

Occupancy agreements

a new model of law reform for boarders, lodgers and other renters excluded from the *Residential Tenancies Act 1987* (NSW)

Most New South Wales renters are covered by the *Residential Tenancies Act 1987* (NSW). This legislation is an important source of rights for tenants and landlords, and provides them with an effective means of dispute resolution – that is, the Consumer, Trader and Tenancy Tribunal. Some renters are covered by other legislation – for example, residential park residents and the *Residential Parks Act 1998* (NSW) – which also provides legislated rights and effective means of dispute resolution through the Tribunal.

Some renters, however, are not covered by the Residential Tenancies Act or any similar legislation. Boarders, lodgers, residents of student accommodation and other renters are excluded from the Residential Tenancies Act and, as a result, have no legislated rights in relation to their housing and no means of dispute resolution through the Tribunal. Instead, these renters must rely on the common law of contract for the terms of their rental agreements, and the Supreme Court for dispute resolution.

In practice, the law of New South Wales is of no use to these renters, who are some of the most vulnerable people in New South Wales.

In this paper, the TU proposes that New South Wales should implement a new model of legislation for boarders, lodgers and other renters excluded from the Residential Tenancies Act. This model is based on recent legislation in the Australian Capital Territory for 'occupancy agreements' (*Residential Tenancies Amendment Act 2004* (ACT), Part 5A).

The elements of this new model of law reform are:

- broad application
- some basic, non-prescriptive legislated rights
- provision for the creation of standard terms
- dispute resolution by the Tribunal.

Boarders, lodgers and the law

In New South Wales, boarders and lodgers have no legislated rights and little economic power.

As a result, their contracts give them few legal rights against:

- eviction
- rent increases
- poor conditions.

They also have no realistic means of enforcing the few rights they have.

Case example. The TU was recently contacted by a lodger who was in dispute with his landlord about the rent.

The landlord's solution: *remove the door* to the lodger's room from its hinges until the lodger agreed to the landlord's terms.

As a result, the lodger was effectively trapped in his room without means of redress. The current law was no use in resolving the dispute – neither about the rent, nor about the door.

A diverse rental subsector

People who rent the following sorts of accommodation are excluded from New South Wales residential tenancies legislation:

- boarding and lodging houses
- lodgements in private houses
- licensed residential centres ('licensed boarding houses')
- crisis accommodation and refuges
- SAAP accommodation
- students' halls of residence and residential colleges
- pubs, hotel and motels
- backpacker hostels
- serviced apartments

These sorts of accommodation are different and diverse – as are the people who live in them, and the people and services who provide them.

Some of these sorts of accommodation and their residents may also shift readily between categories: for example, licensed and unlicensed boarding houses.

The occupancy agreements model of legislation

The TU's preferred model of legislation creates a statutory scheme of enforceable agreements for all renters not covered by current residential tenancies legislation, and a statutory process for the creation of a range of specific standard terms, each made according to the different conditions of the sort of accommodation to which it applies. Following the ACT legislation, we refer to this as the *occupancy agreements model*.

The primary elements of this model of legislation are:

- ***broad application.*** In New South Wales, occupancy legislation would apply generally where a person contracts, for value, for a right to occupy premises as a residence and where the Residential Tenancies Act and similar legislation (such as the Residential Parks Act, the *Retirement Villages Act 1999* (NSW) and the *Landlord and Tenant Amendment Act 1948* (NSW)) does not apply.

This avoids the inequity of some classes of persons being covered while other similar persons are not, and discourages landlords from manipulating definitional loopholes to escape coverage.

- ***some basic, non-prescriptive, legislated rights.*** Referred to as 'occupancy principles' in the ACT legislation, these basic provisions are deemed to be part of all occupancy agreements. In contrast to the prescriptive approach taken in other residential tenancies legislation, by which specific notice periods and other details are fixed for all parties, these principles are less prescriptive. Some of these occupancy principles are:

- that the occupant is entitled to 'reasonable notice' of the termination of an agreement
- that an occupant is entitled to know the rules of the premises before moving in
- that the landlord is entitled to enter the premises at a reasonable time and on reasonable grounds; and
- that the premises should be reasonably clean and in a reasonable state of repair.

In each case, what is 'reasonable' may depend on the circumstances of the particular sort of accommodation in question.

- *provision for the creation of standard terms*, which may apply specifically to different forms of accommodation.

These standard terms would provide the detailed contents of agreements between parties, such as notice periods, grounds for termination and other matters not specified in the occupancy principles. This aspect of the model balances its broad application by allowing for different standard terms to apply to different sorts of accommodation. For example, one set of standard terms might be created for licensed residential centres, another for unlicensed lodging houses, and yet another set for student accommodation.

The ACT legislation makes provision for the creation of standard terms by Regulation, but other variations on this model are conceivable: for example, New South Wales occupancy agreements legislation could provide for the creation of standard terms by order of the Consumer, Trader and Tenancy Tribunal on application by stakeholder groups.

- *dispute resolution by the Tribunal*. This provision would afford both parties to an agreement the relatively cheap, quick and accessible dispute resolution processes of the Consumer, Trader and Tenancy Tribunal.

The law in other States and Territories

Of the Australian States and Territories, only New South Wales and Western Australia have no legislation covering boarders and lodgers.

The other States and Territories each make very different provision in relation to boarders and lodgers, with different definitions and exemptions applying in each. For example, Queensland's *Residential Services (Accommodation) Act 2002* (Qld) applies narrowly to residential services under the *Residential Services (Accreditation) Act 2002* (Qld), which applies only to services that accommodate four or more residents. In Victoria, the *Residential Tenancies Act 1997* (Vic) makes specific provision for residents of 'rooming houses', but that Act excludes 'residential care services', including service agencies funded under the Victorian *Disability Services Act 1991* (Vic).

To generalise, across Australia the predominant model of legislation relating to boarders and lodgers provides a *prescribed regime* of rights and responsibilities, which applies to a *prescribed class* of residents, premises or agreements.

While legislation of this sort is better than none, there are a number of problems with the model.

First, many landlords seek exemption from the legislation, either by lobbying for the coverage of the legislation to be narrow, or by changing the way they do business so as to fall outside of coverage.

Second, if the legislation applies to a variety of different sorts of accommodation, the regime of rights it prescribes may not be appropriate to all forms – or, more likely, the regime will be reduced to the lowest common denominator and offer few protections to any residents.

Legislation for occupancy agreements, as implemented in the ACT, offers a better model of law reform.

Tenants' Union of NSW (TU)

The TU is the peak non-government tenants organisation for New South Wales.

A specialist community legal centre, the TU also resources the State-wide network of local Tenants Advice and Advocacy Services.

The TU convenes the Boarders and Lodgers Action Group.

Boarders and Lodgers Action Group (BLAG)

BLAG is a group of community legal centres, support services and other non-government organisations working for boarders and lodgers law reform.

The ACT legislation – early indications

An early indication of the benefits of the occupancy agreements model is the development of standard occupancy agreements for accommodation provided by Supported Accommodation Assistance Program (SAAP) services in the ACT. Two sets of standard terms have been developed – one for overnight accommodation, the other for longer-term accommodation – by the SAAP sector in consultation with representatives of SAAP clients. These two sets of standards terms are now being 'road-tested' through use by SAAP services and their clients, before possible adoption as Regulations under the ACT legislation.

Occupancy agreements – a new model for long overdue law reform

Since the early 1980s promises of law reform for boarders and lodgers have been made by both sides of New South Wales politics, and have gone unfulfilled.

The occupancy agreements model is a new model of law reform that offers a way past the stumbling blocks met by previous attempts at law reform.

For more information about the TU, BLAG or the occupancy agreements model of law reform, contact:

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