

# **FIVE YEARS OF THE *BOARDING HOUSES ACT 2012* IN NEW SOUTH WALES**

A report by the Tenants' Union of NSW  
March 2018



**TENANTS'  
UNION**  
OF NEW SOUTH WALES

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The Tenants' Union of New South Wales recognises that Aboriginal and Torres Strait Islander people are the First Peoples of Australia. Our office is on the lands of the Gadigal people of the Eora Nation.

The Tenants' Union NSW would like to acknowledge the work of Hayley Stone in the creation of this report. It would not have been possible without her.

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## Introduction

### ***About this report***

The New South Wales *Boarding Houses Act 2012* (the Act) has now been in operation for five years. Section 105 of the Act requires the Minister to review the Act before November 2018, to determine whether its policy objectives remain valid and its terms remain appropriate. This report is intended to assist the Minister in this process.

The Tenants Union of NSW (TUNSW) is the peak body representing the interests of renters in NSW, including residents and occupants of boarding houses in their various forms. We are an accredited Community Legal Centre specialising in New South Wales' renting laws and the main resourcing body for the twenty Tenants' Advice and Advocacy Services (TAASs) across the state. TUNSW and the TAASs have provided information, advice and advocacy to 1650 identified boarders and lodgers, in regions across New South Wales, since the Act commenced.

To assist in the review of the *Boarding Houses Act 2012* this report assesses the Act on its own merits. We acknowledge that there have been changes in the sector over the lifetime of this Act, notably the introduction of the National Disability Insurance Scheme, which may affect consideration of this Act's original purpose and intentions. Whilst this report should not be taken to be an early submission from the Tenants' Union to the review it will act to inform our response to the review of the Boarding Houses Act and we hope it assists others to that end as well.

For the purposes of this report we have drawn on the 5 years of practical experience working with the Act by both our organisation and the TAASs. We have consulted with local government and other advocacy services including university student organisations, neighbourhood centres and homelessness legal services. We have also spoken to residents of boarding houses directly to gain an understanding of their experiences.

The Act identifies two discrete types of boarding house – general registrable boarding houses and assisted boarding houses. The focus of this report is on general registrable boarding houses and how the Act has operated in this specific context. We expect to see similar analysis of the Act in the context of supported registrable boarding houses, so that the effectiveness of the Act can be assessed as a whole.

## ***About the Act***

Prior to the introduction of the Act the boarding house sector was unregulated. The specified aims of the Act are to provide an appropriate regulatory framework for the delivery of quality services to residents of registrable and supported boarding houses whilst at the same time ensuring the sustainability of the boarding house sector as a vital source of affordable accommodation.<sup>1</sup>

In order to achieve its aims, the Act is based around four key principles:

1. Registration – under the Act all proprietors are required to register their premises if operating as a boarding house;
2. Definition – the Act defines a boarding house as a place which provides 5 or more beds for value;
3. Occupancy principles – the Act establishes minimum principles to be applied around the rights and responsibilities of occupants and proprietors; and
4. Enforcement – the Act seeks to provide a framework in which compliance and enforcement can be achieved.

The Act represents the first attempt by a NSW Government to regulate a sector that is complex, diverse and dynamic. Assessing its effectiveness in our key areas of interest – rights for occupants and registration requirements for providers – has proven difficult in many ways. Five years after its introduction, we have not seen the development of case law through the formal resolution of disputes in the NSW Civil and Administrative Tribunal (NCAT). The development of case law would have been expected, considering the Act's purpose includes providing enforceable rights and access to binding dispute resolution processes. We explore some of the barriers to the creation of case law in this report.

## ***Summary of key findings***

While crucial aspects of the Act remain relatively untested, some provisions have worked to secure rights for residents. Refinement is needed to ensure it achieves its aims, in terms of both its provisions and the processes through which its aims might better be realised. This applies to both the introduction of Occupancy Principles and the registration scheme.

On the information, observations and insights obtained through our consultations, it is evident that the Act has had limited success in protecting

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<sup>1</sup> NSW Parliament, *Boarding Houses Bill 2012*, introduced on motion by Mr Andrew Constance, second reading, proof 17 October 2012, p. 1

the rights of registrable boarding house residents. A modest gain has been obtained in that residents now have a working mechanism to recover security deposits, but the majority of rights articulated in the Occupancy Principles have not been realised for residents because their bargaining position remains weak.

Life goes on for boarding house proprietors and residents much as it did before. Nonetheless, the Act provides a useful framework for articulating a set of tangible rights and a clear avenue for enforcement of these. With a number of potential improvements it could represent a significant step towards securing rights for some of New South Wales' most vulnerable residents.

### ***Summary of recommendations***

Looking to the future, the Act will need to be strengthened to realise its aim in providing an appropriate regulatory framework for the delivery of quality services to residents. Incentives for registration must be increased, and rights must be made clear and genuinely accessible to residents. Deficiencies in the compliance and enforcement framework need to be remedied.

#### **Recommendations:**

- The NSW Government should provide ongoing resources for community education projects on the *Boarding Houses Act 2012* and its Occupancy Principles.
- The Act should prevent proprietors from evicting an occupant or otherwise recovering possession of an occupied room in a boarding house, except with an express order of the NCAT.
- The Act should require the NCAT to consider relevant circumstances when determining whether to make orders allowing eviction or other recovery of an occupied room in a boarding house.
- The Act should restrict occupancy fee increases to no more than once per year.
- The Act should allow residents to apply to NCAT to challenge a proposed unreasonable increase to an occupancy fee.
- The Act and Regulations should create standard form boarding house agreements for use in a range of key boarding house types, and mandate their use.

### Recommendations continued:

- The NSW Government should consider enabling local governments to:
  - o investigate whether a property is a registrable boarding house;
  - o register unregistered registrable boarding houses;
  - o require a boarding house to pay the registration fee within a reasonable time frame following registration;
  - o update listings in the Register which are inaccurate or out-of-date and,
  - o receive the amount payable under applicable penalties.
- The NSW Government should act to ensure local governments are able to access all information held in the register.

## Complexity and diversity of the boarding house sector

*'Once upon a time you had a building that was being occupied by persons who were living there three or more months and it would be advertised as a boarding house and that was simple. Now you have places that people say are 'apartments' or 'student houses' or 'private dwellings'.<sup>2</sup>*

The boarding house sector has a history of evolving in response to changes in the housing market. This evolution is continuing and poses a challenge for a regulatory framework that is designed to apply across the sector.

Boarding house accommodation was traditionally short-term, low-cost, basic accommodation for young men travelling from their hometowns to work in urban areas.<sup>3</sup> In the 1960s and 1970s a range of factors, including an increased supply of relatively inexpensive residential flats and the deinstitutionalisation of the mental health sector, saw the boarding house industry split into two streams – licenced boarding house accommodation, regulated under the *Youth and Community Service Act 1973* (NSW) and unlicensed boarding house accommodation.<sup>4</sup>

With these changes, the 'typical' boarding house resident was redefined. Residents were increasingly vulnerable, reliant on government benefits and

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<sup>2</sup> Interview with advocate, Hunter region, July 2017

<sup>3</sup> Di Nicola, M., 'Boarding Houses Education Campaign – Final Report', Tenants Union of NSW, June 2016, <https://files.tenants.org.au/policy/BHR-161026-Final-report-BH-Project.pdf>, accessed 8 March 2018, p.4

<sup>4</sup> Drake G., Blunden., H., et al, 'Boarding Houses Act 2012 Evaluation', Report 1, 29 September 2014, pp.4&5

socially isolated.<sup>5</sup> Unable to access the mainstream rental market or purchase homes, many residents were older and had complex needs, including mental health issues or disabilities.<sup>6</sup> The concept that boarding house accommodation was temporary also shifted, with more residents staying in the sector long term, many until they moved into aged care.<sup>7</sup>

At the same time, the lack of regulation across the sector meant that there was little to no accountability for those proprietors who sought to took advantage of residents. Many residents were dealing with unsanitary and unsafe conditions, insufficient security and arbitrary eviction. Lobbying for sector regulation and statutory protections by public interest groups, including TUNSW, began during this period.<sup>8</sup>

Some 40 years later, the NSW housing market is in a state of crisis, rental properties are in high demand and there is a severe shortage of social and affordable housing. The boarding house sector has continued to adapt to 'fill the gap'. The sector has broadened its target market to include students and workers, including single professionals.

Research indicates that there are now six distinct subsets of boarding houses<sup>9</sup> – older style 'traditional' boarding houses, upgraded traditional boarding houses, student boarding houses, assisted boarding houses, New Generation boarding houses<sup>10</sup> and small, internally subdivided private suburban dwellings.<sup>11</sup> Boarding houses have also become an integral part of the Specialist Homelessness Sector (SHS), providing crisis, temporary and transitional housing for people who are unable to rent in the private sector.<sup>12</sup>

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<sup>5</sup> NSW Interdepartmental Committee on Reform of Shared Private Residential Service (IDC), *Boarding House Reform Discussion Paper*, <https://www.pwd.org.au/documents/project/1012-ADHC-BoardingHouseReformDiscussion.pdf>, accessed 31 January 2018, p.2

<sup>6</sup> Interview with advocates, Sydney Inner West region, July 2017

<sup>7</sup> Ibid.

<sup>8</sup> Interview with advocate, Sydney central region, August 2017

<sup>9</sup> The name "boarding house" itself may need reconsideration. In our experience there appears to have been an end to board (the provision of food) being offered in the vast majority of registrable boarding houses. Most other Australian jurisdictions with regulation of the sector refer to rooming houses. North American jurisdictions may refer to either rooming houses or "single room occupancies". The UK refers to 'houses in multiple occupation' to cover a similar breadth of types of marginal rental as we experience in NSW.

<sup>10</sup> Developments regulated by Division 3 of *State Environmental Planning Policy (Affordable Rental Housing) 2009*.

<sup>11</sup> Pawson, H., Dalton, T., & Hulse, K., '*Rooming House Futures: Governing for Growth, Transparency and Fairness*' NSW Discussion Paper, Australian Housing and Urban Research Institute, Feb 2015, pp.8-10.

<sup>12</sup> For example, the Specialist Homeless Services Practice Guidelines published by Family and Community Services (FACS) NSW refers to an example of SHS staff placing an individual experiencing homelessness into a boarding house as a form of temporary



Each subset of boarding house has unique features, and the characteristics of residents and legal nature of their occupancy agreements vary. Whilst living in a boarding house gives a prima facie indication that a resident is a boarder or lodger, it is not uncommon for boarding houses to contain any variation of boarders, lodgers, tenants and other occupants. There are a large number which appear to contain no boarders or lodgers at all, as may be the case with many New Generation boarding houses and some traditional boarding houses that no longer have onsite managers<sup>13</sup>.

The Act attempts to manage this diversity by providing a broad definition of registrable boarding house. It makes no reference to the physical attributes of a property, its advertised purpose, or the legal nature of its residents' occupancy agreements, but rather defines a registrable boarding house as *'any premises that provides beds, for a fee or a reward, for use by 5 or more residents, who are not proprietors, managers or members of the proprietor or manager's family.'*<sup>14</sup>

Imposing a regulatory framework on a sector that is so diverse is a challenge. Developing core rights for residents is a difficult task when the sector is almost exclusively motivated by financial rather than social considerations.

*'It's a private industry, it's private oriented and it's for profit. There is little altruism here. It doesn't provide government funded services. There was a view [when the Act was being formulated] "what's in it for us"?'<sup>15</sup>*

## Occupancy principles

There are now twelve basic rights afforded to residents covered by the Act. These are set out in Schedule 1 of the Act and are framed as "Occupancy

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accommodation.

[http://www.housing.nsw.gov.au/\\_data/assets/pdf\\_file/0009/327996/GHSHPracticeGuidelines.pdf](http://www.housing.nsw.gov.au/_data/assets/pdf_file/0009/327996/GHSHPracticeGuidelines.pdf) p.33; Greenhalgh, E., Miller, et al, 'Boarding houses and Government supply side intervention' AHURI Positioning Paper, No. 67, March 2004.

[https://www.ahuri.edu.au/\\_data/assets/pdf\\_file/0019/2728/AHURI\\_Positioning\\_Paper\\_No\\_67\\_Boarding\\_houses\\_and\\_government\\_supply\\_side\\_intervention.pdf](https://www.ahuri.edu.au/_data/assets/pdf_file/0019/2728/AHURI_Positioning_Paper_No_67_Boarding_houses_and_government_supply_side_intervention.pdf), accessed 31 January 2018, p.21

<sup>13</sup> The primary legal test for whether a person is a lodger or a tenant is a determination whether there is an expression of 'mastery and control' of the premises. See *Commissioner for Fair Trading v Voulon & Ors* [2005] WASC 229

<sup>14</sup> *Boarding Houses Act 2012* (NSW), s 5(2)

<sup>15</sup> Interview with advocate, Sydney central region, September 2017

Principles". The principles are limited but broad in scope, so as to apply generally across the sector as a whole.

In relation to the state of the premises, the Principles set out that residents have the right to a property that is reasonably clean, in reasonable repair, and reasonably secure. Residents are entitled to quiet enjoyment of the space they occupy and can enforce that the proprietor only access that space during reasonable hours for reasonable purposes, for example, to carry out repairs.

Proprietors must provide residents with information about any house rules prior to the resident moving into the premises, including grounds for termination. They are expressly prohibited from charging penalties for any breaches of the house rules or the substantive agreement. Security deposits are capped at the equivalent of two weeks occupation fees and are repayable to the resident within two weeks of the agreement ending, unless the proprietor has or will incur specific reasonable costs, for example, cleaning fees.

Residents are entitled to receipts for any payments made, and are only able to be charged for utilities if these charges are specified at the outset of the agreement and represent a fair estimate of the resident's actual usage. Proprietors must also provide four weeks notice before increasing an occupation fee. When the proprietor wants to end the agreement, a resident is entitled to reasonable notice depending on the grounds for the termination. The Occupancy Principles also direct that the parties try to use alternative dispute resolution to resolve any disputes they might have.

### ***A step forward***

The Act and its Occupancy Principles represent a step forward in giving boarding house residents definable rights, though a relatively tentative one.

Prior to the Act's implementation residents who could not establish coverage as tenants under the *Residential Tenancies Act 2010* had limited enforceable rights. The process of trying to assert these rights was often convoluted and had no guarantee of success. Without tenancy or occupancy rights, residents could seek remedies under the Australian Consumer Law, or attempt to recover money owed in the Local Court. The range of available remedies was extremely limited, and did not account for many of the typical elements seen in boarding house license agreements. For instance, ensuring

compliance with repairs and maintenance and quiet enjoyment obligations was extremely difficult.<sup>16</sup>

The introduction of the Act provided, for the first time, a focused framework giving residents access to a number of enforceable rights. But good law takes time to develop and an important part in this process is practical testing and interpretation of contestable terms. Testing of the Act by application to the NSW Civil and Administrative Tribunal (NCAT) appears to have been limited over the past five years. Consideration of the Occupancy Principles has been particularly scant. This is disappointing since many residents in interviews we undertook disclosed apparent breaches of the Occupancy Principles by their proprietors.

*Dennis' has lived in his current boarding house for three years. His room has an infestation of rats. The rats have eaten Dennis' belongings and food. Dennis has asked the proprietor to help him deal with the rat problem. His proprietor has taken no action and has told Dennis to go to the local council for baits.*  
[Occupancy Principle 1(a) provides that the resident is entitled to live in premises which are reasonably clean.]

*Kevin's boarding house is in a bad state of repair. There is a hole in the ceiling directly above the entrance to the bathroom. Residents joke that they get three showers when it rains – first going into the bathroom, then when they shower, and then once again as they walk out of the bathroom. Kevin has asked the proprietor to fix the hole, but any time that repairs are raised the proprietor complains about the cost. Things get done, but very slowly.*  
[Occupancy Principle 1(b) provides that the resident is entitled to live in premises which are in a reasonable state of repair.]

*Neville's boarding house has a rule requiring payment of the occupation fee by no later than 5pm on the day that it is due. Neville was sick and couldn't get to the bank to withdraw his money. He was woken up the next morning by the proprietor standing over his bed, in his room shouting at him to pay his occupation fee.*  
[Occupancy Principle 4 provides residents are entitled to quiet enjoyment of the premises; Occupancy Principle 5 provides access by the proprietor at reasonable times for reasonable purposes.]<sup>17</sup>

Our research indicates a number of factors to explain why there is a low take-up of NCAT applications about Occupancy Principles by residents and advocates. These factors include a lack of awareness of the Act, the stark

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<sup>16</sup> Indeed, this continues to apply to occupants who are not covered by either the *Residential Tenancies Act 2010* or the *Boarding Houses Act 2012*.

<sup>17</sup> Interview with boarding house residents, Sydney Inner West region, August 2017 (names have been changed)

imbalance of power (exacerbated by, but not solely the result of, the vulnerabilities of boarding house residents), and a lack of clarity around how the term “reasonable” will be applied to various Occupancy Principles.

### ***Ongoing education projects are needed***

Residents we interviewed were aware that they had ‘general rights’ but none had any working knowledge of the Act. They did not know where to obtain information about the Act, despite high engagement with a number of support services.

*‘I’m not up to date with the laws. I know there are laws but they change all the time. If I wanted it [a copy of the Act] I’d have to ask [the proprietor] for it’.*<sup>18</sup>

Advocates working with international student residents reported that many students believed they were tenants, as they were living in small suburban properties that did not advertise as a ‘boarding house’. Most were unaware that there were different types of renting agreements.

The information we have on resident knowledge is confirmed by the findings released so far from evaluative research conducted by Dr Gabrielle Drake (Australian Catholic University and formerly Western Sydney University) in collaboration with Newtown Neighbourhood Centre (NNC) which demonstrated that while there has been some increase in knowledge and awareness of the Act overall, 45% of residents interviewed in 2016 still responded ‘no’ when asked if they were aware of the Act.<sup>19</sup>

Proprietor knowledge also appears to be lacking. Whilst only 3% of proprietors acknowledged they were not aware of the Act in the Drake and NNC report, our interview respondents suggested that in their experience while proprietors may know of the Act, they do not necessarily understand what the Act requires of them concerning compliance with the Occupancy Principles, or registration.

*‘We think most [proprietors] are ignorant rather than malicious’.*<sup>20</sup>

Councils have reported that some proprietors were operating under the misconception that Council Development Approval was the same as registration on the NSW Fair Trading Boarding Houses Register. There was also reference to the fact that a number of boarding houses are now being

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<sup>18</sup> Interview with boarding house resident, Sydney Inner West region, August 2017

<sup>19</sup> Drake, G., *Boarding Houses Act Evaluation*, Interval 3 Report, December 2016, p.4

<sup>20</sup> Interview with advocate, Sydney Inner West region, July 2017

managed by Real Estate Agencies and that Agents are sometimes importing residential tenancy laws and practices when managing boarding houses, resulting in 'hybridised' agreements that often contain breaches of the Act. These include, for instance, charging the equivalent of four weeks' occupation fee as a security deposit instead of two weeks, as prescribed under Occupancy Principle 8(1)(a).

From April 2014 to June 2016 the TUNSW received funding from the NSW Government, through Newtown Neighbourhood Centre, to undertake a two-year Boarding Houses Education Project. The aim of this project was to inform and educate residents and other stakeholders about the new Act through network building, training and the development of resources. While there were some clear successes in the project, the final report recommended the education aspect of the project should be ongoing.<sup>21</sup>

Our recommendation on this remains unchanged. Further resources need to be invested in educating proprietors, their agents, residents and service providers assisting residents' on the following:

- how to identify instances where the Act will apply
- what the obligations and rights of the parties are under the Act, and
- the process of enforcing these rights through NCAT.

Community education is required on an ongoing basis due to the dynamic nature of the industry and the regular changeover of residents, particularly in the student boarding house subsector.

**Recommendation:**

- The NSW Government should provide ongoing resources for community education projects around the *Boarding Houses Act 2012* and its Occupancy Principles.

## Vulnerability of residents

Boarding house residents may be vulnerable to unfair business practices as a result of a range of social, economic and cultural variables. Our consultations focused on two types of boarding house resident – low socioeconomic residents and international students.

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<sup>21</sup> Di Nicola, M., 'Boarding Houses Education Campaign – Final Report', Tenants Union of NSW, June 2016, <https://files.tenants.org.au/policy/BHR-161026-Final-report-BH-Project.pdf>, accessed 8 March 2018, p.21

These two groups of resident represent a significant proportion of the boarding house population and both face significant challenges when attempting to utilise the Act. Low socio-economic residents and international students were consistently identified as being particularly vulnerable across all services interviewed and represented the majority of boarding house clients assisted by advocacy services.

Our research indicates this vulnerability is translating into underuse of the Act.

### ***Low-socioeconomic residents***

Low socioeconomic residents are predominately single males on government benefits. A majority of these residents are older, and some have spent a period of time in prison. Many of these residents have a lived experience of homelessness and most have extremely limited financial means. They often lack rental histories necessary to rent in the mainstream rental market or have other factors that are used to discriminate against them when applying for properties, such as a history of incarceration, having a mental illness or disability.

Many low socio-economic residents are emotionally invested in the communities that often develop within boarding houses. Some residents have lived in and around the same boarding houses for decades. They usually have limited options in terms of accommodation that is in a reasonable proximity to the services they require, for example, hospitals. Those who are elderly or have disabilities often develop informal care arrangements with fellow residents, and many consider living in a boarding house to be their only viable accommodation option until they transition into an aged care facility.<sup>22</sup>

Low socioeconomic residents tend to have limited faith in legal processes as a way to resolve problems, and do not pursue legal remedies<sup>23</sup>. As one resident commented:

*'You can make all the rules and regulations you want, but someone will always find a way around it. Rules are meant to be broken'.<sup>24</sup>*

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<sup>22</sup> Interview with advocates, Sydney Inner West region, July 2017

<sup>23</sup> Law and Justice Foundation "Access to Justice and Legal Needs Program"  
<http://www.lawfoundation.net.au/ljf/app/54A6A9F9FFD485F0CA25746400187A24.html>

<sup>24</sup> Interview with boarding house resident, Sydney Inner West region, August 2017

For these residents, eviction, occupation fee increases and loss of goods are major and justified fears. During our consultations advocates reported that evictions, in particular, were often a cause of intense emotional distress.

### ***International students***

International students often source accommodation prior to arriving in Australia through foreign language sources on the Web. They often forgo societal expectations around repairs, peace, comfort and privacy, either due to initial naivety or in order to secure the cheapest, or any, accommodation they can. They do not have local rental histories and have greatly reduced access to the mainstream private rental market as a result.<sup>25</sup>

Some international students have limited income and may be working in insecure, cash-only jobs to fund their studies. They seek accommodation around educational institutions and tend to live in student-identified boarding houses or in small suburban privately owned properties operating as boarding houses. It is common for residents to electronically transfer security deposits and any occupation fee in advance to proprietors before arriving in Australia and to not see the premises prior to having committed to live there.<sup>26</sup>

Many international students rent from proprietors within their own cultural communities. Agreements, receipts and copies of house rules may be in foreign languages and the proprietor may not provide their name or address for service. In these situations, it can often be difficult to identify the legal status of the 'proprietor', who may be the owner of the property, or may in fact be leasing the property from someone else.<sup>27</sup>

International student residents sometimes provide copies of their passports and visas to proprietors on entering agreements. This often results in fear that their proprietor could report them to the Department of Immigration and Border Protection if they do not comply with the terms of the agreement or the 'house rules'.<sup>28</sup>

Some registrable boarding houses marketed towards students have also begun to introduce fixed term agreements. This is a novel development in a sector built upon the notion that the licence to occupy can be revoked at any

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<sup>25</sup> Interview with advocates, Sydney Inner West region, July 2017

<sup>26</sup> Interview with advocates, Sydney Inner West region, July 2017

<sup>27</sup> Interview with advocates, Sydney Inner West region, July 2017

<sup>28</sup> Interview with advocates, Sydney Inner West region, July 2017

time. It is consistent however with the development of multiple types of boarding house suited to different customer groups.

These fixed terms appear to be used in some houses purely as a 'bond harvesting' mechanism. The fixed term is put in place not in line with university semesters as one might expect from a student accommodation provider, but carries through the subsequent holiday period. However, both provider and student know that the student will not be staying for that extended period, and that there will be no easy replacement for them in student accommodation during a holiday break. The resident is not fully able to bargain with the provider, and must accept the terms presented to them. Students vacate their accommodation at the end of a school year and are then charged rent to the end of the contract and the bond kept to cover this cost.

International students do not always want longer-term accommodation, but generally always require reasonable time to vacate, the ability to recover their goods and the return of their security deposit.

## **Barriers to residents' use of the Act**

### ***Fear of retaliatory eviction***

The Act has serious deficiencies in being able to protect residents from retaliatory evictions. This deficiency, coupled with the generally vulnerable nature of boarding house residents, is the major barrier preventing residents from enforcing their rights. The rights that are afforded by the Act are, quite simply, undermined and ineffective.

Our consultations showed that both low socioeconomic and international student residents are concerned about being evicted. Residents and advocates report that proprietors regularly use eviction as a threat against those they perceive as 'trouble makers'. Complaining about issues, arguing with a proprietor, seeking advice from external services and making applications to NCAT are all actions residents believe could potentially trigger an eviction.

Many residents had experienced what they perceived as 'unfair' evictions themselves, or had seen other residents evicted.



*'[The proprietor] didn't like me. He threw all my stuff in the garden, all broken up, at night. Everyone had been through it.'*<sup>29</sup>

It was universally agreed that once the relationship soured and the landlord decided to terminate the agreement, it was unsalvageable. The proprietor had all of the power in the relationship:

*'Personalities are a big issue. If they don't like you, you have no say. They will kick you out and you just have to move on'*<sup>30</sup>

The Act does not require proprietors to seek an order from NCAT to validly terminate an agreement. Occupancy Principles 9 and 10 state that a proprietor must advise a resident why and how the agreement can be terminated, and give reasonable written notice when evicting a resident. However, no order of a Tribunal or court is required for proprietors to recover possession of a room under an occupancy agreement. This is a significant departure from the established norms of tenancy legislation, where an eviction cannot lawfully occur without some level of oversight from relevant authorities, such as an order for possession being enforced by a Sheriff's officer.

A resident can apply to NCAT on the basis that reasonable written notice to terminate their occupancy agreement was not given, or that they were not previously advised that a certain action would end the agreement in accordance with the Occupancy Principles. This might result in the resident receiving more time to move out, but the Act provides the tribunal with no jurisdiction to consider whether the termination itself is reasonable, or should be prevented.

*John is over 70 years old. He is waiting on hip replacement surgery and walks with a cane. He was given one month's written notice to move out because the sound of the cane was affecting other residents and the proprietor thought John might be an insurance liability.*

*John can apply to NCAT under the Act to seek an order under s. 32(4) (a) restraining the proprietor from terminating him with only a month's notice, if he can demonstrate that this is not a reasonable amount of time.*

*If the proprietor has advised John previously that disrupting neighbours and being an insurance liability are grounds for ending the agreement with one month's notice, John cannot challenge the eviction itself.'*<sup>31</sup>

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<sup>29</sup> Interview with boarding house resident, Sydney Inner West region, August 2017

<sup>30</sup> Interview with boarding house resident, Sydney Inner West region, August 2017

<sup>31</sup> Interview with advocate, Sydney Inner West region, July 2017

We know that boarding house proprietors evict residents for reasons that could not be considered fair. One advocacy service reports that a proprietor evicted at least one resident *'because they smelt'*. The resident had no ability to challenge the eviction because the proprietor had specified that failing to wash or use deodorant were grounds for termination, and claimed the occupant was in breach of this rule.<sup>32</sup>

The same proprietor openly cites on their website that not cleaning up after using the kitchen, not paying occupation fee by 5pm on the day that occupation fee is due, and not consenting to being breathalysed are also grounds for termination.<sup>33</sup> It is hard to see how such arbitrary powers of eviction, without any level of accountability, can give any confidence to vulnerable residents who might otherwise be advised to assert their rights.

The fact that proprietors can so readily evict residents affects the strategies advocates might suggest when advising residents of their rights. Non-legal advocates explained that the usual strategy was to negotiate with proprietors on the most serious of breaches and to avoid NCAT where possible:<sup>34</sup>

*'We aren't adversarial, we work collaboratively. We try to help the clients sustain tenancies). It's more about sustainability'.*

*'Leverage and negotiation are important... we use the Act for that. It's about what's realistic. We don't enforce the Act unless we need to.'*<sup>35</sup>

Legal advocates explained they were hesitant to advise a resident to apply to NCAT during the course of the agreement, and would only recommend this in the most serious of cases. They also advised that they would inform residents that retaliatory termination without recourse was a real potential consequence of any NCAT application. This advice usually resulted in residents either 'putting up' with issues or leaving of their own accord.

*'When we tell boarding house residents of what they can hope to achieve under the Act and they weigh up the cost and time investment and the risk to their accommodation, they often aren't going to go to NCAT. They just leave the boarding house.'*<sup>36</sup>

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<sup>32</sup> Interview with advocate, Hunter region, July 2017

<sup>33</sup> Lease published on <http://aaronbumanboardinghouses.com/>, accessed 30 January 2018.

<sup>34</sup> Interview with advocates, Sydney Inner West region, July 2017

<sup>35</sup> Interview with advocates, Sydney Inner West region, July 2017

<sup>36</sup> Interview with advocate, Sydney Inner West region, July 2017

If a legal advocate believed it was possible to argue a resident meets the statutory definition of tenant under the *Residential Tenancies Act 2010* their advice was substantially different. They would generally advise the resident apply to NCAT, because the Residential Tenancies Act not only provides residents with a greater range of rights, but also provides nominal protection against retaliatory eviction<sup>37</sup> (although we have noted the need for this to be improved in our submissions to the review of that Act in 2016).<sup>38</sup>

The fact that the Act does not provide the Tribunal with any capacity to deny proprietors the right to evict residents is a major impediment to residents being able to utilise the Occupancy Principles within the agreement. It is notable that the situations where residents are applying to Tribunal are where the proprietor will not return their security deposit or their possessions after the agreement has ended.

Being evicted is an emotionally distressing experience. A proprietor should not be able to threaten a resident with eviction for asserting their rights under the Act or for minor infringements of the agreement or house rules. However, the Act currently does not adequately prevent such practice.

As a basic principle, residents should be able to challenge the proposed termination of an occupancy agreement in NCAT. This should extend to circumstances where a proposed eviction is clearly retaliatory, is based on alleged breaches that cannot be proven on the balance of probabilities, or where an eviction represents a disproportionate response to a breach.

Even if this were possible, it is likely most residents would simply choose to leave when faced with the termination of their occupancy agreement. But for residents seeking to assert their rights during the term of an occupancy agreement, who aren't doing so now for fear of eviction, or for residents who are facing eviction for frivolous or erroneous reasons, Tribunal oversight of terminations is essential. By providing residents with greater confidence in the law we would also give the Tribunal more opportunities to hear and consider matters pertaining to the Act, allowing us to develop our understanding and interpretation of its terms, and identify any further need for reform.

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<sup>37</sup> *Residential Tenancies Act 2010* (NSW) s.115

<sup>38</sup> Tenants Union of NSW, 'Submission – Response to Fair Trading New South Wales Discussion Paper 'Statutory Review of the *Residential Tenancies Act 2010*, Jan 2016, accessed 30 January 2018  
[https://files.tenants.org.au/policy/20160128\\_TUNSWSubmission\\_Final.pdf](https://files.tenants.org.au/policy/20160128_TUNSWSubmission_Final.pdf), accessed 30 January 2018, p.32

### **Recommendations:**

- The Act should prevent proprietors from evicting an occupant or otherwise recovering possession of an occupied room in a boarding house, except with an express order of the NCAT.
- The Act should require the NCAT to consider relevant circumstances when determining whether to make orders allowing eviction or other recovery of an occupied room in a boarding house.

### ***Fear of occupation fee increases***

Another concern expressed by many residents, particularly those in older boarding houses, was that proprietors would increase their occupation fees if they requested repairs under Occupancy Principle 1(b).

A proprietor has an obligation to provide the premises in a reasonable state of repair.<sup>39</sup> Occupancy Principle 6, which specifically concerns occupation fee increases, only stipulates that a proprietor must give a resident no less than 4 weeks written notice of any increase. There are no prescribed limits on how much an occupation fee can be increased by or how often it can be increased.

Theoretically, this means that the proprietor can transfer any costs they incur in the normal upkeep and repair of the premises or simply increase the occupation fee arbitrarily once a month and it would be completely legal to do so.

Given many residents' limited financial resources, this was a major disincentive to apply to NCAT to seek orders for repairs even if there were health and safety issues involved.

*'There was a fire. Two days later we found out half the fire alarms weren't working. They weren't connected. I asked [the proprietor] 'are you going to get them fixed?' he just gave bullshit excuses. He always complained about the price and he always did backyard fixes. He never got a professional job.'*<sup>40</sup>

*'Where I am, the water comes down the wall, but I don't say anything because it will cost \$300-\$400 to fix it. I pay \$120 a week and I only get \$456 a fortnight on the disability pension. I'm scrounging all the time. It's really important not to have the occupation fee go up. If it went past \$150 a week, I'd have to live in my car.'*<sup>41</sup>

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<sup>39</sup> *Boarding Houses Act 2012* (NSW) Sch 1, Occupancy principle 1(b)

<sup>40</sup> Interview with boarding house resident, Sydney Inner West region, August 2017

<sup>41</sup> Interview with boarding house resident, Sydney Inner West region, August 2017

Residents and their advocates tell us that they agree to cheap fixes, attempt their own repairs or resign themselves to living in unsafe conditions rather than ask for repairs, simply because they are concerned that the occupancy fee may rise as a result, to a level they cannot afford.

Proprietors should not be able to directly transfer ordinary repairs and maintenance costs onto residents through increases in occupation fees – such expenses should be anticipated and budgeted for as the legitimate cost of running a boarding house. Residents should have a certain degree of certainty around the occupation fee they pay, and should not have to constantly worry that they may not be able to afford their accommodation.

It is appropriate that Occupancy Principle 6 is expanded to limit occupation fee increases to one increase per calendar year, or only under certain prescribed circumstances such as where the proprietor undertakes major and extensive repair works or makes significant improvements to the premises.

The Act should also provide residents with the capacity to challenge increases of occupation fees if a proposed increase appears out of step with inflation. We suggest the Consumer Price Index is in general a good indicator of a reasonable increase. This would require proprietors to demonstrate why a proposed increase in the occupation fee is reasonable.

**Recommendation:**

- The Act should restrict occupancy fee increases to no more than once per year.
- The Act should allow residents to apply to NCAT to challenge a proposed unreasonable increase to an occupancy fee.

***Concept of reasonable***

The Occupancy Principles are designed with a broad interpretation in mind, to account for the diversity of the boarding house sector and the range of situations to which each principle might be applied. For example, Occupancy Principle 10 sets out that a resident is entitled to reasonable notice of eviction, taking into account the safety of other residents, the proprietor and the manager of the boarding house.<sup>42</sup> Thus, notice periods can legitimately vary from one form of registrable boarding house to another, depending on the nature of the accommodation and its occupants. But residents we

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<sup>42</sup> *Boarding Houses Act 2012* (NSW) Sch 1, Occupancy principles 10 (a) & (b)

consulted demonstrated a difficulty with applying a “reasonableness” test in this context.

*‘Having both parties be reasonable is very difficult. The Tribunal is not an inviting forum for residents and the proprietor can be unreasonable. It’s a disadvantage to the residents to use ‘reasonable’, it’s like “how do I determine what reasonable is when people have never been reasonable to me?”’<sup>43</sup>*

The concept of ‘reasonable’ is not unique to the Act. Section 63(1) of the *Residential Tenancies Act 2010*, for instance, states that a landlord has a general obligation to provide and maintain the premises in a reasonable state of repair. The use of the word indicates an objective test is to be applied, following the common law principle, so that somewhat different interpretations of “reasonable” might apply in circumstances that can be distinguished on the facts. Notwithstanding the confusion demonstrated above, it is easy to envisage problems arising from applying an objective test in the boarding house Occupancy Principles context. The potential for different and unpredictable interpretations acts as a further disincentive for occupants to pursue their rights in NCAT.

When TUNSW proposed the inclusion of Occupancy Principles as part of a comprehensive package for the reform of the marginal rental sector,<sup>44</sup> we considered its application to the boarding house sector in addition to a range of other accommodation types that are not otherwise covered by renting laws in New South Wales. The use of the word “reasonable” in a set of high-level principles that could be adapted to suit the particular needs of a range of contexts is still something we believe has merit, but for such a framework to have value for generally vulnerable residents of marginal rental accommodation further work is required. Predictable and enforceable standards need to be established through the development of case law as the Tribunal interprets and applies the law in a variety of circumstances, and through the publication of a range of standard form agreements that can be applied to each sub-sector.

As we have discussed, the boarding house sector is itself complex and changeable, and includes a diversity of accommodation types. Using the word “reasonable” is conceptually sound if we consider the Occupancy Principles in the kinds of terms we have outlined above – a high level framework under which more specific standards can be determined and applied to agreements for particular types of boarding house, but this has

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<sup>43</sup> Interview with boarding house resident, Sydney Inner West region, August 2017

<sup>44</sup> Tenants’ Union of NSW, *Policy paper: reforming the marginal rental sector*, <<https://www.tenants.org.au/tu/policy-paper-reforming-marginal-renting>>, accessed 31 January 2018

not occurred. We note the publication by Fair Trading of a “model agreement” that attempts to clarify specific rights and obligations that should apply to agreements under the Occupancy Principles.<sup>45</sup> However, this is rarely used and residents seem largely unaware of it. The challenges of interpreting the word “reasonable” remain a problem for both residents and advocates alike, and presumably for proprietors.

Further education around the Act and the Occupancy Principles, as well as law reform designed to motivate application to NCAT for determination of disputes, may assist in resolving the apparent confusion as to the application of the reasonableness test.

#### **Recommendations:**

- The Act should create standard form boarding house agreements for use in a range of key boarding house types, and mandate their use.

### **Structural issues around compliance**

The Act aims to provide an appropriate regulatory framework for the delivery of quality services to residents of boarding houses. In the context of general boarding houses the Act uses a registration system to identify registrable boarding houses and grants power to local councils as enforcement bodies.

The Act requires the Fair Trading Commissioner to keep a centralised register of registrable boarding houses across NSW. The register is administered by NSW Fair Trading and provides the following as publically accessible information:

- The name and address of the boarding house
- The boarding house proprietor
- Whether the boarding house is a general boarding house or an assisted boarding house
- The local council areas in which the boarding house is located.<sup>46</sup>

Proprietors are required to self-register a boarding house within 28 days of commencing operation as a boarding house and pay a one off fee of \$100. Proprietors who do not comply with the registration requirement are guilty of an offence and liable to pay a maximum penalty equivalent to 100 penalty

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<sup>45</sup> Standard Occupancy Agreement, Fair Trading NSW  
<[http://www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/Tenants\\_and\\_home\\_owners/Standard\\_form\\_occupancy\\_agreement.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/Tenants_and_home_owners/Standard_form_occupancy_agreement.pdf), accessed 30 January 2018

<sup>46</sup> The boarding house register is able to be searched via NSW Fair Trading’s website:  
<http://parkspr.fairtrading.nsw.gov.au/BoardingHouse.aspx>, accessed 30 January 2018.

units (\$11,000). Proprietors must also provide an Annual Return to Fair Trading NSW, updating registration details.

Following registration the Act requires an initial compliance investigation to be carried out by the appropriate council within the first 12 months of operation, to ensure that the property complies with requirements under the *Local Government Act* (1993) (LGA) and the *Environmental Planning and Assessment Act* (1979) (EPA).

When conducting the compliance check, councils are encouraged to give consideration to the standards set out in the *Local Government (General) Regulation* (1995) and the *Public Health Regulation* (2012) and to adopt their own policies and programs around boarding house inspections. Enforcing registration and regulatory compliance is the responsibility of local government. Any penalties for non-compliance are paid into the NSW Treasury.

Regulation of the sector is important, but there are a number of issues with the register that are preventing it from functioning at its optimum level. Additionally, local councils are being insufficiently resourced to monitor and enforce compliance with the requirements of registration.

### ***Problems with the Register***

The Register does not appear to be operating as well as it could be. Advocacy services and compliance officers in local councils have raised serious issues, including that it is not a complete list of registrable properties, is often inaccurate and is very difficult to use. We also know that residents rarely, if ever, use the register themselves. This is because they do not know it exists, they may not have access to the Internet, or they have their own established channels of finding boarding house accommodation.

The consensus appears to be that the register is of limited value as it currently operates, except for the purposes of double-checking information already held in organisations' internal databases and looking up the details of proprietors when making an application to NCAT.

If the Register is to be effective as a vehicle to facilitate the delivery of quality services to residents, there needs to be considerable improvement around the key areas of registration, accuracy of information and usability.



## ***Proprietors failing to register***

Many proprietors still remain unregistered. Newtown Neighbourhood Centre, which maintains its own internal register of boarding houses, reports that up to 50% of known, mostly traditional, boarding houses across inner Sydney are not registered. From our own legal practice we believe it is possible that the number of unregistered boarding houses may also be higher in the Newcastle region due to high numbers of small suburban private boarding houses providing accommodation to the student market.

The TUNSW conducted research in 2014 assessing compliance in the room-share sector which sits across both the student housing and suburban dwelling types. This snapshot of the sector displayed an extremely low rate of registration – a mere 2% of properties judged to be likely to be registrable.<sup>47</sup>

There are many reported reasons why proprietors are not registering. Information suggests some may be deliberately operating outside of LGA or EPA guidelines. Such proprietors might avoid advertising as boarding houses:

*What we are seeing are some proprietors trying to get around the boarding houses Act and registration by giving residents tenancy agreements instead of boarding agreements. They will sign up 6 unrelated residents on one residential tenancy agreement to try to get out of the Act or have each resident on a separate tenancy agreement, but in reality the EPA still applies. So the residents actually are covered by the EPA requirements around fire safety and building compliance as well as having tenancy rights. The only issue is that we don't know the premises until they are reported to us, so until then we don't do the EPA and Development Application (DA) checks.<sup>48</sup>*

Other proprietors may be complying with the regulatory requirements, but have deliberately decided not to register to avoid Government scrutiny and 'red tape'. This is more often the case with older established boarding houses with elderly proprietors. These proprietors usually have established ways of operating and are resistant to change. It is noted that compliance officers reported that the older unregistered boarding houses are generally well run and do not, for their purposes, pose any further particular concerns in terms of compliance.

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<sup>47</sup> Tenants' Union of NSW, "Registrable boarding houses and the roomshare market", 2014, [https://files.tenants.org.au/policy/RBH\\_roomshare\\_TU.pdf](https://files.tenants.org.au/policy/RBH_roomshare_TU.pdf), accessed 31 January 2018

<sup>48</sup> Interview with local council worker, August 2017

A third reason why proprietors may not be registering is confusion. There are indications that at least some proprietors believe they do not need to register if they have council DA approval.

*I ran an education session for proprietors of boarding houses. At the end of the session one of the boarding house proprietors said to me 'Do I have to register or not?' This was 5 years after the Act.<sup>49</sup>*

All properties should be registered to ensure regulatory compliance as standard. We are particularly concerned about 'dodgy' smaller suburban operators who are only coming to light when complaints are made to local councils:

*One case where we had to shut a place down was where it was a four-bedroom property that was converted to 12 bedrooms. There was not sufficient DA approval – the owners had got approval to construct a large family room at the back but not subdivide it. It was not compliant in terms of fire safety, so we had to issue a notice to cease use and refer the residents to the local Tenants Advice and Advocacy Service.<sup>50</sup>*

Although it is noted that there is already public information available,<sup>51</sup> the NSW Government needs to commit to fund further public education around the registration scheme so that potential residents, current residents, their advocates, proprietors and potential proprietors all understand the laws around the operation of registrable boarding houses. Proprietors should be encouraged to register in compliance with the law, and resources should be allocated to local councils to ensure new listings and existing listing updates represent accurate information.

The current maximum penalty for failing to register a registrable boarding house is \$11,000. Our interviews with council compliance officers indicate it is unlikely that proprietors will be identified, let alone fined this amount for failing to register. Resources should be provided to local councils to facilitate swift action where a registrable boarding house is identified that has failed to register, and this could be achieved by ensuring some or all of

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<sup>49</sup> Interview with local council worker, August 2017

<sup>50</sup> Interview with local council worker, August 2017

<sup>51</sup> For instance, public information has been provided by the Tenants' Union of NSW under the Boarding Houses Education Project in 2014, including a 'business card', a dedicated boarding house phone advice hotline, the 'OnBoard' Ebulletin, brochures and posters and an updated chapter in the Tenants' Rights Manual, as well as training sessions for staff of local homelessness agencies, legal and medical professionals, council staff and tenants advice and advocacy service staff.

the revenue raised through enforcement activity is distributed back to the councils carrying out enforcement activity.<sup>52</sup>

**Recommendations:**

- The NSW Government should consider enabling local governments to:
  - o investigate whether a property is a registrable boarding house;
  - o register unregistered registrable boarding houses;
  - o require a boarding house to pay the registration fee within a reasonable time frame following registration; and,
  - o receive the amount payable under applicable penalties.

***Inaccuracies within the Register***

There are also no guarantees that the information recorded on the Register is accurate or regularly updated. We do not know whether this is the fault of proprietors, or whether there are processing or administrative issues internal to the register itself. Given that the main reason residents and advocates appear to use the register is to obtain contact details of the proprietor, it is vital that the details are correct and up to date.

Resources need to be invested into educating proprietors about the importance of completing the annual return to Fair Trading NSW. Resources may also have to be provided to Fair Trading NSW to process the annual returns and to review current listings for completeness. An alternative may be for local councils to take on a shared administrative role to keep the register accurate and up to date. This would need to be balanced by resources constraints - this may be covered by a revised enforcement regime.

**Recommendations:**

- The NSW Government should consider equipping local governments with the ability to:
  - o update listings in the Register which are inaccurate or out-of-date and,
  - o receive the amount payable under applicable penalty notices.

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<sup>52</sup> Dalton, T., Pawson, H. and Hulse, K. *Rooming house futures: governing for growth, fairness and transparency*, AHURI Final Report No. 245, Australian Housing and Urban Research Institute Limited, Melbourne, 2015, <https://www.ahuri.edu.au/research/final-reports/245>, accessed 31 January 2018

## ***Usability***

Compliance officers advise they are expected to manually review the Register on a weekly basis to detect any changes, which have been processed by Fair Trading NSW. This manual checking process involves scrutinising the Register to see whether there are any new listings or updates to previous listing.

The process is extremely cumbersome and time consuming. Compliance officers have expressed frustration that Fair Trading NSW do not provide notifications directly to councils of new listings as they are entered onto the Register, and advise that the manual checking system was originally presented to them as a short-term measure until a more effective system could be developed. Compliance officers try to complete manual checking on a weekly basis, but report this is often not possible due to a lack of resources. We understand Fair Trading is in the process of reviewing and improving all the registers it is responsible for.

Compliance officers also express frustration at the limited amount of information they can access on listed properties; for example, they are unable to access the date of registration. This is pointed out as a major deficiency since councils need to be aware of the limitation period for an initial compliance check.

At least one council has requested increased access to the information held by the Commissioner on the Register, and was provided with an undertaking that their request would be acted on.

Greater consultation between Fair Trading NSW and local councils is needed to assess how the register is working with a view to improving efficiency and increasing council access to relevant data. We would hope that the process of identifying new listings would be as simple as possible so that the efforts of compliance officers could be focused on compliance.

### **Recommendations:**

- The NSW Government should act to ensure councils are able to access all information held in the register.

## ***Compliance***

Councils have also struggled to comply with their enforcement obligations under the Act. Councils are given the ability to issue orders for penalty notices for breaches of Part 2 of the Act, including a failure to register the

premises with NSW Fair Trading. These powers are in addition to the enforcement powers councils already have in regards to boarding houses under a variety of legislative instruments including the LGA and the EPA. Police officers are also empowered to issue penalty notices, and Fair Trading NSW has the ability to enforce penalties directly through the court system. There have been no reported instances of either form of compliance action occurring.<sup>53</sup>

Despite being given substantial regulatory enforcement responsibilities under the Act, local councils were not given additional resources to manage increased workload. Each of the councils interviewed had compliance teams of less than five staff. Establishing that a property is a registrable boarding house, can take years of evidence gathering, while the post-registration compliance check requires at least two specialist workers council and four separate checks – a background check, an approved plans check, an Environmental health check and a fire inspection.

We understand that most councils are completing initial compliance checks on registered premises within the required 12 months, albeit with difficulty. One council had insufficient resourcing to do initial compliance checks, and was only conducting checks on premises, as complaints were received- obviously a less than ideal situation.

*'We need to cover a range of compliance issues, not just boarding houses. We look at unauthorised land uses, building works and swimming pool compliance. The regulations around swimming pools came out at the same time as the Act. We can't deal with the 12-month checks...there is no additional funding'.<sup>54</sup>*

It is clear that councils want to be able to effectively enforce compliance across the boarding house sector, but are ill equipped to do so. All compliance officers interviewed expressed strong desire to ensure that residents lived in places that were safe and habitable, and were frustrated by the lack of resources available to achieve this.

Weak penalties for compliance breaches also hinder councils' efforts. We understand that when councils raise penalties against proprietors under the LGA, the Act or the EPA, a proportion of proprietors will pay the penalties and continue to operate in breach.

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<sup>53</sup> Summary of compliance and enforcement results are available from the Fair Trading website at [http://www.fairtrading.nsw.gov.au/ftw/About\\_us/Data\\_and\\_statistics/Compliance\\_and\\_enforcement\\_data/Summary\\_of\\_compliance\\_and\\_enforcement\\_results.page](http://www.fairtrading.nsw.gov.au/ftw/About_us/Data_and_statistics/Compliance_and_enforcement_data/Summary_of_compliance_and_enforcement_results.page), accessed 16 February 2018

<sup>54</sup> Interview with local council worker, August 2017

This may be because the cost of the penalty is extremely low in comparison to the income a proprietor can generate from operating in breach of their obligation to register. These proprietors are generally known across the sector.

*There is this one proprietor, he has 5 registered boarding houses and 1 we believe is not registered. Council are always taking him to NCAT for non-compliance. He doesn't care. He's getting land tax benefits, he's happy to pay the fines rather than comply. The fines are not onerous for him.*<sup>55</sup>

Whilst further research would be beneficial on this area, current penalties should be reviewed and increased so as to counteract any real or perceived financial benefit from operating in breach of the law.

Local councils carry a disproportionate amount of the regulatory enforcement 'weight' of the Act; and we would like to see a dialogue between Local and State Government regarding the redistribution of regulatory compliance duties between councils and Fair Trading NSW. If councils are to carry the burden of enforcing regulatory compliance across the board, this must be coupled with additional funding to accommodate the extra resources required and also with sufficient penalties to actually deter proprietors from doing the wrong thing.

## Conclusion

Any new law needs to be practically applied, tested and refined, and the *Boarding Houses Act 2012* should be seen as a work in progress. It has not achieved as much as could have been hoped for in its first five years.

Prior to the Act's commencement there were no clearly articulated rights for boarding house residents. Residents had limited legal remedies which often required pursuing convoluted legal channels to try to assert the most basic principles; many residents simply did not have the capacity to do this.

The Act provides the framework in which tangible rights may be accessed by residents for the first time, as well as a clear avenue for enforcement of these rights. Modest progress has been made in that residents are now able to recover their security deposits through NCAT. However further reform and community education is required if Occupancy Principles are to be made more useful.

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<sup>55</sup> Interview with local council worker, August 2017

Residents need to be able to apply to NCAT to assert any right without fear of retaliation from proprietors, in the form of either eviction or increased occupancy fees. This is critical. While a resident faces the risk of retaliatory eviction or an unreasonable occupation fee increase, the Act will be underused and many residents will continue to live in the kinds of conditions that prompted the regulation of the sector in the first place. Empowering the Tribunal to make orders on terminations and occupation fee increases would substantially reduce resident anxiety. A flow on effect of increasing access to NCAT will be the development of case law, which will clarify the Occupancy Principles.

At the same time, mechanisms for regulating the industry should be improved. The Register is not fulfilling its role as an instrument to facilitate regulatory compliance. Many proprietors have not registered and are invisible to local councils until issues arise. Further incentives need to be given to ensure that all proprietors register and funding needs to be invested in enforcing all aspects of compliance, administering the Register and community education.

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