

Response to CRTS Scheme Proposal Outlined in the Bundy Flyer No 88-Mid July, 2017

Having read the CTRS proposal, I make the following comments:

Company Title Schemes

The Flyer No.88 refers to the benefits of a similar scheme for companies (non-Co-operatives) registered under *Corporations Law*.

Company Title schemes have largely discontinued in favour of newer, more appropriate structures such as strata title and community title. One major reason for this is that members could not easily obtain mortgages because of the common ability of company directors to block sales of the subject property. This is inconsistent with the claim in the Flyer, page 1 that: ***'It would be a more attractive proposition for banks which may be more prepared to lend, since they are already familiar with Company Title schemes.'***

Owner Builder Permit

Flyer No 88, Page 1 states that a CRTS grant ***'might help Resident Members get the Owner builder Permit'***.

Regulation 19(2) of the *Home Building Regulation 2014* (NSW) requires that to be eligible to obtain an Owner Builder Permit, the applicant at minimum:

"(b) has a leasehold interest in the land that is registered under the Real Property Act 1900."

How will a CRTS grant then result in eligibility for an Owner Builder Permit? It is being proposed as neither a lease nor being registered or registerable on Co-op land titles.

The usual reason a member would apply for an O B Permit would be to build a 'structure' because they don't have one. If a pre-requisite to receiving a CRTS grant is already having a 'structure,' how are members who don't have one, going to receive a CRTS to obtain their O B Permit?

Residential Tenancies Act

Flyer No.88, page 1 states that ***'CRTS would exempt us from the Residential Tenancy (sic) Act. (there is an exclusion in the Residential Tenancy Act for Co-operative Titles)'***.

Could you provide exactly where the Residential Tenancies Act indicates this exclusion?

There is an exemption under the Act (section 8(1)(i) for company title schemes. What is being proposed is not a company title scheme. While Co-operatives and big C companies are both companies, they are incorporated under different legislation. Can you please provide hard evidence (e.g. legislative provision and case law or advice from NSW Fair Trading) that

the Co-op would indeed be exempt under the Residential Tenancies Act under the proposed CTRS?

The above claimed exemption appears to refer to the specific legal relationship between the Co-operative and members with structures granted a CTRS. If, as is claimed by the Co-op that sited members do not have property rights in their sites or structures, a CTRS scheme would not exclude those members who have moveable or temporary structures on sites from the Act. Under the Act 'premises' includes moveable dwellings (section 3, 'Definitions') and would include even a tent. Under the section 3 of the Act, "**residential premises**" means any premises or part of premises (including any land occupied with the premises) used or intended to be used as a residence."

A CTRS would not change the status of those visitors or members living in another member's structure which is the subject of a CTRS. **Can you please show how the legal relationship between the CTRS member and the person they are letting their structure (or part of it) to would not then be subject to the Residential Tenancies Act?**

The Flyer, page 2 states: '(c) Resident Members couldn't be kicked out of their homes as if the Co-op was found to be under the Residential Tenancy Act....' What does this mean? Who would 'kick' resident members out of their homes? One reason for the existence of the *Residential Tenancies Act 2010* (NSW) is to prevent tenants from being unfairly 'kicked out of their homes'. Removing a Residential Tenant from premises requires an order from the NSW Civil and Administrative Tribunal (not that this has prevented the Co-op from removing occupants in the past without one). If it were recognised that Resident Members had property rights in their sites and structures, the Residential Tenancies Act wouldn't apply to them anyway.

Insurance

Flyer No. 88, page 1 states: '*Also, currently, the Co-op and all its members could be currently liable for accidents and injuries caused by just one member's negligence'* **Can you please explain how 'all its members' could be liable? Is this to say that all members could jointly (or separately) be liable for any claim on Co-op land? Is this to say that all members could currently be liable for negligent acts or omissions made by the Co-op? How so? Please clarify.**

Flyer No. 88 states: 'Resident Members would continue to be liable for repairs and maintenance to the structures(s) on their shares, safety insurance etc.' If, as the Co-op claims, that members currently have no property rights in their structures or sites, why are they are currently liable for repairs, maintenance, safety, insurance etc. for the structures they occupy on Co-op land any more than for a house they might rent in Bellingen for example?

If, as appears to be intended, that a CRTS grant confers no property rights in the site or structure to the member (to be construed as mere contractual licence to occupy), can you please explain in detail how the entire burden of obligation and liability for the above is then validly shifted from the Co-op onto that member by a CRTS grant? Can you please provide the legal advice that shows that the CRTS would ensure that members occupying structures would then be legitimately solely and absolutely responsible and liable for structure maintenance, repairs and insurance etc.?

The Flyer, page 2 states: *'The CRTS would be over Residents (sic) Members' structure(s) only.'*

Does this include any sheds, toilets, carports and other outbuildings and fixtures? If not, does this mean that the Co-op will still be responsible for their maintenance, repair and insurance etc.?

If the granted right of exclusive occupancy is only for the structures, what about the land underneath them, (e.g. raised buildings) the land around structures and between outbuildings? Is the Co-op still responsible for these areas? Are these areas common areas (Co-op liable) or exclusive areas? It is noted that members leave considerable amounts building materials and other personal property on their sites. If someone hurts themselves on or around these, who is legally responsible? If members have exclusive rights to their structures only, how are they going to be made legally responsible?

What about areas that members have fenced off for their own use? As land is not the subject of CRTS exclusive occupancy, is this still Co-op common land and who is liable?

Who would be legally liable for maintaining standards in 'expanded house common areas'?

Are the expanded household members jointly liable? How do you arrange this? Are they instead areas accessible by all Co-op members?

To claim (Flyer No.88, page 2) that the above *'will be modelled on what is already in our By-laws and/or current practice'* makes no sense. There is no coherence or legal compliance under the By-laws and/or current practice. That is why change is needed.

CRTSwithout Borders

The Flyer, page 2 states: *'The CRTS can be implemented without borders and subdivisions'*

How can this be done? As above, if there are no borders how can it be determined who is liable when a claim is made for an event in particular place? For example, if it is just outside a member' structure, is it the member or the Co-op?

First Home Owner's Grant

One benefit that a CRTS grant may assist in obtaining in the First Home Owner's Grant.

Under section 5(2)(i) of the *First Home Owner's Grant (New Homes) Act 2000* (NSW) ('FHOGA') where a 'relevant interest' includes:

(g). 'an interest in a company's shares or in units in a unit trust scheme, if the Chief Commissioner is satisfied that:

(i) the interest entitles the holder of the interest to exclusive occupation of a specified home situated on the land and owned by the company or trustees, and

(ii) the value of the shares is not less than the value of the company's or trustees' interest in the home.

Again the issue is whether a company registered under the Co-operatives Act complies with the definition of company in this section.

Valuation of shares

Who will value the structures? Will it be the traditional 'bundle of sticks' valuation by the Co-op or market value by a qualified valuer as required by law?

Will the initial valuation change to reflect CPI and/or rising property market values?

Freedom and Flexibility

The Flyer, page 2, states: ***'The CRTS is an entirely flexible structure that can be crafted to give similar freedom and flexibility to what currently exists.'***

What is 'free' about a proposed legal structure with a primary objective to withhold all member's property rights in their sites and structures while continuing to attempt to dump all the legal obligation and liability for them onto them?

What is 'free' and 'flexible' about the current incomprehensible and contradictory legal jumble of Co-op rules, meeting agreements and by-laws that do not allow sited members to obtain even the basic permits, benefits and safeguards from government and other entities that people building homes for themselves and living in them are usually able to obtain?

What is 'free' and 'flexible' about the current 'structure' which cannot adequately recognise and achieve anything like an appropriate legitimate apportionment of

negligence liability and enables neither the Co-op nor sited members to comply with minimum insurance requirements for protection?

Independent Barrister's Advice

To enable Co-op members to make a fully informed decision on the CRTS, it is necessary to separate the facts from the spin. Perhaps the best way to achieve this is to obtain an independent barrister's advice. An independent barrister would be one whom is also not personally known to the Co-op solicitor, Nigel Hill.

It must be made clear that Mr Hill is obligated by law to act on the instructions of his client, the Co-op which retains him. Such instructions are derived from decisions of Co-ordinator's meetings and/or to delegated member's meetings. Unless specifically delegated by such meetings, individual members (whether Coordinators or not) or unauthorised groups do not have the authority to personally instruct Mr Hill to promote and create their preferred legal structure.

One way and another, Mr Hill appears to have been instructed by certain Co-op members, with or without legal authority, to find a legal structure satisfying their requirements. Requirements such as not recognising nor granting sited members property rights in their sites and structures while attempting to legitimately burden them with legal obligations to maintain, repair, make safe and insure etc.

So instructed, does not mean that Mr Hill necessarily believes that the legal structure that he is being asked to promote is the best one for Bundagen's particular circumstances. It would be interesting if Mr Hill could provide to the members the pros and cons of other possible legal structures he may have researched in the course of arriving at the CRTS as the 'preferred' option. As Flyer No.88 points out, there are a lot of maybes in this proposal. What is needed is greater certainty.

Generally speaking, the appropriate legal principle here is:

If people have no legally recognisable rights in property, they have no legally recognisable liability for it either.

David Farrell

26 August 2017