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SUBMISSION

Response to Fair Trading New South Wales discussion paper "Statutory Review of the *Residential Tenancies Act 2010*"

January 2016

Introduction

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law and policy, and the main resourcing body for the statewide network of Tenants Advice and Advocacy Services (TAASs) in New South Wales.

We have long-standing expertise in renting law, policy and practice, with a particular interest in the *Residential Tenancies Act 2010*. As a key stakeholder throughout the development and implementation of the Act, we ensured tenants' interests and perspectives were considered. From the release of the consultation draft bill in November 2009 to the Act's commencement in January 2011, we provided useful commentary and feedback to government.

Our interest in the Act is ongoing. We train tenants' advocates, lawyers and community workers in the use of its provisions, we consult with government and industry peaks on related matters, and we conduct litigation in the public interest on specific questions arising from the legislation itself. No other organisation in New South Wales has such a relationship with the *Residential Tenancies Act 2010.*

Now in our 40th year, the Tenants' Union is pleased to provide this response to Fair Trading's discussion paper for the statutory review of the Act. This contribution forms part of our continuing work towards greater stability, liveability and affordability for the one in three people who live in rented homes across New South Wales.

In producing this response we have consulted with tenants, tenants advocates, community workers, lawyers and a range of non-government organisations, including other housing

peaks. In particular, we have drawn on the work of the statewide network of Tenants' Advice and Advocacy Services, whom we resource. (TAASs) have collectively handled more than 150,000 questions and requests for assistance from tenants since the *Residential Tenancies Act 2010* commenced. The TAASs' considerable experience informs and complements our own, and provides a significant body of knowledge to draw upon when considering the legislation and its aims.

We understand a number of Tenants Advice and Advocacy Services will also be providing responses to Fair Trading's discussion paper, based on their own experiences working with the Act. We recommend these – they will demonstrate some of the difficulties the Act presents for tenants when attempting to avoid and resolve disputes.

Statutory review of the *Residential Tenancies Act 2010*

The current discussion forms part of a 'statutory review' of the legislation. The Act itself provides that the Minister review the policy objectives and terms of the Act to determine whether they remain valid and useful. As such, there is no apparent policy directive driving this discussion. But five years on from the introduction of the *Residential Tenancies Act 2010*, there is much to recommend further reform of our renting laws.

Between 2009-10 and 2013-14 almost 85,000 properties were added to the private rental market in New South Wales.[1] It is likely that many more have been added in the last year, as landlords borrowed almost $70 billion to fund their investments in 2014-15. This was up from $51 billion the previous year and $35 billion the year before that.[2] By comparison, the number of renter households in New South Wales grew by 43,000 between the 2006 and 2011 Census counts.

As a result of all this investment, only a comparatively low level of new housing has been brought into the rental market. About 90% of residential property investment is in established dwellings, not new construction.[3] This means homes are being transferred from the owner-occupier market, where first homeowner activity is in decline.[4]

At the other end of the income spectrum, renters are becoming less likely to secure a tenancy with a social housing landlord. Tightening of eligibility and rationing of stock

[1] Australian Taxation Office statistics from rental property schedules
[2] Australian Bureau of Statistics *Lending Finance Data* (series 5671 tables 8 & 19)
[3] Ibid
[4] Ibid

means many low-income households who might be seen as candidates for social housing are being redirected to the private rental market. In announcing a new 'Social Housing Strategy' on January 24 2016 – less than a week before the scheduled close of Fair Trading's discussion paper – the New South Wales Government has made it clear that it intends to place even greater reliance on the private rental market to house low income households. But with vacancy rates for Sydney hovering at around 1.6%, there is already no shortage of households taking up residence in the private rental market.

The proportion of tenants in New South Wales is growing faster than the general population. Today more than one in every three residents of New South Wales lives in a rented home. People are spending longer in the rental market, and families with children have become the predominant renter household.[5] Our renting laws should promote stability, liveability and affordability for anyone making a rented house their home.

Fair Trading's discussion questions

BACKGROUND

1 – Are the aims and objectives of the Act – as outlined in Fair Trading's discussion paper – still valid?

Balancing the interests of landlords and tenants

Fair Trading's discussion paper identifies five aims and objectives of the Act. These are not drawn from the text of the Act itself – they are reflected in the second reading speech, as the law was introduced to Parliament.[6] In making those remarks, the former Minister for Fair Trading placed the objectives within a broader context: striking a "fair and equitable balance between the often competing interests of landlords and tenants".[7] This must be at the heart of any discussion about the aims and objectives of the Act.

The interests of landlords and tenants are not the same. Landlords participate in the rental market voluntarily. They pay for an asset – usually with borrowed funds – that they hope

[5] Stone, Burke, Hulse & Ralton, *Long term private rental in a changing Australian private renal sector,* AHURI final report No. 209, July 2013
[6] Then Minister for Fair Trading, second reading speech June 2nd 2010 *(Hansard reference: page 23596)*
[7] Ibid

will grow in value to generate additional wealth. They enter into tenancy agreements to help cover their significant holding costs, and/or to replace other sources of income. Tenants, on the other hand, participate as occupants, residents, homemakers and neighbours. For a growing number of people in New South Wales, renting a home remains a more viable long-term option than home-ownership, because the costs associated with the housing market have become prohibitive for new entrants.[8]

These interests cannot be readily balanced without acknowledging the different positions of power that landlords and tenants hold, relative to one another. Even without taking account of market conditions, landlords generally offer a tenancy on a take-it-or-leave-it basis. Once a tenancy is established they face little competition from other landlords, because tenants are not in a position to look around for a better agreement from week to week. When tenants do relocate it is almost always at a high cost – both financially and emotionally – so the landlord's relative position of strength remains for the duration of a tenancy.

Thus, there is a structurally unequal bargain between landlords and tenants. The loss of the bargain may cause inconvenience and a period of diminished return for one party, while it will cause a significant change of circumstances and disruption for the other. Were either party to threaten to bring a tenancy agreement to an end for want of adherence with its terms, only the landlord would be in a strong position to follow through.

If the regulation of landlord and tenant relationships is to have a genuine concern for the 'balancing of competing interests', it must first work to place these interests on a more equal footing. In doing this, it need not seek to diminish or weaken the position of the stronger party, but to enhance the position of the more vulnerable.

The *Residential Tenancies Act 2010* should not seek to 'balance the interests of landlords and tenants' so much as reduce the impact of accidental, reckless or deliberate manifestation of landlords' unequal power against tenants. At the same time, it should ensure either party can obtain an appropriate remedy for any detriment caused directly by the other.

Aims and objectives of the Act

Fair Trading's discussion paper lists five aims and objectives of the Act. We will address each in turn.

[8] We will discuss this further below, but see also our report *5 years of the residential tenancies act* July 2015

a) To establish a regulatory regime for residential tenancies in NSW that provides clarity and certainty about the rights and obligations of tenants and landlords.

Clarity and certainty about rights and obligations should not be confused with clarity and certainty of outcomes, particularly where parties' interests are at odds. The notion of 'certainty' can lead to outcomes that are inappropriate or unjust, where it restricts courts and Tribunals from properly considering all the relevant facts in a dispute.

A key reform of the *Residential Tenancies Act 2010* provides a clear example of this. The Tribunal's discretion to decline an order for termination without grounds – as had been allowed in the *Residential Tenancies Act 1987* – was removed. The discretion could only be exercised after considering the 'circumstances of the case', and a body of case law had emerged to give clarity to those words. The most notable was the *Swain* case,[9] in which the NSW Supreme Court said it was in the interests of balance for the Tribunal to weigh up the potential hardship of both the tenant and the landlord before making orders for termination. Even so, the Tribunal almost never exercised this discretion in favour of a tenant, but landlords objected, citing a lack of 'certainty' around how and when they might recover a tenanted property. The law was changed.

In producing this certainty of outcome for landlords, the law does two things: first, it diminishes the role of the Tribunal and courts in resolving disagreement with unusual or unexpected circumstances, leaving this instead in the hands of landlords; and second, it creates a disproportionate level of uncertainty for tenants, who must now consider the very real prospect of their tenancy ending 'without grounds' in almost every conceivable situation where a disagreement with the landlord could arise.

b) To establish a regulatory regime for residential tenancies in NSW that promotes equity and efficiency and reduces unnecessary costs for both landlords and tenants.

While seeking to "reduce unnecessary costs for landlords and tenants", it is important to distinguish between costs that are necessary and costs that are not.

Data collected by the Australian Taxation Office provide a detailed account of the expenses claimed by taxpaying landlords each year, and show that the bulk of costs associated with investment in residential property apply even when the property is not occupied. Of the top five costs of being a landlord in New South Wales, only one – repairs and maintenance

[9] *Roads and Traffic Authority v Joy Swain and Terrence Gold and Residential Tenancy Tribunal of New South Wales* [1997] NSWSC 181

expenses – relates to any interaction with the property itself. Interest payments on loans, body corporate fees, council rates and property agent fees make up the remainder. Of these, interest payments on loans is by far the greatest, at more than $6 billion each year. This is at least ten times higher than any other significant cost borne by landlords.[10]

Landlords are adequately compensated for these costs through the taxation system. Negative gearing allows for rental property related expenses to be offset against taxable income each year, and a substantial discount to Capital Gains Tax applies when residential property is sold at a profit.

The most significant cost for tenants is rent. The Australian Taxation Office's data shows that tenants paid around $9.7 billion in rent in New South Wales in 2010-11, increasing to $12.1 billion in 2012-13. Taking into account the increase in properties against which this income was declared, landlords received on average $2175.00 rent more per property in 2012-13 than in 2010-11. Over the same period their combined expenses increased by an average of $880.00 per property.[11]

Water and utility charges also come into consideration, as the standard and amenity of a property can have a direct impact upon those costs. One of the most commonly raised complaints by tenants is the difficulty in getting repairs and maintenance properly seen to, and a property that is in a poor state of repair creates unnecessary costs for occupants who want to keep warm or cool.

c) To establish a regulatory regime for residential tenancies in NSW that enables landlords to manage their investments in a way that optimises returns and supports the future provision of rental accommodation in NSW.

The suggestion that legislation such as the *Residential Tenancies Act 2010* can enable landlords to optimise returns and support the future provision of rental accommodation is essentially a claim that renting laws will have some bearing upon the motivations of property investors. Such an idea has been investigated on numerous occasions and remains unsupported by the evidence.

In 1991, not long after the commencement of the now repealed *Residential Tenancies Act 1987*, two separate studies found that the new residential tenancy laws were of little

[10] Australian Taxation Office statistics from rental property schedules, also discussed in our report *5 years of the residential tenancies act* July 2015
[11] Ibid

concern to the vast majority of landlords.[12] A follow up study in 1992 found no evidence that the law reform had affected the 'fundamental economics' of investment in private rental housing, observing that the majority of landlords were motivated by equity growth, and that this was not affected by residential tenancies law reform.

More recent studies have reached similar conclusions. A 2009 report from the *Australian Housing and Urban Research Institute* found:

> "The relationship between investment and tenancy law reform continues to prove weak. Previous research has emphasised that investors simply do not consider tenancy issues when investing for the first time … and in this study it was almost impossible to get investors to engage on tenancy law as an issue, let alone an important factor connected to investment decisions."[13]

A brief analysis of investment in residential property following the introduction of the current *Residential Tenancies Act 2010* does not throw any new doubt upon the research. Despite predictions from some landlords' advocates that the Act would drive investment away to other markets,[14] the Australian Bureau of Statistics' *Lending and Finance* reports show that more than $155 billion was borrowed for residential property investment in New South Wales over the last three years.[15] Data from the Australian Taxation Office shows that almost 86,000 properties were transferred to rental markets in New South Wales between 2009-10 and 2012-13,[16] and given the median prices for both houses and units have increased at higher rates in New South Wales than any other part of Australia over the last several years,[17] this is not surprising. Property investment in New South Wales remains strong.

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[12] Department of Housing *Rental for Investment: a study of landlords in New South Wales* Department of Housing Sydney, 1991, and Brian Elton & Associates *The Supply Side of the Private Rental Market*, National Housing Strategy, Canberra, 1992

[13] Seelig, Thompson, Burke, Pinnegar, McNelis and Morris, *Understanding what motivates households to become and remain investors in the private rental market,* AHURI final report No. 130, March 2009

[14] Real Estate Institute of NSW, *Preliminary submission on the draft residential tenancy bill 2009,* page 12

[15] Australian Bureau of Statistics *Lending Finance Data* (series 5671 tables 8 & 19)

[16] Australian Taxation Office statistics from rental property schedules, also discussed in our report *5 years of the residential tenancies act* July 2015

[17] Australian Bureau of Statistics *Property Price Index* (series 6416 table 4)

d) To establish a regulatory regime for residential tenancies in NSW that enables tenants to have access to suitable accommodation and make informed choices about where they live, for how long, and what they are paying for.

Enabling tenants to access suitable rental accommodation, make informed choices about where they will live and for how long, and make informed choices about what they are paying for, are worthwhile objectives for the *Residential Tenancies Act 2010.* But failing to take account of the unequal bargaining positions of landlords and tenants will mean such objectives may never be realised.

The law offers no security for tenants in New South Wales, because landlords can end a tenancy without needing to give a reason. This unchecked right to recover premises is such that tenants may never make informed choices about how long they will occupy a home – they may only stay for as long as is convenient for the landlord. And with a growing lack of affordability across New South Wales, driven by a law that allows landlords to increase rents at will, a household's choices are often severely limited when looking to establish a new tenancy. Some households have no option but to enter into a residential tenancy agreement they might prefer to avoid.

e) To establish a regulatory regime for residential tenancies in NSW that encourages both landlords and tenants to take a responsible approach to their obligations to each other, to the people they share their home with and to their neighbours and the wider community.

Encouraging landlords and tenants to take a reasonable approach to their obligations towards one another is essentially about producing a law that embodies common sense. This is a worthwhile objective. However, regarding a regulatory scheme as a tool for encouraging people to take a reasonable approach to obligations towards other householders, neighbours and the wider community is somewhat misguided – particularly where non-compliance with the scheme can trigger a punitive response like expulsion from a household. A more encouraging approach would acknowledge that the kinds of problems encountered within a household, neighbourhood or community are less commonly of a legal nature, and may be better dealt with in a manner more conducive to building a strong and resilient community spirit.

Our recommendation

The majority of aims and objectives of the Act, as identified in Fair Trading's discussion paper, do not reflect what is required of the *Residential Tenancies Act 2010.* The Act should not give preference to certainty over appropriate solutions, and should not concern itself

with the forces that drive investment or the costs that are associated with buying and holding property.

More relevant aims and objectives would take account of the structural imbalance in the bargaining positions of landlords and tenants, and strive to produce a law that promotes greater stability, liveability and affordability to the one in three people who live in rented homes across New South Wales – including families with children, people sharing a home with others, and people who will live in the private rental market for an extended period of time.

2 – How can the regulation of residential tenancies in NSW adapt to effectively support the changing profile of the rental market into the future?

Fair Trading's discussion paper refers to the "changing profile" of the New South Wales rental market, noting that families and older people are becoming increasingly reliant on the rental market to make their home. Data is cited from the Rental Bond Board, showing a rise in the number of tenancies that last longer than three years and a decrease in the number of tenancies that last less than six months. These statistics are not surprising.

A 2013 report from the *Australian Housing and Urban Research Institute* found that families with children are the largest category of households currently living in the private rental market. Single person renter households are in decline, and the proportion of shared households is growing at a considerable rate.[18] Moreover, at least a third of people living in the private rental market have now done so for ten years or more. As the report itself notes, "private rental … forms part of a normative housing experience for large numbers of Australian households".[19] These statistics are reflective of house price growth that remains attractive to investors, but has become increasingly prohibitive for new entrants to the housing market.

Our recommendation

In order to adapt to the changing profile of the rental market, our renting laws must promote stability, liveability and affordability for tenants. Changes must be made to ensure tenants are more secure within their homes, so that they *may* make informed choices about where they will live, and for how long. Indeed, for those renters who have no

[18] Stone, Burke, Hulse & Ralton, *Long term private rental in a changing Australian private renal sector,* AHURI final report No. 209, July 2013, also discussed in our report *5 years of the residential tenancies act* July 2015
[19] Ibid

legislated protection such as people living in a shared house without a written sub-tenancy agreement, the law offers no security at all. This must change.

The law must also make it easier for tenants to obtain a remedy when essential repairs and maintenance cannot be procured, and must take account of the imposition in having a landlord or real estate agent come through a tenant's home without permission.

Finally, the law must take account of affordability, by limiting rent increases and allowing for a consideration of what is reasonable, where disagreements about rent increases are concerned.

3 – Are there any types of occupancy arrangements which should be included or excluded from the Act?

We have long-held concerns that certain types of premises (section 7), and certain types of rental agreement (section 8), are expressly excluded from the coverage of the *Residential Tenancies Act 2010*. Section 10 also excludes a growing number of share house occupants from the Act's protection because they do not have a written sub-tenancy agreement. Other laws do not adequately protect renters who find themselves excluded from the Act.

The common law in this area remains largely undeveloped from the nineteenth century, and its essential principal is *caveat emptor* – 'let the buyer beware'. That such a principal would apply to residents of New South Wales in 2016 is unsatisfactory.

We are aware of many examples of occupants being unfairly evicted and having security deposits or bonds withheld without justification, and with no opportunity to have disputes heard and determined in a low-cost jurisdiction such as the NSW Civil and Administrative Tribunal, their access to justice is effectively denied.

A form of protection is available to some renters under the *Boarding Houses Act 2012*, which came into operation not long after the *Residential Tenancies Act 2010*. Under the *Boarding Houses Act* a number of occupancy principles apply to agreements for accommodation in registrable boarding houses. These principles could be adapted and expanded in a new legislative instrument to cover all types of rental agreement that are not subject to the *Residential Tenancies Act 2010* or the *Boarding Houses Act 2012*.

Alternatively, the *Residential Tenancies Act 2010* and/or the *Boarding Houses Act 2012* could be amended to include provisions that are better suited to the range of occupancy arrangements that are currently excluded from their coverage.

Our recommendation

All residents of New South Wales who pay for their accommodation should have access to consumer protection laws such as, or similar to, the *Residential Tenancies Act 2010* or the *Boarding Houses Act 2012*. We invite Fair Trading NSW to consult with the Tenants Union, the network of Tenants' Advice and Advocacy Services and marginal renters across New South Wales to determine the most appropriate way to resolve this question.

STARTING A TENANCY

4 – Are there any provisions of the standard tenancy agreement or condition report which can be improved or updated?

The standard residential tenancy agreement and condition report are derived from the legislation as it currently stands. The Tenants' Union hopes that the current review of the *Residential Tenancies Act 2010* will recommend key changes to the legislation, in which case these standard forms will require amendment. We will make a more detailed contribution on this question if required.

In the meantime, we offer the following recommendations:

Standard tenancy agreement

- *Light globes* – clauses 16.4 and 18.2 incorporate terms about light globes into a residential tenancy agreement. Such terms are not supported by the legislation. They should be omitted.
- *Keys and opening devices* – clause 29.5 should be clear that if a tenant is unable to access any part of the premises because of a change to locks or security, the landlord is to provide an immediate remedy. This should apply regardless of the timeframe in which keys or other opening devices are to be made available.
- *Strata by-laws* – clause 35 should require landlords to provide to the tenant a copy of any strata by-laws upon signing the residential tenancy agreement. A timeframe of 7 days is not appropriate – the tenant will become bound by the by-laws upon commencement of the tenancy, so the by-laws should be provided upon signing the tenancy agreement.
- *Pets* – clause 43 imports a term into a residential tenancy agreement for which there is no basis in the legislation. It should be omitted.

Condition report

A space for the tenant's comments should be included to note the condition of each part of the property at the end of the tenancy.

5 – Should there be any additional prohibited terms beyond those listed in section 19 of the Act?

Especially given the changing profile of the rental market in New South Wales, discussed above, terms prohibiting the keeping of pets and unreasonably limiting the number of people who can ordinarily occupy premises (taking into account the amenity and available bedrooms) should not be allowed in residential tenancy agreements. For tenants, these should be matters of both personal choice and personal responsibility – adults should not be required to seek permission to keep a pet, or add to their household complement. Of course, where they cause detriment to others, they should continue to be held to account for their decisions.

Terms prohibiting pets

Terms prohibiting pets are frequently included in tenancy agreements, and tenants frequently complain of the difficulty in finding a landlord who will "accept pets"– even before the terms of a tenancy agreement are being considered. But tenants, like anyone, are perfectly capable of keeping pets sensibly and responsibly. A prohibition against 'no pets' terms in residential tenancy agreements is long overdue.

It may be rebuked that pets cause costly damage to properties. This is a matter of some conjecture, but it can't be denied that some pet owners are more responsible than others. What is clear is that a person's tenure can have no bearing on their ability to keep a pet responsibly. But, in the event that a tenant keeps a pet that does cause damage to a property, that tenant should be required to make good. The *Residential Tenancies Act 2010* already has provision for this by ensuring a tenant must not negligently or intentionally cause damage, must keep the premises clean, must not cause or permit a nuisance, and must return the property in more or less the same condition as they took it in at the beginning of the tenancy.[20]

[20] *Residential Tenancies Act 2010* NSW s 51

Terms restricting the number of occupants who may ordinarily reside at a property

Similarly, terms restricting the number of occupants who can normally reside at a property have caused problems. Section 51(1)(e) of the Act prohibits a tenant from allowing more people to reside in the premises than are specified in the residential tenancy agreement – no doubt this is a useful check against overcrowding. But we are aware of cases where landlords rely on it to prevent reasonable additions to a household complement.

For instance, a young couple were unable to bring an adopted child to live with them in a two-bedroom home, because their landlord considered it a breach of this term of their tenancy agreement. The tenants were unwilling to risk such a disagreement with their landlord, and decided against adoption at that time.

A prohibition at section 19 that limits the use of this term beyond what is reasonable would be a sensible reform. It would allow families and households to determine the most effective use of their homes. Where landlords and tenants disagree as to the reasonable limits of a property's capacity, the matter should be referable to the Tribunal for determination.

Our recommendation

Section 19 should prohibit terms that prevent tenants from keeping pets, and that unreasonably limit the number of people who can ordinarily occupy the property, taking into account the amenity and availability of bedrooms.

In the event that the *Residential Tenancies Act* is changed to allow service of notice by email, section 19 should prohibit terms that require either party to consent to receiving notices in that form.

6 – Is the 'New Tenant Checklist' a useful resource? Are there any other important matters which should be covered in the checklist?

The 'New Tenant checklist' is an important document, as it is the 'information statement' that's required to be given by landlord to a tenant at the commencement of a tenancy, subject to section 26(4) of the Act.

Our recommendation

The 'New Tenant Checklist' should identify the terms that are prohibited under section 19 of the Act. It should specify that a landlord or agent may not induce a person to enter into a

tenancy agreement with a false representation. It should also specify the material facts that must be disclosed to a tenant before entering into the agreement. These are requirements under section 26 of the Act.

7 – Should the 'New Tenant Checklist' include, or be accompanied by, specific information on required safety features eg smoke detectors, electrical safety switches, pool fencing, etc?

The Tenants' Union would welcome the inclusion of such information in the 'New Tenant Checklist'. Such information might also be usefully included with the standard condition report, so that it is brought directly to mind while each party is completing the report.

Our recommendation

Information on required safety features should be included in both the 'New Tenant Checklist' and the standard condition report.

8 – Should any other information be required to be disclosed by landlords at the time of entering into an agreement?

Section 26 requires landlords and agents to disclose certain material facts to a tenant before entering into a residential tenancy agreement. There are several material facts that should be considered for disclosure that are not currently required. Matters such as whether the landlord resides in close proximity, whether there are any major urban developments approved in the area, the extent of any repairs and maintenance works undertaken at the property during the previous 24 months, and any other factors that may have a significant bearing on a household's enjoyment of the property were they to take up occupation.

But there is another critical issue with section 26 that has not been raised in Fair Trading's discussion paper: it cannot be enforced. No penalty provisions apply for failing to disclose a material fact. As the requirement to disclose material facts is not a term of every tenancy agreement a tenant cannot rely upon it to end the tenancy, in the event that material facts that ought to have been disclosed at the beginning of the tenancy become known after it has commenced. This must be rectified.

Our recommendation

Landlords should be required to warrant that they have disclosed all prescribed material facts, as a term of every residential tenancy agreement. This would give tenants access to a remedy in the event of non-compliance.

The list of material facts that must be disclosed to tenants should be expanded to include:

- whether the landlord resides in close proximity,
- whether there are any major urban developments approved in the area, the extent of any repairs and maintenance works undertaken at the property during the previous 24 months, and
- any other factors that may have a significant bearing on a household's enjoyment of the property were they to take up occupation.

9 – What incentives would encourage the use of longer term leases?

In posing this question, Fair Trading's discussion paper considers the prevalence of short-term tenancies in New South Wales, and the insecurity this creates for tenants. Long fixed-term tenancy agreements are sometimes presented as a solution to this problem, but the Tenants Union does not believe long fixed-term tenancies should be encouraged. There are two reasons for this.

First, we note that the *Residential Tenancies Act 2010* already 'encourages' long fixed-term agreements. It does this by allowing some mandatory terms to be varied in agreements that are fixed for a period of twenty years or more. Landlords and tenants can include terms in their agreement that would otherwise be prohibited by the Act – such as requiring the tenant to assume responsibility for certain repairs, or preventing the landlord from being able to access the property without the tenant's permission.

In spite of this, landlords and tenants are not taking up the option of long fixed term agreements. The primary reason for this is that landlords are not offering long fixed-term tenancy agreements. The majority of landlords in New South Wales own two or fewer investment properties, and they generally operate at a loss.[21] Their investment strategy is based on utilising incentives within the tax system to offset holding costs, so they may realise the capital gains that accrue as the property increases in value. Under such a strategy landlords may wish to periodically obtain vacant possession of a property – either to realise a capital gain by selling it to someone who wishes to live in it, or to move into it

[21] Australian Taxation Office statistics from rental property schedules

themselves and claim it as a 'main residence', to reset their entitlement to a Capital Gains Tax exemption.[22] In either case, tenants will be moved on.

This brings us to our second reason. If a tenant finds a landlord who is willing to offer a long fixed-term tenancy, we could not immediately recommend they take it up. As we have discussed above, landlords offer tenancies on a take-it-or-leave-it basis and do not face any real competition once a tenancy is established. Private landlords do not trade on reputation, and prospective tenants will rarely know much about the person or people with whom they are about to enter into an agreement. If the relationship sours a tenant may wish to end the agreement, but if they are locked into a long fixed-term this would become both costly and complicated.

A further consideration is that while a fixed-term locks a tenant into a tenancy agreement, it is not entirely binding on the landlord. A tenant may opt into a long fixed-term tenancy with a trusted landlord only to have them sell to a new landlord before the fixed-term ends.

A more effective way to provide security and longevity for tenants would be to amend the provisions of the Act that allow landlords to end tenancies without a reason. In such a regime, landlords and tenants who have a genuine reason to end their agreement could do so as a matter of course, while tenants would have the surety that an agreement would continue for as long as its terms are met, and for as long as the property remained available for rent.

Our recommendation

Further attempts to encourage long fixed-term tenancies should not be pursued. Instead, sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

10 – What are the key challenges for landlords in offering longer term leases? How could longer term leases by managed?

The Tenants Union is not in a position to offer insight on behalf of landlords, and cannot speak to the challenges they face in offering or managing long fixed-term tenancies. We will make a further contribution if additional discussion is sought on this question.

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[22] See Australian Taxation Office publication *Treating a dwelling as your main residence after you move out*, available at https://www.ato.gov.au/General/Capital-gains-tax/In-detail/Real-estate/Treating-a-dwelling-as-your-main-residence-after-you-move-out/ (viewed January 2016)

RENTAL BONDS

11 – Is the maximum bond amount of 4 weeks rent appropriate?

A maximum bond amount of 4 weeks rent is appropriate.

Fair Trading's discussion paper draws on data from the Rental Bond Board showing the vast majority of tenancies end with some or all of the bond being returned to the tenant. According to these figures, only 9% of tenancies in 2014-15 ended with the full bond being returned to the landlord. This suggests the bond amount is set appropriately.

If any change is to be made, it should be to reduce the bond to less than 4 weeks rent. Without anything to restrict rents or tie them to the cost of living, they tend to increase faster than the cost of labour and materials a landlord might use for carrying out cleaning or repairs.

Our recommendation

The maximum amount of bond that a landlord can require should be no more than 4 weeks rent.

12 – Should a portion of the interest on rental bonds continue to be paid to tenants, or should this portion also be used to fund services for tenants?

We can, and should, do both.

Currently more than $1.2 billion worth of tenants bond money is lodged with the Rental Bond Board, and in the last financial year this generated approximately $58 million in interest.[23] Of this, the majority is provided to government agencies such as the NSW Department of Finance and Services and the NSW Civil and Administrative Tribunal. Around 8 per cent is used to fund Tenants' Advice and Advocacy Services, and less than half-of-one per cent is paid out to individual tenants when they obtain a bond refund at the end of a tenancy. The amount to be returned to tenants is set in the *Residential Tenancies Regulation 2010,* at clause 25.

[23] Rental Bond Board *Annual Report 2014-15*

10 per cent of the interest earned on tenants' bonds is paid into a growing surplus, which currently sits at more than $65 million.[24] Without drawing too heavily on this money, we could do both – return a greater portion of interest to tenants, and increase funding to Tenants Advice and Advocacy Services.

Our recommendation

Tenants should continue to receive a proportion of the interest earned when they claim a refund of their bond. Clause 25 of the *Residential Tenancies Regulation 2010* should be amended so that a higher proportion of the interest is paid to them than the current rate of 0.01%. Funding to Tenants' Advice and Advocacy Services should also be increased.

Both of these options can be realised with an adjustment the amount of tenants' money held in surplus. It should have no impact on other services to which this money is currently directed.

13 – Does the process for refunding bonds and resolving bond disputes work well? What could be improved?

Fair Trading's discussion paper notes that of 266,856 bond refunds in 2014-15, only 1.8 per cent – or 4,803 cases – were the subject of an application to the NSW Civil and Administrative Tribunal. This represents more than 16 per cent of the Tribunal's tenancy related workload.[25] Fair Trading's discussion paper also notes that parties agreed to 73.9 per cent of refunds, while claims were raised but not disputed in 22.7 per cent of cases.

It is tempting to view these figures as a sign the process for refunding bonds and resolving bond disputes is working well. However, it should not be assumed that a refund by agreement, or even an undisputed claim, is an indication that all parties are happy with the outcome. Tenants will often relinquish part of their bond – albeit begrudgingly – as a trade-off for staying away from the Tribunal and to avoid being considered a 'trouble-maker'. This is understandable, since many real estate agents ask about bond refunds and Tribunal attendances as part of a tenancy application process.

Feedback we receive from tenants is that the process could be better – or at least clearer. A common complaint is that landlords "refuse to release the bond" and are thus holding up a refund, indicating that tenants are generally unaware of their option to lodge a claim

[24] Ibid
[25] NSW Civil and Administrative Tribunal *Annual Report 2014-15*

unilaterally if no agreement can be reached. This may simply be a matter of providing clearer information about the bond refund process. The Tenants' Union would support this.

It may also be that the refund process needs reform, so that tenants may obtain a greater sense of control over the disbursement of their bond money at the end of a tenancy. This could be easily achieved by altering the 'claim of refund' process so that only tenants may apply to the Rental Bond Board for a refund. In the event that a landlord does not agree with a tenant's proposed disbursement of the bond, or the tenant does not apply for a refund within a reasonable time, landlords could apply to the Tribunal for damages, and orders to disburse the bond accordingly. This would encourage all parties to reach an agreement before seeking a refund or making a claim for a rental bond.

Our recommendation

Fair Trading should engage in a targeted information and education campaign to improve both tenants' and landlords' understanding and expectation of the bond refund and dispute resolution processes.

Consideration should be given to reforming the bond refund process, so that tenants may obtain a greater sense of control over the disbursement of their money at the end of a tenancy.

RENT AND OTHER CHARGES

14 – Are the current notice periods for rent increases appropriate?

The current notice period for a rent increase in New South Wales is 60 days. This is consistent with all other Australian jurisdictions with the exception of the Northern Territory. We would like to see New South Wales to lead the country in increasing the notice period to 90 days. This would give tenants much greater opportunity to arrange their affairs when faced with a notice of rent increase, while adding minimal disruption to current tenancy management practices for landlords.

Our recommendation

The notice period for rent increases should be increased from 60 days to 90 days.

15 – Do the existing provisions governing excessive rent increases strike the right balance between the interests of landlords and tenants? If not, how could they be improved?

In November 2015, National Shelter released a comprehensive *Rental Affordability Index,*[26] showing that rents in Sydney and regional New South Wales are some of the highest in the country. This is not surprising, because the *Residential Tenancies Act 2010* allows landlords to increase rents at will. There are no limits to the number of times a landlord can issue a notice of rent increase, which contrasts with the rest of the country. In Tasmania, South Australia and the Australian Capital Territory landlords are limited to one rent increase every 12 months, while in Victoria, Queensland, Western Australia and the Northern Territory they are limited to one every six months.

In New South Wales, a tenant may only challenge a rent increase in the Tribunal if it is 'excessive'. In considering these cases, the Tribunal is to have regard to such matters as the market level of rents for comparable premises in similar locations. But as National Shelter has shown, rents are comparatively high across the state. And as we have shown, they are rising faster than landlords' tenancy management costs. This has serious implications for stability, liveability and affordability in the private rental market.

In our 2014 Affordable Housing Survey[27] 77 per cent of respondents said they had put up with a problem, or declined to assert their rights, because they were worried about an adverse consequence.[28] Comments in response to the question indicate it is not just the possibility of eviction without grounds that worries tenants, but the prospect of a 'retaliatory' notice of rent increase as well. As one respondent said, "any time you contact the landlord about problems with the property, if they do fix it, they put the rent up by at least 10 per cent. It's better to stay off their radar".[29]

It is also possible for landlords to increase the rent as a de facto means of ending a tenancy. By putting the rent up to make it beyond their means, tenants have no option but to end the tenancy. In a recent example from a Tenants' Advice and Advocacy Service, a landlord sought to increase the rent by $120.00 per week when a tenant took a number of complaints against them to the Tribunal. After several hearings and adjournments it was evident that the landlord would not take a responsible approach to their obligations, so the tenant moved out. When the landlord listed the property again, it was at the original rent.

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[26] Available at http://www.shelter.org.au/
[27] Tenants Union of NSW *Affordable Housing Survey Report* April 2014
[28] Ibid
[29] Ibid

Implications flow beyond the issue of affordability and stability for tenants. If tenants are discouraged from reporting damage or asking for repairs when needed, because they are worried about the rent going up, it could impact upon their liabilities for repairs at the end of the tenancy. Similarly, it could impact upon landlords' expectations about repairs and maintenance requirements for a property. Most importantly, it impacts upon the condition and amenity of the property for the duration of the tenancy.

This raises three points for consideration. First, section 44 of the Act requires the tenant to apply to the Tribunal if they wish to challenge a rent increase. As the applicant, it is the tenant who bears the onus of proof. But much of the information required to prompt full consideration of the matters the Tribunal may consider will be not be available to the tenant. It will be more readily available to landlords.

Second, the only basis for challenging a rent increase is that it is excessive. This makes it especially difficult to bring arguments to the Tribunal about the motivations behind a notice of increase, even where they are demonstrably unreasonable.

Third, while the Act has broadened the matters available for consideration by the Tribunal when in rent increase matters, the concerns listed at section 44(5) are still too limited. In particular, the restriction on considering a tenant's ability to pay an increase (at s44(5)(h) creates additional insecurity for tenants; and the lack of any direct reference to motivating factors means landlords are not minded to consider their reasons for increasing the rent before issuing a notice to their tenant.

Our recommendation

The frequency of rent increases should be limited to once per year, to give tenants certainty about what they will be required to pay.

Where a proposed rent increase exceeds the consumer price index, the onus should be on the landlord to show the increase is not excessive. Where the increase is lower than the consumer price index, the onus should be on the tenant to show it is excessive.

The Tribunal should be able to consider the question of affordability, and other questions relating to the landlord's motives for increasing the rent if warranted, when considering whether a rent increase is excessive.

16 – Do the Act's provisions governing termination for rental arrears strike the right balance between the interests of landlord and tenant?

Section 89 of the Act ensures a tenancy doesn't end for non-payment of rent if the tenant makes good before their eviction. This was an innovation in the *Residential Tenancies Act 2010*, and the Tenants' Union welcomed it in the consultation draft. But a last minute amendment has undermined the provision, making it difficult to predict what will happen when a tenant takes steps to clear arrears in response to a notice of termination for non-payment of rent.

The amendment was the addition of subsection 89(5), which leaves it open to a landlord to proceed with the eviction process, where they can satisfy the Tribunal the tenant has 'frequently failed to pay rent owing' on or before the due date. But what is meant by 'frequently failed to pay' remains open to question. When the amendment was made it was said to discourage the deliberate withholding of rent by tenants who might only ever pay 'on the courthouse steps' if section 89 was allowed in its original form.

Although not consistent in its approach to section 89(5), the Tribunal has often interpreted it more broadly than intended. Questions of whether a tenant has ever made a late payment of rent, irrespective of the significance of the arrears in question to the hearing, have often found their way into the Tribunal's deliberations. The Tribunal regularly invokes section 89(5) in making termination orders, in one way or another, with the result that a tenant can never be sure that payment of arrears will actually result in the continuation of their tenancy. Ultimately, this is to the detriment of all parties; landlords miss out on the payment of arrears,[30] while tenants opt to put their money towards the safer venture of finding another place to live.

This is a problem that can be very easily solved by repealing section 89(5). In the majority of cases, landlords would retain the option to end a tenancy for non-payment of rent by declining to enter in an agreed 'payment plan'. Of course, there is a risk that tenants might dodge termination by simply paying all rent arrears, but it is hard to see how this would cause a problem for the landlord.

In the alternative, section 89(5) could be amended to make its intention clear: tenants who *vexatiously* fail to pay rent owing on the due date should not be assured of their continuing tenancy, when issued with a notice of termination for non-payment of rent.

[30] For a discussion on the financial benefits of sustaining a tenancy, see http://mreep.org.au/agents/

Our recommendation

Section 89(5) of the Act should be repealed. Landlords do not need a special provision to end tenancies because the tenant has "frequently failed to pay rent owing".

Alternatively, the intended effect could be given to section 89(5) by making it apply to tenants who "vexatiously fail to pay rent owing on the due date".

17 – Should the introduction of late fees for rent owing be considered? Please give reasons?

Late fees for rent owing should not be considered.

As is noted in Fair Trading's discussion paper, adding fees to outstanding rent would simply make matters worse for those caught in a situation of arrears. For tenants, it would add an expense that may exacerbate any difficulties they are already facing. For landlords, it would create an additional barrier to recovering unpaid rent.

The Act provides adequate incentive for tenants to pay their rent on time – landlords can issue a notice of termination and initiate proceedings in the Tribunal as soon as the rent falls behind by more than fourteen days. Once there, the Tribunal can end the tenancy or make a specific performance order, requiring the tenant to pay rent owing in instalments. Failing to comply with a payment plan generally results in the tenancy coming to an end.

Additionally, the introduction of late fees would contradict a legal principle – that a contract cannot include penalty terms – that is reflected in section 19(2)(d) of the Act. It is prohibited to include a term in any agreement that would require a tenant to pay a penalty or liquidated damages in the event of a breach.

Our recommendation

Late fees for unpaid rent should not be introduced.

18 – How can the 'split incentive' issue be addressed in the residential tenancy market?

What is referred to as the 'split incentive issue' – that neither the tenant nor the landlord has any real incentive to invest in a property's amenity, for example to improve its energy efficiency – is essentially a feature of an unbalanced and insecure private rental market. As we have already discussed, landlords are able to offer tenancies on a 'take-it-or-leave-

it' basis and do not encounter much competition once a tenancy is established. Tenants face the constant insecurity of their tenancy coming to an end.

Properly addressing this 'split incentive issue' will require a substantial rethink of the aims and objectives of our renting laws, as we have outlined above. Tenants who are secure in their homes will have an interest in making ongoing improvements, particularly as they relate to amenity, comfort and energy efficiency. A renting law that facilitates reasonable discussion and, where appropriate, cost sharing between tenants and landlords would look substantially different, in key respects, to the *Residential Tenancies Act 2010*. At the very least, it would need to ensure tenancies cannot be terminated without grounds.

Our recommendation

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

19 – What incentives might encourage landlords or tenants to improve energy and water efficiency?

The Tenants' Union is not confident that landlords and tenants will be encouraged to improve energy and water efficiency through a regulatory regime that does not take account of their unequal bargaining positions. Stability, security and certainty are the only genuine incentives that will encourage tenants to make anything more than temporary or portable improvements to their homes.

That said, we remain supportive of the 'water efficiency measures' introduced in the *Residential Tenancies Act 2010*. The provisions at section 39 of the Act ensure that a landlord cannot pass on water usage costs to a tenant unless certain steps have been taken to reduce a property's susceptibility to inefficient water use – although we note, this needs to also ensure toilet cisterns do not leak. The introduction of a similar provision to apply to energy costs would be difficult to achieve, because energy is consumed in such a broad range of ways and householders contract with energy suppliers directly.

A more workable proposal is to require landlords to commission a report outlining the condition of their property, including an energy efficiency rating and any ongoing maintenance needs that might affect heating or cooling costs, and provide this to tenants and prospective tenants. Such a report would need to be updated with a degree of regularity in order for it to be of any great effect.

There are further opportunities for government agencies to work together and have a greater impact upon this issue. For instance, a regulatory framework set by Fair Trading may be complemented by financial supports provided by or through Office of Environment and Heritage. The Tenants Union would welcome the opportunity to further consult on this issue.

Our recommendation

Prescribed 'water efficiency measures' should include ensuring that toilet cisterns do not leak, and landlords should be required to demonstrate that the prescribed measures are in place.

Landlords should be required to commission a report, at least once every five years, outlining the condition of the property, its ongoing maintenance needs, and its energy efficiency rating. A copy should be provided to tenants at the commencement of a new tenancy, and when subsequent reports are compiled.

Fair Trading should continue to work with other government agencies, consumer groups and experts to examine and find further solutions to this issue.

RIGHTS/OBLIGATIONS OF LANDLORDS AND TENANTS

20 – Is there an appropriate balance between the general rights and obligations of landlords and tenants under the Act?

In many respects, the *Residential Tenancies Act 2010* delivers a balance of rights and obligations between landlords and tenants. There are some things that could be rebalanced – such as ensuring that a landlord cannot unreasonably refuse to alter the number of people who may ordinarily reside in a property, and must account for the value of goods left behind by a tenant when disposed of by landlord. There are two other key areas that require reform.

Recovering overpaid rent after receiving an invalid rent increase notice

Section 41(10) of the Act prevents the Tribunal from adjusting the rent payable and returning overpaid rent to a tenant, per section 47, where the overpayment has arisen from an invalid notice of rent increase and no recovery attempt has been made within 12 months of the increase. In effect, section 41(10) prevents a tenant from taking action in the Tribunal, concerning an invalid rent increase, after 12 months.

If section 41(10) is intended to put a time limit on claims for overpaid rent arising from invalid rent increases, it goes too far. It is also unnecessary. It allows for an unchecked wrong to become right, as long as it remains undiscovered for the required length of time. But the Tribunal is already equipped with section 47(5), which gives it discretion to order the repayment of '*rent or any other amount'*.

The TU proposes section 41(10) be removed. A landlord may make representations to the Tribunal as to the nature of any defect in a notice of rent increase, and the time that has elapsed since it was issued, in response to a tenant's application for a refund of overpaid rent. Any specific limitations in such matters, as to quantum or time limits on application, can be clarified with an amendment to the Tribunal's discretion at section 47(5).

Landlords ending tenancies without a specific reason

At a fundamental level, the Act remains completely unbalanced while ever landlords are entitled to end tenancies without grounds. This undermines tenants' ability to rely upon their rights when needed.

Tenants can be made to move without a reason, at considerable personal and financial cost. Or, as is more likely, for a bad reason, because there is always a reason to end a tenancy. This becomes a landlord's trump card, and tenants are acutely aware of this. In our 2014 Affordable Housing Survey, 77 per cent of respondents said they had put up with a problem, or declined to assert their tenancy rights, for fear of an adverse consequence.[31]

But it's not just a question of whether tenants will baulk at raising concerns with a landlord. It is a common occurrence for tenants to receive a notice of rent increase with a no-grounds notice of termination in the same envelope, inviting them to choose which one they prefer. Nor is it unusual for tenants who take their landlord to the Tribunal, on matters of performance of residential tenancy agreements, to receive a no-grounds notice of termination some time thereafter. We are aware of one occasion where a real estate agent served a no-grounds notice of termination in the lifts on the way out of the Tribunal; and another where an agent drafted a no-grounds notice of termination and handed it to the tenant before the Tribunal member had finished delivering a decision on an application for repairs.

The 'termination without grounds' provisions affect more than just whether tenants can make informed choices about where they will live, and for how long. They serve as a constant reminder to tenants that their hold on property is tenuous, and only ever at the

[31] Tenants Union of NSW *Affordable Housing Survey Report* April 2014

will of the landlord. They actively undermine tenants' ability to enforce any of their existing rights.

Our recommendation

A landlord should not be able to unreasonably refuse to allow an additional occupant to move in with a tenant, provided it would not lead to overcrowding.

Landlords who sell goods left behind at the end of a tenancy and account to the tenant for the proceeds of sale should be required landlords to obtain a fair price.

Tenants should be able to recover overpaid rent at any time after a landlord has issued an invalid notice of increase.

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

21 – Is further guidance required in relation to whose responsibility it is to repair the premises and when the repairs must be carried out?

Maintenance planning

The Act makes it clear that the landlord must provide and maintain the property in a reasonable state of repair,[32] and that the tenant must notify the landlord as soon as practicable after becoming aware of any damage.[33] The effect of this latter provision is that landlords may sometimes fail to make themselves aware of a property's repairs and maintenance needs, preferring instead to rely on notifications from the tenant. Early signs of repairs and maintenance requirements, or hidden defects, can be easily missed using this strategy. It can become both costly and dangerous for all concerned.

To counter this, landlords should be required to commission a maintenance report outlining the condition of the property, including any ongoing or potential maintenance needs and how they may be addressed, at least once every five years. This report should be provided with the condition report whenever a new tenancy is established, and updated copies provided as they are compiled.

[32] *Residential Tenancies Act 2010* NSW s 63
[33] *Residential Tenancies Act 2010* NSW s 51

Breach and remedy

One of the most common complaints raised by tenants is that the landlord will not carry out necessary repairs, even after they have been brought to their attention. Despite this, the *Residential Tenancies Act 2010* has reduced landlords' repair obligations, and limited the Tribunal's ability to make repair orders by introducing a 'reasonable diligence' defence to a tenant's claim for repairs.

Section 65 of the Act sets out the remedies for tenants when a landlord fails to carry out necessary repairs. A tenant may apply to the Tribunal, and the Tribunal may order the landlord to do the repair. But if the landlord can show they have acted with 'reasonable diligence' then the Tribunal cannot make the order. This may seem like a reasonable addition to the law, but it can leave tenants without an effective remedy when their house in poor repair.

It is also an unnecessary complication. The Tribunal retains a clear discretion over the remedy for repairs, which means it could decline to make a repair order even where a landlord has failed to meet its obligation. The change to the law means that landlords can now invite the Tribunal to eliminate its discretion, by asking it to find that the landlord has acted with reasonable diligence and is therefore not in breach. The 'reasonable diligence' defence should be removed from section 65 of the Act.

Our recommendation

Landlords should be required to commission a report, at least once every five years, outlining the condition of the property, its ongoing maintenance needs, and its energy efficiency rating. A copy should be provided to tenants at the commencement of a new tenancy, and when subsequent reports are compiled.

The 'reasonable diligence' defence should be removed from section 65 of the Act. The question of reasonable diligence is more appropriately a matter for determining remedies, rather than obligations to repair.

22 – Are the current provisions regarding making alterations to a rental premises appropriate?

The question of tenants' rights and obligations around making alterations to premises is really at the heart of the 'split incentives issue', discussed above. Our response to this question should be considered alongside our response to question 18.

As it currently stands, tenants who make alterations to a rented property are providing a gift to their landlords. This is because a landlord can consent to an alteration at the tenant's expense, and then require the tenant to remove it at the end of the tenancy. In all likelihood, this will result in further expense for the tenant, who will also be required to carry out any rectification work or compensate the landlord for damage caused in removing a fixture.[34] If a fixture is unlikely to survive the process of removal – or if a tenant has no further need of it – it may be more cost effective to simply leave it behind.

In such an event, a landlord may apply to the Tribunal for compensation for the cost of rectifying the installation work done by the tenant[35] – but only if the failure to rectify that work is likely to adversely affect the landlord's ability to relet the property. With this in mind, a tenant should be allowed to seek an order that a fixture may be left in place and, if appropriate, ask for compensation for any remaining value of the fixture. This was possible under the *Residential Tenancies Act 1987*, and should be restored under the *Residential Tenancies Act 2010*.

Our recommendation

Section 68 of the Act should include a provision allowing tenants to apply for an order that a fixture is not required to be removed and obtain compensation for the depreciated value of the fixture if appropriate.

23 – Are there other types of work a landlord should be able to refuse permission for a tenant to undertake?

This question should be framed in the negative: are there other types of work a landlord should *not* be able to refuse permission for a tenant to undertake? Given that tenants are liable for the cost of any rectification that is required to an alteration that has affected a landlord's ability to relet a property, there should be no reason to limit the scope of 'permissible alterations' to the extent that the law currently does.

We note the recent passing of the *Strata Schemes Management Act 2015,* with its provisions concerning 'cosmetic work'[36] and 'minor renovations'.[37] To give tenants greater input into the liveability of their homes, the list of work considered to be 'cosmetic' for the purposes of the new strata laws should be included in the *Residential Tenancies Act 2010*.

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[34] *Residential Tenancies Act 2010* NSW ss 66-69
[35] *Residential Tenancies Act 2010* NSW ss 69(1)(b) and 69(2)(b)
[36] *Strata Schemes Management Act 2015* NSW s 109
[37] *Strata Schemes Management Act 2015* NSW s 110

Tenants should be allowed to undertake such work with the landlord's approval. Landlords should not be allowed to unreasonably refuse consent for cosmetic work. Work should be required to meet a professional standard, and be performed by licensed tradespeople where appropriate.

'Cosmetic work' would include:

- installing or replacing hooks, nails or screws for hanging paintings and other things on walls,
- installing or replacing handrails,
- painting,
- filling minor holes and cracks in internal walls,
- laying carpet,
- installing or replacing built-in wardrobes,
- installing or replacing internal blinds and curtains

Our recommendation

Landlords should not be able to unreasonably refuse consent for 'cosmetic work', as it is provided at section 109 of the *Strata Schemes Management Act 2015*, from being carried out by or on behalf of tenants. Any such work would need to be completed to a professional standard.

24 – Are the notice periods for carrying out inspections appropriate?

Tenants commonly raise issues around their privacy and other concerns when landlords access their homes, but usually in relation to something other than the required notice periods. Feedback we receive from tenants is that suitable remedies and enforcement against landlords who fail to comply with their obligations around access without consent are of much greater concern.

But notice periods concerning access to premises are undeniably short. In particular, periods that relate to repairs and maintenance should be increased. This should not derogate from a tenants' ability to give permission for access at an earlier time, when convenient.

Our recommendation

The notice period required for a landlord, agent or contractor to attend a property to carry out or assess the need for repairs or meet compliance obligations with regard to health and safety standards, without the tenants consent, should be increased to 7 days.

25 – Should the number of inspections allowed per year be reduced for long term tenants? If so, how long should a tenant have continuously occupied the same premises to be classified a 'long term tenant'?

The number of inspections allowed per year should be reduced for all tenants.

Section 55(2)(a) of the Act allows landlords to access and inspect a rented property without the tenants consent on up to four occasions in any 12 month period. Section 55 allows them to access a rented property in a number of other circumstances, including to carry out or assess the need for repairs, ensure compliance with property safety standards, to value the property, and in an emergency. Tenants should not need to provide landlords access to their homes for inspection because they already enjoy rights to access the property whenever a genuine need arises.

Our recommendation

A landlord's right of access to inspect the property without the tenants consent should be limited to not more than once per year. This should apply for all tenancies.

26 – Are any additional protections needed for tenants and landlords regarding inspections and privacy?

A common complaint for tenants relates to landlords' ability to enter their homes without their permission, provided it is for a purpose that is allowed by section 55 of the *Residential Tenancies Act 2010* and proper notice has been given. Tenants generally accept landlords should have a right of access for a genuine purpose, but object to having no say in when the landlord or agent may come.

We note the provisions at sections 53(2) and 53(3) of the Act, which require landlords and tenants to make reasonable efforts to agree on times and dates when the property is to be available for inspection by prospective purchasers. This concept should be employed more broadly, to cover all situations where landlords propose to enter a tenant's home without permission.

In the event that an agreement cannot be reached, landlords could seek a remedy in the Tribunal under section 60 of the Act. The availability of such a remedy would act as a deterrent against unreasonably declining to reach an agreement about access.

Our recommendation

When landlords and agents propose to enter a property without the tenant's consent they should be required to negotiate with the tenant to find an agreeable time.

27 – Should there be specific provisions in the Act that deal with the use of photographs or videos showing a tenant's personal property to advertise premises for sale or lease?

This question reflects another common complaint – and one that doesn't just relate to photographs intended for use in advertising premises for sale or lease. Landlords and real estate agents frequently use a smart-phone or other device with a built-in camera to take photographs of a property during a routine inspection. While some tenants may be comfortable with this, others are not. Concerns include not knowing what purpose photographs will be put to or how they will be stored, and worrying that photographs that include identifiable features – such as a tenant's furniture or pictures in the background – will be published along with details of the property. This is a particular concern for survivors of domestic violence.

Our recommendation

The law should require landlords and their agents to obtain a tenant's consent before taking photographs of their home. Tenants should be entitled to copies of any pictures taken, and further consent should be obtained before using any specific photograph to advertise a property for sale or lease.

28 – Does the Act adequately protect the interests of sub-tenants/co-tenants and landlords in shared tenancy arrangements?

As we have discussed above, the number of people living in shared housing in the private rental market has increased considerably over recent years. This is a symptom of unaffordable housing markets, and is likely to continue. Protecting the interests of those who enter into such arrangements when making their homes is of critical importance, but while the *Residential Tenancies Act 2010* has made some improvements to the law for share house occupants, it lets them down in several key respects.

Consent to transfer of sub-let

Provisions that recognise and confirm a tenant's right to transfer or sub-let a tenancy (sections 74 and 75) are welcome, as are provisions that allow for co-tenancies to be

sensibly brought to an end without substantially affecting the landlord-tenant relationship (sections 101 and 102). But landlords should not be able to unreasonably refuse to give consent for a tenant to transfer or sublet their tenancy.

Co-tenancies and domestic violence

Section 79 of the Act provides that a co-tenancy ends when the co-tenant is prohibited from accessing their rented premises by a final apprehended violence order. This provision is a welcome step towards giving domestic violence survivors a clear and useful means to end joint liabilities with a violent co-tenant, but it does not go far enough. In fact, it only slightly changes the nature of the problems it was intended to solve.

Final apprehended violence orders can take a considerable amount of time to obtain, and problems arise because they must identify the premises from which a person is excluded in order for the co-tenancy to end. It is common for parties to have ceased residing together by the time final orders are made, so the necessary exclusions can be easily overlooked.

In the time it takes for final orders to be made – whether or not they are effective to end a co-tenancy – it is common for an excluded co-tenant to refuse to pay their share of the rent, or otherwise contribute to the performance of the residential tenancy agreement, while the remaining co-tenant remains bound to the tenancy. The section 100(1)(d) option to end the tenancy without penalty is not activated until a final apprehended violence order is obtained; and an application to the Tribunal to end the co-tenancy may be fraught as questions of notice and representation could facilitate a breach of the interim apprehended violence order. Even so, the Tribunal's threshold of 'special circumstances of the case' – as provided at section 102 of the Act – may be set too high. As such the co-tenant who seeks an apprehended violence order remains just as disadvantaged by the current Act's provision as they did before its introduction.

To deal with this problem, the TU proposes amendments to section 102 of the Act. The Tribunal should be required to consider just the 'circumstances of the case' when deciding whether to end a co-tenancy. And it must be directed to make orders 'on the papers' where an application to end a co-tenancy concerns domestic violence.

Further, the *Residential Tenancies Act 2010* should ensure that where damage to tenanted premises has arisen because of domestic violence during a co-tenancy, it is the perpetrator who is liable. Currently survivors of domestic violence bear some or all of the cost of such damage, because liabilities remain joint and several until the co-tenancy ends. We understand the South Australian *Residential Tenancies Act 1995* has recently been

amended to include provisions allowing the Tribunal to sever liabilities where domestic violence is a factor. We look to those as a suitable model.[38]

We are aware that *Women's Legal Services NSW* has made submissions to this discussion on similar points. We support those submissions. In particular, their suggestion that a notice of termination should be issuable on grounds that a tenant is the victim of domestic violence would be a sensible inclusion to our renting laws.

Exclusion of sub-tenancies where there is no written agreement

Section 10 of the *Residential Tenancies Act 2010* excludes from the Act any sub-tenant who has not clearly been given an interest in a tenancy by their head-tenant. The provision is based on the assumption that occupants of a share house do not generally intend their occupancy arrangements to be regulated in the same way as landlords and tenants; but where they do, they may opt into the Act by transferring part of their tenancy or executing a written sub-tenancy agreement.

Whether or not this assumption is true, the inclusion of section 10 creates significant problems for the growing number of people residing in shared housing in New South Wales. Regardless of how they see themselves, relationships between head-tenants and sub-tenants operate with some of the same power imbalances that exist between a landlord and a tenant. Head-tenants offer sub-tenancies on a take-it-or-leave-it basis, and prospective sub-tenants who are not offered a written agreement are unlikely to be in a position to insist on one as a condition of acceptance.

This is not to say a head-tenant couldn't offer an interest in their tenancy, in substance, when making an offer to sub-let that is not accompanied by a written agreement. The test provided by section 10 is an arbitrary one, that doesn't necessarily reflect the intentions or the conduct of head-tenants and sub-tenants. We are aware of examples where would-be sub-tenants, aided by their head-tenants, have completed tenancy application forms to ensure they are known to real estate agents and landlords, and have attended to the transfer of interests in rental bonds in the correct way, only to find they are still not considered a sub-tenant under the Act because of section 10. However, most don't look into their legal status as a renter until a dispute of some kind arises, and by then it is often too late. When relationships have soured, getting the necessary paperwork in order can be impossible.

[38] *Residential Tenancies Act 1995* SA ss 89A(4)(d), 89A(10) and 89A(11)

Sub-tenants express surprise and dismay when informed they do not have rights under the Act, raising doubt about assumptions that share house occupants do not want their relationships to be regulated in the same ways as landlord and tenant relationships. Even so, the absence of any other legislative protection makes it all the more important for the Act's coverage of shared housing to be considered on the substance of agreements, rather than their form.

The Tenants' Union recommends the repeal of section 10. In making this recommendation, we are mindful that some provisions of the *Residential Tenancies Act 2010* provide something of an awkward fit for relationships that involve a landlord, head-tenant and sub-tenant. But the exclusion of a large and growing cohort from coverage of the *Residential Tenancies Act 2010* does nothing to alleviate that awkwardness – it merely creates new problems.

We further recommend that, as an outcome of this review, Fair Trading undertake to consult with the community on the question of appropriate provisions to regulate sub-tenancy agreements, within the *Residential Tenancies Act 2010*.

Our recommendation

Tenants should not be required to obtain a landlord's consent to transfer or sublet their tenancy.

The Tribunal should be required to consider the 'circumstances of the case' rather than the 'special circumstances of the case' in matters concerning the termination of co-tenancies, and it should be required to make its orders 'on the papers' where an application to terminate a co-tenancy is based on an interim Apprehended Violence Order.

Co-tenants' liabilities should be severed in cases where damage to the property is the result of domestic violence, so that the perpetrator, not the victim, will be liable.

All sub-tenancy agreements – whether written or oral – should be covered by the Act. Fair Trading should consult further on the regulation of sub-tenancy agreements.

29 – Do the existing provisions in the Act and other legislation in relation to the standard of rental properties strike the right balance between the need to protect tenants and the need to contain costs for landlords?

As we have discussed above, legislators ought to take a very cautious approach to the idea of 'balancing' the need to protect tenants with the need to contain costs for landlords.

The significant bulk of costs incurred by landlords relate to the buying and selling of property, rather than tenancy management expenses. Of the top five costs of being a landlord in New South Wales, only one relates to any interaction with the property itself. Landlords spend more on interest payments on their loans than the majority of other expenses combined – including body corporate fees, council rates and property agent fees.[39]

Further, our system of taxation actively encourages landlords to operate at a loss. Negative gearing allows for rental property expenses to be offset against taxable income each year. Many landlords are happy to do this, as they are also entitled to a substantial discount to Capital Gains Tax when a property is sold. They are hoping their costs will ultimately be recovered.

Regardless, rents appear to be increasing at a more rapid rate than landlords' costs. Tenants paid around $9.7 billion in rent in New South Wales in 2010-11, and this increased to $12.1 billion in 2012-13. Taking into account the increase in the number of properties available for rent, landlords received on average $2175.00 more per property in 2012-13 than in 2010-11. Over the same period their expenses increased by an average of $880.00 per property.[40]

Our recommendation

Legislators should be wary of any suggestion that the *Residential Tenancies Act 2010* has any significant bearing on landlords' costs.

30 – Are there alternative ways to improve the standard of rental properties?

As we have discussed above, the standard of rental properties can be let down by the Act's provisions relating to repairs and maintenance – landlords can remain unaware of a property's repair needs until they become chronic or acute. To counter this, landlords should be required to commission a maintenance report outlining the condition of the property, including any ongoing or potential maintenance needs and how they may be addressed, at least once every five years. While the report itself would not impose any new repairs and maintenance obligations on the landlord, it would bring the condition of their

[39] Australian Taxation Office statistics from rental property schedules, also discussed in our report *5 years of the residential tenancies act* July 2015
[40] Ibid

rental property into focus and allow them to make provision for its ongoing repairs and maintenance needs.

Another key way that standards of rental properties could be improved is by linking tax concessions to basic minimum standards. This would require an agreement between the State and Federal Governments, because they include matters of concern to the federal tax system. Such an agreement is worth exploring, particularly as current law reform discussions progress. These appear to be moving in favour of altering the Goods and Services Tax, rather than restricting tax concessions for landlords, such as negative gearing and Capital Gains Tax exemptions.

In 2010, Roy Morgan and Associates conducted a poll concerning public attitudes to renters and renting, commissioned by the Tenants' Union of NSW .[41] It included the question:

> "In many cases, landlords receive generous tax breaks. Do you think that in exchange for these tax breaks rental properties should meet certain minimum quality standards, such as having an efficient hot water service, electrical safety switches and proper insulation?"

94 per cent of landlords included in the poll said yes.

Our recommendation

Landlords should be required to commission a report, at least once every five years, outlining the condition of the property, its ongoing maintenance needs, and its energy efficiency rating. A copy should be provided to tenants at the commencement of a new tenancy, and when subsequent reports are compiled.

The possibility of an agreement between the Governments of NSW and Australia should be explored, to make the receipt of tax concessions conditional on meeting minimum property standards.

31 – Are the provisions applying to long term tenancies appropriate?

As we have discussed above, provisions relating to long fixed-term residential tenancy agreements are of little value because such agreements are rare. We do not believe they should be encouraged further by making specific provision for them in the law. The

[41] This poll was never published, but see http://www.smh.com.au/federal-politics/political-opinion/making-the-lot-of-tenants-a-happy-one-20100505-uar3.html for a related discussion

objective of long-term tenure is more likely to be achieved through removing landlords' ability to end tenancies without grounds.

However, the Act already contains a number of provisions relating to long term tenancies. These concern both fixed-term tenancy agreements of 20 years or more,[42] and agreements under which a tenant has been in continuous occupation for more than 20 years.[43] With respect to the latter, the idea that a long term tenancy must continue for 20 years or more sets the bar unrealistically high – it would be preferable to reduce this to 10 years, or even lower.

With respect to fixed-term tenancy agreements of 20 years or more, section 20 of the Act allows certain mandatory terms to be varied. Tenants may trade off some of their rights in exchange for a long fixed-term tenancy. The limitations to this are appropriate.

Section 94 of the *Residential Tenancies Act 2010* allows landlords to end tenancies that have continued for 20 years or more – whether by a long fixed-term or continuation of a periodic agreement – without grounds. But this must be initiated by direct application to the Tribunal rather than service of notice upon a tenant. Aside from this process itself, the Act treats the termination of long-term tenancies differently in two ways: first, by giving the Tribunal discretion over the termination of such tenancies; and second, by ensuring a minimum period of 90 days for the return of vacant possession to the landlord, where the Tribunal's discretion is not exercised. This remains appropriate, subject to our concerns that a long term tenancy should not have to last longer than 10 years; and subject to our concerns that a discretion not to terminate if appropriate in the circumstances should apply to all tenancies.

The introduction of a new provision, as part of the *Residential Tenancies and Housing Legislation (Public Housing – Antisocial Behaviour) Amendment Act 2015*, has added a complication to section 94. The new section 154G places a limit on the Tribunal when making possession orders for social housing tenancies – these must not exceed 28 days from termination.

Our recommendation

The time period required for continuous occupation to be considered a 'long term tenancy' should be reduced from of 20 years or more to 10 years or more.

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[42] *Residential Tenancies Act 2010* NSW s 20
[43] *Residential Tenancies Act 2010* NSW s 94

The Tribunal should continue to suspend possession orders for at least 90 days when a termination occurs subject to section 94. Section 154G should be amended so as not to apply to such cases.

Section 94 of the Act should be amended to ensure long term residential tenancy agreements may only ever be terminated with grounds.

TERMINATIONS

32 – Are the current termination notice periods appropriate?

Determining notice periods for termination is where the different interests of landlords and tenants can be most acutely observed – tenants will always want more time, and landlords are likely to want less. As we have discussed, the *Residential Tenancies Act 2010* should take account of the structural imbalance in the bargaining positions of landlords and tenants, and strive to produce a law that promotes greater stability, liveability and affordability for tenants.

14 days notice of termination on the grounds that either party has breached a tenancy agreement is a relatively short time. The implications of a notice of termination for breach will always be more significant for tenants than for landlords, for reasons we have outlined above. However, a breach remains open to remedy or, if appropriate, the facts of the matter can be contested in proceedings before the Tribunal, so we make no recommendation to change the 14 day notice period. We note that it remains broadly consistent with other Australian jurisdictions.

30 days notice of termination is required on the grounds that the premises have been sold. This is significantly shorter than the usual six-week settlement period for a property conveyance, which allows some leeway in the event that a tenant overstays a notice of termination. However, a longer settlement period can be easily negotiated. Greater consideration should be given to a tenant who is being displaced from an established home, with no real control over that outcome, than a buyer with perhaps more flexibility to structure their affairs. We note similar notices periods allow for 60 days in other jurisdictions – this should be the minimum.

21 days notice of termination is required where the tenant wishes to end the agreement. This is generous, giving landlords plenty of time to make arrangements for reletting premises. This could be reduced to 14 days, which would allow tenants to transition to a new housing arrangement within a single rent payment period.

90 days notice of termination is required where the landlord wishes to end the tenancy without grounds. The ability for landlords to end tenancies without a reason effectively undermines all rights available to tenants. Tenancies should only ever be terminated on the basis of a specific ground, and the Act should make provision for an expanded list of grounds. We note that other jurisdictions, such as the Australian Capital Territory and Victoria, provide for extended notice periods for terminations without grounds – six months in the case of the Australian Capital Territory – as well as expanded lists of grounds with shorter notice periods. As landlords still prefer to terminate tenancies without grounds, we do not recommend extending the notice period for no grounds notices of termination, but to remove them from the law altogether.

Our recommendation

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

The notice period required when ending a tenancy on the grounds of sale should be increased from 30 days to 60 days.

The notice period required when tenants end a tenancy should be reduced from 21 days to 14 days.

33 – Should landlords be required to provide a reason for terminating a tenancy? If so, what types of reasons should be considered?

As we have discussed above, the law offers no security for tenants in New South Wales, because landlords can end a tenancy without needing to give a reason. This unchecked right to recover premises under any circumstance is such that tenants may never make informed choices about how long they will occupy a home – they may merely stay for as long as is convenient for the landlord. Further, these provisions actively undermine a tenants' ability to enforce any of their existing rights.

Sections 84, 85 and 94 of the Act allow a tenancy to be terminated without a specific reason, requiring only 30 days notice at the end of a fixed term, 90 days notice during a periodic tenancy, and an application to the Tribunal in the case of long term tenancies. Landlords do not need to prove or even justify their reason for termination – they simply hold the right to end tenancies at their discretion. Put another way, tenants can be made to move, at considerable personal and financial cost, without a reason. Or, as is more likely, for a bad reason, because there is always a reason to end a tenancy. These provisions become landlords' trump card, and tenants are acutely aware of this. In our 2014

Affordable Housing Survey, 77 per cent of respondents said they had put up with a problem, or declined to assert their tenancy rights, for fear of an adverse consequence.[44]

In raising this question, Fair Trading's discussion paper suggests that any proposal to alter the current regime would need to be balanced against the view that landlords are entitled to deal with their property as they see fit. That such a view would influence tenancy legislation is indicative of the basic problem underpinning our renting laws in New South Wales – it fails to consider that tenants' basic need for shelter should take some small precedence over landlords' desire to make unencumbered decisions about the disposition of an investment.

To be clear, property owners are entitled to deal with their property as they see fit. But when that involves offering a property up for let, and transferring some of the interests held in that property to a tenant, they place restrictions on that entitlement. In New South Wales, they are opting into the regulatory scheme provided by the *Residential Tenancies Act 2010*, which limits things like how and when they may visit the property, the circumstances in which they must repair it, and how and when they may opt out of the tenancy agreement.

This includes a provision allowing a tenancy to end on the grounds of sale. If a property owner wishes to deal with a tenanted property in a manner that involves disposing of it, and they require vacant possession in order to do this, an ability to end a tenancy without a reason is not required. The *Residential Tenancies Act 2010* provides that the landlord entering into a contract for sale of the property, under which the landlord is required to give vacant possession, as a ground for termination.[45]

The TU proposes a change to the *Residential Tenancies Act 2010* to amend sections 84, 85 and 94 to remove the option to end tenancies without grounds, and instead provide an expanded list of grounds. The question should be: does the landlord have a purpose that requires recovery of vacant possession, or could it be affected without displacing a sitting tenant? Such a question should be subject to rigorous oversight by the New South Wales Civil and Administrative Tribunal, and the Tribunal should have discretion to decline to make termination orders where appropriate. This discretion should be available to the Tribunal even where a landlord's grounds for termination are made out, in circumstances where the tenant's need to remain in occupation outweighs the landlord's need to recover possession.

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[44] Tenants Union of NSW *Affordable Housing Survey Report* April 2014
[45] *Residential Tenancies Act 2010* NSW s 86

This expansion of grounds would be in addition to those that already appear in the Act, such as the tenant being in breach of the residential tenancy agreement (for fixed term and periodic tenancies), where vacant possession is a condition of sale (for periodic tenancies), and where the landlord faces hardship.

We note this would build upon and improve the model in the Tasmanian *Residential Tenancy Act 1997*, which allows periodic tenancies to end on grounds only. The experience of Tasmanian tenants tells us that grounds for termination need to be specific, and open to challenge in proceedings before the Tribunal. An example of this is the Tasmanian provision that allows a notice to vacate because "the premises are to be sold or transferred to another person".[46] The provision leaves some doubt about whether listing a property for sale is enough to satisfy the "to be sold" threshold, or a contract for sale is required.

This has been the subject of litigation in the Tasmanian courts, where it was found that an 'intention to sell' would satisfy the requirement[47] – giving rise to the further question of whether a landlord may change their intention once a tenancy has been brought to an end. Our colleagues at the Tenants' Union of Tasmania have suggested a provision to allow compensation for wrongful eviction, similar to what is available in the Australian Capital Territory's renting laws,[48] would be a welcome addition to their regime.

In discussing this matter, we are also mindful of the relevant provisions in the Australian Capital Territory's legislation,[49] which provides an expanded list of grounds for issuing a notice of termination but also retains the right of landlords to end tenancies without grounds. Even where termination without a reason requires 26 weeks' written notice, landlords are inclined to end tenancies without a reason rather than giving four weeks notice on grounds. As we understand it, tenancies in the Australian Capital Territory often end without grounds so that landlords may avoid being held to account for their real reason for termination: retaliation against a tenant trying to assert their rights.

Our recommendation

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

The following grounds for termination should be included in the Act:

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[46] *Residential Tenancy Act 1997* Tas s 42(1)(b)
[47] Tenants Union of Tasmania *Rent Rant* Autumn 2015
[48] *Residential Tenancies Act 1997* ACT s 58(2)
[49] *Residential Tenancies Act 1997* ACT ss 47 and 94

- Where the landlord requires the property for their own use, or for the use of a member of their family, as a principle place of residence (using the same definition of *family* that applies at section 42(5) of the Tasmanian legislation);
- Significant renovations are to be performed in respect of the premises, such that continued occupation of the premises cannot be accommodated for a period of four weeks or longer;
- Where the landlord specifies a purpose that is, in the circumstances of the case and in the opinion of the Tribunal, sufficient to justify termination. (The question for consideration should be whether the landlord's purpose requires vacant possession, or could be given effect while a tenant remains in occupation).

34 – Should the Act require all residential tenancy agreements to have provisions imposing break fees?

The Tenants' Union has generally been supportive of the break fee concept, as it provides a straightforward way for tenants to compensate landlords for the unanticipated end of a tenancy. However, we have always maintained that the fees are set too high.

Prior to the break fee concept, landlords would have to calculate their loss arising from abandonment, demonstrating how it had been mitigated, and then ask the tenant to pay. The likelihood of a landlord genuinely losing the equivalent of six weeks rent when a tenancy ends prematurely has always been questionable – even in areas with high vacancy rates. But it was common for landlords and real estate agents to get this wrong, often insisting that tenants continue to pay rent until a new tenant was in place. Consequently it was also common for tenants to challenge the landlord's costs in the Tribunal.

In response to significant lobbying by others against the break fee concept, the Government of the day sought to compromise. The Act provides for both methods of calculation: either the pre-determined break fee, if agreed, or the old regime of mitigated loss arising from breach. This has lead to considerable confusion, with many landlords and real estate agents trying to claim both types of compensation at the same time.

But it has also caused another problem. Tenancies are offered on a take-it-or-leave-it basis, and landlords do not offer terms that will be against their interests, so break-fee terms tend to appear in agreements for properties where vacancy rates are low, but not where vacancy rates are high. This means windfalls for landlords who can relet their property fairly quickly, and the same old disputes about liabilities and mitigation of loss for those who can't.

These issues can be resolved by making a definite choice to legislate one method of calculation over the other. The Tenants' Union remains in favour of the break fee concept because it can reduce complicated disputes over liabilities when a tenancy ends earlier than expected, but we also remain concerned that break fees are currently set too high. They should be no more than three weeks rent.

Our recommendation

The amount allowed to be imposed as a break fee should be reduced to the equivalent of three weeks rent. For certainty, the concept should be applied to all fixed-term residential tenancy agreements, rather than by agreement.

35 – Should there be any additional grounds on which a tenant can terminate a residential tenancy agreement without compensation?

Section 100 of the Act allows tenants to end a fixed term tenancy without having to compensate the landlord, in specified circumstances, with 14 days notice. The provision is an excellent one, ensuring tenants are not locked into agreements where particular hardship or significant disruption will arise.

There are two additional grounds on which a tenant should be able to do this. First, where a tenant is admitted to long term medical care, including into a mental health facility. Second, where a tenant resides within a strata scheme, and the owners corporation has approved a strata renewal plan.

The provision should also be extended to cover periodic agreements.

Our recommendation

A tenant should be entitled to end a fixed-term tenancy with 14 days notice because they have been admitted to long term health care, including a mental health facility, without having to compensate the landlord. A tenant in a strata scheme, who is notified that the owners corporation has approved a strata renewal plan, should also be able to end a fixed-term tenancy without incurring a liability to compensate the landlord. These provisions should be extended to cover periodic tenancies as well as fixed-term agreements.

36 – Is the notice period for mortgagee repossessions appropriate?

Feedback from tenants is that mortgagee repossessions often come as a great surprise, and 30 days notice to relocate is inadequate. Given their relocation is imposed by matters that outside of their concern and beyond their control, tenants in these circumstances should be entitled to more time.

Our recommendation

Section 7A(3) of the *Sheriff Act 2005* should be amended to require a Sheriff to give 90 days notice of an occupier to deliver up possession of land.

37 – Are additional protections needed for tenants in cases of mortgagee repossession?

We note the good that the 'mortgagee in possession' provisions have done in ensuring tenants are not mistakenly dispossessed of property in situations where their landlord has failed to meet the requirements of a mortgage.

However, the provisions are unclear on a critical question. Where a tenant receives notice that mortgagee is entitled to possession, they are entitled to a waiver of rent for the duration of the notice period. But in circumstances where the mortgagee fails to take possession of the premises within that time, leaving the tenant in occupation, it is unclear whether, or to whom, further rent should be paid.

Our recommendation

A tenant should not be required to pay rent to a mortgagee after a notice to vacate has been given by the Sheriff, where the time taken to resolve issues under the mortgage, or take actual possession, exceeds the notice period.

38 – Are there any other termination issues that the Act could better address?

Retaliatory evictions

Section 115 of the Act is said to provide the check and balance against landlords ending tenancies for bad reasons. It allows the Tribunal to consider a landlord's motivation for

issuing a notice of termination, and refuse to make a termination order if it finds the notice retaliatory.

As noted in the discussion on termination without grounds, the retaliatory eviction provisions do not always dissuade landlords or agents from using them for bad reasons. Indeed, in yet another example we are aware of, a tenant received a no-grounds notice of termination less than two weeks after the Tribunal found that an earlier notice was retaliatory. As can be seen in the results of our 2014 Affordable Housing Survey, these provisions do not give tenants a great deal of confidence in asserting their rights.

It is telling that section 115 does not appear to be relied upon very frequently in the Tribunal. Perhaps this is because the Tribunal has, on the whole, taken a cautious approach when considering the section. There are around ten reported decisions where the Tribunal has been asked to consider whether a notice of termination was retaliatory – all but one have been decided in favour of the landlord.

With such a paucity of cases, it is difficult to say the law is settled on retaliatory evictions. The Tribunal is yet to produce a consistent series of decisions outlining the themes at play in these matters. Several decisions turn on landlords' potential other motivations, one refers to the proximity in time between the tenant's and landlord's actions, and in one case the Tribunal sees it as a discretionary power that it would decline to exercise even if it found the notice retaliatory. Notably, there is only one reported decision after 2013.

It appears that where tenants are referring to section 115 at all, they are doing so in the most clear-cut of cases. But we're also aware that retaliatory termination applications are often not proceeding to hearing in the Tribunal. These matters frequently result in termination orders by consent, because conciliators advise this is the preferable outcome when 'the relationship between landlord and tenant has broken down'. This is not in keeping with the 'balancing of interests' objective of the Act – such as it is – and is a poor reflection of our state's housing system.

Our proposal to amend sections 84 and 85 would resolve any question of landlord motivations for ending tenancies. If a landlord may only end a tenancy on specified grounds there will be a much reduced role for the Tribunal in deciding what lies behind the decision to issue a notice of termination. It will be a matter of determining whether the landlord's need to recover vacant possession can be firmly established, and that they are not merely masking their true grounds.

In any case, with the law as it currently stands, section 115 should be reviewed and strengthened, so it can be put to better use by tenants.

Ending a tenancy when the landlord fails to repair

The Act provides two methods by which a tenant can end a tenancy when the landlord fails to carry out repairs – by issuing a notice of termination and giving vacant possession, pursuant to section 98, or by obtaining a Tribunal order pursuant to section 103. The 'reasonable diligence' defence appears to be impeding both of these, too.

Where a tenant seeks to end an agreement by issuing a notice of termination, section 98(4) allows the landlord to ask the Tribunal to decide whether it is appropriate for the tenancy to end, with regard to any effort they may have made to remedy the breach. But landlords rarely do this. Rather, they wait for vacant possession to be returned then make a claim against the tenant for abandoning the tenancy. By raising the 'reasonable diligence' defence in these matters, landlords are able to avoid the question of remedy by convincing the Tribunal that they are not in breach of the tenancy, and that the tenant is liable for abandonment, even where the property remains in need of repair.

This renders section 98 somewhat ineffective. It leaves tenants to rely on the alternative provision at section 103, which allows them to apply to the Tribunal to have the tenancy terminated on the grounds of the landlord's breach. Notably, the same issues arise as to whether the landlord has acted with 'reasonable diligence'. In the face of an identified need, the question of whether the failure to repair justifies termination is again secondary to establishing whether that failure is a breach in the first place.

The overall effect of these provisions, and the way they operate, is that it has become unwise for tenants to take decisive action when a landlord has failed to properly effect repairs. Instead, tenants must apply to the Tribunal and hope for a favourable outcome, as well as a reasonable timeframe in which to act, in circumstances where time and resources should be better employed in the pursuit of another tenancy.

The TU's proposal to remove the 'reasonable diligence' defence from section 65 of the Act should go some way to resolving these issues.

Termination by strata renewal plan

The recently passed *Strata Schemes Development Act 2015* creates a potential complication for tenants when in strata where renewal plans are put into action. Sections 184 & 185 of the Act will operate to transfer the rights and liabilities of an owners corporation to purchasers or developers, and cancel the folios for the lots in a strata scheme, without requiring residential tenancy agreements to be terminated in accordance

with the *Residential Tenancies Act 2010*. Section 81(4)(a) of the *Residential Tenancies Act 2010* will operate to end such tenancies, by a person having superior title to that of the landlord becoming entitled to possession of the residential premises.

These provisions could give rise to similar problems to those that lead to the introduction of 'mortgagee in possession' provisions in the residential tenancies legislation – that is, tenants being unexpectedly required to give vacant possession to purchasers or developers upon cancellation of folios for strata lots, lawfully, with minimal or no notice.

Termination of social housing tenancies

The newly introduced provision at section 154G of the Act requires the Tribunal to order vacant possession be returned to social housing landlords within 28 days of making a termination order. Until now, it has been common practice for social housing landlords to offer up to three months for a tenant to vacate a property if they relinquish their tenancy voluntarily, without the need for a hearing in the Tribunal. Tenants often accept such terms even where there's a chance the Tribunal may find in their favour, because it offers them some degree of certainty, and means they will not have to subject themselves to the process of a hearing. The introduction of section 154G creates a potential disincentive for tenants to enter into termination orders by consent.

Our recommendation

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

Section 115 should be amended to apply more broadly, so that the Tribunal may find a notice of termination 'retaliatory' if the landlord was partly or wholly motivated to issue it because of a disagreement between with the tenant.

The 'reasonable diligence' defence to a landlord's repairs and maintenance obligation should be removed from section 65 of the Act. Tenants need certainty when they wish to end a tenancy because of a landlord's failure to repair.

Section 122 of the *Residential Tenancies Act 2010*, which provides for notice of termination when a mortgagee is in possession, should also apply when purchasers or developers become entitled to possession of a strata scheme under an order relating to collective sale or redevelopment under the *Strata Schemes Management Act 2015*.

Social housing tenants should not be discouraged from avoiding Tribunal hearings by entering into termination orders by consent. Section 154G should be amended so that it does not apply to consent orders.

RESOLVING DISPUTES

39 – Do the current information, advice and dispute resolution services operate effectively?

There are three key components to the information, advice and dispute resolution services that currently operate within New South Wales. These are Fair Trading's information, referral and tenancy complaints services, Tenants' Advice and Advocacy Services, and the NSW Civil and Administrative Tribunal. Each of these components plays a significant role in ensuring tenants have access to information, advice, advocacy and dispute resolution services. However, the overall impact of these services could be enhanced with better consideration of how each type of service might operate with respect to the others.

Fair Trading NSW

Fair Trading provides and information and referral service to landlords, real estate agents and tenants. Recently Fair Trading has also established a tenancy complaints service that seeks to engage parties on a voluntary basis to assist in the resolution of simple disputes. In publicising its tenancy complaint service, Fair Trading says they will give impartial advice to parties to a complaint, and will not take sides or represent either party. They will also not give legal advice. This means that simple disputes can be resolved in an informal way without having regard to complicated process such as a Tribunal hearing.

It also means that a tenancy complaint may be resolved in a way that does not adequately account for both parties' legal rights. With renting laws that fail to acknowledge the structural imbalance of bargaining power between landlords and tenants, tenants are entering into a complaints process from a position of relative weakness.

Even so, Fair Trading's increased interest and activity in tenancy complaint handling is a welcome development. But it is difficult to measure the service's impact because of the nature what Fair Trading considers resolved. A recent exchange in parliament between the Minister responsible for the Fair Trading portfolio and the Member for Newtown revealed that 95 per cent of complaints raised by tenants over a three-month period, relating to

repairs and maintenance, are considered resolved.[50] Given the difficulties we know tenants have in achieving satisfactory outcomes when disputes about repairs and maintenance arise, this raises a question – what does it mean to have a complaint resolved through Fair Trading's tenancy complaint service?

There are no published guidelines as to what Fair Trading means when it says a complaint is resolved. We have received feedback from tenants who have engaged with Fair Trading's tenancy complaint service, indicating that Fair Trading considers a matter resolved if it has been referred to another service, or where there no subsequent inquiries are made by the tenant to Fair Trading. While referral to another service may help resolve a complaint, it cannot be assumed that every tenant who disengages from the service does so because their complaint is resolved.

Fair Trading's tenancy complaints service is not available for certain types of complaint. It does not assist tenants in relation to:

- social housing tenancies
- urgent health and safety issues
- Apprehended Violence orders or matters concerning violence
- lockout and evictions
- termination
- illegal activity
- serious damage to property
- rental arrears in excess of 14 days
- rental bond matters

Such matters may instead be referred to the NSW Civil and Administrative Tribunal. Tenants should be encouraged to contact a Tenants' Advice and Advocacy Service for independent advice.

Tenants Advice and Advocacy Services

Tenants Advice and Advocacy Services (TAASs) are community organisations that work entirely for tenants. There are 15 local TAASs that operate across New South Wales, and four local Aboriginal TAASs. They provide phone advice (more than 25,000 cases in 2014-15), advocate on behalf of tenants in resolving problems with landlords or agents (more

[50] Available at http://www.parliament.nsw.gov.au/prod/la/qala.nsf/18101dc36b638302ca257146007ee41a/200de6d6a5061647ca257eed001d1bca?

than 4,800 cases), represent tenants in Tribunal proceedings (more than 2,000 cases), and conduct community education about tenancy rights and responsibilities.

There are also two resourcing TAASs – the Tenants' Union of NSW and Dtarawarra (Aboriginal Resource Unit), that provide the local TAASs with legal back-up, training and other support. They provide tenants with factsheets and sample letters (almost 700,000 downloaded in 2014-15) and a voice in tenancy policy and law reform.

Tenants' Advice and Advocacy Services provide one-on-one support and assistance to tenants in a way that no other services can. They do this in tenants' interests alone, and are the only services that assist tenants and renters exclusively in hearings at the New South Wales Civil and Administrative Tribunal.

Because of this, they are unique in their understanding of dispute resolution processes. This is important when giving information or advice to tenants about the various ways a dispute could be resolved, because well-advised tenants' make well-considered Tribunal applications. They are also aware of when matters can be better resolved outside of the Tribunal, which saves everyone time, money and angst.

But Tenants' Advice and Advocacy Services really come into their own when helping tenants through the processes of dispute resolution, in whatever form it takes. In a recent example, two tenants received assistance after they had complained to their landlord about some noisy construction work that was taking place within their unit block. These tenants had lived in the property for many years, but the landlord's response was to issue a notice of termination without grounds, while attempting to increase the rent by a substantial margin. The Tenants' Advice and Advocacy Service helped convince the landlord to withdraw the notice of termination, but not the rent increase notice. The tenants applied to the Tribunal to contest the rent increase, and with assistance from the Tenants' Advice and Advocacy Service were able to summons the residential tenancy agreements of other properties within the unit block, with the same landlord. As rents were not being increased for these other agreements, and notices of termination had not been issued, the tenants could demonstrate they were being singled out for an excessive increase due to the complaint they had made.

Tenants Advice and Advocacy Services could also put their considerable skills and experience to good use in referring and assisting tenants through Fair Trading's tenancy complaints service, if adequately resourced. They have not had a genuine increase in funding since 2002. Since then, the number of tenants in New South Wales has increased by at least 25 per cent, and TAASs estimate they are currently unable to assist one in three people who come to them for help.

NSW Civil and Administrative Tribunal

NCAT is the primary forum for tenancy dispute resolution in NSW, which includes alternative dispute resolution process. Where parties are unable to resolve disputes through conciliation, Tribunal Members with specialist skills and knowledge make orders subject to the *Residential Tenancies Act 2010.* These orders are binding on disputing parties, and can generally be enforced inexpensively and easily. It is common for landlords to be represented by real estate agents in matters before the Tribunal, and it is appropriate that tenants have access to similarly qualified and experienced advocates.

Our recommendation

The overall impact of the current information, advice and dispute resolution services could be enhanced with better consideration of how each might operate with respect to the others.

40 – Do you have any other suggestions to encourage the early resolution of tenancy disputes and reduce the number of tenancy disputes?

Access to advice and advocacy services

We have discussed above the need for properly funded Tenants' Advice and Advocacy Services and better integration of all dispute resolution services across New South Wales.

Non-economic loss

Before the *Residential Tenancies Act 2010* became law the Tribunal would sometimes make orders for non-economic loss, to compensate tenants on account of inconvenience, disappointment and embarrassment arising from a breach of a residential tenancy agreement. While the Tribunal generally took a conservative approach to such compensation, the prospect of these orders made a positive contribution to landlords' compliance with the *Residential Tenancies Act 1987,* and the avoidance of protracted disputes. But in 2010 the New South Wales Court of Appeal found, in a decision not related to tenancy laws, that a claim for damages for non-economic loss is subject to the *Civil Liability Act 2002*.[51] This decision makes it practically impossible to obtain orders for non-

[51] *Insight Vacations v Young* (2010) NSWCA 137 (11 June 2010); cited with approval in *Flight Centre v Janice Louw* [2011] NSWSC 132

economic loss in the Tribunal, to the detriment of tenant's confidence in their ability to enforce their rights.

Penalty notices

The *Residential Tenancies Act 2010* introduced penalty notices for non-compliance. Section 203 of the Act allows an authorised officer to issue a penalty notice if it appears a person has committed certain prescribed offenses against the Act or its regulations. Where issued, a person may simply pay the amount required by the penalty notice – in all cases substantially lower than the maximum penalty – and avoid having the matter considered for prosecution. The penalty notice provisions were intended to make it easier to resolve issues of non-compliance.

With the non-economic loss developments from *Insight Vacations* it has been open to Fair Trading NSW to make more active use of these penalty notice and enforcement provisions. But Fair Trading's "Year in Review" reports indicate that there have been only 16 penalty notices issued under the *Residential Tenancies Act 2010*, up to the end of the 2013-14 financial year. Given they handle thousands of tenancy related contacts each year, it is extremely unlikely that they have not had more matters for compliance brought to their attention.

Our recommendation

Funding for the Tenants Advice and Advocacy Services must be increased so that they can meet the demand for their services.

Fair Trading's information, referral and tenancy complaints services, Tenants' Advice and Advocacy Services and the NSW Civil and Administrative Tribunal should work towards better integration of services and purpose. In particular, the role that independent advice and advocacy services can play in assisting tenants through a simple tenancy complaint as well as a more complex hearing in the Tribunal, while acknowledging that not all tenants require advocacy, needs to be recognised.

Tenants' confidence in the law could be boosted by a more proactive approach to compliance and enforcement, and confidence could be better achieved by restoring non-economic loss claims to tenants in the Tribunal. This would require an amendment to the *Civil Liability Act 2002* to exclude claims made under the *Residential Tenancies Act 2010* from Part 2 of the *Civil Liability Act*.

Fair Trading should review its infrequent use of penalty notices in compliance and enforcement related activities.

OTHER KEY ISSUES

41 – Do you have any suggestions for improving the current provisions relating to residential tenancy databases?

The *Residential Tenancies Act 2010* regulates the operation and use of residential tenancy databases. This is a welcome inclusion and in many respects the provisions have been working well, allowing tenants to have vexatious or unjust listings removed and ensuring a listing no longer results in a protracted exclusion from the private rental market.

However, there are a number of areas where improvements need to be made.

Debt related listings

Section 212 of the Act provides that a database listing can only be made where a breach of a residential tenancy agreement has resulted in a debt, that is greater than the tenant's bond, accruing to the landlord; or that has resulted in a termination order in the Tribunal.

The wording of section 212 is causing problems, because it makes reference to what a person "*owes the landlord*" rather than a proven debt. Real estate agents and landlords often list tenants' personal information because of an alleged debt, without taking the matter to the Tribunal. Section 212(c) should be amended to ensure that database listings require a Tribunal order irrespective of the reason for listing.

Co-tenancies and domestic violence

There is no direct provision for a victim of domestic violence, who has been listed on a database for a reason that is attributable to a perpetrator of violence, to have the listing removed.

Novel database products

Some database operators claim a number of their products are not subject to the Act's coverage. This includes a database of Tribunal references that are a matter of public

record,[52] a tool that allows subscribers to 'flag' tenants they wish to keep tabs on so that they will be notified if the tenant approaches another subscriber for a new tenancy, and a database in which the details of every 'tenancy history' search are retained.

The TU recommends two straightforward amendments to the Act to allow tenants to avoid the injustices that novel database products can cause.

The first is to refine the definition of 'residential tenancy database' at section 209 of the Act. The definition contains two parts, and both are too narrow. The first part (a) refers to the kind of information a residential tenancy database contains; both (i) and (ii) should be amended to include 'occupation or *prospective occupation* of residential premises'. The second part (b) refers to the purpose for which information is stored; the words '*for checking a person's tenancy history to decide whether a residential tenancy agreement should be entered into with the person'* should be deleted from this part.

The second is to refine the 'further restriction on listing' at section 213(3) of the Act, so that a database operator is entirely prevented from listing personal information in a residential tenancy database. Listings should be left to subscribers who wish to share information with others, not to database operators themselves.

Excessive fees

There is a further concern where the Act prohibits database operators from charging an excessive fee for giving a tenant access to their listing, at section 216. No action may be taken against an operator who fails to comply with this requirement, and we are aware of at least one database operator whose fees are unreasonable.

Given that a listing on a database can lead to severe consequences, such as an inability to establish a new tenancy – quite possibly resulting in homelessness – such information should always be provided to tenants free of charge. The costs of operating and accessing a database should be borne by those who claim to benefit from them – namely landlords and real estate agents.

[52] NCAT recently found a database provider's 'public record database' is subject to the Act's coverage – see *TICA Default Tenancy Control Pty Ltd (Appellant); Hilal Selvi (First Respondent); Gwenda Champness (Second Respondent)* [2015] NSWCATAP 187. This case took months to conclude because of the Act's ambiguity on its application to a database of this kind.

Alternatively, the inclusion of a penalty provision at section 216(3) must be considered to ensure that tenants are not placed in financial hardship to determine whether they are listed on a residential tenancy database.

Our recommendation

An alleged debt needs to have been heard and determined by the Tribunal before being used as the basis for a residential tenancy database listing.

Databases should be prevented from listing domestic violence survivors where a reason for listing can be attributed to domestic violence.

The definition of 'residential tenancy database' should be broadened to include any database in which information about occupation and *prospective* occupation is contained, and that is established for any use by landlords and real estate agents.

Databases should be required to provide listed personal information to tenants at no charge. Alternatively, a penalty provision should apply to database operators who charge an excessive fee for copies of listed personal information.

42 – Should email or SMS be accepted as methods of giving written notice? What safeguards would be needed to reduce any potential disputes?

Service by email

The Tenants' Union is not opposed to a change in the law that will allow the service of written notice by email. Such a reform must retain clear guidelines to ensure that notices of termination or a notice of rent increase, being documents of considerable importance, are received by their intended recipient in a secure manner.

Acceptance of service by email should not be mandatory, and an intended recipient must have the opportunity to demonstrate and explain why a notice served by email has not been received. While the use of electronic and digital communications is no doubt widespread across New South Wales, there are many reasons why a person may not become aware of a dispatched email within a reasonable period of time. For example, a person who relies on a pre-paid mobile broadband service may have no credit and be unable to check for emails at a crucial time, or a person may have an email address but simply not have regular access to an internet service or connected device.

Service in person

Section 223(1)(a)(ii) of the Act allows the service of notice and other documents to a person apparently over the age of 16 years at the person's residential or business address, however there is no requirement to ensure or inquire as to the person's relationship to the tenant.

Our recommendation

If service of notice by email is to be allowed, it should be in line with the *Electronic Transactions Act 2000*. This provides for a scheme of sending and receiving electronic documents that includes provision for consent by the parties. Any presumption of service must be rebuttable, similar to the provisions regarding service of notice by mail at section 76 of the *Interpretation Act 1987*. And, if implemented, any requirement of service of notices by email must be included in the list of prohibited terms at section 19 of the *Residential Tenancies Act 2010*.

Service of such important notices by SMS should not be implemented. As a short form of messaging, SMS is not appropriate for the service of formal documents.

Section 223(1)(a)(ii) of the Act should be amended to follow a similar provision in the Uniform Civil Procedure Rules (rule 10.5), which clarifies that a person receiving notice in person must apparently reside or be employed at the address of service.

List of recommendations

BACKGROUND

1 – Are the aims and objectives of the Act – as outlined in Fair Trading's discussion paper – still valid?

The majority of aims and objectives of the Act, as identified in Fair Trading's discussion paper, do not reflect what is required of the *Residential Tenancies Act 2010*. The Act should not give preference to certainty over appropriate solutions, and should not concern itself with the forces that drive investment or the costs that are associated with buying and holding property.

More relevant aims and objectives would take account of the structural imbalance in the bargaining positions of landlords and tenants, and strive to produce a law that promotes greater stability, liveability and affordability to the one in three people who live in rented homes across New South Wales – including families with children, people sharing a home with others, and people who will live in the private rental market for an extended period of time.

2 – How can the regulation of residential tenancies in NSW adapt to effectively support the changing profile of the rental market into the future?

In order to adapt to the changing profile of the rental market, our renting laws must promote stability, liveability and affordability for tenants. Changes must be made to ensure tenants are more secure within their homes, so that they may make informed choices about where they will live, and for how long. Indeed, for those renters who have no legal protection, such as those living in a shared house without a written sub-tenancy agreement, the law offers no security at all. This must change.

The law must also make it easier for tenants to obtain a remedy when essential repairs and maintenance cannot be procured, and must take account of the inherent imposition in having a landlord or real estate agent come through a tenant's home without permission.

Finally, the law must take account of affordability, by limiting rent increases and allowing for a consideration of what is reasonable, where disagreements about rent increases are concerned.

3 – Are there any types of occupancy arrangements which should be included or excluded from the Act?

All residents of New South Wales who pay for their accommodation should have access to consumer protection laws such as, or similar to, the *Residential Tenancies Act 2010* or the *Boarding Houses Act 2012*. We invite Fair Trading NSW to consult with the Tenants Union, the network of Tenants' Advice and Advocacy Services and marginal renters across New South Wales to determine the most appropriate way to resolve this question.

STARTING A TENANCY

4 – Are there any provisions of the standard tenancy agreement or condition report which can be improved or updated?

Standard tenancy agreement

- *Light globes* – clauses 16.4 and 18.2 incorporate terms about light globes into a residential tenancy agreement. Such terms are not supported by the legislation. They should be omitted.
- *Keys and opening devices* – clause 29.5 should be clear that if a tenant is unable to access any part of the premises because of a change to locks or security, the landlord is to provide an immediate remedy. This should apply regardless of the timeframe in which keys or other opening devices are to be made available.
- *Strata by-laws* – clause 35 should require landlords to provide to the tenant a copy of any strata by-laws upon signing the residential tenancy agreement. A timeframe of 7 days is not appropriate – the tenant will become bound by the by-laws upon commencement of the tenancy, so the by-laws should be provided upon signing the tenancy agreement.
- *Pets* – clause 43 imports a term into a residential tenancy agreement for which there is no basis in the legislation. It should be omitted.

Condition report

A space for the tenant's comments should be included to note the condition of each part of the property at the end of the tenancy.

5 – Should there be any additional prohibited terms beyond those listed in section 19 of the Act?

Section 19 should prohibit terms that prevent tenants from keeping pets, and that unreasonably limit the number of people who can ordinarily occupy the property, taking into account the amenity and availability of bedrooms.

In the event that the *Residential Tenancies Act* is changed to allow service of notice by email, section 19 should prohibit terms that require either party to consent to receiving notices in that form.

6 – Is the 'New Tenant Checklist' a useful resource? Are there any other important matters which should be covered in the checklist?

The 'New Tenant Checklist' should identify the terms that are prohibited under section 19 of the Act. It should also specify that a landlord or agent may not induce a person to enter into a tenancy agreement with a false representation. It should also specify the material facts that must be disclosed to a tenant before entering into the agreement. These are requirements under section 26 of the Act.

7 – Should the 'New Tenant Checklist' include, or be accompanied by, specific information on required safety features eg smoke detectors, electrical safety switches, pool fencing, etc?

Information on required safety features should be included in both the 'New Tenant Checklist' and the standard condition report.

8 – Should any other information be required to be disclosed by landlords at the time of entering into an agreement?

Landlords should be required to warrant that they have disclosed all prescribed material facts, as a term of every residential tenancy agreement. This would give tenants access to a remedy in the event of non-compliance.

The list of material facts that must be disclosed to tenants should be expanded to include:

- whether the landlord resides in close proximity,
- whether there are any major urban developments approved in the area, the extent of any repairs and maintenance works undertaken at the property during the previous 24 months, and
- any other factors that may have a significant bearing on a household's enjoyment of the property were they to take up occupation.

9 – What incentives would encourage the use of longer term leases?

Further attempts to encourage long fixed-term tenancies should not be pursued. Instead, sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

10 – What are the key challenges for landlords in offering longer term leases? How could longer term leases by managed?

The Tenants Union is not in a position to offer insight on behalf of landlords, and cannot speak to the challenges they face in offering or managing long fixed-term tenancies. We will make a further contribution if additional discussion is sought on this question.

RENTAL BONDS

11 – Is the maximum bond amount of 4 weeks rent appropriate?

The maximum amount of bond that a landlord can require should be no more than 4 weeks rent.

12 – Should a portion of the interest on rental bonds continue to be paid to tenants, or should this portion also be used to fund services for tenants?

Tenants should continue to receive a proportion of the interest earned when they claim a refund of their bond. Clause 25 of the *Residential Tenancies Regulation 2010* should be amended so that a higher proportion of the interest is paid to them than the current rate of 0.01%. Funding to Tenants' Advice and Advocacy Services should also be increased.

Both of these options can be realised with an adjustment the amount of tenants' money held in surplus. It should have no impact on other services to which this money is currently directed.

13 – Does the process for refunding bonds and resolving bond disputes work well? What could be improved?

Fair Trading should engage in a targeted information and education campaign to improve both tenants' and landlords' understanding and expectation of the bond refund and dispute resolution processes.

Consideration should be given to reforming the bond refund process, so that tenants may obtain a greater sense of control over the disbursement of their money at the end of a tenancy.

RENT AND OTHER CHARGES

14 – Are the current notice periods for rent increases appropriate?

The notice period for rent increases should be increased from 60 days to 90 days.

15 – Do the existing provisions governing excessive rent increases strike the right balance between the interests of landlords and tenants? If not, how could they be improved?

The frequency of rent increases should be limited to once per year, to give tenants certainty about what they will be required to pay.

Where a proposed rent increase exceeds the consumer price index, the onus should be on the landlord to show the increase is not excessive. Where the increase is lower than the consumer price index, the onus should be on the tenant to show it is excessive.

The Tribunal should be able to consider the question of affordability, and other questions relating to the landlord's motives for increasing the rent if warranted, when considering whether a rent increase is excessive.

16 – Do the Act's provisions governing termination for rental arrears strike the right balance between the interests of landlord and tenant?

Section 89(5) of the Act should be repealed. Landlords do not need a special provision to end tenancies because the tenant has "frequently failed to pay rent owing".

Alternatively, the intended effect could be given to section 89(5) by making it apply to tenants who "vexatiously fail to pay rent owing on the due date".

17 – Should the introduction of late fees for rent owing be considered? Please give reasons?

Late fees for unpaid rent should not be introduced.

18 – How can the 'split incentive' issue be addressed in the residential tenancy market?

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

19 – What incentives might encourage landlords or tenants to improve energy and water efficiency?

Prescribed 'water efficiency measures' should include ensuring that toilet cisterns do not leak, and landlords should be required to demonstrate that the prescribed measures are in place.

Landlords should be required to commission a report, at least once every five years, outlining the condition of the property, its ongoing maintenance needs, and its energy efficiency rating. A copy should be provided to tenants at the commencement of a new tenancy, and when subsequent reports are compiled.

Fair Trading should continue to work with other government agencies, consumer groups and experts to examine and find further solutions to this issue.

RIGHTS/OBLIGATIONS OF LANDLORDS AND TENANTS

20 – Is there an appropriate balance between the general rights and obligations of landlords and tenants under the Act?

A landlord should not be able to unreasonably refuse to allow an additional occupant to move in with a tenant, provided it would not lead to overcrowding.

Landlords who sell goods left behind at the end of a tenancy and account to the tenant for the proceeds of sale should be required landlords to obtain a fair price.

Tenants should be able to recover overpaid rent at any time after a landlord has issued an invalid notice of increase.

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

21 – Is further guidance required in relation to whose responsibility it is to repair the premises and when the repairs must be carried out?

Landlords should be required to commission a report, at least once every five years, outlining the condition of the property, its ongoing maintenance needs, and its energy efficiency rating. A copy should be provided to tenants at the commencement of a new tenancy, and when subsequent reports are compiled.

The 'reasonable diligence' defence should be removed from section 65 of the Act. The question of reasonable diligence is more appropriately a matter for determining remedies, rather than obligations to repair.

22 – Are the current provisions regarding making alterations to a rental premises appropriate?

Section 68 of the Act should include a provision allowing tenants to apply for an order that a fixture is not required to be removed and obtain compensation for the depreciated value of the fixture if appropriate.

23 – Are there other types of work a landlord should be able to refuse permission for a tenant to undertake?

Landlords should not be able to unreasonably refuse consent for 'cosmetic work', as it is provided at section 109 of the *Strata Schemes Management Act 2015*, from being carried out by or on behalf of tenants. Any such work would need to be completed to a professional standard.

24 – Are the notice periods for carrying out inspections appropriate?

The notice period required for a landlord, agent or contractor to attend a property to carry out or assess the need for repairs or meet compliance obligations with regard to health and safety standards, without the tenants consent, should be increased to 7 days.

25 – Should the number of inspections allowed per year be reduced for long term tenants? If so, how long should a tenant have continuously occupied the same premises to be classified a 'long term tenant'?

A landlord's right of access to inspect the property without the tenants consent should be limited to not more than once per year. This should apply for all tenancies.

26 – Are any additional protections needed for tenants and landlords regarding inspections and privacy?

When landlords and agents propose to enter a property without the tenant's consent they should be required to negotiate with the tenant to find an agreeable time.

27 – Should there be specific provisions in the Act that deal with the use of photographs or videos showing a tenant's personal property to advertise premises for sale or lease?

The law should require landlords and their agents to obtain a tenant's consent before taking photographs of their home. Tenants should be entitled to copies of any pictures taken, and further consent should be obtained before using any specific photograph to advertise a property for sale or lease.

28 – Does the Act adequately protect the interests of sub-tenants/co-tenants and landlords in shared tenancy arrangements?

Tenants should not be required to obtain a landlord's consent to transfer or sublet their tenancy.

The Tribunal should be required to consider the 'circumstances of the case' rather than the 'special circumstances of the case' in matters concerning the termination of co-tenancies, and it should be required to make its orders 'on the papers' where an application to terminate a co-tenancy is based on an interim Apprehended Violence Order.

Co-tenants' liabilities should be severed in cases where damage to the property is the result of domestic violence, so that the perpetrator, not the victim, will be liable.

All sub-tenancy agreements – whether written or oral – should be covered by the Act. Fair Trading should consult further consult further on the regulation of sub-tenancy agreements if required.

29 – Do the existing provisions in the Act and other legislation in relation to the standard of rental properties strike the right balance between the need to protect tenants and the need to contain costs for landlords?

Legislators should be wary of any suggestion that the *Residential Tenancies Act 2010* has any significant bearing on landlords' costs.

30 – Are there alternative ways to improve the standard of rental properties?

Landlords should be required to commission a report, at least once every five years, outlining the condition of the property, its ongoing maintenance needs, and its energy efficiency rating. A copy should be provided to tenants at the commencement of a new tenancy, and when subsequent reports are compiled.

The possibility of an agreement between the Governments of NSW and Australia should be explored, to make the receipt of tax concessions conditional on meeting minimum property standards.

31 – Are the provisions applying to long term tenancies appropriate?

The time period required for continuous occupation to be considered a 'long term tenancy' should be reduced from of 20 years or more to 10 years or more.

The Tribunal should continue to suspend possession orders for at least 90 days when a termination occurs subject to section 94. Section 154G should be amended so as not to apply to such cases.

Section 94 of the Act should be amended to ensure long term residential tenancy agreements may only ever be terminated with grounds.

TERMINATIONS

32 – Are the current termination notice periods appropriate?

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

The notice period required when ending a tenancy on the grounds of sale should be increased from 30 days to 60 days.

The notice period required when tenants end a tenancy should be reduced from 21 days to 14 days.

33 – Should landlords be required to provide a reason for terminating a tenancy? If so, what types of reasons should be considered?

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds

The following grounds for termination should be included in the Act:

- Where the landlord requires the property for their own use, or for the use of a member of their family, as a principle place of residence (using the same definition of *family* that applies at section 42(5) of the Tasmanian legislation);

- Significant renovations are to be performed in respect of the premises, such that continued occupation of the premises cannot be accommodated for a period of four weeks or longer;
- Where the landlord specifies a purpose that is, in the circumstances of the case and in the opinion of the Tribunal, sufficient to justify termination. (The question for consideration should be whether the landlord's purpose requires vacant possession, or could be given effect while a tenant remains in occupation).

34 – Should the Act require all residential tenancy agreements to have provisions imposing break fees?

The amount allowed to be imposed as a break fee should be reduced to the equivalent of three weeks rent. For certainty, the concept should be applied to all fixed-term residential tenancy agreements, rather than by agreement.

35 – Should there be any additional grounds on which a tenant can terminate a residential tenancy agreement without compensation?

A tenant should be entitled to end a fixed-term tenancy with 14 days notice because they have been admitted to long term health care, including a mental health facility, without having to compensate the landlord. A tenant in a strata scheme, who is notified that the owners corporation has approved a strata renewal plan, should also be able to end a fixed-term tenancy without incurring a liability to compensate the landlord. These provisions should be extended to cover periodic tenancies as well as fixed-term agreements.

36 – Is the notice period for mortgagee repossessions appropriate?

Section 7A(3) of the *Sheriff Act 2005* should be amended to require a Sheriff to give 90 days notice of an occupier to deliver up possession of land.

37 – Are additional protections needed for tenants in cases of mortgagee repossession?

A tenant should not be required to pay rent to a mortgagee after a notice to vacate has been given by the Sheriff, where the time taken to resolve issues under the mortgage, or take actual possession, exceeds the notice period.

38 – Are there any other termination issues that the Act could better address?

Sections 84, 85 and 94 of the *Residential Tenancies Act 2010* should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.

Section 115 should be amended to apply more broadly, so that the Tribunal may find a notice of termination 'retaliatory' if the landlord was partly or wholly motivated to issue it because of a disagreement between with the tenant.

The 'reasonable diligence' defence to a landlord's repairs and maintenance obligation should be removed from section 65 of the Act. Tenants need certainty when they wish to end a tenancy because of a landlord's failure to repair.

Section 122 of the *Residential Tenancies Act 2010*, which provides for notice of termination when a mortgagee is in possession, should also apply when purchasers or developers become entitled to possession of a strata scheme under an order relating to collective sale or redevelopment under the *Strata Schemes Management Act 2015*.

Social housing tenants should not be discouraged from avoiding Tribunal hearings by entering into termination orders by consent. Section 154G should be amended so that it does not apply to consent orders.

RESOLVING DISPUTES

39 – Do the current information, advice and dispute resolution services operate effectively?

The overall impact of the current information, advice and dispute resolution services could be enhanced with better consideration of how each might operate with respect to the others.

40 – Do you have any other suggestions to encourage the early resolution of tenancy disputes and reduce the number of tenancy disputes?

Funding for the Tenants Advice and Advocacy Services must be increased so that they can meet the demand for their services.

Fair Trading's information, referral and tenancy complaints services, Tenants' Advice and Advocacy Services and the NSW Civil and Administrative Tribunal should work towards better integration of services and purpose. In particular, the role that independent advice and advocacy services can play in assisting tenants through a simple tenancy complaint as well as a more complex hearing in the Tribunal, while acknowledging that not all tenants require advocacy, needs to be recognised.

Tenants' confidence in the law could be boosted by a more proactive approach to compliance and enforcement, and confidence could be better achieved by restoring non-economic loss claims to tenants in the Tribunal. This would require an amendment to the *Civil Liability Act 2002* to exclude claims made under the *Residential Tenancies Act 2010* from Part 2 of the *Civil Liability Act*.

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If service of notice by email is to be allowed, it should be in line with the *Electronic Transactions Act 2000.* This provides for a scheme of sending and receiving electronic documents that includes provision for consent by the parties. Any presumption of service must be rebuttable, similar to the provisions regarding service of notice by mail at section 76 of the *Interpretation Act 1987*. And, if implemented, any requirement of service of notices by email must be included in the list of prohibited terms at section 19 of the *Residential Tenancies Act 2010*.

Service of such important notices by SMS should not be implemented. As a short form of messaging, SMS is not conducive to the service of formal documents.

Section 223(1)(a)(ii) of the Act should be amended to follow a similar provision in the Uniform Civil Procedure Rules (rule 10.5), which clarifies that a person receiving notice in person must apparently reside or be employed at the address of service.

List of proposed changes to the *Residential Tenancies Act 2010*

Sections 7 & 8 – Occupancy principles such as in the *Boarding House Act 2012* should be expanded and adapted to apply to all rental agreements not covered by other legislation in New South Wales.

Section 10 – This provision should be repealed. The status of sub-tenancy agreements should be determined on substance rather than form.

Section 19 – This provision should be amended to prohibit terms against keeping pets as well as terms limiting the number of people who may ordinarily reside in a property, beyond what is reasonable. If service of notice by email is to be allowed, this provision should also prohibit terms requiring parties to agree to that method of service.

Section 26 – It should be a term of every agreement that the landlord warrants they have not withheld any material fact of a kind prescribed by the regulation. Further material facts should be prescribed in the regulation.

Section 39(1)(b) – 'Water efficiency measures' should include ensuring that toilet cisterns do not leak. Landlords should be required to demonstrate that prescribed water efficiency measures are in place.

Section 41 –Landlords should be prohibited from increasing the rent more than once every 12 months, and the notice period required for a rent increase should be increased from 60 days to 90 days. Tenants should be able to recover of overpaid rent in the Tribunal, when the overpayment has arisen because of a landlord's error.

Section 44 – When a tenant seeks a remedy for an excessive rent increase the burden of proof should be shared. Where a proposed increase is above CPI, the landlord should be

required to show that it is not excessive. Where a proposed increase is less than CPI, the tenant should be required to show that it is excessive. Considerations of affordability for the tenant should be allowed in the Tribunal when determining excessive rent increase matters.

Section 52 – This provision should be amended to ensure that a landlord cannot unreasonably refuse to allow an additional occupant to move in with a tenant, provided it would not lead to overcrowding.

Section 55(2) – This provision should be amended to limit the frequency of general inspections to once every 12 months, and to increase the period of notice required to access a property for repairs and maintenance purposes to 7 days. It should also require landlords to negotiate with a tenant to find an agreeable time for access when proposing to attend a property without the tenant's consent.

Section 65 – On the question of repair obligations, whether a landlord has acted with 'reasonable diligence' should be removed from the Tribunal's considerations for establishing breach. It should instead be a matter for the Tribunal to take into account when deciding an appropriate remedy.

Section 68 – This provision should allow a tenant to apply to the Tribunal for orders that a fixture installed by or for the tenant does not require removal at the end of a tenancy and. It should also allow a tenant to obtain compensation for the depreciated value of a fixture, if appropriate in the circumstances of the case. Tenants should be able to undertake 'cosmetic work' as it is prescribed at section 109 of the *Strata Schemes Management Act 2015*, with the landlord's consent. Landlords should not be able to unreasonably refuse such consent.

Section 75 – This provision should be amended to ensure landlords are to have regard to reason when considering consent for a tenant to transfer or sub-let their tenancy.

Sections 84 & 85 – These provisions should be amended to ensure a landlord may only end a tenancy where there are grounds. The following grounds for termination should be included elsewhere in Part 5, Division 2 of the Act:

- Where the landlord requires the property for their own use, or for the use of a member of their family, as a principle place of residence (using the same definition of *family* that applies at section 42(5) of the Tasmanian legislation);
- Significant renovations are to be performed in respect of the premises, such that continued occupation of the premises cannot be accommodated for a period of four weeks or longer;

- Where the landlord specifies a purpose that is, in the circumstances of the case, sufficient to justify termination. (The question for consideration should be whether the landlord's purpose requires vacant possession, or could be given effect while a tenant remains in occupation).

Section 89(5) – This provision creates uncertainty for tenants who wish to pay unintended rent arrears and continue with their tenancy. It should be repealed. Alternatively, it should be amended to apply only to tenants who have *vexatiously* failed to pay rent owing.

Section 94 – This provision should apply to tenants who have been in continuous occupation for 10 years or more, rather than 20 years as currently. It should also ensure that landlords may only end a long term tenancy where there are grounds.

Section 100 – This provision should be expanded to include tenants who are admitted into health care, including a mental health facility, as well as tenants in strata schemes that are subject to a strata renewal plan. It should be amended so that it applies to tenants in periodic agreements, as well as those within a fixed-term.

Section 102 – This provision should be amended. When asked to end co-tenancies because of domestic violence, the Tribunal should consider the 'circumstances of the case', rather than the 'special circumstances of the case'. It should also be directed to consider an application to end a co-tenancy on the papers, where a matter concerns domestic violence. Finally, the Tribunal should be able to sever co-tenants' liabilities, so that victims are not liable to pay compensation where damage is the result of domestic violence.

Section 107 – Break fees should be reduced to three-weeks' rent in all cases, and applied to all fixed-term tenancy agreements.

Section 115 – Provisions about retaliatory evictions are of little use to tenants in their current form. They should be amended so that the Tribunal may find a notice of termination 'retaliatory' if the landlord was partly or wholly motivated to issue it because of a disagreement between with the tenant.

Section 122(2) – This provision should be amended to ensure that tenants are not required to pay rent to a mortgagee after a notice to vacate has been given by the Sheriff, where the time taken to resolve issues under the mortgage or take actual possession exceeds the notice period.

Section 130 – This provision should be amended. Where a landlord sells goods left behind by a tenant, they should be required to account for the value of the goods, not simply the proceeds of sale.

Section 154G – This provisions should be amended so that it does not apply to tenancies that are terminated under section 94, or to termination orders that are made by consent.

Section 209 – The definition of 'residential tenancy database' should be broadened to include any database in which information about occupation and *prospective* occupation is contained, and that is established for any use by landlords and real estate agents.

Section 212 – This provision should be amended to ensure that any debt that is the subject of a residential tenancy database listing has been heard and determined by the Tribunal.

Section 213 – This provision should be amended so that databases are prevented from listing domestic violence survivors where the reason for listing can be attributed to a violent co-tenant.

Section 216(3) – A penalty provision should apply to database operators who charge excessive fee for copies of listed personal information.

Section 223(1)(a)(ii) - This provision should be amended to follow a similar provision in the Uniform Civil Procedure Rules (rule 10.5), to clarify that a person receiving notice by personal service at a tenant's residential or business address must apparently reside or be employed at the address of service.