



environmental defender's office new south wales

Submission to the NSW Office of Fair Trading on Draft Residential Tenancies Bill 2009

18 December 2009

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

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Introduction

The Environmental Defender's Office of NSW (*EDO*) welcomes the opportunity to comment on the NSW Office of Fair Trading proposal for reforming NSW's residential tenancy laws, as set out in the *Residential Tenancies Bill 2009* ('the Bill'). The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. The EDO has commented regularly on a broad spectrum of environmental law and policy issues including on sustainability, climate change policy and consumer protection in relation to environmental issues. Given this expertise of the EDO, our comments on the Bill are limited to measures to facilitate residential tenancies becoming 'green'.

The concept of 'green leases' has developed considerably in the realm of commercial leasing over the past few years. Yet, the greening of residential leases has not similarly developed. In commercial leasing arrangements, there is often incentive for landlords to commit to the upfront costs that can be associated with a green lease, due to the long term cost-saving benefits that may accrue, and the growing body of commercial tenants who seek 'green leases' in order to promote their environmental credentials.

This is in contrast to the short term residential tenancy market. The issue of 'split incentives' is perhaps the biggest barrier for tenants to 'green' their rented premises, as the landlord has overarching control over the upfront investments required to improve the environmental performance of a building (particularly energy efficiency measures such as improving insulation) that would only be of real benefit the tenant over the long run, through savings on electricity bills. Landlords are likely to keep investment costs as low as possible, as their profit depends on them. As the residential tenancy market can be very competitive, it can be difficult for a tenant to influence a landlord to make 'green' changes to residential premises, when there may be other tenants willing to enter into a lease without pressing the need for investment to meet their environmental concerns.

This situation is unfortunately at odds with the growing impetus for voluntary action on the part of individuals to live more sustainably; particularly to reduce greenhouse gas emissions and reduce water consumption in the home. While there are many Government programs aimed at individual action to increase water and energy efficient consumption, for example, rebates for solar panels, these are not generally available to tenants. This is in spite of the fact that it is tenants who bear the majority of the costs associated with choices made by landlords, particularly in respect of energy consumption, and also where tenants are responsible for paying for water usage.

The EDO recognises that, at a policy level, a combination of measures such as building and appliance codes and standards, certification and labelling schemes, direct regulation, and education campaigns is necessary to improve the sustainability of residential properties for owners and renters alike. We submit that this matrix of measures must include appropriate residential tenancy laws containing sufficient incentives and direct regulatory measures to facilitate investment in 'green' choices, for both landlords and tenants. The EDO therefore submits that changes are required to the Bill to facilitate improved sustainability choices and to overcome the 'market failures' associated with the split incentives of landlord and tenant in the residential market.

This submission addresses measures to improve environmental performance of residential tenancies in existing aspects of the Bill, and proposes some additions to the Bill, in the following areas:

1. Rent and other payments
2. Repairs to Premises
3. Alterations and Additions to Residential Premises
4. Disclosure of Environmental Performance
5. Optional 'Green Lease' Schedule
6. Strata Scheme Tenancies

1. Rent and Other Payments

The Bill proposes, in section 39(1), that a tenant must pay water usage charges where:

- (a) the premises are separately metered;
- (b) the premises contain water efficiency measures; and
- (c) the charges do not exceed the amount payable by the landlord for the water used by the tenant.

The EDO supports the inclusion of this provision in the Bill. It is consistent with the 'user pays' principle, and is likely to encourage greater consciousness of water conservation on the parts of tenants who will become responsible for paying for water usage. It also provides an incentive for landlords to install water efficiency measures as per section 39(1)(b).

2. Repairs to Premises

The EDO submits that the requirement for tenants to pay for water usage, above, must also be coupled with provisions that facilitate the introduction of water efficient appliances for those premises that do not have separate metering, and therefore where tenants are not responsible for paying for water charges. This is particularly common for older residential flat buildings.

In the circumstances, the EDO submits that the Bill should also include provisions that require landlords to ensure that replacement appliances, fittings or fixtures that use or supply water at the premises must have at least an "A" rating for water efficiency (or equivalent). This provision could be included in Division 5 of Part 3 of the Bill, which addresses repairs to premises. This type of requirement is consistent with section 69 of the Victorian *Residential Tenancies Act 1997*. It would ensure that only efficient water-using fixtures and appliances are installed in the future, which is critical given that these products can have a long life-cycle, and so it could be at least 20 years before another replacement is necessary. It would also provide incentives to manufacturers to focus production towards water efficient appliances.

We also note that in its current form, the Bill does not contain any measures to promote or require more energy efficient choices to be made by landlords in the context of repairs. While the EDO recognises that there are many policy approaches required to drive the move to greater energy efficiency in homes, there is a place for intervening in the landlord and tenant relationship in this context in order to address market failures such as split incentives.

The EDO's view is that, as argued for above in relation to water appliances and water-using devices, the Bill should be amended include a provision that mandates that when installing a new appliance that needs replacing, it must meet a specified level of energy efficiency. This could include, for example, where the landlord has agreed to provide a fridge, washing machine or dryer. It should also require that where possible, new hot water systems should be gas rather than electric. Gas systems are considerably more efficient than electricity, and this requirement would ensure there is a shift towards energy efficiency in residential tenancies. Again, it would also provide a signal to the market that would drive the focus of production towards energy efficient appliances.

We note there may be other amendments to related legislation that could be made to create new incentives for landlords to upgrade appliances and fixtures, such as tax breaks or rebates. However, in the absence of such targeted incentives a mandatory requirement in the Bill should be considered.

In respect of 'urgent repair' provisions, the EDO submits that these should be defined to include the repair or replacement of any leaking water appliances, fittings or fixtures. As currently drafted, the Bill at section 62 provides that urgent repairs now include work to repair 'an appliance, fitting or fixture that uses water or is used to supply water that is broken or not functioning properly, so *that a substantial amount of water is being wasted*' (emphasis added). The EDO submits that the phrase 'so that a substantial amount of water is being wasted' should be removed from this section of the Bill. Dripping taps and other seemingly minor water leaks can account for significant losses of water over time, although it is not clear whether or not this would amount to a 'substantial amount of water being wasted' in the context of 'urgent repairs.' Removing this qualifier would draw attention to the importance of repairing water using appliances quickly, and would give the tenant the capacity to do so if the landlord does not arrange the repairs in a timely manner.

3. Alterations and Additions to Residential Premises

In relation to Division 6 of Part 3 of the Bill, which deals with alterations and additions, the EDO submits that it should be made clear that the rights afforded to tenants in these sections are clearly available for the purposes of making alterations or installing fixtures for improving water and energy efficiency, or more broadly, the 'environmental performance' of the premises.

As currently drafted, the Bill provides that a landlord must not 'unreasonably withhold consent to an alteration, addition or renovation to the residential premises by the tenant if it is of a minor or cosmetic nature': section 66(2). This should be extended to include that the landlord cannot unreasonably withhold consent in respect of an alteration or addition that improves the environmental performance of the premises. This would make it clear that tenants could install water saving devices such as low-flow showerheads, change light fixtures or install insulation measures (such as thicker curtains), or could even extend to the installation of water tanks in appropriate circumstances. Tenants would then have the power to apply to the Tribunal to obtain that consent if withheld by the landlord, as per section 68 of the Bill.

An optional 'green lease schedule' could also enable explicit agreement to be made on these matters upfront in a residential tenancy agreement. For example, upon entering

into the lease, the landlord and tenant could agree on the fixtures or alterations and additions that the tenant is permitted to make. This is discussed further below.

4. Mandatory Disclosure of Environmental Performance

The EDO submits that the Bill should also include a mandatory requirement for landlords to disclose the environmental performance of a property at the time of leasing. This would require mandatory assessment of environmental performance, disclosure of the details in any advertisement and then disclosure of a certificate setting out the relevant information, to prospective renters.

Disclosing this kind of information to potential renters enables informed consumer choice to be made on the part of renters, and provides greater incentive on the part of landlords to initiate environmental improvements to a rental property. It would also be appealing to renters given that energy and water prices are likely to continue to rise in the future.

Mandatory disclosure requirements have been introduced in the ACT, and in Europe. In the ACT, section 11A of the *Residential Tenancies Act 1997* (ACT) provides that it is an offence to publish an advertisement for the lease of premises if it does not contain a statement of any existing energy efficiency rating of the habitable part of the premises.

The UK has introduced regulations requiring landlords to produce and provide 'Energy Performance Certificates' (EPC) to tenants, in order to fulfil its obligations under a Directive of the European Union (Energy Performance of Buildings Directive 2002/91/EC). An EPC shows ratings for energy efficiency and environmental impact of a dwelling, setting out the estimated energy use, CO₂ emissions and fuel costs of the residence. It is also accompanied by a 'Recommendations Report' that sets out possible measures that can be taken to improve the ratings (although there is no requirement to carry out any of the recommended energy efficiency measures).

The EDO submits that a similar type of disclosure requirement should be adopted in NSW through the Bill. A new provision should be inserted into the Bill which mandates the disclosure of a certificate that sets out energy efficiency and CO₂ emissions, as in the UK, as well as water use and efficiency figures.

We note that COAG, through the National Strategy on Energy Efficiency,¹ has indicated its intention to phase in mandatory disclosure of commercial and residential building performance at the time of sale or lease. In mid-2010, a disclosure scheme for the energy efficiency of commercial buildings is set to begin, for the lease of office space over 2,000 square metres. For residential buildings, the scheme will cover energy, greenhouse and water performance. However, when the residential scheme will be introduced is uncertain, although there is some suggestion that it may be by May 2011.² In the circumstances, the EDO submits that the NSW government should take the opportunity presented by the current review of the *Residential Tenancies Act*, and incorporate relevant provisions establishing this mandatory disclosure scheme for NSW.

¹ See the 'Measures Table' (Appendix A), available at:
http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/Energy_efficiency_measures_table.pdf

² <http://www.environment.gov.au/settlements/energyefficiency/buildings/homes/index.html>; see also clause 3.3 in Appendix A to COAG's National Partnership Agreement on Energy Efficiency

5. Optional Green Lease Schedule

We have noted that in the current residential tenancy market it is often difficult for tenants to have any influence over their landlords in terms of implementing sustainability measures. However, of course there may be some landlords who are willing to incorporate sustainability and efficiency elements into a residential tenancy agreement.

Section 15 (1) of the Bill currently provides that the regulations may prescribe a standard form of residential tenancy agreement. Clause 15(2) also establishes that the regulations may provide for the ‘addition of clauses to... a standard form of residential tenancy agreement in specified circumstances’.

The EDO submits that section 15 of the Bill should be amended to explicitly provide for the inclusion of a ‘Green Lease Schedule’ to residential tenancy agreements. This would include a number of ‘green’ provisions that could be chosen, upon agreement of landlord and tenant, to be included in a residential lease.

The concept behind a green lease (from its inception in the commercial realm) is that the landlord and tenant work collaboratively to achieve a number of measures to enhance the environmental performance of a building. In commercial green leases, matters commonly addressed include: the setting of targets and benchmarks for environmental performance (usually through the mutual collaboration of landlord and tenant) such as for energy and water consumption and GHG emissions, and the imposition of obligations on both landlords and tenants in respect of matters such as indoor air quality, waste management and recycling, the promotion of sustainable transport (for example providing space for bicycle parking in an office), and the use of sustainable materials for office fit outs.³

For example, the Commonwealth Government has recently prepared a Green Lease Schedule that is to be used in a lease involving Commonwealth agencies or bodies, where the premises are 2,000 square metres or more, are for 2 years or more, and the tenant occupies 100% of the building.⁴ This Schedule includes requirements for the development and implementation of an energy management plan, contains provisions requiring certain energy intensity targets to be reached, and requires the meeting of a 4.5 star under the Australian Building Greenhouse Rating Scheme.

While the matters addressed by a residential Green Lease Schedule would undoubtedly differ, the concept of a green lease could still be applied to the relationship between landlord and tenant in the residential market. The EDO submits that a ‘Green Lease Schedule’ to a residential tenancy agreement could contain a number of optional obligations on both landlord and tenant.

While not an exhaustive list, some possible clauses for a Green Lease Schedule to a residential tenancy agreement include:

- Clauses establishing agreement between landlord and tenant about various permissible alterations and additions, and new fixtures, that the landlord and tenant each agree to be responsible for, that improve the environmental

³ See, for example, the ‘Green Lease Guide’ for commercial office tenants, 2006, Investa Property Group: http://www.livingthing.net.au/rc/guides/2007_11_GreenLeaseGuide.pdf

⁴ A copy of the Green Lease Schedule is available at: <http://www.environment.gov.au/sustainability/government/eego>

performance of the premises. We note that certain initiatives including the Mandatory Renewable Energy Target (MRET) legislation⁵ which enables the generation of ‘renewable energy certificates’ for some small scale renewable technology by homes, as well as the introduction of a feed-in tariff in NSW⁶ which enables households to profit if they feed energy back into the grid, may assist in making this a realistic option to be negotiated. Other ‘green’ additions or fixtures that could be addressed by this type of clause could include the installation of grey water systems or water tanks, particularly as these would benefit the landlord through water savings, where the landlord is paying for water charges.

- Where the landlord remains responsible for paying for water usage, a clause that the landlord agrees to install water saving devices in the rental property upon the agreement of the tenant to work towards specified water usage goals or benchmarks.
- A clause placing obligations on the landlord in respect of recycling, to ensure appropriate receptacles are available.
- A clause that establishes that the tenant may make alterations to a garden space for the purposes of vegetable gardens, and for the landlord to provide areas for composting.
- Where the landlord has a garden on the rental premises that requires maintenance, and the tenant pays for water usage, a provision whereby the tenant agrees to maintain the garden of the premises if the landlord plants drought tolerant species, or installs water saving irrigation systems.
- A clause requiring the landlord to ensure at the start of a lease, that all light fittings are fitted out with long-life energy efficient bulbs.
- Dispute resolution provisions, in the event of conflict between landlord and tenant.

The Green Lease Schedule could contain a number of these kinds of provisions that could be incorporated or adapted, as appropriate to the circumstances of each lease.

6. Strata Scheme Tenancies

Although not directly applicable to the *Residential Tenancies Act*, the EDO also submits that concurrent amendments should be made to the *Strata Schemes Management Act 1996* to address issues that arise for tenants in strata managed buildings. In particular, it would be appropriate to amend section 43, which sets out what by-laws can be made about, to include environmental concerns such as: recycling areas, the installation of solar panels, creating organic waste management areas, the provision of bicycle storage areas, and the adoption of an environmental management plan for the building (for example to address things like water-savings benchmarks and whole-of-building energy efficiency measures).

For further information about this submission or to discuss any matters related to the submission, please contact Rachel Walmsley, EDO Policy Director on (02) 9262 6989.

⁵ More information is available on the MRET at <http://www.climatechange.gov.au/government/initiatives/renewable-target.aspx>

⁶ More information is available on the feed-in tariff at: <http://www.industry.nsw.gov.au/energy/sustainable/renewable/solar/solar-scheme>