean and tidy condition and be responsible for damage they have caused to the site (beyond fair wear and tear).
- Recommendation 32:** Undertake further consultation on how these general principles about site maintenance and repair should be expressed in the Act, and whether it is necessary to list specific aspects of site maintenance and repair for which the operator is responsible.
- Recommendation 33:** Amend the Act so that notices of dilapidation can only be issued in respect of the home (see section 43(1)(a)) or where dilapidation to the residential site has clearly been caused by the home owner.
- Recommendation 34:** Allow home owners to make minor alterations or additions to the home that do not need operator consent. These should include the installation of:
- window locks,
  - window screens and shutters,
  - door screens, and
  - exterior lights.
- Recommendation 35:** Explicitly state in the relevant provisions of the Act that any modification or alteration to the home is required to comply with the relevant Local Government Regulations.
- Recommendation 36:** The Department of Customer Service liaise with the Department of Planning, Industry and Environment over whether education and information provided to land lease community operators and residents needs to give clearer guidance on the need to comply with the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021*.
- Recommendation 37:** The Department of Customer Service work with the Department of Planning, Infrastructure and Environment during the review of the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021* to assess whether the requirements of that regulation as



they relate to alterations and additions to homes in residential land lease communities are fit for purpose.

- Recommendation 38:** Work with operators to further refine the mandatory education obligations for all operators and their employees to ensure that they are targeted and support sector development and understanding.
- Recommendation 39:** Develop new materials to support home owners and residents committees improve their understandings of rights, responsibilities and governance under the Act.
- Recommendation 40:** Amend section 39 of the Act so that an operator may enter a site only (as opposed to entering a home), unless in an emergency where entry to the home is needed to avert danger to life.
- Recommendation 41:** Require regular testing of emergency procedures in communities.
- Recommendation 42:** Provide that a breach of the rules of conduct by an operator constitutes a penalty notice offence and may warrant a penalty infringement notice.
- Recommendation 43:** Extend the application of the rules of conduct to include employees acting on behalf of the operator where relevant.
- Recommendation 44:** Review the penalty framework during the drafting process to clarify the effectiveness of the current arrangements.
- Recommendation 45:** Require that compensation is also payable under section 127 if the operator has taken action that has rendered use of the site unlawful either before or after the site agreement was entered into.
- Recommendation 46:** Require operators to provide notice of any development application or planning proposal that may affect the community, or sites within it, to all potentially affected residents.
- Recommendation 47:** Extend the notice period under section 127 from 90 days to 120 days.
- Recommendation 48:** Remove section 128 of the Act which allows operators to give a termination notice on the basis that the site has not been used for the past 3 years.

# Section 1 – Introduction

## 1.1 Residential Communities in NSW

A residential land lease community is one in which residents often own the home they live in and lease the land on which the home sits from the community operator. Residents may also rent the home from the home owner. Home owners pay rent (site fees) to the operator for the right to occupy a site with a manufactured home or a moveable dwelling such as a caravan.

As at September 2021, there were approximately 518 communities in NSW on the register of land lease communities, housing over 36,000 residents.<sup>1</sup> This is a slight increase on the 495 communities reported by Fair Trading in November 2015.<sup>2</sup>

Ninety-five per cent of all residential land lease communities are located in rural and regional NSW, with only 23 communities located within the Sydney metropolitan area. The most communities are located in the Central Coast and Shoalhaven local government areas.

Communities offer a variety of services and facilities and some have a mixture of tourists, tenants, long-term casual occupants and home owners.

Operators of land lease communities range from ‘mum and dad’ investors, to commercial developers and larger corporations.<sup>3</sup>

Many of these communities play an essential role in the provision of low-cost housing while some offer resort-style living. Many are marketed to people over 50-55 years and may impose rules that limit the age of residents accordingly. It is important to note that despite any imposed age restrictions, a land lease community is not a retirement village.

Residential land lease communities have become an important part of the housing mix in NSW, adding diversity to the mix of available accommodation. Recently, there has been a renewed interest in residential land lease communities as an affordable long-term housing option. This is in part due to the decline in housing affordability, as well as some older residents preferring the communal lifestyle and informal care networks that develop in communities which may enable them to live independently.<sup>4</sup>

## 1.2 Overview of the Act

All residential land lease communities in NSW are covered by the *Residential (Land Lease) Communities Act 2013* (the Act). It provides the framework for the regulation of land lease communities, including the relationship between community operators, home owners and other residents of permanent sites in residential land lease communities.

The Act sets out the rules that govern:

- the rights and obligations of community operators and home owners
- site agreements and site fees
- selling a home, buying into a community and terminating an agreement
- utilities and other charges
- community rules and residents committees

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<sup>1</sup> Register accessed – 10 August 2021

<sup>2</sup> Fair Trading, *Residential Land Lease Communities – Profile of the Industry*, November 2015, p. 2

<sup>3</sup> Nina Hendy, *Why Caravan Parks Are Enticing Developers*, The Urban Developer, accessed on 21 September 2021 at <https://www.theurbandevolver.com/articles/caravan-parks-manufactured-homes-development>

<sup>4</sup> Combined Pensioners & Superannuants Association (CPSA) Housing Report 2018, p 18. Accessed at: [https://cpsa.org.au/wp-content/uploads/2019/01/180622\\_CPSA\\_Housing\\_report.pdf](https://cpsa.org.au/wp-content/uploads/2019/01/180622_CPSA_Housing_report.pdf)

- dispute resolution, mediation, the role of the Tribunal and enforcement.

The Act was introduced in 2013 following a comprehensive review of the *Residential Parks Act 1998* (the Former Act). The Act commenced in November 2015, replacing the Former Act.

The main reforms introduced by the Act included:

- changing the title of the legislation from parks to land lease communities to reflect the ‘increasing community feel of parks and the permanency of residents’
- expanding the types of information captured by the residential land lease communities register
- a disclosure statement which operators must provide to a prospective home owner before entering into a site agreement
- arrangements for special levies for community upgrades and voluntary sharing arrangements
- a negative licensing system for operators
- procedures for establishing and electing a residents committee
- requiring operators to take reasonable steps to help find another site for displaced residents in the case of termination.<sup>5</sup>

## 1.3 Relationship with other legislation and policies

### 1.3.1 Planning legislation

Community operators are required to obtain council approval to operate a land lease community in accordance with section 68 of the *Local Government Act 1993* (the Local Government Act). The approval outlines the conditions for operating the community, such as the permitted number of sites for the total land. An approval to operate must be renewed every 5 years by council unless the terms of the approval specify otherwise.

Operators and home owners also have obligations under the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021* (LG Regulation) which sets out:

- rules for the design of manufactured home estates and caravan parks
- rules for the design and construction of manufactured homes and other moveable dwellings
- standards to promote the health, safety and amenity of occupiers of manufactured homes and other moveable dwellings.

The Local Government Act and LG Regulation, as they relate to communities, have not been amended since before the Act commenced in 2015, although the LG Regulation was remade as an interim measure in September 2021 with no change to the policy intent. The Act and Regulation therefore retain terms that were used to describe communities under the Former Act.<sup>6</sup> They are due to be reviewed as part of the Department of Planning, Industry and Environment’s ongoing development of a new Housing State Environmental Planning Policy (the Housing SEPP), which is scheduled to commence in late 2021.

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<sup>5</sup> Residential Land Lease Communities Bill 2013 Second Reading, 18 September 2013. Legislative Assembly Hansard, at <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-75342>

<sup>6</sup> The terms caravan park and manufactured home estate together comprised a definition for ‘residential park’ under the Former Act. Although the term ‘residential park’ was replaced by a new definition for ‘community’ or ‘residential community’ under the Act, the substance of the definition for ‘residential park’ is retained in the Act through a note to the definition of ‘community’.

### 1.3.2 Tenants in residential land lease communities

Tenants may rent a home in a residential land lease community under a tenancy agreement that is covered by the *Residential Tenancies Act 2010*.

While the *Residential (Land Lease) Communities Act 2013* does not apply to these tenancy agreements, tenants are subject to some requirements in the Act as residents of the community, such as those about complying with the community rules (Part 8) and residents committees (Part 9).

### 1.3.3 Distinction between holiday parks and communities

The Act is distinguishable from the *Holiday Parks (Long-term Casual Occupation) Act 2002* (the Holiday Parks Act), which provides the regulatory framework for long-term casual occupants in a holiday park. Long-term casual occupants are persons who have a principal place of residence somewhere other than the leased site and occupy the site for no more than 180 days in any 12-month period.

Depending on the nature of their council approval, some operators may run mixed use communities that house both permanent residents and long-term casual occupants.

### 1.3.4 Tax exemptions

Section 10Q of the *Land Tax Management Act 1956* enables an operator to apply for a land tax exemption, or a reduction in the taxable value of land, where their community is used primarily for low-cost accommodation.<sup>7</sup>

For an exemption or reduction to apply, the land must be used only as a residential land lease community, and over half of the homes in the community must be the principal place of residence for senior or retired home owners (over 55 years old). To be able to apply for a land tax exemption or reduction, the community must be listed in the Register of Communities as required under section 14 of the Act.

### 1.3.5 National Energy Regulation

Operators of residential communities that provide electricity through an embedded network are considered exempt sellers under the *National Energy Retail Law 2012* (NERL).

Under the NERL, a person or business who sells energy to another person for use at premises must have a retailer authorisation or an exemption from having to hold an authorisation (a retail exemption). Exemptions are granted where the sale of electricity is:

- incidental to the main business,
- a community service,
- at cost, or
- to a defined group of customers at one site.

The National Energy Retail Rules (NERR) are made under the NERL and govern the sale and supply of energy (electricity and natural gas) from retailers and distributors to customers in NSW, QLD, SA, TAS and the ACT. The Rules have the force of law.

The NERR provide detail about the consumer protection measures and model contracts that govern the relationship between consumers, retailers and distributors. They also facilitate the provision of electricity and gas services to retail customers, including through rules relating to:

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<sup>7</sup> See Ruling LT 071v3 by Chief Commissioner of Land Tax issued 7 February 2018 accessed 13 September 2021 at <https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/land/lt071v3>

- electricity pricing
- customer connections
- retail competition – allowing customers to choose between competing retailers and to switch their retailer
- energy-specific consumer protections
- basic terms and conditions contained in standard and market retail contracts.

Under the Australian Energy Regulator's (AER) *Retail Exempt Selling Guideline*, exempt sellers such as residential land lease community operators are required to follow strict conditions and meet a range of obligations to their customers. However, the regulatory requirements are less strict than those for retailers that sell electricity as their main business.

Condition 7 of the AER Retail Exempt Selling Guidelines provides that the maximum an exempt seller (an operator) may charge an exempt customer (a home owner) for electricity is the standing offer price for the relevant local retailer if that retailer were to supply electricity to the customer directly.<sup>8</sup>

The Standing Offer Price is usually the highest tariff charged by a utility company and is the price which a customer pays if they do not choose a specific plan. The Standing Offer cannot be higher than the Default Market Offer (DMO), which is set by the AER.

In the absence of any electricity pricing restrictions in the Act, the price protections in the AER's Retail Exempt Selling Guideline would automatically apply.

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<sup>8</sup> See [AER Final Retail Exempt Selling Guideline - March 2016](https://www.aer.gov.au/system/files/AER%20Retail%20Exempt%20Selling%20Guideline%20-%20version%205%20-%20March%202018.pdf). Accessed on 13 September 2021 at <https://www.aer.gov.au/system/files/AER%20Retail%20Exempt%20Selling%20Guideline%20-%20version%205%20-%20March%202018.pdf>

# Section 2 – The Statutory Review

## 2.1 Requirement for Review

The Act and supporting Regulation are administered by the Minister for Better Regulation and Innovation. Section 187 of the Act requires the Minister to conduct a review to determine whether the policy objectives of the Act remain valid and its terms remain appropriate for securing those objectives.

The review is to be undertaken as soon as possible after the period of 5 years from the commencement of the Act. The Act commenced on 1 November 2015.

A report on the outcome of the review must be tabled in both Houses of the NSW Parliament within 12 months from the end of the 5 year period, that is, by November 2021.

## 2.2 Consultation for the statutory review

On 30 November 2020, a discussion paper on the statutory review of the Act was published to help elicit feedback on the Act. The paper explored all parts of the current regulatory framework established by the Act and Regulation, including the Act's objectives, the residential land lease communities register, site fees, the rights and obligations of operators and home owners, utility charging, the termination of agreements, dispute resolution processes and the compliance and enforcement framework.

All stakeholder groups and the general public were invited to comment – including on any other general matters relevant to improving the current regulatory framework.

Public consultation was open for approximately 14 weeks and closed on 12 March 2021. DCS received a total of 386 submissions. All submissions were reviewed and carefully considered and will be made available on the Fair Trading website.

Of the 386 submissions received by the review, 365 were from home owners or home owner advocates and 9 were from operators or operator advocates. Legal centres and stakeholders not officially affiliated with home owners or operators accounted for 12 of the submissions received.

Public consultation also took place through an online consultation tool – the NSW Government 'Have Your Say' platform. The tool presented the questions posed in the discussion paper in an online survey format and invited respondents to respond to a quick poll question.

The quick poll question received 158 responses and was designed to gauge sentiments towards community living. Of the responses received:

- 22% had a very positive experience living in a community,
- 32% had a positive experience living in a community,
- 22% had a negative experience living in a community,
- 13% had a very negative experience living in a community, and
- 11% had a neutral experience living in a community.

In addition to analysing stakeholder submissions, the Department undertook face-to-face consultation with a number of stakeholder groups including operator representatives, home owner advocacy groups and other government agencies.

The Department also undertook additional consultation on reform options for electricity charging in communities where electricity is supplied through an embedded network. Public consultation was open for four weeks from 19 July 2021 to 16 August 2021, also using the

NSW Government online consultation platform 'Have your Say'. The Department received 100 survey responses and 11 more detailed submissions. On 2 September 2021, the Department facilitated a roundtable on the electricity charging options with key stakeholders to further discuss reform options.

## Section 3 – Findings of the review

### 3.1 Introduction

Overall, the review has found that the intent and objects of the Act remain valid and relevant, with the majority of survey responses (81.4%) indicating that the objects of the Act were still relevant to communities.<sup>9</sup> Submissions received from key stakeholders generally echoed these sentiments.

However, based on the feedback received, it is clear that there are opportunities to enhance the operation of the Act and improve its effectiveness for operators and residents in communities. The following parts in this section focus on the areas of the Act which were the subject of substantial feedback and where more significant reforms are proposed. The recommendations propose a range of reforms to adjust or amend certain parts of the Act rather than to fundamentally reform. The aim of these changes is to enhance the overall operation of the Act, as well as improve clarity, certainty and transparency for all parties.

While many of the recommendations involve specific reforms, others identify issues where further consideration or consultation is required. This may be to review the Act's interaction with other legislation, undertake more detailed analysis and review, or to ensure that there is adequate opportunity for detailed stakeholder input on focused areas of reform.

Alongside feedback on key issues, the review also received a number of sensible suggestions for minor wording, language or provision location amendments that would assist in interpreting the Act or clarifying provisions. While not all of these are discussed in detail in this report, they will be considered and incorporated as part of the amendment drafting process.

Useful feedback on matters in the *Residential (Land Lease) Communities Regulation 2015* was also provided in a number of submissions. These included suggestions about whether additional fees or charges should be prescribed in the regulation, possible additional prohibited terms, Tribunal application time limits, whether certain maximum utility charges should be revised and the content of the standard agreement. While some of these issues are noted in the following sections, not all are discussed as a potential reform at this time. Instead, they will be considered in detail when the Regulation is reviewed in full following the amendments to the primary Act resulting from this review.

### 3.2 Entering into a community

When someone is considering buying into a land lease community, Parts 4 and 10 of the Act provide a number of requirements that must be met in relation to information provision and the sale process. These include the provision of a disclosure statement prior to entering into any new site agreement and requiring the current home owner to refer a prospective purchaser to the community operator prior to the sale of a home.

Overall, feedback to the review suggested there is scope for improvements to the information provided and the sale process, particularly given this kind of home purchase involves two distinct transactions - the purchase of the home from the current home owner and the entry into a site agreement with the community operator.

The following sections outline proposed reforms to the nature and timing of information provided to prospective purchasers, as well as to the site fees that can be offered under new agreements. As a package, these reforms seek to ensure prospective purchasers have a greater understanding of the nature of the transactions, as well as a higher degree of

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<sup>9</sup> Note the survey received 70 responses for these questions.



certainty around the key costs, so they can make fully informed decisions about their entry into a community.

### **3.2.1 Information for prospective purchasers to support informed choice**

The Act currently includes a number of provisions designed to help prospective purchasers gain an understanding of the transactions and costs involved in joining a specific community, as well as understand more about the community itself.

Section 21 of the Act requires that a community operator must not enter into a site agreement with a person unless the operator has provided the person with a disclosure statement at least 14 days before entering into the agreement. The Act requires the disclosure statement to be in the approved form and contain details of:

- site fees and charges that will be payable under the proposed site agreement for the particular residential site,
- the current range of site fees paid in the community,
- the services and facilities available in the community, and
- compliance with statutory requirements applying to the community.

At the same time, under section 108(1), a home owner must ensure that a genuine prospective home owner is advised to contact the operator of a community about the proposed sale before they enter into a contract for the sale of the home. This requirement is designed to help prospective home purchasers understand the leasing component of entering into the community and to support operators to comply with their disclosure obligations.

The other key document for prospective purchasers is the site agreement, which is the key document binding parties to the lease of a residential site in the community. The agreement sets out the responsibilities and obligations of the home owner and operator in respect of their stay and use of the site. An operator is responsible for ensuring a written agreement is in place at the commencement of the agreement. The Act does not currently regulate the contract for sale of the home, and there is a lack of clarity around the current protections available to prospective purchasers to provide security of ownership of the home.

A key intent of the above provisions is to ensure that potential home owners clearly understand the nature of the transactions they are entering into, as well as the community itself. However, feedback to the review has indicated that there remains uncertainty around the sale of home process (including the roles of home owners, prospective home owners and operators), as well as scope to improve what and when key information is provided.

Comments from operators and their representative body, the Caravan & Camping Industry Association NSW (CCIA), highlighted concerns around potential purchasers not always understanding the nature of the dual transactions, as well as some sellers or seller's agents failing to explain the need to liaise with an operator prior to concluding a home purchase. Submissions also highlighted that there have been a number of cases where prospective residents have faced barriers in accessing the relevant information (including site agreements and completed disclosure statements) in a timely manner. The review is also aware that there can be confusion about the likely site fee for a home, with prospective purchasers sometimes being told one site fee by the seller and then a different proposed site fee by the operator. This appears to be causing confusion for purchasers and adversely impacting home sales.

Submissions to the review also contained divergent comments about the current mandatory content for the disclosure statement. While some feedback suggested that more information needs to be included, such as community rules and proof of development consent, other

feedback suggested a need to streamline the current document to ensure that it was not too 'overwhelming' and only contained relevant information. A number of submissions also suggested that consideration should be given to providing the proposed site agreement alongside the disclosure statement.

Following consideration of the above feedback, as well as further discussions with key stakeholders, the review is proposing a package of six reforms to address these issues.

### **A new 'Sale Information Sheet'**

The first part of these reforms is to introduce a new, prescribed 'Sale Information Sheet' (SIS) that must be prepared prior to a home being put on the market and provided to any prospective purchaser at the time they first seek to see a prospective home. The aim is for this document to be no more than one to two pages and for it to contain in plain English:

- information on how to undertake the two distinct transactions - buying a home, and leasing a site,
- the proposed home sale price and the proposed site fee,
- what documents a buyer should expect to receive and the timelines for receiving those documents, and
- encouragement to seek legal advice on the proposed sale contract and site agreement.

While responsibility for the SIS would sit with whomever is undertaking the sale (which could be the home owner, the operator or their agent), the information in the SIS would require cooperation between the parties, given the need to include the proposed site fee and the proposed sale price.

The review appreciates that such an approach creates a new linkage in what are otherwise largely separate transactions. However, in light of the confusion around site fees, and the broader regulatory desire to ensure the consumer journey is as straightforward as possible, such a linkage seems necessary. In making this change, the review aims to ensure that potential home owners understand from the outset what their likely costs will be in choosing to join a given community.

To support this process, it is also recommended that a home owner be required to provide the operator with at least 14 days notice of their intention to sell (a minor amendment to the existing requirements of section 105) to ensure that an operator has sufficient time to confirm the proposed site fee.

### **Timely access to the disclosure statement and proposed site agreement**

The second part of these reforms relates to the timing for the provision of the disclosure statement and proposed site agreement.

As already noted, operators must provide disclosure statements at least 14 days before a site agreement is entered into. However, the Act has no equivalent requirement for an operator to provide the proposed site agreement in advance of signing.

The review acknowledges that much of the information in the disclosure statement at present relates to what would be in the site agreement. However, early access to the proposed site agreement would ensure that prospective home owners are able to fully consider the details of the purchase and lease transactions together to ensure they are the right arrangements for them.

On this basis, and in light of substantial feedback supporting access to additional information by prospective purchasers, the review recommends that the disclosure statement and the proposed site agreement be made available to any prospective purchaser within 5 days of a

request being made to an operator. This approach is not intended to remove scope for negotiation but is designed to provide a baseline 'rent-only' agreement that can then be negotiated further as needed between parties prior to signing.

Such an approach is comparable to a traditional property purchase where anyone can access the proposed contract of sale to understand the terms and conditions. Similarly, in retirement villages an operator must provide a disclosure statement within 14 days of a request by a prospective resident, and all contracts to a prospective resident 14 days in advance of entering into a contract.

In requiring the disclosure statement and the proposed site agreement to be provided together, and at least 14 days in advance of signing, the review considers that there are likely to be a number of benefits. Prospective home owners will be better placed to understand the exact nature and costs of the agreement they are entering into, have sufficient time to seek legal advice on sale and leasing documentation, and be better informed in seeking any amendments. Such an approach, combined with the introduction of the new SIS, also enables the Department to undertake a broader review of the disclosure statement to streamline its content, avoid duplication and allow it to focus on the key information that a prospective resident will need alongside the proposed site agreement and SIS.

The review considers the disclosure document and the proposed site agreement would still need to be provided at least 14 days in advance, in line with the existing section 21 of the Act. However, the early provision of both documents also opens up the option of allowing prospective home owners to choose to waive some, or all, of the 14 day period if they feel they are ready to sign the site agreement at an earlier date. Such a reform was put forward in the CCIA submission and makes sense in a context where prospective purchasers have ready access to all relevant information and documentation.

Overall, the review believes this package of reforms will help provide greater clarity for prospective home owners by ensuring they have early access to the essential information they need to make more informed choices about entering a community and potentially negotiating the sale and lease terms.

### **Further consideration in relation to the contract of sale for a home**

The contract of sale for the home in a community is not currently regulated under the Act. There is no prescribed standard contract unlike in more general conveyancing. While this matter was not the subject of substantial feedback, the Australian Institute of Conveyancers NSW (AIC) observed that there is no provision linking the 'structure' of the home to the site agreement and noted that there may be inadequate assurance for a prospective home owner that the home seller is in fact the owner. AIC recommends that the contract of sale for the home and the site agreement be interdependent on each other and that provision should be made for an appropriate form of contract of sale.

Given the lack of feedback on this matter it may be that this regulatory situation is appropriate and no further action is needed. However, this type of housing is a growing market, frequently in areas which are in high demand. In some instances, ownership of the home may be difficult to evidence, for example, after several ownership transfers or where an owner dies. The purchase price can also be substantial and the parties may potentially have vulnerabilities (such as age or socio-economic factors) that should be considered.

In this context, while no specific reforms are proposed at this time, the review considers that there would be benefit from further discussions with stakeholders and residents around whether there is a need for further specific protections and/or regulation of contracts for sale.

Such consideration and consultation would be undertaken during the implementation of the other aspects of the review report.

### **Recommendations**

1. A mandatory 'Sale Information Sheet' be prescribed and be required to be prepared prior to the sale of any community home and provided to all prospective purchasers. This sheet would include information on:
  - the process for sale and leasing under the Act,
  - proposed sale price and site fees,
  - an explanation of documents a buyer should expect to receive and when.
2. Require a home owner to provide a community operator with at least 14 days notice of an intention to sell their home and request the operator to provide confirmation of the proposed site fee.
3. Require an operator to provide the disclosure statement and the proposed site agreement to a prospective purchaser within 5 days of it being requested.
4. Review the currently prescribed content of the disclosure statement in light of the above reforms to streamline and amend it as required.
5. Introduce a prescribed waiver form that will allow a prospective home owner to choose to enter into a site agreement less than 14 days after the receipt of the disclosure statement and proposed site agreement.
6. Further consider and seek stakeholder input on whether there should be further specific regulation of the contract of sale for the home.

### **3.2.2 Site assignment and site fees under new site agreements**

Section 109 of the Act currently requires that site fees under a new agreement must not exceed fair market value, which is defined as the higher of:

- the site fees currently payable by the home owner who is selling the home, or
- the site fees currently payable for residential sites of a similar size and location within the community.

As noted earlier in this section, and based on feedback to the review, there appears to be some confusion as well as considerable contention around new site fees when a home is being sold. Some of the most common issues raised were the rate of site fees set by operators under new site agreements and barriers preventing home owners from assigning their site agreement to a prospective buyer.

Site assignment is where an existing home owner transfers their own site agreement to a new home owner seeking to occupy the site. Based on feedback to this review, as well as subsequent discussions with stakeholders, it appears the primary reason for a home owner wishing to assign a site agreement at the point of sale is to enable them to transfer their existing site fees to the new home owner.

The issue of site assignment has been the subject of diverse sector views since the current Act replaced the Former Act. This is because the Former Act provided a right to assign the site agreement under its section 41. This approach was removed under the new Act, with the basis for this articulated in the second reading speech for the new Act:

*‘...[the] system of assigning existing leases upon the sale of a home was seen as complex and confusing. The bill replaces this process with an obligation on the operator to enter into a new site agreement with the purchaser unless it would be reasonable to refuse. The site fees under the new agreement must be no greater than the current site fees payable for the site or the fees payable for comparable sites in the community.’<sup>10</sup>*

Subsequent amendments to the Act during the passage through Parliament did not reinstate the right to assign site agreements.

Feedback from a number of stakeholder groups (the Tenants’ Union, Affiliated Residential Park Residents Association (ARPR), Independent Park Residents Action Group (IPRAG)) and community residents has raised concerns about the way the current provisions are operating. Submissions have detailed circumstances in which home owners have put their home on the market and have been unable to sell due to the prospective home owner and the operator subsequently disagreeing on terms under a new site agreement. Feedback suggests the breakdown of negotiations revolves primarily around the proposed site fees under the new site agreement.

A number of submissions (Illawarra Legal Centre, IPRAG, ARPR) also indicated that the requirements of section 109 have caused confusion and concern. Submissions from home owners indicate that there is no way for a prospective home owner to know what the comparable rates in the community could be when entering into an agreement, and there is no requirement under the Act for the operator to provide evidence of the fair market value to a prospective home owner.

A range of reform options for this issue were proposed to the review. For example, the Tenants’ Union argued that the Act should enable a home owner to assign their site agreement and that the operator cannot unreasonably withhold or refuse consent. The Tenants’ Union considers that ability to assign is a key tool that can “provide protection against unlawful site fee increases, unfair fixed method increase terms and unfair additional terms in new site agreements”. IPRAG also supported this suggestion and argued that site fees for new agreements should remain the same as the amount being paid by the selling home owner. On the other hand, the CCIA, Ingenia and Hometown supported the assignment provisions under the Act remaining unchanged. The CCIA noted that the current section 109 replaced the automatic right of assignment and was introduced to allow fair market value to be a consideration.

The review has considered all feedback and, on balance, considers that the current provisions of the Act in relation to site assignment should remain unchanged. The unfettered assignment of site agreements is problematic as it enables older site agreements and terms to appear to be in place, despite changes to the Act. Its potential to cause confusion and uncertainty around owners’ and operators’ rights and responsibilities outweigh any potential benefits.

However, it appears that a key driver for people seeking to assign site agreements is the transfer of site fees from a home owner’s existing site agreement to a prospective home owner’s new site agreement. The review considers there is merit in this line of argument and that there is scope for some minor reforms in this respect. In particular, the review finds that allowing for the ‘transfer’ of site fees that are substantially the same as existing fees for similar sites would provide greater certainty, as well as reduce a current barrier to the sales process and a key cause of disputes.

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<sup>10</sup> Residential Land Lease Communities Bill 2013 Second Reading, 18 September 2013. Legislative Assembly Hansard, at <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-75342>

The review recommends that section 109 be amended to require that site fees for new agreements remain the same as the existing site fees for the same site, unless they are substantially below the site fees for other comparable site fees in the community. This approach, when combined with the new SIS, should enable greater certainty in the sales process and greater clarity for prospective purchasers.

The review appreciates that there are likely to be situations where an existing site fee is substantially lower than other comparable sites and that an operator may wish to use a sale process as an opportunity to align comparable site fees within a community. These reforms would ensure that operators remain able to do so by putting forward an appropriate site fee in both the SIS and the proposed site agreement in such situations. Time to calculate this new site fee would be enabled through the new requirement that a home owner looking to sell must give operators at least 14 days notice of their intention to sell, so that the proposed sites fee for the SIS can be confirmed.

### **Recommendation**

7. Enable the 'transfer' of site fees by requiring that the site fee under a new site agreement be the same as the existing site agreement, unless it is substantially below the site fee payable for comparable sites in the community.

### **3.2.3 Voluntary sharing arrangements**

The Act makes provision for voluntary sharing arrangements (**VSA**s) in section 110. A VSA is any provision under which the home owner agrees to pay:

- a specified entry fee to the operator on entry into the agreement or in any other manner specified in the agreement,
- deferred site fees to the operator, being site fees the payment of which is deferred in a manner specified in the agreement,
- a specified sale amount to the operator if the home is sold by the home owner, with that sale amount being either a specified share of the capital gain in respect of the home or a specified on-site premium of the total sale price of the home as determined in the agreement,
- a specified exit fee to the operator, being a fixed fee that is payable if the home is sold or removed from the site.

The Act also imposes certain restrictions on VSAs at section 111.

Feedback to the review indicates that the uptake of VSAs has been very low. However, despite these low levels of usage, a number of submissions raised concerns about these provisions and proposed their removal from the Act as they are more beneficial to operators and could potentially introduce adverse outcomes. Such submissions noted that the Act does not require that site fees must be lower under a VSA and there is no mechanism to ensure that the home owner benefits. In contrast, the CCIA argued that VSAs enable collaboration and mutual benefit and should remain available for home owners and operators.

The review has considered all submissions and reviewed the provisions of the Act. In the absence of actual evidence of use, the review has needed to examine the risk of harm if these provisions were applied. Overall, there seems to be benefit from retaining some form of these provisions as they provide flexibility for both operators and home owners to potentially negotiate agreements that may be tailored to a home owner's specific financial situation.

However, at the same time, the review accepts that some of the current provisions, if applied in certain ways, could risk harm to new residents entering the sector, or act as a barrier to entry.

As noted in a submission from the Hometown operator group, exit and entry fees are largely a feature of the retirement village sector. The review notes that these have been contentious in that context. While there is little evidence of large scale usage in the residential communities sector, within the small amount of feedback received on this issue, examples were given of agreements being offered to prospective purchasers where the options are either a high entry fee or an excessively high rent, with the entry fee being used to 'push' people towards the higher rents. Overall, there is a potential for entry or exit fees to be excessive under the current provisions. This could in turn act as a barrier to entering or exiting a community. There is also little evidence of how entry or exit fees are likely to benefit a resident given the other VSA options available. In this context, the review considers these types of fees should no longer be allowed under the Act.

The review also proposes that where VSAs are to be used the cost impacts under a VSA should be clearly explained prior to start of the site agreement, such as in comparison to a 'rent-only' agreement, so that a home owner understands the options available. This is especially important where a VSA is proposed by an operator.

Given the intended 'voluntary' nature of these agreements, the review also considers that this section of the Act could benefit from a requirement that an operator cannot refuse to enter into a 'rent only' agreement if that is the preference of a prospective purchaser. This is already a requirement in relation to some home owners under section 111 and would make the application of the Act more consistent and help ensure that VSAs work as intended.

#### **Recommendation**

8. Refine the application of voluntary sharing arrangements (VSAs) to focus on:
  - requiring that an operator cannot refuse to enter a 'rent-only' agreement if preferred by a prospective home owner,
  - providing that VSAs cannot include entry or exit fees,
  - any use of VSAs needing to be accompanied by information to illustrate the costs of the VSA compared to a standard 'rent-only' agreement.

### **3.2.4 The residential land lease communities register**

The Act currently requires the Commissioner for Fair Trading to keep a register of information about communities in NSW. Community operators must notify the Commissioner of particulars about the community, such as the trading name and address, contact details of the operator and owner of the community, information about any relevant training, qualifications or experience of the operator, and information relating to the occupation and use of residential sites in the community. The information is published on the NSW Fair Trading website for users to search for communities in a particular area or by name.

When originally developed, a primary objective of the register was to assist prospective home owners make informed decisions about whether or not to buy into a specific community. The register also serves as a useful source of data for NSW Fair Trading about existing communities in NSW, which can be used to monitor industry compliance.

Survey responses to the consultation indicated that many people are either unaware of the communities register or believe it lacks sufficient detail to be of much value to prospective purchasers. Other views included that the register in its current form is hard to use and that some information was out of date.

Some submissions noted that more meaningful data should be captured by the register, such as:

- up to date information about the community, including operator and owner details
- the number of Tribunal hearings related to a community
- available facilities in the community
- rebates available for utilities

- contact details for the residents committee
- whether the community is also a tourist park
- whether the owner owns other communities.

Submissions also noted that not all information that could be made public currently is made available, such as details of enforcement or disciplinary action. At the same time, others such as the CCIA, expressed concerns that putting more information on the register could potentially amount to a quasi-disclosure statement. Given operators are required to give prospective purchasers a disclosure statement which covers detailed information about the community, expanding the data in the register could also be potentially duplicative.

The review has considered the purpose and use of the register in light of this feedback. While there are benefits of having a register for public and regulatory purposes, the best use and value of the register needs further consideration in light of the other reforms being put forward in this review. In particular, in a context of increasingly limited government resources, the review recommends further analysis of how the content and use of the register can best meet modern regulatory needs and the objectives of the Act.

#### **Recommendation**

9. Review the use and content of residential land lease communities register to ensure it meets modern regulatory requirements.



## 3.3 Living in a land lease community

### 3.3.1 Making site fee increases simpler and more certain for the sector

The Act provides two methods of increasing site fees during the lease of a site – the by notice method or the fixed method. When entering a site agreement, the operator and home owner will choose one of these two methods for calculating future site increases.

The by notice method allows operators to issue on a yearly basis a notice to increase the site fee. Operators must give at least 60 days' notice prior to the increase taking effect and comply with a number of prescribed information requirements, including providing an explanation for the increase. The Act also includes provisions enabling mediation and application to the Tribunal in cases where a proposed increase is objected to by residents.

The second method of increase is the fixed method. Section 66 of the Act requires that a site agreement must not provide that site fees may be increased by more than one fixed method. If more than one method is specified, the method that results in the lower, or lowest, increase of site fees applies. Fixed method increases require 14 days' notice and an explanation of how they have been calculated. Unlike the by notice method, the fixed method cannot be challenged at the Tribunal, except if the method does not comply with the Act or site agreement.

The Standard Form Agreement in the Regulation lists a number of possible calculations that can be utilised under the fixed method. These are:

- in proportion to variations in the CPI,
- by a nominated dollar amount,
- by a percentage of the increase to the single/couple age pension,
- each time the pension increases, or
- 'other'.

Site fee increase methods were the focus of many submissions, raising a range of concerns about the current system by which fees are being increased. A majority of respondents, particularly home owner advocates (the NSW Tenants' Union, IPRAG and ARPRA), argued that the current regulatory arrangements for site fees disadvantage home owners and recommended amending the laws to strengthen protections for home owners. Some others, such as the CCIA, supported the existing framework, suggesting little or no change is required.

In light of the feedback, the review has considered there may be opportunities to increase clarity and certainty around the site fee provisions in the Act. The following sections outline the issues raised and recommend a package of reforms that seeks to deliver a more transparent system of dealing with site fees in communities while responding to operators' and home owners' needs.

#### Fixed method increases

Many submissions noted that site fees are unpredictable and difficult to calculate where they are based on multiple components using the 'other' option under the fixed method in the standard form site agreement. These submissions commonly referred to the Tribunal decision made in *Morris and Ors v Kincumber Nautical Village Pty Ltd* [2020] NSWCATCD which involved a group of home owners disputing the fixed method used to calculate the home owner's site fee. The fixed method used by the Kincumber community at the time of the dispute was:

- any positive change in the CPI; plus
- 3.75%; plus
- a proportional share of any increase in costs incurred by the operator since the calculation of the last site fee increase calculation for –
  - electricity and water (net of any amount that has been recouped from home owners); plus

- gas; plus
- communications; plus
- insurance; plus
- rates; plus
- any other Government (federal, state or local) charges or taxes other than company tax; plus
- the effect of any change in the rate of GST or similar tax that is included in the site fees.

On 14 September 2021 the Appeal Panel of the Tribunal set aside the original decision made in *Morris and Ors v Kincumber Nautical Village Pty Ltd*<sup>11</sup> that the fixed fee method breached the Act. The Tribunal found that it is irrelevant if a fixed fee method has multiple components as long as the increase in any given year can be calculated or ascertained definitely and is “a fixed calculation”.

Submissions argued that such complex calculations do not enable certainty for many home owners and have led to compounding increases that make the site no longer affordable. Moreover, a number of home owner submissions claimed that most site agreements are offered on a ‘take it or leave it’ basis, with little or no opportunity for the home owner to negotiate its terms. On this basis, most suggested removing the ‘other’ option under the fixed method, limiting the fixed method to prescribed calculations only (such as in proportion to CPI), or removing the fixed fee method entirely. The Tenants’ Union further proposed introducing a system to review the method of increase after one year of entering the site agreement, then automatically reverting to a by notice increase method if parties could not reach an agreement.

At the same time, it is noted that not all fixed method increases use complex calculations and that they can provide clear and straightforward increases with less scope for dispute. The submission from the operator of Hometown communities argued that their use of a simple fixed method increase provided certainty and substantially less administrative work than the by-notice method. The review was also provided with examples of increases that were based solely on CPI or other simple annual calculations. The Hometown submission, the CCIA’s submission and a number of others all noted that the ‘other’ option provided flexibility and allowed operators and home owners to negotiate an appropriate fixed calculation.

The review has considered all proposals in detail. It is understood that the use of the fixed method to calculate site fee increases has contributed in some cases to a lack of certainty for some home owners. However, removing the fixed method and relying solely on the by-notice method is unlikely to resolve this problem, and may also limit choice and flexibility for both the operator and home owner. The review also notes that a significant proportion of survey responses indicated support for retaining both methods of increase in the Act.<sup>12</sup>

Simultaneously however, the review recognises that the use of multiple components in the ‘other’ option under the fixed method is causing significant confusion, as well as potentially financial detriment for home owners. Noting that there have been different interpretations of the requirements for ‘one method’ under section 66(2) of the Act, the review proposes that the Standard Form Agreement clarify that the ‘other’ option under the fixed method of increase be limited to a single variable only. This approach would enable greater certainty for the home owner by making it easier to understand and calculate future increases in

<sup>11</sup> NSW Civil and Administrative Tribunal Appeal Panel Decision in *Kincumber Nautical Village Pty Ltd v Morris & Ors*. Accessed 14 September 2021 at <https://www.caselaw.nsw.gov.au/decision/17bdd2e3487298a472abfb74>

<sup>12</sup> 43.2% of all survey responses to the question ‘Should the Act continue to allow for both the fixed method and the by notice method of site fee increases, or just one method?’ stated that both fixed and by notice methods should continue to be used. 24.7% noted support for just the fixed fee increase method being retained, 13.6% supported only the by notice method increase being retained and 18.5% indicated they were uncertain.

costs. If an operator and/or home owner considers that a single variable is not suitable for their situation, then the option of using the by notice method remains in place.

Alongside the above recommendation, the review proposes that where existing site agreements contain multi-component calculations for fixed method increases, this aspect of the site agreement will need to be reviewed and renegotiated so that it complies with the new single variable requirement within three years of the relevant amendments to the Act commencing. This three-year transition is designed to ensure that existing home owners who are currently subject to multi-component fixed method increases access the benefits of clearer fixed method increases, and that operators have sufficient lead time to review their calculations and determine an appropriate variable.

It is noted by the review that some submissions raised concerns about the restriction on home owners disputing fixed method fee increases at the Tribunal, arguing that there should be a means to challenge excessive fixed fee increases similarly to the by notice method. However, the review considers that one of the key features of the fixed method is that it is designed to provide certainty to both parties – the operator and the resident. The proposal to limit the fixed method of increase to single variable calculations should reduce the risk of disputes between home owners and operators regarding increases and provide greater clarity upfront as to the likely scale of increases. In turn, the certainty of this method should be retained for operators as well. On this basis, it is recommended that the prohibition on challenging site fee increases using the fixed method continues to remain, with any disputes to NCAT limited to those which may relate to broader breaches of obligations, as can be brought under section 156 of the Act.

### **Recommendations**

10. Make the fixed method of increase simpler to understand and easier to predict by limiting the number of variables that can be used in the 'other' option to a single variable.
11. Existing site agreements that are subject to multi-variable fixed method increases must be reviewed within three years from the commencement of the amended Act so that they comply with the single variable requirement.

### **Frequency of fixed method increases**

Under the current Act, operators and home owners may negotiate the frequency of a fixed method increase, whether it occurs every certain number of months or years (unless the fixed method is linked to the home owner's age pension). This contrasts to the by notice method of increase for which the Act explicitly prohibits site fees from being increased more than once in any 12-month period (section 67(6)).

Many submissions suggested that there should be some limits placed on the operator being able to impose multiple increases throughout a year. Seventy-eight per cent of survey responses to the public consultation indicated support when asked whether site fees should only be increased once per year, whatever method of increase is used. At the same time, operator groups such as Hometown Australia noted that while their businesses use fixed method increases in their site agreements on the basis that the site fee only increases once every 12 months, they did not support embedding such a restriction into the Act.

The Tenants' Union also proposed that all fixed method increases in a community be required to have the same effective date to enable a better comparison between increases sought by notice and those by fixed methods. While the intent of such a change is understood, the review does not recommend this change as it would likely impose a

disproportionate administrative burden on operators to manage increases to occur at a single point in the year.

The review has considered these views and proposes that a new provision should be introduced limiting site fee increases using the fixed method to once per year, except for increases linked to the age pension. This is a similar approach to the restriction for by notice increases, and also aligns with other Australian jurisdictions such as Queensland and Victoria which place an annual limit on fixed method increases.

### **Recommendation**

12. Limit site fee increases using the fixed method to once per year, except where the increase is pegged to the age pension in which case it would be limited to twice per year.

### **By notice increases**

Section 67 of the Act requires that by notice increases must be given in writing, 60 days in advance, to all the home owners in the community under site agreements which provide for by notice increases, and at the same time. The notice must:

- specify the amount of the increased site fees,
- specify the day on and from which the increased site fees are payable,
- include an explanation for the increase,
- include such other information as may be prescribed by the regulations, and
- be in the approved form (if any).

By notice increases are only permissible once every 12 months, and all by notice increases must take effect on the same day.

### **Transparency in by-notice increase notices**

Many submissions expressed concern about the lack of transparency in the reasons given for by notice site fee increases.

While section 67(4) of the Act prescribes specific information that must be included as part of a notice to increase the site fee, including the amount of increase and an explanation for the increase, stakeholders such as IPRAG and ARPRA claimed that, in practice, notices tend to list generic costs but fail to show the actual costs or how they factor into the site fee increase. Some of these submissions further argued that by notice increases should be supported with concrete evidence to substantiate the reasons for the increase in costs. Without any information about cost factors, home owners who wish to challenge an increase are at a disadvantage when trying to show that the increase is excessive. Submissions also noted that providing more information is likely to reduce disputes because when residents understand the reasons for a site fee increase, they are less likely to oppose the increase.

In light of this feedback, the review considers that it would assist the by notice increase provisions to work more effectively if an increase notice provided more information. The review recommends that by notice increase notices be required to include information about:

- the specific costs increases that have led to the site fee increase,
- how much these costs have increased since the last fee increase, and
- how these costs are being apportioned in the site fee increase.

### **Process for challenging a by notice increase**

Another frequently raised issue was dissatisfaction with the process for challenging a by notice increase. Under section 69 of the Act, if 25% of home owners believe that a site fee increase is excessive, they can lodge an application for mediation signed by at least 25% of the home owners who received the notice, within the first 30 days of the notice period. The parties are then required to use reasonable endeavours to participate in and finalise

mediation. A home owner can opt out of mediation and pay the increase. If the mediation is unsuccessful the home owners can apply to the Tribunal for a determination.

An individual home owner can also apply to the Tribunal without having to go mediation first, on the basis that a site fee increase is substantially excessive when compared to fees for similar sites in the community.

Home owner advocates argued for a lower percentage requirement for home owners to lodge an application for compulsory mediation. They argue that 25% is difficult to achieve and is preventing disadvantaged home owners from being able to initiate a challenge.

The review does not support lowering the threshold for applying for mediation below 25%. While it may sometimes be difficult to gain the support of 25% of home owners, lowering the threshold to, for example, 10%, would mean that every site fee increase could be challenged by a small minority, requiring the operator to attend mediation and possibly a Tribunal hearing, even though the majority of home owners did not object to the increase.

Another issue raised in some submissions was that there is a trend of operators not participating in the mediation process, thereby costing home owners time and money by requiring them to take the matter to the Tribunal. As this is not the intention of the Act, which clearly requires both parties to use reasonable endeavours to participate in and finalise mediation, the review does not consider that any legislative amendment is required. Ultimately the success of mediation depends on the willingness of both parties to try to find common ground, and legislation is limited in its ability to achieve this. The review notes that submissions suggested that most mediations are successful and result in agreements.

The length of time the mediation process and a possible Tribunal hearing can take was raised in submissions from both home owner and operator advocates, although all felt that compulsory mediation is a positive measure. The Tenants' Union submission argued that the notice period for a by notice increase should be extended from 60 to 90 days. This is because by the time the dispute resolution process is finalised, the 60 days may have expired, with the result being that home owners are already paying the increased fee and will require a refund if it is successfully challenged. The review appreciates this from a practical perspective but considers that 60 days is a reasonable notice period for home owners. The provision of more information to home owners in fee increase notices should allow disputes to be dealt with more efficiently.

### **Recommendation**

13. A site fee increase by notice be required to include further information about the reason for an increase including:

- the specific costs increases that have led to the site fee increase,
- how much these costs have increased since the last fee increase and
- how these costs are being apportioned in the site fee increase.

### **Community upgrades, capital vs operational costs and special levies**

Another area of contention is whether site fees should be used to recover or fund the capital costs of community upgrades.

The Act does not regulate what kinds of costs can be recovered through a site fee. However, under section 50 of the Act, home owners in a community may, by special resolution, agree to pay a special levy for the operator of the community to make a specified improvement to the community or to provide a new facility or service (a **community upgrade**). The original purpose of this provision was to enable community upgrades where either the home owner

or operator wished to install the upgrade.<sup>13</sup> The special resolution is only valid if operators give reasonable notice to all home owners in the community and the resolution is passed by at least 75% of all home owners within 90 days of the notice. Section 51 sets out further requirements in relation to the payment and use of a special levy, including that the operator must hold proceeds of the special levy on trust until used or refunded, and that payments must be used for the specified purpose within a reasonable time.

The review process highlighted divergent views about the issue of recovering the cost of community improvements.

Some submissions (such as the Tenants' Union, ARPRA, IPRAG) raised concerns about home owners being asked to pay for the costs of community upgrades through site fee increases. These stakeholders argued that it is unfair for a site fee increase, which becomes a recurring and compounding cost for home owners, to be used to pay for the one-off expense of upgrading community facilities and infrastructure. These submissions also argued that operators should be responsible for funding the total costs of community upgrades, on the basis that these are capital assets of the operator that are being improved, and that site fees should only be used to recover operating expenses.

Operator submissions argued that home owners reap the benefits of community upgrades both while living in the community as well as through a higher price when they sell their home. Some also argued that the contribution of site fee increases to the costs of upgrades is always small and most of the cost is borne by the operator.

The review considers that, while community upgrades increase the value of an operator's capital assets, home owners may also benefit from being able to use those upgraded facilities or via the potential increase to the value of their home when they sell. The review also considers that limiting site fees to only recovering operating costs is too inflexible for the possible needs of different communities.

However, given the fixed incomes of many community residents, the review acknowledges that there should be an effective means for residents to challenge site fee increases that are aimed at funding community upgrades. The review also considers that home owners are entitled to understand how their money is being used and that access to information is necessary for home owners to challenge site fee increases. As such, transparency of information about community upgrades should be improved.

Section 49(2) of the Act currently requires community operators to give at least 30 days' prior notice to the residents committee (or to all residents if there is no residents committee) of any proposal to provide a new facility or service for a community. For the reasons above, the review proposes that this provision be strengthened to provide that operators must advise all residents of any major capital works plans to install new, or upgrade existing, facilities or services in the community over the next 12 months, as well as reporting back on the details of projects undertaken in the past 12 months. The overall costs of the works, the timelines, any expected ongoing maintenance costs, and any proposed contribution from site fees should also be clearly set out by the operator.

Although this proposal would place an administrative burden on operators to prepare information, the review considers that this cost is justified as it will improve communication between operators and residents and reduce the number of disputes.

Where site fees are being used to contribute to community upgrades, the review recommends that this be clearly outlined in the site fee increase notice, and that the Tribunal be able to consider the additional factors outlined in the next section when deciding whether the proposed site fee contribution is excessive.

In relation to the special levy provisions, some submissions argued that the provisions are rarely used as it is easier to recoup costs via a site fee increase rather than having to obtain

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<sup>13</sup> Residential (Land Lease) Communities Bill 2013 Second Reading, 18 September 2013. Legislative Assembly Hansard, at <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-75342>

the agreement of 75% of home owners in the community. Some of these submissions recommended the provisions be removed from the Act. Some submissions from operator representatives shared similar views about the special levy provisions, further suggesting that the requirements for operators to hold funds on trust was an added administrative burden.

While it seems that the special levy provisions are rarely used, the review does not consider that they should be removed from the Act. The provisions provide an alternative means by which a majority of home owners can take action to make a specified improvement to a community, which may be useful in some circumstances.

### **Projected vs actual expenses**

A further issue raised in submissions was whether site fees should be able to recover projected expenses or whether they should be limited to actual expenses. Home owner advocates argued that some projected expenses never eventuate, leaving home owners paying for something that was never delivered or did not result in an expense.

While the review accepts that there is a risk that projected expenses may sometimes not eventuate, prohibiting projected expenses from ever being included in site fees is too inflexible to account for all possible circumstances. It may also have implications for cash flow – for example, where funds are needed up front to pay for urgent works.

However, to ensure that fees based on projected costs can be effectively challenged, the review recommends that, where a portion of a site fee increase is based on projected expenses, the Tribunal should be able to consider the reasonableness of including these in the increase, and whether previous projected expenses eventuated. This is addressed in the next section.

### **Recommendations**

14. Amend section 49 of the Act so that each year an operator of a community must advise residents of any major capital expenditure works, or major repair projects, undertaken in the past 12 months and those that are planned for the next 12 months (if any).

The overall costs of the works, the timelines, any expected ongoing maintenance costs, and any proposed contribution from site fees should also be clearly set out by the operator.

15. Where a site fee increase is contributing to the cost of a community upgrade, this be clearly set out in the site fee increase notice.

### **Matters the Tribunal may consider in determining if a by notice site fee increase is excessive**

Section 73 of the Act allows for the Tribunal, on application, to make an order relating to excessive site fee increases by notice. The Tribunal may make an order:

- declaring that an increase in site fees is excessive,
- reducing the amount of the increase by a specified amount,
- placing a limit on how much site fees can be increased by,
- setting aside the increase, or
- any ancillary order that the Tribunal thinks is appropriate in the circumstances.

Section 74 sets out the factors that the Tribunal may have regard to when deciding whether to make an order under section 73. The matters are:

- the frequency and amount of past increases in site fees for the community,

- any actual or projected increase in the outgoings and operating expenses for the community as provided by the operator since the previous increase,
- any repairs or improvements to the community since the previous increase or planned by the operator for the period covered by the increase being reviewed,
- the general condition of the community including its common areas,
- the range and average level of site fees within the community,
- the value of the land comprising the community, as determined by the Valuer-General,
- the value of any improvements to the community (including common areas) paid for or carried out by home owners,
- any explanation for the increase provided by the operator by notice in writing to the affected home owners,
- variations in the Consumer Price Index (All Groups Index) for Sydney,
- whether the increase is fair and equitable in the operation of the community,
- any other matters prescribed by the regulations.

Where part or all of a site fee increase is to pay for a community upgrade, the review recommends that the Tribunal be able to consider the need for the upgrade in the context of the facilities available in the community, the contribution of the operator to the total cost of the upgrade, the reasonableness of the amount that is being charged as a proportionate contribution to the community upgrade, and whether it is reasonable for this amount to be included in the site fee as an ongoing charge to contribute to the maintenance of the community upgrade.

Further, where part or all of a site fee increase seeks to recover projected costs, the review recommends that the Tribunal should be able to consider the need to recover these projected costs and whether the amount proposed to be included is reasonable. The Tribunal should also be able to consider whether previous projected costs that were charged to homeowners became actual costs and, if not, whether the funds collected for these could be used to cover the new projected costs.

Some submissions to the review argued that section 74(1)(f), which refers to the value of the land comprising the community, should be removed as it is not relevant to site fee increases. The review considers that there is merit in this argument and that if the value of the land impacts an operator's land tax liability this could be included when considering the costs of the operator.

While the Tribunal may consider the matters in section 74(1), it is limited in the orders it can make by section 73(4), which states that the Tribunal must not make an order that would result in an increase lower than that needed to cover any actual or projected increase (established to the satisfaction of the Tribunal) in the outgoings and operating expenses for the community since the previous increase (if any) in site fees for the community. Home owner advocates argued that this provision should be removed and the Tribunal given complete discretion to decide whether a fee increase is excessive.

The review does not consider that section 73(4) should be removed altogether, and the Tribunal given discretion to make an order that would result in an increase lower than that needed to cover actual cost increases. However, in light of the review's recommendation that the Tribunal be able to consider the reasonableness and other matters about increases based on projected costs, the review recommends that section 73(4) be amended to remove the reference to projected increases in costs.



### **Recommendations**

16. Where part or all of a site fee increase is to pay for a community upgrade, enable the Tribunal to consider:
- the need for the upgrade in the context of the facilities available in the community
  - the operator's contribution to the total cost of the upgrade
  - the reasonableness of the amount included in the site fee increase as a proportionate contribution to the community upgrade, and
  - whether this amount is a reasonable inclusion in the site fee as an ongoing charge to contribute to the maintenance of the community upgrade.
17. Where part or all of a site fee increase seeks to recover projected costs, enable the Tribunal to consider:
- the need to recover these projected costs,
  - whether the amount proposed to be included in the site fee is reasonable and
  - whether previous projected costs that were used as the basis for a site fee increase became actual costs and, if not, whether the funds collected for these costs could be used to cover the new projected costs.
18. Remove section 74(1)(f) from the Act. This provision enables the Tribunal, when considering whether a by-notice site fee increase is excessive, to consider the value of the land comprising the community, as determined by the Valuer-General.
19. Amend section 73(4) to remove the reference to projected costs. This provision prevents the Tribunal making an order that would lead to an increase less than the amount needed to cover actual and projected cost increases since the previous site fee increase, and should be amended to align with Recommendation 17.

### **3.3.2 Utilities and energy access and charges**

#### **Embedded networks and electricity charging**

Around 40% of residential land lease communities are connected to the electricity network via an embedded network, which is a private electricity network connected to the main supply through a "parent meter". The embedded network distributes electricity to premises within the community. The operator is responsible for operating and maintaining the network and administering billing.

Residents in embedded network communities do not have the option to switch providers for a better deal. Because of this, the Act offers protections for those residents to ensure they are not exposed to excessive prices. Section 77(3) provides that an operator must not charge a home owner more than the amount charged by the utility service provider or regulated offer retailer who is providing the service for the quantity of the service supplied to, or used at, the residential site.

#### **The 'Reckless' decision and implications**

In the 2018 decision *Silva Portfolios Pty Ltd trading as Ballina Waterfront Village & Tourist Park v Reckless* (Reckless), the Court of Appeal of the Supreme Court of NSW clarified that this provision means that an operator is not entitled to charge a home owner more than the operator has been charged by the energy provider for the electricity consumed by the home owner.

Following this, the matter was returned to NCAT to decide how the electricity bill should have been calculated. The method NCAT used was to take the total cost in dollars of the community's electricity bill and divide it by the total kilowatt hours (kWh) of electricity consumed by the community to get a single "dollar per kilowatt hour" rate. This rate was then multiplied by the number of kWh consumed by each home owner in the community to produce each home owner's total bill.

This is known as the Reckless method, which has been used as the basis for energy calculation in many communities since.

Although it has ensured lower than average energy prices for many home owners, use of the Reckless method has also meant that home owners lack certainty about the rate they will be paying for electricity each month (especially as the commercial bills issued to the operator vary more than residential bills), and often face confusion in understanding how their bills have been calculated. Further, because the home owner's bill cannot be issued until the operator has been charged, any delays to the operator's bill means that there are delays to the home owner's bill. This means that the home owners' bills can be issued at varying frequencies, which can lead to a home owner facing significantly larger bills than they may have prepared for.

The Reckless method is complex and time consuming for operators to administer. It also means that operators must absorb the cost of maintaining an embedded network, administration costs and the annual price of a mandatory Energy & Water Ombudsman NSW (EWON) membership. Feedback received from operators during the consultation process has been that these costs can be significant for operators as small-business owners.

Further, because of the complexities associated with the Reckless method, some operators have outsourced the role of supplying electricity through the embedded network and administering billing to third party providers. Such providers are not captured by the provisions within the Act, and are sometimes also excluded from other state or federal energy legislation, and may charge unregulated amounts for electricity.

Because the Reckless method poses these difficulties for both operators and home owners, stakeholders representing both groups have been calling for change to the law, including to allow operators to recover costs and to ensure fair and transparent electricity charging for home owners. However, as Reckless has also ensured very low cost electricity for many home owners, any change to the legislation is likely to result in an increase in electricity prices for some home owners.

### **Proposed way forward – price caps**

In developing a solution to the problem of electricity charging, the review developed six principles of reform to assess proposed reform options. These are: simplicity; transparency; certainty; balancing the financial impact on operators and residents; pricing reflecting supply quality; and being simple for the NSW Government to regulate. Development of these principles was informed by best practice, discussions with key stakeholders and pricing principles used by the Department of Planning, Industry and Environment and the Independent Pricing and Regulatory Tribunal.

The initial discussion paper for the review sought feedback on three options for reform to the regulation of electricity charging:

- amending the Act to require the Reckless method to be used to calculate the amount that the operator of an embedded network (whether that be the community operator or a third party) can charge a home owner for the supply of electricity,

- amending the Act to require use of the Reckless method but also allowing the embedded network operator to charge home owners a fixed percentage above the amount they pay for electricity (which can be used for EWON membership and administration), and
- removing the regulation of electricity charging from the Act and letting the national energy laws apply.

Feedback to the discussion paper did not demonstrate a clear preference for any of these options.

Following further work and discussion with stakeholders, a number of other options were identified, which involve ‘pegging’ the maximum amount that can be charged for electricity to the prices that are paid for electricity in the retail market by customers in the same distribution area who are not supplied through an embedded network.

In order to assess the pricing impact of these different options on operators and home owners, the review undertook modelling of the price impacts of the options using a small sample of 11 electricity bills from different distribution areas.

The Government then consulted on two of these options which were identified as allowing operators to recover some costs while not causing an unreasonable increase in home owners’ bills. These options were:

1. setting the maximum price that a resident could be charged at the median market price for electricity in that distribution area, calculated as a single rate that combines usage and supply charges.
2. setting the maximum amount that a resident could be charged at the median market price, with separate median usage and median supply charges.

The consultation also sought views on whether it was preferable to have a single discount for residents receiving a low-quality electricity supply, or whether that discount should be tiered.

Modelling of both of these options resulted in an increase for some residents when compared against Reckless, but for home owners who are currently being supplied through an embedded network operated by a third party the options resulted in price reductions of up to 36%. The price increases were also mitigated in the modelling by application of discounts to the service availability charge for low amperage, which is estimated to be experienced by 93% of residents.<sup>14</sup>

In the second consultation, 79% of respondents supported using the median market price for each distribution area as a price cap. The consultation was clear that while these options would be simpler, create greater certainty and align with general retail market prices, they may also result in price increases for some home owners.

The review also carefully considered what discounts, if any, are appropriate for home owners experiencing poor amperage. Organisations representing operators have argued for the removal of such discounts on the basis that the costs of supplying electricity to a community are the same regardless of whether the site is receiving 20 or 60 amps.<sup>15</sup> While the review appreciates this perspective, the review notes that the quality of life for those residents on reduced amperage is compromised, with residents on extremely low amperage facing difficulties using basic appliances, such as toasters or kettles, at the same time. The

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<sup>14</sup> CCIA NSW Submission; *Statutory Review of the Residential (Land Lease) Communities Act 2013 Discussion Paper* (12 March 2021); p 63.

<sup>15</sup> *Ibid.*

review considers it appropriate that residents facing these difficulties are not required to pay the full price for a utility which is not delivered in full.

The consultation was fairly evenly split between support for single, flat rate discounts (58%) and tiered discounts (41%). As part of modelling a range of alternative options, the review also modelled the impact of a number of different discount options. The existing discount tiers (80% for residents on less than 20 amps; 50% for residents on 20-30 amps, and 30% for residents on 30-60 amps)<sup>16</sup>, resulted in some operators losing money when compared against Reckless. However, feedback from a number of stakeholders including EWON, the Tenants' Union, and the Public Interest Advocacy Centre (PIAC) on the impacts of the different rates of energy supply support the continuation of tiered discounting.

Taking into account the above principles for reform, feedback from stakeholders, and the impact of the price modelling, the review considers that the "median separate charges" approach to regulation of electricity charging could present the best balance between the interests of home owners and operators.

This approach would involve:

- Setting the maximum amount that a resident in a land lease community may be charged for electricity (by either an operator or a contracted third party supplier) at the median retail market price, comprised of separate usage and supply charges that are contained in the median market offer for each distribution area, as identified by IPART.
- Residents who receive low quality electricity supply receiving the following discounts to their service availability charge (which will be renamed daily supply charge):
  - a. 30% discount to the daily supply charge for residents with 31-60 amps
  - b. 60% discount to the daily supply charge for residents with below 30 amps.

This approach is simple to calculate, transparent, delivers on the home owner need for certainty, balances the financial impact on operators and residents, and allows for pricing to reflect supply quality. It would allow operators to more easily administer electricity billing and allow residents to predict and budget for their electricity bills – both of which are not feasible under the Reckless method.

However, the review is also aware of the potential impacts of utility price rises for residents. While the review endeavoured to undertake modelling to understand the likely costs implications, this could only be done on a very small sample of bills (11) provided.

The review therefore recommends that further work be done to understand the likely cost implications of a maximum price cap based on the median market price. The further work should include consideration of whether there is a need for any mitigation strategies, such as, for example, additional mechanisms to promote competition and transparency of electricity pricing.

The review also recommends that consideration be given to extending the pricing protections that are provided to home owners to tenants who rent from the operator of a land lease community.

### **Proposed solution will be reviewed within 3 years**

The review considers that, ideally, it would be preferable for the electricity pricing provisions be removed from the Act in the longer term, allowing electricity pricing to be solely regulated

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<sup>16</sup> Residential (Land Lease) Communities Regulation 2015 cl13(2)

through the national electricity regulatory framework, which is better able to address the complexity of energy regulation.

In this context, the review notes that the National Energy Ministers are yet to consider the Australian Energy Market Commission (AEMC) recommended reforms outlined in the AEMC's 2019 report *Updating the Regulatory Frameworks for Embedded Networks*, and the associated cost impact assessment of these recommended reforms that was undertaken by independent consultants.

However, if regulation of electricity prices were to be removed from the Act at the current time, residents could be charged up to the Standing Offer Price for the relevant local area retailer.

The Standing Offer Price is usually the highest tariff charged by a utility company and is the price which a customer is charged if they do not choose a specific plan. The Standing Offer cannot be higher than the Default Market Offer (DMO), which is set by the Australian Energy Regulator.

This option would likely result in a sharp increase in residents' energy bills and, as they are not able to shop around for the cheapest retailer, there is no competition to push prices down. This option is therefore not currently supported by residents or their representative groups given the substantial price impacts, and the review also does not support this option at the present time.

Nevertheless, given the uncertainty about what broader changes may occur to the regulation of electricity charging, the review recommends that the proposed changes to electricity pricing arrangements in the Act be reviewed within 3 years of commencement, and that this review include an assessment of any changes to the national electricity framework or other regulatory changes that affect embedded networks.

### **Recommendations**

20. For electricity supplied through an embedded network, undertake further work on the potential price impacts of the introduction of a maximum price cap based on the median market price. This should include consideration of whether there is a need for any mitigation strategies, and any additional mechanisms to promote competition and transparency of electricity prices.
21. Give consideration to applying any amended electricity pricing provisions in the Act to the community operator and any contracted third party provider who is providing electricity to residents through an embedded network.
22. Give consideration to extending the pricing protections provided to home owners in the Act to tenants who rent directly from the operator of a land lease community.
23. Review any new electricity pricing provisions in the Act within 3 years of their commencement, including an assessment of any changes to the national electricity framework and other regulatory changes that affect embedded networks.

## **Billing and receipts for electricity and other utilities**

Separate from the actual price of electricity discussed above, Part 7 of the Act includes requirements relating to *how* operators are to charge for utilities. This includes requirements that a home owner cannot be required to pay for the use of the utility unless the use is separately measured or metered, that an operator gives the home owner an itemised account and allows at least 21 days for payment to be made, and requirements relating to operator receipts for payments. Particulars required to be provided on receipts include the name of the home owner, the period for which the charges are paid, the date on which the charges were received and the amount of charges paid.

The Act does not currently contain any specific requirements about what information an operator must provide on bills for utility charges, or when, and how often, such bills need to be issued. However, operators with an embedded electricity network (and any other authorised electricity retailers) must comply with obligations under the national energy framework, which specify requirements for the contents of bills and their frequency.

Feedback to the review (including from the Tenants' Union, ARPRA and PIAC) suggested that the lack of specific requirements in the Act relating to the content and timing of bills has resulted in many different types of billing systems across communities, with a high degree of variability in the levels of information provided to residents. They also noted that this has resulted in a lack of certainty around the timing for bills, which in some cases has resulted in residents needing to pay very large bills within 21 days, given the length of the billing period used.

While feedback from CCIA observed that the current billing requirements were fair, they also noted that there would be benefits from more explicitly aligning billing requirements with those under the national electricity laws. In relation to receipts, a number of stakeholders (including the Tenants' Union and PIAC) raised a concern that despite the current provisions, some receipts for utilities do not contain sufficient information to enable eligible residents to apply for government rebates or access payment assistance schemes, such as Energy Accounts Payment Assistance (EAPA).

While feedback was often not specific about whether the above issues related to electricity, gas and/or water billing, the concerns raised suggest that there is a lack of clarity within the Act that is creating problems for residents in terms of budgeting, understanding and accessing government supports. At the same time, while there are national requirements for electricity billing, it is not clear whether all operators with embedded networks are aware of their obligations under the national electricity customer framework in relation to energy billing and are billing in line with them.

On the basis of this feedback, the review considers that there is scope for the Act to provide greater clarity and consistency in relation to billing. More specifically, it is proposed that the Act explicitly clarify that all energy billing and receipts must be separate and consistent with requirements imposed under the national electricity laws, and that similar provisions be introduced for any other utility billing by operators.

In its response, the Tenants' Union suggested that the following specific information about utility charges be provided in every bill:

- the name and site number of the resident,
- the date of the account and the date payable,
- the previous and current meter readings,
- the amount of water, electricity or gas supplied for the period,
- the charge per unit of usage, and total usage charge, and
- the supply charge.

The review will draw on this suggestion, alongside the requirements under national electricity laws, in developing these amendments during the drafting stage.

The national electricity laws require bills to be issued at least every three months and to include the particulars suggested by the Tenants' Union, as well as:

- the legal name, and trading name (if relevant), in the contact details of the exempt seller,
- the identifier of the meter for the exempt customer's premises,
- any amount deducted, credited or received under a government or non-government funded energy charge rebate, concession or relief scheme or under a payment arrangement,
- details of the available payment methods,
- a telephone number for account enquiries and complaints.

### **Recommendations**

24. Clarify that all energy billing by operators (or contracted third-parties) must occur in line with requirements under the National Energy Customer Framework, being the National Energy Retail Rules for authorised retailers, and the Australian Energy Regulator's Retail Exempt Selling Guidelines for exempt sellers.
25. Introduce new provisions, consistent with the requirements for energy billing, which specify the minimum information in, and frequency of, bills issued by operators (or contracted third parties) for the use of other utilities.

### **Sustainability infrastructure in communities**

The installation of sustainability infrastructure, and in particular solar panels, in a residential context has been growing substantially across NSW in recent years, with NSW installing the largest amount of roof top solar in the country in 2020, and also increasing the amount installed by almost 30% compared to 2019.<sup>17</sup> While the installation of such infrastructure, including solar panels, to a home within a community is likely to be considered an alteration or addition under section 42, and therefore feasible provided operator consent is given, the Act currently contains no specific provisions relating to sustainability infrastructure.

Feedback to the review focussed almost entirely on the issue of solar power and highlighted that solar panel installation in communities can be complicated, especially where a community has an embedded network. Overall, submissions to the review have noted that although there is a general willingness to install and access environmentally sustainable infrastructure in communities, there are a number of complexities and barriers limiting broader uptake. For example, a number of submissions, including those from EWON, PIAC ARPRA and the CCIA, outlined a number of technical, economic, infrastructure and policy barriers to home owners installing solar panels that successfully integrate with their community's electricity network. These barriers include:

- the upfront costs of solar,
- issues with home owners being able to access incentive programs, rebates and receive the benefits of feed-in tariffs,

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<sup>17</sup> CSIRO, *Australia installs record-breaking number of rooftop solar panels*, 13 May 2021, accessed on 13 September 2021 on <https://www.csiro.au/en/news/news-releases/2021/australia-installs-record-breaking-number-of-rooftop-solar-panels>

- the frequent need for upgrades to individual metering, as well as community electricity networks, to enable effective solar energy usage and manage the impacts of the additional energy generation, and
- divergent views over who should fund such upgrades.

These issues are further complicated by the interactions with broader NSW and national electricity policy around pricing and embedded networks, including a number of policies which are currently under review such as the Exempt Seller Guidelines. Feedback generally agreed that further work was needed to address this issue.

The complexities identified above go beyond the Act alone and a coordinated cross-government solution is needed. To support such a process the review recommends further targeted consideration of this matter in partnership with other key parts of NSW Government, such as the Department of Planning, Industry and Environment (DPIE), as well as operators, residents and other interested stakeholders. This approach would enable the development of any reforms to occur in the context of broader national electricity market review work, and allow for the development of a solution that could ideally align with the finalisation of broader reforms to electricity charging in embedded networks within land lease communities.

### **Recommendations**

26. Undertake further work to consider the complexities, barriers and costs associated with enabling the effective installation of sustainability infrastructure, notably solar panels, in communities. This work should occur in partnership with the Department of Planning Industry and Environment and engagement with the broader land lease communities sector.

### **3.3.3 Community rules**

#### **Development of community rules – creating a more collaborative process**

Part 8 of the Act outlines requirements relating to community rules. Community rules are written rules that relate to the use, enjoyment, control and management of a community. There are certain requirements that must be met with respect to developing a community rule, including that it cannot invalidate anything that has already occurred in the community and that rules must be fair, reasonable and clearly expressed. Operators and home owners have an obligation to comply with community rules where they apply. There is a rebuttable presumption that a community rule is not fair and reasonable if it does not apply uniformly to all residents of the community.

The Act allows for operators to make community rules if the community has no residents at the time the rules are made. If a community has residents but no community rules, an operator may create rules for the community by following the procedures set out in section 90 of the Act. This includes consulting with the residents committee (if one exists for the community) about the proposed rule and then giving each resident written notice of the proposed rule at least 30 days before the day on which the rule takes effect. The same procedures apply for making any amendment to existing community rules.

Feedback on the operation and development of community rules highlighted a range of different views. Some submissions to the review (including those from the Tenants' Union and IPRAG) raised a concern that the outcome of the current regulatory framework is that changes to, or the creation of new, community rules tend to sit largely with the operator without the opportunity for genuine input or collaboration from residents. Given the impact



community rules have on the daily lives of residents, the Tenants' Union has suggested introducing a voting threshold requiring at least 75% of residents in the community to agree to the proposed new or amended rule as a way to facilitate resident engagement.

The role of the residents committee in representing home owner views in relation to community rules was also the subject of contention. Submissions and survey responses highlighted that the knowledge and collaboration ability of committee members was very variable and that they should not be the decision makers for the community.

At the same time, feedback through operator submissions (such the CCIA and Hometown) supported retaining the current requirements relating to the development of community rules. They additionally proposed amending the Act so that at least 25% of residents must support contesting a community rule before progressing the matter to the Tribunal, similarly to how by notice increases may be challenged. ARPRA also suggested that group applications to NCAT relating to community rules should be enabled to streamline the current process which allows only for separate applications from single residents.

On the basis of the feedback, the review considers that some changes to how community rules are developed and contested could improve the operation of this aspect of the Act. In particular, there seems to be scope to prescribe a more collaborative process among operators and residents for the development of community rules, and streamline the process for contesting new rules with the Tribunal. Comparable processes, such as for village rules in retirement villages and by-laws in strata schemes, offer examples of more specific systems for owner involvement in developing the rules which govern their living situation. A version of such processes is likely to be of benefit in the land lease community context.

While further consultation with the sector is recommended to refine the final changes, it is proposed that the reforms include developing a process for residents to propose new rules, specifying the consultation and voting process required for new or amended rules, requiring a minimum percentage of the community to support an application to NCAT to challenge a rule and enabling group applications for such disputes. In allowing for greater involvement from home owners, it is anticipated that disputes over rules should decrease and the role of the residents committee clarified.

Such a process should also enable further consideration of whether changes to enforcement provisions are needed once the reform direction is confirmed. Various issues associated with the enforcement of community rules was highlighted in both submissions and surveys, and the review considers these would best be explored in conjunction with this wider reform package.

### **Recommendation**

27. Introduce, following further consultation with the sector, changes to the community rule development and dispute process including:

- a process for residents to propose new rules or changes,
- a consultation and voting process for new or amended rules,
- a minimum percentage of the community to support an application to the NSW Civil and Administrative Tribunal (NCAT) to challenge a rule, and
- enabling group applications to NCAT for such disputes.

### **Age restriction community rules**

Section 44(6) of the Act provides that it is not unreasonable for an operator to withhold consent to having additional persons occupy a site if the additional person does not meet age restrictions for occupancy as set out in the community rules. This section applies if the

age restriction rules were in force when the home owner leasing the site entered into the site agreement. While section 44(6) implies that age restriction rules are allowed, there is no express requirement in the Act that enables these rules to be adopted in a community.

The matter of age restriction rules was the subject of divergent and strong views within submissions and the survey. Many survey responses and some submissions support having community rules regarding age restrictions, showing a preference to live among same aged people rather than with younger residents. Hometown suggested that most home owners choose to reside in their communities because they are age restricted, whereas the CCIA noted that there have been recent Tribunal decisions that upheld age restriction rules in the community.<sup>18</sup> ARPRA also noted that most home owners wanted age restriction rules but suggested that exceptions were necessary to allow children to reside on a residential site where the home owner is the legal guardian of a child.

However, age restriction rules were not favoured by all submissions. The Tenants' Union has raised concerns that age restrictions are unjust for younger people who may wish or need to live in the community. While the Tenants' Union did not oppose communities being marketed at older people, they raised that such rules can conflict with section 44(5) which allows a home owner's spouse or de facto partner, or a home owner's carer, to have an automatic right of occupation of a residential site. They have suggested that if age restriction rules are to be permitted, clear exemptions should be prescribed to clarify the situation. It was also noted that community rules also apply to sites occupied by long-term casual occupants who are covered under the Holiday Parks Act.<sup>19</sup> This would mean that mixed use communities accommodating both permanent residents and long-term casual occupants would be subject to age restriction rules, if any existed for the community.

Given that many communities generally cater for older people, the review considers there is value in enabling communities to adopt an age restriction rule for their community if it is desirable and has the support of residents. The level of support required will be considered as part of the broader work on community involvement in the making of community rules, as discussed in the previous section.

At the same time, the review recognises that there are situations in which it would be unreasonable to prohibit a person from living in the community based on their age, such as a child whose legal guardian is a community resident, the home owner's partner, or a beneficiary of an estate. On this basis, the review proposes clarifying in the Act that age restriction community rules are allowed, subject to community support for the relevant rule and ensuring that any age restriction rules do not override the right of occupation for a home owner's spouse, de facto partner or the person's carer as provided for under section 44(5).

Alongside the above clarification in the Act, the review considers that the application of community rules to long-term casual occupants in an occupation agreement with the operator under the Holiday Parks Act should be reviewed. If community rules were to continue to apply, this may result in mixed use communities being unable to offer site leases to some long-term casual occupants, who are generally comprised of younger families who use their site for holiday purposes. Further work is needed to examine this situation and whether changes are required.

### **Recommendations**

28. Clarify that age restriction community rules are allowed under the Act subject to support by residents and the introduction of relevant exemptions.

<sup>18</sup> *Barbara Evans v Cabana Holdings Pty Ltd trading as Broadlands Relocatable Homes Estate* NCT RC15/168173

<sup>19</sup> *Holiday Parks (Long-term Casual Occupation) Act 2002* (NSW) s 7(2).

29. Review the application of Part 8 of the *Residential (Land Lease) Communities Act 2013* to long-term casual occupants covered by the *Holiday Parks (Long-term Casual Occupation) Act 2002*.

### 3.3.4 Maintenance and repairs

#### Responsibility for site maintenance and repair

The Act requires operators to maintain the community's common areas in a reasonable state of cleanliness and repair, and so it is safe and fit for use by the home owners.

Section 37(1)(k) provides that an operator is to ensure a residential site is in 'reasonable condition and fit for habitation at *the commencement* of a site agreement for the site'. Prior to the 2013 amendments to the Act, section 24(1)(b) of the Former Act provided that the park owner had a responsibility to provide *and maintain* the residential site in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.

Some submissions argued that the limitation in section 37(1)(k) of the operator's responsibility to the commencement of a site agreement has led to uncertainty over who is responsible for the 'ongoing' maintenance of the site.

Operator advocates argued that section 37(1)(k), together with section 43(1), show that the intention of the Act is to make the home owner responsible for maintaining the site on an ongoing basis, and that information provided to prospective home owners should make this clear.

Submissions on behalf of home owners contended that operators should be responsible for maintenance of the site and home owners should only be responsible for any damages they cause to the site. This was argued on the basis that any parts of the site such as driveways, paths, and retaining walls form part of the structure of the site, cannot be taken with the home owner and are owned by the operator. The Tenants' Union submission provided examples of home owners being told they were responsible for replacement or repair of retaining walls that were keeping their site level, with costs sometimes reaching over \$10,000.

The review has considered the feedback and agrees that greater clarity is needed around who is responsible for ongoing site maintenance.

On balance, it is considered that, while home owners should generally be expected to keep the site they occupy in a clean and tidy state, operators should be responsible for maintaining infrastructure and hardscaping that forms part of the site and cannot be taken with the home owner if they remove the home. While home owners buy the home, they are merely leasing the site, and the review considers that it is not reasonable to require home owners to maintain and repair infrastructure that is part of the land owned by the operator and would be retained by the operator if the home owner were to remove their home from the site.

However, the review recommends that home owners should continue to be responsible for damage they have caused to the site beyond fair wear and tear.

While this is a general statement of principle, the review considers that further consultation should occur on how this principle is stated in the Act and whether it is necessary, for the sake of clarity and to avoid disputes, to list specific aspects of site maintenance for which an operator is responsible.

### **Recommendations**

30. Clarify that operators should be required to ensure a site is safe, in a reasonable condition and fit for habitation, and that operators are responsible for maintaining infrastructure that forms part of the structure of the site and cannot be removed.
31. Require home owners to keep the site they occupy in a clean and tidy condition and be responsible for damage they have caused to the site (beyond fair wear and tear).
32. Undertake further consultation on how these general principles about site maintenance and repair should be expressed in the Act, and whether it is necessary to list specific aspects of site maintenance and repair for which the operator is responsible.

### **Dilapidation**

Section 43 of the Act allows operators to issue home owners with a written notice requiring the home owner to rectify any defects within 60 days where the operator reasonably believes that either:

- the residential site or the home sitting on the site is significantly dilapidated, or
- any external feature of the home has been altered or added to, or any fixtures on the site have been altered or added by the home owner in such a manner as is likely to cause serious health or safety risks to others.

A number of submissions raised concerns about the responsibility to rectify dilapidation to the residential site falling on a home owner despite the site not being owned by the home owner.

In line with the recommendation that operators should be responsible for ensuring a site is safe and in a reasonable condition, and for maintaining any infrastructure that forms part of the site and cannot be removed by the home owner, the review recommends that section 43 be amended to provide that a notice requiring repair of dilapidation only be issued to a home owner in relation to the home or where dilapidation of the site has been caused by the home owner.

In their submission to the review, the CCIA raised the issue of operators having a means to address dilapidation of a home and recommended the review consider reintroducing the provision in section 99 of the Former Act that explicitly allowed an operator to issue a termination notice on the basis that the dilapidated condition of the home is a breach of the site agreement.

The review considers that a home owner allowing a home to fall into significant dilapidation is already a breach of clause 19.1 of the standard site agreement, which states that the home owner will “maintain (subject to fair wear and tear) the home located on the residential site in a reasonable state of cleanliness and repair, and so as to be fit to live in”.

The review further considers that section 43 provides a means of dealing with dilapidation as if a home owner fails to carry out repairs after being issued with a notice to do so under section 43, the operator can apply to the Tribunal for an order requiring the repairs to be carried out and, if the home owner fails to comply with this order, the operator can seek an order authorising the operator to arrange for the repairs to be carried out and recover reasonable costs from the home owner.

### **Recommendation**

33. Amend the Act so that notices of dilapidation can only be issued in respect of the home (see section 43(1)(a)) or where dilapidation to the residential site has clearly been caused by the home owner.

### **Minor alterations to the home**

Section 42 of the Act provides that a home owner must not make any alteration to the exterior of the home (other than painting or minor repairs), except with the written consent of the operator of the community or unless the site agreement otherwise provides. This also applies to circumstances where a home owner may seek to add a fixture to the site or replace the home with another home. The operator must not unreasonably withhold or refuse consent, but the consent may be given with reasonable conditions.

Some feedback to the review argues that the Act should enable home owners to carry out more 'minor alterations and additions' such as installing alarms, window locks, window screens and shutters, door screens and exterior lights, without needing to obtain the consent of the operator.

The review proposes that the Act be amended to enable home owners to make a small number of minor alterations to their homes without the need for operator consent. The review recommends that these include window locks, window screens and shutters, door screens and exterior lights. The review considers that it is appropriate to require operator consent for the installation of measures such as alarms and security cameras as these may impact on the amenity of other residents.

Removing the need for operator approval streamlines the process for home owners and reduces the administrative burden on operators of approving relatively minor alterations.

### **Recommendation**

34. Allow home owners to make minor alterations or additions to the home that do not need operator consent. These should include the installation of:

- window locks
- window screens and shutters
- door screens, and
- exterior lights.

### **Compliance with planning requirements**

As well as the requirement to gain operator consent, section 42 requires that any alteration, addition to, or replacement of a home must comply with the *Local Government Act 1993*, the *Environmental Planning and Assessment Act 1979* or any approval, consent or certificate under either or both of those Acts.

This means home owners and operators must also comply with the requirements of the LG Regulation. The review notes that the LG Regulation falls under the remit of DPIE.

The LG Regulation imposes requirements for the 'design and construction of caravan parks, camping grounds and Manufactured Home Estates (MHEs), and for the installation of

moveable dwellings and associated structures'.<sup>20</sup> An associated structure is defined in the LG Act as a 'carport, garage, shed, pergola, verandah or other structure designed to enhance the amenity of a moveable dwelling and attached to or integrated with, or located on the same site as, the dwelling concerned.' This definition captures many alterations and additions to homes commonly found in communities.

Prior council approval is generally not required for the installation of homes and associated structures in communities. However, they must be constructed and installed in compliance with the LG Regulation. The review understands that prior council approval is required where the community is located on flood-labile or bushfire prone land.

The LG Regulation requirements include that homes and structures not requiring council approval must:

- be of a design certified by a practising structural engineer as structurally sound,
- be installed in accordance with the specifications in the engineer's certificate and other specifications in the approval for the park or estate
- have compliance plates attached<sup>21</sup>.

Under the LG Regulation, the operator is required to notify council of the installation of a manufactured home or associated structure. The notice provided to council by the operator must be in writing and provided within 7 days of completion of the installation of the structure. The notice must contain certain details about the site and additional structure and must be accompanied by a copy of the engineer's certificate for structure and a fully dimensioned diagram. Within 5 business days of receiving the notice, the council must issue a certificate of completion to the owner of the home or a written notice that states why a certificate of completion was not issued.

Feedback to the review has indicated that some longstanding alterations and additions made to homes in some communities, with the consent of the operator, have been later found by council to be non-compliant with the LG Regulation and have been required to be removed. In some instances, these alterations and additions were made to the home years prior to the existing home owner buying the home. In these circumstances, council may not have been made aware of the alteration at the time it was made, or may not have issued a certificate of completion.

Despite the obligation on operators under the Rules of Conduct at Schedule 1 of the Act to have a knowledge and understanding of the LG Regulation, it appears that some operators are not aware of the requirements of the Regulation.

This view is supported by the submission from the Tenants Union. The CCIA suggested that the Act should be amended to clarify that alterations and additions must comply with the requirements of the LG Regulation and other requirements under planning law.

On the basis of this feedback, the review proposes to amend the Act to clarify for operators and home owners that alterations and additions must comply with the requirements of the LG Regulation. The review believes that this will direct home owners and operators to the requirements of the LG Regulation.

The review also recommends that DCS liaise with DPIE over whether education and information provided to land lease community operators and residents needs to place more emphasis on the need to comply with the LG Regulation. The review notes that the LG Regulation will be reviewed by DPIE in 2022 as part of the ongoing development of the new

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<sup>20</sup> Planning Circular - 'Commencement of updated regulation for caravan parks and moveable dwellings Act and Regulation changes; Circular - PS 05-007 issued – 14 September 2005

<sup>21</sup> Ibid

Housing SEPP. The review proposes that DCS works with DPIE in the course of that review to assess whether the requirements of the LG Regulation as they relate to alterations and additions to homes are fit for purpose and reflect the current needs of the sector.

### **Recommendations**

35. Explicitly state in the relevant provisions of the Act that any modification or alteration to the home is required to comply with the relevant Local Government Regulations.
36. The Department of Customer Service liaise with the Department of Planning, Industry and Environment over whether education and information provided to land lease community operators and residents needs to give clearer guidance on the need to comply with the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021.
37. The Department of Customer Service work with the Department of Planning, Infrastructure and Environment during the review of the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021* to assess whether the requirements of that regulation as they relate to alterations and additions to homes in residential land lease communities are fit for purpose.

### **3.3.5 Other rights and responsibilities**

#### **Educating operators and home owners about their rights and responsibilities**

Under section 55 of the Act, new operators must undertake a mandatory education briefing approved by the Commissioner for Fair Trading within 30 days of their name being listed on the community register. The mandatory education briefing involves either:

- reading through all information contained in the pages on land lease community operators on the Fair Trading website, or
- attending an information session or seminar on the laws given by Fair Trading or the Land Lease Living Industry Association.

Operators must complete a declaration form and provide it to Fair Trading to demonstrate completion of education.

A number of submissions (including from the Tenants' Union and ARPRA) suggested that the current mandatory education requirements for operators are inadequate and should be improved. Both the Tenants' Union and ARPRA suggested establishing an online tool for delivering mandatory education, which would enable the use of tools to test operators' knowledge. Some submissions also suggested that the mandatory education requirements should extend to not only new operators but existing operators, as well as other operational staff given their proactive role in managing communities.

It was also proposed that the Government should institute a licensing or accreditation scheme to assess operators before they may operate a community to ensure they meet a minimum standard. This approach was opposed by others, including the CCIA, who argued that a licensing scheme would impose an unnecessary layer of regulatory burden on operators and increase costs to the Government to administer the scheme. Alternatively, the CCIA suggested Fair Trading work more closely with stakeholders to develop further voluntary educational resources and programs.

The review has considered the range of suggested proposals. Although a licensing or accreditation scheme would be the preferred outcome for some stakeholders, the review considers that the cost involved in establishing the system, as well as the administrative burden of having to obtain a licence in addition to council approval to operate a community, may be overly burdensome. This could also have the unintended consequence of driving smaller operators out of the market and may result in the passing on of costs associated with obtaining and upkeeping a licence or accreditation to home owners through increased site fees.

However, the review found that there is scope to improve the mandatory education program for operators. Operator education is particularly important given the critical role that operators play in managing the community and their impact on residents. However, the current system is unreliable as there are no ways to verify how aware an operator is of their legal obligations other than through their submission of the declaration form. On this basis, the review recommends that the mandatory education obligations be further refined in consultation with operators to ensure that it is fit for purpose and designed to support sector development and understanding. It is also proposed the education requirements extend to operators' employees where the content is relevant, such as the rules of conduct, given that employees may also interact with home owners and work on site in the community.

In addition to improving operators' knowledge, the review considers there is also an opportunity to strengthen home owners' understanding of their rights and obligations under the Act.

A review of the submissions highlighted that aside from the need for clarity in the Act, home owners' understanding of their rights and obligations was variable and could be strengthened. Submissions also expressed concern about resident committees in communities, with the majority claiming that committees do not understand the laws or procedures related to the community rules. Operator representatives, including Hometown, noted that information provided by operators to the residents committee is not always shared with the rest of home owners.

Based on this feedback, the review proposes that material be developed to support home owners and residents committees in communities understand their rights, responsibilities and governance arrangements under the Act, including changes arising from the review process. Materials could include interactive seminars, brochures or online information available for download by communities, similar to the current '[Moving into a Land Lease Community?](#)' brochure published by Fair Trading. It is proposed that sector engagement would be used to help identify the best approach and formats for these materials.

### **Recommendations**

38. Work with operators to further refine the mandatory education obligations for all operators and their employees to ensure that they are targeted and support sector development and understanding.
39. Develop new materials to support home owners and residents committees improve their understandings of rights, responsibilities and governance under the Act.

### **Entry into the home**

Section 39 of the Act regulates the operator's access to a residential site and any home located on the site. It provides that an operator or a person acting on the operator's behalf may, while a site agreement is in force, enter both the site and home in a range of



prescribed circumstances such as with the consent of the home owner at least 14 days before entry, to read utility meters, or in an emergency.

Legal Aid NSW raised concerns that section 39 too broadly permits the operator to enter a home (as opposed to the site) as operators have no interest or ownership in the home. They suggested consideration be given to limiting operators' access to the residential site only, and the home only in certain emergency circumstances.

The review recommends amending section 39 to limit an operator's entry to the home except in the case of an emergency where entry is necessary to avert danger to a resident's life. Operators would still be allowed to enter a residential site for all of the prescribed purposes in section 39(1) of the Act.

#### **Recommendation**

40. Amend section 39 of the Act so that an operator may enter a site only (as opposed to entering a home), unless in an emergency where entry to the home is needed to avert danger to life.

### **Community emergency plans and procedures**

Under section 37(1)(h) of the Act, operators have an obligation to prepare emergency evacuation procedures for the community and take reasonable steps to ensure that all residents are aware of these procedures. These laws exist to ensure that the community is prepared in the event of an emergency to evacuate, especially since communities may be located near the coast or on bush fire prone land.

While this was not a focus of many submissions, Legal Aid NSW submitted that some residents had been never advised that the community was in a flood risk area and were not assisted to evacuate in the occurrence of a flood. ARPRA also noted the need for ensuring that all communities had clear emergency plans which were tested. Correspondence received by Fair Trading has also questioned whether operators should be required to carry out regular testing of emergency evacuation procedures. This feedback indicates that in some communities there is a general lack of awareness about the emergency procedures among residents. This is particularly troubling for communities located in flood-labile or bushfire prone land where there may be regular and persistent threats to the safety of the community.

While the inclusion of emergency plans can be considered in the context of reviewing the disclosure statement (see recommendation 4), the review also considers the current requirements around emergency procedures could be improved by requiring operators to periodically test the procedures with all community residents.

Practising the emergency procedures on a regular basis would enable operators to determine if they are effective or need to be updated and would ensure that residents are aware of the processes and can readily evacuate in the event of an emergency.

#### **Recommendation**

41. Require regular testing of emergency procedures in communities.

## **Enforcement of operator rules of conduct**

Section 54 of the Act requires community operators to comply with the rules of conduct in Schedule 1 of the Act. The rules include that an operator must:

- have a knowledge of the Act and other laws relevant to the operation of a community,
- act honestly, fairly and professionally,
- not mislead or deceive any parties in negotiations or a transaction,
- exercise reasonable skill, care and diligence,
- not engage in high pressure tactics, harassment or harsh or unconscionable conduct,
- take reasonable steps to ensure employees comply with the legislation,
- when acting as a selling agent for more than one home in a community, act fairly and advise prospective home owners of all available homes in the community, and
- not provide false information about the effect of the legislation.

Any person may make a complaint to the Commissioner if they believe that the operator has breached a rule of conduct, for which the Commissioner may conduct inquiries and undertake disciplinary action as set out in Part 13 of the Act. Disciplinary action could include:

- a caution or reprimand,
- a direction that the person undertake training or arrange for another person involved in managing the community to undertake training,
- give a written explanation, correction or apology to another person(s),
- vary a notice or document in a specified way,
- give an undertaking to the Commissioner about the way the person (or someone else involved in managing a community) manages a community,
- prohibiting the person from carrying on all or specified activities in the management of a community and requiring the appointment of another person as operator during that period.

A person against whom disciplinary action is taken can apply to the Tribunal for a review of the Commissioner's decision.

Feedback to the review on the effectiveness of these provisions was divergent. Submissions from some residents and stakeholders such as the Tenants' Union and Legal Aid NSW raised a number of concerns. These included that the rules of conduct do not ensure appropriate conduct by operators including their on-site employees, concerns that some home owners do not make a complaint out of fear of retaliatory conduct and concerns about specific cases where enforcement action by Fair Trading against an operator was considered to be insufficient and /or ineffective. At the same time, feedback from operator representatives such as the CCIA and Hometown found that the current rules of conduct were comprehensive and that the current stages of enforcement with Fair Trading and the Tribunal were appropriate.

Having considered the feedback provided, the review considers that some minor amendments to these provisions could assist with enforcement. In particular, it is recommended that the scope of the rules of conduct be expanded to include the conduct of on-site employees and that penalty notice offences are attached to breaches of the rules of conduct. This latter change would mean that Fair Trading may issue a penalty infringement notice to an operator, or their on-site employee acting on behalf of the operator, for identified breaches of the rules. This reform is consistent with most other Australian jurisdictions where operator conduct requirements are expressed as penalty notice offences in their legislation.

The inclusion of on-site employees under the rules of conduct seeks to ensure operators take reasonable steps to ensure employee compliance.

It is noted that the submission from the CCIA also proposed that Fair Trading be able to investigate and issue penalty notices to home owners who harass or intimidate their fellow home owners or the operator's employees. While the review appreciates that such behaviour can be challenging to address, operators do have recourse to terminating a site agreement with residents who seriously or persistently threaten or abuse the operator or other residents in the community (section 129). Under section 36 of the Act, home owners also have the responsibility to respect the rights of the operator, agents and employees of the operator to work in an environment free from harassment or intimidation which could also constitute a breach of the site agreement. Given these safeguards, introducing a penalty notice offence for home owner conduct is not considered proportionate at this time.

#### **Recommendation**

42. Provide that a breach of the rules of conduct by an operator constitutes a penalty notice offence and may warrant a penalty infringement notice.
43. Extend the application of the rules of conduct to include employees acting on behalf of the operator where relevant.

### **Penalty framework and penalty notice offences**

Fair Trading can take action against a person who commits an offence against the Act or regulations by commencing proceedings against them (section 176 of the Act). Proceedings for an offence are dealt with summarily in the Local Court and must be commenced within 3 years of the commission of the offence or when evidence of the offence first came to the attention of a Fair Trading investigator.

Some offences in the Act are penalty notice offences, which allows Fair Trading officers to issue the person with a penalty infringement notice, similar to a fine. If the person disputes the penalty notice, they may have the matter heard by the Court. Otherwise, they must pay the penalty amount specified in the notice. Penalty notice offences are set out in Schedule 4 of the regulations.

As discussed in the previous section on the rules of conduct, there appears to be scope to broaden the application of penalty notice provisions to enable a more diverse approach to compliance. The review considers that such an approach could also be applied more generally across the Act, especially given some offences progress straight from education to legal proceedings without capacity for a more tiered compliance framework. Proceedings are often time consuming and a costly exercise for all parties. Further, in some circumstances taking the matter to the court is disproportionate to the level of risk. On this basis, the review proposes that the penalty framework be reviewed as part of the drafting process to consider whether there is a need to insert additional penalty notice offences or make any other required changes.

#### **Recommendation**

44. Review the penalty framework during the drafting process to clarify the effectiveness of the current arrangements.

## 3.4 Termination of site agreements

### 3.4.1 Ensuring the termination process is transparent and reasonable

Section 116 of the Act currently prescribes specific circumstances under which a site agreement may be terminated. This includes if either the operator or home owner gives the other party a termination notice, if the home owner agrees to relocate to a different residential site, or if the Tribunal makes a termination order for the agreement.

Feedback to the review suggests that the termination provisions are generally appropriate and work well. Where concerns were raised, they focussed largely on terminations that relate to the lack of authority to use a site and non-use of a site.

#### **Terminations for unlawful site use due to changes in use**

Section 127 of the Act allows operators to terminate a site agreement due to a site not being lawfully usable as a residential site. Operators are required to give 90 days notice for this type of termination and the home owner is eligible for compensation only if residential use was unlawful at the time they entered the site agreement and they were not aware of this fact.

Section 125 is an alternative grounds for termination and is designed to address changes in the use of sites. Section 125 provides that an operator may give a termination notice for a particular site if there is to be a change in use of that site. A termination notice may only be given after the operator has obtained the Tribunal's consent to give a termination notice on those grounds, as well as the appropriate development consent for the proposed use under the *Environmental Planning and Assessment Act 1979*. Section 125 has substantially longer notice periods (a minimum of 12 months) than section 127, as well as requirements relating to requests for further time and support to find alternative accommodation.

A number of submissions, including from the Tenants' Union and ARPRA, as well as separate correspondence received by the Department, have highlighted that section 127 is being used by some operators to terminate sites in cases where an operator has chosen to amend their operating approval for a site from long-term to short-term occupation *after* having entered into a site agreement with a home owner. That is, the use of the site for residential use becomes unlawful due to this change. This enables some operators to terminate under section 127 without the need to pay compensation as the use of the site was not unlawful at the time the agreement was entered into. Feedback to the review has raised concerns about the substantial impact that these kinds of terminations have on home owners who have entered into a site agreement expecting to live there on a permanent basis. Such use of section 127 also raises potential issues regarding its interactions with section 125; that is, although a change to the site designation may constitute grounds for termination under section 127 (on the basis it is no longer lawfully useable under the conditions of an operator's approval to operate), it could also arguably fall under grounds for termination under section 125, as it is a change in site use.

A number of suggestions were put forward regarding reform in this area, including that operators should be prohibited from terminating a site agreement if they had knowingly taken action that has rendered the site unlawful after they entered into the site agreement, that compensation should be payable under such circumstances, and that there should be notification requirements when site use changes are being proposed.

Having considered feedback on this issue, the review recognises that there are likely to be valid reasons for the use of both sections but agrees that some clarification in relation to these provisions would improve their operation. In particular, the review recommends that section 127 should be amended to provide that compensation is payable to a home owner if the operator has rendered the use of the site unlawful, including *after* the site agreement

was entered into. Most home owners enter into a site agreement with the expectation that they would live on the residential site long-term or on a permanent basis. Making compensation payable acknowledges the potential adverse impact on home owners as a result of the operator's action or inaction to ensure the lawfulness of using the site.

At the same time, the review considers that there would be benefits from greater transparency around proposed changes to site usage given the impact it will have on the site resident. The review recommends that operators be required to provide notice to any owners whose legal use of their site would be impacted by a development application or planning proposal that has been lodged by the operator. Such a requirement is similar to a previous requirement under the Former Act.

In addition, the majority of home owners living in a residential land lease community may experience difficulty in trying to find alternative accommodation and organise their finances when the designation of their site has changed. Home owners may have made significant upfront investments when entering into the community and the home is unlikely to be sold where the site designation has changed. Comparable alternate sites may not be available in other nearby locations. On this basis, the review also proposes extending the notice period where termination occurs under section 127 from 90 days to 120 days, so as to allow reasonable time for home owners to plan their future living arrangements.

#### **Recommendations**

45. Require that compensation is also payable under section 127 if the operator has taken action that has rendered use of the site unlawful either before or after the site agreement was entered into.
46. Require operators to provide notice of any development application or planning proposal that may affect the community, or sites within it, to all potentially affected residents.
47. Extend the notice period under section 127 from 90 days to 120 days.

#### **Termination on the basis of non-use of the site**

Section 128 of the Act allows for operators to issue a termination notice on the ground that the home owner's residential site has not been used for the past three years as a residence. Home owners are entitled to at least 180 days' notice if they are given a termination notice under this section.

Feedback to the review, including from the Tenants' Union, argued that the non-use of a residential site should not form grounds for terminating a site agreement provided that the site was well-maintained and site fees paid on time. Stakeholder consultation also indicated that non-use of a site does not appear to have ever been invoked as a ground for termination.

On the basis of the feedback, the review considers that non-use of a site does not comprise sufficient grounds for terminating a site agreement if the home owner continues to fulfil their obligations under the Act. While the review appreciates that some stakeholders may be concerned about a potential risk of 'land banking' where an investor purchases but vacates (or sub-lets) multiple homes on different sites if they are not required to live in those premises, there appears to be little evidence of this occurring. Moreover, the review considers that if an owner fails to keep up with their obligations for a site then the operator may have grounds to terminate an agreement on other grounds, such as under section 122 of the Act for a breach of the site agreement.

### **Recommendations**

48. Remove section 128 of the Act which allows operators to give a termination notice on the basis that the site has not been used for the past 3 years.

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