



City Futures Research Centre

Submission to the
NSW Department of Customer Service
'Improving NSW rental laws' consultation

August 2023



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Introduction

We welcome the opportunity to make this submission on improving NSW rental laws.

City Futures Research Centre (CFRC), UNSW Sydney, is a leader in scholarly applied public interest research on our cities. CFRC has an international reputation for excellence in housing research, with many major projects commissioned by the Australian Housing and Urban Research Institute (AHURI), the Australian Research Council (ARC), government agencies and non-government organisations.

CFRC has an especially strong record of research about rental housing. Last year we produced a major report for AHURI on rental regulation and impacts on investment, which includes the most comprehensive review of Australian residential tenancy laws in almost 30 years.

- Martin, C. et al. (2022) *Regulation of residential tenancies and impacts on investment*, Final Report No. 391, Melbourne: AHURI <https://www.ahuri.edu.au/research/final-reports/391>

Other major rental housing research outputs from CFRC include:

- Martin, C. et al. (2023) *Towards an Australian Housing and Homelessness Strategy: understanding national approaches in contemporary policy*, Final Report No. 401, Melbourne: AHURI <https://www.ahuri.edu.au/research/final-reports/401>
- Morris, A., Hulse, K. and Pawson, H. (2021) *The Private Rental Sector in Australia: Living with uncertainty*; Singapore: Springer
- Pawson, H., Martin, C., Thompson, S., Aminpour, F. (2021) 'COVID-19: Rental housing and homelessness policy impacts in Australia' ACOSS/UNSW Poverty and Inequality Partnership Report No. 12, Sydney <https://bit.ly/3nTsZld>
- Pawson, H., Milligan, V. and Yates, J. (2020) *Housing Policy in Australia*. Singapore: Palgrave Macmillan.
- Martin, C., Hulse, K. and Pawson, H. (2018) *The changing institutions of private rental housing: an international review*, Final Report no. 292; Melbourne: AHURI <https://www.ahuri.edu.au/research/final-reports/292>

This submission's principal author is Dr Chris Martin.

The structure of the submission mostly follows that of the consultation paper (CP). A compilation of summary answers to the CP's numbered questions is provided at the end of the submission.

1. Removing ‘no grounds’ terminations

This is a crucial reform. It goes to the single most unsatisfactory aspect of the current experience of renting – its chronic insecurity. It is also the reform on which other improvements in the renting experience depend. For renters to have the full benefit of their rights under the Residential Tenancies Act (RT Act), they must be assured that their tenancies cannot be terminated without good reason.

The appropriate approach to this reform is to entirely remove provision for no-grounds terminations by landlords. This is the approach recently taken in the ACT.

1.1. Ending a fixed term lease

The expiry of the fixed term of a tenancy should not be a ground for termination. It is a no-grounds termination by another name.

The use of fixed terms is a persistent feature of private rental sector practice, but it is not sacrosanct. Fixed terms are not required by the RT Act, and are really a hangover from the common law of leases. To the extent that their use has a purpose it is to create a period for which the landlord can expect to receive rent, and a period for which the tenant can expect to have the premises (provided they do not breach the agreement), at the rent agreed. Because they simultaneously take off the table most options for termination by both sides and (in most cases) rent increases, fixed terms are not precision instruments; rather, they have a gross effect and for that reason are almost always kept short (6 or 12 months). In rental housing policy terms, fixed terms are not very good servants, and are certainly poor masters – no reform should carve out an exception for fixed terms just because their use has endured so long. Fixed terms should yield to legislative reform, particularly where reform is for the purpose of improving tenants’ security.

As the CP notes, both Queensland and Victoria have retained no-grounds termination at the end of fixed terms, although Victoria limits its availability to the first fixed term of a tenancy. In both states, retaining the ground undermines security and the effectiveness of other reforms. This is especially so in Queensland, where there was already a strong practice of tenancies being conducted as a series of fixed terms (rather than becoming periodic agreements, as is more common in NSW). Now the insecurity generated by fixed terms ending is worsened by the following course of conduct advised by the Real Estate Institute of Queensland:

The Real Estate Institute of Queensland (REIQ) recommends, as a matter of best practice, that following the introduction of the new legislation, property managers commence issuing notices to leave on grounds of end of fixed term, at the commencement of each fixed term tenancy agreement.¹

To be clear: on this advice, agents and landlords signing up a new tenant should immediately give them a no-grounds notice with a termination date at the end of the fixed term, which the landlord may choose to proceed with as the date nears – or they may then choose to offer a new fixed term, and given another termination notice. This is bizarre, outrageous advice from the REIQ, but we understand from tenants advocates in Queensland that at least some agents are following it. We also understand from advocates and media reports that no-grounds notices are being given to renters at the end of fixed terms to relet dwellings at higher rents, or to press a renter to renew at a higher rent.² The

¹ <https://www.reiq.com/articles/property-management/legislative-amendments-to-affect-the-issuing-of-notices-to-leave-from-1-october-2022>

² <https://www.theguardian.com/australia-news/2023/jul/14/renters-worse-off-as-landlords-begin-evictions-to-skirt-new-queensland-laws-tenants-group-says>

insecurity of no-grounds termination continues to hang over the heads of renters in Queensland. Victoria's approach is less open to abuse, but still abusable.

1. What is your preferred model for ending fixed term leases and why?

There should be no special provision for terminating tenancies at the end of a fixed term. This is merely no-grounds termination by another name.

1.2. New reasons for ending a lease

The CP puts forward five new grounds for termination, addressed to situations where currently no-grounds terminations would be used. We discuss each below, including questions of evidence and notice periods also raised by the CP.

1. **The property is being prepared for sale.** This is not a reasonable ground and should not be included in the RT Act. Rental properties are frequently sold to other landlords. In a recent project, we conducted a survey of rental investors in western Sydney, and found 43% of properties acquired by investors had been used as rental housing immediately prior to purchase. Furthermore, in 75% of those acquisitions the renter signed a new agreement with the incoming landlord.³ The proportion of landlord-to-landlord sales would vary geographically, but we submit that such sales should be regarded as a reasonable prospect across the market generally. Allowing termination in preparation for sale is therefore unnecessarily disruptive, with renters bearing the costs of the disruption. The expectation should be that premises may be marketed for sale with the tenancy remaining on foot (provided that the tenant does not give a termination notice themselves). Where a landlord sells a rented dwelling to a purchaser who requires vacant possession, the existing ground at s 86 should be used – however, we recommend that that grounds should be refined. It should provide that a landlord may give a termination notice on the ground that they have entered into a contract for the sale of the premises under which the landlord is required to give vacant possession *for one of the four reasons*: i.e. reconstruction, repair or renovation; change of use; demolition; or use as a home by the purchaser or their family. The notice period should be the same as the notice period for the equivalent ground, as discussed below.
2. **The property will go through reconstruction, repair or renovation that requires it to be vacant.** This would be a reasonable ground if it were more circumscribed. It should be subject to two qualifications: (i) that the nature of the work is such that the premises must be vacant for not less than 30 days, and (ii) the work is permitted by relevant planning instruments and, where required, that development consent has been given by the relevant consent authority. The first qualification would stop landlords from seeking termination where repairs are necessary but the disruption is relatively short, such that the renter may be content to stay temporarily elsewhere and resume occupation afterwards. It also helps prevent abuse of the ground: e.g. the landlord conducting a retaliatory paint-job. The second qualification reflects that there is no good reason why a tenancy should be terminated for impermissible work.

Notice period: 180 days. This reflects the importance of housing relative to other uses of premises.

Evidence: a copy of the development consent, or an extract of the planning instrument permitting the development without consent.

³ Pawson, H. and Martin C. (2021) 'Rental property investment in disadvantaged areas: the means and motivations of Western Sydney's new landlords', *Housing Studies*, 36:5, 621-643, DOI: 10.1080/02673037.2019.1709806

3. **The property will change its use (e.g. change from a home to a shop or office).** This is a reasonable ground, subject to the qualification that the use is permitted by relevant planning instruments and, where required, that development consent has been given by the relevant consent authority. There is no good reason why a tenancy should be terminated for an impermissible use.

Notice period: 180 days. This reflects the importance of housing relative to other uses of premises.

Evidence: a copy of the development consent, or an extract of the planning instrument permitting the development without consent.

4. **The property will be demolished.** This is a reasonable ground, subject to the qualification that the use is permitted by relevant planning instruments and, where required, that development consent has been given by the relevant consent authority. There is no good reason why a tenancy should be terminated for an impermissible demolition.

Notice period: 180 days. This reflects the importance of housing relative to other uses of premises.

Evidence: a copy of the development consent, or an extract of the planning instrument permitting the development without consent.

5. **The landlord will move into the property, or a member of their immediate family will move in.** This is a reasonable ground, except we submit that it should be worded 'requires the premises for their own housing', rather than 'move in'.

Notice period: 90 days. This is the same as the current notice period for no-grounds termination.

Evidence: a statutory declaration.

To ensure the integrity of the new grounds for termination, and the existing sale ground, the RT Act should be amended to impose a penalty on landlords who subsequently use premises contrary to the ground for termination. The penalty should be a substantial fine.

2. Are there any other specific situations where a landlord should be able to end a lease?

The existing and proposed new grounds (absent the proposed new ground about preparing a premises for sale), and the existing provisions for direction application to the Tribunal, are sufficient.

3. What would be an appropriate notice period for the five proposed reasons (and for any other reasons you have suggested)? Why is it reasonable?

90 days for the landlord requiring the premises for their own or a family member's housing; this is the same as the current no-grounds period.

180 days for the other proposed grounds; this reflects the importance of housing relative to other uses of premises.

4. What reasons should require evidence from the landlord? What should the evidence be?

A development approval, or copy of the relevant permission in a planning instrument, for the reconstruction, change of use and demolition grounds.

A statutory declaration for the landlord's own housing ground.

5. Should any reasons have a temporary ban on renting again after using them? If so, which ones and how long should the ban be?

No, this is wasteful of housing resources. Landlords should instead be penalised by a substantial fine.

1.3. The Tribunal's discretion in termination proceedings

The CP does not discuss the issue of the tribunal's discretion in termination proceedings. This issue is almost as important, if not as important, as reasonable grounds for termination.

The RT Act's treatment of the issue is complex: it affords discretion in some types of proceedings and not in others, and where it affords discretion it structures the decision-making in different ways. In no-grounds termination proceedings (ss 84 and 85), the tribunal is afforded no discretion: it must terminate, and has discretion only as to the date for possession. This makes no-grounds termination notices a trump card for landlords, compounding their pernicious effect.

It is also contrary to international jurisprudence on the human right to housing. Over the past 30 years, the right to housing has been the subject of comments and decisions by the United Nations Committee on Economic, Social and Cultural Rights ('UN CESCR') that have elaborated on state obligations to ensure that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction',⁴ and that evictions occur only after accessible legal proceedings to 'ascertain that the measure in question is duly justified', only as a 'last resort', and not to 'render individuals homeless'.⁵

⁴ Committee on Economic, Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing (Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights), 6th sess, UN ESCOR, UN Doc E/1992/23 (13 December 1991) [8].

⁵ Committee on Economic, Social and Cultural Rights, Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with Regard to Communication No 5/2015, 61st sess, UN Doc E/C.12/61/D/5/2015 (21 July 2017) 11 [15.1]–[15.2] ('Djazia and Bellili v Spain'). See also the discussion in Padraic Kenna, 'Introduction' in Padraic Kenna et al (eds), *Loss of Homes and Evictions across Europe: A Comparative Legal and Policy Examination* (Edward Elgar, 2018) 1, 27–9.

All of these matters – justification, whether a last resort, whether homelessness will result – require that the tribunal be afforded scope to consider the circumstances of each case and discretion to decline termination where that's necessary for justice.

The amendments for the new grounds for termination should provide the tribunal with discretion to decline to terminate. This could be achieved in a number of ways:

- Require the tribunal to consider whether the termination is justified, taken as a last resort, and whether the renter would be evicted into homelessness. This would expressly align with international jurisprudence on the human right to housing.
- Require the tribunal to consider whether termination is justified in the circumstances of the case. This would align with the discretion afforded under the RT Act 1987 and the associated caselaw.
- Require the tribunal to determine whether termination is 'reasonable and proportionate', aligning with the recently amended Victorian RT Act 1997 (s 330(1)(f)) and emerging judicial consideration of those provisions (e.g. *Hanson v Director of Housing* [2022] VSC 710).

2. A new model for keeping pets

Renters face two barriers to keeping pets:

1) at the application stage, when landlords may ask whether an applicant has or intends to have a pet, and may decline to give a tenancy because of an applicant pet, and

2) during a tenancy, when landlords typically prohibit tenants from keeping a pet without the landlord's prior consent, which may be refused without reason.

The reform proposed in this part of the CP would address only the second barrier. There is a question whether the CP's proposals regarding renters' personal information addresses the first. We discuss this question in the relevant section below.

The CP's model for addressing the second barrier would still require renters to notify the landlord – or make a 'request' of the landlord, the language in the CP differs – to keep a pet, and provide for the landlord to decline the proposal/request, but absent a timely response from the landlord. approval would be deemed. Disputes would be determined by the tribunal, but the CP is not clear about all the circumstances in which a dispute may be heard by the tribunal.

Our preferred model is different: prohibit (per s 19 of the RT Act) terms that do not allow renters to keep pets. This would mean that renters could keep a pet without first seeking approval from their landlord. However, they would still be subject to terms requiring them to keep the premises reasonably clean, not cause or permit a nuisance or damage, not use the premises for an illegal purpose (and, in the case of dwellings in a strata scheme, comply with strata by-laws). Each of these terms may have the practical effect, depending on the circumstances, of preventing the renter from keeping certain types of animals (e.g. the hypothetical horse in a studio flat). Aside from those terms, renters would be subject to the same restrictions on keeping animals as the rest of the community. Those restrictions do not need to be enforced by landlords to be effective.

A compromise of the two models would require a renter to notify their landlord of their intention to keep a pet. Where the landlord is of the view that this will result in a breach of the nuisance, damage or illegal use terms, they could apply to the tribunal and, if satisfied by the landlord that a breach will result, the tribunal could make a specific performance order against the renter restraining them from keeping the pet. Compared with the CP's model, we submit that 'notifying' rather than 'requesting' is appropriately respectful of the renter's autonomy, and requiring the landlord to frame any objection with reference to the other prescribed terms sets a more appropriately rigorous standard for restricting the renter from keeping a pet.

6. Is 21 days the right amount of time for a landlord to consider a request to keep a pet? If not, should the landlord have more or less time?

The better approach is to allow pets without request. Leaving that aside: seven days is more appropriate for this simple communication.

7. What are valid reasons why a landlord should be able to refuse a pet without going to the Tribunal? Why?

None. The onus should be on the landlord to apply to the Tribunal and show that keeping an animal will result, or has resulted, in a breach of the nuisance, damage, illegal use or strata by-law terms.

8. Should the Tribunal be able to allow a landlord to refuse the keeping of animals at a specific rental property on an ongoing basis? Please explain.

Yes – as a specific performance order where it is satisfied that the renter's keeping of animals at the premises will result, or has resulted, in a breach of the nuisance, damage, illegal use or strata by-law terms.

9. What other conditions could a landlord reasonably set for keeping a pet in the property? What conditions should not be allowed?

None. The relevant conditions are already set by the RT ACT: that the renter not cause or permit a nuisance, damage to the premises, use of the premises for an illegal purpose, or breach of a strata by-law.

3. Renters' personal information

We commend the focus that Fair Trading has taken to this issue in the current consultation. Apart from the provisions about residential tenancy databases, the RT Act currently does not address issues about the collection, storing and using of personal information about tenants. The tenancy application process is largely unregulated.

We also commend to Fair Trading the submission of Linda Przhedetsky, whose academic research is specifically on the role of proptech in the rental application process.

The CP presents at pp 10-11 a table of types of information that may be permissibly collected in the application process. We submit that it is important that the limitation should expressly apply not only to information collected from the applicant, but collected from any source. Proptechs, agents and landlords are collecting and using information from online searches and other sources, aside from the information directly provided by applicants.

To that end, we suggest two additional cells should be added to the table's 'suitability' column:

- Personal information about the applicant held by the agent or landlord arising from a previous tenancy between the applicant and the landlord, or between the applicant and another landlord managed by the agent. This would reflect the reality that where an applicant has previously rented from an agent or landlord, they know something about them.
- Personal information about the applicant listed on a residential tenancy database. This would reflect the reality that residential databases are used in the application process. If, on the other hand, the NSW Government wished to eliminate them from the application process, it would have our support.

We note some other types of information that are not included in the table, but which agents and landlords currently commonly seek: the names and other personal information relating to non-tenant occupants who would also reside at the premises (e.g. children); whether the applicant has applied for social housing or aged care; and whether the applicant had a pet that would be kept at the premises. We support making the collection and use of these types of information impermissible, as is suggested by their absence from the table. Questions in the application process about children raises the prospect of discrimination and is often felt to be very invasive of privacy. Questions about social housing applications are also discriminatory and interfere with the effectiveness of the social housing system. Questions about pets are the first barrier to renters' keeping pets, as discussed above.

A prescribed standard tenancy application form, reflecting what is permitted by the table, would be very useful. It could also inform applicants about their right to access and correct information.

10. Do you support limiting the information that applicants can be asked for in a tenancy application? Why/why not?

Yes – but more than that, limiting the information that may be collected and used in the considering a tenancy application. Proptechs, agents and landlords collect and use information aside from that provided by applicants themselves.

11. Do you have any concerns with landlords or agents only being able to collect the information set out in the table above to assess a tenancy application? Please explain.

The table sets out an appropriately strong framework for the types of information that may be permissibly collected and used in the application process.

12. Do you support the use of a standard tenancy application form that limits the information that can be collected?

Yes.

13. Do you think that limiting the information that may be collected from rental applicants will help reduce discrimination in the application process?

Yes.

14. Do you support new laws that set out how landlords and agents can use and disclose renters' personal information? Why/why not?

Yes. The use of applicants' personal information should be limited to determination of the application and, if the parties enter into a tenancy agreement, management of the tenancy, settlement of liabilities arising from the tenancy, and listing on a residential tenancy dataset consistently with the RT Act.

15. What should applicants be told about how their information will be used before they submit a tenancy application? Why?

The prescribed standard tenancy application form should state the limits on the collection and use of information, and state that applicants have the right to view and correct any information about them held by the agent, landlord or proptech.

16. Do you support new laws to require anyone holding renter personal information to secure it? Why/Why not?

Yes. A regime specific to renter personal information is required, considering the gaps in coverage of the Australian Privacy Principles.

17. How long should landlords, agents or proptechs be able to keep renter personal information? Please explain.

Subject to wider consultation with sector stakeholders, we support the proposed South Australian timeframes:

- Where the parties enter into a tenancy agreement: 3 years after the tenancy ends;
- Where the parties do not enter into a tenancy agreement: 6 months (with the applicant's consent) or 30 days after the tenancy agreement was entered into with another party.

18. Do you support requiring landlords, agents or proptechs to:

(a) give rental applicants' access their personal information,

(b) correct rental applicants' personal information?

Please explain your concerns (if any).

Yes, applicants and renters should have the right to access and correct any personal information about them held by an agent, landlord or proptech.

19. Are you aware of automated decision making having unfair outcomes for rental applicants?

Please explain.

We have not researched ADM in the rental sector. We commend to Fair Trading Linda Przhedetsky's research and submission on this issue.

20. What should we consider as we explore options to address the use of automated decision making to assess rental applications?

As above.

4. Portable rental bond scheme

The scheme is a smartly designed solution to a problem often faced by renters. It makes clever use of the state government's statutory position as holder of all rental bonds, by allowing it to issue certificates as a temporary security pending transfer of a tenant's bond from an old tenancy to a new one. This happens in the first few months of the new tenancy, when there is unlikely to be any cause for the new landlord to make a claim on the bond.

21. How long should a renter have to top up the new bond if some or part of the bond has been claimed by the previous landlord?

28 days. The need for the top-up payment is not urgent, because the landlord is unlikely to have cause to make a claim on the bond at that point in time.

22. What should happen if the renter does not top up the second bond on time? Please explain why.

Allow the landlord to treat it as a breach of the term to pay the agreed amount of bond, with the usual remedies (payment, specific performance or termination).

23. Should this scheme be available to all renters, or should it only be available to some? Please explain why.

All renters. Making provision for the exclusion of previously non-compliant renters from the scheme would involve Fair Trading in making administrative decisions on renters' non-compliance, keeping records of non-compliant renters, and ensuring no confusion of renters' identities – an administrative burden for Fair Trading and a data risk for renters, for no real benefit.

24. Who should have a choice on whether to use the scheme?

The renter.

25. What other (if any) things should we consider as we design and implement the portable bond scheme? Please explain.

Consult with stakeholders as the design and implementation progresses.

5. Rent increases

The consultation should include a discussion about regulating rent increases for affordability. The issue has been absent from past reviews of residential tenancies laws, but is now being widely discussed by the public and by political parties. We also note the comments of the UN CESCR that rent increases should be 'in accordance with the principle of affordability'.⁶ It is appropriate that the consultation should hear stakeholders' views on the different options for regulating rents, or their reasons for opposing such regulation.

We have investigated rent setting regulations and practices in numerous countries.⁷ New South Wales, like other Australian states and territories, can do better than the largely hands-off approach it has taken in recent decades.

We submit that the simplest and best approach is to limit rent increases during tenancies by a certain percentage amount. The RT Act could fix this amount at, say, 3% per annum (i.e. the upper end of the RBA's inflation target), or provide for it to be calculated by reference to change in the CPI over the previous year. The frequency of rent increases should also be limited, as it is currently, to not more than once in 12 months (including where the tenancy is renewed as a series of fixed term agreements). Also, current provisions allowing tenants to challenge rent increases as excessive to the general *market level* of rents for comparable premises should be retained.

This simple model of rent regulation is along the lines of the models used for years in most Canadian provinces, and recently adopted in Scotland. It would protect tenants from high rent increases that might otherwise put their housing at risk, while more or less maintaining the real value of the landlord's return on their investment.

Significantly, our proposed model of rent regulation would not seek to regulate rents for tenancies when they commence. These would continue to be set by the market, with only subsequent increasing during the tenancy to be regulated as above.

There are two reasons for restricting rent regulation to rent increases during a tenancy.

First, it means that the new tenancy market would generate price signals for the supply of housing. In a market where there is high demand, high asking rents would signal to property owners to bring more housing supply to the market. Crucially, this supply should come from outside the existing rental housing stock: i.e. new construction, unused dwellings, second homes and Airbnb dwellings. Our current lack of rent regulation means that new tenancy market price signals are transmitted to the existing rental stock, in rent increases that may price existing tenants out of their homes. This brings those properties to the market, but also adds the former tenants to the numbers of those seeking housing. Regulation of rent increases for existing tenancies helps transmit new tenancy market price signals to sources of genuinely additional housing supply.

The second reason for regulating rent increases during tenancies only is its legal and administrative simplicity. All that is required is an amendment to the RT Act to the effect that a purported increase

⁶ Committee on Economic, Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing (Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights), 6th sess, UN ESCOR, UN Doc E/1992/23 (13 December 1991) [8].

⁷ Pawson, H., Martin, C., Aminpour, F., Gibb, K., Foye, C. (2022) 'COVID-19: Housing market impacts and housing policy responses - an international review' ACROSS/UNSW Sydney Poverty and Inequality Partnership Report No. 16, Sydney https://povertyandinequality.across.org.au/wp-content/uploads/2022/03/COVID-19_housing-market-impacts-Poverty-and-Inequality-Partnership-report-16_v1.pdf; Ong, R., Pawson, H., Singh, R., and Martin, C. (2020) Demand-side assistance in Australia's rental housing market: exploring reform options, AHURI Final Report No. 342, Australian Housing and Urban Research Institute Limited, Melbourne, <https://www.ahuri.edu.au/research/final-reports/342>; Martin, C., Hulse, K. & Pawson, H. (2018) The changing institutions of private rental housing: an international review; Final Report no. 292; Melbourne: AHURI <https://www.ahuri.edu.au/research/final-reports/292>.

beyond the limit for the relevant period is unlawful and invalid. There should be provision for a penalty, but mostly the regulation would be carried into effect by the contracts between landlords and tenants. By contrast, a regulation of new tenancy rents would be difficult, requiring the authorisation of some agency to determine new tenancy rents, including where the dwelling has not been let before; new records recording rents so determined; and investigations and enforcement processes where no contract yet exists between parties.

6. Information to help renters know when a rent increase is ‘excessive’

We agree it would be useful to have data about the amount and frequency of rent increases during tenancies. There is currently no regular, official publication of such data.⁸ The data would be useful in assessing the state of the rental market and the level of housing needs in the community. However, without other amendments to the rent increase provisions of the RTA, the data would be of limited use to individual renters faced with a rent increase notice.

Current s 44 lists the factors that the tribunal may consider in determining whether a rent increase is excessive. The first of these is ‘the general market level of rents for comparable premises in the locality or a similar locality’ (s 44(5)(a)). This is more specific than rent increases ‘on average’, rent increases ‘based on location’, and rent increases ‘based on property (e.g. apartments vs houses)’, as suggested by the CP. Were a renter to tender in evidence data about average rent increases for houses in their location, we think it likely that the tribunal would regard it as insufficient for the purpose of showing the general market level of rents of comparable premises.

For an example of the tribunal’s approach to this factor, see *Welch v Chabra* [2022] NSWCATCD 132, where the tribunal disregarded evidence about median rents derived from rental bond data presented on the Tenants’ Union’s ‘Rent Tracker’ webpage:

I have not put any weight on the evidence both parties submitted from ‘Rent Tracker’. While Rent Tracker does indicate broad trends about rent in identified suburbs, apart from the number of bedrooms and dwelling type, it does not provide a filter for other relevant facilities or the size of the property [21].

The best way of collecting such data would be to amend the RT Act to require that when a landlord gives a rent increase notice to a tenant, a copy of the notice must also be lodged with NSW Fair Trading. If a lesser increase is subsequently negotiated with the renter, or ordered by the Tribunal, the information lodged could be updated. To ensure compliance the requirement, the RT Act should provide that the rent increase does not have legal effect unless the copy of the notice is lodged. The lodgement process could be integrated with the online rental bond lodgement process. In our view a voluntary survey would be of very little value.

26. Do you have any concerns about the NSW Government collecting information on rent increases and making it publicly available for renters? If yes, please provide details.

Collecting information about rent increases would create valuable evidence about the performance of the rental sector and housing needs. However, it would be of little use in excessive rent increaser proceedings under the current law.

27. What do you think is the best way to collect this information?

Require landlords to lodge a copy of each rent increase notice with NSW Fair Trading, and provide that the increase is invalid without lodgement.

⁸ The CPI Rents series published by the ABS relates only to capital cities, and does not separate the effect of rents agreed for new tenancies commencing in the quarter from that of rent increases for tenancies on foot from some earlier period. The dataset from which the CPI Rents series is derived has recently been used in a high-level analysis of the frequency and distribution of rent increases, but it does not breakdown beyond capital and non-capital areas and we understand that that publication is a one-off. Hanmer, F. and Marquant, M. (2023) New Insights into the Rental Market; Australian Economy Bulletin; Reserve Bank of Australia <https://www.rba.gov.au/publications/bulletin/2023/jun/new-insights-into-the-rental-market.html>

7. Other changes to improve rental affordability

7.1.1. Frequency of rent increases

The frequency of rent increases should be limited to not more than once in 12 months, and this limit should apply generally – i.e. whether the tenancy is conducted as a continuing agreement, a series of fixed terms, or a continuing agreement that is varied to a fixed term agreement by the parties. Parties might agree to a fixed term that provides for rent increases even less frequently, but entering into a fixed term should never allow for rent to be increased more frequently than once in 12 months.

28. Do you think the 'one increase per 12 months' limit should carry over if the renter is swapped to a different type of tenancy agreement (periodic or fixed term)? Please explain.

Fixed terms should be irrelevant to the frequency of rent increases in most cases. Entry into a fixed term might have the effect of even less frequent increases than one in 12 months, but should not allow more frequent increases.

29. Do you think fixed term agreements under two years should be limited to one increase within a 12 month period? Why or why not?

Yes. Fixed terms should be mostly irrelevant to the frequency of rent increases, which should be set at not more than one in 12 months.

7.1.2. A rent increase guideline

The CP raises as a possible option amending the RT Act to 'require a landlord to prove that a rent increase is *not* 'excessive' where, for example, a rent increase exceeds CPI over a certain period.' This is the ACT's 'guideline' model. It would be an improvement on the current NSW model, whereby the onus is always on the renter to show that an increase is excessive, having regard to the general market level of rents for comparable premises and other factors at s 44. Placing that onus on the landlord is appropriate for two reasons. First, landlords and agents generally have better access to data about the general level of rents for comparable premises and other factors, so it makes sense to require them to provide it in tribunal proceedings. Secondly, the prospect of being put to proof in tribunal proceedings is probably a mild discouragement to landlords seeking above-guideline increases.

The guideline could be the annual change in any one of CPI, CPI Rents (noting both of those relate only to all Australian capital cities, or to Sydney – not to the rest of NSW), either of those figures with a loading (e.g. 110%, as in the ACT), the median rent for the relevant local government area as reported in the NSW Rent and Sales Report, or a simple percentage (e.g. 3%).

As stated above, our primary recommendation is to limit rent increases during tenancies to a certain percentage amount. The ACT model does not do that. However, we submit that it is an alternative lesser improvement on the current provisions.

7.1.3. Criteria for 'excessive' rents and increases

The criteria at s 44(5) are something of a grab-bag. The first criterion – '(a) the general market level of rents for comparable premises in the locality or a similar locality' – was in the chapeau of the equivalent section of the RT Act 1987, which was interpreted as giving it predominant status in determinations. Although now apparently the first among equal criteria, for practical purposes it still dominates determinations. Some of the other criteria are arguably merely aspects of the first criterion: e.g. (c) fittings, (d) state of repair and (e) amenities provided all factor in the comparability of

premises. Criterion (f) work done to the premises by the renter, can be considered as operating as a discount to the rent indicated by the general market level for comparable premises: the circumstances should arise only exceptionally, but where work has been done it is appropriate that it be considered (i.e. a renter who repairs a dwelling should not get a rent increase for their trouble). Were it not expressly prohibited, consideration of 'affordability' (proscribed at (h)) would presumably also factor as a discount in some cases. It is unclear how criteria (b) landlord's outgoings and (g) when the last increase occurred should be factored in the balance.

We submit that the proscription of affordability should be removed. Apart from that, we submit that it would be better to require landlords to state in the notice of rent increase the criteria considered and the method used to calculate the proposed increase. This would be like the requirement at s 44(3)(b) of the Victorian RT Act.

30. What do you think about the above options [an ACT-style guideline, and different 'excessive' criteria]? Please provide detail.

An ACT-style guideline does not limit rent increases, but is an alternative lesser reform that improves on the current provisions.

The proscription of 'affordability' as a consideration in excessive rent increase determinations should be removed. Landlords should be required to include in notices of rent increase the criteria considered and method used to calculate the increase.

8. Other changes to make renting laws better

8.1. Telling renters about the use of embedded networks

We support the recommendation that embedded networks should be disclosed prior to prospective applicants for a tenancy. We submit that the appropriate time to do so is prior to an application being made. This is also the appropriate time for disclosure of other factors per s 26. Section 26 should be amended accordingly.

31. Do you support new laws to require landlords or their agents to tell rental applicants if a rental property uses any embedded network? Why/why not?

Yes. It has cost implications for renters and may affect whether they want to live in the premises.

32. When should a rental applicant be told that a property uses an embedded network?

Prior to applying for a tenancy. Section 26 should be amended to require this and other discourse to be made by lands and agents prior to taking applications.

33. What information should a renter be told about a rental property using an embedded network? Please explain.

Whether an embedded network is present, the services affected and estimated costs.

8.2. Free ways to pay rent

Renters should never have to pay a fee to pay rent. Also, over the past two decades, the balance of convenience has shifted towards electronic payments, so we can say more specifically that renters should not have to pay a fee to pay rent electronically.

The best reform would be to prohibit any person – the landlord, agent or third-party company - from requiring or receiving a fee from a renter in connection with the payment of rent. Where the landlord or agent proposes to use a payment method that charges fees, the landlord or agent should pay the fee as a cost of doing business.

Alternatively, the RT Act could be amended to require two fee-free methods of payment options: cash, and an electronic means of payment.

34. What would be the best way to ensure that the free way for renters to pay rent is convenient or easy to use? Please explain.

Prohibit any person from requiring or receiving a fee from a renter in connection with the payment of rent. Alternatively, require two fee-free methods of payment options: cash, and an electronic means of payment.

35. Should the law require a landlord or agent to offer an electronic way to pay rent that is free to use? Why/why not?

Yes. The balance of convenience has shifted towards electronic payments, and it is appropriate that the more convenient should be free.

8.3. Renters moving into strata schemes

Relevant strata by-laws should be disclosed prior to application, because they are relevant to a person's decision about whether they want to live at the premises, and prior knowledge helps avoid disputes and conflict between residents. Such a requirement should be included in an amended s 26.

By 'relevant' we mean to distinguish by-laws relating to residents' conduct within the individual lots and common areas of a scheme, from other by-laws, such as those relating to the scheme's financial management. It would be useful to formalise this distinction in strata legislation, not only for the purpose of clarifying the 'conduct' by-laws required to be disclosed to potential applicants. We submit strata legislation should be further amended to give renter residents, along with other residents, a say in conduct by-laws, including rights to move and vote on amendments, repeals and new conduct by-laws.

36. What are the issues faced by renters when moving into a strata scheme? Would better disclosure about the strata rules for moving in help with this?

'Conduct by-laws' should be disclosed prior to application. Renters should have a say in the making of conduct-by laws.

9. Other topics for law reform

We have identified numerous other topics for law reform in our recent AHURI report, *Regulation of residential tenancies and impacts on investment*.⁹ We would welcome an expansion of the current consultation process to countenance these topics and others identified by other stakeholders. Queensland's approach of planned successive stages of reforms could be considered.

Of those other topics we have identified, we have discussed one – limiting rent increases – above, and we discuss another one here: dwelling conditions. This has been a high-profile topic in recent reviews of residential tenancies legislation, particularly as regards 'minimum standards' – such as those enacted in New South Wales by the 2018 amendments. However, other important aspects of the topic have been overlooked.

9.1. Dwelling conditions

More than most aspects of residential tenancies law, landlords' obligations regarding dwelling conditions have been the subject of judicial interpretation by state and territory superior courts and the High Court. The case law is complex, and presents some problems that should be resolved by legislative amendment.

Section 52 requires that the landlord provide premises that are 'fit for habitation', and s 63 provides that the landlord must also maintain the premises in a reasonable state of repair. The meaning of 'habitable' is usefully illustrated by the non-exhaustive minimum standards at s 51(1A) and (1B). It is also clear that there is no diminution of the landlord's obligation where the premises were in a bad state of repair when first taken by the renter, nor where the landlord charges a low level rent (*Shields v Deliopoulos* [2016] VSC 500).

9.1.1. Problems of scope

The obligation does not require that premises are 'free from risk to health or safety' (*Gray v Queensland Housing Commission* [2004] QSC 276: 5); nor that materials or facilities that are non-compliant with current building standards are replaced, unless defective (*Jones v Bartlett* [2000] HCA 56). One might accept those propositions but also see that the scope of the obligation is difficult to specify.

Some further problematic qualifications are made in *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1), which held 'a finding that premises are not fit for habitation should not lightly be made', and that 'questions of fitness for habitation are to be judged against a standard of reasonableness having regard to the age, character and locality of the residential premises and to the effect of the defect on the state or condition of the premises as a whole.' There are also older authorities that relate the habitability of a dwelling to 'the class [of tenant] who would be likely to take it' (*Proudfoot v Hart* (1890) 25 QBD 42, cited at *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1). That decision also held that concepts of 'security, peace and dignity' are too 'broad and imprecise' to be of use in determining habitability.

9.1.2. Problems of content

There is authority for obligation requiring the landlord to take reasonable steps to ascertain defects, such as by inspecting the premises before the tenancy commences, and to rectify defects they know

⁹ Martin, C. et al. (2022) *Regulation of residential tenancies and impacts on investment*, Final Report No. 391, Melbourne: AHURI <https://www.ahuri.edu.au/research/final-reports/391>.

or ought to know about, but not as an absolute obligation: the landlord is not liable for defects unapparent to a reasonable ordinary person: *Gration v C Gillan Investments Pty Ltd* [2005] QCA 184. This is in tension with the strict liability that usually attaches to contractual obligations. *Shields v Deliopoulos* [2016] VSC 500 is an example of this tension: it characterises the obligation as 'strict and absolute', but approvingly cites *Gration v C Gillan Investments Pty Ltd* and other judgements to also find that the obligation is to take reasonable steps and that it is 'not in the nature of a warranty or guarantee'. The obligation is also not non-delegable. In other words, where a landlord engages an apparently competent person to rectify a defect, they have discharged their obligation (until such time as any deficiency in the repair becomes known to the landlord) (*Jones v Bartlett* [2000] HCA 56; *Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39). Courts have observed that some jurisdictions' RT Acts use the wording that the landlord will 'provide' premises in habitable condition, while some use 'ensure', but it does not appear to be a material difference.

Some of the complexity and confusion in the caselaw may reflect the co-existence of the contractual obligation prescribed the RT Act with an obligation owed by landlords under common law principles of negligence. This duty is owed not only to the tenant but also to the tenant's household members and visitors (to whom the landlord does not owe the contractual obligation). This obligation closely resembles the contractual obligation, and requires that the landlord take reasonable care to avoid foreseeable risks of harm, including by ensuring that the premises are fit for habitation (*Jones v Bartlett* [2000] HCA 56; *Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39). However, the High Court has indicated that this common law obligation may be less onerous than the prescribed contractual obligation (per Gummow and Hayne JJ at 172). However, subsequent judgements on the latter have interpreted them very similarly, if not identically (*Gray v Queensland Housing Commission* [2004] QSC 276, *Gration v C Gillan Investments Pty Ltd* [2005] QCA 184).

9.1.3. Problems of remedies

A breach of the contractual obligation is compensable if it causes the tenant to suffer economic loss (e.g. the value of clothes ruined by mould). If, however, the tenant's loss is in the nature of distress or disappointment, the common law restrictions against compensation for non-economic loss will likely deny the tenant a remedy.

At common law, non-economic loss is not compensable unless (i) the loss arises from physical inconvenience caused by the breach, or (ii) the object of the contract is specifically to 'provide enjoyment, relaxation or freedom from molestation' (*Baltic Shipping Company v Dillon* [1993] HCA 4). The NSW Supreme Court (in *Fawzi El-Saiedy v New South Wales Land & Housing Corporation* [2011] NSWSC 820) and the NT Court of Appeal (in *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1) have held that residential tenancy agreements do not have the object in the second limb of that test; specifically, 'quiet enjoyment' is 'very different' from 'enjoyment' in the relevant sense.

So, only loss from physical inconvenience arising from a breach of the habitability obligation is compensable. According to the leading cases, it is not self-evident that unfit premises cause physical inconvenience. For example, in *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1, the premises had been without a back door for over five years, but the court struck down a compensation order because 'physical inconvenience' had not been proved.

Summary answers to numbered questions

1. What is your preferred model for ending fixed term leases and why?

There should be no special provision for terminating tenancies at the end of a fixed term. This is merely no-grounds termination by another name.

2. Are there any other specific situations where a landlord should be able to end a lease?

The existing and proposed new grounds (absent the proposed new ground about preparing a premises for sale), and the existing provisions for direction application to the Tribunal, are sufficient.

3. What would be an appropriate notice period for the five proposed reasons (and for any other reasons you have suggested)? Why is it reasonable?

90 days for the landlord requiring the premises for their own or a family member's housing; this is the same as the current no-grounds period.

180 days for the other proposed grounds; this reflects the importance of housing relative to other uses of premises.

4. What reasons should require evidence from the landlord? What should the evidence be?

A development approval, or copy of the relevant permission in a planning instrument, for the reconstruction, change of use and demolition grounds.

A statutory declaration for the landlord's own housing ground.

5. Should any reasons have a temporary ban on renting again after using them? If so, which ones and how long should the ban be?

No, this is wasteful of housing resources. Landlords should instead be penalised by a substantial fine.

6. Is 21 days the right amount of time for a landlord to consider a request to keep a pet? If not, should the landlord have more or less time?

The better approach is to allow pets without request. Leaving that aside: seven days is more appropriate for this simple communication.

7. What are valid reasons why a landlord should be able to refuse a pet without going to the Tribunal? Why?

None. The onus should be on the landlord to apply to the Tribunal and show that keeping an animal will result, or has resulted, in a breach of the nuisance, damage, illegal use or strata by-law terms.

8. Should the Tribunal be able to allow a landlord to refuse the keeping of animals at a specific rental property on an ongoing basis? Please explain.

Yes – as a specific performance order where it is satisfied that the renter's keeping of animals at the premises will result, or has resulted, in a breach of the nuisance, damage, illegal use or strata by-law terms.

9. What other conditions could a landlord reasonably set for keeping a pet in the property? What conditions should not be allowed?

None. The relevant conditions are already set by the RTA: that the renter not cause or permit a nuisance, damage to the premises, use of the premises for an illegal purpose, or breach of a strata by-law.

10. Do you support limiting the information that applicants can be asked for in a tenancy application? Why/why not?

Yes – but more than that, limiting the information that may be collected and used in the considering a tenancy application. Proptechs, agents and landlords collect and use information aside from that provided by applicants themselves.

11. Do you have any concerns with landlords or agents only being able to collect the information set out in the table above to assess a tenancy application? Please explain.

The table sets out an appropriately strong framework for the types of information that may be permissibly collected and used in the application process.

12. Do you support the use of a standard tenancy application form that limits the information that can be collected?

Yes.

13. Do you think that limiting the information that may be collected from rental applicants will help reduce discrimination in the application process?

Yes.

14. Do you support new laws that set out how landlords and agents can use and disclose renters' personal information? Why/why not?

Yes. The use of applicants' personal information should be limited to determination of the application and, if the parties enter into a tenancy agreement, management of the tenancy, settlement of liabilities arising from the tenancy, and listing on a residential tenancy dataset consistently with the RT Act.

15. What should applicants be told about how their information will be used before they submit a tenancy application? Why?

The prescribed standard tenancy application form should state the limits on the collection and use of information, and state that applicants have the right to view and correct any information about them held by the agent, landlord or proptech.

16. Do you support new laws to require anyone holding renter personal information to secure it? Why/Why not?

Yes. A regime specific to renter personal information is required, considering the gaps in coverage of the Australian Privacy Principles.

17. How long should landlords, agents or proptechs be able to keep renter personal information? Please explain.

Subject to wider consultation with sector stakeholders, we support the proposed South Australian timeframes:

- Where the parties enter into a tenancy agreement: 3 years after the tenancy ends;
- Where the parties do not enter into a tenancy agreement: 6 months (with the applicant's consent) or 30 days after the tenancy agreement was entered into with another party.

18. Do you support requiring landlords, agents or proptechs to:

(a) give rental applicants' access their personal information,

(b) correct rental applicants' personal information?

Please explain your concerns (if any).

Yes, applicants and renters should have the right to access and correct any personal information about them held by an agent, landlord or proptech.

19. Are you aware of automated decision making having unfair outcomes for rental applicants? Please explain.

We have not researched ADM in the rental sector. We commend to Fair Trading Linda Przhedetsky's research and submission on this issue.

20. What should we consider as we explore options to address the use of automated decision making to assess rental applications?

As above.

21. How long should a renter have to top up the new bond if some or part of the bond has been claimed by the previous landlord?

28 days. The need for the top-up payment is not urgent, because the landlord is unlikely to have cause to make a claim on the bond at that point in time.

22. What should happen if the renter does not top up the second bond on time? Please explain why.

Allow the landlord to treat it as a breach of the term to pay the agreed amount of bond, with the usual remedies (payment, specific performance or termination).

23. Should this scheme be available to all renters, or should it only be available to some? Please explain why.

All renters. Making provision for the exclusion of previously non-compliant renters from the scheme would involve Fair Trading in making administrative decisions on renters' non-compliance, keeping records of non-compliant renters, and ensuring no confusion of renters' identities – an administrative burden for Fair Trading and a data risk for renters, for no real benefit.

24. Who should have a choice on whether to use the scheme?

The renter.

25. What other (if any) things should we consider as we design and implement the portable bond scheme? Please explain.

Consult with stakeholders as the design and implementation progresses.

26. Do you have any concerns about the NSW Government collecting information on rent increases and making it publicly available for renters? If yes, please provide details.

Collecting information about rent increases would create valuable evidence about the performance of the rental sector and housing needs. However, it would be of little use in excessive rent increaser proceedings under the current law.

27. What do you think is the best way to collect this information?

Require landlords to lodge a copy of each rent increase notice with NSW Fair Trading, and provide that the increase is invalid without lodgement.

28. Do you think the 'one increase per 12 months' limit should carry over if the renter is swapped to a different type of tenancy agreement (periodic or fixed term)? Please explain.

Fixed terms should be irrelevant to the frequency of rent increases in most cases. Entry into a fixed term might have the effect of even less frequent increases than one in 12 months, but should not allow more frequent increases.

29. Do you think fixed term agreements under two years should be limited to one increase within a 12 month period? Why or why not?

Yes. Fixed terms should be mostly irrelevant to the frequency of rent increases, which should be set at not more than one in 12 months.

30. What do you think about the above options [an ACT-style guideline, and different 'excessive' criteria]? Please provide detail.

An ACT-style guideline does not limit rent increases, but is an alternative lesser reform that improves on the current provisions.

The proscription of 'affordability' as a consideration in excessive rent increase determinations should be removed. Landlords should be required to include in notices of rent increase the criteria considered and method used to calculate the increase.

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Yes. It has cost implications for renters and may affect whether they want to live in the premises.

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Prior to applying for a tenancy. Section 26 should be amended to require this and other discourse to be made by lands and agents prior to taking applications.

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Whether an embedded network is present, the services affected and estimated costs.

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