Submission in response to the Discussion Paper on the Statutory Review of the Residential (Land Lease) Communities Act 2013

March 2021

About the Tenants' Union of NSW

The Tenants' Union of New South Wales (TU) is a Community Legal Centre specialising in residential tenancy law and policy. We are the resourcing body for the state-wide network of Tenants Advice and Advocacy Services (TAASs), who have collectively handled more than 3,600 questions and requests for assistance from land lease community residents since the LLC Act commenced.

The TU also assists home owners directly and through our work with resident organisations. Since the commencement of the Act we have provided almost 1,400 services to home owners including representation in proceedings in the NSW Civil and Administrative Tribunal (NCAT), the NCAT Appeal Panel, the NSW Supreme Court, the NSW Land and Environment Court, and the NSW Court of Appeal.

Our experience and expertise, along with that of the TAASs' and resident organisations provides a significant body of knowledge to draw upon when considering the legislation and its aims. We are in a unique position to understand and demonstrate the functions of the Act, and how it operates, with a singular focus on the 35,000 people who live in land lease communities in New South Wales.

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The Tenants' Union of NSW' office is located on the unceded land of the Gadigal of the Eora Nation.

About this submission

The Tenants' Union NSW welcomes the opportunity to provide comment on the Discussion Paper on the *Statutory Review of the Residential Land Lease Communities Act (2013).*

In the lead up to the statutory review in August last year we made available our **Report on 5 years of the *Residential (Land Lease) Communities Act 2013*.** In this, we identified a number of positive changes introduced in the 2013 Act, as well as a number of key areas in which the Act has fallen short of expected or hoped for outcomes. This submission builds on and reiterates the discussion and recommendations set out in our earlier Report.

To assist us to respond to the review we also surveyed 300 home owners during August to October 2020 on a range of issues including site fees and site fee increases, operator conduct, and dealing with disputes. In writing this submission we have considered the survey responses, along with feedback from resident organisation and resident committee representatives and Tenant Advocates who are members of our Residential Land Lease Communities Forum.

Part 1 of our submission sets out our recommendations, including those on matters not raised in the Discussion Paper that we believe need to be addressed as part of the review.

Part 2 of our submission directly addresses the questions raised in the Discussion Paper, with a focus on the impact the Act has had on home owners.

Recommendations

Chapter 1 – Objectives of the Act

Recommendation 1

Consider also referencing tenants in *object (b).*

Recommendation 2

Change *object (e)* to become 'to establish legislative protection for home owners' or otherwise retain.

Recommendation 3

Repeal *object (f).*

Chapter 2 – Informed choices for prospective home owners

Recommendation 4

That the disclosure statement includes the following additional information:

- the fees and charges payable to the operator including current utility charges
- the amps of electricity supplied to the residential site
- the mail facilities provided in the community
- the operators EWON membership (where appropriate)
- confirmation the site is long-term and able to be used for residential purposes
- final Court or Tribunal decisions where the operator was found to be in breach of the Act or a site agreement (within the previous 12 months)
- whether the Tribunal has referred a question of contempt regarding the operators' failure to comply with Tribunal orders to the Supreme Court of NSW (within the previous 12 months)

Recommendation 5

Along with the disclosure statement the operator should be required to provide: the community rules; the proposed site agreement; copies of the current approval to operate and community map.

Recommendation 6

The Act should enable the current home owner and a prospective home owners' agent to apply to the Tribunal if the operator fails to provide the disclosure document within 14 days.

Recommendation 7

The penalty for not providing a disclosure statement should apply where an operator fails to use the approved form and/or fails to disclose requisite information in the statement; inserts inaccurate or untruthful information; and when a disclosure statement is not provided to person acting on behalf of a prospective home owner.

Recommendation 8

A failure to provide the correct written site agreement should attract the same penalty as failing to provide a disclosure statement.

Recommendation 9

Additional prohibited terms should include:

- any term that seeks to restrict what home owners can post on websites and social media
- terms requiring home owners to pay a security deposit for electricity or gas
- any terms regarding a home owner taking ownership and being responsible for the preservation of site infrastructure such as concrete slabs, driveways, retaining walls or any structure that is not the home or an associated structure
- any term requiring a home owner to pay a bond to the operator as a condition of obtaining written consent to add or alter a structure on the residential site
- a term giving an operator a right to buy a home before another person may be offered the home, or a right to make a final offer to buy the home after all other offers have been received.

Recommendation 10

Additional terms must be on an approved or prescribed standard form and commence at number 1.

Recommendation 11

A maximum of 10 additional terms should be permitted by the Act.

Recommendation 12

The following information should be published on the internet for public access:

- the trading name, address and contact details of the community
- the name of the operator
- particulars of enforcement or disciplinary action taken in respect of the community, its operator or staff (in accordance with the regulations)

Recommendation 13

That operators provide a dated disclosure statement (or similar document) that can be viewed and downloaded from the register. This document should include details about

site fees and other charges; community services and facilities; who operates the community; and, whether the community is residential or mixed use.

Chapter 3 – Site fees

Recommendation 14

If fixed method site fee increases are retained in the Act, the method should apply for no longer that 12 months (one increase).

Recommendation 15

If fixed method site fee increases are retained, the Act should require prospective home owners to be offered a choice of site fee increase methods in new site agreements.

Recommendation 16

If fixed method site fee increases are permitted, they should be limited to: in proportion to the CPI; a specified dollar amount; or, a percentage.

Recommendation 17

Site fees should only be able to be increased once per year regardless of the method and all increases in the community should have the same effective date.

Recommendation 18

If fixed method increases are permitted, the Act should provide access to the Tribunal in certain limited circumstances.

Recommendation 19

The notice period for increasing site fees by notice should be extended to 90 days.

Recommendation 20

Operators must be required to disclose information relevant to a site fee increase in mediation.

Recommendation 21

That mediation is mandatory for both parties.

Recommendation 22

That the Act define precisely what must be included in an explanation for a site fee increase including: the costs relevant to the increase, the amount by which the cost has increased since the last site fee increase, and how that cost has been apportioned for the current increase.

Recommendation 23

The 25% requirement for challenging a site fee increase be abolished or lowered to 10%.

Recommendation 24

Any change in the increase payable apply to all home owners who received the notice of increase.

Recommendation 25

Projected increases in outgoings and operating expenses should not be factors in a site fee increase.

Recommendation 26

The Act should better define operating expenses by prescribing the items that can be included:

- wages and employment costs (for staff providing direct services to the community)
- utility costs for common areas available for use by residents
- grounds maintenance
- cleaning of common areas
- health and safety compliance costs
- administration
- council rates
- government charges and taxes relevant to the operation of the community
- insurances relevant to the operation of the community

Recommendation 27

Repairs and improvements to the community (actual or planned) should not be factors in a site fee increase.

Recommendation 28

That the Act provide definitions for item of capital or capital asset, capital maintenance and capital replacement.

Recommendation 29

The Act should provide that capital expenditure cannot be claimed as a cost for the purpose of a site fee increase

Recommendation 30

That the value of land comprising the community be removed as a factor in site fee increases.

Recommendation 31

The discretion of the Tribunal to determine a site fee increase should not be limited.

Recommendation 32

That site fees in new site agreements must be the same as the selling home owner is paying.

Recommendation 33

That voluntary sharing arrangements are not permitted in the Act.

Chapter 4 – Living in a land lease community

Recommendation 34

That it is clear in the Act that operators are responsible for providing and maintaining the residential site in a reasonable condition and fit for habitation.

Recommendation 35

That the Act define clearly that a residential site includes hardscaping and landscaping including; concrete slab, driveway, structural retaining walls and utility infrastructure (pipes, cables and taps).

Recommendation 36

That the standard form condition report clearly identifies all elements of the residential site and enables comment to be made on their condition at the commencement of the agreement.

Recommendation 37

That section 43(1)(a) is amended to remove any reference to the residential site.

Recommendation 38

The Act should enable home owners to make the following alterations or additions without the need to obtain the operators' written consent:

- installation of a security alarm
- window locks
- window screens and shutters
- door screens, and
- exterior lights.

Recommendation 39

The special levy provisions should be removed from the Act.

Recommendation 40

That complaints made to the regulator are thoroughly and properly investigated and appropriate enforcement action taken where necessary.

Recommendation 41

A more transparent complaints process is developed, and complainants are kept informed and advised of the outcome of their complaint.

Recommendation 42

That the provisions for which Penalty Infringement Notices are able to be issued are expanded and that the penalty is appropriate to the breach or conduct.

Recommendation 43

That consideration be given to a licensing regime for land lease community operators.

Recommendation 44

That the rules of conduct for operators are expanded to include:

- a requirement for front line office staff to have a knowledge and understanding of the relevant legislation, and
- a requirement on operators to engage in genuine communication with residents and members of the residents committee

Recommendation 45

Expand section 56 (1) to include circumstances where a home owner has taken or proposed to take any action to enforce a right of the home owner under the site agreement, this Act or any other law.

Recommendation 46

Broaden section 56 to permit the Tribunal to consider retaliatory conduct in circumstances where the operator lodges an application and the home owner wishes to contest the application as constituting retaliatory conduct.

Recommendation 47

The requirement for mandatory education should be expanded to all operators and front-line employees.

Recommendation 48

A new online education package that enables participation to be monitored and knowledge to be tested should be developed and rolled-out as a matter of urgency.

Recommendation 49

That the Act prohibit any community rule regarding age restrictions.

Recommendation 50

If age restriction community rules are permitted, they are only permitted in communities that are wholly residential.

Recommendation 51

If age restriction community rules are permitted the Act must clarify the application and exemptions of age restriction rules, including that beneficiaries, a home owner's spouse, de facto partner and carer are exempt.

Recommendation 52

75% of residents must agree to a proposed new rule or an amendment to a community rule.

Recommendation 53

An operator must amend or set aside a community rule if requested to do so by 25% of residents.

Recommendation 54

That the Act provide concise and clear compliance requirements for community rules that are fair and reasonable.

Recommendation 55

That subject matter for community rules be specified in the Act.

Recommendation 56

The Act should include 'occupant' in the definition of 'resident' or provide specifically for occupants to be members of a residents committee if voted for by residents of the community.

Recommendation 57

The Act should enable an office holder, committee member or residents committee to be removed by a majority of residents of the community.

Chapter 5 - Utilities

Recommendation 58

As a minimum, utility accounts should include:

- the name and site number of the resident

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

Recommendation 59

That the Act require operators to bill home owners at least every three months and prohibit operators from recovering charges that were not requested within three months of the operator being billed by their utility service provider.

Recommendation 60

The Act should require receipts to be in a format that enables residents to access rebates and EAPA.

Recommendation 61

The Act should provide that the method of charging home owners for electricity also applies to tenants.

Recommendation 62

Electricity use and supply charges should be separate.

Recommendation 63

The maximum charges for use and supply can be no more than the best market offer for a single rate tariff without discounts for the relevant area available through the energy made easy website. Supply charges should be discounted according to the level of amps supplied and the fair market offer reviewed every year on 1 July. In addition, operators and third-party providers could be permitted to charge a flat rate administration fee, prescribed in the regulations.

Recommendation 64

Supply charges should continue to be discounted where the supply to the site is less than 60 amps.

Recommendation 65

Where the supply is less than 20 amps there should be no supply charge payable.

Chapter 6 – The end of the agreement

Recommendation 66

The Act should include the following as additional specific instances of interference with the right to sell:

- failure to provide a disclosure statement when requested
- inserting terms or conditions into a site agreement offered to a prospective home owner requiring them to take action to comply with any requirement made by or under the *Local Government Act 1993* unless the matter has been the subject of previous action

Recommendation 67

The Act should provide that a home owner has the right to assign their site agreement and the operator cannot unreasonably withhold or refuse consent.

Recommendation 68

Assignment should be automatic if an operator fails to respond to a request within seven days.

Recommendation 69

A standard form Deed of Assignment should be included in the regulations.

Recommendation 70

Any reference to the assignment of a tenancy agreement should be removed from section 45.

Recommendation 71

The restriction on sub-leasing only once within any three-year period should be removed or, the Act should provide that an operator cannot unreasonably withhold or refuse consent for a sub-lease of up to three years.

Recommendation 72

That a site agreement cannot be terminated solely on the basis a site is designated short-term in a community's approval to operate.

Recommendation 73

That a site agreement cannot be terminated on the basis the site is not lawfully useable for residential purposes if an operator has knowingly taken, or failed to take any action that has rendered the site unlawful either before or after they entered into the site agreement.

Recommendation 74

That a site agreement cannot be terminated on the basis of non-use of the residential site.

Recommendation 75

That the Tribunal is required to ensure the grounds for termination have been established and consider the circumstances of the case in all termination matters.

Recommendation 76

The notice period under section 126 should be 120 days.

Recommendation 77

The right to compensation should not be dependent upon a valid termination notice being issued where the right would otherwise exist.

Recommendation 78

That a home owner who has their site agreement terminated under s127 is entitled to compensation in all circumstances.

Recommendation 79

Section 136 (3) should be amended so that all reasonable costs of relocating the home under this section are payable by the operator.

Chapter 7 – Resolving disputes

Recommendation 80

That information about the mediation service provided by NSW Fair Trading be available on the website.

Recommendation 81

That a specific application form for the mediation service be developed and made available.

Recommendation 82

That the Act contain a general provision enabling group applications to be made to the Tribunal, or enable group applications regarding: maintenance and repair of common areas and facilities; safety and security; community access arrangements; emergency evacuation procedures; reduction of site fees; refund of overpaid site fees; utility charges and refunds; review of utility cost and reduction in site fees; community rules; and, rules of conduct for operators.

Chapter 8 – Administration and enforcement

Recommendation 83

That it is an offence under the Act for an operator not to have in place emergency evacuation procedures and take reasonable steps to ensure residents are aware of the procedures.

Recommendation 84

That the following additional provisions should be offences:

- a failure by an operator to comply with all statutory obligations relating to the community
- a failure to provide an explanation for a site fee increase by notice that is compliant with the requirements of the Act.
- a failure by an operator to participate in compulsory mediation of a site fee increase dispute.

Recommendation 85

That additional, appropriate limitation periods be included in the Act.

Further recommendations

Recommendation 86

Section 32 should specify a timeframe in which the written agreement must be provided to the home owner.

Recommendation 87

The class of persons with an automatic right of occupation under s 44(5) should be extended to include children of the home owner or who the home owner is a 'guardian' for in accordance with the definition of that term under s 79A *Children and Young Persons (Care and Protection) Act 1998* (NSW).

Additionally, if a home owner becomes the carer of another person, that person should also have an automatic right of occupation.

Recommendation 88

Section 64 is too restrictive and places too high a burden of proof on home owners. It should be expanded to include a reduction or withdrawal by the operator of any goods, services or facilities provided by the operator under the site or any other agreement, contract or arrangement. If an operator agrees to provide something but provides less than what is agreed site fees should be reduced.

Recommendation 89

Section 68 should enable the recovery of any overpaid amounts that result from and unlawful increase. If an increase is invalid under the Act, then it should not become valid or beyond reproach solely because of the passage of time.

Recommendation 90

Section 83 should be amended to 'paid or payable' to prevent operators circumventing the requirement to provide home owners with reasonable access to bills and documents relevant to their utility charges.

Recommendation 91

Sections 116 and 130 contain language that could be problematic in that only in very rare circumstances is vacant possession of the residential site delivered when a site agreement is terminated. Vacant possession implies removal of the home, but homes almost always remain and are sold on-site. The Act should clarify that vacant possession does not require removal of the home.

Recommendation 92

Section 117 should enable a joint home owner to sever their interest in a site agreement. Sometimes relationships break down and in that circumstance one of the parties should be able to release themselves from future liabilities under the site agreement if they are no longer living in the home.

Recommendation 93

Section 140 (1) should apply regardless of the operator of the community to which the home owner relocates. It is inequitable to have two systems of compensation where the impact on the home owner is the same.

Recommendation 94

Section 144 should be expanded to cover correspondence between the operator and a resident or residents committee. It is a common complaint that some operators simply ignore correspondence. The Act should require operators to respond to all written correspondence from a resident or the residents committee within a certain period.

Recommendation 95

Section 154 contains confidentiality requirements that are too broad. Although confidentiality provisions in relation to a mediator are commonplace, section 154 extends the obligation to 'any other person' which would naturally capture parties to the mediation including home owners. It is reasonable to expect home owners involved in mediation may need or wish to discuss their mediation with other home owners who have a vested interest or could be impacted by the outcome. The section should be amended to remove the reference to 'any other person'.

Chapter 1 - Objectives of the Act

Question 1: *Are the objects of the Act still relevant to residential land lease communities?*

Question 2: *Has the Act been effective in delivering its objects?*

Question 3: *Should the objects of the Act be expanded or updated to reflect the changing nature of land lease communities?*

The objects outline the underlying purposes of the Act and should primarily focus on governing the relationship between operators and residents of communities. The Acts' principal function should be to provide legislative protection to residents.

Object (a) to improve the governance of residential communities

Improving governance is essentially about improving operator conduct. It concerns behaviour, practices, standards, ethical conduct and probity, accountability and regulation. This object is arguably more relevant than when the Act commenced. Operator conduct is one of the most common complaints raised with the TU, and the most difficult to resolve.

The Act contains provisions that were intended to improve governance including: section 54 (rules of conduct), section 55 (mandatory education briefing for new operators), section 67(c) (explanation for site fee increase) and section 83 (access to information about utility charges). On the whole, these provisions have failed to lead to improvements in governance.

Object (b) to set out particular rights and obligations of operators of residential communities and home owners in residential communities

As the main purpose of the legislation this remains relevant. We note the Act also contains some rights and responsibilities for tenants of land lease communities but that is not reflected in this object. More inclusive wording should be considered.

Object (c) to enable prospective home owners to make informed choices.

This is an important object for any prospective home owner but especially those considering land lease community living for the first time. It is our view the Act has failed to deliver on this object. It should be retained and relevant provisions strengthened to enable the objective to be met.

Object (d) to establish procedures for resolving disputes between operators and home owners

The object is still relevant. The dispute resolution processes established by the Act are appropriate and largely effective.

Object (e) to protect home owners from bullying, intimidation and unfair business practices

It is a sad reflection on the land lease industry that it is necessary for the Act to include an object to protect home owners from bullying, intimidation and unfair business practices. Whilst this object is still relevant it is restrictive and would be more helpful in protecting home owners if the object were simply 'to establish legislative protection for residents' (or home owners). The objects of an Act are generally used to resolve ambiguity and uncertainty and a less specific object could assist in more situations where residents are being disadvantaged by the actions of an operator.

Object (f) to encourage the continued growth and viability of the industry

Prior to 2011 it was unknown how many residential parks there were in NSW and whether there were issues of viability. In May 2012 NSW Fair Trading published a report profiling the residential parks industry, using information from the residential parks register. The report put the number of residential parks at 477, providing a total of 22,478 residential sites housing 33,632 residents.

The RLLC Act was assented to on 20 November 2013. Since that time, data from the register shows growth in communities, sites and residents. At February 2020 there were 510 communities housing 35,434 residents according to the register. New communities are being developed every year, and many are expanding the number of sites and homes to be used for residential purposes.

In 2021 the land lease industry is thriving and while we cannot say definitively this is because of the Act, there does appear to be a correlation. In order to facilitate industry growth, we believe the Act unfairly enabled operators to enter into new financial arrangements with home owners, including voluntary sharing arrangements and special levies. The removal of assignment rights enabled operators to increase site fees substantially when entering into new site agreements. Additionally, ambiguities around site maintenance have led to home owners paying costs that should properly be borne by operators.

The Act now needs to rebalance the rights, responsibilities and financial obligations of operators and home owners. This Act does not need to continue to encourage the growth of a healthy and profitable industry. In all negotiations, transactions and contractual arrangements operators hold the power. The Act must strive to restrict some of the current operator advantages so that homeowners and residents might exert greater consumer power over the arrangements they enter into with operators, and in matters related to their use and enjoyment of the community.

Recommendation 1

Consider also referencing tenants in *object (b).*

Recommendation 2

Change *object (e)* to become ‘to establish legislative protection for home owners’ or otherwise retain.

Recommendation 2

Repeal *object (f)*.

Chapter 2 - Informed choices for prospective home owners

Marketing and information disclosure

Question 4: *Is the ban on inducing a person to enter into an agreement through false, misleading or deceptive statements or promises working effectively?*

The TU has not received any complaints directly regarding a person being induced into entering into a site agreement through false, misleading or deceptive statements or promises. We believe the provision is generally working effectively.

Question 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?*

The disclosure statement is not as helpful as it could be in assisting prospective home owners to make an informed decision. The disclosure statement should also set out:

- all the fees and charges payable to the operator including current utility charges
- the number of amps of electricity supplied to the residential site
- what mail facilities are provided in the community.

In section 5 the operator should be required to provide information regarding their membership of the Energy and Water Ombudsman (EWON), where appropriate.

In section 9 the operator should confirm the site is approved as a long-term site and can be lawfully used for residential purposes. Site designation is a key issue and the TU has assisted a number of home owners who have site agreements but have discovered their home is on a short-term site. It is a breach of the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* to use a short-term site for residential purposes, and the Act also enables operators to issue a termination notice on these grounds.

Section 10 should require operators to disclose final Court or Tribunal decisions where the operator was found to be in breach of the Act or a site agreement (within the previous 12 months). Additionally, where the Tribunal has referred a question of contempt regarding the operators' failure to comply with Tribunal orders to the Supreme Court of NSW.

Question 6: *Is the form of the disclosure statement easy for prospective home owners to understand?*

The form of the disclosure statement is easy to understand, however the approved form is not always used by operators. We have also seen disclosure statements that contain inaccurate and untruthful information.

Question 7: Is the disclosure statement provided at the right time?

The requirement to provide a disclosure at least 14 days before entering into a site agreement is a good provision that is generally adhered to. It is our view that 14 days is sufficient time for a prospective home owner to consider the information and seek advice where necessary.

We suggest that at the time the disclosure statement is provided the operator should also be required to provide:

- the community rules,
- the proposed site agreement,
- copies of the current approval to operate and community map.

A prospective home owner must be provided with the community rules upon signing the agreement and can request copies of the other documents – they will be better placed to make an informed decision if the documents are provided in advance.

The Act enables a prospective home owner to apply to the Tribunal if the operator fails to provide the disclosure document within 14 days. This provision could be expanded to enable the current home owner and prospective home owners' agent to make the application. Prospective home owners are unlikely to want to effectively start their relationship with the operator by taking them to the Tribunal.

Question 8: Does the disclosure statement form need to be improved?

The current form provides the information in a clear manner.

Question 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. Is the maximum penalty of 100 units ($11,000) appropriate?

Failing to provide a disclosure statement to a prospective home owner may lead to some people making decisions they would not otherwise have made. Once a home is purchased and the home owner moves into a community, moving again because certain information was not disclosed can be difficult, stressful and costly. The maximum penalty is appropriate because the penalty must be sufficient to discourage the non-disclosure of information.

We note the Act also provides for a disclosure statement to be provided to another person acting on behalf of a potential purchaser. The TU has received complaints from a real estate agent who has been rebuffed by operators when requesting a disclosure statement on behalf of his clients. It is appropriate that the penalty apply when a person acting on behalf of a prospective home owner requests a disclosure statement and it is not provided.

The penalty should also apply where an operator fails to use the approved form and/or fails to disclose requisite information in the statement, or inserts inaccurate or untruthful information.

Further, the regulator should be more active in checking and ensuring that disclosure statements comply with the requirements of the Act.

Recommendation 4

The disclosure statement should include the following additional information:

- the fees and charges payable to the operator including current utility charges
- the amps of electricity supplied to the residential site
- the mail facilities provided in the community
- the operators EWON membership (where appropriate)
- confirmation the site is long-term and able to be used for residential purposes
- final Court or Tribunal decisions where the operator was found to be in breach of the Act or a site agreement (within the previous 12 months)
- whether the Tribunal has referred a question of contempt regarding the operators' failure to comply with Tribunal orders to the Supreme Court of NSW (within the previous 12 months)

Recommendation 5

Along with the disclosure statement the operator should also be required to provide: the community rules; the proposed site agreement; copies of the current approval to operate and community map.

Recommendation 6

The Act should enable the current home owner and a prospective home owners' agent to apply to the Tribunal if the operator fails to provide the disclosure document within 14 days.

Recommendation 7

The penalty for not providing a disclosure statement should apply where an operator fails to use the approved form and/or fails to disclose requisite information in the statement, or inserts inaccurate or untruthful information, and when a disclosure statement is not provided to person acting on behalf of a prospective home owner.

Site agreements

Question 10: Are you aware of home owners not being provided with the correct written site agreement?

The TU is aware of many cases of home owners not being provided with the correct written site agreement. Some operators provide casual occupation agreements when they should be providing site agreements, some provide non-compliant site agreements drafted in-house, and we have seen site agreements pursuant to the *Residential Parks Act 1998* issued to home owners after 1 November 2015.

Below is an extract from the website of Goulburn Lifestyle Village. Under a section about home sales residents are advised they will need to sign a 'Residential Tenancies Agreement'. (https://www.goulburnsouthcp.com.au/lifestyle-village/)

> New residents entering the Goulburn South Lifestyle Village will be required to sign a Residential Tenancies Agreement which is designed to protect both the resident and the park manager. As a resident of the Goulburn South Lifestyle Village, you will be required to pay site fees which will cover the following items:

Failure to provide the correct written site agreement demonstrates either a lack of knowledge or simple disregard for the law by operators. The penalty for failing to provide the correct site agreement should be in-line with the penalty for failing to provide a disclosure statement.

Question 11: Does having a prescribed standard form site agreement work well?

A standard form site agreement is essential. Without such we have no doubt the range of site agreements provided to home owners would expand and we would see an increase in site agreements with standard terms omitted, or with non-compliant terms.

Question 12: Should the list of prohibited terms in site agreements be modified?

There are a number of prohibited terms that should be added to the current list. We are aware some operators are inserting additional terms into site agreements that place extra restrictions on home owners, require home owners to maintain operator-owned infrastructure, and to levy fees and charges not permitted by the Act or regulations.

One of the most commonly complained about additional terms is the 'social media' clause. It is a standard additional term of the Land Lease Industry Association (LLIA) site agreement used widely in NSW. The term states *"You agree that you will not on any social media or otherwise do anything that negatively impacts on the reputation of our business, including without limitation, adversely commenting on the residential community, its home owners or tenants or all of them".*

Non-disparagement clauses should not be a permissible term in site agreements as they may operate to impede a home owner's enforcement of their rights and limit their ability to seek advice. The Federal Court recently found a non-disparagement clause to

be an unfair contract term under Australian Consumer Law and therefore void in *ACCC v Mitolo Group Pty Ltd (2019) FCA 1257 (2 August 2019).*

Additionally, the following terms should be prohibited:

- any term enabling operators to charge a security deposit for electricity and gas. Such charges are not permitted by the Act.
- terms regarding a home owner taking ownership and being responsible for the preservation of site infrastructure such as concrete slabs, driveways, structural retaining walls or any structure that is not the home or an associated structure. These terms facilitate the transfer of an operators' maintenance responsibilities to home owners.
- any term requiring a home owner to pay a bond to the operator as a condition of obtaining written consent to add or alter a structure on the residential site.
- a term giving an operator a right to buy a home before another person may be offered the home, or a right to make a final offer to buy the home after all other offers have been received.

Question 13: Should the requirements about additional terms be changed or improved?

The most common complaints received by the TU regarding additional terms are that they are not negotiable, there are too many of them and they are often not clearly identifiable as additional terms.

The Act provides that additional terms are negotiable but that is not the reality. Site agreements are offered to prospective home owners on a take it or leave it basis. The Act legitimises this conduct by making it lawful for an operator to refuse to enter into a site agreement if they and the prospective home owner do not agree on the terms. Prospective home owners have no negotiating power regarding additional terms.

We have reviewed the additional terms in a number of site agreements and it is our view that many are unnecessary and cause confusion by repeating standard terms or reiterating community rules. We have also seen terms which we believe conflict with the Act, but unless they are challenged at the Tribunal, they remain terms of the agreement.

The Act and standard form site agreement comprehensively cover the rights and responsibilities of home owners and operators. Community rules impose another set of conditions on residents. Additional terms should not be necessary however, we recognise that communities are unique and there may be circumstances where additional terms may be desirable. We submit these situations will be limited and suggest a maximum of ten (10) additional terms should be permitted by the Act.

Despite the current requirement for additional terms to be set out in a separate and clearly labelled part of the site agreement, we have seen additional terms that omit the 'NOTE' in the standard from site agreement that any additional terms are not required

by law and are negotiable. We suggest that additional terms should commence with the number 1, thus clearly identifying an additional set of terms. Further, an approved or prescribed form should be developed to standardise the information prospective home owners are given regarding their ability to negotiate additional terms, and ensure additional terms are genuinely and easily identifiable.

Recommendation 8

A failure to provide the correct written site agreement should attract the same penalty as failing to provide a disclosure statement.

Recommendation 9

Additional prohibited terms should include:

- any term that seeks to restrict what home owners can post on websites and social media
- terms requiring home owners to pay a security deposit for electricity or gas
- any terms regarding a home owner taking ownership and being responsible for the preservation of site infrastructure such as concrete slabs, driveways, retaining walls or any structure that is not the home or an associated structure
- any term requiring a home owner to pay a bond to the operator as a condition of obtaining written consent to add or alter a structure on the residential site
- a term giving an operator a right to buy a home before another person may be offered the home, or a right to make a final offer to buy the home after all other offers have been received.

Recommendation 10

Additional terms must be on an approved or prescribed standard form and commence at number 1.

Recommendation 11

A maximum of ten (10) additional terms should be permitted by the Act.

Community registration and the Public Register

Question 14: Have you accessed the public register?

The TU regularly uses the public register and we are very familiar with it. We have received feedback from a number of users that they struggled to locate the register, or were unable to find it at all. This obviously impacts its usefulness.

The register of communities enables the user to search for communities in a particular area or by name. However, the information provided is limited and is of little value to prospective home owners. The name, address or website of a community is not

information that will assist prospective home owners to make an informed choice about whether to purchase a home in a community or particular community.

We note the Act already requires certain additional useful information to be published, for example the trading name and name of the operator, plus particulars of enforcement or disciplinary action. It is disappointing and frustrating for many people that this information has not been published as required.

Question 15: What information should be included on the public register and how should the information be presented?

If the register aims to increase accountability and transparency in the industry, and genuinely assist prospective home owners to make informed decisions, the register must be more accessible, and the information available to the public expanded.

The types of details prospective home owners are interested in are: location; homes available for sale; site fees and other charges; community services and facilities; who operates the community; whether the operator is law abiding; and, whether the community is residential or mixed use.

Essentially prospective home owners are trying to assess whether a community is right for them, and whether they can afford to live there. The register cannot and should not be the only place prospective home owners can access the information they are seeking, but it could provide some of that information.

A simple way to achieve this would be for operators to provide a dated disclosure statement, or similar document, that can be viewed and downloaded from the register. The document should be an approved or prescribed form so that there is consistency across communities. To ensure currency the documents could be updated quarterly, or six-monthly.

Recommendation 12

The following information should be published on the internet for public access:

- the trading name, address and contact details of the community
- the name of the operator
- particulars of enforcement or disciplinary action taken in respect of the community, its operator or staff (in accordance with the regulations)

Recommendation 13

That operators provide a dated disclosure statement (or similar document) that can be viewed and downloaded from the register. This document should include details about site fees and other charges; community services and facilities; who operates the community; and, whether the community is residential or mixed use.

Chapter 3 - Site fees

Site fee increases – fixed method

Question 16: Should the Act continue to allow for both the fixed method and the notice method of site fee increases?

The TU consulted home owners and resident organisations about whether there should be a single method to increase site fees, or whether both methods should be available. We received a mixed response but there were clear concerns that fixed methods are now commonly 3.5% or above and are not negotiable. When coupled with the high site fees we see in many communities and the compounding nature of percentage increases it is possible home owners may find their site fees become unaffordable within a relatively short period of time.

Our consultation produced two reasons why a home owner may prefer a fixed method increase. Firstly, it provides certainty. Secondly, elderly home owners do not have the desire, skills or confidence to challenge an excessive site fee increase.

Whilst we acknowledge these are genuine concerns, in our view fixed method increases are always going to be problematic unless protections are introduced to address the current unequal bargaining position of home owners and prospective home owners. Currently fixed methods are not negotiable or transparent and they bear no relevance to operating costs or the condition of a community. In short, the benefit to operators far outweighs any potential benefit to home owners.

The TU can only support the retention of fixed method increases if prospective home owners and home owners entering into new site agreements are better able to make informed decisions.

We suggest a fixed method should apply for no more than 12 months (one increase). After this time the parties can agree to renew the increase for a further 12 months, or negotiate a different fixed method. If the home owner rejects the fixed method offered, they automatically go on to increase by notice. By limiting the period for which a fixed method can apply, the Act can provide home owners with a genuine opportunity to negotiate. We propose this limitation apply only to home owners who enter into site agreements after the provision commences.

We believe the only way to enable prospective home owners to make an informed decision about the method of increase is for the Act to require operators to offer a choice of site fee increase methods in new site agreements – fixed or by notice. The decision about which method to accept should be the sole discretion of the prospective home owner. Additionally, the 12-month limitation on a fixed method should apply as above.

Recommendation 14

If fixed method site fee increases are retained in the Act, the method should apply for no longer than 12 months (one increase).

Recommendation 15

If fixed method site fee increases are retained, the Act should require prospective home owners to be offered a choice of site fee increase methods in new site agreements.

Question 17: Should there be any restrictions on the method that can be used for fixed method site fee increases?

There must be restrictions on the method used for fixed method site fee increases. The complex, multi-method increases in place in many communities should not be permitted under the Act.

If fixed method site fee increases are retained the Act should prescribe precisely the permitted methods and the option of 'other' must be removed to prevent further abuse of this provision. Site fee increases are necessary to enable operators to cover increases in certain costs relevant to the operation of the community. Operators should not be given open slather to introduce a fixed method bears no relevance to these costs and that covers every potential increase in their outgoings, however irrelevant to the operation of the community.

Fixed method increases should be limited to:

- in proportion to the CPI, or
- a specified dollar amount, or
- a percentage.

Recommendation 16

If fixed method site fee increases are permitted, they should be limited to: in proportion to the CPI; a specified dollar amount; or, a percentage.

Question 18: Should there be a requirement that site fees can only be increased once per year, whatever method is used?

Yes, site fees should only be able to be increased once per year regardless of the method.

In our experience this is the general practice of operators and it is equitable. Fixed method increases should also take effect on the same date as increases by notice take effect. Having a general 'increase day' will better enable comparison between increases being sought by notice and those by fixed methods, and support the desire for transparency around site fee increases.

Recommendation 17

Site fees should only be able to be increased once per year regardless of the method, and all increases in the community should have the same effective date.

Question 19: Should there be any grounds on which a site fee that is based on a fixed method is able to be challenged at the Tribunal?

This is one of the key issues regarding fixed method increases. On one hand, it is not unreasonable for parties to a contract to be held to the terms they have agreed to, such as a fixed method site fee increase. On the other hand, it is notable that a fixed method increase can operate for the life of the site agreement. It therefore has the potential to place a significant burden on home owners, where the increase becomes unreasonably and unexpectedly substantial and not commensurate with the general condition of the community or operator's outgoings.

It is also inequitable that the relevant considerations for the Tribunal in determining an excessive increase application under section 74 have no application to a home owner on a fixed method increase, and in particular, the considerations under section 74 (1) (b), (d), (i), (j). A home owner on a fixed method increase should still have recourse to argue the increase is excessive with reference to these and any other relevant factors.

The current construction of section 66 (7) appears to prevent any application to the Tribunal regarding a fixed method increase term regardless of whether the method or term is lawful. This exact point is being argued in proceedings before the NCAT Appeal Panel and the operator has indicated they may further appeal to the Supreme Court of NSW or a higher court if the Appeal Panel does not rule in their favour. It is patently unjust that the Act prevents even a potentially unlawful fixed method from being challenged by a home owner.

The Act must provide a right to apply to the Tribunal regarding a fixed method increase. The right could be limited to particular circumstances including:

- to determine whether the method complies with the Act
- to determine whether the term is unfair (when measured against the same or similar factors to those in the ACL)
- where home owners in the same community have received a lower increase by notice, or
- the Tribunal has ordered a lower increase by notice.

The latter two situations would indicate the fixed method increase is out of step with the increase in operating costs and/or condition of the community. In these circumstances it is appropriate the Tribunal have the power to make orders for a lower increase for home owners on the fixed method.

We note that the Act and discussion paper reference a possibility that an unfair term fixing a fee increase method may be challenged under the unfair contract terms in the

ACL. In *Morris and ors v Kincumber Nautical Village* the Tribunal was not satisfied that the contract (site agreement) is a standard form contract because certain terms are, at least on paper, negotiable. The Tribunal was *"not satisfied that provisions of the ACL in respect of unfair contract terms apply to the subject agreements".* As a challenge under the ACL is not available, the Act must provide access to the Tribunal.

Recommendation 18

If fixed method increases are permitted, the Act should provide access to the Tribunal in certain limited circumstances.

Challenging site fee increases by notice

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

Consideration should be given to increasing the notice period for site fee increases by notice from 60 to 90 days. At present when an increase is challenged the process takes more than 60 days and home owners are often required to pay an increase that is later found to be excessive. Allowing a longer notice period will enable more disputes to be settled prior to the increase taking effect.

The TU generally supports the current system of mediation prior to an increase being challenged at the Tribunal. Anecdotal evidence suggests that mediation is largely successful in site fee increase disputes, with the majority of applications resulting in agreements. However, we are concerned that home owners are reaching settlement without access to evidence and information and they may therefore be paying higher site fee increases than are warranted.

The Act enables a mediator to require a party to disclose details of their case and evidence in support of that case. However, NSW Fair Trading (the mediator) has advised they never have, and never would, require a party to disclose evidence. The mediation process provided for by the Act is robust. It deals with confidentiality and inadmissibility in proceedings of things said and done in mediation. There really is no valid reason for the non-disclosure of information by any party.

If mediation fails and the site fee increase dispute goes to the Tribunal the operator must provide the evidence or risk not being allowed to increase the site fees. In *Laing v Yamba Operations Pty Ltd* [2018] (unpublished) the Tribunal set aside the full increase sought because the operator failed to provide evidence in support of their claim.

In 2019 the operator of Sunrise Property Holdings Pty Ltd appealed against a decision of the Tribunal to award an increase of 2% rather than 5.32%. At first instance the operator provided a document regarding the outgoings and operating expenses but declined to provide any evidence in support. The Appeal Panel found no error in the decision and dismissed the appeal.

Mediation is a good process for resolving site fee increase disputes but it must be balanced and fair. If one party holds all of the information and there is no requirement to disclose that information to the other party it is questionable whether the making of any agreement is proper.

We would also add that mediation is currently only mandatory for home owners. If an operator chooses not to participate, mediation fails and home owners can apply to the Tribunal. Mediation should be mandatory for both parties. The Act should provide that the Tribunal can make an order setting aside the increase if the operator did not participate in mediation without valid reason.

Recommendation 19

The notice period for increasing site fees by notice should be extended to 90 days.

Recommendation 20

Operators must be required to disclose information and evidence relevant to a site fee increase in mediation.

Recommendation 21

That mediation is mandatory for both parties.

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

Site fee increases by notice needs a fundamental re-think. The current system asks home owners to accept or reject a proposed increase without any supporting reasoning or information being provided by an operator, or argue a legal case. This puts the majority of home owners in an impossible situation and leads to many accepting an increase that is excessive, unjustified and unfair.

The Act requires a site fee increase notice to contain an explanation for the increase. The intention behind this requirement is to improve transparency and provide home owners with sufficient information to enable them to assess whether the proposed increase is necessary. The reality is that operators provide a generic list of costs which have purportedly increased. Such 'explanations' are entirely deficient, and the Act needs to demand greater specificity of operators when they are seeking to increase site fees.

A notice of site fee increase should be required to clearly set out the costs relevant to the increase, the amount by which each cost has increased since the last site fee increase, and how that cost has been apportioned for the current increase. This is not an unreasonable requirement. Operators should have undertaken this exercise to determine the site fee increase. Providing the information to home owners facilitates transparency and enables home owners to see the basis on which the increase is being sought. We believe that requiring this information in a site fee increase notice could

lead to fewer disputes and also assist with mediation and Tribunal hearings should the increase be disputed.

The site fee increase notice should be an approved form, which operators are required to use. This would assist compliance.

We support the current grounds for challenging site fee increases but not the requirement that 25% of home owners are required to mount a challenge. This requirement is a barrier to justice and can result in home owners paying an increase that is excessive. Home owners have complained of not being permitted to be part of the 25% or having limited input to the discussion and decision-making processes surrounding mediation and, where relevant, the Tribunal. Not every community has a functional residents committee to organise and coordinate a challenge, and it cannot be assumed that home owners who do not know each other, or know which other home owners are on the increase by notice method, are able to act collectively to challenge a site fee increase. The 25% requirement should either be abolished or lowered to 10%.

Additionally, if home owners successfully challenge an increase and it is set aside, or a lower increase becomes payable, that outcome should apply to every home owner in the community on the 'by notice' method.

Recommendation 22

That the Act define precisely what must be included in an explanation for a site fee increase including: the costs relevant to the increase, the amount by which each cost has increased since the last site fee increase, and how that cost has been apportioned for the current increase.

Recommendation 23

The 25% threshold for challenging a site fee increase be abolished or lowered to 10%.

Recommendation 24

Any change in the increase payable should apply to all home owners who received the notice of increase.

Question 22: Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed?

The whole basis for site fee increases needs to be reconsidered and significant changes made.

It must be remembered that land lease communities are considered to be an affordable housing option for retirees. Indeed, in a 2017 submission to Treasury, the LLIA along with the large operators stated that residents are aged and *"typically from a low socio-economic background."* The submission went on to say that

"*Typically, those retirees who are looking to downsize and free up equity, will only be able to free up equity of between $60-120k. They typically cannot afford a retirement village villa or unit in their desired location.*

Releasing equity while retaining pension and rental assistance from government is increasingly attractive and for some, the only viable option. RLLCs are becoming increasing popular as an affordable housing option as they allow retirees the conversion of home equity into a comfortable retirement in a community setting."

Currently operators have the ability to increase site fees almost without restriction unless home owners are able to act collectively to apply for mediation and potentially pursue a legal case. Site fees are becoming unaffordable in many communities and are affecting home sales. The Act should better define the costs an operator is responsible for and those that can lawfully be recovered from home owners. A more balanced approach to the factors that can be included in site fee increases is needed.

This submission considers each factor the Tribunal is currently able to consider in turn.

Factor (a), the frequency and amount of past increases is still a relevant factor that should be retained. It is often considered by the Tribunal when determining increases.

Factor (b), any actual or projected increase in the outgoings and operating expenses for the community since the previous increase needs modification.

Enabling site fee increases to be constructed using projected expenditure is manifestly unfair and structurally problematic. A projected increase is always going to be subject to change yet the Tribunal has to determine a fixed amount to apply to the increase – it is impossible to be accurate with such a figure. Additionally, projected increases may not eventuate, or may be for a lesser amount than projected, yet home owners have had the increase factored into their site fees and it cannot be amended or reversed.

In a land lease community on the NSW Mid North Coast a large projected increase in costs relating to new sewerage infrastructure was relied upon by the operator as justification for a significant site fee increase. A number of years later, the operator has still not commenced work on the sewerage project despite securing an increase partly based on these projected costs. Home owners continue to pay for something that has not, and may never, be provided.

Any reference to *projected increases* must be removed from this factor, leaving only actual expenditure. Additionally, the Act should better define operating expenses by prescribing the items that can be included. They are:

- wages and employment costs (for staff providing direct services to the community)
- utility costs for common areas available for use by residents
- grounds maintenance
- cleaning of common areas

- health and safety compliance costs
- administration
- council rates
- government charges and taxes relevant to the operation of the community
- insurances relevant to the operation of the community

Any increase in the above costs would be an increase in operating expenses and relevant to a site fee increase.

Factor (c), any repairs or improvements to the community carried out since the previous increase, or planned for the period covered by the increase being reviewed has led to disputes and confusion about what costs can actually be included in site fee increases.

Repairs and maintenance costs are fully tax deductable and can be claimed in the year the expense was incurred. Operators can take care of their assets without passing the cost on to home owners.

Improving or adding a facility to a community is a business decision made by the operator. Additions and improvements add value to their overall asset, which will be realised in the future. Costs related to improving the operators' assets is capital expenditure, which the operator must bear.

Capital expenditure is regularly challenged in site fee increase disputes and the Tribunal is consistent in finding that it is not expenditure that can be factored into a site fee increase. In *Wright v Hometown Australia Management PTY LTD* [2020] NSWCATCD the operator claimed costs for upgrades to facilities including new flooring and air conditioning. The Tribunal found *"these are necessary costs, which add value to the respondent's assets, not operating expenses"*.

In *Metheringham v Gateway Redhead Operations* [2019] NSWCAT the Tribunal considered a claim by the operator that capital expenditure is an 'outgoing' or 'operating expense'. The Tribunal was not satisfied that it is. The Tribunal went on to say *"Although it may be true that residents get an indirect benefit from capital expenditure, the operator is able to recover that amount on sale of the park. For all these reasons the Tribunal is not satisfied that capital expenditure has been proven to be an outgoing or operating expense contemplated by s 74"*.

Adding, maintaining and improving capital assets is the responsibility of operators. Capital assets are not owned by home owners, they are provided for their use as part of the community in exchange for the payment of site fees. Capital assets should be maintained, replaced or improved by the operator.

The Act should provide definitions for ***item of capital*** or ***capital asset***, ***capital maintenance*** and ***capital replacement*** and clarify that these items cannot be factored into site fee increases.

Factor (c) is further unjust because it enables operators to incur a one-off expense and recover that same expense from home owners every year thereafter. For example, the operator of a community with 50 sites spends $5000 over the course of a year carrying out minor repairs to the community. In the next site fee increase the operator factors $1.92 per week into the site fee increase for each site ($5000/50/52). After a year the operator has recovered the full cost of the repairs but home owners continue to pay the additional $1.92 per week in perpetuity because it is now part of their site fees. In five years, the operator will have recovered the original $5000 expended and received an additional $20000 from home owners as a result of the $1.92 per week increase.

A fairer and more balanced approach to site fee increases requires the removal of *factor (c)* as a factor in site fee increases.

Factor (d) the general condition of the community including its common areas should be retained. The operator contracts with home owners to provide and maintain community facilities in a reasonable state of cleanliness and repair. If the operator fails in this obligation and allows the facilities to become run down or fall into disrepair the Tribunal must be able to take this into consideration when determining whether a site fee increase is excessive. Likewise, if the facilities are being maintained.

Factor (e) the range and level of site fees within the community is a factor with little or no relevance to a site fee increase. Site fee increases are intended to cover an increase in operating expenses relevant to the community and a comparison with other site fees does not assist this consideration. *Factor (e)* is a legacy from the *Residential Parks Act 1998* when market value was a consideration in site fee increases. As that is no longer a consideration under the Act *factor (e) should be repealed.*

Factor (f) the value of land comprising the community is an irrelevant factor, rarely if ever, considered by the Tribunal and it should be repealed.

Factor (g) the value of improvements to the community (including common areas) paid for or carried out by home owners is a little used factor but it would be crucial in a dispute where a special levy is in place in a community. Further, more and more home owners are undertaking maintenance of common areas because operators are reducing these services. It should be retained for these reasons.

Factor (h) should be retained if there is a requirement in the Act for operators to provide a genuine explanation outlining the reasons for the increase (as outline earlier in these submissions). *Factor (h)* would be the pivotal factor in determining excessive increase matters in these circumstances.

Factor (i) variations in the Consumer Price Index should be retained as it is an important indicator of the cost of living, inflation and deflation. Site fee increases must be considered with reference to an external index and the CPI is the most appropriate index.

Factor (j) whether the increase is fair and equitable in the operation of the community should be retained. This is the only factor that enables the Tribunal to consider the potential effects of the proposed increase on both home owners and the operator.

Factor (k) any other matters prescribed by the regulations should be retained to enable further matters to be prescribed.

Under section 73 (4) of the Act the Tribunal is prohibited from awarding an increase lower than that needed to cover any actual or projected increase in outgoings and operating costs, established to the satisfaction of the Tribunal. The provision should be repealed and the Tribunal given full discretion to decide whether an increase is excessive by reference to the factors prescribed in the Act and the evidence provided in support of those factors.

Some operators have used section 73 (4) to argue for higher increases at the Tribunal than sought in the notice of increase. One operator used this section to try to convince home owners to accept a large increase, stating that if the Tribunal decided the matter, the increase would be much higher because of section 73 (4). The Act should not provide operators with a tool to bully home owners into accepting a site fee increase.

This provision also rewards inefficiency and poor business management at the cost of home owners. Operators have no need to be mindful about outgoings and operating expenses because they can recover those costs through site fee increases. Poor business practices and decisions should not be protected by legislation that has an objective of protecting home owners from unfair business practices.

Recommendation 25

Projected increases in outgoings and operating expenses should not be factors in a site fee increase.

Recommendation 26

The Act should better define operating expenses by prescribing the items that can be included:

- wages and employment costs (for staff providing direct services to the community)
- utility costs for common areas available for use by residents
- grounds maintenance
- cleaning of common areas
- health and safety compliance costs
- administration
- council rates
- government charges and taxes relevant to the operation of the community
- insurances relevant to the operation of the community

Recommendation 27

Repairs and improvements to the community (actual or planned) should not be factors in a site fee increase.

Recommendation 28

The Act should provide definitions for item of capital or capital asset, capital maintenance and capital replacement.

Recommendation 29

The Act should specify that capital expenditure cannot be claimed as a cost for the purpose of a site fee increase

Recommendation 30

The value of land comprising the community should be removed as a factor in site fee increases.

Recommendation 31

The discretion of the Tribunal to determine a site fee increase should not be limited.

Site fees under new agreements

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

The provisions regarding the requirement for site fees in new agreements to be fair market value have been an abysmal failure. The provision has failed for a number of reasons, but principally because operators have taken advantage of the fact that prospective home owners are unaware of the provision and operators have not taken steps to inform them, as there is no requirement for them to do so.

The disclosure statement does not assist prospective home owners. It requires the operator to provide the site fees currently payable for the site in question, and the range of site fees within the community. It does not mention fair market value. Invariably the site fees in the site agreement offered to the purchaser are the highest amount paid in the community but that is often not fair market value.

This provision simply cannot protect prospective home owners from unlawful site fee increases in its current form and that means the Act is also failing in its objective to enable prospective home owners to make an informed decision, and to protect home owners from unfair business practices. The information needed to determine fair market value by reference to similar sites in a similar location is not available to prospective home owners, and even if it was, it is a complex process to work out which sites may actually be similar. The Tribunal has expressed differing views on the characteristics that make sites similar.

The TU has recently advised in a matter involving two home owners who had site fees in their new agreements set at $160 per week, $30 a week above what the selling home owner was paying. All other site fees in the community are $125 and $130 per week, except one where the home was sold by the operator (Part 10 does not apply to homes sold by an operator). The operator has stated $160 is fair market value because the Interpretation Act says a plural includes the singular. If this argument is accepted by the Tribunal it further undermines any potential protections provided by section 109 because every operator could increase fair market value in a community by selling a single home and setting the site fees for that site as high as possible. Site fees in all new site agreements could then be set at that same level.

In our survey of 300 home owners, we asked whether the purchaser of a home should pay the same site fees as the selling home owner or higher site fees. 98.2% of respondents said the purchaser should pay the same as the seller. Some of the reasons given were:

> *Change of ownership does not alter the cost of operation. Otherwise operators leapfrog rentals in a process of jacking up overall site fees without any control. Incoming home owners have no access or knowledge of site fee manipulations at time of entry.*
>
> *Fee influences decision to buy.*
>
> *Owners can increase the rent to a point where the property will become unsellable.*
>
> *All rents should be the same. This may prevent unscrupulous operators charging excessive rents to new owners.*
>
> *Whenever a home in our village is sold, the owner [operator] puts the buyer on the highest rent he can, which does not seem fair to me.*
>
> *There is no reason to allow exploitative increases on transfer of ownership.*

The Act already provides for site fees to be increased by a fixed method or by notice. This enables operators to assess the income, outgoings and operating costs for the community and set site fee increases accordingly. A home changing hands has no impact on these assessments and does not justify another site fee increase.

The Act should provide that site fees in new site agreements are the site fees currently payable by the home owner selling the home.

Recommendation 32

That site fees in new site agreements must be the same as the selling home owner is paying.

Voluntary sharing arrangements

Question 24: Have you entered into an agreement that included a voluntary sharing arrangement?

Question 25: If you have been a party to an agreement with a voluntary sharing arrangement were there any problems with parties understanding or meeting the terms of the arrangement?

Question 26: If you have been a 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?

Since the Act commenced the TU is aware of only one voluntary sharing arrangement being entered into. This is perhaps because prospective home owners have an equal say in whether to enter into such an arrangement and the vast majority, unsurprisingly, have chosen not to. The voluntary sharing arrangement provisions are seriously flawed and provide a benefit only to operators. If they are not removed from the Act, they need significant amendment, so that any arrangement provides a benefit to both the operator and home owner.

During consultation on the Act when voluntary sharing arrangements were raised the main benefit to home owners was lower site fees. The notion was that home owners could pay an entry fee, for example, and in return they would pay lower site fees than they would otherwise have been required to pay. Unfortunately, the Act failed to provide a requirement that site fees must be lower, a method to calculate lower site fees, or any mechanism to ensure the home owner actually benefits from the arrangement.

The TU was recently contacted about a voluntary sharing arrangement where prospective home owners paid a $3000 entry fee in return for a $14 per week reduction in site fees for the duration of their site agreement. Three years after entering into the arrangement the home owners discovered they were paying exactly the same site fees as five of their neighbours despite being on a smaller site. They paid $3000 to the operator and received nothing in return.

These provisions can never provide equal benefit to home owners and operators. Home owners are required to enter into an arrangement in good faith and that leaves them open to exploitation. The provisions should be repealed.

Recommendation 33

Voluntary sharing arrangements should not be permitted in the Act.

Chapter 4 - Living in a land lease community

Quiet enjoyment by a home owner

Question 27: Should there be neighbour to neighbour obligations that are able to be enforced by other home owners?

The purpose of the Act is to regulate the relationship between operators and community residents. It should not stray into neighbour disputes.

The Act already places requirements on home owners regarding their obligations to other home owners and they are appropriate. Further obligations regarding the conduct of residents are often the subject of community rules. It is appropriate these obligations are enforced by the operator of the community, not other home owners.

Repairs to and maintenance of the residential site

Question 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?

If home owners are to be protected from unfair business practices and unscrupulous operators it is essential the Act sets out clear responsibilities for the ongoing maintenance of residential sites.

Historically, residential sites were just that - they did not contain homes. Operators were required to provide a residential site in reasonable condition and fit for habitation. That meant the site had to be 'home ready'. It would have utilities available to connect to, a slab for the home to be placed on, a driveway and parking space. If the site was on a rise, there would be retaining walls to ensure it was stable and would remain level. All of these components make the residential site and they are owned by the operator.

Operators are still required to provide a residential site in reasonable condition and fit for habitation. What has changed is that sites are rarely available without a home already *in situ*. That fact does not change the operators' responsibility for ensuring the site, including all of the infrastructure and hardscape are in reasonable condition and the site is fit for habitation.

Operators should not be permitted to burden home owners with the responsibility of maintaining any part of the residential site, except where the home owner has caused, or permitted, intentional or negligent damage.

There is a clear differentiation between what is owned by a home owner on a residential site, and what is owned by an operator. Home owners own the fixtures - they are not part of the land and can be removed or sold individually or as part of the home. Everything else is part of the land and cannot be removed, or sold by the home owner.

The land, concrete slab, driveway, structural retaining walls and utility infrastructure are all owned by operators and it should be clear they have a maintenance obligation for these, as they have with the facilities and common areas of the community.

The standard form condition report should differentiate between the garden area, which home owners have an obligation to maintain, and the land, hardscape and infrastructure, which the operator is required to maintain.

Section 43 should also be amended to remove any reference to the site. It is proper that section 43 provides an operator with a remedy if a home owner allows their home to become significantly dilapidated, however care of the site is already dealt with appropriately in section 36.

The effect of the failure to provide clarity around site maintenance obligations cannot be understated. In one Central Coast community the operator has pursued individual home owners to replace 30-year-old operator owned structural retaining walls that are essential to the integrity of residential sites. The 'retaining walls' were constructed of timber and arguably never fit for purpose, but that has not deterred the operator from requiring home owners to replace them.

The TU assisted an elderly home owner in this community when the operator issued her with a notice of dilapidation requiring replacement of two retaining walls that were keeping her site level. The cost to the home owner was $6000 and, as a pensioner, she simply could not afford it. The operator pursued the matter at the Tribunal but the application failed on a technicality. The Member said that were it not for the technicality she would have ordered the home owner to replace the walls. The home owner was so distressed by the proceedings she paid for the walls to be replaced rather than face further Tribunal hearings.

We are aware that in this same community numerous other home owners have paid for retaining walls to be replaced at significant cost.

In November 2020 prospective home owners were viewing a home in a community when they noticed a 1-metre-high structural retaining wall within the site was leaning and looked unsafe. They asked the operator who was responsible for repairing the wall and the operator advised they would get back to them. The prospective home owners had sold their home already and although the operator had not responded to their query they proceeded with the purchase. When they did receive a response from the operator it was that they, the home owners were responsible for repairing or replacing the retaining wall. The home owners have been provided with quotes of $10,300 and $12,980 to repair the wall.

Just recently the TU has been contacted by the executor of an estate who is unable to sell the home due to subsidence on the site. When the (deceased) home owner contacted the operator in July 2020 the operator responded with a solicitor's letter that stated 'subsidence is a matter for you to deal with'.

It is unacceptable for the Act to enable operators to pass on to home owners the cost of repairing, maintaining or replacing essential site infrastructure. Amendments are needed to clarify:

- that the operator is responsible for maintaining the residential site
- that hardscaping such as concrete driveways, slabs and structural retaining walls that support the integrity of the site are part of the site, and
- that notices of dilapidation can only be issued regarding the home.

Recommendation 34

That it is clear in the Act that operators are responsible for providing and maintaining the residential site in a reasonable condition and fit for habitation.

Recommendation 35

That the Act define clearly that a residential site includes hardscaping and landscaping including; concrete slab, driveway, structural retaining walls and utility infrastructure (pipes, cables and taps).

Recommendation 36

That the standard form condition report clearly identifies all elements of the residential site and enables comment to be made on their condition at the commencement of the agreement.

Recommendation 37

That section 43(1)(a) is amended to remove any reference to the residential site.

Repairs to and maintenance of the home

Question 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?

The Act is clear that home owners are responsible for maintaining the home in a reasonable state of cleanliness and repair. The provisions regarding alterations, additions and replacement of homes are also clear.

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

The TU does not believe changes are needed to the repair and maintenance provisions.

The provisions regarding alterations are, in our view, unnecessarily restrictive and should be expanded. Home owners ought to be able to install security measures

including alarms, window locks, screens and shutters, door screens and exterior lights to the home without first needing to obtain the operator's consent. Such additions are minor in nature and do not significantly alter the exterior of the home.

In all other circumstances it is appropriate that home owners seek the operator's consent before adding a fixture to the site or making an alteration to the home. It is also appropriate that the operator cannot unreasonably withhold consent and that the Tribunal has jurisdiction to determine a dispute. The main issue that comes up on this point is when operators give verbal consent, which a home owner relies on, only for a dispute to arise later around the lack of *written* consent. The Act should recognise and account for this, not infrequent, scenario.

Many of the problems with alterations and additions lie in the crossover of responsibilities under the Act with those under local government regulations made under the *Local Government Act 1993*. The regulations contain a number of requirements regarding homes and structures, separation distances and setbacks, and notifications to the local council. Many home owners and operators are not aware of, or do not fully understand these obligations. This can lead to non-compliance. We note the 2005 regulation is long-overdue for review. We suggest that this Act should not add any new requirements regarding the regulation until it has been reviewed and updated.

Recommendation 38

The Act should enable home owners to make the following alterations or additions without the need to obtain the operators' written consent:

- installation of a security alarm
- window locks
- window screens and shutters
- door screens, and
- exterior lights.

Upgrades and special levies

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

As far as we are aware the special levy provisions have never been utilised. We reiterate that upgrades and improvements to the community are the responsibility of the operator, not home owners. Improvements and upgrades add value to the operators' assets and fall under capital expenditure. A special levy is basically a way of shifting operator costs to home owners.

In addition to the lack of benefit to home owners, there are a number of issues with the provisions that we believe discourage home owners from instigating a special levy.

- The special resolution requires only 75% of home owners to agree to the levy, leaving 25% of home owners paying for an improvement or upgrade they did not want, and may be unable to afford.
- Each residential site counts as one share meaning that single home owners contribute the same amount as joint home owners, which is disproportionate and unfair.
- Home owners could contribute significant funds to a levy but receive no benefit if they sell their home.
- Having a levy in place could discourage potential purchasers.
- The levy is recoverable as a debt, potentially placing home owners at risk of losing their home to pay for something for which they did not vote.
- The provisions do not contain any requirements for the operator to be accountable to home owners regarding the security of monies collected or the expenditure of the funds.
- There is no timeframe in which the operator must commence work after all payments have been received – reasonable is meaningless.

It is our view that the special levy provisions should not operate in the land lease community context where the benefit to home owners (who potentially pay all of the costs) is minimal but the benefit to the operator is significant.

Recommendation 39

The special levy provisions should be removed from the Act.

Operator conduct and education

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

The rules of conduct for operators at Schedule 1 are comprehensive. The Act requires operators to comply with the rules of conduct but in practice, the rules are of little or no effect. Many home owners have reported breaches of the rules of conduct to the regulator and been disappointed by the outcome. They report that no action was taken and the operator continues to breach the rules of conduct with apparent impunity.

The TU has provided feedback to the regulator regarding the experience of home owners complaining about operators breaching the rules of conduct. The regulator has advised that if an operator denies the alleged conduct and there is no “hard” evidence they cannot act. “Hard” evidence does not include statutory declarations by home owners, a common type of evidence accepted by the Tribunal. It is difficult to understand how conduct such as verbal abuse, threats and intimidation can be evidenced in any other way.

We are aware of situations where the regulator has accepted an operator has breached the rules of conduct and they have provided education to the operator regarding their obligations under the Act. Home owners report this is ineffective in improving the conduct of an operator, who is already required to understand their obligations under the relevant legislation.

Home owners have also informed us that when they complain to the regulator, they are advised to make an application to the Tribunal and provide the regulator with copies of the orders, if they are successful. Home owners see no merit in this process. Once they have orders from the Tribunal, the issue is generally resolved and they have no need to go back to the regulator.

Home owners report a loss of confidence in the regulator and the majority believe making a complaint is a waste of time.

In our survey 64.7% of home owners replied in the affirmative to the question 'Have you ever been concerned about the conduct of the operator or an employee of the operator?' Comments regarding the source of the concern included:

> *(The operator) generally treats home owners with contempt regarding site agreement issues.*
>
> *The manager was a bully who treated us with no respect.*
>
> *Threats to increase rent even more if we did not agree within a week to a rent increase. Interfering with resident business, spreading of malicious rumours.*
>
> *He uses lying & bullying tactics to get his way.*
>
> *Intimidation and threats for asking questions about rental increases.*
>
> *Bullying, misleading, coercive, unconscionable behaviour. Breaches of confidentiality.*
>
> *I thought I would enjoy my retirement not be intimidated by a greedy man.*

31.9% of survey respondents said they had made a complaint to the regulator regarding the operator, or an employee, but only 45.3% of those felt their complaint was treated seriously.

The rules of conduct have failed to contribute to the improved governance of land lease communities and if that is to change, the review must consider a new approach to compliance.

The Commissioner has a function under the Act to investigate suspected contraventions and to take appropriate action to enforce the Act or regulations. The perception is that this function is rarely, if ever, exercised and that must change. Complaints must be thoroughly investigated, and appropriate enforcement action taken.

The regulator must be given the power to issue penalty notices for breaches of the rules of conduct and other provisions related to governance. The penalties must be appropriate to the conduct and be sufficient to deter operators from engaging in conduct that breaches the Act.

Evidence demonstrates the land lease industry is unable to self-regulate and the regulator must be given resources and tools to enable them to regulate if the Government is serious about improving governance.

The alternative to an improved compliance regime is operator licensing, and there is support for this within communities. Many home owners are of the view that it is the only way to improve governance. We believe licensing of operators should be given serious consideration.

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

As submitted above, the main problem with the rules is compliance and enforcement however, we suggest two additions to the rules.

- Employees who handle site agreements and resident queries and complaints should be required to have a knowledge and understanding of the relevant legislation.
- Operators should be required to engage in genuine communication with a resident or member of the residents committee.

It is a common complaint of home owners that operators often fail to engage with them, respond to their correspondence and generally communicate with them. This lack of transparency and failure to communicate undoubtedly leads to an increase in discontent in land lease communities and also in Tribunal applications. The Act, though the rules of conduct (or section 37), should require an operator to provide a complete response to correspondence within 14 days.

Another issue commonly reported to the TU is retaliation by operators when a home owner has asserted their rights in some way. Section 56 is too limited in defining when conduct can be considered retaliatory. Section 56 (1) should be expanded to include circumstances where a home owner has taken or proposed to take any action to enforce a right of the home owner under the site agreement, this Act or any other law.

Section 56 should also be broadened to permit the Tribunal to consider retaliatory conduct in circumstances where the operator lodges an application and the home owner wishes to contest the application itself as constituting retaliatory conduct. In such a scenario, it would be appropriate for the Tribunal to deal with the operator's application and the allegation of retaliatory conduct at the same time without the need for two separate applications.

Recommendation 40

That complaints made to the regulator are thoroughly and properly investigated and appropriate enforcement action taken where necessary.

Recommendation 41

A more transparent complaints process is developed, and complainants are kept informed and advised of the outcome of their complaint.

Recommendation 42

That the provisions for which Penalty Infringement Notices are able to be issued should be expanded and the penalty must be appropriate to the breach or conduct.

Recommendation 43

That consideration be given to a licensing regime for land lease community operators.

Recommendation 44

That the rules of conduct for operators are expanded to include:

- a requirement for front line office staff to have a knowledge and understanding of the relevant legislation, and
- a requirement on operators to engage in genuine communication with residents and members of the residents committee

Recommendation 45

Expand section 56 (1) to include circumstances where a home owner has taken or proposed to take any action to enforce a right of the home owner under the site agreement, this Act or any other law.

Recommendation 46

Broaden section 56 to permit the Tribunal to consider retaliatory conduct in circumstances where the operator lodges an application and the home owner wishes to contest the application as constituting retaliatory conduct.

Question 34: Are the operator education requirements effective?

The way in which a community is operated has a major impact on the residents yet there is no requirement for operators or their employees to hold any type of qualification or achieve a certain level of knowledge regarding the applicable legislation.

The education requirement applies only to new operators and this is not satisfactory. It should not be assumed that because an operator has been in the industry for some time that they have the requisite understanding of the law, or the skills to properly

operate a community. Only 40.8% of survey respondents rated their operator as being quite knowledgeable (27.1%) or very knowledgeable (13.7%) about the law.

At present, the requirement under section 55 can be satisfied by attending an information session provided by NSW Fair Trading on land lease communities, or by reading through the information on the NSW Fair Trading website. This is not considered sufficient. Currently an 'honesty' system exists where operators simply sign a declaration stating they have read through the website without any examination or testing of what the operator has learned. Education should be comprehensive, tested and capable of being properly monitored.

An operator reading and reviewing the information on the Fair Trading website is not the same as determining whether an operator actually understands the information and is able to apply the law to situations which might arise in the community. It is not appropriate that whether an operator understands the law is essentially tested on residents rather than by the regulator.

The current requirement also fails to account for the complex structures of many land lease community operators. The Act defines operator as "*the person who manages, controls or otherwise operates the community, including by granting rights of occupancy under site agreements or tenancy agreements, whether or not the person is an owner of the community*".

Gateway Lifestyle, Ingenia Communities, Hometown Australia and Hampshire Property Group currently own and operate over 50 communities between them in NSW. Some of these companies are structured in a way that makes it difficult to determine the actual operator. Even where that is clear, it nonetheless remains unclear who within the company should undertake mandatory education. Employees in senior roles make decisions about communities and attend Tribunal proceedings. Other employees manage day to day operations including dealing with resident queries, selling homes, providing disclosure statements, and signing people up to site agreements. We suggest education requirements should apply to employees who make operational decisions and those who undertake day to day operations.

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

Essentially what the land lease industry needs is professionalisation. This could be achieved through operators being required to achieve a more comprehensive knowledge and understanding of the relevant legislation, expansion of the rules of conduct to front-line employees, and enforcement of the rules of conduct.

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

Probably the most cost effective and efficient way to deliver education is online. Online education has extensive reach, it can be delivered flexibly.

Other advantages include the ability to check participants through a registration process, provide documentation to participants, and to use tools to encourage engagement and test knowledge.

Recommendation 47

The requirement for mandatory education should be expanded to all operators and front-line employees.

Recommendation 48

A new online education package that enables participation to be monitored and knowledge to be tested should be developed and rolled-out as a matter of urgency.

Community rules

Question 37: Before reading this discussion paper, were you aware of the option of communities having community rules?

Question 38: Does your community have community rules?

We are not aware of a community that does *not* have community rules.

Question 39: Does your community have a community rule regarding age restrictions? If so, does this impact your community?

We estimate that since commencement of the Act, a majority of communities have introduced a community rule that imposes age restrictions for occupants. Land lease communities are largely marketed at, and appeal to retirees and pensioners. While we recognise many older people may prefer to live with other older people, and that some may for that reason support age restriction rules, our view is that age restriction rules are both discriminatory and unnecessary.

In our survey 69.5% of respondents live in a community with an age restriction rule and 69.7% of respondents support age restriction rules in land lease communities.

The TU is not against land lease communities being marketed at older people however, we do not support age restriction rules. Age does not determine how a person behaves or make someone automatically suitable or unsuitable to land lease living.

Our main issue is that an age restriction rule is simply unjust. Land lease communities can be mixed use – both holiday and residential - and in those situations age restriction rules are nonsensical and deeply unfair. Home owners are prevented from

allowing anyone under a certain age from occupying their site, but they are surrounded by families with young children on holiday. A home owner is unable to offer accommodation to a younger family member in need, but that same family member could stay on a holiday site in the same community, in some cases right next door.

Operators also seem unaware that community rules apply to long-term casual occupants by virtue of section 7 (2) *Holiday Parks (Long-term casual occupation) Act 2002*. It provides *"Part 8 of the Residential (Land Lease) Communities Act 2013 applies to sites occupied under occupation agreements to which this Act applies and the occupants of those sites."* This means that long-term causal occupants must meet any age restriction rule in place in the community.

Age restriction rules are also problematic because there are rights of residence provided for in the Act that are in conflict with an age restriction rule. Section 44 provides an automatic right of occupation for a home owner's spouse, de facto partner and carer. An age restriction rule cannot and should not override this right.

The definition of a home owner rightly includes a person who obtains an interest in a site agreement as the personal representative, or a beneficiary of the estate, of a deceased individual who was a home owner with a site agreement immediately before the individual's death, or another successor in title. As a home owner a beneficiary is entitled to live in the home if they choose regardless of their age.

Age restriction rules were almost unheard of before the commencement of the current Act because when a park owner tried to introduce one a number of years ago the Anti-Discrimination Board found that it was discriminatory. The introduction of section 44 (6) of the Act, which refers to age restrictions for occupancy in community rules, led to the current situation. It is now argued that the Act contemplates age restriction rules and they must therefore be permitted.

The current position on age restriction community rules is unworkable and the Act should prohibit age restriction community rules.

In the alternative age restriction community rules should be permitted only in communities where all sites are occupied by home owners and the Act should provide clear exemptions for beneficiaries, a home owner's spouse, de facto partner and carer.

Further, if age restriction rules are to be permitted by the Act then clarity regarding compliance is also required. One survey respondent complained that he lives in an over 50s community but the operator rents out homes to people in their 30s.

Recommendation 49

That the Act prohibit any community rule regarding age restrictions.

Recommendation 50

If age restriction community rules are permitted that they are only permitted in communities that are wholly residential.

Recommendation 51

If age restriction community rules are permitted the Act must clarify the application and exemptions of age restriction rules, including that beneficiaries, a home owner's spouse, de facto partner and carer are exempt.

Question 40: Where residents' committees are in place, should they be involved in the development of community rules?

Any provision requiring resident involvement in the development of community rules is sensible and likely to be welcomed by residents. The current requirement for consultation with the residents committee has not generally resulted in a collaborative approach. Our only concern is that there are a small number of dysfunctional residents committees and it would be unwise to place any power into the hands of those committees without safeguards to ensure the involvement of other residents of the community.

Question 41: If there is no residents' committee in place, how could residents contribute to the development of community rules?

Community rules are introduced or amended at the behest of the operator. Given the impact community rules can have on the lives of residents the Act should enable residents to contribute to their development. We suggest a requirement that 75% of all residents must agree to any new or proposed amendment to a community rule would facilitate resident involvement. The Act already has a similar requirement for the introduction of a special levy and consequently such a concept is not new.

Additionally, the residents of a community should be able to propose amendments to community rules, including having rules set aside. A process similar to that available in section 51 of the *Retirement Villages Act 1999* would be appropriate in land lease communities whereby the operator is required to amend a rule if requested to do so by a percentage of residents.

If an operator fails to set aside a community rule as requested by the requisite percentage of residents the Tribunal should have the power to settle the dispute.

Question 42: Is the system of enforcement of community rules appropriate?

The TU receives complaints that rules are not enforced fairly and consistently. We are told some operators issue breach notices to home owners when the parties have been in dispute about other issues. This is more about operator conduct than a reflection of the system, which is appropriate if used correctly.

Compliance requirements have been the source of many disagreements and disputes, particularly in mixed communities, and where an operator rents out premises to tenants. Operators largely take the view that only residents, their guests and occupants are required to comply with community rules and that they do not apply to anyone else in the community.

It is inequitable to have community rules apply to only some people within a community and not others. The Act must provide fair compliance requirements for community rules and the requirements must be precise and clear.

Question 43: Are community rules being used to improve life in residential communities?

The short answer is no, they are used by operators to control and limit the freedoms of residents. Since the subject matter for community rules was removed from the Act, the scope of rules has widened to the point where operators make rules about issues that really are personal choices for home owners. For example:

> *External window coverings, canvas blinds and/or shade sales must meet the Operator's colour criteria.*
>
> *A maximum of three in total of the following items shall be permissible in the home owner's house or site, visible from the road (including their front yard, patio/s & garden): garden gnomes, statues, water features, bird baths, wall art pieces or any other decorative items.*

If the intention of community rules is to improve life in land lease communities the Act should limit what rules can be made about. The broad statement about use, enjoyment, control and management can be retained but the Act should provide that rules can only be made about:

- the use and operation of the communal facilities; and
- the making and abatement of noise; and
- the carrying on of sporting and other recreational activities; and
- the speed limits for motor vehicles; and
- the parking of motor vehicles; and
- the disposal of refuse; and
- the keeping of pets; and
- other things prescribed under the regulation.

Recommendation 52

75% of residents must agree to a proposed new rule or an amendment to a community rule.

Recommendation 53

An operator must amend or set aside a community rule if requested to do so by 25% of home owners.

Recommendation 54

That the Act provide concise and clear compliance requirements for community rules that are fair and reasonable.

Recommendation 55

That subject matter for community rules is specified in the Act.

Residents committees

Question 44: Should residents committees also be required to take part in mandatory education? If yes, what topics should be covered?

Providing education to residents committee members is a good idea and it may encourage otherwise reluctant residents to participate. The most common questions the TU gets from residents committees are about constitutions and rules for the committee. Education around these topics is likely to be beneficial.

In their liaison role it would also be beneficial for residents committees to have some knowledge of the legislation, particularly those areas that affect the whole community such as community rules, maintenance of common areas, access and security.

Question 45: If your community has a residents committee, is it working effectively?

In our estimation the majority of residents committees do their best to assist and represent residents of the community. We have received only a few complaints about committees who act only in their own interests or the interests of the operator.

Question 46: Do you have any suggestions for changes to the way residents committees are established or run?

We suggest that occupants of the community should be eligible to be members of residents committees. For example, if a person moves in with a home owner either as their spouse they are not considered a resident and are therefore ineligible to be a member of the residents committee under the Act. If residents of the community are happy to elect an occupant to the committee, the operator should not be able to refuse to deal with that person just because they are not a resident according to the definition in the Act. This exact situation has arisen in a community on the Central Coast.

It may also be appropriate to provide an alternative way in which a committee can be established or elected. This year residents committees were unsure how to re-elect members when they weren't permitted to hold meetings due to the pandemic.

The other questions that come to the TU are around how to remove a residents committee that is not representing the interests of residents. It may be that a committees' constitution or rules set out the process, but some committees operate

outside any formal processes, which makes their removal appear impossible. Perhaps the Act should provide that an office holder, committee member, or whole committee can be removed by a resolution signed by a majority of residents of the community.

Recommendation 56

The Act should include 'occupant' in the definition of 'resident' or provide specifically for occupants to be members of a residents committee if voted for by residents of the community.

Recommendation 57

The Act should enable an office holder, committee member or residents committee to be removed by a majority of residents of the community.

Chapter 5 - Utilities

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

The utility charging provisions under the Act are generally fair. It is appropriate that services must be separately metered and that there are limits on what can be charged. Operators are not utility retailers and should not be able to make significant profit from on-selling utilities to residents who are a captive market.

We are aware of discontent regarding sewerage charges, largely because many do not understand whether they can be charged and how the charges are calculated. The provision is complex and consideration should be given to abandoning the charge, or converting it to a flat fee.

The method for calculating water and sewerage usage charges is appropriate, as is the maximum charge of $50 per calendar year.

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

There is a large variation in the information provided on utility accounts. The (repealed) *Residential Parks Act* required the provision of certain information and this Act should do the same. As a minimum, accounts should provide:

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

The TU has also received complaints about accounts not always being issued regularly. This impacts home owners who are presented with a large bill covering more than one normal period with only 21 days to pay. The Act should require operators to bill residents for utilities at least every 3 months, and contain a provision similar to section 39 of the *Residential Tenancies Act 2010* whereby an operator is prohibited from recovering utility charges that were not requested within three months of the operator being billed by their utility service provider.

The majority of home owners seeking access to bills and other documents relevant to their utility charges have to seek orders from the Tribunal before access is granted. The Act should provide greater specificity regarding what documents residents are entitled to, and what is meant by access.

The Act should also provide greater clarity around the format and provision of utility receipts and require a functional equivalent to that provided by a market retailer. Receipts must provide sufficient detail to enable eligible residents to access rebates and Energy Accounts Payment Assistance (EAPA).

Recommendation 58

As a minimum, utility accounts should include:

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

Recommendation 59

That the Act require operators to bill home owners at least every three months and prohibit operators from recovering charges that were not requested within three months of the operator being billed by their utility service provider.

Recommendation 60

The Act should require receipts to be in a format that enables residents to access rebates and EAPA.

Electricity charging in communities with embedded electricity networks

Question 49: What are your views on the operation of section 77(3) as it applies to an embedded electricity network in a community?

Prior to commencement of the Act operators were able to charge standing offer rates charged by local area retailer, with a discounted supply charge for lower levels of supply. This led to residents being charged the highest possible price for electricity and enabled operators to make significant profit.

Section 77 (3) of the Act brought in a fairer charging regime, in recognition of the fact that operators are not energy retailers and home owners are unable to negotiate better pricing by going on-market. The commitment to a fair charging system should not be lost through the review process.

The TU notes that Part 7 of the Act does not apply to tenants in land lease communities and they are therefore without the legislative protection regarding electricity charges that applies to home owners. The *Residential Tenancies Act 2010* assumes that tenants purchase electricity on-market. Tenants in an embedded network

in a land lease community cannot go on-market but cannot rely on price protections within the Act. The Act should provide that the method of charging home owners for electricity also applies to tenants.

Recommendation 61

The Act should provide that the method of charging home owners for electricity also applies to tenants.

Question 50: Which reform option for electricity charging do you support and why?

The TU fully supports electricity charging provisions within the Act applying to third-party retailers, as well as community operators. Home owners who are not able to go on-market for electricity must be provided with a higher level of protection than energy customers who are able to shop around for the best deal.

Option 1: In our view, whilst the 'Reckless' method resulted in significant savings for home owners, it is unnecessarily complex and provides only cost recovery for operators. This has led to a number of operators opting out of on-selling electricity, which has increased costs to affected home owners.

We remain concerned that 'Reckless' does not enable home owners who are supplied with a lower level of amps to be charged less than home owners supplied with more amps. There are communities where some home owners receive less than 30 amps but others receive 60 amps. It is inequitable for these home owners to pay the same rate for electricity.

We are also aware of communities with two parent meters where home owners receiving the same level of supply and service are paying different rates for electricity determined only by which parent meter they are connected to.

For these reasons we do not support *option 1.*

Option 2 is similar to Reckless in that it is a pass-through method with the addition of administration and network maintenance costs. We have two concerns about this option.

Firstly, enabling network maintenance costs to be recouped would, we believe, be in conflict with the Australian Energy Regulator (AER) policy on internal network charges and the National Energy Rules (NER). Currently exempt network operators are prohibited from charging for internal network services except where the parties have entered into an agreement on mutually agreed terms and both parties are large customers or large corporate entities.

In the Australian Energy Market Commission (AEMC) Final Report 'Updating the Regulatory Frameworks for Embedded Networks' the Commission concluded that *"consumer protections should be driven by the needs of consumers, rather than the business model of the supplier".* In the proposed regulatory framework for embedded

networks the Commission said *"ENSPs will not be permitted to charge residential customers for any infrastructure costs associated with their internal embedded networks".*

Secondly, given the age and condition of some embedded networks there is potential for maintenance costs to be significant and we do not believe home owners should bear the burden of these costs. An embedded network is community infrastructure, which the operator is responsible for maintaining as part of their general responsibility to maintain the community. Further, it must be acknowledged that prior to 'Reckless' operators made significant profit on electricity over a number of years yet, on the whole, that profit was not used to improve electricity infrastructure.

In *Tootill & Ors v Parklea Operations Pty Ltd* [2019] NSWCAT the operator contended a defence of change of position when home owners sought refunds because the operator had overcharged for electricity. The operator submitted that it had relied on the revenue received from electricity charges to undertake improvements, repairs and maintenance costing a total of $133,942.12. Despite home owners in this community complaining of brown outs and outages caused by poor levels of supply, none of the $133,942.12 was spent on improving the embedded network.

Home owners should not be asked to pay network maintenance or improvement costs because operators have ignored their obligation to maintain infrastructure, and provide a reasonable standard of supply.

If *option 2* was a pass-through method that enabled supply and usage charges to be separated, and supply charges to be apportioned according the level of supply we could support the inclusion of a fixed administration charge.

Option 3 is a return to the charging regime that was in place prior to 'Reckless'. This would be tantamount to ripping the rug out from under home owners who fought long and hard for fairer electricity charges.

We could support this option if home owners had the freedom to go on-market and choose their energy retailer. They do not have that freedom because on the whole, operators have failed to upgrade embedded networks and metering. The Act should not reward operators for their failures by enabling them to charge the top rate for electricity to customers who are trapped in an embedded network, often receiving an inferior level of supply and service.

The TU does not generally support pass-through methods of charging because where there are differing levels of supply, or more than one parent meter the result is inequitable charges. However, if we had to choose one of the three options it would *option 2* as described above – separate supply and usage charges; supply charges apportioned according the number of amps supplied; plus a fixed administration charge.

Question 51: Are there other reform options which you think should be considered?

The TU supports the separation of usage and supply charges and the discounting of supply charges where sites are supplied with less than 60 amps. The charges payable by home owners must be transparent and fair and a flat rate kWh charge does not support this principle.

The Act could provide that the maximum charges for use and supply can be no more than the best market offer for a single rate tariff without discounts for the relevant area available through the energy made easy website. Supply charges should be discounted according to the level of supply and the fair market offer reviewed every year on 1 July. In addition, operators and third-party providers could be permitted to charge a flat rate administration fee, prescribed in the regulations.

Given the changing nature of the energy market and the difficulty in assessing the impact of any particular method on home owners and operators the TU suggests the key elements or principles of the method be incorporated into the Act and the specifics set out in the regulations. This would enable impacts to be monitored and amendments to be made more easily.

Recommendation 62

Electricity use and supply charges should be separate.

Recommendation 63

The maximum charges for use and supply can be no more than the best market offer for a single rate tariff without discounts for the relevant area available through the energy made easy website. Supply charges should be discounted according to the level of amps supplied and the fair market offer reviewed every year on 1 July. In addition, operators and third-party providers could be permitted to charge a flat rate administration fee, prescribed in the regulations.

Question 52: What is your view on the impacts these options would have on electricity bills in your community?

We are unable to assess the impact of the above options.

Question 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?

The TU is aware of three other methods that were determined by the Tribunal or by agreement prior to 'Reckless' being determined.

In *Myles v Holiday Retreats Australia Pty Ltd t/as Rivergum Holiday Park (No. 2)* [2018] NSWCAT (unpublished) the Tribunal determined the operator could charge the peak

rate (billed to the operator) for electricity use and continue to charge the service availability charge (SAC) for supply.

In *Marsh v The Pines Resort Management Pty Ltd* [2018] NSWCAT (unpublished) the Tribunal determined the usage charge should be the average of the three energy use rates charged to the operator and the SAC would remain a separate charge.

The TU believes there is merit in both these methods because they enable the operator to make a small profit on usage charges; they are simple to calculate and understand; home owners who receive less than 60 amps pay a discounted SAC; and, operators can rely on a stable, calculable income from the SAC.

In the third method usage is calculated by taking the total amount charged to the operator (excluding network charges) and dividing that by the number of kilowatts consumed in the community. This provides the kWh usage charge for home owners. The supply charge is the total amount charged to the operator as network charges divided by the number of sites in the community. This method shares some similarities with Reckless in that it produces a variable usage rate and does not account for varying levels of supply within a community. It does, however, provide a level of profit for the operator because they do not contribute to network costs – that cost is fully covered by home owners.

Question 54: As an operator, what costs do you incur due to maintaining an embedded network and to what extent do you recover these?

No comment.

Question 55: Are the current discounts in the Regulation appropriate?

The discounts in the Regulation have been in place for a number of years and we believe they are generally appropriate. It is fitting that home owners who receive lower amperage pay a lower supply or availability charge.

The TU is concerned that in some communities there are still residential sites that are supplied with less than 20 amps and this raises questions of safety and habitability. We believe that where the supply to the site is less than 20 amps no supply charge should be payable.

Question 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?

Operators should be encouraged to upgrade electricity infrastructure, including metering. Limiting and discounting supply charges has the potential to act as an incentive for operators to upgrade infrastructure and improve the level of supply.

Recommendation 64

Supply charges should continue to be discounted where the supply to the site is less than 60 amps.

Recommendation 65

Where the supply is less than 20 amps there should be no supply charge payable.

Sustainability infrastructure

Question 57: What difficulties are operators facing in managing solar systems in communities?

No comment.

Question 58: Are there other forms of sustainability infrastructure that are becoming common in communities?

We are not aware of other sustainability infrastructure in communities.

Question 59: What are the greatest barriers to home owners installing solar panels?

In some communities, operators refuse to allow connection to the embedded network, and where connection is permitted, they often retain the right to disconnect. This is possibly because the infrastructure cannot support solar connections.

If home owners produce more electricity than they use and feed that into the network they generally do not receive a feed-in tariff. This could disincentivise home owners from investing in solar.

Additionally, operators can refuse to allow a home owner to install solar panels under the Act and whilst that refusal cannot be unreasonable, home owners often do not want to take the dispute to the Tribunal. If the Act is to encourage solar panel installation in communities, the right to install should be automatic unless the operator can demonstrate a detriment to the embedded network.

Question 60: How can sustainability infrastructure be made more available in land lease communities?

Land lease communities have the potential to develop community energy projects like solar gardens that could benefit the whole community including the operator. Such projects are beyond the scope of this review but the TU would like to see the government work with communities and consider providing grants to enable sustainability infrastructure projects to be developed within suitable communities.

Chapter 6 - The end of the agreement

Interference in a sale

Question 61: Are the Act's provisions about the sale of a home and interference with a sale working well?

The TU receives fewer complaints about interference with a sale than we did under the previous Act. This indicates the provisions are, on the whole, working well.

The biggest area of complaint is about the terms in new site agreements offered to prospective home owners. Site fees in new agreements are invariably much higher than the selling home owner is paying. Fixed method increases are more common and in the range of 3.5% to 5% per annum for at least five years. We are also aware the number of unfavourable additional terms added to new site agreements can be extensive. As discussed above the terms of new site agreements are generally not negotiable, despite what the Act says. All of these factors contribute to the loss of home sales, and all should be addressed through the review (see further discussion in the section below relating to assignment).

The Act should also provide that failing or refusing to provide a disclosure statement to a prospective purchaser or their agent when requested constitutes interference with the right to sell.

Question 62: Is the Act's control over operators who act as selling agents appropriate?

The controls in the Act appear to be appropriate. The TU has not received any complaints regarding operators acting as selling agents.

Question 63: Should operators continue to be able to act as selling agents?

The TU does not have any objections to operators acting as selling agents, provided they comply with the Act when carrying out this service.

Question 64: Do you have any other suggested changes to the provisions about the sale of homes?

In addition to the current factors specified as interference we would add that interference includes the operator inserting any terms or conditions into a site agreement offered to a prospective home owner requiring them to take action to comply with any requirement made by or under the *Local Government Act 1993* unless the matter has been the subject of previous action. The TU is aware of a number of sales falling through because of such terms. The operator cannot take action against the home owner (when they have not previously acted) so they attempt to make it a pre-condition of a new site agreement.

Recommendation 66

The Act should include the following as additional specific instances of interference with the right to sell:

- failure to provide a disclosure statement when requested
- inserting terms or conditions into a site agreement offered to a prospective purchaser requiring them to take action to comply with any requirement made by or under the *Local Government Act 1993* unless the matter has been the subject of previous action

Assignment (transfer) of site agreement and tenancy agreements

Question 65: Should the Act be amended to also prevent an operator unreasonably refusing consent to assignment of a site agreement?

Section 45 (3) is the result of a drafting error that must be fixed during the review. The TU strongly disagrees that the assignment of site agreements did not work well under the 1998 Act. Assignment worked very well and that is why the industry fought to have it removed. Assignment is key to better consumer protection for home owners and prospective home owners when a home is exchanging hands. It is the only tool that can provide any protection against unlawful site fee increases, unfair fixed method increase terms, and unfair additional terms in new site agreements.

The Act has failed to provide alternative protections to those available through the assignment of a site agreement and, although better protections could be included, operators will find a way to circumvent those protections unless assignment rights are reinstated.

The fact that some home owners may lose or damage their copy of their site agreement does not justify the removal of such an important right from the Act. Operators hold copies of all site agreements and could easily provide a copy to a purchaser where necessary. Operators should be required to provide a disclosure statement and copy of the current community rules to any prospective home owner when an agreement is being assigned. These simple and reasonable requirements will ensure the incoming home owner has all the requisite information.

The loss of assignment rights has had a significant impact on home sales. Home owners report sales falling through or homes taking a long time to sell because of terms in new site agreements, in particular high site fees and fixed method site fee increases. Some home owners who have lost sales have sold their homes to the operator at significantly reduced prices because they felt they had no other option. By failing to provide the right to assign a site agreement the Act is enabling operators to take advantage of vulnerable elderly people who are desperate to sell their home.

In 2018 the TU assisted a home owner who had secured a purchaser for her home. He was referred to the operator who presented him with a disclosure statement declaring: the current site fees for the site he was interested in were $191.30 per week; the range of site fees in the community was $191.30-$198 per week; and his site fees would be $198 per week.

The proposed site agreement contained a fixed method increase - any positive increase in the CPI; plus 5%; plus any changes to GST rulings, increases in GST or other government taxes; rounded to the nearest dollar.

The purchaser advised the vendor home owner that he could not accept those terms. The home owner wrote to the operator and sought consent to assign her site agreement to the purchaser to facilitate the sale. In the alternative, the home owner asked the operator to improve the site fee and fixed method increase terms in the proposed agreement. The operator refused both requests, which resulted in purchaser advising the home owner he would not be going ahead with the purchase.

We have recently assisted a home owner who was paying site fees of $165 a week – the highest in the community. When the purchaser was provided with a disclosure statement, it stated site fees would be $190 per week. The operator refused an assignment request and the purchaser has advised he will not proceed unless site fees in the proposed agreement are reduced.

The failure to provide assignment rights for home owners puts NSW at odds with a majority of other States. For example, Queensland, South Australia and Victoria all allow a home owner to assign their agreements with the consent of the operator, which cannot be unreasonably withheld.

In Queensland if the operator refuses consent to an assignment request they must provide written reasons for the refusal.

South Australia provides a simple and clear process for assignment (via section 48 of the *Residential Parks Act 2007*). In that Act, the operator is taken to have consented to assignment if the home owner requests the operator's consent in writing and the operator fails to respond with refusal or consent within seven days. The automatic nature of this assignment provision is attractive and the short time frame would be beneficial in the context of what can often be time-sensitive sales of homes.

Assignment does not prevent operators from entering into new site agreements with prospective home owners. It does, however, provide better protection from interference in sales, and give prospective home owners bargaining power and choice. This amendment is essential to the rebalancing of power in the Act.

NSW should reinstate assignment rights, and introduce a process similar to that available in Qld or SA so that home sales in our state can proceed in a smooth and timely manner. A standard deed of assignment should be included in the regulations.

We note that if the right to assign a site agreement is reintroduced, section 116 (f) will need amending to ensure the site agreement does not terminate by default.

Question 66: Are the provisions relating to the assignment of tenancy agreements working in practice?

The Act does not provide a right to assign a tenancy agreement, only a right to assign a site agreement. The drafting error in section 45 (3) implies a right that does not exist. The TU is not aware of a single assignment of a tenancy agreement in a land lease community. Tenancy agreements fall under the jurisdiction of the *Residential Tenancies Act 2010*, which deals with the transfer of tenancy agreements. Any reference to the assignment or transfer of a tenancy agreement should be removed from the RLLC Act.

Recommendation 67

The Act should provide that a home owner has the right to assign their site agreement and the operator cannot unreasonably withhold or refuse consent.

Recommendation 68

Assignment should be automatic if an operator fails to respond to a request within seven days.

Recommendation 69

A standard form Deed of Assignment should be included in the regulations.

Recommendation 70

Any reference to the assignment of a tenancy agreement should be removed from section 45.

Sub-leasing by home owners

Question 67: Are the provisions about sub-leasing a home working well?

Sub-leasing a home in a land lease community is a rare event, usually only undertaken as a necessity. The operator must not unreasonably withhold or refuse consent but only where the proposed sub-lease is for a term of 12 months or less, and only once during any three-year period. These restrictions are unreasonable and unnecessary.

Home owners invest significantly to live in a land lease community through the purchase of their home and site fees. If they need to sub-let their home for a period, they should be able to do so without unreasonable restrictions, and without the need to apply to the Tribunal. If the restrictions are not removed, the Act should be amended to provide an operator cannot unreasonably withhold or refuse consent for a sub-lease of up to three years.

Recommendation 71

The restriction on sub-leasing only once within any three-year period should be removed or, the Act should provide that an operator cannot unreasonably withhold or refuse consent for a sub-lease of up to three years.

Terminating a site agreement

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

The Act generally provides appropriate grounds for the termination of site agreements by operators. The only provisions that are of concern to the TU are termination for lack of authority for use of a residential site and termination for non-use of a residential site.

Section 127 (unlawful use) enables operators to terminate a site agreement if the site is designated as a short-term site in the approval to operate. This is inappropriate and is in effect a back-door to no-grounds termination. Termination should not be available solely on the basis a site is designated as short-term because a sites designation is not fixed – it can be changed by the operator making a request to the local council. There is no requirement for the home owner to be consulted or notified about the change, yet they are the only person affected.

When entering into a site agreement, an operator agrees to take all reasonable steps to ensure that, at that time, there is no legal reason why the residential site cannot be used as a residence. They are providing a warranty regarding the use of the site.

An operator should not be able to terminate a site agreement on the basis a site is not lawfully useable as a residence if they have knowingly taken, or failed to take any action, that has rendered the site unlawful either before or after they entered into the site agreement.

The ability to terminate a site agreement for non-use of the site (section 128) serves no genuine purpose and should not be available. When this provision is considered in conjunction with the limitations on sub-leasing it is not a stretch to see a situation where a site agreement may be terminated for little or no tangible reason. If a home owner is away from their home but is paying site fees and ensuring the site and home are maintained it is difficult to see why this should be a ground for termination.

Termination of a residential site agreement is a very serious matter given the significant investment home owners make to live in a community. The TU believes section 130 should specifically require the Tribunal to ensure the grounds for termination have been established, and to consider the circumstances of the case prior to making an order for termination. These simple measures will ensure a clear and balanced process in all termination matters.

Recommendation 72

That a site agreement cannot be terminated solely on the basis a site is designated short-term in a community's approval to operate.

Recommendation 73

That a site agreement cannot be terminated on the basis the site is not lawfully useable for residential purposes if an operator has knowingly taken, or failed to take any action that has rendered the site unlawful either before or after they entered into the site agreement.

Recommendation 74

That a site agreement cannot be terminated on the basis of non-use of the residential site.

Recommendation 75

That the Tribunal is required to ensure the grounds for termination have been established and consider the circumstances of the case in all termination matters.

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

The TU is supportive of the current notice periods for termination other than section 126, compulsory acquisition. 90 days is insufficient time for home owners in this situation. We suggest 120 days is a more appropriate notice period.

It is possible 90 days was identified as an appropriate amount of time because under section 13 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), 90 days is the relevant acquisition notice period under that Act before the land is acquired. That being said, section 34 (2) generally entitles a person to remain in occupation of the land for 3 months after the land is actually acquired.

Similarly, for Commonwealth acquisitions under the *Land Acquisition Act 1989* (Cth), occupants can generally stay for 6 months after the land is acquired, in accordance with section 47(1)(b).

Recommendation 76

The notice period under section 126 should be 120 days.

Question 70: Are the compensation provisions working well?

We are only aware of one situation where the compensation provisions were utilised. We believe in this instance they were effective in ensuring home owners were adequately compensated for the loss of their homes.

There are two other situations that came to our attention where home owners ought to have received compensation but they were unable to pursue the matter at the Tribunal because the operator in each case had failed to issue a valid termination notice to the home owner. In one situation the community had been closed. In the other, the site was going to be used as a short-term site due to serious flooding issues. Both situations highlight a failure in the Act to properly protect home owners who lose their homes if the operator does not do the right thing. The right to compensation should not be dependent upon a valid termination notice being issued where the right would otherwise exist.

There also appears to be an oversight in section 127 (termination for lack of authority for use of residential site). If this section is not amended through the review, and termination remains available on the basis a site is short-term, then compensation must be payable to all home owners who have their site agreement terminated under this section.

As outlined earlier in this submission, an operator can redesignate a site from long-term to short-term by making a request to the local council and without the knowledge of the home owner. This happens more than it should and currently a home owner whose site is redesignated in this way is not entitled to compensation under section 127 if the site agreement is terminated.

It is not equitable that a home owner whose site is unusable from the beginning of the site agreement is entitled to compensation, but a home owner whose site becomes unlawfully unusable during the course of the site agreement, through no fault of their own, is denied that same compensation.

We also note the difference between the compensation payable under section 135 (2), 'all reasonable costs of relocating' versus 'the costs of relocating the home' under section 136 (3). It is unclear why these are different and there should be an amendment to bring these into line with each other.

Recommendation 77

The right to compensation should not be dependent upon a valid termination notice being issued where the right would otherwise exist.

Recommendation 78

That a home owner who has their site agreement terminated under s127 is entitled to compensation in all circumstances.

Recommendation 79

Section 136 (3) should be amended so that all reasonable costs of relocating the home under this section are payable by the operator.

Chapter 7 - Resolving disputes

Mediation

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

The overwhelming feedback from home owners is that the majority of operators do not participate in genuine discussion and negotiation unless there is a third party involved. Home owners report being shouted at, threatened and abused by operators when trying to resolve disputes directly. This indicates a need for third party intervention.

Question 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?

There are two barriers to accessing mediation provided by Fair Trading for disputes other than excessive site fee increase disputes – the service is not advertised, and the application process is unclear.

The land lease community section on the Fair Trading website has a page entitled 'Resolving disputes'. Under 'NSW Fair Trading and other services' residents are advised they can use the free complaint service. However, there is no reference to a mediation service being available.

Home owners who are aware of the mediation service have advised they have been unable to find the application form. The application form is called a 'Property Complaint Form' and there is no clear indication it is the mediation application form, unless you find it via the 'Forms' page where it is listed as 'Other mediation/complaints form'.

The TU supports mediated disputes in land lease communities because the majority of home owners are elderly and are either unable or unwilling to take a dispute to the Tribunal. Mediation is a valuable service and it should be advertised and made widely available. We suggest Fair Trading provides information about the mediation service on the website, in publications and at seminars, and that a land lease community mediation application form is developed and made available.

Mediation should continue to be made available by digital means for those parties who are willing and able to mediate in this way.

Recommendation 80

That information about the mediation service provided by NSW Fair Trading be available on the website.

Recommendation 81

That a specific application form for the mediation service be developed and made available.

Escalating disputes to the Tribunal

Although the discussion paper does not ask specific questions regarding escalating disputes to the Tribunal, the TU is raising group applications as an issue in this submission.

Land lease community home owners often share similar values and concerns about their community and through residents' committees or other less formal structures, act in a collective way. This collective process is sometimes extended to Tribunal applications. However, site fee increase disputes aside, this is an expensive and burdensome process.

The Tribunal has an appropriate process for handling group applications but currently when multiple applicants are seeking the same orders every home owner must make an individual application and pay an application fee. In one community where home owners sought a reduction in site fees the 80 plus home owners paid over $1000 in application fees. The Tribunal also initially advised that every home owner had to submit a bundle of evidence despite the evidence being common to all applications. The matter was eventually dealt with in a single hearing with all home owners relying on a single bundle of evidence, but only after strenuous advocacy by the home owners' representative.

The Tribunal cannot make orders in favour of home owners who are not a party to proceedings, hence the current need for multiple applications. The Act should contain a provision that enables a group application to be made regarding any dispute arising out of facts or circumstances that are the same or similar for each individual. Alternatively, group applications should be specifically available for disputes regarding: maintenance and repair of common areas and facilities; safety and security; community access arrangements; emergency evacuation procedures; reduction of site fees; refund of overpaid site fees; utility charges and refunds; review of utility cost and reduction in site fees; community rules; and, rules of conduct for operators.

Group applications will significantly reduce the administrative burden on the Tribunal and home owners as well as ensuring the fee is appropriate to the service.

Recommendation 82

That the Act contain a general provision enabling group applications to be made to the Tribunal, or enable group applications regarding: maintenance and repair of common areas and facilities; safety and security; community access arrangements; emergency evacuation procedures; reduction of site fees; refund of overpaid site fees; utility charges and refunds; review of utility cost and reduction in site fees; community rules; and, rules of conduct for operators.

Chapter 8 - Administration and enforcement

Question 73: Are the Commissioner's disciplinary powers adequate?

The Commissioner's powers are adequate but appear not to be exercised as widely or regularly as is necessary to bring about change in the way communities are operated. The majority of disciplinary action appears to be a direction for training. In our experience, this has little or no effect in improving operator conduct.

For example, after the Tribunal had determined a number of cases and made orders in those cases that operators were required to provide access to their electricity accounts many operators still refused to provide that access. Some home owners contacted Fair Trading for assistance and were told they would have to make applications to the Tribunal. These were clear instances of breaches of the Act by those operators but no disciplinary action was taken.

Question 74: Are there breaches of certain provisions of the Act that are currently not offences that should be offences?

Given the demographic of the majority of land lease communities it should be an offence for an operator to fail to have in place emergency evacuation procedures and take reasonable steps to ensure residents are aware of the procedures.

Additional provisions that should be offences if they are breached are:

- A failure by an operator to comply with all statutory obligations relating to the community. Some communities operate without an approval to operate from the local council and this can impact home owners. A penalty in this Act may encourage greater compliance.
- A failure to provide an explanation for a site fee increase by notice that is compliant with the requirements of the Act.
- A failure to participate in compulsory mediation of a site fee increase dispute.

Question 75: Are there any other offences that should be penalty notice offences?

Penalty notice offences should be more broadly available as a compliance tool. They must also be appropriate to the breach and of sufficient gravity to effect change in operator conduct. The obvious provision where a penalty notice should be available is section 54 Rules of conduct for operators.

In addition, we suggest the following:

- the above suggested offences
- section 39
- section 40 (1) and (2)

- section 41 (1)
- section 56
- section 77 (3)
- section 83
- section 96 (3)
- section 97 (3)
- section 107 (1)

Question 76: Are the powers of Fair Trading investigators appropriate?

The powers of Fair Trading investigators are appropriate.

Recommendation 83

That it is an offence under the Act for an operator not to have in place emergency evacuation procedures and take reasonable steps to ensure residents are aware of the procedures.

Recommendation 84

That the following additional provisions should be offences:

- a failure by an operator to comply with all statutory obligations relating to the community
- a failure to provide an explanation for a site fee increase by notice that is compliant with the requirements of the Act.
- a failure by an operator to participate in compulsory mediation of a site fee increase dispute.

Notice periods to commence proceedings in the Tribunal

All applications to the Tribunal must be made within a specific period of time (limitation period) prescribed by the enabling legislation. Where the enabling legislation does not specify a limitation period the application becomes subject to NCAT Rule 23, which provides a default limitation period of 28 days.

Whilst it is often desirable to have a dispute resolved quickly, in many instances 28 days is insufficient time for a party to become aware of a point of dispute, communicate with the other party and lodge an application with the Tribunal. The Act must provide appropriate limitation periods for Tribunal applications.

The TU has, in conjunction with home owners and resident representatives identified a number of provisions in the Act that should provide a limitation period. We wrote to the Minister on 29 March 2019 setting out our suggestions for limitation periods to be included in the Act and we have attached the schedule to this submission.

Recommendation 85

That additional, appropriate limitation periods be included in the Act.

Question 77: Would you be interested in attending a community information session via webinar?

Not applicable.

Question 78: Do you have any access issues preventing you from attending a community engagement session digitally?

Not applicable.

Schedule of suggested limitation periods for Tribunal applications

Section	Period
Section 39(3)	60 days
Section 40(4)	60 days
Section 41(2)	At any time
Section 42(4)	60 days
Section 44(4)	60 days
Section 44(7)	60 days
Section 45(6)	60 days
Section 50(5)	60 days
Section 78(2)	30 days
Section 85(3)	12 months
Section 95(1)	30 days
Section 101(2)	60 days
Section 115(1)	60 days
Section 121	60 days
Section 122(5)	30 days
Section 130(1)	30 days
Section 142(1)	60 days
Section 143(2)	30 days
Section 156(2)	90 days