

# Boarding houses in New South Wales: growth, change and implications for equitable density

A research report for Shelter NSW

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**Chris Martin**

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## Introduction

Boarding houses are a form of residential accommodation where residents do not get the premises to themselves. There is more sharing of space between residents, and more control exercised by the proprietor, than in mainstream rental housing. Boarding house accommodation also tends to be more transitory, and is commonly regarded as being less than a 'home'.

For decades the NSW boarding house sector was in decline, with an increasingly marginalised clientele. A range of state government policies have sought to retain existing stock and, more recently, encourage new development (the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (NSW) (AHSEPP)), as well as improve regulation and residents' legal rights (the *Boarding Houses Act 2012* (NSW)). Now boarding houses appear to be undergoing something of a resurgence, with the traditional sector joined by 'new generation boarding houses', purpose-built student accommodation and 'co-living' enterprises – aspects of which challenge conventional understandings of the form and role of boarding houses. Another aspect of the sector's growth and change – but one not sought by government – is the proliferation of informal boarding houses offering shared rooms in otherwise ordinary houses and flats.

There is a need for greater clarity around the types of premises that comprise 'boarding houses' and their roles in the housing system. This should in turn shed light on how the sector can be effectively regulated and incentives best arranged to achieve genuine housing policy objectives for low-income households.

## About this report

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This is the report of a research project commissioned by Shelter NSW. The aims of the project are to:

- Review of the evidence of recent growth and change in the boarding house sector;
- Investigate the implications of these changes for the effective regulation of the sector, and for legal relations between proprietors and residents;
- Clarify policy objectives regarding boarding houses and present options for reforms directed at better housing outcomes.

The project used a mix of research methods:

- A review of law and policy documents
- Analysis of quantitative data, particularly from the NSW Boarding Houses Register
- Interviews with stakeholders in the boarding house sector.

NSW Fair Trading kindly provided the Boarding Houses Register data. Twelve persons from various stakeholder agencies were interviewed, comprising:

- Resident advocacy organisations (4 persons from three different agencies)
- Proprietors (3 persons, one each from the 'traditional boarding house', 'new generation boarding house' and community housing sectors)
- Tertiary education sector – student accommodation (1 person)
- State government (3 persons)
- Local government (1 person)

Both the quantitative data analysis and the interviews were conducted in accordance with the approval of the UNSW Human Research Ethics Committee (HC180623).

## What is a boarding house?

Boarding houses are a form of residential accommodation where residents pay for a periodic right to occupy premises, but do not get the premises to themselves. In a boarding house, there is more sharing of space between residents, and more control exercised over the premises by the proprietor, than there is in a rented private dwelling.

In a related way, boarding houses can also be differentiated from other forms of accommodation in terms of their built form, which is often specially configured and equipped for higher density occupation and sharing. Also relatedly, boarding houses may be distinguished by their role in the housing system, providing accommodation that tends to be both more readily accessible and more transitory than mainstream rental: 'easy in, easy out', as one of our boarding house proprietor interviewees characterised it.

For all these reasons, boarding houses are commonly regarded as something other than a 'home'. Indeed, in homelessness policy and research, boarding house residents are generally considered homeless, 'because their accommodation does not have the characteristics identified in the minimum community standard' (Chamberlain, 2014: 6).

Boarding houses are referred to in various pieces of legislation and policy. Where they are referred to, they are not always defined; and where they are defined, the definitions are not entirely consistent or straightforward. There is caselaw on the meaning of 'boarding house', particularly as it relates to 'dwelling' and 'dwelling house', that provides some guidance to understanding current legislative definitions, but as we will see the crucial common elements in the definitions are those regarding 'lodging' and 'lodgers'. This raises another definitional question – what is a lodger? – which we will also discuss.

There's one definitional issue that is straightforward and uncontroversial: boarders are lodgers who receive meals with their accommodation.<sup>1</sup> The rest, though, is complicated.

### New South Wales statutory definitions

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The obvious place to look for a definition of 'boarding house' is the *Boarding Houses Act 2012* (NSW) – but that exact term is not actually defined there. The Boarding Houses Act instead defines 'boarding premises':

boarding premises means premises (or a complex of premises) that:

- (a) are wholly or partly a boarding house, rooming or common lodgings house, hostel or let in lodgings, and
- (b) provide boarders or lodgers with a principal place of residence, and
- (c) may have shared facilities (such as a communal living room, bathroom, kitchen or laundry) or services that are provided to boarders or lodgers by or on behalf of the proprietor, or both, and
- (d) have rooms (some or all of which may have private kitchen and bathroom facilities) that accommodate one or more boarders or lodgers.

The Boarding Houses Act then applies to this basic definition certain other criteria and exemptions to further define two categories of 'registrable boarding house' – 'general boarding houses' and 'assisted boarding houses' – with which the Boarding Houses Act substantively deals. General boarding houses provide beds for five or more residents (not counting the proprietor and associates who might also reside there); assisted boarding housing provide beds for two or more residents (not counting the proprietor, etc) who are 'persons with additional needs', as defined in the Boarding Houses Act. Both these categories of boarding houses under the Boarding Houses Act, and their specific definitions, are discussed further in 'Forms of boarding houses', below.

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<sup>1</sup> *Roberts v Waverley Municipal Council* (1988) 14 NSWLR 423.

The 'boarding premises' definition, it might be said, is somewhat difficult. In the first limb (a) there is a grammatical problem ('hostel or let in lodgings') and a reference to 'boarding house' that would go circular if there were not other elements. Some of those elements – about shared and private facilities in (c) and (d) – are inclusive ('may have') and so are not really defining. The really defining elements are in limbs (b) and (d): the premises 'provide boarders or lodgers with a principal place of residence', and 'have rooms... that accommodate one or more boarders or lodgers'.

In the NSW planning system, boarding houses are defined in planning instruments in similar, but not identical terms, to those of the Boarding Houses Act. The Dictionary in the Standard Instrument for Local Environmental Plans, prescribed by the *Standard Instrument (Local Environmental Plans) Order 2006* (NSW), provides:

boarding house means a building that:

- (a) is wholly or partly let in lodgings, and
- (b) provides lodgers with a principal place of residence for 3 months or more, and
- (c) may have shared facilities, such as a communal living room, bathroom, kitchen or laundry, and
- (d) has rooms, some or all of which may have private kitchen and bathroom facilities, that accommodate one or more lodgers,

but does not include backpackers' accommodation, a group home, hotel or motel accommodation, seniors housing or a serviced apartment.

This definition is neater – it avoids the grammatical and circularity problems in the Boarding Houses Act definition – but the defining elements are essentially the same: boarding houses are let in lodgings; provide a principal place of residence to lodgers (subject here to a 3-month qualification); and have rooms that accommodate lodgers.

The importance of the lodging elements of the definition is reinforced by the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (NSW) (AHSEPP), which does not have its own definition for boarding houses (appropriately, or it would compete with the Standard Instrument definition), but it does introduce a definition of 'boarding room' (section 4):

boarding room means a room or suite of rooms within a boarding house occupied or so constructed or adapted as to be capable of being occupied by one or more lodgers.

Also important is the wider scheme in which the Standard Instrument's definition of 'boarding house' is located. The Standard Instrument Dictionary provides that boarding houses are one type of 'residential accommodation', which also includes 'dwelling houses', 'attached dwellings', 'multi dwelling housing' and 'residential flat buildings', as well as 'group homes' and 'hostels'. As these examples suggest, there is differentiation within the 'residential accommodation' category around the term 'dwelling', which is an element in many types (including residential flat buildings, which are defined as buildings containing 3 or more dwellings) but not others (boarding houses and hostels). 'Dwelling' is defined as 'a room or suite of rooms occupied or used... as a separate domicile'.

This scheme is important because when the question 'what is a boarding house?' arises in practice, it is primarily about distinguishing other forms of residential accommodation. On the one hand, at what point does a typical detached or attached house – particularly where it is 'let' to various persons – become a boarding house? And, on the other hand, at what point does a building let to various persons stop being a boarding house and start becoming a residential flat building? The meaning of 'dwelling' is important to making the distinction in both directions, and there is a body of caselaw on how the terms 'boarding house' and 'dwelling' relate to each other.

## **New South Wales case law on dwellings and boarding houses**

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The caselaw on dwellings and boarding houses arises from the use of these terms in planning and other legal instruments (including tenancy legislation and leases) from long before the adoption of the Standard

Instrument. The case law is inconsistent, with interpretations differing by the particular contexts in which the terms are used. In particular, the definition of 'boarding house' adopted by the NSW Court of Appeal in *Roberts v Waverley Municipal Council*, being 'a place where a business is carried on of providing food and lodging to the boarders, and the food comprises meals' is shaped strongly by the particular legal problem in that case (whether a group using premises as a women's refuge was protected from summary eviction by the *Landlord and Tenant Act 1899* (NSW)) and the particular history of amendments to that Act. Although a superior court decision, it proceeds from a different premise to the scheme of the Standard Instrument, and is of limited assistance in really fleshing out that scheme.

More relevant is the body of cases that establish the principle that a building is a dwelling house, and not another form of residential accommodation, if 'it is occupied in much the same way as it might be occupied by a family group in the ordinary way of life'. This formulation is from the NSW Court of Appeal decision in *South Sydney Municipal Council v James* (1977) 35 LGRA 432, where a group of unrelated persons living communally<sup>2</sup> – described as 'a private group whose members are linked by shared affinity and attitude' – were held to be enough like a 'family group' that the premises they were to occupy would be a dwelling; by contrast, premises that offer accommodation to members of the public or a section of the public would be better characterised as a boarding house. More recently, the NSW Land and Environment Court has elaborated on the association of 'dwellings' with 'a family group in the ordinary way of life':

*A building accommodating, for example, friends living together in a share house arrangement, will readily constitute a "dwelling". It may even encompass persons living together who, while initially strangers, ultimately live together as a household unit under the rubric of flat-mates or house-mates. Modern 'families' reflect modern times and modern mores. (Blacktown City Council v Haddad [2012] NSWLEC 224)*

There is an older Victorian decision in which premises occupied by a married couple, their child, and a succession of boarders, up to six at a time, were held to be a dwelling house, because all the residents were regarded as 'one household, that of [the husband]'<sup>3</sup> – but this may not reflect 'modern times and modern mores'. Interestingly, one of the more consistent themes of the caselaw is that the typical student share house is a dwelling house: it recurs throughout the caselaw as a self-evident example of unrelated persons forming a household or family group and occupying premises as a dwelling house.<sup>4</sup> However, premises providing accommodation to cohorts of students for the duration of a course have been held to be a boarding house<sup>5</sup> – even if under the supervision of 'house parents' in 'an atmosphere that closely simulates a family environment', as in *Burwood Municipal Council v Aboriginal Hostels Ltd*.

In *Sun v Randwick City Council*, the NSW Land and Environment Court had to decide whether premises were, as contended by the proprietor, a 'share house', and hence a dwelling house, and held that the following factors indicated that the premises were instead a boarding house: each resident paid rent directly to the proprietor; the proprietor imposed house rules, including a cleaning roster and a requirement that residents ask the proprietor's permission and pay an additional charge to have overnight guests; and the proprietor would find new residents to fill vacancies. Overall, held the court:

*[The proprietor] had far too much involvement and the renters had far too little independence with respect to the management of the house for it to be possible to characterise the purpose of use of the building as a dwelling house in the nature of a share house.*

The caselaw on 'dwellings' is also addressed to built form, with the NSW Land and Environment Court holding that it 'denotes premises which contain not only accommodation for sleeping but also kitchen, bathroom and lavatory facilities'.<sup>6</sup> The implication is that where all these facilities are provided in a room or suite of rooms, those rooms will be a dwelling, and the building they comprise will be a residential flat building, not a boarding house. This was the issue in *Warlam Pty Ltd v Marrickville Council* (2009) LGRA

<sup>2</sup> Including the late housing activist, and Shelter NSW life-member, Col James, who led the proceedings for the group.

<sup>3</sup> *Downie v Lockwood* [1965] VR 257.

<sup>4</sup> For example, *Downie v Lockwood*; *South Sydney Municipal Council v James*; *Blacktown City Council v Haddad*; *Sun v Randwick City Council* [2017] NSWLEC 188

<sup>5</sup> *Burwood Municipal Council v Aboriginal Hostels Ltd* (1979) 39 LGRA 150; *Council of the Municipality of Ashfield v Australian College of Physical Education Ltd* (1992) LGRA 151.

<sup>6</sup> *Wollongong City Council v Vic Vellar Nominees Pty Ltd* [2010] NSWLEC 266; see also *Louinder v Stuckey* [1984] 2 NSWLR 354

184, where the court considered a purported boarding house development where each room would have all those facilities, under a local environmental plan from before the adoption of the Standard Instrument. The court held that 'rooms with both ensuite bathrooms and toilets and kitchens constitute separate domiciles', and hence 'dwellings', such that the development would be a residential flat building, not a boarding house.<sup>7</sup>

This aspect of the distinction is now blurred by the Standard Instrument Dictionary definition (and the Boarding Houses Act definition) which expressly allow that boarding houses may have rooms with private kitchen and bathroom facilities. However, the concept of 'separate domicile' still helps distinguish dwellings from boarding houses, because aside from implications for built form it also 'embodies the idea of a permanent home or a significant degree of permanency of habitation or occupancy' (*Wollongong City Council v Vic Vellar Nominees Pty Ltd*). An example of this idea in action is *Burwood Municipal Council v Aboriginal Hostels Ltd*, where part of the reason for characterising the students' accommodation as a boarding house was that they would return to homes elsewhere after completion of their courses. Even so, the Standard Instrument definition slightly blurs this aspect of the distinction too, by characterising boarding houses as a principal place of residence 'for three months or more'. The upshot of this is that even more of the work of distinguishing boarding houses from dwellings is done by the terms 'lodging' and 'lodgers'.

## The law of lodgings and lodgers

Although 'lodgings' and 'lodgers' are together the crucial common element in the statutory definitions of 'boarding house', none of the legislation discussed above defines those terms. Nor does the *Residential Tenancies Act 2010* (NSW), which applies to most residential tenancy agreements ('an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence' (section 13), but not to agreements with boarders and lodgers (section 8).

Historically, the law has sharply distinguished lodging from tenancy. At common law, a tenancy is a proprietary interest that affords a right to possession of the premises, such that the tenant may exclude all others, including the landlord; by contrast, lodging is merely contractual, not proprietary, and not exclusive.<sup>8</sup> The distinction is underscored by differences in terminology: tenants have a lease, lodgers a licence; tenants pay rent, while lodgers pay tariffs. In practice, landlords have sometimes used the terminology of lodging to try to avoid controls and obligations imposed by tenancy laws and other legislation, but what matters is the substance, not form, of the agreement; that is, whether viewed objectively the right granted by the landlord is for exclusive possession (*Radaich v Smith*).

This distinction has become less clear in the era of modern residential tenancies legislation. The Residential Tenancies Act provides that an agreement may be a residential tenancy agreement 'even though... it does not grant a right to exclusive occupation' (section 13(3)(a) – but not if it is an agreement 'under which a person boards or lodges with another person' (section 8(1)(c)).). The Act's predecessor, the *Residential Tenancies Act 1987* (NSW), contained a similar formulation, and so does the residential tenancies legislation of all other Australian states and territories, except Victoria (it retains 'exclusive occupation' for tenancies). As observed by the Western Australian Supreme Court in *Commissioner for Fair Trading v Voulon & ors* [2005] WASC 229, "residential tenancy agreement" has been framed in a manner which departs from the common law so that exclusive possession cannot be regarded as the crucial test.'

With this departure from the conventional position in mind, the court adopted the following test:

The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. In other words, a lodger is entitled to live in the premises but cannot call the place his own. He resides essentially as an inmate in another person's house. (*Commissioner for Fair Trading v Voulon*)

This is the only superior court decision in which the statutory departure from the common law distinction is acknowledged, but it is questionable whether the test formulated is wholly satisfactory: it is pieced together from elaborations on the previous distinction in older cases, and the old-fashioned language (attendance,

<sup>7</sup> Conversely, rooms with ensuite bathrooms and toilets, but without kitchens, or with kitchens but without ensuites, would not be separate domiciles, and the building would be a boarding house.

<sup>8</sup> *Radaich v Smith* [1959] HCA 45.

servants, inmates) does not speak clearly to anything in current practice that might serve as a line between tenancy and lodging.

The decision in *Sun v Randwick City Council*, while not addressed to the issue of the statutory departure, does a better job of analysing contemporary relations in shared housing. This decision suggests a focus on the 'involvement' of the landlord, versus the 'independence' of the residents, in managing relations in shared space, particularly the introduction of new residents.

## **Federal taxation law and 'commercial residential premises'**

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A final source on the legal meaning of 'boarding houses' is federal taxation law. These provisions will not directly determine controversies about whether premises are boarding houses for the purposes of the Boarding House Act or the planning system, and they set out a different scheme to that of the Standard Instrument, but they may be a significant influence on how parts of the sector operate.

Under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act), 'boarding houses' are part of the category 'commercial residential premises' (section 195-1). This category, which also includes 'hotels', 'motels', 'inns' and 'hostels' and some other types of accommodation, is differentiated from 'residential premises' for the purposes of Goods and Services Tax (GST). The distinction has also become relevant lately for the taxation of managed investment trusts (MITs): MITs' income from investments in commercial residential premises will be subject to a lower rate of withholding tax than from investments in residential premises (except affordable rental managed by community housing providers).

The GST Act does not define 'boarding houses' or most of the other types of commercial residential premises, but the Goods and Services Tax Ruling GSTR 2012/6 provides further guidance. It states that the terms 'take their ordinary meanings in context', and states 'a boarding house is a dwelling at which board and lodging are provided to guests or residents'. It also sets out some features that indicate premises are not a boarding house (or hotel, motel, hostel or similar), including that the accommodation is provided for a 'period of months or years... such as in a residential lease'; there is a written in-going and out-going condition report; the occupant may hang pictures and keep a pet at the premises; and the occupant is responsible for cleaning and changing light bulbs. All of these non-features are characteristic of mainstream residential tenancies, and reinforce the theme that boarding houses are places of residence for lodgers.

## Boarding house sector numbers

There are several sources of quantitative data about boarding houses in New South Wales. We need to consider each in order to get an appropriately nuanced and qualified sense of the size of the sector and its recent growth. One of the data sources, the NSW Boarding Houses Register, also provides data about the locations, forms, clienteles and proprietors of boarding houses.

### Sector size and growth

The Census counts boarding houses together with 'private hotels' as one of several categories of 'non-private residential dwellings.' In 2016, 586 boarding houses and private hotels were counted in New South Wales, an increase on each of the two previous censuses. Residential colleges and halls of residence grew even more over the period; hostels for disabled persons and homeless persons generally declined.

**Table 1. Boarding houses, private hotels and similar non-private residential dwellings, New South Wales, 2006-16**

|                                            | 2006       | 2011        | 2016        |
|--------------------------------------------|------------|-------------|-------------|
| Boarding house, private hotel              | 466        | 539         | 586         |
| Residential college, hall of residence     | 120        | 328         | 345         |
| Hostel for the disabled                    | 237        | 116         | 144         |
| Hostel for homeless, night shelter, refuge | 165        | 173         | 74          |
| <b>Total</b>                               | <b>985</b> | <b>1159</b> | <b>1152</b> |

Source: ABS table builder.

In light of other data, however, the Census figures appear to undercount boarding houses. Looking to the NSW Boarding Houses Register, we find 904 boarding houses were registered as at 2016 – 318 (54%) more than were counted as 'boarding houses and private hotels' in the Census that year. The total number of registered boarding houses has grown each year since the register opened in 2013, and at August 2018 stood at 1043 – just over double the 2013 figure. Of these, 23 are registered as assisted boarding houses, but we know from NSW Family and Community Services (FACS) that there are in fact 17 authorised assisted boarding houses currently in operation.<sup>9</sup>

**Table 2. Registered boarding houses, New South Wales, 2013-2018**

|                                  | 2013 | 2014 | 2015 | 2016 | 2017 | 2018    |
|----------------------------------|------|------|------|------|------|---------|
| Total registered boarding houses | 505  | 742  | 829  | 904  | 992  | 1043    |
| General boarding houses          | 482  | 720  | 809  | 884  | 974  | 1026    |
| Assisted boarding houses         | 23   | 22   | 20   | 20   | 18   | 17 (23) |

Source: NSW Boarding Houses Register, NSW FACS. Note figures for general boarding houses are derived from total registered boarding houses (per register) and assisted boarding houses (per FACS).

The most obvious question prompted by the register data is how much of the growth comes from the development of new boarding houses, and how much comes from belated registrations of boarding houses that have been operating for some time. There is also a question as to whether premises are being registered even though they may not accommodate 'lodgers' and so do not satisfy the definition of 'boarding

<sup>9</sup> Of the six dubious registrations, four have ceased operations but are still registered, and three appear to be mischaracterised.

premises'. On the other hand, though, the number of unregistered boarding houses – ie the informal sector – would undoubtedly be larger than the number of what we might call registered non-boarding houses; in all likelihood it is larger – perhaps multitudes larger – than the number of registered boarding houses.

Another source of data is NSW Revenue, which administers a land tax exemption for low-cost boarding houses. To get the exemption proprietors first must apply for it, and the property must be eligible on numerous criteria. These are: that the premises are a registered boarding house; none of the residents have a residential tenancy agreement under the Residential Tenancies Act; and at least 80 per cent of the accommodation provided in the past year, and in the current year, is affordable (ie at or below certain thresholds published each year by NSW Revenue<sup>10</sup>) and long-term (ie occupied by the resident continuously for at least three months). Boarding houses granted the exemption, therefore, are a subset of the registered boarding house sector. NSW Revenue does not regularly publish data about the exemption (and refused a request for data for the present research), but did provide the following figures in June 2018 in answer to a question in Parliament as to the number of boarding houses granted the exemption.

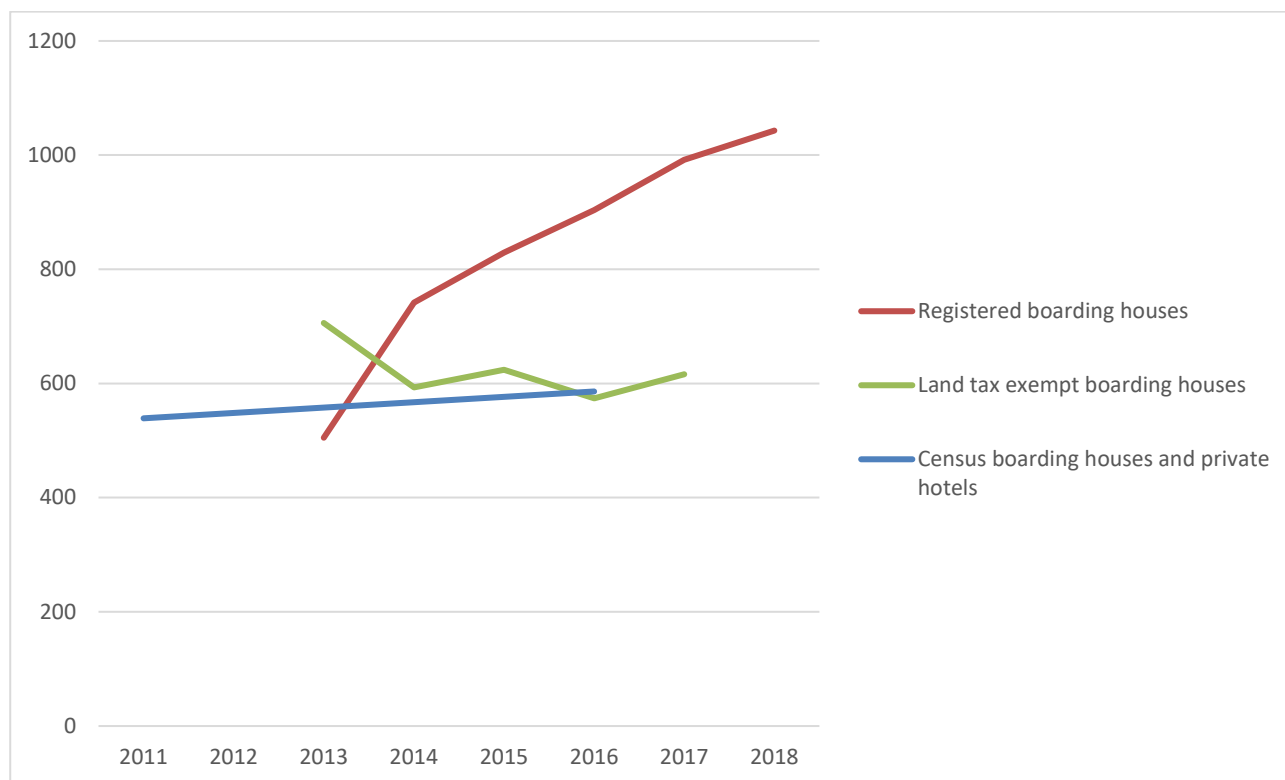
**Table 3. Low cost (land tax exempt) boarding houses, New South Wales, 2013-17.**

|                                 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---------------------------------|------|------|------|------|------|
| Land tax exempt boarding houses | 706  | 593  | 624  | 574  | 616  |

Source: NSW Parliament, Legislative Assembly House Papers: 8378 – Boarding Houses Land Tax Exemptions.

These data show a decline over the period, mostly in 2013-14. Our traditional boarding house proprietor interviewee suggested that the 2013-14 decline was an effect of the introduction of the Boarding Houses Act, and some proprietors leaving the sector rather than being subject to the new regime. Fluctuations in the number might also reflect changes in the value of the exemption relative to rents, or in the strictness of NSW Revenue in monitoring compliance with the eligibility criteria.

<sup>10</sup> For example, the threshold for a single room (less than full board) in 2018 was \$255 per week, and in 2019 is \$265 per week: Land Tax Ruling LT104.

**Figure 1. Census boarding houses, registered boarding houses and land tax exempt boarding houses, NSW, 2013-2018**

Source: ABS table builder; NSW Parliament; NSW Boarding Houses Register. Thanks to our traditional boarding house proprietor interviewee for suggesting this comparison.

A final source of data are development approvals, as analysed by Troy et al (2018, 2019). Their analysis is limited to the 11 LGAs in the Southern Sydney Regional Organisation of Councils but, as will be discussed further below, these LGAs account for the large majority of the state's registered boarding house stocks. Troy et al count 281 development approvals for new boarding houses for the period 2009-17, plus 56 development approvals that expanded the capacity of existing boarding houses (2018). In follow-up research, Troy et al (2019) investigated how many approved boarding house developments were completed: from registrations, bond lodgement and aerial survey data, they conclude 238 new boarding houses (excluding large purpose-built student accommodation) were completed. However, only a minority of these (102, or 43%) were on the Boarding Houses Register. These LGAs had a total of 701 registered boarding houses (excluding student-only accommodation) at August 2018, so recently developed portion comprises about 15 per cent.

Without development approval and completion data for the rest of New South Wales, we cannot say for sure, but it seems implausible that there would be so much more new boarding house development outside these LGAs, and/or on such a different pattern regarding registration, so as to account for the remainder of the apparent growth in registered boarding houses. Rather, it is likely that the larger part of the apparent growth is existing boarding houses registering belatedly. At the same time, the proportion of boarding houses qualifying for the land tax exemption – and presumably charging the relatively low tariffs required by the exemption – is decreasing.

## Sector places and people

The Boarding House Register holds data (updated annually, some publicly accessible, some not) about the location, size and resident characteristics of each registered boarding house. Subject to the qualifications we noted above, these data give us the most detailed picture we have of the boarding house sector's geography and clientele.

At August 2018, the register recorded **1,043 registered boarding houses** in New South Wales, providing accommodation for **16,196 residents**. Of these, 23 registrations are assisted boarding houses but, as noted above, this should be read as **17 authorised assisted boarding houses**, which accommodate approximately 270 residents. Less than half of the assisted boarding houses are located in greater Sydney, with more in and around smaller regional centres. As we will see below, this is quite a different geography to that of registered boarding houses more widely, and hence general boarding houses. In the data we received, we cannot match boarding house size and resident characteristics to the premises' classification as assisted or general boarding house so, in our analysis of these factors, we do not separate assisted boarding houses from the wider sector. However, because the former are so small, the analysis should give a reasonably clear view of the sector and its predominant class, the general boarding houses.

From the resident characteristics data we can, however, identify where premises accommodate students only. There are **80 student-only boarding houses** on the register, accommodating a total of **3,522 students**, half of whom live in just five very large premises (which, with 300-565 residents each, are by far the largest on the register). This represents a fraction of the student accommodation sector as calculated by industry consultants – about 20,000 student accommodation beds in Sydney alone (JLL, 2019) – but it is large relative to the rest of the registrable boarding house sector, and distinctively configured and populated, so we have separated these boarding houses and their residents from the wider sector in our analysis of boarding house size and resident characteristics.

On this basis, there are approximately **940 general boarding houses** (exclusive of student-only accommodation) registered, providing accommodation for approximately **12,400 residents** across New South Wales.

The data show that registered boarding houses (including assisted boarding houses, excluding student-only accommodation) are highly concentrated geographically. More than one quarter (26%) of all registered boarding houses in New South Wales are in just one local government area (LGA) – the City of Sydney – and a further 19 per cent are in a second LGA, Inner West. Randwick and Newcastle LGAs have the next two largest stocks of registered boarding houses. The top ten LGAs represent almost three quarters of all registered boarding houses in New South Wales. The geography of boarding house residents corresponds fairly closely.

As noted, the geography of assisted boarding houses differs from that of registered boarding houses generally, with the exception of Inner West and Newcastle LGAs, where both assisted and general boarding houses are represented. The geography of student-only accommodation is less different, with most of that sector located also in the top ten LGAs for registered boarding houses (ex-student accommodation).

**Table 4. Registered boarding houses, top 10 LGAs.**

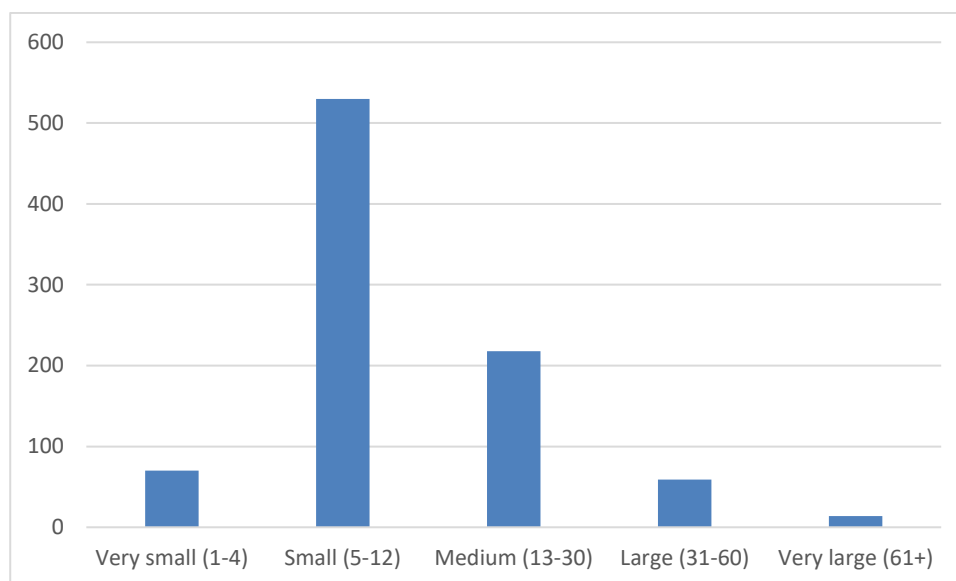
|                      | RBH (ex SA) | Residents<br>(RBH ex SA) | GBH (ex<br>SA) | ABH      | SA       |
|----------------------|-------------|--------------------------|----------------|----------|----------|
| Bayside              | 27 (3%)     | 286 (2%)                 | 26             | 1        | 0        |
| Burwood              | 33 (3%)     | 741 (6%)                 | 32             | 1        | 0        |
| Canterbury Bankstown | 27 (3%)     | 470 (4%)                 | 26             | 1        | 1        |
| City of Sydney       | 250 (26%)   | 3451 (26%)               | 250            | 0        | 24       |
| Inner West           | 187 (19%)   | 2649 (20%)               | 183            | 2 [4]    | 6        |
| Newcastle            | 41 (4%)     | 479 (4%)                 | 38             | 3        | 15       |
| North Sydney         | 19 (2%)     | 352 (3%)                 | 19             | 0        | 0        |
| Randwick             | 58 (6%)     | 784 (6%)                 | 58             | 0        | 11       |
| Waverley             | 41 (4%)     | 557 (4%)                 | 41             | 0        | 3        |
| Wollongong           | 17 (2%)     | 205 (2%)                 | 17             | 0        | 7        |
| Total top 10 LGAs    | 700 (73%)   | 9974 (79%)               | 690 (73%)      | 10 (52%) | 67 (84%) |
| New South Wales      | 963         | 12673                    | 940            | 17 [23]* | 80       |

Source: NSW Boarding Houses Register. Note. RBH = registered boarding houses. SA = student-only accommodation. GBH = general boarding houses. ABH = assisted boarding houses. Figures in parentheses are percentages of statewide total. Figures in square brackets are registered assisted boarding houses but which include some known to be closed; the number actually in operation per FACS is also given.

We might also note that the geography of registered boarding houses differs from what we know – albeit from limited data – of the unregistered informal sector. In Nasreen and Ruming’s study of roomshare listings on Gumtree (2018), the largest numbers of listings were in City of Sydney LGA and Waverley LGA – both of which have high numbers of registered boarding houses – but also scoring high were Parramatta LGA and Auburn LGA (now Cumberland LGA), which are not in the top ten for registered boarding houses.

### ***Size and built form***

Sixty per cent of registered boarding houses are small boarding houses (5-12 residents). The median number of residents for all registered boarding houses is 10. These small boarding houses would be Class 1b buildings under the Building Code of Australia (BCA), so may look much like private dwelling houses. (The BCA’s classifications and implications for built form are discussed in the next chapter.)

**Figure 2. Registered boarding houses, by size, New South Wales.**

Source: NSW Boarding Houses Register

The pattern is similar in both City of Sydney and the Inner West, while Burwood, Canterbury-Bankstown and North Sydney have proportionately more large boarding houses, and Waverley has more medium-sized boarding houses. As Troy et al (2018) observe, the development approvals data for the southern Sydney region indicate a shift to larger buildings, but most of these are not registering as boarding houses.

**Table 5. Registered boarding houses, by size, top 10 LGAs.**

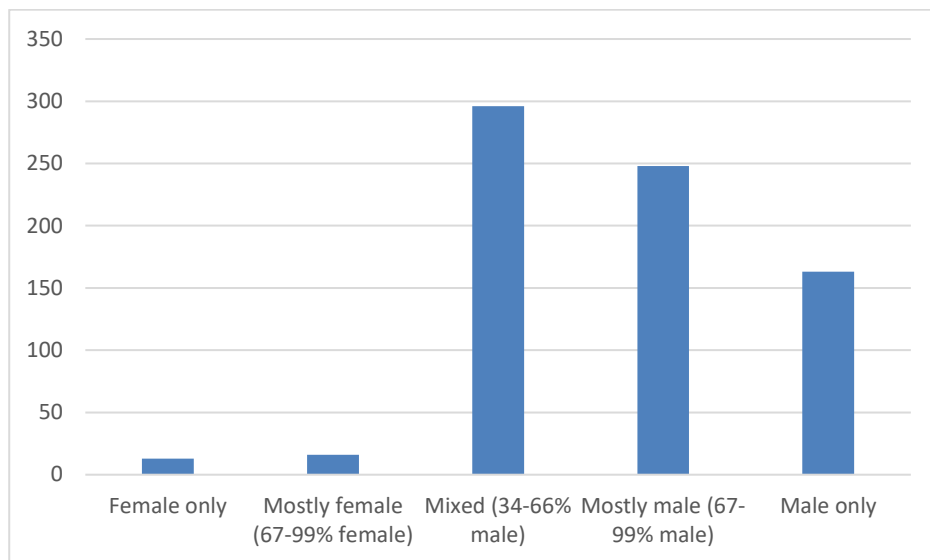
| LGA                  | Very small (1-4) | Small (5-12) | Medium (13-30) | Large (31-60) | Very large (61+) |
|----------------------|------------------|--------------|----------------|---------------|------------------|
| Bayside              | 7                | 15           | 4              | 1             | 0                |
| Burwood              | 1                | 14           | 10             | 7             | 1                |
| Canterbury Bankstown | 1                | 15           | 6              | 5             | 0                |
| City of Sydney       | 11               | 170          | 49             | 16            | 4                |
| Inner West           | 9                | 111          | 53             | 11            | 3                |
| Newcastle            | 7                | 24           | 7              | 3             | 0                |
| North Sydney         | 1                | 8            | 7              | 2             | 1                |
| Randwick             | 5                | 34           | 14             | 5             | 0                |
| Waverley             | 3                | 19           | 19             | 0             | 0                |
| Wollongong           | 1                | 11           | 4              | 1             | 0                |

Source: NSW Boarding Houses Register

## Gender

There is a strong gender dimension to registered boarding houses: more than two-thirds of residents are male. For a significant part of the sector, the gendering is even more marked, with 18 per cent of all registrable boarding houses accommodating males only. There are very few female-only, or pre-dominantly female, registered boarding houses.

**Figure 3. Registered boarding houses, by gender mix, New South Wales.**



Source: NSW Boarding Houses Register

There is a geography to this gender dimension: the Inner West, Newcastle and Wollongong have especially high proportions of male-dominated and male-only boarding houses.

**Table 6. Registered boarding houses, by gender mix, top 10 LGAs.**

| LGA                  | Female only | Mostly female (67-99% female) | Mixed (34-66% male) | Mostly male (67-99% male) | Male only |
|----------------------|-------------|-------------------------------|---------------------|---------------------------|-----------|
| Bayside              | 0           | 0                             | 8                   | 6                         | 7         |
| Burwood              | 0           | 0                             | 10                  | 12                        | 5         |
| Canterbury Bankstown | 0           | 0                             | 10                  | 8                         | 6         |
| City of Sydney       | 1           | 7                             | 99                  | 62                        | 29        |
| Inner West           | 3           | 2                             | 50                  | 54                        | 46        |
| Newcastle            | 0           | 0                             | 9                   | 11                        | 15        |
| North Sydney         | 1           | 0                             | 3                   | 7                         | 2         |
| Randwick             | 1           | 2                             | 27                  | 15                        | 5         |
| Waverley             | 1           | 0                             | 16                  | 14                        | 5         |
| Wollongong           | 2           | 1                             | 2                   | 3                         | 7         |

Source: NSW Boarding Houses Register

### ***Young persons and students***

The register records very few persons aged under 18 years living in registered boarding houses: just 97 young persons are counted, in 39 boarding houses, across the state. There are more tertiary education students (aged over 18, but presumably a young-skewing group): aside from those in the student accommodation sector, there are 1,814 students living in registered boarding houses (so, about half the number accommodated in student-only accommodation). Across the state, there are 66 registered boarding houses where most (but not all) residents are students, but many more – in fact, two-thirds (65%) of all registered boarding houses – have no students at all.

### ***Older persons***

The register records 1,408 persons aged 60 years and older living in RBHs, comprising 11 per cent of all residents. However, they are relatively concentrated: while 61 per cent of registered boarding houses do not accommodate any older persons, there are 91 where older persons comprise one-third or more of residents, and 33 of these premises predominantly accommodate older persons (ie two-thirds or more are aged 60 years and older).

Some of these moderately or predominately older persons boarding houses would be assisted boarding houses – but plainly not all of them. The Inner West has a relatively high proportion of the boarding houses with moderately or predominately older clientele.

**Table 7. Registered boarding houses, by mix of older persons, top 10 LGAs.**

| LGA                  | Mostly under 60 years (up to 33%) | Moderately aged (33-66% aged 60+) | Predominately aged 60+ (more than 66%) |
|----------------------|-----------------------------------|-----------------------------------|----------------------------------------|
| Bayside              | 20                                | 1                                 | 2                                      |
| Burwood              | 19                                | 5                                 | 3                                      |
| Canterbury Bankstown | 21                                | 3                                 | 0                                      |
| City of Sydney       | 195                               | 10                                | 7                                      |
| Inner West           | 136                               | 12                                | 12                                     |
| Newcastle            | 33                                | 3                                 | 0                                      |
| North Sydney         | 13                                | 3                                 | 0                                      |
| Randwick             | 50                                | 3                                 | 0                                      |
| Waverley             | 27                                | 7                                 | 1                                      |
| Wollongong           | 14                                | 1                                 | 1                                      |

Source: NSW Boarding Houses Register

### ***Vulnerable residents***

The register records where a resident has, to the best knowledge of the proprietor, a disability, a mental illness, a health problem, or a need for daily assistance. Across the whole of the state, the register records just 354 persons with disability, 477 persons with mental illness, 234 persons with health problems and – incredibly – zero persons in need of daily assistance residing in registered boarding houses – including the assisted boarding house sector. For the large majority of registered boarding houses (83%), no-one with any of these factors is reported among the residents.

The figures appear to challenge common stereotypes about boarding houses, but arguably they undercount the prevalence of these factors. This is because the factors correspond with the definition of a 'person with additional needs' in the Boarding Houses Act, so where there are two or more residents with these characteristics, there is a possibility that premises will fit the definition of an assisted boarding house. This possibility and the additional obligations it entails arguably leads to proprietors under-reporting these factors. Nonetheless, there are 109 registered boarding houses with two or more residents with one of these factors ('vulnerable residents').

Under the Boarding Houses Act definition, a resident with 'age-related frailty' may also qualify a 'person with additional needs'. This might be indicated – but not very strongly – by register's data on residents aged 60 and older.

**Table 8. Registered boarding houses, by vulnerable residents, and assisted boarding houses, top 10 LGAs.**

| <b>LGA</b>           | <b>Two or more vulnerable residents</b> | <b>Two or more vulnerable or older residents</b> | <b>ABH</b> |
|----------------------|-----------------------------------------|--------------------------------------------------|------------|
| Bayside              | 2                                       | 10                                               | 0          |
| Burwood              | 5                                       | 16                                               | 1          |
| Canterbury Bankstown | 3                                       | 13                                               | 1          |
| City of Sydney       | 12                                      | 56                                               | 0          |
| Inner West           | 29                                      | 72                                               | 2 [4]      |
| Newcastle            | 12                                      | 17                                               | 3          |
| North Sydney         | 4                                       | 9                                                | 0          |
| Randwick             | 3                                       | 12                                               | 0          |
| Waverley             | 3                                       | 15                                               | 0          |
| Wollongong           | 3                                       | 6                                                | 0          |

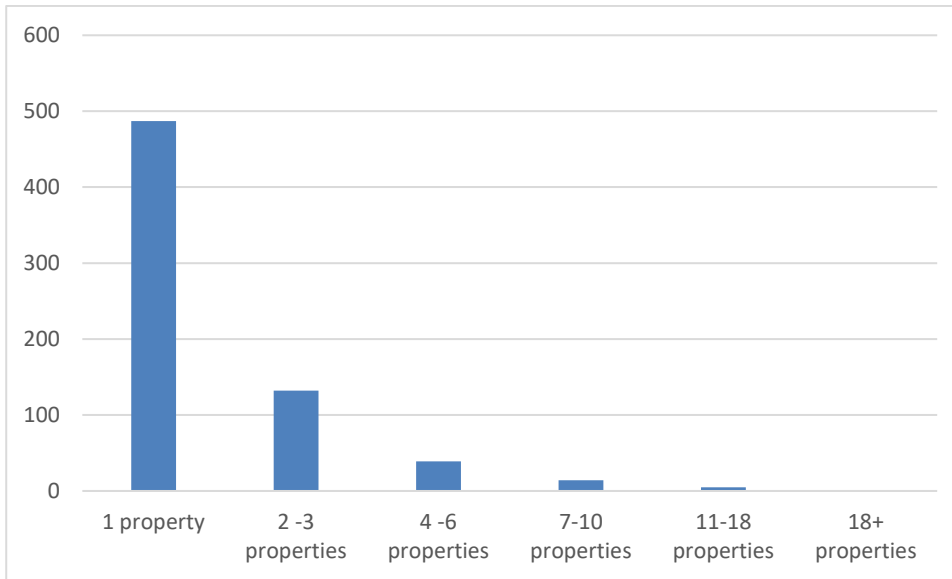
Source: NSW Boarding Houses Register

## **Ownership**

Finally, because the register records proprietors' names, it can give us an indication of the ownership structure of the registered boarding house sector.

Figure 4 indicates how many proprietors (excluding proprietors known to be associated with student-only providers) hold a single registered boarding house, how many own two or three, and so on. It is a rough indication, because in this analysis proprietors are identified by surname, in order to capture family groups that own several boarding houses between related members, but it may also capture together unrelated proprietors who happen to have a common surname. On this basis, there are 652 registered proprietor surnames on the register, and the large majority (487, or 75%) are recorded against a single property. The largest holding is 17 properties (held between two related persons).

**Figure 4. Registered proprietors' holdings of registered boarding houses**



Source: NSW Boarding Houses Register.

## Forms of boarding houses

In this chapter we discuss the different forms of boarding houses – some of which have a basis in legislation, others of which reflect differences in business models and clienteles. The discussion includes comments from our interviewees about current issues and prospects for the different parts of the sector.

### Registrable boarding houses: general and assisted boarding houses

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As discussed above, the Boarding Houses Act applies to ‘boarding premises’ that also fit the Act’s criteria for ‘general boarding houses’ or ‘assisted boarding houses’. These two forms are referred to together as ‘registrable houses’ and are subject to the following requirements:

- the proprietor must register the premises on the Boarding Houses Register;
- the premises must be inspected by the local council;
- the premises must comply with the standards for ‘places of shared accommodation’ at Schedule 2 of the *Local Government (General) Regulation 2005* (NSW); and
- lodging agreements with respect to the premises must comply with the ‘occupancy principles’ at Schedule 1 of the Boarding Houses Act, and disputes about them are within the jurisdiction of the NSW Civil and Administrative Tribunal (NCAT).

The requirement to register is separate from and additional to the requirement to obtain development approval for a boarding house – and, for that matter, the requirement to obtain authorisation from FACS to operate an assisted boarding house. For this reason, registration does not necessarily mean that a boarding house is operating lawfully – but it would be odd for an illegal operator to register, because it would draw attention to the operation. The register can be seen to serve a number of purposes. It helps local councils rebuild their knowledge of the sector locally (knowledge lost after the introduction of the *Local Government Act 1993* (NSW), which removed a prior system of local licensing of boarding houses). Secondly, it provides information to state government agencies. Thirdly, the register allows members of the public to check if premises are registered and the name of the registered proprietor, so has a mild consumer protection function.

We discuss the standards for places of shared accommodation along with other issues of built form further below. The remaining common requirement of the Boarding Houses Act is compliance with the occupancy principles. These are 12 principles about residents’ entitlements regarding their housing, that are required to be reflected in the individual ‘occupancy agreements’ between proprietors and residents with provision for dispute resolution by NCAT. For example, residents are entitled to know the rules of the boarding house before they move in (OP 2), and know why and how the occupancy may be terminated, and how much notice will be given (OP 9). The principles are less specifically prescriptive than the provisions of the Residential Tenancies Act, so allow more variation between individual agreements, or between different parts of the boarding house sector. Provision is made for the state government to prescribe standard forms of occupancy agreement, but it has not done so.

The common view of our resident advocate interviewees was that the occupancy principles had generally improved the standard of conduct around lodging agreements, but that residents were still reluctant to go as far as applying to NCAT to enforce their contractual rights or resolve disputes. This is, in a way, consistent with the view of our traditional boarding house proprietor interviewee, who said ‘looking back, it’s not as bad as we thought it would be.’

### General boarding houses

General boarding houses are boarding premises with beds for five or more residents (not including the proprietor, or manager, or their relatives, if they reside there) and that do not also meet the definition of ‘assisted boarding house’ (section 5, Boarding Houses Act) or one of a long list of types of exempt premises (for example, social housing, refuges, some student accommodation). Notwithstanding the various exemptions, this makes ‘general boarding houses’ a broad category, ranging from all but the smallest boarding houses to the largest, and encompassing long-established traditional boarding houses, informal

boarding houses and, though the definitional problems discussed above make this uncertain, some 'new generation boarding houses' (NGBH), 'co-living' accommodation and purpose-built student accommodation. All these forms are discussed further below.

Apart from the provisions common to all registrable boarding houses (as outlined above), the Boarding Houses Act makes no further provisions regarding general house boarding houses, their proprietors and residents.

### ***Assisted boarding houses***

Assisted boarding houses are boarding premises with beds for two or more residents, where those residents are 'persons with additional needs'. The Boarding Houses Act provides that 'a person is a person with additional needs if:

- (a) the person has any one or more of the following conditions:
  - (i) an age related frailty,
  - (ii) a mental illness within the meaning of the Mental Health Act 2007,
  - (iii) a disability (however arising and whether or not of a chronic episodic nature) that is attributable to an intellectual, psychiatric, sensory, physical or like impairment or to a combination of such impairments, and
- (b) the condition is permanent or likely to be permanent, and
- (c) the condition results in the need for care or support services (whether or not of an ongoing nature) involving assistance with, or supervision of, daily tasks and personal care such as (but not limited to) showering or bathing, the preparation of meals and the management of medication.

The assisted boarding house sector is, therefore, highly specific: it is congregated accommodation for disabled persons. Although vastly outnumbered by general boarding houses, most of the content of the Boarding Houses Act is directed to regulating assisted boarding houses.

Prior to the implementation of the Boarding Houses Act, these sorts of premises were regulated under the *Youth and Community Services Act 1973* (NSW) as 'licenced residential centres' or 'licenced boarding houses'. This sector emerged as large residential institutions for disabled persons closed, but the boarding houses were also institutional, with large numbers of residents accommodated in dormitory rooms and isolated from the wider community. As documented in numerous government reports, residents were commonly neglected, abused and financially exploited by proprietors, and regulation was inadequate. A reform program was commenced in 1998, but even with increased attention to the sector doubts about the legal enforceability of licence conditions persisted until the legislation was replaced by the Boarding Houses Act.

The regulation of assisted boarding houses under the Boarding Houses Act is tightly prescriptive. Where premises fit the definition of an assisted boarding house, the proprietor must seek the approval of FACS to continue operating as such. The maximum number of residents for an assisted boarding house is 30, and residents are entitled to have a room of their own (Boarding Houses Regulation 2013, Schedule 1). Proprietors are required to use a screening tool devised by FACS when taking in new residents, to ensure only persons with low levels of additional need are accommodated; submit to monitoring and inspections by FACS officers; allow access to service providers and advocates; and provide services and facilities according to the Boarding Houses Regulation.<sup>11</sup>

The current general state of the assisted boarding house sector is, according to one of our state government interviewees, 'as good as they are going to get: they are safe, clean, regulators go in quite often, there's a lot of external stakeholders, and most proprietors are trying to run a decent service'. However, this interviewee also characterised them as a 'legacy model': the current operators are approaching retirement, with little prospect of selling their businesses as going concerns, and the congregated, institutional mode in which they operate is not supported by disability advocates.

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<sup>11</sup> Including, for example, ensuring that each resident has their own clothing, toothbrush and soap (Schedule 1, clause 12). The fact this needs to be stipulated suggests the level of neglect previously experienced in the sector.

However, assisted boarding houses might continue to appear in the sector, in unexpected ways. This is because assisted boarding houses are defined by the presence of two or more persons with additional needs – regardless of the type of service the proprietor intends to provide. When the Boarding Houses Act was introduced, proprietor and resident representatives expressed concern that an ordinary ('general') boarding house would, if it happened to accommodate a second disabled person, be transformed by the definition into an unauthorised assisted boarding house, with the liabilities and restrictions that follow from that. This has not happened, but FACS does monitor the Boarding House Register for updated data indicating persons with additional needs and visits premises it regards as potential unauthorised assisted boarding houses. Our state government interviewee gave the example of a large general boarding house that is often observed accommodating disabled persons, arguably 'with additional needs', though the proprietor does not particularly seek them out: it has not yet been determined to be an unauthorised assisted boarding house but it 'sails very close to the wind'.

Another area of concern is the proliferation of new forms of accommodation for disabled persons associated with the National Disability Insurance Scheme (NDIS), which shifted disability service funding away from government and non-government agencies to individual disabled persons, in the form of NDIS packages. When it was first enacted, premises providing accommodation for persons with additional needs that were wholly or partly funded by the state – for example, the group homes operated by the then-Department of Ageing, Disability and Home Care – were excluded from the Boarding Houses Act (section 37(2)(o)), and in 2016 this exemption was extended to Specialist Disability Accommodation (section 37(2)(o1)), which serves persons who are assessed as having very high support needs and have SDA included in their NDIS package. Standards in SDA are regulated by the NDIS Quality and Safeguards. However, very many more persons receive a Supported Independent Living (SIL) package, which funds the receipt of support services for daily tasks, wherever they may be housed. Some disability service providers now offer to SIL recipients accommodation combined with support services – and where the premises accommodate two or more such persons, they most likely fit the definition of an assisted boarding house. Our state government interviewee said that one service provider has recently applied for authorisation to operate an assisted boarding house – and did so reluctantly, because of the poor reputation of the sector. Our interviewee also thought that this provider did not need the high level of monitoring and prescription applied to the assisted boarding houses under the Boarding Houses Act, but currently no other regime (such as the NDIS Quality and Safeguards) applies.

## **Class 1b and Class 3 boarding houses, and places of shared accommodation**

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Aside from the classification scheme in the Boarding Houses Act, there is also a classification of boarding houses in the National Construction Code (NCC), which classifies all buildings constructed across Australia by their use and sets out performance standards. In this scheme a boarding house is either a Class 1b or Class 3 building, depending on its size. A general boarding house may be either a Class 1b or a Class 3 building; likewise, an assisted boarding house may be either class.

Class 1b buildings include small boarding houses, for up to 12 residents and not more than 300 square metres in area, and the specification is little different from that for single dwellings (Class 1a). Class 3 buildings include larger boarding houses, alongside hotels, hostels, detention centres and other larger non-private residential buildings. Class 3 buildings have higher specifications around fire safety, accessibility and facilities (e.g. one bath or shower, one closet pan, and one washbasin, for every 10 residents: NCC vol 1: F2.1(b)).

The specifications of the NCC are given effect through the development approval and certification process, along with the requirements of planning instruments such as the AHSEPP and local Development Control Plans (DCPs).

Overlying both classes are the requirements for 'places of shared accommodation' set out in the *Local Government (General) Regulation 2005* (NSW) (Schedule 2). These provisions are traditional sanitary-style regulation and require, for example, rooms to be assigned a number and a schedule of room numbers, maximum number of residents and maximum length of stay to be displayed. Prior to the introduction of the

Boarding Houses Act, these provisions applied only to Class 3 buildings; now they are extended to all registrable boarding houses (clause 83).

## **‘Traditional’ and ‘new generation’ boarding houses**

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The terms ‘traditional boarding house’ and ‘new generation boarding house’ are not legislated, but are instead used in policy documents and sector parlance to reflect the diversity of boarding house forms permitted by the Standard Instrument definition. **Traditional boarding houses** are mostly older buildings, characterised by shared bathroom and/or kitchen facilities; **new generation boarding houses** have kitchen and bathroom facilities in self-contained rooms, and have almost all been developed (newly built, or converted from older buildings) since the commencement of the AHSEPP in 2009 (NSW Planning and Environment, 2018). The two forms also have different clienteles, modes of operation, and roles in the housing system.

### ***Traditional boarding houses***

As well as tending to be older buildings, **traditional boarding houses** tend to be older businesses, sometimes owned and operated by a family over successive generations. Historically, these proprietors typically lived at the premises themselves or employed a resident caretaker, used lodging licences and the associated terminology, and conducted operations according to the proprietors’ own rules – all factors that firmly distinguished their relations with residents from tenancies, and their premises from ordinary dwelling houses.

Our traditional boarding house proprietor interviewee highlighted the ‘flexibility’ that this mode of operation afforded both proprietors and residents, neither of whom wanted to be ‘stuck with a problem’, and that gave the sector the ‘easy in, easy out’ character we observed above. In particular, this flexibility meant proprietors were more disposed to offering accommodation to persons who would be screened out by the more rigorous application processes used in the mainstream residential tenancy sector, and not assisted quickly enough by the social housing sector.

All of our resident advocate interviewees agreed that the relative accessibility of the traditional boarding houses was a key feature. This was especially so for persons leaving prison. In the Inner West, which as the previous chapter indicates is a centre of the traditional boarding house sector, Newtown Neighbourhood Centre and the NSW Community Restorative Centre collaborate on a ‘Transitional Boarding House Support’ project, which assists ex-prisoners find accommodation in boarding houses and provides case work support. Interviewees indicated that some proprietors consciously manage their intake of ex-prisoners, with assistance for support workers where available and their own working knowledge, but it is difficult work: ‘boarding houses have a really transient population and the people there can be completely different in a matter of weeks. So that’s hard to manage.’ Resident advocate interviewees were ambivalent about what the relative accessibility of traditional boarding houses got residents into: aside from the unpredictability of who else might reside at the premises, the experience of the space itself, and the rules and surveillance by proprietors, often made boarding house accommodation a stop-gap.

It’s the physical nature of it: the room – and the fact they are paying for this! – it’s the size of a cell and that’s quite confronting for a lot of people. There’s not much freedom in arranging the room, so there’s limits on choice, and they may feel like they’re being monitored, or restricted. And for that reason people will sometimes stay for two weeks and move out. (Resident advocate interviewee)

A state government interviewee with direct experience of the traditional boarding house sector said that ‘the ones I see are really bad’, citing visits to premises in very poor repair, and premises that were inaccessible for disabled persons (including where disabled residents were effectively confined to their rooms by steep stairs between storeys). The traditional boarding house proprietor interviewee conceded that some proprietors ‘deserved a kick in the pants,’ but suggested ‘most are doing a pretty good job.’ The worst problems, according to this interviewee, were in the informal sector, but it was competing on price with the lower end of the traditional sector and, as a result, undermining viability and conditions there too.

Regarding the regulation of traditional boarding houses, both our state government interviewee and our traditional boarding house proprietor interviewee were critical of local government. The state government interviewee admitted variation in performance across councils – ‘some aren’t bad; some of them are terrible’ – but said generally local councils had not done enough to drive proprietors to comply with their obligations under the Boarding Houses Act, or general health and safety standards.<sup>12</sup> The proprietor interviewee, on the other hand, suggested councils were ‘looking under the light-post: they tend to deal with the boarding houses they can see – the ones that are registered – when really, we should see regulation hitting the illegal operators.’ This interviewee further said that council officers often lacked specific knowledge or experience regarding boarding houses, leading to inconsistent directions to proprietors, particularly regarding fire safety. When we relayed these criticisms to our local government interviewee, he said councils generally would act where premises were not safe, but there is ‘a tension: if you say to a proprietor you have to do all this, and they say we can’t afford it, we’ll have to close, there’s people on the street. It’s difficult.’

The state government provides two important financial supports to the traditional boarding house sector. The first is the land tax exemption, mentioned in the previous chapter and amounting to \$12 million this year (NSW Government, 2019). This subsidy is targeted to the traditional sector by ruling out from eligibility premises that use residential tenancy agreements, and so in turn has the effect of promoting the use of lodging agreements. It also tends to converse the existing sector, rather than the development of new boarding house accommodation; in particular, the amount of the subsidy it provides a proprietor would not increase were they to add additional rooms to their property. Our traditional boarding house proprietor interviewee regarded the land tax exemption as very important, observing that it gave proprietors ‘security’: they could pay bills and live off their cashflows and not worry about the ‘big chunk of money’ otherwise levied annually by land tax. The second, smaller source of support is the Boarding House Financial Assistance Program, administered by FACS. This program provides grants of up to \$60,000 to contribute to the cost of fire safety upgrades, which our traditional boarding house proprietor interviewee considered as having saved some boarding houses from closing down. For a time the program also offered grants to contribute to the cost of developing new boarding house rooms, but this stream is currently suspended.

Interviewees spoke about trends in the traditional boarding house sector. According to our proprietor interviewee, there had been something of a shake-out of proprietors on the introduction of the Boarding Houses Act, and ongoing competition and undercutting from the informal sector, but he otherwise saw across the rest of the traditional sector a trend towards improved conditions, including occasional renovations to include kitchenettes or bathroom facilities in rooms. Our traditional boarding house proprietor and some of the resident advocate interviewees also observed more proprietors engaging real estate agents, rather than resident caretakers, to manage their boarding houses. Both these movements in built form and management raise questions about whether premises are providing residential tenancies, rather than lodgements. Two of our resident advocate interviewees said they observed more women living in boarding houses, and that a few proprietors were trying to establish a higher proportion of women residents to make them safer places.

### ***New generation boarding houses***

New generation boarding houses (NGBHs) are very much creatures of the AHSEPP. The AHSEPP operates by setting certain standards that boarding house developments are required to meet (clause 30), and by preventing local councils from refusing development consent where they do not meet a higher or more onerous requirement (clause 29). The result is a form that can be built in many residential and commercial zones, at densities equal to, and sometimes exceeding, the maximum floor space ratio otherwise set out in local plans, with rooms measuring 12-25 square metres (excluding space given to kitchen and bathroom facilities). For NGBHs with more than five rooms, communal areas are also required, and those with more than 20 residents are required to have a ‘boarding house manager’, echoing the traditional boarding house form, but in fact these developments typically resemble blocks of (very) small self-contained flats. The AHSEPP also contains no affordability requirement for boarding house developments, so the form it permits can generate relatively high rental yields. Since its introduction, there has been some tightening of the

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<sup>12</sup> Specifically, councils’ powers under the *Local Government Act 1993* and the *Environmental Planning and Assessment Act 1979*.

AHSEPP provisions, with the introduction of consideration of 'local character' in development applications (clause 30A) and a 12-room limit on NGBH developments in low density residential zones (clause 30AA), and more onerous parking requirements (one parking space for every 2 residents).

The growth of the NGBH sector was also facilitated by the National Rental Affordability Scheme (NRAS). Under the scheme, NRAS subsidies (approximately \$10,000, indexed annually, for 10 years) are paid to qualifying projects on a per dwelling basis, and it was determined that each self-contained 'room' in an NGBH development is eligible for the payment. NRAS requires subsidised dwellings to be let at below-market rents, and occupied under residential tenancy agreements – another formal indication that these NGBHs are not, in fact, boarding houses.

Although NRAS was closed to new applications in 2014, the provisions of the AHSEPP have been encouraging enough for the continued development of market-rate NGBHs by for profit private entities, and by community housing providers. The total number of NGBHs are not known but, as noted above, Troy et al (2018) count 238 new developments under the AHSEPP boarding house provisions in the 11 LGAs of southern Sydney, and the Community Housing Industry Association has stated that more 100 NGBHs have been developed by its members, mostly in Sydney, but also the Central Coast and Newcastle (NSW CHIA, 2018).

The growth of the NGBH sector has been controversial, with numerous instances of local communities objecting to proposed developments, local councils declining applications, and litigation by developers to secure development approval (Judith Stubbs and Associates, 2017). This was primarily because of the negative connotations of the term 'boarding house', said our NGBH proprietor interviewee and two state government interviewees, which did not accurately convey how NGBHs operate or who they accommodate: 'we're nothing like that' (NGBH proprietor interviewee). The proprietor interviewee described the resident profile of one of his Inner West buildings as '50:50 male:female, some students, some nurses, some registrars at RPA [Royal Prince Alfred Hospital], some apprentices – hospitality people who need to live within 6km of the CBD – and some people from Wollongong or the Blue Mountains who live in the boarding house during the week and go to their principal place on the weekend.' And the accommodation provided, said the interviewee, 'is safe, long-term, and secure.'

The argument that NGBHs are misnamed is a strong one: it appears most are not boarding houses at all. Following up their 2018 research, which found most of the southern Sydney NGBHs were not registered as boarding houses, Troy, et al (2019) surveyed occupants of newly developed boarding houses and found 86 per cent occupied rooms with both kitchen and bathroom facilities, and 86 per cent had a residential tenancy agreement, not an occupancy agreement.

Our NGBH proprietor interviewee said none of his several NGBHs operated as boarding houses: all the rooms – 'studios' – were self-contained and occupied under residential tenancy agreements. In the case of one building, this was a requirement of NRAS, but overall the main reason was that both he and the residents preferred the security and commitment of a tenancy agreement. (The interviewee also said that he had early on used lodging agreements, in an attempt to comply with the land tax exemption requirement, but this was not economic for his developments and residential tenancy agreements were preferable.) The developments complied with AHSEPP requirements by providing communal kitchens and lounges, but 'these are seldom if ever used', and engaging a 'manager' for each building – a resident who pays reduced rent for being a point of contact with the proprietor. But overall the premises were 'more akin to a residential flat building' and the proprietor consciously did not register any of these NGBHs on the Boarding Houses Register.

As our local government interviewee put it, 'new generation boarding houses give [developers] an opportunity to do small apartments that otherwise they just could not do', specifically because of the design guide for residential flat buildings prescribed by State Environmental Planning Policy 65. Both the NGBH proprietor and two state government interviewees contended that NGBH development had been held to a sufficiently high standard by the combination of the AHSEPP, the NCC specification for Class 3 buildings and local councils' DCPs, with the proprietor also stating that as a matter of meeting the market most NGBH rooms were above the AHSEPP's minimum size. The state government interviewees did feel, however, that the size of NGBH rooms generally limited them to a 'transitional' role, particularly for students and young persons, and not permanent housing.

The contribution of NGBHs to affordability objectives is also controversial. It was common ground among our NGBH proprietor and state and local government interviewees that NGBHs in the inner and beachside suburbs of Sydney were not being let at a lower price point than other studio apartments, but they had usefully met growing demand in these areas from students and young workers. The local government interviewee advocated for an affordability requirement to be imposed on NGBH developments under AHSEPP, and for market-rate developments to proceed under a separate planning instrument, with less generous provisions. On the other hand, according to the state government interviewees, NGBHs in middle and outer suburbs and regional centres had created a new price point that was affordable for people on low-moderate incomes.

Looking ahead, all these interviewees saw demand for NGBH-style accommodation increasing. The NGBH proprietor, in particular, envisaged the form rebranded as ‘micro-apartments’, and shorn of its associations with boarding houses. However, it appears that the new, more onerous requirements around parking may be the sector’s biggest challenge to further growth.

## Student accommodation

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Alongside the residential colleges and halls of residence that have long been a part of university campuses, a sector of purpose-built student accommodation (PBSA) has developed over the past 25 years or so, catering particularly to the growing numbers of international students. This sector has significant institutional backing and includes premises developed on or near university campuses in formal collaboration with universities (e.g. the Campus Village model), and premises developed off-campus and without an affiliation with any one university or education provider (e.g. Urbanest, Iglu and Scape). JLL counts just over 10,000 beds in accommodation provided by or affiliated with universities, and just under 10,000 beds in unaffiliated ‘commercial’ student accommodation, in Sydney (JLL, 2019).

Aside from the development of fee-paying tertiary education as an export industry, PBSA growth was also supported by NRAS – this had an ‘epic’ impact on PBSA across Australia, according to our tertiary education sector interviewee, and arguably contributed to the demise of the scheme. In New South Wales, the sector was also facilitated by the AHSEPP – to the frustration of our NGBH proprietor interviewee, who said that PBSA developers were outbidding him on sites, and not contributing to housing affordability objectives. On the other hand, our state and local government interviewees generally acknowledged that there was a plain need for student accommodation that the sector had served.

The size and specific purpose of the sector make it difficult to conceive of PBSA as part of the boarding house sector, and it is subject to even more definitional confusion than NGBHs. Student accommodation is not a distinct land use in the Standard Instrument, and developments generally proceed as boarding houses. For federal tax purposes, student accommodation is regarded as commercial residential premises, but specifically as a hostel, rather than a boarding house.<sup>13</sup> This characterisation implies that the accommodation provided is ‘comparatively low-cost’ – a point that may have been lost on some providers.

‘Residential colleges and halls of residence’ formally affiliated with education providers are generally exempt from the Residential Tenancies Act (per clause 20 of the *Residential Tenancies Regulation 2010*), although for premises built with NRAS subsidies, there is an obligation to use residential tenancy agreements. There is also an exemption for ‘premises that are used by an educational body to provide accommodation for its students’ from the Boarding Houses Act (section 5(3)(f)) – and hence from the requirement to register, and application of the occupancy principles. It appears that affiliated providers generally use lodging agreements, except where required to use residential tenancy agreements by NRAS; while commercial/unaffiliated providers generally use residential tenancy agreements, including where there is no NRAS requirement.

Across both the affiliated and unaffiliated providers, the built form of student accommodation varies from very small self-contained rooms with kitchenette and ensuite bathroom, to ‘apartments’ comprising up to six or so bedrooms with a shared bathroom, kitchenette and living room, and various other dining, study and common rooms shared by all the residents of the building. As in NGBHs, self-contained rooms most likely mean occupation by a tenant, not a lodger; on the other hand, rooms in shared suites and a high degree of

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<sup>13</sup> *ECC Southbank Pty Ltd v Federal Commissioner of Taxation* [2012] FCA 795.

'involvement' by the proprietor in living arrangements look more like lodgings. Whether the sector's use of residential tenancy and lodging agreements corresponds to these substantial differences is not clear. Similarly, it is not clear that the relative few PBSA premises on the Boarding Houses Register (all are unaffiliated providers) actually operate as boarding houses, accommodating lodgers.

Our NGBH proprietor interviewee was doubtful about the prospects of the PBSA sector: he saw Asian countries, in particular, developing their own tertiary education sectors and the Australian sector losing ground. In this event, our interviewee also further questioned whether the PBSA stock could be adapted to general use, considering the especially small size of rooms and sharing arrangements. Our tertiary education sector interviewee, however, saw the sector continuing to grow, and even predicted that it might branch out into providing education services itself.

## Co-living

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Co-living is a very small sector of recently established businesses offering upmarket furnished accommodation with varying degrees of sharing. The accommodation ranges from so-called 'pocket rooms' with shared bathrooms and kitchens, to self-contained rooms with access to shared communal spaces. 'Co-living' also boasts community events such as yoga sessions and wine tastings. Pocket rooms are currently advertised at \$325-\$425 per week – considerably above the land tax exemption threshold of \$265 per week.

There are currently two companies operating in Sydney under the 'co-living' banner: UKO, with two premises, and Hmlet, with four premises – but rather more in Hong Kong, and in Singapore, where Hmlet is based. Both say they make special efforts to 'match' compatible residents, with Hmlet claiming to use '10 data points' and 'advanced psychometric techniques' (Hmlet, n.d.).

None of the Sydney co-living premises are registered as boarding houses, but the degree of sharing and proprietor involvement in selecting sharing residents and managing events at the premises raises a question as to whether they are boarding houses – albeit posh ones.

## Refuges and crisis accommodation

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Refuges, crisis accommodation provided by charitable organisations and other not-for-profit agencies also have an ambiguous place in the sector. Some refuges and crisis accommodation operate in ways similar to those of boarding houses, by providing accommodation under lodging agreements. They are not, however, regulated as boarding houses.

For the purposes of the planning system, refuges and crisis accommodation may be either a 'hostel' – a 'non-dwelling' type of residential accommodation that planning instrument historically included in the 'boarding houses' category – or a 'transitional group home'. The latter is a type of dwelling, expressly characterised in the Standard Instrument as 'occupied by persons as a single household (see also *Roberts v Waverley Municipal Council*)'. Refuges and crisis accommodation are expressly excluded from the Residential Tenancies Act (per clause 14 of the Residential Tenancies Regulation 2010), unless the operator agrees to opt in. Refuges and crisis accommodation are also expressly excluded from the definitions of 'general boarding house' (section 5(3)(p)) and 'assisted boarding house' (section 37(3)(o)) under the Boarding Houses Act.

## Informal boarding houses and lodging

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Informal boarding houses are premises let in lodgings that have not been formally developed or approved for use as a boarding house. For this reason they are also most unlikely to appear on the Boarding House Register, and are hidden in other housing system data too.

Informal boarding houses are one type in a larger category of informal housing – i.e. premises used as housing in contravention of planning, building or tenancy rules – which Gurran et al (2019) have begun to

investigate in Sydney. The informal boarding house sector also shades into the share housing sector (Nasreen and Ruming, 2018). As discussed in the first chapter, share housing is an allowed form of dwelling house use, to the extent that it resembles 'a family group in the ordinary way of life', but when 'sharing' goes beyond that, and the proprietor is determining who will be admitted and how they will be accommodated (e.g. as in *Sun v Randwick City Council*), it will be an informal boarding house.

Diverse properties are used as informal boarding houses: otherwise ordinary houses, apartments and, in an infamous case in Alexandria, a yard full of old buses, caravans and shipping containers (Olding, 2014). Premises are often furnished with bunk beds and partitioned or altered to accommodate as many residents as possible, such as the 3-storey Ultimo terrace converted to a 19-room, 58-bed informal boarding houses (Han, 2015). Both the unauthorised use and associated alterations are unlawful developments, against which local councils are empowered under the *Environmental Planning and Assessment Act 1979* (NSW) to make orders and take criminal proceedings. Councils are also empowered to issue fines or prosecute proprietors for failing to register premises as required by the Boarding Houses Act. Amongst councils, the City of Sydney has probably made the largest effort against unlawful boarding houses, with a special taskforce established in 2015 that inspected more than 100 premises, executed 30 search warrants and issued more than 80 notices and orders in its first year of operation (Daily Telegraph, 2016). Aside from public law enforcement, private law may also be used against informal boarding houses: in particular, in strata apartment buildings, the owners corporation can use by-laws to limit the number of residents in each apartment, and where a rented property is used as an informal boarding house, the standard terms against subletting and use of premises for an illegal purpose can be used to terminate the tenancy and the unlawful operation.

Despite the illegality, informal boarding houses remain rampant, according to both our traditional boarding house proprietor and resident advocate interviewees. Our state government interviewees acknowledged that they had 'little visibility' of the informal sector and, as already noted, our traditional boarding house proprietor interviewee likened current regulatory practice to 'looking under the light-post'. These comments echo the characterisation of informal boarding houses as being in a 'regulatory blindspot' (Martin, 2015). On this analysis, the image of the traditional boarding house – reinforced by the NCC's classes and the standards for places of shared accommodation – has diverted regulators from the reality of apartments let in lodgings, and where to draw the line between what is unsafe, exploitative and unacceptable, and what is tolerable, in this new operating environment for boarding houses.

## Towards a new policy agenda for boarding houses

With the AHSEPP now ten years old, and the Boarding Houses Act now in operation for more than six years, it is timely to refresh the policy agenda around boarding houses. In this concluding chapter, we reflect on the preceding discussion and briefly outline some directions for a new policy agenda.

### **Clarifying terms**

One of the themes of this report is the definitional confusion around boarding houses. It is taken for granted that boarding houses are different from other forms of residential accommodation, and that their differences require different regulation, but terms by which boarding houses are currently defined do not mark strong lines of difference.

A clarification of terms should be discussed by all stakeholders, but a starting point might be the proposition that where a resident is granted a right to occupy premises but shares sleeping space, or kitchen and bathroom space, with other residents, and the grantor of the right determines who they will share with, the relationship between resident and the grantor of the right should be different from that of a resident who does not share, and the premises should be regulated differently from premises where there is no sharing.

This implies two follow-up propositions: that occupation rights where there is sharing ought to be more readily terminated than where there is none; and that both proprietors and premises providing sharing accommodation ought to be subject to more comprehensive standards and monitoring by public authorities.

In particular, consideration should be given to legislating a clear definition of 'lodger' and 'lodging'. This may mean revisiting the Residential Tenancies Act's inclusion of agreements that grant non-exclusive occupation – partial and blurry as it is. For residents on the lodging side of the line, the occupancy principles should apply. The occupancy principles regime could be legislatively reframed so that it is the default regime for all residents who pay for a periodic right to occupy who are not covered by more specific legislation, such as the Residential Tenancies Act or the *Residential (Land Lease) Communities Act 2013* (NSW).

Redefining 'lodgers' and 'lodging' would have the follow-on effect of clarifying the definition of 'boarding house' for the purposes of the planning system. There remains a question about whether the current inclusion of self-contained rooms is consistent with 'lodging' and 'lodgers', however defined, and this too should be reconsidered. Where premises are used to provide self-contained accommodation under residential tenancy agreements, and without sharing, they should not be called boarding houses. Whether micro-apartment blocks with studios as small as 12 square metres should be allowed is a separate question – to be considered as part of a wider discussion about residential flat building design, with evidence from the NGBH sector – and should not be confused with boarding house regulation.

### **An enhanced scheme of registration and accreditation**

As well as more clearly differentiating, in legislation and policy, boarding houses from other forms of residential accommodation, we should more clearly differentiate between types of boarding house. Differences in the clienteles served, and additional services provided, entail different levels of risk and should attract correspondingly different levels of regulation and monitoring. The current registration regime established by the Boarding Houses Act does this only very partially, with 'assisted boarding houses' well-defined and strongly regulated (though in need of an update for SIL-related accommodation), but 'general boarding houses' is an undifferentiated mix.

A more sophisticated approach is indicated by Queensland's *Residential Services (Accreditation) Act 2002* (Qld), which requires proprietors to register and become accredited for up to three levels of service provision: 'accommodation service' (mandatory for all registered residential services); 'food service'; and 'personal care service'. Consideration should be given to moving the New South Wales registration system to this model, with assisted boarding houses regulated as providers of accommodation, food and personal care services,

and other boarding houses seeking accreditation according to their mode of business (e.g. accommodation only, or accommodation and board. Consideration should also be given to requiring forms of accommodation that are excluded from the Queensland regime – specifically, student accommodation, and refuge and crisis accommodation – to be registered and accredited (as accommodation only, or accommodation and food services, as the case may be), with accreditation backed by monitoring and audit by relevant local and state authorities. For the information of prospective residents and the general public, the register could publish for each registered premises the name, address, proprietor, accreditation levels and service type (i.e. boarding house, assisted boarding house, student accommodation, crisis accommodation) of the premises, and any infringements, with provision for details about refuges to be suppressed.

Finally, for each of the different service types a specific standard form of occupancy agreement could be developed – consistent with the occupancy principles, and tailored to the particular type of service – and prescribed for use.

### ***Sector subsidies and encouragement***

Before considering the question of subsidies and other preferential treatment for boarding houses, there is a more basic question to be answered: what good do boarding houses specifically do? The accommodation boarding houses provide may be relatively affordable, but it also lacks privacy and security, and is often uncomfortable, unpredictable and unsafe. If it can make a claim to making a specific positive contribution to the housing system, it is that its 'easy in easy out' character allows access by persons who have more immediate needs, and shorter plans, than are currently served by wait-turn social housing or the mainstream private rental sector.

The land tax exemption and the BHFAP fire safety grants appear to be well-suited to preserving existing stocks of traditional boarding houses. The peculiar effect of the land tax exemption promoting insecure tenure would seem less peculiar if the tenure was also subject to a more comprehensive regime of accreditation and monitoring. In terms of measures to encourage the future development of the sector, consideration should be given to making the generous AHSEPP provisions subject to an affordability requirement, such as being let at a discount to the market rent or at less than the local first quartile rent. Meanwhile the development of market-rate boarding houses (e.g. co-living, or student accommodation) could be subject to less generous provisions. This might open up the prospect of community housing provider involvement in boarding houses – properly defined – and a more supportive, resident-focused ethos being brought to the sector's role.

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