



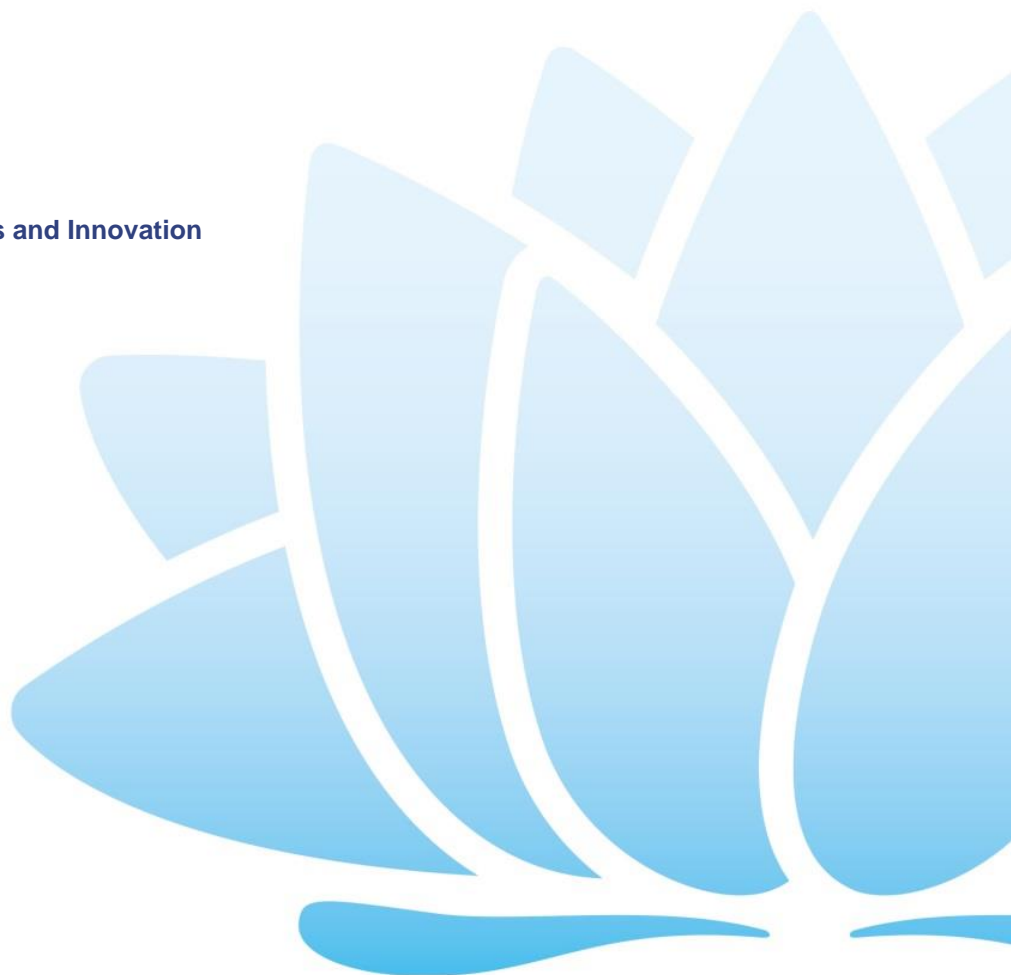
Fair  
Trading

# *Residential Tenancies Act 2010 – Statutory Review*

Date: 17 June 2016

NSW Fair Trading  
NSW Department **Finance, Services and Innovation**

June 2016



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# Section 1 — Executive Summary

The *Residential Tenancies Act 2010* (the Act) commenced operation on 31 January 2011. The Act represented the first comprehensive overhaul of NSW tenancy laws in more than 20 years.

The Act aims to provide a modernised regulatory framework for residential tenancies in NSW that strikes an appropriate balance between the interests of tenants and landlords.

This review is conducted pursuant to section 227 of the Act, which requires the responsible Minister to conduct a review after five years to determine whether the policy objectives of the Act remain valid and whether its terms remain appropriate for securing those objectives.

The review received over 210 public submissions, all of which made a valuable contribution to the review and were given careful consideration. NSW Fair Trading also undertook face-to-face consultation with a number of external stakeholders.

NSW Fair Trading found that the objectives of the Act remain valid and its terms remain generally appropriate for securing those objectives. In the five years since the Act was introduced there has been widespread acceptance of many of its new provisions. Feedback from the consultation found the provisions are generally working well and functioning as intended.

However, the review did find that there are some areas where the operation of the Act could be improved.

The major area where amendment is needed is in relation to the protections in the Act for victims of domestic violence. The review recommends a number of amendments to make it easier for victims to either leave a violent home or end the tenancy of a violent co-tenant without financial penalty, and to avoid being penalised for damage caused by domestic violence.

The review also explores the issues of security of tenure and protections for occupants of share households. These issues featured heavily in submissions from tenants' advocates and the review recommends further work on these topics.

The review also recommends minor amendments in the areas of:

- pre-tenancy disclosure requirements
- condition reports
- interest paid on bonds
- Rental Bonds Online
- water and utility charges
- repairs
- alterations
- break fees
- tenancy databases and
- electronic service of notices and signatures.

# Section 2 — the Statutory Review

## 2.1 The Residential Tenancies Act 2010

The *Residential Tenancies Act 2010* (the Act) replaced the *Residential Tenancies Act 1987* (the 1987 Act) over five years ago. The Act represented a major re-write and modernisation of the regulatory framework for residential tenancies in NSW.

Since the Act commenced, a number of administrative changes have occurred which impact on the regulatory scheme for residential tenancies. These include:

- abolition of the Consumer, Trader and Tenancy Tribunal and establishment of the NSW Civil and Administrative Tribunal (NCAT)
- abolition of the Fair Trading shop front and introduction of Service NSW
- introduction of Rental Bonds Online for the secure electronic lodgement of bonds, and
- introduction of a new tenancy dispute resolution service which is delivered by NSW Fair Trading.

## 2.2 Requirement for Review

Section 227 of the Act requires the responsible Minister to conduct a review to determine whether the policy objectives of the Act remain valid and whether its terms remain appropriate for securing those objectives.

The review is to be undertaken as soon as possible after the period of five years from the date of assent to this Act, with a report on the outcome of the review to be tabled in each House of Parliament within 12 months after that. As the Residential Tenancies Act was assented to on 17 June 2010, this report is due to be tabled in Parliament by 17 June 2016.

## 2.3 Policy objectives of the Act

The 2010 Act commenced operation on 31 January 2011 and consolidated the *Residential Tenancies Act 1987* and the *Landlord and Tenant (Rental Bonds) Act 1977*. This new Act was the first comprehensive overhaul of NSW tenancy laws in more than 20 years and sought to modernise and streamline existing tenancy laws<sup>1</sup>.

The Act is divided into seven key topic areas:

1. Starting a tenancy
2. Rental bonds
3. Rent and other charges
4. Rights and obligations of landlords and tenants
5. Terminations

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<sup>1</sup> Judge MP, V., Residential Tenancies Bill 2010 'Agreement in principle' speech, Legislative Assembly, NSW Parliament, 2 June 2010

6. Resolving disputes
7. Other key issues

According to the second reading speech delivered by the then Minister for Fair Trading when introducing the Act into the NSW Parliament, the Act aims to establish a regulatory regime for residential tenancies in NSW that:

- provides clarity and certainty about the rights and obligations of tenants and landlords
- promotes equity and efficiency and reduces unnecessary costs for both landlords and tenants
- enables landlords to manage their investment in a way that optimises returns and supports the future provision of rental accommodation in NSW
- enables tenants to have access to suitable rental accommodation and make informed choices about where they live, for how long, and what they are paying for
- 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.

## 2.4 Consultation

### Public submissions October 2015 –January 2016

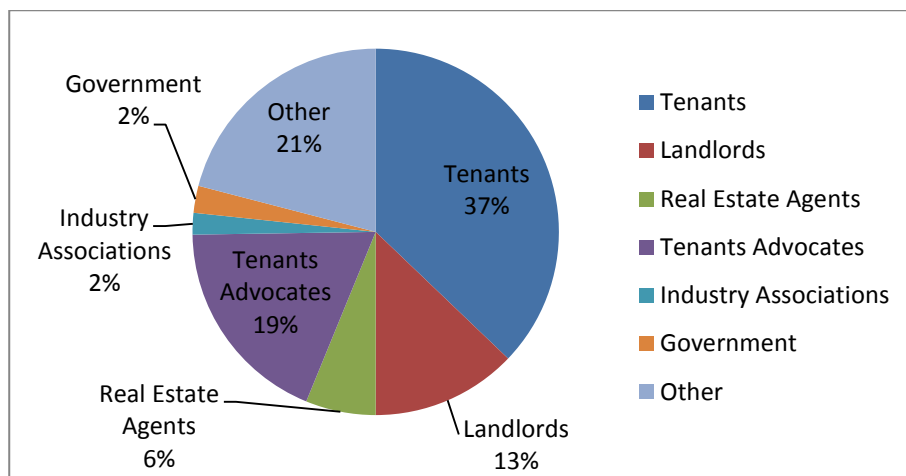
A Discussion Paper on the statutory review of the *Residential Tenancies Act 2010* was published in October 2015. The paper explored key tenancy topics including starting a tenancy, rental bonds, rent and other charges, tenants' and landlords' rights and obligations, terminations and resolving disputes.

All stakeholder groups, as well as the general public, were invited to provide comment on their experience with the Act and whether it is working as intended.

Public submissions closed on 29 January 2016 with NSW Fair Trading receiving a total of 210 submissions. Fair Trading reviewed all submissions and gave careful consideration to every suggestion.

Individual tenants were the largest group of respondents, providing 37 per cent of submissions. Groups or individuals clearly advocating on behalf of tenants, including legal centres and two NSW Members of Parliament among others, made up 19 per cent of submissions. Individual landlords and real estate agents made up 13 percent and 6 percent of the submissions respectively.

The graph below shows a breakdown of the submissions received.



### Face to face consultation

In addition to receiving written submissions, Fair Trading also undertook face-to-face consultation with a range of stakeholders. The Tenants' Union, the Real Estate Institute and the Property Owners Association were invited to discuss their views on the broad operation of the Act.

Redfern Legal Centre and Marrickville Legal Centre were invited to discuss specific issues of concern including domestic violence, sub-tenancies and share housing.

Women's Legal Service NSW and Legal Aid were invited to share their unique experience and expertise on the issue of domestic violence.

Vulnerable, older and women tenants were the focus of a meeting with members of the Older Women's Housing and Homelessness Group, co-convened by Shelter NSW.

Coverage of the Act was discussed with Flatmates.Com.Au and Arc@UNSW in relation to the potential regulatory challenges posed by the expansion of share housing. Discussions were held with NSW Farmers in relation to employee and caretaker arrangements.

The review has also taken into careful consideration the complaint handling experience in Fair Trading's own Real Estate and Property division. Their insights as independent mediators of disputes between tenants, landlords and agents have been highly valuable.

# Section 3 — Snapshot of renting in New South Wales

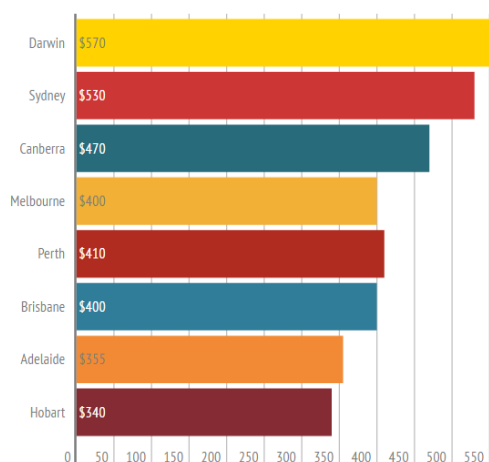
## The NSW rental market

The past five years has seen housing affordability in Sydney dropping significantly. This has contributed to a significant proportion of people being priced out of home ownership, to continuing low rental vacancy rates throughout Sydney and rising rents.

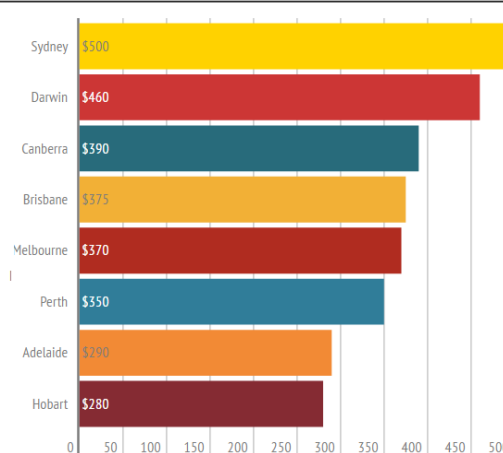
In March 2016, the Real Estate Institute found that Sydney's vacancy rate was at 1.7 percent.<sup>2</sup>

In relation to rent levels, according to Domain.com, the median weekly asking rent for units in December 2015 was \$500 in Sydney, significantly higher than Melbourne (\$370) and Brisbane (\$375). For houses, the median asking rent in December 2015 was \$530, again well above the median rental price of \$400 for houses in both Melbourne and Brisbane.

Median Weekly Asking Rents - Houses



Weekly Median Asking Rents - Units



Source: Domain Rental Report - December Quarter 2015

## The changing profile of tenants

Decreasing housing affordability has meant that a significant number of individuals and families are no longer using renting merely as a stepping stone while saving up to purchase a property of their own. 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. Moreover, at least a third of people living in the private rental market have now done so for ten years or more.<sup>3</sup>

<sup>2</sup> [www.rei.com.au](http://www.rei.com.au) accessed on 5 May 2016

<sup>3</sup> 'Long term private rental in a changing Australian private rental sector', Australian Housing and Urban Research Institute, quoted in Tenants' Union of NSW submission to the statutory review, p.9



## **Shared occupancy arrangements**

Shifting social norms along with the shortage of affordable rental properties has led to an increase in shared occupancy arrangements within NSW. A new group of tenants, comprised of professionals, couples, young families, and students, who cannot afford to buy or rent an entire property of their own are increasingly turning to shared occupancy as a way to afford housing in NSW.

Shared occupancy can also allow home buyers to generate rental income by renting out part of their own home to assist with mortgage repayments. These factors have led to an increase in the numbers of sub-tenants and boarders in NSW.

## Section 4 — Findings of the review

### 4.1 Objectives of the Act

The review found that the policy objectives of the Act remain valid and that the provisions of the Act remain largely appropriate for securing those objectives.

Submissions to the review overwhelmingly confirmed that the Residential Tenancies Act is a necessary and welcome framework for the regulation of landlord-tenant relationships.

### 4.2 Coverage of the Act

A large majority of submissions either argued for widening the coverage of the Act, or for the maintenance of the status quo. Arguments for widening the Act's coverage primarily came from tenants' advocacy groups and centred on the growing group of renters who occupy shared households, as well as boarders and lodgers who are not covered by the *Boarding Houses Act 2012*.

A small number of respondents made suggestions for narrowing the coverage of the Act. Of these, suggestions for amending the application of the Act to employee and caretaker arrangements are worthy of further consideration.

#### 4.2.1 Employee and caretaker arrangements

Section 9 of the Act states that where an employer provides residential accommodation to an employee or caretaker as part of the employee or caretaker's contract of employment, then that arrangement is taken to be a residential tenancy agreement.

Further, section 9 states that the Act continues to apply to these arrangements even where section 7 would otherwise exclude the premises from the operation of the Act.

The NSW Farmers' submission cited a typical example. Agricultural employers will sometimes provide a cottage for a farmhand to live in while they work on the property where the cottage is located, as part of the contract of employment. The Act applies to those accommodation arrangements, making the farmhand a tenant in law and providing them with the protections of the Act in terms of quiet enjoyment of their home while they are in residence, notice periods, rights to repairs and other remedies.

The submission from NSW Farmers contended that section 9 has caused problems when a contract of employment comes to an end. As the arrangement to provide accommodation is a tenancy, the employee may be entitled to up to 90 days' notice of termination. This means that the employment of a new farmhand can be delayed or frustrated by the tenancy termination notice period, which can far exceed the employment termination notice period.

Policy options in this regard include repealing section 9, which is not preferred, as this would remove all the protections of the Act that currently apply to employees and caretakers as tenants.

Alternatively, specific provisions could be made for termination notice periods where the residential accommodation is provided as part of a contract of employment. One of the options put forward for consideration by NSW Farmers is to align tenancy termination periods for tenants in these circumstances with either the notice period set out in the contract of employment, or as provided by the *Fair Work Act 2010*, whichever is the greater.

However, notice periods under the Fair Work Act and employment contracts can be as short as one week, which may not be enough time for a person to find new accommodation, arrange a removalist and move house. It is therefore recommended that the tenancy termination periods for employees and caretakers whose accommodation is tied to their employment be a minimum of two weeks, or the notice period set out in the contract of employment, whichever is the greater.

#### **Recommendation 1**

The Act's coverage of employee and caretaker arrangements should be maintained. However the Act should be amended to provide that the termination period for employees and caretakers whose accommodation is tied to their employment is to be a minimum of two weeks or the notice period set out in the contract of employment, whichever is the greater. Parties will still have access to the NSW Civil and Administrative Tribunal to resolve disputes.

### **4.2.2 Occupants of shared housing**

A major theme in submissions from tenants' advocates was concern over the lack of legal protection for occupants of shared households, including boarders and lodgers.

The 2010 Act introduced a new provision, section 10, which aimed to clarify the tenancy status of occupants of shared households:

#### **10 Application of Act to occupants in shared households**

A person who occupies residential premises that are subject to a written residential tenancy agreement, is not named as a tenant in the agreement and who occupies the premises together with a named tenant is a tenant for the purposes of this Act only if:

- (a) a tenant under that agreement transfers the tenancy to the person or the person is recognised as a tenant (see Part 4), or
- (b) the person is a sub-tenant of a tenant under a written residential tenancy agreement with that tenant.

**Note.** Boarders and lodgers are not covered by this Act (see section 8(1)(c)). An occupier may be recognised as a tenant (see sections 77 and 79).

Accordingly, for an occupant of a shared household to be recognised as a tenant and enjoy the protections of the Act, the occupant (or 'sub-tenant') must have a written residential tenancy

agreement with the 'head tenant'. Under such an arrangement, section 3 of the Act places the head tenant in the position of landlord in relation to the sub-tenant. The policy rationale for the introduction of section 10 was two-fold.

Firstly, the 1987 Act left the tenancy status of shared housing occupants unclear and open to interpretation by the Tribunal, which made decisions case by case and according to the substance of the agreement in question.

Secondly, as pointed out by share accommodation website Flatmates.Com.Au, many occupants of shared households enter into those living arrangements on an informal basis. They do not necessarily expect or want to have the full force of the Residential Tenancies Act applying to their living arrangements. This can be the case even where bonds and regular rent are collected, and there may be a written agreement of some sort signed by the housemates.

However, submissions from tenants' advocates and community legal centres argued that section 10 can place renters who do not have a written agreement with their head tenant (that is, a sub-lease of their own) in a precarious position. Where the shared house relationship breaks down, sub-tenants can be exposed to evictions without notice, withholding of money owing, interference with quiet enjoyment of their part of the household and disabling of swipe keys. They also do not have access to the NSW Civil and Administrative Tribunal to resolve disputes.

A further complicating factor is that in some situations it may not be clear whether those who share a house with a head-tenant are sub-tenants or boarders. The distinction between the two is that sub-tenants share some control over the premises with the head-tenant, whereas a boarder does not.

The Residential Tenancies Act does not apply to boarders. Shared house occupants who are boarders are also usually not subject to the Boarding Houses Act (which provides some basic occupancy rights) as that Act only applies to registrable boarding houses with five or more residents.

Accordingly, the only legal recourse for renters in this situation is court action under contract law.

### **The size of the share housing sector**

As an unregulated sub-section of the rental economy, there is a general lack of good quality statistical data available about the number of people who live in share housing arrangements. Flatmates.com.au estimates that about 280,000 individuals searched for or offered share accommodation in NSW in the 12 months to January 2016, with Sydney accounting for a large majority of those people. Over the same period, they estimate the share accommodation market grew by over 36%.

There also appears to be a generational shift taking place in attitudes to shared housing and its typical occupants. The previous stereotypical image of share house occupants being young, students, in transition to home ownership or otherwise marginal members of society is becoming increasingly outdated.<sup>4</sup>

### **Options**

Flatmates.com.au, the largest share accommodation platform in Australia (with over 50% of the market), viewed share accommodation as an example of the expanding collaborative or 'peer-to-peer' economy. They argued that giving legal certainty and basic rights to share housing occupants

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<sup>4</sup> 'Increasing number of Australians over 40 turning to share housing', Domain.Com.Au, 23 March 2016

will encourage this market to expand and move further into the mainstream, potentially providing more affordable housing.

While these assumptions are untested, it is true that the share housing sector is growing and that many head-tenants do not offer written agreements, leaving sub-tenants without any occupancy rights.

Some submissions suggested applying the whole of the Act to sub-tenancies. However, the Act is aimed at the traditional landlord and tenant relationship, rather than a housemate relationship. Further, a number of the obligations imposed on landlords by the Act, such as the obligation to carry out repairs, are not appropriate to impose on head-tenants, who do not have ultimate control over the property.

An alternative could be to prescribe a specific sub-tenancy agreement for sub-tenants, giving them basic rights such as return of bond, notice of rent increases and eviction, and a right to quiet enjoyment. If it is considered appropriate, this could be further extended to include all boarders and lodgers who are currently excluded from the Act.

In the absence of conclusive data about the legal difficulties which occupants in share housing experience and adequate evidence of appropriate policy responses, the review recommends further consideration be given to the potential for legislative reform.

Consultation would need to occur on the details of what rights should be included in such a sub-tenancy agreement. Consideration would also need to be given to possible consequences, such as increased demands on NSW Fair Trading's tenancy dispute resolution service and the Tribunal. It is also important to ensure that landlords would not be adversely affected by disputes between tenants and sub-tenants.

### **Recommendation 2**

That the Government give further consideration to:

- i) whether it is appropriate to provide occupancy rights to sub-tenants without a written tenancy agreement and/or to boarders not covered by the Boarding Houses Act, and
- ii) what kinds of occupancy rights should be provided to these groups.

In considering these questions, the Government should consult with interested stakeholders.

## 4.3 Rights and obligations of landlords and tenants

The review found that the majority of the general provisions governing the rights and obligations of landlords and tenants do not need amendment. These provisions set out the basic framework for the tenancy and provide guidance on how tenants and landlords can resolve common tenancy issues.

### 4.3.1 Disclosure requirements

Section 26 of the Act provides that a real estate agent or landlord must disclose to a prospective tenant prior to entering into a tenancy (i) any proposal to sell the premises, if a contract for sale has been prepared, and (ii) that a mortgagee is taking action for possession, if the mortgagee has commenced court proceedings.

Section 26 also provides that a landlord or their agent must not induce a tenant to enter into a tenancy agreement by knowingly making any false, misleading or deceptive statement or by knowingly concealing a material fact of a kind prescribed by the regulations. The Residential Tenancies Regulation currently prescribes a number of material facts that must not be knowingly concealed, including the existence of an easement, that a property has been the scene of a serious violent crime within the last five years, or that the premises are subject to significant health or safety risks that are not obvious on inspection.

#### Enforcement of disclosure requirements

The Tenants Union argued that section 26 of the Act does not have an enforcement mechanism, as it is not a term of the standard residential tenancy agreement and the tenant cannot end a tenancy for failure to disclose or concealment of a material fact.

#### Drug crime

Several submissions raised concerns about properties that may have recently been the scene of drug crimes such as the manufacturing of crystal methamphetamine ('ice'). The concerns were:

- i) that associates of a drug dealer/manufacturer/user may not realise that the person is no longer resident there and attempt to visit the property; and/or
- ii) that a property that has been used for drug making can contain dangerous toxic chemical residue.

Properties that have been used as drug laboratories are required to be cleaned and decontaminated by experts in the removal of hazardous chemicals, to the satisfaction of the Environmental Health Officer of the relevant local council.

The review considers that landlords and agents should be required to disclose the use of the premises as a drug lab in the past two years. This differs from the time limit on disclosure of other material facts, which is five years. Consideration should be given as to whether a period of five years remains generally appropriate for the disclosure requirements on landlords and agents under section 26.

#### Strata by-laws

Strata by-laws govern the behaviour of residents and the use of common property in a strata scheme. Currently clause 35 of the standard form residential tenancy agreement requires landlords to provide a tenant with the strata by-laws within seven days of signing the agreement. This can

mean that, if tenants move into the property immediately or soon after signing the lease, they will be bound by the by-laws before they know what they are.

As it is important for the tenant to know the rules of the complex they will be living in before they commit to a residential tenancy agreement, the review recommends that landlords and agents be required to disclose strata by-laws before or at the time a tenancy agreement is signed.

### Strata renewal

The City Futures Research Centre at UNSW suggested that there be a requirement to disclose that the owners corporation has decided to form a strata renewal committee. If the owners corporation has decided to form such a committee, it is possible that all the lots in the property will be sold to a developer, requiring the tenant to find alternative accommodation.

#### **Recommendation 3**

That a term be inserted in the standard form residential tenancy agreement to provide that landlords are to:

- i) disclose any matters required to be disclosed under section 26 of the Act, and
- ii) not knowingly conceal any of the material facts set out in clause 7 of the Residential Tenancies Regulation.

That section 26 of the Act be amended to provide that, for properties in strata schemes, a landlord must

- i) provide the strata by-laws to the tenant before or at the same time that the tenant enters into a tenancy agreement; and
- ii) disclose that a strata renewal committee has been formed.

That clause 7 of the Regulation be amended to include in the list of material facts that must not knowingly be concealed:

- i) that the premises have been the scene of a drug crime in the last two years; and
- ii) that the premises have been the scene of drug manufacturing in the last two years.

That consideration be given as to whether five years remains generally appropriate as a time limit for the disclosure requirements under section 26.

### **4.3.2 Information statements for tenants and landlords**

At the start of every tenancy, the landlord or agent must give the tenant a copy of a Fair Trading publication called the 'New Tenant Checklist'. This checklist contains important information to be aware of before signing a new tenancy agreement.

Submissions from tenants, agents and landlords all agree that the new tenant checklist has been useful. Major stakeholders along with a large number of individual submissions agreed it could be further improved with the inclusion of information on tenants' and landlords' safety obligations in

residential premises, such as smoke alarms, electrical safety switches and child safety window locks.

### Landlord's Checklist

The Real Estate Institute has suggested that the Act should also require landlords to view an information statement prior to the start of a tenancy, setting out their rights and obligations in relation to the tenancy. This would operate in a similar manner to the new tenant's checklist, with the landlord required to sign a statement on the lease that they have obtained, read and understood an information statement. The aim of this would be to make landlords more aware of their responsibilities and to help reduce disputes over routine repairs and maintenance.

#### **Recommendation 4**

That the Tenant's Checklist include information about statutory safety requirements relating to smoke alarms, electrical safety switches and child safety window locks.

#### **Recommendation 5**

That the Act require landlords to sign a statement that they have obtained, read and understood an information statement the contents of which are prescribed, setting out their rights and obligations under the Residential Tenancies Act and other legislation, including obligations relating to statutory safety requirements such as smoke alarms, electrical safety switches and child safety window locks.

Stakeholders should be consulted over the contents of the new Landlord's Checklist.

### **4.3.3 Bonds**

The majority of submissions expressed support for the current requirement which limits the amount of bond that can be required from a tenant to four weeks' rent.

Some submissions argued that higher bond amounts should be allowed for higher value and furnished properties, and for agreements which allow the tenant to keep a pet.

In the context of increasing rents and housing affordability problems, the review does not consider that the amount of allowable bond should be increased. Any increase would create a significant barrier for tenants wishing to enter into a tenancy agreement.

The current median rent for apartments in Sydney is \$500 per week, which correlates to a rental bond of \$2000. Further, if a landlord is concerned about the potential for damage to the property to exceed this amount, it would be advisable to obtain landlord insurance.

In relation to suggestions for a pet bond, there was insufficient evidence to demonstrate that implementing such a bond would encourage landlords to allow pets on a property or minimise bond disputes due to pet-related damage.



### Interest paid on bonds

The Act provides that other interest money from the Rental Bond Interest Account is to be used for the costs of administering the Act, half the costs incurred by NCAT in dealing with residential and social housing matters, and for tenancy advisory services, education about tenancy laws, research into tenancy issues, schemes for provision of residential accommodation and other activities for the benefit of landlords and tenants.

NSW is the last remaining jurisdiction in Australia to pay any interest to tenants on rental bonds.

The Act provides that the interest paid to tenants upon refund of their rental bond is calculated at the same rate as applied by the Commonwealth Bank to an everyday access account balance of \$1,000. As bond money could be called upon at any time, the interest rate for an on-call account was considered an appropriate benchmark. Historically, that rate has been around 0.01% per annum and many submissions noted this resulted in negligible returns to tenants. The Commonwealth Bank recently reduced the applicable interest rate to 0% per annum, even for account balances of over \$100,000, meaning that even without legislative change tenants no longer receive any interest on their bond.

The Tenants' Union argued that tenants should be paid a higher rate of interest on bonds than currently is the case. However, the review concluded that the administrative costs incurred in calculating interest to be paid to tenants should be saved.

Tenants' advocates also argued that the level of funding for services to the residential tenancy sector from the Rental Bond Board should be increased. Instead, the review concluded that the Act should be amended to widen the purposes for which those funds can be used to include consumer protection more generally.

### Rental Bonds Online

The new Rental Bonds Online system has been very well received by all stakeholders. It has allowed tenants to pay their bond directly to the Rental Bond Board, thereby reducing the incidence of landlords and agents failing to lodge bonds – an offence under the Act. However, tenants can only lodge a bond electronically if the real estate agent or the landlord has an account with Rental Bonds Online.

In order to drive uptake by tenants and facilitate the transition of bond payments from a paper-based system to an online system, the review concluded that the Act should require landlords or their agents to register with Rental Bonds Online and provide new tenants with an invitation to use Rental Bonds Online prior to lodgement of the bond.

Importantly, tenants without online access would not be disadvantaged. If they preferred, they could still give the bond directly to the landlord or real estate agent, who would then be required to lodge it with the Rental Bond Board as before.

#### **Recommendation 6**

That four weeks' rent should continue to be the maximum amount that can be received from a tenant as a rental bond.

#### **Recommendation 7**

That the payment of interest to tenants on rental bonds be abolished and the

purposes for which Rental Bond Interest Account money can be spent should be widened to include consumer protection more generally.

**Recommendation 8**

That the Act require all landlords and agents to register with Rental Bonds Online and provide tenants with an invitation to use Rental Bonds Online prior to bond lodgement.

#### **4.3.4 Condition reports**

The condition report provides a snapshot of the general condition of the property, on a room by room basis. It is often used as a key piece of evidence at the end of the tenancy if there is a dispute about whether the tenant has caused damage.

##### Photos

As the condition report is commonly used as evidence, it is important that both the tenant and landlord fill out the report as accurately as possible. Some submissions expressed concern that tenants often only indicate agreement or disagreement with the agent's comments, leading to under-reporting of defects and damage.

One of the more popular suggestions from the consultation process was to include time stamped photos in condition reports. Photos could provide visual evidence to reinforce one party's claim and reduce disputes.

The Greens NSW submission included a case study where a tenant was able to retain their bond as they were able to provide photographic evidence that they had cleaned the property:

We took photos after we cleaned to move out. They then sent us photos of the property looking dirty and damaged, claiming we had done it and they wanted to keep our bond (lucky we had time stamped photos).

##### Photos during inspections and for advertising

It is becoming more common for landlords and agents to take photos during inspections. These should be kept confidential and used only for the purposes of recording the condition of the property.

##### Photos used for advertising

Some submissions have expressed concerns about the use of photos showing a tenant's possessions to advertise a property for sale or rent. This is especially a concern for survivors of domestic violence, in case the photos can lead to the tenant's address being discovered.

Some submissions suggest that photos showing the tenant's possessions should not be used in advertising without the tenant's prior written consent, and note that a tenant's belongings can usually be edited out of photos.

If a tenant refuses consent, however, it may operate unfairly on a vendor who cannot show pictures of the inside of the property.

It is suggested that the landlord be required to consult with a tenant about taking photos that show a tenant's possessions and provide the tenant with a chance to remove any items that can

reasonably be moved. The landlord should also obtain the tenant's written consent to the use of photos in advertising, but this consent should not be able to be unreasonably withheld.

#### Time for tenant to complete the condition report

Concern was expressed in submissions about the time tenants are given to fill out the condition report. The condition report must be submitted to the landlord or agent seven days after the tenancy agreement has been signed. However, tenancy agreements may be signed two to three weeks before the tenancy commences, meaning the tenant does not have access to the property. In some cases the previous tenant is still in occupation. In these instances, the incoming tenant will have to rely on the landlord or real estate agent's condition report and their recollection of what the property looks like during a brief open house inspection.

A preferable option would be to require the condition report to be provided to the landlord or agent within seven days after the tenant has moved into the property. This would also allow the tenant to discover any faults or damage that may not be noticeable upon initial inspection.

#### **Recommendation 9**

That the condition report provides a page that can contain photos of the property if the tenant or landlord wishes to use them.

#### **Recommendation 10**

That landlords/agents be required to:

- i) consult with the tenant before taking photos to be used in advertising and provide the tenant with an opportunity to move any possessions that can reasonably be moved, and
- ii) obtain the tenant's written permission to use photos containing the tenant's possessions in advertising.

That tenants be prohibited from unreasonably withholding consent to the use of photos in advertising.

#### **Recommendation 11**

That the condition report be required to be completed by the tenant and provided to the landlord or agent no later than seven days after the tenants obtains possession of the rented premises.

### **4.3.5 Water and utility charges**

Sections 38 to 40 of the 2010 Act govern the responsibilities for payment of utility and water usage charges by landlords and tenants. Tenants are responsible for payment of all utility charges (electricity, gas, oil) if the premises are separately metered. Tenants are similarly responsible for paying water usage charges, but only if:

- o the premises are separately metered (or water is delivered by vehicle, such as those with water tanks on rural properties), and
- o the premises contain water efficiency measures prescribed by the regulations, and

- the charges do not exceed the amount payable by the landlord for water used by the tenant.

The review found that stakeholders agree the above provisions are generally working well, and the 2010 changes to promote water efficiency were welcome.

#### Separate metering of residential premises

Tenancy complaints handled by NSW Fair Trading have suggested a need for clarification of the meaning of “separate metering” for the purposes of calculating the utility and water usage charges to be paid by the tenant.

Disputes have arisen in cases where tenants are responsible for only a portion of the usage charges listed in a water or energy bill. This can occur when the rented premises adjoin the landlord’s own residential or business premises. In these cases, Fair Trading has found that some landlords maintain a single water or energy bill in their own name, and pass on a portion of the charges to the tenant based on their own methods of separately metering the tenant’s part of the property.

For water charges, this can involve the use of a small gauge or ‘clicker’ at some point along the water delivery system.

The review concluded that the Act should be amended to reduce disputes over the proper allocation of utility and water usage charges to tenants. In the case of water, a separate bill exclusively relating to the tenant’s part of the premises should be required for a landlord to pass on water usage charges to the tenant. For utility charges, an NMI (National Meter Identifier) number should be available for the tenant’s part of the premises so that their usage can be separately billed by the energy supplier.

#### **Recommendation 12**

That section 3 of the Act be amended to introduce a definition of *separately metered premises* for utility and water usage charges.

*Separately metered premises* should be those can be separately billed by a water authority, or an NMI number available for energy charges.

### **4.3.6 Rent increases**

The Act has different provisions relating to rent increases depending on whether the agreement is a fixed term or periodic agreement.

#### Fixed term agreements

For a fixed term agreement of less than two years, rent can only be increased during the fixed term if the agreement specifies the increase or the method of calculating the increase. For fixed term agreements of two years or more, a rent increase does not need to be written into the agreement but rent can only be increased once in any 12 month period.

In both cases, 60 days' written notice is required.

Submissions questioned the need for a tenant to be provided with 60 days' written notice of a rent increase where the date of the increase is already written into the residential tenancy agreement. The tenant has been given notice of such an increase when signing the agreement.

The review agrees that providing 60 days' written notice of a rent increase where the date of the increase is clearly set out in an agreement is unnecessary. Such a clause will be an additional term and as such will need to be initialled by the parties. This will ensure that the tenant is aware of the term.

### Periodic agreements

Tenants must be provided with 60 days' written notice of any rent increase during a periodic agreement.

If the tenant considers the rent increase to be excessive, the tenant can challenge the increase in the Tribunal. In considering whether a rent increase is excessive, the Tribunal is to have regard to a number of factors, including the market rent for comparable premises in the area, the landlord's outgoings, the state of repair and the amenities provided in the premises, work done by the tenant, when the last increase occurred and any other relevant matter other than the income of the tenant or the tenant's ability to afford the increase.

### *Frequency of rent increases*

Tenants' advocates have suggested that rent increases in periodic agreements should be limited to once every 12 months. Queensland and Victoria limit the frequency of rent increases in periodic agreements to once every 6 months.

The review considers that there is a risk in limiting the frequency of rent increases, which is that an expectation can develop that rents are to be increased every six or 12 months. Further, landlords may increase the rent by more than they would have otherwise done, out of concern that they will not get another chance to increase the rent for at least six or 12 months.

### *Amount of rent increases*

A number of tenants' advocates have noted that, in their experience, it is difficult for tenants to successfully argue in the Tribunal that a rent increase is excessive. These advocates have suggested a variation to the onus of proof when the rent increase is greater than the consumer price index. Therefore if the rent increase is greater than the CPI, and is challenged by the tenant, the landlord would bear the onus of proving that the increase is not excessive. They argue that information about the level of rents for similar premises would be more readily available to the landlord (who would usually be using an agent with access to this information) than to the tenant.

The review considers that there is insufficient evidence to support such an amendment.

### **Recommendation 13**

That the requirement to provide 60 days' written notice of a rent increase where the date and the amount of the increase are clearly specified in a fixed term tenancy agreement be removed.

#### **4.3.7 Repairs**

Section 63 of the Act contains a general obligation on landlords to provide and maintain rental premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.

The Act defines certain repairs as urgent – these include a burst water service, blocked or broken lavatories, flooding or fire damage, dangerous electrical faults, gas leaks, and breakdowns of essential services or any fault or damage that causes the premises to be unsafe.

A tenant is able to incur reasonable costs for carrying out urgent repairs and the landlord is required to reimburse the tenant within 14 days of being given written notice of these costs. Reimbursement costs are currently limited to \$1,000.

The Act does not impose a requirement that the landlord reimburse the tenant for non-urgent repairs.

A number of submissions highlighted tenants' difficulties in having repairs attended to by their landlord. These include routine repairs and maintenance that fall outside of the Act's definition of urgent repairs. NSW Fair Trading's tenancy dispute resolution service receives more complaints about repairs than about any other issue.

While a tenant can apply to the Tribunal under section 65 for an order that the landlord carry out specified repairs, subsection 3(b) provides that the Tribunal must not make such an order unless the landlord failed to act with "reasonable diligence" to have the repair carried out. This can mean that no order for repairs is made if the landlord argues that they have acted diligently in trying to arrange for a repair to be carried out but have so far not been successful in doing so.

While this recognises that the landlord is usually dependent on tradespeople to carry out repairs, it leaves the tenant without a means to obtain a remedy for repairs, even if they have been waiting for a considerable time. It also works to counter to the landlord's obligation to provide and maintain premises in a reasonable state of repair.

It appears that the "reasonable diligence" defence is also preventing tenants being able to terminate the tenancy on the grounds that the landlord has breached the agreement by not carrying out repairs.

The review considers that the Commissioner for Fair Trading should issue guidelines regarding reasonable timeframes within which different repairs should be carried out. Urgent repairs would be subject to shorter timeframes.

The Act should also be amended to remove the reasonable diligence defence. Instead, it should provide that in deciding whether to make an order that repairs be carried out or that a tenancy be

terminated because the landlord has failed to carry out repairs, the Tribunal is to consider the timeframes in the Commissioner's guidelines, the effect of the failure to carry out repairs on the amenity of the premises and the tenant, and whether the landlord has acted with reasonable diligence in the circumstances. Reasonable diligence would then be only one factor to consider, and the time that a tenant has been waiting and the effect on the tenant would also be considered.

#### **Recommendation14**

- i) That the Act be amended to remove the "reasonable diligence" defence to:
  - a claim for an order that the landlord carry out specified repairs, and
  - a tenant's ability to terminate a tenancy on the grounds that the landlord has not carried out repairs.
- ii) That the Commissioner for Fair Trading issue guidelines suggesting reasonable timeframes for the carrying out of different types of repairs.
- iii) That the Act provide that, in deciding whether to make an order that the landlord carry out specified repairs or that a tenancy be terminated because the landlord has failed to carry out repairs, the Tribunal is to consider:
  - the timeframes in the Commissioner's guidelines,
  - the effect of the failure to carry out the repairs on the amenity of the premises and the tenant, and
  - whether the landlord has acted with reasonable diligence in the circumstances.

#### **4.3.8 Alterations**

The Act allows tenants to add fixtures or make minor alterations to the rental premises, at their own expense, if they have the landlord's written consent or the residential tenancy agreement permits it. It further provides that a landlord must not unreasonably withhold consent to a fixture, renovation or alteration if it is of a minor nature.

A tenant may remove a fixture added under these provisions at the end of a tenancy, at their own expense, and repair any damage or compensate the landlord for the cost of the repair.

Some tenants' advocates have suggested that landlords should not be able to withhold consent to any "cosmetic" alterations to a property, including painting, laying carpet, and installing or replacing built-in wardrobes. The review considers that it is reasonable for a landlord's consent to be required for changes that are not minor in nature.

However, the issue of minor alterations to accommodate elderly or disabled tenants is worthy of further consideration. Some submissions have mentioned installation of grab rails in bathrooms or

the addition of an access ramp, where this does not cause structural damage or the damage would be easily rectified.

The review recommends amendment of the Act to clarify that a landlord may not unreasonably refuse consent to minor alterations that are designed to make the premises liveable for disabled or elderly tenants.

#### **Recommendation 15**

That the Act be amended to clarify that a landlord may not unreasonably refuse consent to minor alterations or fixtures which are designed to make the premises liveable for disabled or elderly tenants.

## **4.4 Terminations**

### **4.4.1 Security of tenure**

Security of tenure and the related issue of terminations initiated by landlords emerged as a major theme of the review, and perhaps the most contentious area of the 2010 Act. Many respondents, especially tenants' advocates, set their submissions against the general background of many tenants being unable to afford to buy property and renting for longer periods.

Some individual tenants shared unhappy experiences of renting in the private residential market. Unwanted terminations of tenancies, often due to vacant possession being required for sale of the property, have given some renting families a feeling of uncertainty and constant upheaval, necessitating change of schools and the severance of established ties with local communities.

#### **Longer fixed term leases**

Fixed term leases offer greater security of tenure than periodic leases – at least during the fixed term. Rent increases are more regulated and the landlord cannot terminate the lease other than under exceptional circumstances as prescribed by the Act.

The 2010 Act does not prescribe any minimum duration for fixed term leases. Despite this, the general practice for many years in NSW has been for fixed term leases to be offered at the commencement of a tenancy and for their duration to be six or 12 months. After that time expires, both parties can agree to continue under a periodic lease, or vacate, as the case may be.

There are likely to be a number of reasons why landlords and tenants are not entering into longer fixed term leases.

Landlords and agents may prefer the greater flexibility under periodic leases for rent increases and for regaining vacant possession of the property for reasons of sale, personal use or for re-letting to a preferred tenant. Tax settings in Australia and the tendency to purchase of property to make a capital gain rather than to collect rental income also contribute to landlords' reluctance to enter long term leases.

Tenants may not request long fixed term leases, as they may want to keep their housing options open, or may fear being 'stuck' with an undesirable landlord. This would especially be the case if their lease did not include a flat break fee provision, which is discussed further below.



Indeed the Tenants' Union has argued that it would caution tenants against entering into a long fixed term tenancy, in case the landlord proves to be difficult or sells to another landlord who is an unknown quantity. The Tenants' Union would prefer security of tenure for tenants to be achieved by limiting the grounds on which a landlord can terminate a periodic tenancy (discussed further below).

Nevertheless there are likely to be some tenants and landlords who are interested in long fixed term leases, and it may be possible for the Act to provide some incentives to make these more attractive.

#### Existing provisions applying to long term leases

There are two ways in which the Act currently treats long term tenancies differently to other tenancies. In both cases, long term tenancies are defined as periods of 20 years or more. Several submissions to the review argued that this is an unrealistically long period of time, affecting very few tenants in practice.

#### *More flexible terms*

Firstly, section 20 of the Act allows for the variation of leases to include terms that would otherwise be prohibited if the agreement is for a fixed term tenancy of 20 years or more. Those agreements can also exclude certain terms that would otherwise be mandatory.

It may be that allowing landlords and tenants to vary the standard terms for fixed term tenancies of five or ten years would increase the appeal of longer fixed term tenancies. A longer lease could offer the tenant both additional security of tenure, and certainty and stability of rent increases. In exchange for those benefits, the tenant could agree, for example, to take on some of the landlord's usual obligations to carry out minor repairs and maintenance.

Reducing the fixed term period in section 20 to five years would give parties more opportunity to agree and tailor a tenancy with terms agreed by both parties. They would still have access to the Tribunal for an order about critical provisions. As leases which are longer than three years in duration need to be registered on the property title, security of tenure for the term of the lease is assured.

#### **Recommendation 16**

- i) That section 20 be amended to reduce the applicable term to 5 years to encourage longer fixed term tenancies.
- ii) That the Government give further consideration to other changes that could be made to the Act to further incentivise the use of longer fixed term tenancies.

### *Special provisions applying to termination of long term leases*

Section 94 of the Act makes special provision for the termination of tenancies where the tenant has been in continual occupation of the premises for 20 years or more. In these circumstances, the landlord must apply to the Tribunal if they wish to terminate the tenancy. If the Tribunal agrees to make a termination order, the long term tenant must be given a minimum of 90 days to vacate.

Several submissions to the review, including from Council on the Ageing NSW, express concern that tenants who have been in continual occupation of the same residential premises are often elderly and vulnerable. Reasons for termination of their tenancy can include the death of the landlord and the impending liquidation of their estate to enable its distribution to the beneficiaries.

This situation can leave long term tenants at risk of homelessness. However, shorter term elderly tenants face the same risks. The Tribunal retains a discretion not to order termination in the case of long term tenancies if it considers it inappropriate to do so in the circumstances, and the tenant will have 90 days' notice.

#### **4.4.2 No grounds terminations**

The 1987 Act allowed landlords to terminate tenancies without stating their grounds for doing so, as long as tenants were given a minimum of 60 days' notice in writing. If a tenant disputed a no grounds termination notice, the law gave some discretion to the Tribunal. The Tribunal could uphold such a termination notice "if satisfied that, having considered the circumstances of the case, it [was] appropriate to do so".

When the previous NSW Government introduced the 2010 Act, it removed the Tribunal's discretion in order to provide landlords with greater certainty of being able to regain possession of their property, and extended the notice period to 90 days - considerably longer than the notice periods that apply to any other reason for termination.

Accordingly, section 85 of the 2010 Act states that if a no grounds termination notice has been correctly issued, and the tenant has been given a minimum of 90 days' notice to vacate (extended from 60 days), the Tribunal must order the tenant to vacate.

In addressing the broader issue of security of tenure in the rental market, submissions from the Tenants' Union and several others argue that not only does the existence of a right to terminate without grounds affect security of tenure, it also undermines tenants' other rights under the Act, as many tenants will not assert those rights for fear of being evicted.

They cite instances where tenants have in fact been evicted for asserting rights against the landlord. While the Act does have provisions to prevent retaliatory evictions, tenant advocates argue that the landlord's motivation is very difficult to prove. Also, the Tribunal will often encourage the tenant to accept the termination of the tenancy as the landlord could gain vacant possession under the no grounds provision anyway.

Accordingly, submissions from tenants' advocates universally recommended the removal of the no grounds terminations provision from the Act, coupled with an expanded list of 'legitimate' grounds for landlords to regain vacant possession of their property. Such grounds could include that the landlord or a family member needs to live in the property, that renovations are to be undertaken, or any other stated purpose that in the opinion of the Tribunal was sufficient to justify termination and vacant possession. If a tenant believes that the landlord is not in fact terminating for one of these reasons, they could challenge the termination in the Tribunal. The landlord would then need to prove the existence of the reason cited.

Landlords and agents, in contrast, emphasise the need for landlords to have certainty that they can regain possession of their property. Landlords may also consider that they should not be required to provide details of their private affairs if they are willing to use the no grounds provision and allow the tenant the longer 90 day notice period.

All other Australian jurisdictions except Tasmania allow for no grounds termination. The Australian Capital Territory also provides an expanded list of other grounds for termination, combined with a six month notice period for no grounds terminations.

**Recommendation 17**

The Act's provisions in relation to no grounds terminations should remain unchanged. The Government should consider other ways of improving security of tenure in the rental market, including through facilitating the use of longer fixed term leases.

### 4.4.3 Breaking a fixed term lease

Giving all parties to a residential tenancy agreement greater certainty over the costs to be incurred in the event of early termination is desirable, and may contribute to making fixed term leases more appealing.

The 2010 Act introduced a new optional method for calculating a tenant's liability for early departure from a fixed term lease, the *break fee* as provided by section 107. In most cases this is set at six weeks' rent if less than half of the fixed term has expired, or four weeks' rent in the second half of the fixed term.

The break fee method remains an option only: it can be crossed out from a lease, in which case the landlord is entitled to claim compensation from the tenant for their costs incurred in breaking the lease, including loss of rent.

The break fee has been widely welcomed by tenants and many real estate agents for the simplicity and certainty it provides all parties to a tenancy agreement, from the outset. However, many submissions questioned the need for landlords to recover six weeks' rent if a tenant breaks the lease in its first half, as this may far exceed the costs incurred by the landlords as a result of the tenant breaking the lease.

A prescribed method of calculating costs for a tenant to exit a fixed term lease early is desirable not only for administrative simplicity. The additional certainty and associated containment of costs provided by a prescribed break fee method may help to reduce barriers to the take-up of longer fixed term leases.

#### **Recommendation 18**

Section 107 of the Act should prescribe a method for calculating a tenant's liability to the landlord upon breaking a fixed term lease prior to its expiry.

### 4.4.4 Landlord's decision to sell property – section 100(1)(c)

The introduction of section 100(1)(c) in the 2010 Act provided a tenant with a right to terminate their tenancy with two weeks' notice and without further compensation to the landlord after being notified of the landlord's intention to sell the property. The tenant cannot take advantage of this provision if they were notified of the landlord's intention to sell before entering into the tenancy.

This section has attracted comment from landlord and agents' groups, citing confusion over its intent and interpretation, and calling for it to be repealed or re-drafted.

The policy intent of this change was primarily related to loss of amenity. A tenant takes up a residential lease on the expectation of exclusive use of the property and quiet enjoyment throughout their period of occupancy. However, when the landlord places the property on the market, tenants can expect to have sales agents visit to take photographs and/or videos for advertising, potential purchasers to be shown the property in person at reasonable intervals, and to constantly keep the property in a heightened state of neatness and cleanliness to make it ready for inspection. These factors taken together can be considered to have fundamentally changed the nature of the contract that the tenant originally signed with the landlord.

In response to some concern from stakeholders about the provision, it was re-drafted under the *Statute Law (Miscellaneous Provisions) Act 2014* to clarify that tenants cannot use this provision if they were already advised of the proposed sale prior to entering the tenancy agreement.

Because of the contentious nature of this section with particular stakeholders, the review examined several relevant Tribunal decisions, all of which were made before the 2014 statute law re-draft placed the operation of the section beyond doubt.

The 2011 CTTT decision in the case of *Kutzner v Kamp* stated, in part:

The policy for s.100(1)(c) can be seen as a means of resolving the tension between the landlord's right to show the premises to prospective purchasers in accordance with s.53 and the tenant's right to reasonable peace and privacy.

The review concluded that there is no need for further amendment of section 100(1)(c).

#### **4.4.5 Rental arrears**

Many submissions to the review also addressed the termination provisions for rental arrears in the 2010 Act. When tenants fall behind in their rent payments, for whatever reason, the issue of terminating the tenancy can emerge as a point of significant contention.

Landlords and real estate agents can find the process of evicting tenants who fall behind in their rent payments frustrating and not as quick as they would like. On the other hand, tenants and their advocates believe the 'pay to stay' approach of the 2010 Act is fair and provides support for security of tenure. They consider it reasonable that if a tenant makes good on their debts, then the sanction against them—eviction—should generally be withdrawn.

Section 88 of the 2010 Act allows a landlord to initiate termination proceedings after a tenant falls 14 days in rental arrears. The REI, the POA and some others propose that this period should be reduced to 7 days. However, the fortnightly payment of rent is very common in NSW. In light of this, the 14 days provided by section 88 effectively allows landlords to terminate for rental arrears after the tenant is behind by one full rent period.

Section 89 provides that if a landlord obtains a termination order and warrant for possession on the ground of non-payment of rent, the order and warrant cease to have effect if the tenant pays all rent owing before the order is executed. However, the Tribunal can overrule this continuation guarantee if it is satisfied that the tenant has frequently failed to pay their rent on time.

Both landlord and tenant advocates have voiced criticisms of these provisions.

Landlord advocates have argued that landlords incur costs in attempting to enforce Tribunal orders, such as the Sheriff's call-out fee, which should be recovered from the tenant if eviction fails to proceed.

Tenant advocates suggested that the word "frequently" should be changed to "vexatiously", so that only those tenants who 'vexatiously' rather than 'frequently' fail to pay their rent on time can have their tenancies terminated under section 89.

The review has concluded that the so called "pay to stay" provisions work reasonably well in practice and that it is usually in the interests of both parties for tenancies to be able to continue if possible.

Requiring tenants to cover the costs of the Sheriff's call-out fee would place more financial stress on tenants. If a landlord has to pay such a fee repeatedly, they can apply to have the tenancy terminated on the basis that the tenant has frequently failed to pay rent on time.

Replacing the word 'frequently' with 'vexatiously' is not supported as it would leave landlords without a remedy against tenants who, regardless of their intentions, continuously fail to pay rent on time.

#### Extending pay-to-stay to water usage and utility charges arrears

The review noted that while the Act provides a continuation guarantee for tenants in rental arrears, there is no such recourse for tenants who fall into arrears on their water usage or utility charges. Payment of water usage and utility charges is a term of every residential tenancy agreement, meaning a landlord can terminate the tenancy of a tenant who has failed to pay these charges (where the landlord is billed for them by the supplier).

#### **Recommendation 19**

That the continuation guarantee that applies to rental arrears be extended to cover arrears in water usage or utility charges.

#### **4.4.6 Domestic violence**

The 2010 Act introduced provisions that aimed to give some protection to tenants who have been the victim of domestic violence.

Those provisions include an option at section 100(1)(d) for a tenant to terminate an agreement with two weeks' notice and without further compensation to the landlord, if a co-tenant or co-occupant is prohibited by a *final* apprehended violence order (AVO) from having access to the residential premises (emphasis added).

Other amendments were also introduced, including allowing the termination of a co-tenant's tenancy where that person has been prohibited by a final AVO from accessing the property (section 79), and the urgent changing of locks where an AVO (not a final AVO) is in place against a co-tenant or co-occupant.

Convincing evidence emerged from several submissions that the new provisions of the 2010 Act have provided little real protection to victims of domestic violence and require reform. This has also been noted by NSW Fair Trading's own tenancy complaint handling service.

Provisions such as sections 100(1)(d) and 79, which require a victim to have obtained a *final* apprehended violence order before a tenancy can be terminated, have proven largely ineffective in reducing victims' exposure to domestic violence for the following reasons:

- (i) a final AVO can take up to a year to be obtained, and in many cases of domestic violence it is never obtained
- (ii) many victims do not feel safe in seeking an AVO, in case the violence escalates
- (iii) if the victim has left the property the AVO will not exclude the perpetrator from the property
- (iv) if the victim wants to remain in the property, a court will not exclude the perpetrator without considering their housing needs.

Without the ability to terminate a tenancy, a victim of domestic violence can remain liable for rent and damage although they are no longer living in the property.

Women's Legal Service advocates a new provision allowing a victim of domestic violence to end their tenancy immediately by serving a notice of termination on the landlord and any other co-tenants, and providing evidence of domestic violence. Acceptable evidence of domestic violence would include:

- an interim or final apprehended violence order, or
- an injunction made under section 114 of the Family Law Act 1975 (Cth), or
- a standard form statutory declaration from one of a prescribed list of people who can make a professional assessment as to whether the victim has experienced a domestic violence offence (such as a doctor, police officer, registered psychologist, registered nurse, others).

If the termination notice is challenged by the landlord, submissions suggest that the Tribunal be required to make a termination order if one of the documents above is provided, rather than require the tenant to bring other proof of domestic violence.

Amendments were also suggested:

- to make it easier to obtain an order terminating the tenancy of a co-tenant in cases of domestic violence;
- to provide that it is reasonable to change locks where necessary to protect a tenant from violence;
- to remove, in cases of domestic violence, the automatic liability of a tenant for the damage caused by others who are on the premises;
- to give the Tribunal discretion, when a tenancy is terminated due to domestic violence, to find that only the perpetrator is liable for damage to the property arising from domestic violence; and
- to prohibit landlords and agents from listing a tenant on a tenancy database where they are aware the tenant's breach or debt is the result of domestic violence.

The review supports the amendments suggested by the Women's Legal Service NSW. The NSW Government has placed reducing domestic violence and the rate of re-offending near the top of the list of Premier's Priorities, and action in this area is of critical importance.

The Victorian Royal Commission into Family Violence has recently recommended that the Victorian Civil and Administrative Tribunal be able to terminate a tenancy on the basis of evidence of domestic violence other than a final family violence intervention order and that amendments similar to those recommended below be considered. The Commission recommended further work on how domestic violence should be proven.

**Recommendation 20**

That:

- (i) the Act be amended to allow a victim of domestic violence to end their tenancy immediately by serving a notice of termination on the landlord and any other co-tenants, and providing evidence of domestic violence. Acceptable evidence of domestic violence would include:
  - (a) a provisional, interim or final apprehended violence order (AVO), or

an injunction made under section 114 of the Family Law Act 1975 (Cth)

- (ii) That a landlord or tenant be able to apply to the Tribunal for resolution of a dispute over whether a termination notice with the appropriate evidence was provided. The Tribunal may then declare that a termination notice was or was not given in accordance with the Act. ,
- (iii) That further amendments to the Act be made to:
  - (a) provide that a Tribunal order under section 102 of the Act terminating the tenancy of a co-tenant can be made in cases of domestic violence ;
  - (b) to amend section 71 to include within the list of reasonable excuses to change locks that it is necessary to protect a tenant from domestic violence;
  - (c) to amend section 54 to remove, in cases of domestic violence, the automatic liability of a tenant for the damage caused by others who are on the premises;
  - (d) to give the Tribunal a discretion, in cases of domestic violence, to find that only the perpetrator is liable for damage to the property arising from domestic violence;
  - (e) to prohibit landlords and agents from listing a tenant on a tenancy database where they are aware the tenant's breach or debt is the result of domestic violence and the tenant in question was not the perpetrator of the violence.
- (iv) That the Department of Justice and the NSW Civil and Administrative Tribunal be consulted on appropriate definitions of domestic violence and on the criteria for proving domestic violence in recommendations (iii)(a)-(e).



## 4.5 Other matters

### 4.5.1 Residential tenancy databases

Residential tenancy databases are designed help landlords and agents to screen prospective tenants. They can impact on a tenant's ability to secure a property in the private rental market.

The 2010 Act introduced major changes to the regulation of tenancy databases. The new provisions provide for notice to a tenant that they are to be listed on a database, limit the grounds that can lead to a tenant being listed, provide a tenant with a chance to review the information listed, impose obligations on landlords and agents to correct inaccurate listings, limit the time for which a listing can remain on a database, and provide for the Tribunal to make orders about listings.

#### Domestic violence

As discussed above, several submissions to the review expressed concerns about victims of domestic violence being listed on a database for damage to the property or debts that are the result of domestic violence. This can place extra pressure on someone attempting to escape domestic violence, by making it difficult to find a new place to live.

The review recommends changes to the Act to prevent landlords and agents listing a tenant on a tenancy database where damage or a breach is the result of domestic violence, where the tenant in question was not the perpetrator of the violence.

#### Charging of fees

Tenants' advocates expressed concern about database operators charging tenants a fee to find out if they are listed on a database and access their information. While the Act provides that any fees must not be unreasonable, there is no mechanism for this requirement to be enforced. These advocates suggest that, given the serious consequences of being listed on database, the listing information should be available to the listed person free of charge, and costs borne by agents and landlords who benefit from the databases.

#### **Recommendation 21**

That residential tenancy database operators be prohibited from charging a tenant a fee to find out if they have been listed on the database.

### 4.5.2 Electronic notifications and signatures

Submissions to the review almost universally agreed that the Act should be updated to allow for the electronic service of notices.

However, some submissions argued that tenants should be given a choice to opt into serving and receiving notices electronically. Accordingly, the review recommends the standard form of residential tenancy agreement include a new section stating whether the parties agree to the electronic service of notices, to provide their email address and agree to inform the other party within 7 days of the email address changing. It should also be possible for parties to exchange

information using electronic platforms (eg., an online tenancy management product) provided that both parties agree to the method.

The review agrees with major stakeholders who believe SMS is not generally suitable as a medium for the transmission of formal documentation under the Act, such as notices of rent increases or terminations. However, there is nothing preventing landlords and agents using SMS for informal everyday communication with tenants.

Consultation following the Discussion Paper raised the related issue of electronic signatures. Section 9 of the Electronic Signatures Act 2000 allows for agreements to be approved electronically in NSW if the parties consent.

**Recommendation 22**

The Act should allow for notices to be served electronically via email or by other agreed electronic methods (excluding SMS) if the parties so agree.

**Recommendation 23**

The Act and standard form tenancy agreement should allow the parties to opt into receiving and sending electronic notice

**Recommendation 24**

The Act should require parties to notify the other of any change to their email address within 7 days and to opt out of receiving notices electronically by written notice to the other party.

**Recommendation 25**

That the standard form residential tenancy agreement include a note stating that section 9 of the Electronic Transactions Act applies to enable the agreement to be approved by electronic means.

#### **4. 5.3 Open data project – Rental Bond Board**

Presently, the Rental Bond Board provides raw data to Housing NSW under a Memorandum of Understanding for the production of the Housing NSW quarterly Rent and Sales Report.

The Property Owners Association suggested during consultation that, as the Rental Bond Board holds a large amount of valuable data about the NSW residential tenancy market, this data should be more freely accessible by the public.

The POA suggests that the Government should go a step further and initiate an open data project, which would deliver online up-to-date Rental Bond Board data directly to the public. As with other open data initiatives, the information should be made available in a searchable, downloadable, manipulable format so as to allow for its innovative use.

Importantly, the data would have personal information removed prior to its public release.

**Recommendation 26**

The Government deliver Rental Bond Board data online directly to the public, in a downloadable, searchable, manipulable format, without revealing personal information.

**4.5.4 Minor amendments**

Throughout the 210 submissions to the review are a number of suggestions for minor amendments to the Act to clarify wording or improve consistency between different provisions.

It is proposed that, in drafting the amendments recommended by this review, the Government include those minor amendments that are considered to have merit.

**Recommendation 27**

In drafting legislative amendments recommended by this review, the Government should include those minor amendments that are considered to have merit and which are consistent with Government policy.

# Section 5 — Recommendations

## **Recommendation 1**

The Act's coverage of employee and caretaker arrangements should be maintained. However the Act should be amended to provide that the termination period for employees and caretakers whose accommodation is tied to their employment is to be a minimum of two weeks or the notice period set out in the contract of employment, whichever is the greater. Parties will still have access to the NSW Civil and Administrative Tribunal to resolve disputes.

## **Recommendation 2**

That the Government give further consideration to:

- i) whether it is appropriate to provide occupancy rights to sub-tenants without a written tenancy agreement and/or to boarders not covered by the Boarding Houses Act; and
- ii) what kinds of occupancy rights should be provided to these groups.

In considering these questions the Government should consult with interested stakeholders.

## **Recommendation 3**

That a term be inserted in the standard form residential tenancy agreement to provide that landlords are to:

- i) disclose any matters required to be disclosed under section 26 of the Act;
- ii) not knowingly conceal any of the material facts set out in clause 7 of the Residential Tenancies Regulation.

That section 26 of the Act be amended to provide that, for properties in strata schemes, a landlord must

- iii) provide the strata by-laws to the tenant before the tenant enters into a tenancy agreement
- iv) disclose that a strata renewal committee has been formed.

That clause 7 of the Regulation be amended to include in the list of material facts that must not knowingly be concealed:

- v) that the premises have been the scene of a drug crime in the last two years;
- vi) that the premises have been the scene of drug manufacturing in the last two years.

That consideration be given to whether five years remains generally appropriate as a time limit for the disclosure requirements under section 26.

## **Recommendation 4**

That the Tenant's Checklist include information about statutory safety requirements relating to smoke alarms, electrical safety switches and child safety window locks.

## **Recommendation 5**

That the Act require landlords to sign a statement that they have obtained, read and understood an information statement the contents of which are prescribed, setting out their rights and obligations under the Residential Tenancies Act and other legislation, including obligations relating to statutory safety requirements such as smoke alarms, electrical safety switches and child safety window locks.

Stakeholders should be consulted over the contents of the new Landlord's Checklist.

### **Recommendation 6**

That four weeks' rent should continue to be the maximum amount that can be received from a tenant as a rental bond.

### **Recommendation 7**

That the payment of interest to tenants on rental bonds be abolished and the purposes for which Rental Bond Interest Account moneys can be spent should be widened to include consumer protection more generally.

### **Recommendation 8**

That the Act require all landlords and agents to register with Rental Bonds Online, and provide tenants with an invitation to use Rental Bonds Online prior to bond lodgement.

### **Recommendation 9**

That the condition report provides a page that can contain photos of the property if the tenant or landlord wishes to use them.

### **Recommendation 10**

- i) That landlords/agents be required to:
  - consult with the tenant before taking photos to be used in advertising and provide the tenant with an opportunity to move any possessions that can reasonably be moved; and
  - obtain the tenant's written permission to use photos containing the tenant's possessions in advertising.
- ii) That tenants be prohibited from unreasonably withholding consent to the use of photos in advertising.

### **Recommendation 11**

That the condition report be required to be completed by the tenant and provided to the landlord or agent no later than seven days after the tenants obtains possession of the rented premises.

### **Recommendation 12**

That section 3 of the Act be amended to introduce a definition of *separately metered premises* for utility and water usage charges.

*Separately metered premises* should be those that have a separate bill issued by a water authority, or an NMI number available for energy charges.

### **Recommendation 13**

That the requirement to provide 60 days' written notice of a rent increase where the date and the amount of the increase are clearly specified in a fixed term tenancy agreement be removed.

### **Recommendation 14**

- i) That the Act be amended to remove the "reasonable diligence" defence to:
  - a claim for an order that the landlord carry out specified repairs, and
  - a tenant's ability to terminate a tenancy on the grounds that the landlord has not carried out repairs.
  
- ii) That the Commissioner for Fair Trading issue guidelines suggesting reasonable timeframes for the carrying out of different types of repairs.
  
- iii) That the Act provide that, in deciding whether to make an order that the landlord carry out specified repairs or that a tenancy be terminated because the landlord has failed to carry out repairs, the Tribunal is to consider:
  - the timeframes in the Commissioner's guidelines,
  - the effect of the failure to carry out the repairs on the amenity of the premises and the tenant, and
  - whether the landlord has acted with reasonable diligence in the circumstances.

### **Recommendation 15**

That the Act be amended to clarify that a landlord may not unreasonably refuse consent to minor alterations or fixtures which are designed to make the premises liveable for disabled or elderly tenants.

### **Recommendation 16**

- i) That section 20 be amended to reduce the applicable term to five years to encourage longer fixed term tenancies.
  
- ii) That the Government give further consideration to other changes that could be made to the Act to further incentivise the use of longer fixed term tenancies.

### **Recommendation 17**

The Act's provisions in relation to no grounds terminations should remain unchanged. The Government should consider other ways of improving security of tenure in the rental market, including through facilitating the use of longer fixed term leases.

### **Recommendation 18**

Section 107 of the Act should prescribe a method for calculating a tenant's liability to the landlord upon breaking a fixed term lease prior to its expiry.

### **Recommendation 19**

That the continuation guarantee that applies to rental arrears be extended to cover arrears in water usage or utility charges.

### **Recommendation 20**

- (i) That the Act be amended to allow a victim of domestic violence to end their tenancy immediately by serving a notice of termination on the landlord and any other co-tenants, and providing evidence of domestic violence. Acceptable evidence of domestic violence would include:
  - (a) an interim or final apprehended violence order (AVO), or
  - (b) an injunction made under section 114 of the Family Law Act 1975 (Cth).
- (ii) That a landlord or tenant be able to apply to the Tribunal for resolution of a dispute over whether a termination notice with the appropriate evidence was provided. The Tribunal may then declare that a termination notice was or was not given in accordance with the Act.
- (iii) That further amendments to the Act be made to:
  - (a) provide that a Tribunal order under section 102 of the Act terminating the tenancy of a co-tenant can be made in cases of domestic violence;
  - (b) to amend section 71 to include within the list of reasonable excuses to change locks where it is necessary to protect a tenant from violence;
  - (c) to amend section 54 to remove, in cases of domestic violence, the automatic liability of a tenant for the damage caused by others who are on the premises;
  - (d) to give the Tribunal a discretion, when a tenancy is terminated due to domestic violence, to find that only the perpetrator is liable for damage to the property arising from domestic violence;
  - (e) to prohibit landlords and agents from listing a tenant on a tenancy database where they are aware the tenant's breach or debt is the result of domestic violence and the tenant in question was not the perpetrator of the violence.
- (iv) That the Department of Justice and the NSW Civil and Administrative Tribunal be consulted on appropriate definitions of domestic violence and on the criteria for proving domestic violence in recommendations (iii)(a)-(e) above.

### **Recommendation 21**

That residential tenancy database operators be prohibited from charging a tenant a fee to find out if they have been listed on the database.

### **Recommendation 22**

The Act should allow notices to be served electronically via email if the parties so agree, or by other agreed electronic methods (excluding SMS)

### **Recommendation 23**

The Act and standard form residential tenancy agreement should allow tenants to opt into receiving and sending electronic notices.

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**Recommendation 27**

In drafting legislative amendments recommended by this review, the Government should include those minor amendments that are considered to have merit and which are consistent with Government policy.



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