



# Discussion Paper

Statutory Review of the  
Residential (Land Lease) Communities Act 2013

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# Introduction

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## ***Purpose of this discussion paper***

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

The NSW Government introduced the Act in 2013 following the review of the *Residential Parks Act 1998* (the **1998 Act**) and significant community consultation. The Act commenced in November 2015, accompanied by the *Residential (Land Lease) Communities Regulation 2015* (the **Regulation**).

The Minister for Better Regulation and Innovation administers the Act and supporting Regulation. Section 187 of the Act requires the Minister to conduct a review of the Act to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. The review is now underway, and this Discussion Paper is part of that process.

The purpose of this Discussion Paper is to encourage and facilitate public discussion about the regulation of residential land lease communities in NSW, and to ensure fit for purpose legislation that is effective and practical. This discussion paper focuses on the customer journey and whether the Act effectively balances the rights and interests of home owners and operators.

This paper provides an opportunity for you to express your opinions about the Act. Your feedback will help the Government to ensure that the legislation continues to reflect the needs of home owners and operators in communities. In preparing this paper and identifying a range of matters for consideration, the NSW Government has considered comments received from home owners, operators and other interested parties since the Act commenced in 2015.

The issues and options identified in this Discussion Paper are not exhaustive, as they intend to facilitate discussion and do not indicate NSW Government policy.

We welcome further comments on any other general matters that are relevant to improving the current regulatory framework established by the Act.

## ***Next Steps***

Once the consultation period has closed, all comments and submissions will be analysed. A report on the outcome of the review is required by section 187 of the Act to be tabled in each House of Parliament by November 2021.

Have your say

We invite you to read this discussion paper and provide comments where you think appropriate.

To help you make a submission, an online survey is available on our website at [www.nsw.gov.au/have-your-say](http://www.nsw.gov.au/have-your-say).

However, this survey is not compulsory, and submissions can be in any written format. You may wish to comment on only one or two matters of personal interest, or all the issues raised in this discussion paper.

You can make a submission by:

- online feedback at the NSW Government's Have Your Say website:

[www.haveyoursay.nsw.gov.au](http://www.haveyoursay.nsw.gov.au)

- email: [rlcreview@customerservice.nsw.gov.au](mailto:rlcreview@customerservice.nsw.gov.au)

- mail:

Statutory Review of the Residential (Land Lease) Communities Act 2013  
Policy and Strategy Division  
Department of Customer Service  
4 Parramatta Square  
12 Darcy St  
PARRAMATTA NSW 2150

Please take careful note of the deadline for submissions: **5:00pm 26 February 2021**

#### **Important note: release of submissions**

Submissions may be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission. Automatically generated confidentiality statements in emails are not sufficient. Submissions may be referred to in a report on the outcome of the consultation, however any anonymous submissions will be referred to as such.

Please note, there may be circumstances where the Government is required by law to release the information in your submission. For example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*. It is also a statutory requirement that all submissions are provided to the Legislation Review Committee of Parliament.

# Chapter 1 – Objectives of the Act

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## **Objects**

The purpose of the Residential (Land Lease) Communities Act 2013 is to provide a regulatory framework to govern the relationship between the operators of residential land lease communities and the people who live in them.

Residential land lease communities offer a diverse range of accommodation. Many communities play an essential role in the provision of low-cost, affordable housing, but some also offer resort-style communities which are often marketed to over 50s. Residents often own the home they live in and lease the land on which the house sits. Residents may also rent the home from the homeowner. Within this diversity, home owners and operators of land lease communities have varying needs and expectations.

The objects of the Act stated in section 3 are:

- (a) to improve the governance of residential communities,
- (b) to set out particular rights and obligations of operators of residential communities and home owners in residential communities,
- (c) to enable prospective home owners to make informed choices,
- (d) to establish procedures for resolving disputes between operators and home owners,
- (e) to protect home owners from bullying, intimidation and unfair business practices,
- (f) to encourage the continued growth and viability of residential communities in the State.

1. Are the objects of the Act still relevant to residential land lease communities?
2. Has the Act been effective in delivering its objects?
3. Should the objects of the Act be expanded or updated to reflect the changing nature of land lease communities? Please identify how they should be expanded or updated and why.

## Chapter 2 – Informed choices for prospective home owners

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### ***Buying a home in a residential community***

The path to home ownership in a residential land lease community bears many similarities to any other property purchase – with a home advertised for sale, and a prospective buyer inspecting the home and gathering information in order to make a home buying decision. However, the unique nature of ownership in a land lease community and the requirements of the Act lead to a number of important differences. This chapter examines the process of advertising a home in a residential community, negotiating a new site agreement and the associated disclosure statement.

### ***Marketing and information disclosure***

Section 25 of the Act prohibits the operator of a community from inducing a person to enter into a site agreement by any false, misleading or deceptive statement or promise. While Fair Trading does receive some complaints about such conduct, it is not clear whether this is a significant problem in the sector.

At the time of purchasing a home, an operator and a new homeowner enter into a new site agreement. Before the site agreement is agreed to, the operator is required to give a prospective home owner a disclosure statement which outlines:

- the fees and charges that will be payable under the proposed site agreement
- details of the current range of site fees paid in the community
- details of the services and facilities available in the community
- details of compliance with statutory requirements applying to the community<sup>1</sup>.

This disclosure statement must be given to a new entrant to a community at least 14 days before the site agreement is entered into. The purpose of the disclosure statement is to help the new homeowner to make an informed decision when entering into a site agreement. The disclosure statement must be in the form that Fair Trading has approved (download a copy at [https://www.fairtrading.nsw.gov.au/\\_data/assets/pdf\\_file/0005/367772/Disclosure\\_statement.pdf](https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0005/367772/Disclosure_statement.pdf)).

The Act provides a 14 day ‘cooling off period’ where prospective home owners can change their mind after signing the site agreement.

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<sup>1</sup> Section 21(2)

4. Is the ban on inducing a person to enter into an agreement through false, misleading or deceptive statements or promises working effectively?
5. Does the disclosure statement provide enough information to a prospective home owner to allow them to make an informed decision about purchasing into the community? Why/why not?
6. Is the form of the disclosure statement easy for prospective home owners to understand?
7. Is the disclosure statement provided at the right time? I.e., should it be given earlier or later?
8. Does the disclosure statement form need to be improved? If yes, how would you improve it?
9. If an operator of a community fails to provide a disclosure statement to a prospective home owner before entering into a site agreement with them, a penalty will apply. Do you think the maximum penalty of 100 units (\$11,000) is appropriate?

### **Site agreements**

The site agreement is the key document setting out the rights and responsibilities that come with living in a residential land lease community.

The Act regulates the process of entering into a site agreement and certain aspects of the site agreement by:

- requiring the operator to ensure a written site agreement is entered into;
- providing for a standard form of site agreement that must be used;
- prohibiting certain terms;
- prohibiting the operator from charging a prospective home owner fees before entering into a site agreement;<sup>2</sup>
- requiring the operator to give the home owner a copy of the completed site agreement.<sup>3</sup>

If a written agreement is not provided or the agreement is not in the correct standard form, a home owner may apply to the Tribunal for an order that directs the operator to provide a written agreement or to provide an agreement in the correct standard form.

While an operator who fails to provide a written site agreement is guilty of an offence, the homeowner is nevertheless protected as the provisions of the Act and the standard form site agreement still apply to the accommodation arrangement between the resident and operator.

Feedback to Fair Trading, as well as cases in the Tribunal, has shown that while most people have the correct written agreements, there have also been instances where prospective home owners have

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<sup>2</sup> Section 30

<sup>3</sup> Section 32

received the wrong type of written agreement, the agreement contains the incorrect terms or not received one at all.

### ***Additional and prohibited terms in site agreements***

The Act permits the homeowner and operator to agree to additional terms as long as they:

- do not contravene the Act
- are not inconsistent with the terms in the standard form; and
- are in a separate part of the agreement and are clearly labelled as additional terms.

Additional terms that contravene the Act and/or are inconsistent with the prescribed standard agreement may be declared void by an order from the Tribunal.<sup>4</sup> The Tribunal may also seek to prohibit the operator (or future operator) from using that term in future agreements. The Act also enables the prohibition of terms by regulation.<sup>5</sup> The Residential (Land Lease) Communities Regulation 2015 prohibits the following types of terms in site agreements:

- a term indemnifying the operator or owner against any liability for damage, loss or injury arising from an act or omission of the operator or owner (or their employees or agents)
- a term requiring the home owner to take out any form of insurance (except a term requiring a home to be insured in the case of certain voluntary sharing arrangements)
- a term providing that, if the home owner breaches the agreement, the home owner is liable to pay increased site fees or other charges, or any penalty or liquidated damages
- a term providing that, if a home owner does not breach the agreement, site fees or other charges will be reduced, or the home owner will be paid a rebate of site fees or other charges, or other benefit.

While it is clearly necessary and appropriate for additional terms to be allowed in site agreements, some feedback suggests that the interaction with existing standard terms may sometimes be unclear or confusing for home owners.

10. Are you aware of home owners not being provided with the correct written site agreement?
11. Does having a prescribed standard form site agreement work well?
12. Should the list of prohibited terms in site agreements be modified? If so, what type of terms should be included or removed?
13. Should the requirements about additional terms be changed or improved?

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<sup>4</sup> Section 28

<sup>5</sup> Section 29

## ***Community registration and the Public Register***

Operators of communities are required to provide specified information to NSW Fair Trading for inclusion in a register of land lease communities (the Register).<sup>6</sup> NSW Fair Trading is also required to publish on the internet for public access particular register information such as the trading name, address and contact details of the community, the name of the operator and details of certain enforcement action or disciplinary action taken in respect of the community, its operator or staff. The Regulation also provides that the Register is to include information about whether a community has a residents committee.

The Register aims to increase accountability and transparency in the land lease communities sector and enables Fair Trading to collect information to inform policy and other initiatives.<sup>7</sup>

The Register may also help prospective home owners make informed choices. Information from the Register is available on the Fair Trading website at <https://www.fairtrading.nsw.gov.au/help-centre/online-tools/fair-trading-public-register-data> and provides a means for prospective home owners to identify communities in the locations they are interested in as well as find out some initial information, which may support their decision making process.

This review provides an opportunity to seek feedback on the effectiveness of the Register and identify if there should be any changes to its operation.

14. Have you accessed the communities register? If so, was the register easy to navigate? Did the information on the register inform a decision you made regarding a community?
15. What information should be included on the public register and how should the information be presented?

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<sup>6</sup> Section 14 of the Act requires NSW Fair Trading to keep an up to date Register of Communities. Section 16 requires operators of communities to notify Fair Trading when details about communities change.

<sup>7</sup> The Hon Anthony Roberts, Second reading Speech, Residential Parks Amendment (Register) Bill 2011, <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-44676>>.

## Chapter 3 – Site fees

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A home owner does not own the land on which their home sits. When entering into an agreement with an operator, the home owner and operator agree that the home owner is able to occupy a site and use the community facilities in return for a fee.

### ***Payment of site fees***

The Act provides that:

- a home owner cannot be required to pay more than two weeks site fees in advance;
- a receipt for site fees paid must be provided and must include details including the name and address of the community and the site number, the name of the owner, whether the home owner is in debit or credit and the amount, the period for which the fees are paid, and the date the fees are received and amount paid;
- the operator must keep a record of site fees paid in written or electronic form.

In terms of the method of payment of site fees, the operator must permit payment by at least one method for which the home owner does not incur a cost (other than bank fees or other account fees usually payable for the home owner's transactions) and that is reasonably available to the home owner.

### ***Reduction of site fees***

Site fees may be reduced by a method set out in the site agreement or by mutual agreement between the home owner and the operator.

The Tribunal may also make an order reducing site fees if it is satisfied that:

- the amenity or standard of the common areas has decreased substantially since the agreement was entered into;
- a communal facility or service has been withdrawn or substantially reduced;
- a communal facility or service that was described in the operator's advertising or in a document provided to a home owner before entering into the site agreement has not been provided.

### ***Site fee increases***

The Act does not regulate how much can be charged in site fees.

The Act requires that the site fees are detailed in the site agreement and that the fees must only be increased:

- at specified intervals or on specified dates by a fixed method, which can be either a fixed amount or a fixed calculation, or
- by notice.

### ***Fixed method***

If the site agreement indicates that site fees are increased by a fixed method, the agreement must not allow for fees to be increased by more than one fixed method.

The operator must give at least 14 days written notice of the increase to the home owner, even if the timing of the increase is specified in the agreement. The notice must specify the amount of the increase, how the increased fees have been calculated and the day from which the new fees apply. The notice must also be in the approved form.

The Standard Form Agreement allows an operator to choose from a selection of fixed method increases. These options include:

- in proportion to variations in the Consumer Price Index,
- a specified dollar amount,
- a specified percentage,
- by a percentage of the increase to the single or couple age pension (whichever is applicable to the circumstances) each time the pension increases, or
- other.

Some stakeholders have claimed that some site agreements that choose the 'other' method of site fee increase provide for complex, multi-component methods of calculating site fee increases, that are difficult for residents to understand and do not provide enough certainty to enable residents to plan their financial commitments.

A term of an agreement fixing the method of a fee increase may not be challenged in the Tribunal. Parties to the agreement may however vary the term through a separate written agreement.

It may be possible for an unfair term fixing a fee increase method to be challenged under the unfair contract terms provisions in the Australian Consumer Law (ACL). However, Fair Trading is not aware of any challenges to such terms under the ACL.

### ***Increase by notice***

The alternative to a fixed method increase is an increase by notice.

If an operator wishes to increase site fees by notice they must give all home owners notice at the same time.<sup>8</sup> The notice must specify the amount of the increased fees, the date on which the increased site fees will take effect and an explanation for the increase. The notice must be provided at least 60 days prior to the date the increase will take effect. This method can only be used once per year and the notice must use the approved form.

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<sup>8</sup> Section 67

16. Should the Act continue to allow for both the fixed method and the notice method of site fee increases? Why or why not? If not, what method should be allowed?
17. Should there be any restrictions on the method that can be used for fixed method fee increases, or is the existing flexibility working well and/or necessary for operators?
18. Should there be a requirement that site fees can only be increased once per year, whatever method is used? Why or why not?
19. Should there be any grounds on which a site fee increase that is based on a fixed method is able to be challenged in the Tribunal?

### ***Challenging site fee increases by notice***

There are two grounds on which home owners can challenge site fee increases by notice in the Tribunal:

- 1) where one or more owners object to the increase, an application for mediation has been made in accordance with section 69 of the Act, and the mediation was unsuccessful; or
- 2) where a home owner objects to an increase on the basis that the increase is substantially excessive when compared with increases for similar sites in the community.

Under the first method, mediation is required before an application to the Tribunal can be made. An application for mediation must be signed by at least 25% of the home owners who received the notice, within the first 30 days of the notice period. The parties to the mediation must use 'reasonable endeavours' to participate in and finalise mediation before the day the increase is due to take effect.

Upon application by a home owner or group of owners under either 1) or 2) above, the Tribunal may make orders:

- declaring an increase in site fees is excessive,
- reducing the amount of the increase by a specified amount,
- setting aside the increase,
- limiting the site fees by a specified amount or payment period,
- confirming the increase on conditions that the Tribunal thinks appropriate, or
- any ancillary order that the Tribunal thinks appropriate.

Section 74 provides that the Tribunal may have regard to any or all of the following factors in making an order about a proposed site fee increase:

- the frequency and amount of past site fee increases
- any actual or projected increase in the outgoings and operating expenses for the community
- any repairs or improvements to the community since the previous increase or planned for the period covered by the increase
- the general condition of the community including its common areas

- the range and average level of site fees in the community
- the value of the land comprising the community
- 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
- variations in the Sydney Consumer Price Index and
- whether the increase is fair and equitable in the operation of the community.

While site fee increases are the subject of around 15% of all land lease communities complaints to Fair Trading, it appears that few of these complaints proceed to mediation or to the Tribunal.

### ***Site fees under new agreements***

Section 109(5) provides that the site fees under a new site agreement must not exceed 'fair market value'. Section 109(6) further provides that the 'fair market value' is determined by reference to 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.

20. Is the process for resolving disputes over site fee increases by notice working effectively?

21. Should there be changes to the grounds for challenging site fee increases by notice?

22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest?

23. Are the provisions governing site fees for new agreements fair and effective?

### ***Voluntary Sharing Arrangements***

The Act provides an option for new home owners to decrease the site fees payable under their site agreement. Section 110 of the Act makes provision for 'voluntary sharing arrangements'. These arrangements typically provide that a portion of the capital gain from the sale of a home is payable to the operator in exchange for the home owner receiving decreased site fees.<sup>9</sup>

Voluntary sharing arrangements may be incorporated into a site agreement between a new home owner and an operator provided certain conditions are met. The Act also imposes a number of restrictions on the adoption of these arrangements in agreements to protect prospective home owners.<sup>10</sup>

<sup>9</sup> Section 110 provides for a number of other arrangements that could constitute a voluntary sharing arrangement

<sup>10</sup> Sections 110 and 111

Fair Trading has not received any complaints about voluntary sharing arrangements since the introduction of the Act. There is also no data to suggest a notable uptake of the arrangements in site agreements since the commencement of the Act.

24. Have you entered into an agreement with an operator/home owner that included a voluntary sharing arrangement?
25. If you have been party to an agreement with a voluntary sharing arrangement, were there any problems with parties understanding or meeting the terms of the arrangement?
26. If you have been party to an agreement with a voluntary sharing arrangement and are a home owner, did the arrangement assist you to afford to live in the community?

## Chapter 4 – Living in a land lease community

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### ***Rights and obligations of home owners and operators***

Part 5 of the Act sets out the rights and obligations of home owners and operators. Additional rights and obligations may be contained in site agreements.

Rights and responsibilities set out in Part 5 cover a wide range of issues including:

- prohibitions against intentional or reckless damage
- prohibitions against harassment and intimidation
- compliance with community rules
- an operator's obligation to ensure that the community is reasonably safe and secure
- an operator's obligation to maintain community facilities in a reasonable state of cleanliness and repair
- a home owner's right to quiet enjoyment
- rules around access to sites for repairs and in emergencies
- rules relating to alterations, additions and replacement of homes, dilapidation, additional occupants, sub-letting, mail facilities, maintenance of trees, and special levies.

### ***Quiet enjoyment by a home owner***

Section 38 of the Act provides that an operator must not unreasonably restrict or interfere with, or permit any unreasonable restriction or interference with, a home owner's privacy, peace and quiet, or proper use and enjoyment of the residential site and the community's common areas.

Home owners also have an obligation not to interfere with, and to ensure as far as practical that other occupants living with the home owner or guests do not interfere with, the reasonable peace, comfort or privacy of the community's residents. While this obligation is aimed at conduct towards others in the community, the obligation is in the contract with the operator and so is enforceable by the operator rather than other home owners.

Some stakeholders have raised the possibility of home owner to home owner obligations, which could be enforced by other home owners.

27. Should there be neighbour to neighbour obligations that are able to be enforced by other home owners? Why or why not?

### ***Repairs to and maintenance of the residential site***

Section 37(c) imposes a responsibility on the operator to maintain the community's common areas in a reasonable state of cleanliness and repair, and section 37(k) requires an operator to ensure a residential site is in a reasonable condition, and fit for habitation, at the commencement of the site agreement.

However, the Act does not expressly require operators to repair and maintain the residential site as it did previously in section 24 of the 1998 Act.

Under section 43 an operator has the right to issue a rectification notice to a home owner if they believe that a site or a home has become significantly dilapidated.

28. Should the Act be clearer on whether ongoing maintenance of a residential site or certain aspects of a site is the responsibility of an operator or a home owner? Why or why not?

### ***Repairs to and maintenance of the home***

Section 36 of the Act provides that it is the responsibility of the home owner to maintain (subject to fair wear and tear) the home in a reasonable state of cleanliness and repair, and so as to be fit to live in, and to keep the residential site tidy and free of rubbish.

Under section 42, a home owner must not make alterations to the exterior of the house (other than painting or minor repairs) or add a fixture to the site or replace the home with another home without the consent of the operator (or unless otherwise provided for in the site agreement). An operator must not unreasonably withhold consent.

29. Is the Act clear about rights and responsibilities relating to repairs and maintenance of the home and alterations, additions and replacement of the home?

30. Should there be any changes to the provisions about repairs and maintenance of the home, and alterations, additions and replacement of the home?

### ***Upgrades and special levies***

One of the changes introduced by the Act was the ability for home owners to agree, by special resolution, to pay a special levy to enable the operator to provide a specified new facility or service or make a specified improvement (community upgrades).

The levy was introduced into the Act to create a source of capital to fund upgrades without the need to periodically or permanently increase site fees.

A special levy must be held by the operator on trust for the home owners until used for the specific purpose for which it was authorised, or refunded.

31. Are the special levy provisions useful or are upgrades usually funded by site fee increases?

### ***Operator conduct & education***

Section 54 of the Act requires operators to comply with the rules of conduct found at Schedule 1.

The rules require 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
- not use or disclose any confidential information obtained while acting on behalf of a resident
- 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
- not solicit residents through communications that the operator knows or should know are false or misleading
- ensure all material details are included in any documents that someone is asked to sign
- not provide false information about the effect of the legislation.

Section 56 prohibits an operator from retaliatory conduct against a home owner for making a complaint, applying to the Tribunal or promoting the establishment of a residents committee.

Section 55 of the Act requires a new operator of a community to undertake mandatory education approved by the Commissioner for Fair Trading within 30 days of their name being listed in the Register.

32. Are the rules of conduct adequate and are they having the intended effect of ensuring appropriate conduct by operators?

33. Should the content of the rules be expanded to cover other issues?

34. Are the operator education requirements effective?

35. Can you suggest other educational resources or topics to facilitate a greater understanding of the role and responsibilities under the Act?

36. What delivery methods could be used to improve mandatory education?

### ***Community rules***

Community rules can play a key role in ensuring community living is happy and enjoyable for all involved in a community.

Section 86 of the Act provides that rules may relate to the use, enjoyment, control and management of a community and must be fair and reasonable and clearly expressed. There is a rebuttable presumption that a rule is not fair and reasonable if it does not apply equally to all residents of the community.<sup>11</sup>

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<sup>11</sup> Section 86(4)

Where terms of a site agreement or tenancy agreement are inconsistent with the community rules, the agreement prevails.<sup>12</sup> Community rules also have no effect if they are inconsistent with any part of the Act or any other law.

An operator may amend community rules (vary, delete or insert new rules) provided written notice of the amendment has been given to each resident and, if the community has a resident's committee, the operator has discussed the amendment with the committee prior to written notice being given. A new set of rules introduced into a community that has residents and that previously did not have rules is taken to be an 'amendment of community rules'.

Operators and home owners have an obligation to comply with community rules where they apply. Where occupants and visitors are staying with or visiting residents, those residents must use reasonable endeavours to ensure that the other occupants and visitors comply with the rules.<sup>13</sup>

Operators must use reasonable endeavours to ensure that their employees, people attending the community on their invitation as well as all residents and occupants comply with the community rules.<sup>14</sup>

A home owner or operator may apply to the Tribunal if there is a dispute about whether a community rule complies with provisions of the Act, or whether the procedure for making or amending a community rule has been followed. The Tribunal may make orders setting aside the community rule, modifying the rule or an order upholding the rule.

The operator of the community must enforce the community rules and ensure that they are interpreted consistently and fairly. If there is a breach of rule, the operator may give a notice to the breaching resident to remedy that breach within a period of least 30 days. If the breach has not been remedied within the period specified in the notice, the operator may apply to the Tribunal for orders within 30 days of the notice lapsing.<sup>15</sup> The Tribunal may make orders requiring compliance within a specified period, an order terminating the resident's site agreement or tenancy agreement or an order the Tribunal thinks appropriate. In making a decision, the Tribunal may consider the nature of the breach, any previous breaches by the resident, any steps taken by either party to remedy the breach, the previous history of the operator and the resident, and whether the community rule is being enforced and interpreted consistently and fairly.

Residents can also enforce the community rules by giving written notice to the operator to take action to remedy a breach by any person within a period of at least 30 days. The resident's notice must be in the

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<sup>12</sup> Section 86

<sup>13</sup> Section 92(2)

<sup>14</sup> Section 92(3)

<sup>15</sup> Section 93(3)

approved form.<sup>16</sup> As with an operator, a resident is able to progress the matter to the Tribunal for further orders within 30 days of the period in the notice lapsing.

37. Before reading this discussion paper, were you aware of the option of communities having community rules?
38. Does your community have community rules?
39. Does your community have a community rule regarding age restrictions? If so, does this impact your community?
40. Where residents' committees are in place, should they be involved in the development of community rules? Why or why not?
41. If there is no residents committee in place, how could residents contribute to the development of community rules?
42. Is the system of enforcement of community rules appropriate?
43. Are community rules being used to improve life in residential communities?

### ***Residents committees***

To enable residents to play an active role in their community, the Act allows residents to establish a residents committee.<sup>17</sup> Committees may only be established by a majority resolution at an 'establishment meeting', to which all residents of the community have been invited. Each community may only have one residents committee.

Members may be elected by the residents at an establishment meeting from time to time, and have a term of office of one year, but may be re-elected.

Committees are to represent the interests of residents and consult with residents and the operator about the daily running of the community and any complaint or proposal about the operation of the community raised by the residents. Committees also arrange for meetings to take place with all residents if a matter needs considering and voting upon. A committee may determine its own procedures and can adopt and vary its own constitution by resolution.

An operator must not discourage or prevent the establishment or continued existence of a residents committee or require that committee to be incorporated or take out any form of insurance. Section 97(2) prohibits the operator from obstructing the committee in the exercise of its functions or preventing it from using community facilities ordinarily available for use by residents. Section 103 provides that neither the operator nor their close associates may form part of the residents committee (this includes associates who are residents).

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<sup>16</sup> This form is currently available on Fair Trading's website at <https://www.fairtrading.nsw.gov.au/housing-and-property/strata-and-community-living/residential-land-lease-communities/community-rules>

<sup>17</sup> Section 96

Complaints received by Fair Trading about committees usually are centred around disputes between members or residents or members and operators.

44. Should residents committees also be required to take part in mandatory education? If yes, what topics should be covered?
45. If your community has a residents committee, is it working effectively?
46. Do you have any suggestions for changes to the way residents committees are established or run?

## Chapter 5 – Utilities

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### ***Utility charging in a land lease community***

Part 7 of the Act regulates how, and what, an operator can charge for utility costs in connection with the occupation of a residential site.

Operators are permitted to charge home owners for utilities such as electricity and water usage provided that certain requirements are met. The main requirement is that the site must be separately metered. The operator is not permitted to charge more than the operator is charged by the utility service provider<sup>18</sup> and an itemised account must be provided with at least 21 days to pay<sup>19</sup>. Receipts must be provided for accounts paid in person or upon request. Home owners are entitled to reasonable access to bills or other documents in relation to utility charges payable by the home owner.<sup>20</sup>

47. What are your overall views on utilities charging provisions under the Act, other than electricity charging in embedded networks, which is discussed below?

48. How well do the current provisions relating to accounts, access to bills and other documents work?

### ***Electricity charging in communities with embedded electricity networks***

Many 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 single parent meter. The electricity is then supplied by the operator of the parent meter to premises within the community. Many retirement villages, holiday parks, and strata schemes also have embedded networks.

Residents of a community with an embedded network may not have access to their choice of electricity provider as their electricity, and the billing for it, is provided by the community operator or a third-party supplier that operates the parent meter and network. In circumstances where the electricity is supplied by the community operator, section 77 of the Act places restrictions on how and what an operator can charge a home owner for the utilities they consume. The Regulation also establishes the maximum service availability charge (SAC) that an operator can charge.

### ***Embedded Networks and authorised retailers***

In most circumstances, anyone who sells residential electricity needs to be an authorised retailer regulated by the Australian Energy Regulator. However, many operators of land lease communities are able to take on the functions of electricity retailing as they are categorised as Exempt Sellers by the Australian Energy Regulator, due to the nature and small size of their operations. As Exempt Sellers,

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<sup>18</sup> Section 77(3)

<sup>19</sup> Section 77(2)

<sup>20</sup> Section 83

community operators need to comply with the Australian Energy Regulator's Exempt Seller Guidelines, including a requirement not to set customer tariffs higher than the standing offer price,<sup>21</sup> as well as the requirements under the Act.

Some community operators have chosen to outsource their energy supply and billing services and have engaged a third-party authorised retailer to manage the supply of electricity in the embedded network. This removes the electricity provider from the provisions of the Act (as it is no longer the operator who is the supplier) and places electricity charging regulation solely under the national framework, which can lead to different billing outcomes for the homeowners as authorised retailers that operate an embedded network are not subject to the same framework on customer tariffs as exempt sellers. In particular, authorised retailers are able to set customer tariffs in embedded networks that they operate, without any restriction or price cap.

### ***Interpretation of utility charging provisions as they relate to electricity – the Reckless Case***

Section 77(3) of the Act provides that an operator must not charge a home owner an amount for the use of a utility that is 'more than the amount charged by the utility service provide or regulated offer retailer who is providing the service' for the quantity supplied to, or used at, the site.

There have been divergent views on the meaning of section 77(3) and this provision has been the subject of a number of cases in the Tribunal, as well as the Supreme Court. Interpretation has been further complicated by the interactions between the electricity charging provisions and national energy laws, given changes in these laws and terminology since the Act commenced, as well as an evolving electricity market.

In 2018, the Supreme Court of New South Wales clarified how section 77(3) of the Act should operate in the matter of *Silva Portfolios Pty Ltd trading as Ballina Waterfront Village & Tourist Park v Reckless*. The Supreme Court interpreted section 77(3) to mean 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.

In light of the Supreme Court's decision, the Tribunal's Consumer and Commercial Division then considered how to calculate a refund for the home owner in the case, Ms Reckless. In calculating the amount owed to the home owner, the Tribunal determined the overall cost of electricity to the operator, divided that amount by the total kilowatts used in the community. This provides the kilowatt per hour price. The total kilowatts used by each home owner are then multiplied by the kilowatt per hour price. This method of calculation has been referred to as the 'Reckless method' and has been applied in many communities following this case.

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<sup>21</sup> The standing offer price is the amount that would be charged by the relevant local area retailer for connections, if the local area retailer were to supply that quantity of energy directly to the premises of the exempt customer.

While the Supreme Court decision and the Tribunal’s identification of the ‘Reckless method’ has provided a way forward on charging, it has also continued to be an area of disagreement, with some stakeholders seeking greater legislative clarity and others seeking other reforms of electricity charging to enable different charging methods in embedded networks, including consideration of how to account for the operator costs of maintaining electricity infrastructure.

Further, in some other cases that have been decided by the Tribunal, methods other than the Reckless method have been used to determine refunds due to home owners.

**Possible reform options**

#	Option	Description
Option 1	Embed Reckless approach in the Act for both operators and authorised third-party retailers	<p>The Act would be amended to give legislative effect to the Reckless method of energy charging, for operators as well as authorised third-party retailers.</p> <p>This would mean that both operators and third-party retailers would be only be able to charge a home owner what they have been charged by the energy provider for the electricity consumed by the home owner.</p>
Option 2	Amend the Act to allow for electricity charging that includes network maintenance cost recovery and administration costs, but does not result in a profit for the operator	<p>This option would amend the Act to clarify that the operator, or an authorised third-party, is entitled to pass on all costs associated with the provision of electricity with the exception of the original purchase price of the embedded network.</p> <p>This option would allow the operator/third-party retailer to pass on the direct costs charged by their electricity provider as well as the costs of maintaining the embedded network within the community and administration costs, provided they could be transparently identified as part of cost-recovery.</p>

Option 3	Remove provisions that govern what can be charged for electricity from the Act and allow national rules to apply	<p>This option would amend the Act by removing the provisions relating to <i>what</i> can be charged for electricity.</p> <p>Under this option, the amount that can be charged for electricity would be regulated entirely by the national energy framework, including the Australian Energy Regulator’s Exempt Seller Guidelines.</p> <p>If needed, transitional consumer protections could be included in the Act to address any gaps in the application of the national framework to land lease communities.</p> <p>Requirements relating to <i>when</i> electricity can be charged for, as well as information provision, would remain.</p>
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Community and industry feedback on these options is important to fully assess the options and determine the best way forward. Depending on the outcomes of the feedback, the implementation of reforms to electricity charging may progress in advance of the rest of the statutory review.

- 49. What are your views on the operation of section 77(3) as it applies to an embedded electricity network in a community?
- 50. Which reform option for electricity charging do you support and why?
- 51. Are there other reform options which you think should be considered?
- 52. What is your view on the impacts these options would have on electricity bills in your community?
- 53. If your community uses another method other than the Reckless method to calculate electricity charges that has not been considered in this paper, can you describe your experience with this?
- 54. As an operator, what costs do you incur due to maintaining an embedded network and to what extent do you recover these?

**Amperage**

Amperage is the amount of electricity flowing through something that conducts electricity. In the case of an electrical outlet in a home, amperage is the amount of electricity that flows from the point of supply to the electrical appliance. Different appliances require different amounts of electricity, or amps, to operate. For example, a dishwasher requires about 10amps to run, a kettle requires about 13amps, and a mobile

phone charger requires less than 0.5amps. Using these figures as an example, a home owner with electricity supply of less than 20 amps would struggle to operate a dishwasher and a kettle at the same time from the same connection.

Some home owners on embedded networks receive lower amperage than others. The Act currently provides that home owners that receive lower amperage of electricity should not be required to pay the same service availability charge as home owners that receives greater amperage.

This issue is currently addressed in Clause 13 of the Residential (Land Lease) Communities Regulation 2015. Clause 13 provides for discounts for residents whose amperage is lower than 60 amps, with progressively increasing discounts for lower amperage.

Views are sought on how widespread an issue low amperage is and what steps could be taken to alleviate the issue of low amperage. This issue will be considered further once a preferred option on embedded network charging has been determined.

55. Are the current discounts in the Regulation appropriate?

56. Are you an operator or home owner with less than 60 amps? Are there any steps which could be taken to increase this level?

### ***Sustainability infrastructure***

As we move towards a more climate conscious society, it is important that all forms of housing are able to make use of environmentally sustainable infrastructure. Not only can this infrastructure assist in lessening the impacts of utilities on the environment, but it can also assist in lessening utility bills for home owners.

As installation costs for solar panels are dropping, installing solar panels in communities is becoming a more affordable option. In communities, attaching solar panels to the roof of a home would constitute an alteration or addition within the meaning of section 43. This means that, before installing a solar system, home owners first need the operator's consent, but operators are not be able to unreasonably refuse consent. Installation of solar systems can be complicated further when an embedded network is involved, due to the home owner's lack of direct connection to the electricity market.

Given the growing interest in this area, stakeholders views are sought on whether there are barriers to accessing sustainable infrastructure in land lease communities and how they could be overcome. It may be that these issues cannot be properly addressed within the confines of the Act.

57. What difficulties are operators facing in managing solar systems in communities?
58. Are there other forms of sustainability infrastructure that are becoming common in communities?
59. What are the greatest barriers to home owners installing solar panels?
60. How can sustainability infrastructure be made more available in land lease communities?

## Chapter 6 – The end of the agreement

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### *Selling a home*

The sale of a home marks the end of the home owner's journey in a community. In a residential land lease community, the process of selling a house is different to the process of selling other properties, because the home owner owns only the home, and not the land upon which that home sits.

### *Interference in a sale*

The Act provides that a home owner is entitled to sell a home while it is located on a site within a community.<sup>22</sup> To begin the sale process, a home owner must provide the operator of the community with notice of the intention to offer the home for sale.<sup>23</sup> Section 107 provides that an operator must not cause, permit or attempt any interference with a home owner's right to sell their home or display a 'for sale' sign in or on a home. The operator's permission is required to display a 'for sale' sign anywhere else in a community.

Section 107(2) sets out a number of actions that will amount to interference with a home owner's right to sell, including unreasonably restricting possible purchasers from inspecting the home or common areas, making false or misleading statements about the community, and taking action to require a home owner to comply with a requirement made by or under the Local Government Act 1993, unless the matter has been the subject of previous action.

As the home sits on a site within the community, the incoming home owner will be required to negotiate a new site agreement with the operator. An operator is not considered to have interfered with the sale if they decline to enter into a site agreement with the prospective home owner and do so on reasonable grounds.<sup>24</sup> The Act indicates that reasonable grounds can be established if unfavourable information about the prospective buyer is obtained from the residential tenancy database or if the prospective home owner was evicted from a community within the last five years for a breach of a site agreement.<sup>25</sup>

Some stakeholders have noted that the Act's clarity regarding what constitutes 'interference' has been helpful and has been a welcome change from the 1998 Act. However, some complaints to Fair Trading still raise concerns about interference with sales.

61. Are the Act's provisions about the sale of a home and interference with a sale working well in practice?

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<sup>22</sup> Section 105

<sup>23</sup> Section 102(5)

<sup>24</sup> Section 107(3)

<sup>25</sup> Section 107(4)

### ***Selling Agents***

The Act enables home owners to appoint a selling agent to sell or negotiate the sale of the home on their behalf. Section 112 provides that a selling agent may also be the operator of the community. If a home owner appoints a selling agent who is not the operator, an operator must not interfere with the selling agent's access to the community.

Currently, the Act does not require an operator acting as a selling agent to hold a licence as an agent under the *Property and Stock Agents Act 2002* or a motor dealer's licence under the *Motor Dealers and Repairer's Act 2013*

The Act requires that a sale commission or incidental expense (e.g. marketing expenses) is only payable to a selling agent if the agent and the home owner had entered into a written selling agency agreement (section 113), and if the agreement provides for the payment of the commission or incidental expense, specifies the amount payable (in the case of commission) and sets out the services that will be provided.

If the operator acts as a selling agent for the seller, any money received on behalf of the seller is held in trust and must be deposited in an account with an Authorised Deposit-Taking Institution that is used only for depositing money held under selling agency agreements, opened in the name of the operator and entitled 'sales trust account'. When the sale is completed, the operator must pay the proceeds as directed by the home owner after deducting commissions and any other fees or charges payable to the operator under the site agreement.

An operator acting as a selling agent is not bound by the rules that apply to a real estate agent under the Property and Stock Agents Act, although the operator may be subject to the general duties that apply to an agent acting on behalf of a principal.

### ***Disclosure of prospective sale***

The Act requires a home owner selling their home to ensure that any genuine prospective home owner has been advised to contact the operator of the community about the potential sale before a contract for sale is entered into. However, if a home owner fails to do this, or if the purchaser fails to contact the operator or the operator fails to respond, it does not affect the validity of the contract of sale or site agreement.

### ***Disputes relating to sale***

A home owner, prospective home owner, operator or selling agent may apply to the Tribunal for resolution of a dispute concerning sale of a home, including a dispute about compliance with the Act, whether a sale commission or other expense or fee is payable to the operator or another agent, or the amount of a sale commission, expense or other fee, a dispute about interference with a sale or about the reasonableness of an operator's decision not to enter into a site agreement with a purchaser.

62. Is the Act's control over operators who act as selling agents appropriate?
63. Should operators continue to be able to act as selling agents?
64. Do you have any other suggested changes to the provisions about the sale of homes?

### ***Assignment (transfer) of site agreements and tenancy agreements***

Section 45 of the Act provides that a home owner may assign (that is, transfer) a site agreement with the prior written consent of the operator of the community.

Under the 1998 Act, an operator was prohibited from unreasonably withholding or refusing consent to the assignment of a site agreement, but there is no such provision in the current Act.

This is due to the findings of the NSW Government's major review of the 1998 Act, that the site agreement provisions in that Act were not working well. Residents often lost or damaged their copy of their original site agreement, so incoming residents would receive incomplete or outdated information about the agreement that had been assigned to them.

The review proposed that new residents should be required to enter into a new residential site agreement with the community operator, so that the new resident receives complete and up to date information about the agreement they were entering into, and the site fees they pay are equal to the outgoing resident's fees, or equal to other comparable sites in the community. It also allows a park operator to refuse to enter into a site agreement with a person who has a history of not paying fees.

During debate in Parliament, an amendment was introduced which resulted in section 45(3) of the Act, which states that an operator must not unreasonably withhold or refuse consent to the assignment of a *tenancy* agreement. Section 45(3) applies to assignment of a tenancy agreement, under which a resident leases a dwelling, but does not apply to assignment of site agreements.

65. Should the Act be amended to also prevent an operator unreasonably refusing consent to assignment of a site agreement? Why or why not?
66. Are the provisions relating to the assignment of tenancy agreements working well in practice?

### ***Sub-leasing by home owners***

Operators also have the right to withhold consent for the home-owner to enter into a tenancy agreement or otherwise sub-let the site or the home located on it,<sup>26</sup> but must only withhold consent if it is reasonable to do so.

67. Are the provisions about sub-leasing by home owners working well?

### ***Terminating a site agreement***

Part 11 of the Act makes provision for the termination of site agreements. Site agreements may be terminated:

- if the either party to the agreement gives a termination notice and the home owner vacates the residential site after the notice is given,
- the Tribunal makes a termination order for the agreement and the home owner vacates the residential site,
- the Tribunal makes an order declaring that the home owner has abandoned the residential site,
- a warrant for possession of the residential site is enforced,
- if the home owner vacates the residential site with the prior consent of the operator,
- the home owner agrees to relocation to a different residential site and a new site agreement executed between parties, or
- if the home is sold to a new home owner.

The Act makes provision for circumstances under which a home owner, an operator or the Tribunal may terminate an agreement.

A home owner is entitled to terminate a site agreement if they provide 30 days' notice stating the date the site will be vacated. Home owners may terminate without specifying grounds and must vacate the residential site on or before the date stated in the notice. Section 119 also provides that home owners may also revoke a termination notice at any time with the consent of the operator.

Under Part 11, Division 2 of the Act, operators may only issue a termination notice on the following grounds:

- there has been a serious or persistent breach of the site agreement (and the operator needs to give at least 90 days notice),
- the operator is required to undertake repair and upgrade works to the site by an Act,
- the site is to be compulsorily acquired by the State or Commonwealth Government,
- the community is set to close,
- the use of the site as residential site is proposed to change,

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<sup>26</sup> Section 45(1)

- the residential site is not lawfully usable for housing a home,
- the home owner has not used the site for a period of 3 years, or
- there has been serious misconduct by an home owner, or a person occupying the site.

The different grounds for termination each have their own notice periods.

The Tribunal is able to make termination and possession orders.

In some instances of termination that do not involve breach of agreement, non-use of a site or serious misconduct, the operator is liable to pay compensation to the home owner.

68. Are the grounds on which operators can terminate a site agreement appropriate? Should any other grounds be added?

69. Are the notice periods that operators are required to give for the different termination reasons appropriate?

70. Are the compensation provisions working well?

## Chapter 7 – Resolving disputes

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### *Internal voluntary dispute resolution*

The operator of a community may establish arrangements for resolving disputes between home owners or between the operator and home owners. This must be done in consultation with the residents committee if there is one and may also be the subject of community rules. Participation in these internal arrangements is voluntary.

### *Mediation*

Under section 146, Fair Trading may be asked to provide mediation for community disputes, either by a home owner or operator, or through referral by the Tribunal. The dispute must be one for which orders can be sought from by the Tribunal but are not currently the subject of proceedings before the Tribunal.

The application for mediation is made to the Commissioner for Fair Trading. Applications for mediation can be rejected by the Commissioner on three grounds:

- the matter is vexatious, misconceived, frivolous or lacking in substance
- the applicant has not responded to a request for further information or has responded inadequately
- the matter has been or is currently the subject of mediation or proceedings before the Tribunal and the Commissioner believes further action is not warranted.

The Commissioner may appoint mediators with the appropriate expertise. The mediator's role is to encourage the settlement of the dispute by helping the parties to negotiate, promoting the open exchange of information relevant to the dispute and providing information to the parties about the operation of the Act relevant to settlement of the dispute. Mediation is held in private and information obtained during a mediation is confidential and can only be disclosed in limited circumstances.

Mediators do not have the power to determine any matter in dispute. A settlement agreed to in a mediation is binding as long as it is consistent with the Act. The settlement must be in writing and signed by or for the parties.

The Tribunal can make orders to give effect to any agreement or arrangement arising out of mediation.

**Fair Trading data indicates that few applications for mediation are received. This may be due to a misconception about the range of disputes that can be the subject of mediation.**

71. Are there other ways that residents and operators can resolve disputes?

72. Are there barriers to accessing mediation provided by Fair Trading? Should mediation continue to be provided by digital means after social distancing measures end?

### ***Escalating disputes to the Tribunal***

The Act allows home owners, former home owners and operators to apply to the Tribunal for the determination of a dispute. The dispute must relate to a right or obligation under the Act, a dispute arising from, or relating to, a site agreement or collateral agreement or for any other matter that may be determined by the Tribunal under the Act.

Section 157 provides that the Tribunal may make any one or more of the following orders:

- restraining an action in breach of the Act or a site agreement or collateral agreement (meaning an agreement for the sale of the home)
- requiring a person to comply with an obligation under the Act, or a site agreement or collateral agreement
- relieving a party to a site agreement or collateral agreement from the obligation to comply with a provision of the agreement
- requiring the payment of money
- requiring the payment of compensation
- that a party to a site agreement perform such work or take steps to remedy a breach of the agreement
- requiring payment of part or all site fees payable under a site agreement to the Tribunal until the whole or part of the agreement has been performed or any application for compensation has been determined
- requiring site fees paid to the Tribunal to be paid towards the cost of remedying a breach of the site agreement or towards the amount of any compensation
- directing an operator to give a former home owner or person authorised by a former home owner access to a site or home for the purpose of recovering goods of the former home owner
- an order for anything else necessary or desirable to resolve a dispute.

The Commissioner may also take or defend proceedings on behalf of a party in the Tribunal or intervene in proceedings before the Tribunal if the Commissioner considers that this is in the public interest.

## Chapter 8 – Administration and enforcement

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The Commissioner for Fair Trading has the following functions under the Act:

- to carry out investigations and research into matters relating to communities,
- to investigate contraventions of the Act or the Regulation and to take appropriate action to enforce the Act or the Regulation,
- to investigate and report on any matters referred to the Commissioner by the Minister in connection with land lease community laws,
- to provide information to the public about the Act and services provided by Fair Trading, the Tribunal and others,
- to provide information to the public about mediation services, and
- any other function conferred or imposed by the Act on the Commissioner.

### ***Complaints and disciplinary action***

Any person can make a complaint to the Commissioner alleging grounds for taking disciplinary action against a person. Disciplinary action can also be taken whether or not a complaint has been made.

The Commissioner (through Fair Trading) can conduct inquiries and investigations in relation to a complaint.

Disciplinary action can be taken against a person who is or was the operator of a community on any of the following grounds:

- the person has breached the Act or Regulation
- the person has breached one of the rules of conduct
- the person has breached an undertaking given to the Commissioner
- the person has failed to comply with a direction given by the Commissioner
- the person has failed to pay a monetary penalty payable under a penalty notice.

Disciplinary action the Commissioner can take can 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. In this way the Tribunal provides independent oversight of Fair Trading's exercise of its enforcement powers.

Since the commencement of the Act on 1 November 2015, Fair Trading has handled a total of 409 complaints under the Act. The following table provides a calendar year breakdown of these complaints:

Year	2015	2016	2017	2018	2019	2020
<b>Number of complaints</b>	16	157	56	80	57	48
<b>Number of enquiries</b>	150	831	548	492	540	161

### **Offences**

If a person has committed an offence against the Act, Fair Trading can take action against them.

Proceedings for an offence against the Act or the Regulation are dealt with summarily in the Local Court. Proceedings must be commenced within 3 years of the commission of the offence or of when evidence of the offence first came to the attention of a Fair Trading investigator.

Some offences in the Act are penalty notice offences. This means that Fair Trading officers can issue them with a penalty notice which is similar to a fine. If the person disputes the penalty notice, they can have the matter heard by the Court. If they do not dispute it, they can pay the penalty amount.

A schedule of the Act's penalty notice offences is at **Appendix 2** to this paper.

A contravention of a provision of the Act or the Regulation for which there is no penalty specified is not an offence.

### **Powers of Fair Trading investigators**

In order to investigate suspected breaches of the Act, section 179 of the Act provides Fair Trading investigators with power to enter any premises at any reasonable time. Premises may include an office or other place involved in the management of a community. In order to enter residential premises, the investigator must first obtain consent from the occupier or a search warrant.

Investigators may:

- require any person on the premises to produce any documents in their possession or control and inspect those documents
- take copies or extracts or make notes from any document and take temporary possession of documents for that purpose,
- take photographs or record (audio and visual) information where necessary,

- require persons on the premises to answer questions or provide information in relation to a contravention of the Act or the Regulation, or
- require the owner or occupier of the premises to provide assistance and facilities as necessary to enable the investigator to exercise their functions.

73. Are the Commissioner's disciplinary powers adequate?
74. Are there breaches of certain provisions of the Act that are currently not offences that should be offences?
75. Are there any other offences that should be penalty notice offences?
76. Are the powers of Fair Trading investigators appropriate?

### ***Notice Periods to commence proceedings in the Tribunal***

The Act prescribes a number of timeframes within which proceedings in the Tribunal must be commenced. A full list of the limitations is contained at Appendix 3.

### ***Community engagement***

Fair Trading, as the regulator of land lease communities, seeks to ensure that the sector is engaged and informed about developments relating to, and affecting, community living.

Fair Trading has undertaken a number of proactive community engagement sessions with residents and operators of communities. Community engagement comprised of face-to-face information sessions taking place mostly throughout regional NSW (areas have included Nowra, Yamba, Mayfield, Tweed Head, Woy Woy and Swansea). These sessions have focused primarily on the use of embedded networks and electricity charges in communities. Feedback on these sessions indicates that attendees often found them to be informative and relevant. However, some feedback suggests that other issues should also be covered in these information sessions.

Due to COVID-19 distancing measures and to provide improved reach for future sessions, Fair Trading may develop and release webinars and online information packages for communities.

77. Would you be interested in attending a community information session via webinar?
78. Do you have any access issues preventing you from attending a community engagement session digitally? For example, internet access, computer or smartphone access, digital literacy etc.

# Appendix 1

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## List of questions in the discussion paper

1. Are the objects of the Act still relevant to residential land lease communities?
2. Has the Act been effective in delivering its objects?
3. Should the objects of the Act be expanded or updated to reflect the changing nature of land lease communities? Please identify how they should be expanded or updated and why.
4. Is the ban on inducing a person to enter into an agreement through false, misleading or deceptive statements or promises working effectively?
5. Does the disclosure statement provide enough information to a prospective home owner to allow them to make an informed decision about buying into the community? Why/why not?
6. Is the form of the disclosure statement easy for prospective home owners to understand?
7. Is the disclosure statement provided at the right time? I.e., should it be given earlier or later?
8. Does the disclosure statement form need to be improved? If yes, how would you improve it?
9. If an operator of a community fails to provide a disclosure statement to a prospective home owner before entering into a site agreement with them, a penalty will apply. Do you think the maximum penalty of 100 units (\$11,000) is appropriate?
10. Are you aware of home owners not being provided with the correct written site agreement?
11. Does having a prescribed standard form site agreement work well?
12. Should the list of prohibited terms in site agreements be modified? If so, what type of terms should be included or removed?
13. Should the requirements about additional terms be changed or improved?
14. Have you accessed the communities register? If so, was the register easy to navigate? Did the information on the register inform a decision you made regarding a community?
15. What information should be included on the public register and how should the information be presented?
16. Should the Act continue to allow for both the fixed method and the notice method of site fee increases? Why or why not? If not, what method should be allowed?
17. Should there be any restrictions on the method that can be used for fixed method fee increases, or is the existing flexibility working well and/or necessary for operators?
18. Should there be a requirement that site fees can only be increased once per year, whatever method is used? Why or why not?
19. Should there be any grounds on which a site fee increase that is based on a fixed method is able to be challenged in the Tribunal?
20. Is the process for resolving disputes over site fee increases by notice working effectively?
21. Should there be changes to the grounds for challenging site fee increases by notice?
22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest?
23. Are the provisions governing site fees for new agreements fair and effective?
24. Have you entered into an agreement with an operator/home owner that included a voluntary sharing arrangement?

25. If you have been party to an agreement with a voluntary sharing arrangement, were there any problems with parties understanding or meeting the terms of the arrangement?
26. If you have been party to an agreement with a voluntary sharing arrangement and are a home owner, did the arrangement assist you to afford to live in the community?
27. Should there be neighbour to neighbour obligations that are able to be enforced by other home owners? Why or why not?
28. Should the Act be clearer on whether ongoing maintenance of a residential site or certain aspects of a site is the responsibility of an operator or a home owner? Why or why not?
29. Is the Act clear about rights and responsibilities relating to repairs and maintenance of the home and alterations, additions and replacement of the home?
30. Should there be any changes to the provisions about repairs and maintenance of the home, and alterations, additions and replacement of the home?
31. Are the special levy provisions useful or are upgrades usually funded by site fee increases?
32. Are the rules of conduct adequate and are they having the intended effect of ensuring appropriate conduct by operators?
33. Should the content of the rules be expanded to cover other issues?
34. Are the operator education requirements effective?
35. Can you suggest other educational resources or topics to facilitate a greater understanding of the role and responsibilities under the Act?
36. What delivery methods could be used to improve mandatory education?
37. Before reading this discussion paper, were you aware of the option of communities having community rules?
38. Does your community have community rules?
39. Does your community have a community rule regarding age restrictions? If so, does this impact your community?
40. Where residents committees are in place, should they be involved in the development of community rules? Why or why not?
41. If there is no residents committee in place, how could residents contribute to the development of community rules?
42. Is the system of enforcement of community rules appropriate?
43. Are community rules being used to improve life in residential communities?
44. Should residents committees also be required to take part in mandatory education? If yes, what topics should be covered?
45. If your community has a residents committee, is it working effectively?
46. Do you have any suggestions for changes to the way residents committees are established or run?
47. What are your overall views on utilities charging provisions under the Act, other than electricity charging in embedded networks, which is discussed below?
48. How well do the current provisions relating to accounts, access to bills and other documents work?
49. What are your views on the operation of section 77(3) as it applies to an embedded electricity network in a community?
50. Which reform option for electricity charging do you support and why?
51. Are there other reform options which you think should be considered?

52. What is your view on the impacts these options would have on electricity bills in your community?
53. If your community uses another method other than the Reckless method to calculate electricity charges that has not been considered in this paper, can you describe your experience with this?
54. As an operator, what costs do you incur due to maintaining an embedded network and to what extent do you recover these?
55. Are the current discounts in the Regulation appropriate?
56. Are you an operator or home owner with less than 60 amps? Are there any steps which could be taken to increase this level?
57. What difficulties are operators facing in managing solar systems in communities?
58. Are there other forms of sustainability infrastructure that are becoming common in communities?
59. What are the greatest barriers to home owners installing solar panels?
60. How can sustainability infrastructure be made more available in land lease communities?
61. Are the Act's provisions about the sale of a home and interference with a sale working well in practice?
62. Is the Act's control over operators who act as selling agents appropriate?
63. Should operators continue to be able to act as selling agents?
64. Do you have any other suggested changes to the provisions about the sale of homes?
65. Should the Act be amended to also prevent an operator unreasonably refusing consent to assignment of a site agreement? Why or why not?
66. Are the provisions relating to the assignment of tenancy agreements working well in practice?
67. Are the provisions about sub-leasing by home owners working well?
68. Are the grounds on which operators can terminate a site agreement appropriate? Should any other grounds be added?
69. Are the notice periods that operators are required to give for the different termination reasons appropriate?
70. Are the compensation provisions working well?
71. Are there other ways that residents and operators can resolve disputes?
72. Are there barriers to accessing mediation provided by Fair Trading? Should mediation continue to be provided by digital means after social distancing measures end?
73. Are the Commissioner's disciplinary powers adequate?
74. Are there breaches of certain provisions of the Act that are currently not offences that should be offences?
75. Are there any other offences that should be penalty notice offences?
76. Are the powers of Fair Trading investigators appropriate?
77. Would you be interested in attending a community information session via webinar?
78. Do you have any access issues preventing you from attending a community engagement session digitally? For example, internet access, computer or smartphone access, digital literacy etc.

## Appendix 2

### Penalty Notice Offences

Section	Offence	Penalty
16(5)	Operator fails to notify the particulars of a community	\$1,100 (Corporation) \$550 (individual)
17	Operator fails to notify when a place ceases to be a community	\$440 (Corporation) \$220 (individual)
21 (1)	Operator fails to provide the disclosure statement to prospective home owner at least 14 days before entering into a site agreement	\$1,100
26 (1)	Operator fails to ensure that site agreement is in writing at the commencement of the agreement	\$220
26 (3)	Operator fails to ensure the site agreement: <ul style="list-style-type: none"> <li>• identifies the residential site by its number and dimensions</li> <li>• states:               <ul style="list-style-type: none"> <li>○ the operator's name and address (for service of documents)</li> <li>○ if the operator is a company, the address of the registered office</li> <li>○ if the operator is not the owner of the community name of the owner</li> </ul> </li> <li>• is executed by the parties</li> <li>• complies with any requirements prescribed in the Regulation (none prescribed)</li> </ul>	\$220
29 (2)	Operator must not include, or attempt to enforce, a term of a side agreement that is prohibited by regulations.	\$1,100
30 (1)	Operator (or a person acting on their behalf) must not request, demand or receive any fee or charge from a prospective home owner before entering into a site agreement with them.	\$220
32	Operator fails to ensure a homeowner receives, free of charge, a copy of the side agreement upon execution by both parties.	\$220
52 (2)	A new operator fails to, within 14 days of becoming the operator, provide home owners a notice stating the operator's name and business address.	\$110
53	Operator fails to give homeowners notice of a change in the operator's name or address within 14 days of the change.	\$110
55 (3)	Operator fails to notify the Commissioner in writing within 7 days of the completion of the education briefing that it has been undertaken and completed. (in the context of mandatory education briefing for new operators).	\$550

Section	Offence	Penalty
57 (1)	It is an offence for a person to demand or require that the homeowner or prospective home owner pay site fees in advance equal to more than 2 weeks worth of site fees.	\$110
57 (2)	It is an offence for a person to demand or require the payment of any site fees (other than the first payment) under a site agreement for a period of occupation of a site before the end of the previous period for which site fees have been paid they are guilty of an offence.	\$110
58 (1)	If site fees were paid in person, any person who receives payment of the fees and fails to provide a receipt for the payment is guilty of an offence. This penalty amount includes a penalty that the receipt does not include required particulars. Receipts must meet the requirements under section 58(3).	\$220
58 (2)	If site fees are not paid in person, the operator fails to (on receiving the fees and being asked for a receipt) prepare a receipt and provide it to the home owner they are guilty of an offence. Receipts must meet the requirements under section 58(3).	\$220
59 (1)	Operator fails to keep or cause to be kept a record showing site fees received under site agreements.	\$110
59 (2)	Operator is guilty of an offence if they knowingly make an entry that is false in a material particular in a record required by section 59(1).	\$110
66 (3)	Operator is guilty of an offence if they increase (or attempt to increase) the site fees that are to be increased by a fixed method otherwise than in accordance with that method and section 66 (e.g. must meet the form and substance requirements, 14 days written notice to home owner of fee increase).	\$550
76 (3)	The operator is guilty of an offence if they require or permit the payment of fees, charges or deposits from a house owner in contravention of section 76. Section 76 requires that only fees and charges that are: <ul style="list-style-type: none"> <li>• site fees, including fees permitted to be paid in advance (2 weeks' worth of site fees),</li> <li>• the cost of registering/recording the site agreement under the <i>Real Property Act 1900</i> if any fixed term period exceeds 3 years,</li> <li>• a refundable deposit for a key/access device for the community not exceeding \$25,</li> <li>• other fees/charges/deposits required by the Act or Regulation (none prescribed).</li> </ul>	\$220
84 (1)	The operator is guilty of an offence if they fail to provide a receipt without delay to a person	\$220
84 (2)	If utility fees are payable to the operator and were paid in person, any person who receives payment of the fees and fails to provide a receipt for the payment is guilty of an offence. Receipts must meet the requirements under section 84(3)	\$220

Section	Offence	Penalty
	If utility fees are not paid in person, the operator fails to (on receiving the fees and being asked for a receipt) prepare a receipt and provide it to the home owner they are guilty of an offence. Receipts must meet the requirements under section 84(3)	
91 (3)	<p>The operator is guilty of an offence if they make or attempt to make a rule that:</p> <ul style="list-style-type: none"> <li>• requires a home owner to replace or remove an older home, or</li> <li>• make upgrades or improvements to a home for any reason that is not related to health and safety</li> </ul>	\$1,100
124 (3)	The operator fails to provide at least 7 days notice to the Commissioner before giving a termination notice for closure of the community.	\$550

## Appendix 3

### Periods for making applications to Tribunal

Section	Substance of application	An application may be made in:
21(4)	The Tribunal may, on application by a prospective home owner, make an order requiring the operator to provide a disclosure statement if a residential site in the community is available for occupation by the prospective home owner, and the operator fails to provide a disclosure statement within 14 days after a request for the statement is made.	The period of 14 days starting with the date of request for a disclosure statement
26(4)	The Tribunal may on application by a home owner who was not given a written site agreement at the time occupation of the residential site commenced, order the operator to prepare and enter into a standard form site agreement.	The period during which the site home owner did not have a written site agreement
27(5)	The Tribunal may, on application by a home owner under a site agreement that is entered into after the commencement of the provision and is not in standard form, order the operator to prepare and enter into a standard form site agreement.	The period during which the site agreement is in force (where the agreement is not in the relevant standard form)
28(2)(a)	The Tribunal may on application by a home owner or operator make an order declaring an additional term is void. The Tribunal may also prohibit the use of the same or a similar term in any future site agreement entered into while the community remains in the same ownership and can prohibit that term's use in any future site agreement entered into in connection with any other community operated by the operator.	The period during which the site agreement is in force
29(4)	A home owner or operator of a community may apply to the Tribunal to consider whether part or all of the specified term of the site agreement is void.	The period during which the site agreement is in force
37(2)(c)	The Tribunal may on application of the home owner make orders with respect of the failure to carry out work.	The period of 90 days starting with the date the work was completed or was expected to be completed
38(2)	The Tribunal may, on application by a home owner, make an order resolving a dispute concerning an operator's unreasonable restriction with the home owners privacy, peace and quiet, or proper use and enjoyment of the residential site and the community common areas.	The period of 6 months starting with the date of the alleged non-compliance
43(2)	The Tribunal may, on application by the operator, make an order requiring the home owner to carry out the work within a specified period, and where the home owner does not comply, an order authorising the operator to arrange for the work to be carried out (and recover the reasonable costs associated with engaging someone to carry out that work).	The period of 60 days starting with the date that is 60 days after the date the notice was issued under section 43(1) of the Act
43(3)	The Tribunal may, on application by the home owner, make an order declaring that a notice requiring the home owner to	The period of 60 days starting with the date the

Section	Substance of application	An application may be made in:
	carry out work is invalid on grounds that the site or home is not significantly dilapidated, or that the alteration or addition the subject of the notice is not likely to cause serious health or safety risks to others. The Tribunal may also order an extension of the 60-day period.	notice was issued under section 43 (1) of the Act
47(3)	The Tribunal may, on application by a home owner, make an order resolving a dispute concerning an operator's obligation to establish and maintain secure mail facilities in the community and to not access or interfere with individual mail facilities.	The period during which the site agreement is in force
48(4)	The Tribunal may, on application by a home owner, make an order resolving a dispute concerning an operator's obligation to ensure that all trees in the community are properly maintained and to take reasonable action if a home owner reports that a tree has caused or is likely to cause injury to a person or damage a property	The period during which the site agreement is in force
48(5)	The Tribunal may, on application by an operator, make an order for the removal of a tree that has been planted without the consent of the operator. An order may require the home owner concerned to remove the tree at the home owner's expense or require the home owner to repay to the operator the reasonable costs of removing the tree.	The period during which the site agreement entered into by the home owner responsible for the planting is in force
56(2)	<p>The Tribunal may, on application by the home owner, make an order resolving a dispute concerning the operator engaging in retaliatory conduct against a home owner. Retaliatory conduct is conduct taken in response to:</p> <ul style="list-style-type: none"> <li>• a complaint made by the home owner in good faith to the Commissioner or a government agency about the operator, or</li> <li>• a complaint made by the home owner in good faith to the operator, or</li> <li>• an application made by the home owner to the Tribunal or a court, or</li> <li>• any action by the home owner to promote the establishment of a residents committee for the community, or</li> <li>• the withdrawal or withholding of a service or use of a facility (per clause 9 of the Regulation).</li> </ul>	The period of 90 days starting with the date on which the alleged non-compliance occurred

Section	Substance of application	An application may be made in:
64(1)	<p>The Tribunal may, on application by the home owner under a site agreement, make an order that the site fees payable under the agreement be reduced by an amount the Tribunal considers appropriate if it is satisfied:</p> <ul style="list-style-type: none"> <li>• the amenity/standard of the community's common areas has decreased substantially since the agreement was entered into, or</li> <li>• a communal facility/service provided at the community when the agreement was entered into has been withdrawn/substantially reduced, or</li> <li>• a communal facility/service described in advertising, done by or for the operator, of which the home owner was aware before the site agreement was entered into has not been provided at the community, or</li> <li>• a communal facility/service described in a document made available to the home owner by the operator before the site agreement was entered into.</li> </ul>	The period during which the site agreement is in force
123(4)	Regarding the operator's ability to terminate a site agreement for the purpose of the operator carrying out repairs and/or making upgrades to a site or the community, the Tribunal may, on application by the home owner, make an order settling any dispute as to whether vacant possession is necessary for the operator to comply with an obligation to carry out works under an Act.	The period of 90 days starting with the date the notice was received
129(1)	The operator of a community may apply to the Tribunal for a termination order against a home owner on the ground of serious misconduct, without the need for a termination notice to be given.	The period of 30 days starting with the date the alleged serious misconduct became known to the operator
140(4)	<p>The Tribunal may make orders settling a dispute relating to the compensation payable to a home owner for the relocation of a home after the operator terminates the site agreement on grounds that are not for the home owner breaching the agreement, for serious misconduct or for non-use of the residential site.</p> <p>Section 140 outlines the likely reasonable costs associated with the relocation that the operator must pay to the home owner in compensation.</p>	The period of 12 months starting with the date the home was installed on the new site
141(8)	<p>The Tribunal may make orders settling a dispute relating to the compensation payable to a home owner where the home <u>is not</u> relocated after the operator terminates the site agreement on grounds that are not for the home owner breaching the agreement, for serious misconduct or for non-use of the residential site.</p> <p>Section 141 outlines a number of elements that may be considered in determining compensation.</p>	The period of 90 days starting with the date of the alleged non-compliance with section 141