TENANTNEWS
Newsletter of the Tenants' Union of NSW ■ Number 93 June 2010

Boarders and lodgers still without safeguards

Elizabeth De Freitas
Legal Support Officer

Boarders and lodgers in New South Wales live in an unenviable position. They teeter precariously on the margins of the private rental sector, in often inadequate and insecure accommodation and with no legislated rights.

The *Residential Tenancies Act 1987*, which oversees the relationship between tenants and landlords in the NSW mainstream private rental sector, specifically excludes boarders and lodgers from its coverage.

This means that marginal renters, including occupants of boarding houses and student accommodation, and lodgers in private homes, are not afforded any protection other than that under common law.

The ostensible remedies available under common law are hard to access, time consuming and expensive. Boarders and lodgers, as some of the most economically and socially disadvantaged of renters, can rarely avail themselves of these remedies.

Along with Western Australia, New South Wales currently has no legislative safeguards for boarders and lodgers. What this means is that many landlords are not held to account for unfair evictions, substandard conditions or excessive rent increases.

The TU has made repeated submissions to NSW Fair Trading over the years, calling for the inclusion of boarders and lodgers in residential tenancies legislation. Despite this, the Residential Tenancies Bill currently being considered by the NSW Parliament excludes boarding and lodging arrangements and proposes to expand the definition of boarding and lodging to include:

- premises used as a backpackers hostel
- serviced apartments
- refuges or crisis accommodation
- agreements or arrangements under which persons occupy premises as a residence in return for or as part of remuneration for carrying out work in connection with the premises or for employment
- occupants in shared households without written residential tenancy agreements.

Photo by Patrycja Arvidssen

Alternative protection

It is time to redouble our efforts for New South Wales to introduce an alternative form of protection – legally binding 'occupancy agreements'.

The TU seeks to have common-law contracts replaced with

occupancy agreements in a form similar to that introduced in the Australian Capital Territory in 2004.

The National Association of Tenant Organisations (of which the TU is a member) and National Shelter have recently endorsed this idea in their report *A better lease on life – Improving Australian tenancy law*. It recommends that all states and territories "[i]mplement statutory schemes of enforceable agreements for all renters not covered by residential tenancies legislation".

In recognition of the diversity of boarding and lodging arrangements, the standards inherent in such occupancy agreements should be much less prescriptive than in mainstream residential tenancy legislation but would reflect the following nine principles:

The TU's four-point plan for reform of the marginal rental sector

- The introduction of occupancy agreements
- law reform to better regulate unlicensed boarding houses
- linking boarders and lodgers with services to support their participation in the community
- increased financial viability for the boarding house sector.

- written agreements and receipts
- reasonable cleanliness, security and state of repair
- quiet enjoyment
- rules of the premises set out
- reasonable access by the landlord at reasonable times only
- reasonable notices of rent increase
- termination with reasonable notice
- notice of termination on reasonable grounds only
- access to the Consumer, Trader and Tenancy Tribunal for occupancy disputes.

In the absence of such measures, boarders and lodgers in New South Wales will continue to be denied the most basic of rights afforded to other renters in the state and, to various degrees, to boarders and lodgers in almost every other state and territory.

It is time to put an end to the neglect of these most vulnerable of renters. ■

Case study

Our client was an African man living in a boarding house in Sydney's Inner West. His room had a lock but the caretaker had keys and could enter at any time. There were house rules and 'enforcement' meant eviction.

The caretaker was racist and targeted the non-white residents. He often made racist comments to our client – sometimes in front of other residents. One day, he casually mentioned that he was 'cleaning up the place'.

During this time our client got mugged and lost his ID and bank card. This caused problems with Centrelink and he fell into rent arrears. This proved the perfect opportunity for the caretaker to evict him and he was given a notice of termination allowing him two days to vacate the property.

On the day our client was required to leave, the caretaker called the police. Our service was contacted. We negotiated with the police and the caretaker for more time for our client to vacate but a few days later, he came home to find his room empty. He found some of his belongings at the back of the boarding house and many others were missing. He was too frightened to confront the caretaker and so moved into temporary emergency accommodation.

The caretaker claimed that our client's rent arrears was greater than it actually was and he was claiming the cost of storing our client's goods. He refused to return the goods until our client payed all of the alleged arrears and the storage costs.

We made a complaint to the Anti-Discrimination Board (ADB) on grounds of racial discrimination and vilification. Conciliation was organised but the caretaker refused to participate.

Our client has since been able to find stable accommodation but not before alternatively sleeping rough, staying with acquaintances or staying in emergency accommodation.

He is yet to recover his belongings. The ADB complaint has been referred to a solicitor.

Alex Azarov,
Inner West Tenants Service

Deceased estates: Park owners try it on

Paul Smyth, Residential Parks Legal Officer

Following the death of a resident, some park owners have taken action under residential tenancies law seeking to end the resident's site agreement. The TU and the Park and Village Service (PAVS) argue that a site agreement cannot be ended this way. Residential parks law applies instead.

What's going on?

Park owners have been serving executors of deceased estates with notices of termination under the *Residential Tenancies Act 1987* (RTA) and applying to the Consumer, Trader and Tenancy Tribunal for orders for termination of the tenancy agreement and vacant possession of premises.

The basic submission of the park owner in these cases is that the matter is covered by the RTA – rather than the *Residential Parks Act 1998* (RPA) – because the executor does not personally live in the residential premises as their principal place of residence.

If this was the case it would result in significant detriment to the deceased estate and a depletion of the assets for distribution by the executor. The executor would have little option but to either sell the residence to the park owner, usually for much less than full market value, or relocate the dwelling elsewhere at significant cost.

By issuing a notice of termination, under the RTA some park owners are seeking to make a quick profit and avoid paying compensation for relocation under the RPA.

We say

An executor is placed in the position of "resident" through the definition given in the *Residential Parks Act 1998* (RPA). Resident means "the person who has the right to occupy residential premises under a residential tenancy agreement, and includes the person's heirs, executors, administrators and assigns."

The RPA applies to residential tenancy agreements under which the premises consists of a residential site, or a moveable dwelling on a residential site, and the resident occupies the premises as their principal place of residence. There merely has to be an intention to reside – there is no ongoing obligation to reside in the residence.

In a September 2009 Supreme Court case, *Cardiacos v Cooper Consulting & Construction Services (Aust) Pty Ltd*, the judge held that "residence does not require continued physical presence". Although "resident" is clearly defined in section 3 of RPA, not all cases in the CTTT have been decided in favour of the executor.

Many absurd, irrational scenarios could arise if an executor was required to physically reside in the residential premises. While executors can be family members or friends, they can also be other

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The TU recently acted for the executor of a deceased estate of a park resident in the Consumer, Trader and Tenancy Tribunal.

After the death of the resident of 16 years in a residential park, his daughter and executor attempted to sell the dwelling, a manufactured home, on-site.

The park owner served her with a 'no grounds' notice of termination pursuant to the RTA and applied to the Tenancy Division of the tribunal for orders of termination and vacant possession.

In the tribunal, the park owner argued that, as the executor did not live in the dwelling, the RPA did not apply. The tribunal dismissed the park owner's application and found that:

- the daughter, as executor of the estate, meets the legal definition of "resident" – the RPA continues to apply after the death of the resident, the non-occupation of the premises by the executor does not remove the residential tenancy agreement from the provisions of the RPA
- the resident's agreement with the park owner is a residential site agreement – as such the park owner had to specify appropriate grounds in the notice of termination
- the executor has the legal right to occupy, the right to assign or sublet and/or the right to sell.

people (such as a lawyer) or legal entities (such as the NSW Trustee and Guardian).

The death of a resident does not bring a residential site agreement to an end – it can only come to an end as a result of the termination provisions in section 95 of the RPA.

It is the view of both the TU and PAVS that residential site agreements are covered by the RPA. An executor cannot 'fall out' of coverage of the RPA and 'fall in' to coverage of the RTA and retain the benefits and detriments of a residential site agreement.

While the definition of 'resident' in the RPA includes a person's executors, it could never have been the intention of the legislature to require them to personally reside in the premises – given that this could be a lawyer or legal entity, as noted above.

In keeping with the purpose of the RPA, the interpretation intended is that a resident has a right to occupy but need not physically reside at the premises. Legal possession (which the resident has not parted with) and actual physical possession clearly need to be distinguished.

If an executor wants to sell the dwelling and assign the residential tenancy agreement to a purchaser, provided that on-site sale is permitted, the park owner cannot refuse the sale, and furthermore, cannot unreasonably refuse the assignment (under section 41 of the RPA). ■

Residential Tenancies Bill before parliament

The Minister for Fair Trading, Virginia Judge, introduced the Residential Tenancies Bill 2010 into the NSW Parliament on 2 June 2010.

If enacted, the Bill would replace the current *Residential Tenancies Act 1987*.

The TU believes the Bill would generally improve renting laws in New South Wales. These improvements would include:

- effective regulation of tenant databases
- options for survivors of domestic violence to change their tenancy arrangements
- 'fee-free' methods for paying rent
- longer notice periods for 'no-grounds' termination notices.

Disappointingly, the Bill would still allow landlords to give termination notices without grounds, and would require the Consumer, Trader and Tenancy Tribunal to terminate tenancies where landlords give these notices.

In our next issue, the TU will report in detail on the outcomes of the Bill.

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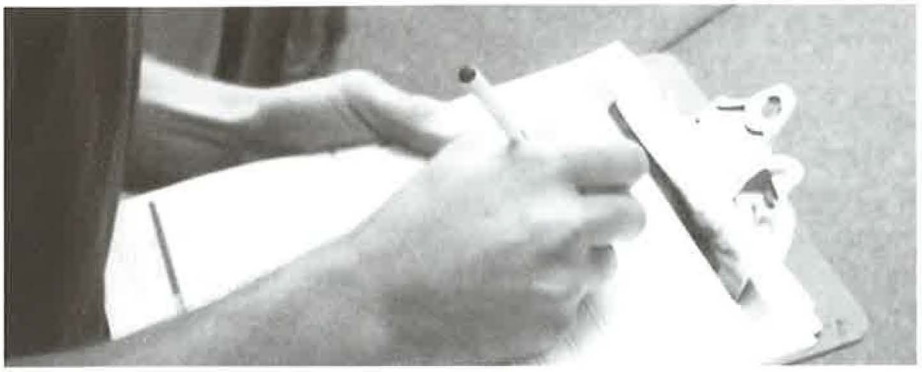
Registration for CHPs

Ned Cutcher, Policy Officer

Recent amendments to the *Housing Act 2001*, and the Housing Regulation 2009 set out a new system for NSW community housing providers (CHPs).



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In order to receive government assistance (e.g. funding or housing stock) CHPs must register with the Registrar of Community Housing.

CHPs will be registered in one of four classes: growth provider, housing provider, housing manager or small housing manager.

To register, CHPs must ensure they comply with the Regulatory Code for Community Housing Providers (schedule 1 of the Housing Regulation 2009). CHPs must satisfy the requirements of the code's eight performance areas.

1. Fairness and resident satisfaction – CHPs must use fair and transparent allocations processes, and maintain a level of resident satisfaction with the services they provide.

2. Sustainable tenancies and communities – CHPs must ensure relevant support is available to tenants who need it.

3. Asset management – CHPs must ensure their properties are well maintained.

4. Sound governance – CHPs must have appropriate governing bodies and sound operational procedures.

5. Standards of probity – CHPs must ensure their systems are designed to prevent corruption.

6. Protection of government investment – CHPs must be financially viable, and capable of delivering the services they are funded to provide.

7. Efficient and competitive delivery of community housing – CHPs must utilise their resources efficiently.

8. Development projects – CHPs that are classed as 'growth' or 'housing' providers must engage in appropriate and cost-effective housing development projects.

The role of the registrar

The registrar assists CHPs through the registration process and ensures compliance with the code. If a CHP fails to meet its obligations, the registrar can investigate and determine what action needs to be taken. Where issues cannot be resolved, a CHP could have their registration cancelled.

The code requires that CHPs' performance in many areas is "satisfactory in the opinion of the Registrar", so the registrar will play a crucial role in setting standards for CHPs.

What it means for tenants

The registrar invites comments and complaints about CHPs who do not comply with the code. The registrar has broad powers of investigation, including the power to inspect premises and records.

The registrar's function is not to assist with dispute resolution, but to investigate systemic bad practice in CHPs. For advice on disputes with your landlord, contact your local Tenants Advice and Advocacy Service. ■

Registrar of Community Housing

- phone 1800 330 940
- www.rch.nsw.gov.au

At what cost?

Jen Rignold

Housing NSW is very good at moving us out and moving us on, but doesn't do so well at cushioning the impact on our hearts. We who live in public housing are resilient and will survive being relocated, but I ask at what cost?

A house is made of bricks and mortar, but a home is something much greater, much more intangible. It is often referred to as love.

And it's true. To know the love that can exist for a home all you need to do is listen to those who are losing theirs: the emotion in their voices, the tears in their eyes and most importantly, the fear behind their eyes.

You cannot put a price on something intangible and make it a commodity because a home is love, memories, security, safety and so much more.

Residents who are being relocated have said to me "Where will I go? What will I do? My neighbours are my family. They are my support. I can't leave."

I felt for these people but I was an outsider. Even though they were my neighbours, I wasn't the one having to move. Until now. I am having to consider the impact on me of losing my home.

The words people say now hit deep in my heart, my soul. Words like loss and sadness.

Home. Home is where the heart is. My neighbours talk about feeling safe when they can close the door and shut out the rest of the world.

For a family, they will talk about the impact on their children. The timing of changing schools and how much disruption it is in their lives. There is fear for a young person to leave one friend behind and then have to replace them with another. A friend said to me it was like a betrayal of their friendship.

For an older person, it can seem just too hard. For me at 53 and with severe degenerative arthritis I am very much afraid the work involved with moving will cause the pain I suffer to be unbearable. I envy those who can pick up, move on and start somewhere new.

I raised three children in my home. This was their foundation, their safety in times of trouble. One son is estranged and it would destroy me as a mother that when he comes looking for me, I am not here.

My home, like yours, is made of memories. It is an intimate reflection of me. My home is made of the laughter of my children, the tears of my mother's death and the comfort of a friend. To leave my home is to sacrifice a part of myself.

My home is so much more than bricks and mortar. My home is very central to my existence. It is my foundation, my sacred space that gives me strength to go out into the world and do all that I do. And it is being taken away from me and I have to start again somewhere new. And I ask again … at what cost? ■

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Rent payment charges

Q **I have been renting for 18 months and have always paid my rent by direct deposit into the real estate agent's bank account. Recently I received a letter from the agent advising that they were closing this account and that I would have to start paying rent via a third-party rent collection agency. When I read the collection agency's pamphlet, I discovered that they would charge me a $2.50 fee every time I paid rent! Can they do this?**

A The method of rent payment is usually negotiated before the tenancy begins and noted on the residential tenancy agreement (the lease). If your lease does not specify a method of rent payment, and you have been paying your rent by direct deposit into your agent's back account for 18 months, then this mutually agreed method of rent payment becomes a term of you agreement.

Any changes to a term of the lease – a legally binding contract between you and the landlord – is only permitted with the consent of both parties. The agent does not have the authority to change a term of the agreement unilaterally.

You should write to the agent and advise them that you intend to continue to pay your rent as per your agreement. If they insist that you pay using the collection agency, or if they close the account and prevent you paying rent, you can take action at the Consumer, Trader and Tenancy Tribunal (CTTT) for breach of the agreement.

You will need to apply to the CTTT within 30 days of becoming aware of this breach. In the meantime, you should keep your rent aside each week to be paid once the matter has been resolved. ■

Elizabeth De Freitas

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In *Turnbull and Darwiche v Eastern Suburbs Housing Rental Association* (Tenancy) [2008] NSWCTTT 1462 (23 December 2008), the CTTT found that the agent had breached the tenant's right to peace, comfort and privacy with respect to their attempt to change the method of rent payment. The CTTT stated that changes to the agent's accounting system "should not result in unreasonable additional cost to the tenant".

Many real estate agencies today use the services of rent collection agencies that collect rent and purport to provide tenants with a more convenient way to pay rent through such schemes as 'Advantage Card', 'Ezidebit', 'Ray White Gateway', 'Rent Rewards' and the 'Priority Card'. Any 'convenience' however comes with a fee, incurred by a tenant whenever they pay their rent.

This is not prohibited under the *Residential Tenancies Act 1987* because the payment is not to the landlord but to a third party. However, a landlord cannot force a tenant to pay rent via one method only that charges a fee, especially if it is through a third party. This is called third line forcing and is prohibited by law.

The Residential Tenancies Bill 2010, currently before the NSW Parliament, proposes to make it obligatory for a landlord or a landlord's agent to provide a tenant with at least one rent payment method "for which the tenant does not incur a cost and that is reasonably available to the tenant".

Elizabeth De Freitas

JOIN THE TENANTS' UNION

Support us in our work for safe, secure and affordable rental housing for people in New South Wales

Membership application (tax invoice)

I would like to apply for membership of the Tenants' Union of NSW Co-operative Limited (ABN 88 984 223 164)

First name

Last name

Organisation*

Position*

E-mail

Postal address

Suburb

State Postcode

Phone (W)

Phone (H)

**If applicable*

Membership type

☐ tenant ☐ tenant organisation

☐ non-tenant ☐ non-tenant organisation

Fees (all include GST)

- unwaged $ 8.00
- waged $16.00
- organisation $32.00

Annual fee runs 1 January–31 December.
New members can pay half fees after 30 June.

Payment

Please enclose a cheque/money order made out to the Tenants' Union of NSW for:

$

I am over 18 years of age. I support the objectives of the Tenants' Union of NSW.

Signed Date

Return with payment to Tenants' Union of NSW
Suite 201, 55 Holt St, Surry Hills NSW 2010

CONTACTS

NSW Tenants Advice and Advocacy Services

Inner Sydney		9698 5975
Inner Western Sydney		9559 2899
Southern Sydney		9787 4679
South Western Sydney	1800 631 993	4628 1678
Eastern Sydney		9386 9147
Western Sydney		8833 0911
Northern Sydney		9884 9605
North Western Sydney	1800 625 956	9413 2677
Blue Mountains	1300 363 967	
Central Coast		4353 5515
Hunter	1800 654 504	4969 7666
Illawarra and South Coast	1800 807 225	4274 3475
Mid North Coast	1800 777 722	6583 9866
Northern Rivers	1800 649 135	6621 1022
North Western NSW	1800 836 268	6772 4698
South Western NSW	1800 642 609	

Aboriginal services

Greater Sydney		9569 0222
Western NSW	1800 810 233	
Southern NSW	1800 672 185	4472 9363
Northern NSW	1800 248 913	6643 4426

Tenants NSW website www.tenants.org.au

Tenant News
ISSN-1030-1054

Editor: Gregor Macfie

Views expressed by contributors are not necessarily those held by the Tenants' Union.

Disclaimer: Legal information in this newsletter: is intended as guide to the law and should not be used as a substitute for legal advice; applies to people who live in, or are affected by, the law as it applies in New South Wales, Australia.

Tenants' Union of NSW

The Tenants' Union of NSW is a specialist community legal centre that has been active in promoting the rights of over 1.5 million tenants in New South Wales since 1976.

The Tenants' Union is also the peak resourcing body for the NSW Tenants Advice and Advocacy Program.

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