Redfern Legal Centre

Improving NSW Rental Laws
Submission by Redfern Legal Centre

Redfern Legal Centre

Table of Contents

Recommendations

Removing 'no grounds' terminations

Recommendation 1:	Landlords should be required to provide a reason to terminate any tenancy agreement, whether it be periodic or at the end of a fixed term.
Recommendation 2:	A landlord should only be able to terminate a tenancy if the property is going to be removed from the rental market for a significant period.
Recommendation 3:	Tenants who have their tenancy terminated for a reason other than a breach should automatically receive compensation from the landlord.

Renters' Personal Information

Recommendation 4:	A data minimisation approach should be adopted. Information allowed to be collected by landlords should be limited by law to that reasonably necessary to determine whether a prospective tenant will be able to sustain the tenancy.
Recommendation 5:	Landlords or agents should be prohibited from holding copies of identity documents for tenants and prospective tenants.
Recommendation 6:	The use of oral character references from landlords or agents should be prohibited.
Recommendation 7:	Reference information should be restricted to the use of tenant databases that are already regulated under the *Residential Tenancies Act* or other sources of information that can be verified by a tenant for accuracy.
Recommendation 8:	A standard tenancy application form should be introduced to limit information that can be collected.
Recommendation 9:	Introduce an express prohibition on requesting any information that could be used to unlawfully discriminate against a tenant or prospective tenant.
Recommendation 10:	Introduce laws limiting how tenant personal and sensitive information can be used and disclosed that apply to all landlords, agents, PropTech, RentTech and any third-party platforms used in the management of tenant information.
Recommendation 11:	Extend protections on the use and disclosure of personal and sensitive information to all tenants, not just those covered by the *Residential Tenancies Act*.
Recommendation 12:	Personal and sensitive information obtained about a tenant should only be used for assessing a person's suitability for the premises or where required by law.
Recommendation 13:	There should be an express prohibition on the use of tenant personal information and data for marketing purposes, or sharing or selling to other parties for profit or benefit.
Recommendation 14:	Applicants and tenants should be provided with a plain English explanation on how their information will be used, stored and disclosed and given instruction on how to withdraw their consent.

Recommendation 15: Any person or organisation holding tenant (or prospective tenant) information must be obligated to secure that information.

Recommendation 16: Personal information obtained about an unsuccessful applicant should be destroyed as soon as practicable after the landlord enters into a residential tenancy agreement to which the application relates.

Recommendation 17: Limited personal information obtained about a successful applicant reasonably necessary for the ongoing tenant-landlord relationship should be stored securely. Other information must be destroyed as in the case for unsuccessful applicants.

Recommendation 18: Tenants and prospective tenants should have access to their personal information and an available mechanism to correct or remove any inaccurate, outdated or potentially discriminatory information held about them.

Other changes to improve rental affordability

Recommendation 19: Introduce a blanket rule that rent can be increased only once in any 12-month period, irrespective of the type and length of lease.

Recommendation 20: Introduce a clear way for tenants to make an application to the Tribunal to dispute the validity of a rent increase notice.

Recommendation 21: If a rent increase exceeds an appropriately set threshold the landlord should be required to demonstrate that it is justified.

Recommendation 22: Tenants should have access to free and independent assessments of the appropriate rent for a property.

Recommendation 23: Introduce an obligation on landlords under the *Residential Tenancies Act* to offer tenants at least one free electronic payment method in addition to a cash method of payment.

Recommendation 24: Landlords should be required to provide tenants with a free electronic method of rent payment.

1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in NSW and the second in Australia. We provide free legal advice, legal services and education to people experiencing disadvantage in our local area and statewide. We work to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage.

We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs - to our local community as well as state-wide. Our specialist legal services focus on tenancy, credit, debt and consumer law, financial abuse, employment law, international students, First Nations justice, police accountability, and we provide outreach services including through our health justice partnership.

2. RLC's work in Tenancy

RLC has a long history of providing tenancy advice, assistance and advocacy, with a key focus on the provision of information and services to people experiencing vulnerability and strong emphasis on the prevention of homelessness. Since RLC was founded in 1977, tenancy has been one of our core areas of advice. Since 1995, RLC has been funded by NSW Fair Trading to conduct the Inner Sydney Tenants' Advice and Advocacy Service (ISTAAS). ISTAAS assists tenants living in City of Sydney, Leichardt and Botany local government areas through advice, advocacy and representation. Our submission is informed by the experiences of our clients.

3. RLC's general position

RLC endorses the submission of the Tenants' Union of NSW and provides the following submission based on our experience advising and advocating for tenants in Inner Sydney.

4. Removing 'no grounds' terminations

Fixed term tenancy agreements are typically only six or twelve months long. At the end of that time, tenants may receive a termination notice and be forced to move out, even if they have not breached the tenancy agreement and can afford to pay the rent. They will have to pay significant moving costs, their children may have to change to a different school or daycare, and they may face losing their connection with neighbours and the broader community.

No grounds terminations serve as a deterrent to tenants wishing to enforce their rights. Many tenants are rightly concerned that they will be issued with a termination notice if they ask for repairs, try to negotiate on a proposed rent increase, or apply to the NSW Civil and Administrative Tribunal ('the Tribunal') to resolve an issue with the tenancy.

In recommending reform of tenancy laws under the Commission of Inquiry into Poverty in 1975, Professor Ronald Sackville stated:

> protection of the tenant against retaliatory eviction does not of itself ensure that the landlord will refrain from arbitrarily exercising his power to terminate the lease. We consider that the tenant's interest in maintaining a secure home is sufficient to warrant the imposition of further restrictions on the landlord's power of termination, provided that a landlord who has a legitimate reason for regaining possession is permitted to do so.[1]

Sackville, R. (1975) Law and Poverty in Australia: Second Main Report. Australian Government Commission of Inquiry into Poverty, Canberra p.80

Case Study 1:
Peta was a reliable tenant who paid her rent on time and looked after her home. Towards the end of her tenancy agreement, her landlord asked if she would like to renew. She was told that she could re-sign to a new fixed-term tenancy agreement at a higher rent. Peta believed that the higher rent proposed by the landlord was excessive, and tried to negotiate a lower amount that everyone could be happy with.

Peta did not receive a response for over two weeks. When the landlord finally replied, it was with a notice to terminate the tenancy on no grounds. Peta really wanted to stay in the property, so she told the landlord that she would agree to pay the increased amount that had originally been asked for.

Peta's landlord refused this offer and said that Peta would have to move out. Peta then offered to pay even more rent to remain in the tenancy. The landlord still refused, and Peta was forced to leave her home.

***Case study 2**:*
Barbara was offered a new fixed term agreement by her landlord Robert, with a 25% rent increase. Barbara felt this was excessive but wanted to keep living in her home, so she made a counter-offer. Robert rejected Barbara's offer, and immediately sent her an end of fixed term termination notice. Barbara went back to Robert and offered to pay the amount that had originally been asked for. Robert refused and said he was going to continue with termination of the tenancy.

These stories are representative of the many people we have advised who have been evicted from their homes because their landlord decided arbitrarily to terminate their tenancy. In both these instances, the tenant had not breached the tenancy agreement and the tenancy could have continued at the rent requested by the landlord.

The existing protections against retaliatory eviction are not broad enough or strong enough to give any realistic prospect that these tenancies could continue. Tenancies are regularly terminated for no good reason. Landlords terminating on no grounds must apply to the Tribunal for termination orders (if their tenants don't move out), but these orders are mandatory. The Tribunal has no discretion to consider the tenant's personal circumstances.

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

Our preferred model is that landlords are required to provide reasons for ending both periodic and fixed term tenancies.

We understand that several models are being considered for ending no grounds terminations. In our view the models in Queensland and Victoria referred to in the consultation paper do not achieve the right balance between the interests of landlords and tenants.

There is no rational basis for making a distinction between fixed term and periodic tenancies in circumstances where the tenant is not in breach of the tenancy agreement. If no grounds evictions are removed for periodic tenancies but not for fixed term tenancies, the imbalance between landlord and tenants will remain. The models adopted by Victoria and Queensland would not do enough to counteract the discrimination, retaliation and uncertainty that some tenants experience.

If these models are adopted, it is likely that more tenancies would be terminated at the end of the fixed term and that less would be rolled over into periodic leases. Tenants may alternatively find themselves

stuck in multiple short, fixed-term leases. If these short fixed-term leases are at the same premises, then under the current legislation tenants may face rent increases upon renewal of each fixed term.

This practice has been observed by tenants' advocates in Queensland, where 'no grounds' evictions have been ended only for periodic agreements and not for fixed-term tenancies. A similar situation has also emerged in Tasmania and Victoria where no grounds evictions have only been prohibited for periodic agreements.

Recommendation 1: Landlords should be required to provide a reason to terminate any tenancy agreement, whether it be periodic or at the end of a fixed term.

4.2 Are there any specific reasons where a landlord should be able to end a lease?

The Sackville report recommended a limited list of reasons that a landlord should be permitted to issue a termination notice. Aside from circumstances where a tenant is in breach of the tenancy agreement, the only reasons proposed were:

1. The landlord or their immediate family needs to move into the property;
2. Reconstruction, demolition or removal of the property;
3. The landlord has agreed to sell the property under a contract of sale that requires the landlord to deliver vacant possession; or
4. The tenant has served a termination notice but has not moved out of the property.[2]

Reasons 3 and 4 are already covered under the current law. The remaining reasons proposed in the Sackville report are consistent with the principle that a tenancy should only be terminated if the property is being taken off the rental market. We strongly support this approach.

We endorse the position of the Tenants' Union of NSW on the proposed grounds and add our own comments below.

<u>The property is being prepared for sale:</u>

We are opposed to this being included as a ground for termination.

This ground of termination would be prone to abuse or misuse by landlords. A landlord could issue a termination notice on the ground that they intend to prepare the property for sale, and then claim that they have changed their mind or that their circumstances have changed and re-rent the property. This would be difficult to monitor and enforce for compliance.

If this ground of termination is included, then we strongly recommend mandating that a tenant who is evicted on this ground is paid compensation by the landlord. The amount of compensation should be adequate to cover the cost of relocation.

The notice period should also be long enough for a tenant to find suitable alternative accommodation.

Appropriate evidence requirements and a short-term ban on future renting may only be partly effective in ensuring this ground is only used in genuine circumstances.

[2] Sackville, R. (1975) Law and Poverty in Australia, 81.

The property will go through reconstruction, repair or renovation that requires it to be vacant, or will be demolished:

It is reasonable that reconstruction or demolition of the premises be included as grounds for terminating a tenancy. However, in our view repairs and renovations fall into a different category and should not be treated in the same way. Landlords have an obligation to maintain the premises during the tenancy agreement. It would be unacceptable to allow a landlord to terminate a tenancy agreement so that they can carry out the repairs and maintenance that they are legally obligated to carry out during the tenancy.

The general principle should be that a tenancy can only be terminated if the works are necessary, are not the result of a landlord breach, and the premises need to be vacant for a significant period for the works to be done.

Appropriate evidence requirements and a short-term ban on future renting may be partly effective in ensuring this ground is only used in genuine circumstances.

The property will change use

It is reasonable to include this ground to terminate a tenancy.

This ground should only be available when the premises are no longer going to be used for any residential purpose. If a landlord proposes to put premises to another kind of residential use, for example by converting from private apartments to a registered boarding house, then the landlord should not have a right to terminate the tenancy of someone who wishes to continue living there.

A landlord must be required to prove any intended change of use. As a deterrent and protection against misuse of this ground, a temporary ban on re-letting the premises should be imposed if a tenancy is terminated on this ground.

The landlord will move into the property, or a member of their immediate family will move in

It is reasonable to include this ground to terminate a tenancy. A clear definition of 'immediate family' should be inserted into the Act.

Recommendation 2: A landlord should only be able to terminate a tenancy if the property is going to be removed from the rental market for a significant period.

4.3 What would be an appropriate notice period for these proposed reasons?

We endorse the notice periods proposed by the Tenants' Union of NSW in their submission.

4.4 What reasons should require evidence from the landlord? What should the evidence be?

We endorse the evidence requirements proposed by the Tenants' Union of NSW in their submission.

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

We generally concur with the submission of the Tenants Union of NSW that all new grounds proposed should result in a temporary ban on renting the property. This is consistent with the overarching principle that a tenancy should only be ended in circumstances where the property is genuinely going to be removed from the rental market. We also concur with the lengths of ban proposed in that submission, namely:

- Change of use - 12 months
- Demolition and/or reconstruction - 6 months
- Landlord or immediate family moving in - 12 months

One practical exception would need to be made where a landlord is terminating on grounds that immediate family will move into the property, which may result in a tenancy agreement being entered into with that family member. In those circumstances a landlord should be prohibited from entering into a tenancy agreement with anyone other than the immediate family member who is moving in. Appropriate compliance and enforcement mechanisms should be put in place to ensure that this ground is only used in genuine circumstances.

4.6 Additional Issue - compensation to tenants

The threat of a compensation claim by a wrongfully evicted tenant is unlikely to be an adequate deterrent to a landlord's false reliance on these grounds. Tenants will usually have limited means to determine whether the eviction was wrongful after the tenancy has ended and pursue compensation if they are wrongfully evicted. It should not be incumbent on tenants to pursue and demonstrate a right to compensation.

Evictions place onerous costs and burdens associated with moving onto tenants. The low numbers and escalating costs of available vacant rentals also mean many tenants are evicted into homelessness or marginal renting situations. A practical solution would be to introduce automatic compensation to all tenants who are evicted for any reason other than a breach of the tenancy agreement.

Automatic compensation would also act as a direct disincentive to landlords falsely relying on these new grounds of termination. Landlords who genuinely need to terminate the tenancy for their own purposes could factor in and absorb the cost of compensating their tenant.

Recommendation 3: Tenants who have their tenancy terminated for a reason other than a breach should automatically receive compensation from the landlord.

5. Renters' Personal Information

5.1 Do you support limiting the information that applicants can be asked for in a tenancy application?

There should be a limit on the information that a landlord or agent can collect about an applicant during the tenancy application process. These limitations should be formalised in the *Residential Tenancies Act 2010* (NSW) (***Residential Tenancies Act***). Restrictions must also extend to PropTech, RentTech and any third-party providers that assist in assessing or managing tenant applications (e.g. Snug, t-App, Ignite, 2Apply or others). A data minimisation approach should be adopted to the collection of a tenant's (or a prospective tenant's) personal information. That is, any personal data collected should be "adequate,

relevant and limited to what is necessary in relation to the purposes for which they are processed".[3]

The purpose of a tenancy application is for the landlord to assess whether a prospective tenant will be able to sustain the tenancy. The current general practice for landlords and agents assessing tenancy applications is to require large amounts of personal and sensitive information from each applicant. The following information is routinely sought:

- 100 points of identification (including providing copies of identity documents)
- Current employment details
- Employee reference
- Previous employment details
- Current address
- Previous addresses
- Current property manager's details for reference
- Current tenant ledger
- Proof of income (e.g. multiple payslips)
- 3 months of Bank Statements, and
- Personal references.[4]

The information sought from applicants far exceeds what is required to determine whether a tenant can sustain a tenancy. The excessive information obtained about a tenant not only creates an opportunity for unlawful discrimination against tenants, but also presents significant issues in relation to privacy and data protection.

The data and privacy risks posed to renters because of the over-collection of personal and sensitive information warrants a data minimisation approach to the personal information that can be collected.

Recommendation 4: A data minimisation approach should be adopted. Information allowed to be collected by landlords should be limited by law to that reasonably necessary to determine whether a prospective tenant will be able to sustain the tenancy.

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

We support restricting the information that can be collected by landlords and agents to assess a tenancy application. We also support the suggested approach of identifying a list of acceptable types of documentation to support an application provided the tenant can choose which items to provide in support of their application.

We make further comments about the items suggested in the table on pages 10 and 11 of the consultation paper below.

Verification of identity

There must be a balance between having a convenient option for a landlord or agent to verify the identity of prospective tenants and the risks to tenants' personal and sensitive information in the event of a data or privacy breach.

[3] *Article 5, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC* (General Data Protection Regulation)

[4] This list is taken from Belle Property's "How to Apply for Our Property" information sheet, obtained in May 2023.

There is no clear reason why a landlord, agent or third-party provider needs to hold copies of identity documents for applicants on file. It should be sufficient that an applicant's identity is verifiable and limited identity information recorded. This could be done through a centralised platform such as an identity verification service of Service NSW or by the agency sighting identity documents at the point of application or sign-up to the tenancy agreement.

Tenants typically apply for multiple rental properties before securing a tenancy and must provide personal and sensitive information in support of each application. While there is indisputable benefit to placing positive obligations on landlords and agents in the handling and securing of personal information, the spread of personal information and consequence of a data breach is significant enough to warrant alternative methods of verifying a prospective tenant's identity.

Ability to Pay

Requiring a prospective tenant to provide two months of payslips should only be imposed in circumstances where a tenant's income is variable (e.g. they are employed on a casual basis and the additional payslips would provide better guidance as to their income over a period).

For tenants with stable income, a maximum of two payslips should be required.

Confirmation of an applicant's bank balance should be sufficient for a landlord or agent to understand the financial position of the applicant. A landlord or agent should be prohibited from requesting any transaction history, and any sensitive account information (such as BSBs and account numbers) should be redacted.

Suitability

Suitability or reference information must be of a kind that is able to be verified and scrutinised by applicants for accuracy or be an objective measure of the success of a former tenancy.

Evidence such as previous rental ledgers, three months of rent receipts and written character references are types of references that can be verified by tenants.

Oral character references are more problematic as there is limited accountability for accuracy or relevance of the information sought or given in a verbal reference. RLC only supports the use of oral character references if the *Residential Tenancies Act* or other regulation expressly *excludes* a character reference from a former landlord or agent.

We regularly provide advice on the impacts of oral character references due to their unregulated nature and the absence of any protections against adverse, inaccurate, discriminatory or biased references.

Oral character references from former landlords or agents are problematic and should be prohibited for the following reasons:

- There is no method for the tenant to know the information that has been exchanged about them;
- There is no mechanism for a tenant to verify information exchanged or to alter incorrect, outdated or biased references;
- The use of oral references is not regulated in the same way as a tenancy database listing is regulated under the *Residential Tenancies Act*;
- The use of oral references exposes tenants to discriminatory practices with no means of oversight;
- There is an inherent power imbalance between tenants and landlords/agents in the unregulated oral reference process that can directly affect a tenant's ability to secure housing;
- There is no accountability for the information shared with another landlord or agent; and

- Published tenant databases (such as TICA, RTA or NTD) are a method of suitability vetting already available to landlords or agents and regulated under the *Residential Tenancies Act* to prevent the harm caused by unfair, inaccurate or out of date information affecting a tenant's ability to secure housing.

Finally, the assessment of whether a rental bond was returned in full at a previous address is not a useful or accurate method to assess the success of a former tenancy. Minor claims such as a few days of rent, outgoing water charges, small costs (e.g. light bulb replacement) or the payment of a break fee do not provide an accurate measure of the success of a tenancy.

Recommendation 5: Landlords or agents should be prohibited from holding copies of identity documents for tenants and prospective tenants.

Recommendation 6: The use of oral character references from landlords or agents should be prohibited.

Recommendation 7: Reference information should be restricted to the use of tenant databases that are already regulated under the Residential Tenancies Act or other sources of information that can be verified by a tenant for accuracy.

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

A standard tenancy application form would assist in implementing a limitation on the amount of information that can be requested by a landlord or agent in support of a tenancy application. A standard tenancy application form could be included as a schedule to the *Residential Tenancies Regulation 2019* (NSW) as done for the standard form residential tenancy agreement.

Recommendation 8: A standard tenancy application form should be introduced to limit information that can be collected by a landlord or agent.

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

Limiting the information collected from prospective tenants will provide greater protection for tenants against unlawful discrimination in the application process. We support the introduction of an express prohibition on a request for any information that could be used to unlawfully discriminate against a prospective tenant.

While we support express restrictions on the types of information that may be collected by landlords and agents, the use of RentTech and third party platforms also needs to be regulated so that discrimination in the application process can be meaningfully addressed.

Recommendation 9: Introduce an express prohibition on requesting any information that could be used to unlawfully discriminate against a tenant or prospective tenant.

5.5 Do you support new laws that set out how landlords and agents can use and disclose renters' personal information?

Tenants need stronger protections around the manner and circumstances in which their personal and sensitive information can be used and disclosed. Regulations relating to the use and disclosure of tenant

personal information should apply to all landlords, agents, PropTech, RentTech and any other related third-party platforms.

The Australian Privacy Principles only apply to organisations with an annual turnover of more than $3 million. There are many private landlords or smaller agencies whose practices are not covered by the *Privacy Act 1988* (Cth). As the law currently stands there are no obligations on these landlords or agents with respect to storing, using or disclosing personal and sensitive information of tenants. This is an unsatisfactory risk to tenant privacy and data security and should be addressed in these reforms.

Express obligations should be imposed on all landlords, agents, PropTech or RentTech organisations under the *Residential Tenancies Act* that restricts the manner and circumstances in which tenant information can be used and disclosed.

Consideration should also be given to ways to implement comparable protections and limitations on the collection of information for renter not covered by the *Residential Tenancies Act*: marginal renters, residents of purpose built student accommodation, boarding house residents and site owners in land lease communities.

We consider the best approach would be to adopt the Victorian model on use and disclosure of personal or sensitive information. That is, personal information obtained about a tenant (or prospective tenant) can only be used for the purposes of assessing a person's suitability for a premises or where required by law.

We only support the inclusion of an option permitting disclosure of tenant personal information by consent if the tenant's consent is given freely and expressly using an 'opt-in' only consent model. Blanket consent statements are insufficient for the purposes of obtaining genuine consent for the disclosure of information as this type of consent is typically 'all-or-nothing' and seeks to authorise broad and far-reaching disclosure.

The extract below is taken from the consent statement for RentTech organisation t-App and illustrates the breadth of the authority that must be given by applicants in order to use the platform:

> I acknowledge and agree that information provided to TRA and/or the agent by these authorities given by me be disclosed to: a) Real Estate Agents, Landlords, Trades persons, Emergency Contacts, Employers past, present or prospective, Referees, Housing New South Wales, Compass Housing, to assist them in evaluating applications which may be made by me to any of these parties, for the purpose of managing any property and my requirements as tenant/s during my tenancy of any property owned or managed by any of those parties and b) Real Estate Agents, Landlords, Banks, Utility companies, Commercial Agents, organisations or any other members for any lawful purpose and c) third parties with which TRA has entered into any co-operation, partnering, licensing or similar agreement for the purpose of allowing those parties to offer their products and services to me and I hereby consent to such use and disclosure of that information for those purposes. Should any such party transfer its business to another person, I consent to the new person (and any further person to whom that business may be transferred) taking any step which the former party could have taken.

The above general consent allows t-App to disclose information to 'organisations or any other members' for any lawful purpose and third parties where the parent company, TRA, has entered into 'co-operation, partnering, licensing or similar agreement(s)'. Information disclosed under these circumstances would appear to largely benefit t-App and there is no ability to opt-out or limit the breadth of the consent given when using this application platform.

Before a landlord, agent or third party can use a tenant's personal information for any purpose other than assessing a tenancy application, express and withdrawable consent must be obtained from the renter for each and any other additional purpose. This consent should be obtained separately to any tenancy application.

The use of tenant personal information and data for marketing purposes or sharing or selling to other parties for profit or benefit should be expressly prohibited. We encourage the introduction of penalty provisions for breaches relating to the use and misuse of personal information.

Recommendation 10: Introduce laws limiting how tenant personal and sensitive information can be used and disclosed that apply to all landlords, agents, PropTech, RentTech and any third-party platforms used in the management of tenant information.

Recommendation 11: Extend protections on the use and disclosure of personal and sensitive information to all renters, not just those covered by the Residential Tenancies Act.

Recommendation 12: Personal and sensitive information obtained about a tenant should only be used for assessing a person's suitability for the premises or where required by law.

Recommendation 13: There should be an express prohibition on the use of tenant personal information and data for marketing purposes, or sharing or selling to other parties for profit or benefit.

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

Any personal information provided by a person when submitting a tenancy application should only be used for the purpose of assessing their suitability for the rental property applied for.

Applicants should be given a plain language explanation about the circumstances in which their information will be used and disclosed (e.g. how long their information will be kept, whether it be used to cross-reference any future applications, the duration of consent, and when personal information will be deleted).

Before a landlord, agent or third party can use a tenant's personal information for any purpose other than assessing a tenancy application, express and withdrawable consent must be obtained for each and any other additional purpose.

All applicants and tenants should be told how to withdraw their consent for the use or disclosure of their personal information and should be able to do so at any time.

Recommendation 14: Applicants and tenants should be provided with a plain English explanation on how their information will be used, stored and disclosed and given instruction on how to withdraw their consent.

5.7 Do you support new laws to require anyone holding renter personal information to secure it?

There are significant security risks associated with the collection, use, disclosure and storage of personal information. The 2023 *Australian Community Attitudes to Privacy Survey* conducted by the Office of the Australian Information Commissioner found that Australians see data breaches as presenting the biggest risk to their privacy, with almost half of the respondents having been personally affected by a data breach in the previous year.[5]

There must be a positive obligation on any person or organisation holding tenant (or prospective tenant) information to secure it. This obligation must also extend to imposing obligations on parties using cloud

[5] Office of the Australian Information Commissioner, *Australian Community Attitudes to Privacy Survey* (Report, August 2023) 5, 24.

computing, third-party providers or where personal information is transmitted to overseas recipients as part of their business management practices.

The privacy statement of Ray White in their tenant application form (obtained in August 2023) contemplates potential breaches of the Australian Privacy Principles by overseas recipients of personal information due to their business practices:

> As your information may be emailed or stored in the cloud, we cannot ensure that overseas recipients to whom your information is disclosed will not breach the Australian Privacy Principles in relation to your information. Acknowledging that this is so, you consent to your information being emailed and stored in the cloud.

This statement illustrates the importance of imposing positive obligations on anyone holding or transmitting tenant information as part of their business operations and to take all reasonable steps to ensure its security in all circumstances.

Recommendation 15: Any person or organisation holding tenant (or prospective tenant) information must be obligated to secure that information.

5.8 How long should landlords, agents or proptechs be able to keep renter personal information?

The length of time that landlords, agents, PropTechs, RentTechs or other related third parties are permitted to keep tenant (or prospective tenant) personal information should depend on the reason for holding the personal information and be limited to information reasonably necessary to support the identified functions.

Personal Information in Tenancy Applications for Unsuccessful Applicants

Personal information obtained through the tenancy application process should be destroyed as soon as practical (i.e. within 2 weeks) after the landlord enters into a residential tenancy agreement for a property for which the application relates. This would allow time for the landlord to contact other applicants in the event the agreement falls through.

An exception could be provided where the applicant gives express consent for their personal information to be held for a longer period (e.g. if they are using a centralised application process and are applying for multiple properties). The applicant should be required to opt-in to this option, rather than this being the default option. Personal information should be stored for a maximum of six months or consent renewed.

The underlying policy principle driving this exception should be that the retention of personal information is at the direction of the tenant (including prospective tenants) and for the benefit of the tenant.

Personal Information for Successful Applicants/Tenants

Personal information reasonably necessary for the ongoing relationship such as full names, phone numbers, email addresses and emergency contacts should be stored securely.

All other personal information obtained through the tenancy application process should be destroyed as soon as practicable after entering into the residential tenancy agreement with the successful applicant as recommended in the case of unsuccessful applicants (above).

Consent to share personal information such as name and contact numbers with tradespeople should only be sought for successful applicants and be limited to contact information for the purposes of arranging access for repairs to the premises.

After a tenancy ends, it is reasonable for landlords or agents (not PropTech or RentTech) to hold such personal information reasonably necessary for the commencement of legal proceedings or enforcement of orders made in respect of the tenancy.

Recommendation 16: Personal information obtained about an unsuccessful applicant should be destroyed as soon as practicable after the landlord enters into a residential tenancy agreement to which the application relates.

Recommendation 17: Limited personal information obtained about a successful applicant reasonably necessary for the ongoing tenant-landlord relationship should be stored securely. Other information must be destroyed as in the case for unsuccessful applicants.

5.9 Do you support requiring landlords, agents or proptechs to: (a) give rental applicants' access to their personal information, (b) correct rental applicant's personal information?

Information collected, used, stored and disclosed about tenants by landlords, agents, PropTechs, RentTechs and other related third parties should be limited.

We support tenants (including prospective tenants) having free and easy access to the personal information held by landlords, agents, PropTech, RentTech or other third-party platforms. Access should not only be available for the personal information provided with a tenancy application, but any information collected or generated by the landlord, agent or third party such as rental scores or recommendations made through automatic decision making processes.

There should be a mechanism in place that allows tenants to easily correct or have removed any inaccurate, outdated or potentially discriminatory information held about them. As is the case for incorrect or out-of-date database listings, there must be an effective way for tenants to enforce access or correction of information held about them. The risk of a penalty is not a sufficient mechanism to encourage compliance on this issue if it is a standalone protection and unable to be enforced by the tenant themselves.

Recommendation 18: Tenants and prospective tenants should have access to their personal information and an available mechanism to correct or remove any inaccurate, outdated or potentially discriminatory information held about them.

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

We endorse the position of the Tenants' Union of NSW in their submission relating to automated decision making.

6. Other changes to improve rental affordability

6.1 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)?

Landlords should be limited to one rent increase in a twelve month period, irrespective of the type of

agreement. This would help to protect tenants from unfair rent increases and close the current loophole that makes it possible for landlords to increase the rent at the start of successive short fixed-term agreements with the same tenant at the same property. This change would be consistent with other provisions in the *Residential Tenancies Act*, which limits rent increases in periodic leases and during fixed term agreements of two or more years to no more than one increase in a twelve month period.[6]

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

While we do not regularly see landlords utilising the option of writing future increases into the agreement, it may become more common if other controls are implemented to limit the amount of a rent increase.

There is a general benefit to be gained from simplifying the rules around rent increases by introducing a blanket rule that rents can only be increased once in a 12-month period, regardless of the type and length of lease. A single clear and consistent rule would have the effect of providing certainty to all parties, and potentially result in less matters going to the Tribunal for determination.

Limiting the frequency of rent increases may have the negative consequence of creating an incentive for landlords to terminate a tenancy so that they can enter an agreement with a new tenant and increase the rent. However, if no grounds evictions are removed as proposed, and landlords are required to provide a valid reason supported by evidence to terminate any tenancy (not just periodic), then this risk would be limited and should not weigh heavily against making this change.

Recommendation 19: Introduce a blanket rule that rent can be increased only once in any twelve month period, irrespective of the type and length of lease.

6.3 Clarifying the right to apply to Tribunal to dispute an invalid rent increase.

A landlord is required to give a tenant sixty days' notice of a rent increase. If a landlord purports to increase the rent without proper notice, then the rent increase is not payable.

However tenants who have not been given valid notice of rent increase do not currently have a clear cause of action under the *Residential Tenancies Act*.

Section 41(10) is confusingly drafted and worded in the negative:

> *The Tribunal must not make an order that a rent increase is not payable because this section has not been complied with unless the application for the order is made not later than 12 months after the rent is increased…*

This does not clearly give the Tribunal power to make a standalone declaratory order that a rent increase is not payable. Tenants applying to The Tribunal online do not have an option to apply for any order under section 41(10), even though that section contains reference to the Tribunal making an order that a rent increase is not payable.

This leaves tenants in the position of either seeking relief through the general order making powers of the Tribunal, refusing to pay the invalidly increased rent and putting themselves in a position where they may have to defend termination proceedings for rental arrears, or paying the invalid increase and then pursuing reimbursement from the landlord through the mechanism in section 47.

The *Residential Tenancies Act* grants the Tribunal this kind of declaratory power in relation to termination

[6] *Residential Tenancies Act 2010* (NSW) ss 41(1B), 42(2).

notices. Tenants or landlords who have received a termination notice can apply to the Tribunal under section 111 for an order declaring that the notice was or was not validly given. A similar provision for rent increase notices would be relatively simple to implement.

Recommendation 20: Introduce a clear way for tenants to make an application to the Tribunal to dispute the validity of a rent increase notice.

6.4 Other options to address affordability

We regularly advise tenants who have received notice that their rent will be going up by 25-30%, and sometimes over 50%. While tenants can dispute the amount of a rent increase by seeking a Tribunal order that the proposed increase is excessive, this does not provide adequate protection because tenants have the onus of proving that the proposed rent is excessive. Tenants do not have ready access to most of the evidence they need to succeed in such an application.

If no grounds terminations are removed as proposed, then there is a further risk that landlords will start using excessive rent increases as a means of achieving a 'de facto' termination by pricing an existing tenant out of the property.

At a bare minimum, the model implemented in the ACT should be introduced, switching the onus of proof to the landlord once the proposed rent increase exceeds a prescribed threshold based on CPI or similar appropriate benchmark measure.

Another reasonable measure would be to give tenants access to a free and independent assessment of the appropriate rent for their premises. This has been implemented in Victoria: Victorian tenants who believe a rent increase is excessive can apply to Consumer Affairs Victoria for a free rent assessment. This rent assessment can form the basis of a VCAT application if the rent assessment says the rent is excessive and the landlord doesn't agree. A similar role could be adopted by NSW Fair Trading or the NSW Rental Commissioner.

Recommendation 21: If a rent increase exceeds an appropriately set threshold the landlord should be required to demonstrate that it is justified.

Recommendation 22: Tenants should have access to free and independent assessments of the appropriate rent for a property.

7. Free Ways to Pay Rent

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

Rent payments are payments for an essential service. Tenants should be able to meet their rental obligations easily and without incurring any fees or charges for meeting their rental obligations.

The best way to ensure a free, convenient and easy-to-use method of rent payment is to enable a tenant to elect their preferred payment method from a minimum set of payment options. Minimum requirements should be included in the *Residential Tenancies Act* and include an obligation for a landlord to offer at least the following free payment options for each tenant:

- Electronic funds transfer, BPay or other fee free electronic method of rent payment, and
- Cash in person to the landlord, the landlord's agent or their local Post Office.

Section 35 of the *Residential Tenancies Act* requires that a tenant be permitted to pay the rent by at least one means for which the tenant does not incur a cost and that is reasonably available to the tenant. As the law stands, if the free payment method offered by the landlord is not reasonably available to the tenant then the tenant bears the burden of lodging an application to the Tribunal for an order addressing the method of payment of rent.

Case Study 3:
Maja is a tenant in the inner suburbs of Sydney. She was provided with PostPay as the free payment method to pay her rent. Maja worked full-time from home in a demanding job. The local post office was a 20-30 minute walk from home and queueing for service at the Post Office was time consuming. The only other payment method offered to Maja was via a third-party platform where a $1.95 transaction fee was charged to Maja for each rent payment. We gave advice on the Tribunal process to dispute that the payment method offered was a reasonably available payment option, however Maja made the difficult choice not to pursue this in the Tribunal. The application fee at the time was $54 which was non-recoverable even if successful and Maja would have needed to take several hours off work to attend Tribunal hearings. It was not practical for her to pursue this in the Tribunal.

Recommendation 23: Introduce an obligation on landlords under the Residential Tenancies Act to offer tenants at least one free electronic payment method in addition to a cash method of payment.

7.2 Should the law require a landlord or agent to offer an electronic way to pay rent that is free to use?

The *Residential Tenancies Act* should require a landlord or agent to offer tenants a free electronic way to pay rent.

Free payment methods such as cash or PostPay are not convenient, easy-to-use, or reasonably available to the majority of tenants. As illustrated by the case study above, providing one of these options as the only free way to pay is insufficient.

In the case of Postpay, tenants can only pay using an invoice and are unable to make rent payments in advance in anticipation of travel, public holiday periods, illness or other events. Tenants report to us that it is difficult to make payments towards arrears or part payments of rent in the case of sharehousing arrangements where multiple tenants want to make separate payments to the landlord.

It is increasingly common for agents to offer electronic payments only via third-party payment platforms. This is a payment option that almost exclusively benefits landlords and agents. The platforms assist the landlord or agency by outsourcing account management workload and improving workflow. It is unfair to transfer the operational costs of a landlord or agent's preferred way of managing their business onto tenants by restricting the availability of other payment options that are convenient for the tenant to use.

Requiring landlords or agents to provide a free electronic payment method is in line with the standard payment options offered for other essential services such as water services, telecommunications services, and utilities.

Recommendation 24: Landlords should be required to provide tenants with a free electronic method of rent payment.