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Submission

Reform of strata laws in New South Wales: consultation drafts

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Introduction

The Tenants' Union of New South Wales (TU) is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law and policy. And we are the resourcing body for the statewide network of Tenants' Advice and Advocacy Services (TAASs), who collectively handle around 30,00 questions and requests for assistance from tenants each year. This includes tenants in strata schemes.

Investors own more than half of the residential strata lots in New South Wales'.[1] It stands to reason that tenants occupy the majority of lots within the state's strata schemes, and have a particular interest in how strata schemes are managed. Tenants also have an interest in the redevelopment of strata schemes that will result in the termination of residential tenancy agreements. The TU's submissions are made with these concerns in mind.

Our focus is on those parts of the consultation draft Strata Schemes Management Bill 2015 and Strata Schemes Development Bill 2015 that relate to relations between occupiers and owners of lots, as well as occupiers and owners corporations. We do not intend to comment on the consultation drafts in their entirety, or submit a particular view as to the overall balance of rights and obligations the draft bills propose to achieve.

There are six key areas of such interest in the proposed Strata Schemes Management Bill 2015, and two in the proposed Strata Schemes Development Bill 2015.

Strata Schemes Management Bill 2015

1. Tenant participation in strata scheme management
2. By-laws
3. Repairs and maintenance
4. Measures to prevent overcrowding
5. Dealing with abandoned goods
6. Dispute resolution

Strata Schemes Development Bill 2015

[1] See City Futures NSW 'Strata Data 2013 Residential Strata in NSW A summary analysis'

1. Strata renewal
2. Effects of strata scheme renewal plans on residential tenancy agreements

Draft Strata Schemes Management Bill 2015

1. Tenant participation in strata scheme management

The draft bill proposes a number of mechanisms that would allow tenants greater participation in the management of strata schemes through improved access to owners corporations and attendance at some meetings. The TU is supportive of these, although a modern strata management law could go a great deal further than what is proposed.

Attendance and observation of owners corporation meetings

Clause 253 will require the lessor of a lot that is leased (or sub-lessor of a lot that is sub-leased; or assignor of a lot that is assigned) to notify the owners corporation of certain particulars, including the name of the tenant. Schedule 1 of the draft bill then includes clause 11 that will require a copy of the agenda for an owners corporation general meeting to a tenant who has been properly notified to the owners corporation, and clause 21 that will allow such tenants to attend and observe general meetings.

While tenants will have no general right of participation beyond mere observation, this level of access will ensure tenants are put on notice when discussions that are of interest to them will occur. Most importantly, tenants will have the opportunity to directly observe such discussions, rather than rely on second hand information. Tenants will be equipped to contribute to such discussions indirectly – being able to identify appropriate members of their owners corporation with whom matters may be raised.

To give the greatest effect to these provisions, clause 253 should be amended to ensure there is no doubt a 'lease' includes a residential tenancy agreement, and the definition of *tenant* at clause 4 should expressly include a person occupying a lot subject to an agreement under the *Residential Tenancies Act 2010*.

Representation on strata committees

Clause 33 will allow the tenants of a strata scheme, in which there are tenants for at least half the lots in the scheme, to nominate a tenant representative for appointment on an owners corporation's strata committee. The provision ensures a tenant representative will have no substantive power in a strata committee, as it prevents them from voting, holding office or acting as an office-bearer, or being counted towards a quorum. It also allows a strata committee to exclude a tenant representative from a meeting during discussions of a financial concern.

Nevertheless, a tenant representative may provide useful advice, information and insight to a strata committee on how its decisions impact upon tenants residing within the scheme. The benefits of such perspective should be available to all strata schemes, not simply those where tenants occupy half the lots. Clause 33(1) should be removed. There is a further concern that, were clause

33(1) to be retained, the bill provides no process for establishing when the 'tenant representation' provisions come into operation in schemes where occupation fluctuates between owners and tenants.

Schedule 2 of the draft bill sets out meeting procedures for strata committees. Included at clause 14 is a prohibition on a committee member moving a motion they cannot themselves vote on, which will exclude tenant representatives from moving any motion at all. Thus, while a tenant representative may offer perspective in relation to the motions and concerns of others, they will be unable to convey tenant sentiment or preference to the committee as directly as possible. We recommend an amendment to allow a tenant representative to move a motion on any matter for which they are not excluded. This would allow a more involved and effective role for tenant representatives, and because the power to move a motion alone does not produce a substantive right as to governance, it would not disturb the balance of committee powers as proposed in the draft bill.

Proxy votes

We note, with approval, the limits on the number of proxy votes that may be held by a person, at clause 26(7) of schedule 1 of the draft bill. This will appropriately restrict the potential voting power of members of an owners corporation in which a number of owners are absentee investors.

The management of strata schemes can only benefit from a diversity of input from parties with an interest in the success of the scheme, and whose concerns arise more from day to day matters than anticipated return on investment. We note clause 21 of schedule 1 contemplates the holding of duly appointed proxy votes by tenants.

We submit that the inclusion of tenants with established, ongoing interests in strata schemes could be included with provisions relating to the appointment of proxies. This could be facilitated by placing a minimum requirement on a lot owner's participation in the management of a strata scheme, such as attendance at annual general meetings. Owners who fail to two attend two consecutive annual general meetings could be required to attend the following meeting or be directed to appoint a proxy. Where the lot has been continuously occupied for 12 months or more, a preference could be given to asking the tenant to accept that appointment. Tenants' proxies could be limited in such ways as are already proposed at clause 21 of schedule 1, at the discretion of the lot owner.

2. By-laws

For tenants, by-laws are perhaps the most significant aspect of a strata management scheme. In the absence of provisions allowing direct participation in a scheme – such as those discussed above – a tenant's interaction with a strata scheme will usually be in relation to its by-laws. The draft bill proposes some changes to the establishment, amendment and enforcement of by-laws that will be of particular interest to tenants.

Clause 136 will allow by-laws to be made 'in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme'. This is in

contrast to the corresponding provision in the current law,[2] which sets out a number of specific matters for which by-laws can be made – including safety and security measures, the keeping of pets, parking, floor coverings, and behaviour – although the list is not limiting.

Clause 138 proposes that model by-laws may be prescribed by the regulations, and clause 139 will set out certain restrictions on by-laws, but even so a series of by-law innovations is the likely result of the proposed new approach. Clause 147 will increase penalties for failing to comply with by-laws, and make them payable to the owners corporation, so it is especially important that by-laws can be easily modified or challenged where appropriate.

Clauses 148, 149 & 150 of the draft bill will provide the mechanism for changing or overturning a by-law by application to the Tribunal. But in each instance only a lot owner may make such an application. An occupier subject to a residential tenancy agreement would need to rely on their landlord making an application to the Tribunal in relation to a by-law that is, for instance, harsh or oppressive in the opinion of the tenant. In many cases, a landlord's failure to do this could put them in breach of their residential tenancy agreement. This would be on the grounds of interference with the tenant's peace, comfort and privacy, pursuant to section 50 of the *Residential Tenancies Act 2010*. In such instances the tenant could seek an order of the Tribunal requiring the landlord to take such steps as are required to remedy the breach.[3]

Thus, where a landlord will not champion their tenant's wish to challenge a by-law in the Tribunal, it may be open to the tenant to apply to the Tribunal for an order that would have the effect of requiring the landlord to apply to the Tribunal against the owners corporation. Not only is this an extremely cumbersome process for all concerned, it has the effect of creating unnecessary disputes between landlords and tenants. At the same time, it brings landlords into disputes between tenants and owners corporations in a way that may be unhelpful.

The TU submits that, in relation to proposed clauses 148, 149 & 150, application to the Tribunal should be open to any occupier of a strata lot who may be affected by the by-law in question.

3. Repairs and maintenance

Repairs and maintenance is another issue of concern for tenants in strata schemes. Disagreements about who will pay to rectify building defects in new strata schemes can be frustrating for tenants, and strata schemes can limit landlords' abilities to meet their ongoing maintenance and repair obligations under residential tenancy agreements. Proposed improvements to both these areas of concern will be of benefit to tenants.

Part 11, Division 3 will establish 'building bonds' – an amount to be set aside by developers of new strata schemes, to pay for rectifying defective building work after completion – as well as a process for the disbursement of these funds if required. This will be a comfort to tenants in newly developed strata schemes as problems arising from building defects will be more easily and

[2] *Strata Schemes Management Act 1996* (NSW), s43
[3] *Residential Tenancies Act 2010* (NSW), s187(1)(e)

promptly solved than under the current law. It remains to be seen whether the proposed bonds, being set at 2% of the contract price for the building work, will be sufficient where building defects are substantial, but the proposed concept and structure of 'building bonds' appears sound.

The *Residential Tenancies Act 2010* allows landlords to avoid being in breach of tenancy agreements where they have employed 'reasonable diligence' to effect repairs.[4] This means a landlord can be prevented from meeting a repair obligation under a residential tenancy agreement because, for instance, they are not empowered by the owners corporation to carry out the necessary work; and where they can show they are prevented from carrying out work without further regard to the owners corporation, or the rules of the strata scheme, they may argue they have met their repair obligation under a residential tenancy agreement.

Thus, tenants in strata schemes can remain without a direct remedy where premises are in poor repair. Proposals in the draft bill will improve this in some cases. Clause 109 will allow owners to carry out minor cosmetic work – including installing or replacing handrails, filling minor holes and cracks in internal walls, and installing or replacing blinds and curtains – without the approval of the owners corporation. Clause 110 will make it easier for owners to obtain approval for minor renovations, such as making changes to kitchens and bathrooms, changing recessed light fittings, installing or replacing hard floors, or work related to wiring, cabling, and the placement of power outlets.

But there will still be cases where tenants in strata schemes are unable to obtain repairs. Tenants have no formal relationship with owners corporations, and will remain reliant on landlords' actions when approval for a repair is needed. This will be subject to landlords' requirement to employ 'reasonable diligence' to effect repairs, as discussed above. We note clause 106(5) will allow owners of strata lots to recover damages from owners corporations where a failure to repair causes a loss. We submit that this should be broadly available to all occupiers of lots, to ensure that owners corporations have regard to the repairs and maintenance needs of all who live within a strata scheme, as well as its owners.

4. Measures to prevent overcrowding

The draft bill proposes a number of measures to tackle overcrowding in strata schemes. These will primarily affect tenants and people who rent but do not have rights under the *Residential Tenancies Act 2010* because of the type of rental agreement they have. The TU accepts the need to address overcrowding in strata schemes for a range of reasons, but is mindful that overcrowding is very often a symptom of broader dysfunction across the housing system – most notably the lack of affordable housing in the private rental market and ever-increasing restrictions on eligibility for social housing assistance.

[4] *Residential Tenancies Act 2010* (NSW), s 65

Penalties for overcrowding

Clause 137 will allow strata schemes to enact a by-law to limit the number of adults who may reside in a lot, prohibiting a limit of fewer than 2 adults per bedroom. Clause 139(4) will prevent by-laws restricting the number of children who may occupy a lot. These are appropriate provisions.

Clause 147 will allow an owners corporation to pursue the contravention of such a by-law by applying to the Tribunal for a 'civil penalty' to be applied to the breaching party. For a breach of a by-law that limits the number of occupants in a strata lot, the civil penalty will be 50 penalty units (currently $5,500) for a first occasion, and 100 penalty units (currently $11,000) for any subsequent occasion within 12 months. These are significant penalties. They may lead to injustice for vulnerable renters if they are to apply to 'any person' as the draft bill proposes, without limiting unscrupulous landlords' and head tenants' ability to exploit them.

As we have discussed above, clause 253 of the draft bill will require the lessor of a lot that is leased (or sub-lessor of a lot that is sub-leased; or assignor of a lot that is assigned) to provide the owners corporation with details of the tenant. It stands to reason that an owners corporation will make use of these records when determining whether a breach of a section 137 by-law has occurred, and whether the person or people occupying a lot do so as owners, tenants, sub-tenants or lodgers. Thus it should be possible to ensure that a 'civil penalty' can be applied to a person who has facilitated a breach of a section 137 by-law, rather than a vulnerable renter.

Civil penalties in relation to overcrowding should only apply to those who possess a transferable interest in a strata lot, and transfer that interest to more people than are allowed by a section 137 by-law. Vulnerable renters who occupy overcrowded premises on the basis of a mere license should not be subject to such penalties. On this basis, the proposed provisions at clause 147 should apply more narrowly to 'a person *with an identifiable interest in the strata lot, who has caused or permitted the breach*' rather than to simply 'a person'.

Denying access to occupiers of strata lots

The draft bill does not address an emerging problem in strata management practice: the cancellation of occupiers' electronic key-cards for entry to the strata scheme by agents of the owners corporation. The effect is to prevent occupiers from accessing their lots. We understand that in some cases the agents of the owners corporation will offer to issue a new key-card to restore access, but only upon payment of a substantial fee. Redfern Legal Centre has received numerous complaints about this practice over recent months. The introduction of clause 253 may facilitate some strata schemes making more systemic use of this practice, rather than pursuing civil penalties.

We understand there is no effective remedy for tenants who are locked out of their lots in this way. An occupier who is prevented from accessing their lot may have an action in trespass, but such action would be costly and time consuming.

We recommend Part 6 of the bill include a provision to the following effect:

- *The owners corporation (or its agent) must not change locks or security codes or otherwise prevent occupiers from having access to their lots, except in the event of an emergency.*
- *Where the owners corporation (or its agent) changes locks or security codes or otherwise prevents an occupier from having access to their lot, the owners corporation must, upon request of their occupier, immediately and without charge provide a key or code or otherwise restore access to the occupier.*

5. Dealing with abandoned goods

Clause 125 of draft bill will provide that matters pertaining to the disposal of abandoned goods will be dealt with in the regulations. These provisions will be of particular importance for tenants, as the circumstances in which they cease to occupy or have access to strata scheme lots will vary considerably in comparison to those of owners. They should be drafted so as to ensure consistency between the *Strata Schemes Management Act 2015* and the provisions at Part 6, Division 2 of the *Residential Tenancies Act 2010*. Most importantly, tenants whose goods are wrongfully disposed of by an owners corporation should have a direct remedy against them. This should be a matter for legislation, not regulation.

6. Dispute resolution

Disputes generally

The draft bill will simplify the manner in which disputes among strata scheme occupants and owners corporations can be raised and resolved, by streamlining the process in the majority of cases. But for tenants in strata schemes, where disputes most commonly involve the establishment or enforcement of by-laws, the most significant issues will be whether they can bring an action against a by-law and the manner in which they may be pursued for breaching a by-law.

We have noted above, in our discussion about by-laws generally, the process by which a by-law may be changed or overturned under proposed clauses 148, 149 & 150. In each instance only a lot owner may make an application to the Tribunal in relation to a b-law. An occupier subject to a residential tenancy agreement would need to rely on their landlord making an application to the Tribunal in relation to a by-law that is, for instance, harsh or oppressive to the tenant. As we have discussed above, where a landlord does not pursue such a matter on behalf of a tenant, a breach of their residential tenancy agreement may arise. To avoid unnecessary disputes between landlords and tenants, the TU submits that in relation to proposed clauses 148, 149 & 150, application to the Tribunal should be open to any occupier of a strata lot who may be affected by the by-law in question.

We have also noted above, in our discussion about preventing overcrowding, that proposed clause 147 will allow an owners corporation to pursue the contravention of such a by-law by applying to the Tribunal for a 'civil penalty' to be applied to the breaching party. Penalties will range from $1,100 to $11,000 depending on the nature of the by-law, and whether it is a first or subsequent breach.

We note that penalties may be payable to owners corporations, which may act as an incentive for an owners corporation to pursue a breach of a by-law with more vigour than is the case under the current law. Owners corporations are often perceived to pursue enforcement of by-laws against tenants more frequently than owners. It should be noted that a penalty of between $1,100 and $11,000 would, in many cases, have some bearing on the viability of a residential tenancy agreement. Owners of lots may have some interest in ensuring their tenants are not unreasonably pursued over breaches of by-laws that would not be pursued against occupiers who also happen to own the lot.

Disputes about keeping pets

Clause 157 will allow an owner or occupier to apply to the Tribunal for an order declaring they may keep an animal. But the inclusion of occupier in this provision is contingent on the occupier having the owner's consent.

There is no requirement in the *Residential Tenancies Act 2010* for a tenant to obtain the landlord's consent before keeping an animal, and this is appropriate. Tenants are liable for any damage caused or nuisance created, including by their pets. This can be easily managed with reference to residential tenancy agreements. As such, it should be a matter of personal choice – and personal responsibility – whether or not to keep an animal. The requirement for an occupier of a lot to have the consent of the owner before making an application to the Tribunal about keeping an animal should be removed.

Draft Strata Schemes Development Bill 2015

7. Strata renewal

Part 10 of the draft bill will provide a "strata renewal process for freehold strata schemes". Essentially, this will allow for the winding up of a strata scheme where a defined ***required level of support*** is achieved – that being at least 75% of owners of lots being in support of a strata renewal plan.

We note and support the submissions made by Shelter NSW on this point. There are many who have bought into strata schemes with the assumption that their housing would be secure and assured as a result. To lose that security based on the decisions of other owners in the strata scheme would be an injustice, particularly for those in older schemes where the ***market value*** may not provide enough to remain within the same locality. We support the call to retain the required level of support for a strata renewal plan at 100% of affected strata lot owners.

Alternatively, protections should be built in to strata renewal processes for existing lot owners who are older, or who own lots that are below median market values for their locality. Lot owners who are older than 55 years of age, or whose lots are worth less than ten per cent below the median value for their locality, and who purchased their lots under the existing rules should be able veto a strata renewal plan. We submit that such provisions would not prevent the development of strata renewal plans, but would provide more appropriate bargaining opportunities for vulnerable strata lot owners than if they were simply required to sell by a majority decision.

8. Effects of strata scheme renewal plan on residential tenancy agreements

The draft bill does not appear to consider the question of what happens to residential tenancy agreements when strata renewal plans are put into action.

Clauses 184 & 185 of the draft bill will, among other things, operate to transfer the rights and liabilities of an owners corporation to purchasers or developers, and cancel the folios for the lots in a strata scheme. Notwithstanding provisions that will ensure the termination of a lease of a lot does not affect a right or remedy a person may have under the lease, nothing in clauses 184 & 185 prevents a residential tenancy agreement that is for a fixed term to be terminated by its operation, or otherwise requires a residential tenancy agreement to be terminated by giving notice to the tenant in accordance with the *Residential Tenancies Act 2010*.

Where residential tenancy agreements in strata schemes are not terminated prior to an order relating to collective sale or redevelopment taking effect, they will terminate according to section 81(4)(a) of the *Residential Tenancies Act 2010* – by a person having superior title to that of the landlord becoming entitled to possession of the residential premises. These provisions will give rise to similar problems to those that lead to the introduction of 'mortgagee in possession' provisions in the residential tenancies legislation – that is, tenants being unexpectedly required to give vacant possession to purchasers or developers upon cancellation of folios for strata lots, lawfully, with minimal or no notice. Such a problem could be very easily avoided by amending section 122 of the *Residential Tenancies Act 2010* to make it apply to purchasers and developers in possession of a strata scheme that is subject to an order relating to collective sale or redevelopment, as well as to mortgagees in possession.