
Submission to the NSW Fair Trading Enquiry

Improving NSW rental laws consultation paper

AUGUST 2023

About Marrickville Legal Centre

Marrickville Legal Centre (MLC) has provided legal services to vulnerable and disadvantaged members of its community for over 40 years.

MLC operates two tenants' advice and advocacy services, the Inner West Tenants' Advice & Advocacy Service (IWTAAS) and the Northern Sydney Area Tenants' Service (NSATS). The combined services (the Services) assist tenants across the Inner Western and Northern Suburbs of Sydney, from Strathfield to Berowra. The Services offer free legal services to private and social housing tenants, boarders, lodgers, and residential community residents. The Services work to improve the rights of tenants in NSW.

In 2021-2022, the Services assisted more than 2600 tenants. The Services regularly represent tenants at hearings before the NSW Civil & Administrative Tribunal (the Tribunal) and provide outreach services to vulnerable clients at various locations within our catchment.

Through our work in the community, we approach our clients with a view of holistic legal provision and a person-centred approach. While our tenancy advice and advocacy services are often the first port of call for clients with housing issues, we also provide internal referrals to clients with various needs through our Legal Health Check. Our Health Justice Partnership also ensures access to vulnerable clients within the health system. MLC remains actively engaged with other legal and non-legal services in the community.

Marrickville Legal Centre has a long history of advocating for the rights of tenants, boarders, and lodgers. The recommendations outlined in this Submission draw on our experiences in the community and from feedback provided by the tenants we assist.

Marrickville Legal Centre
From the inner west, serving NSW

Thursday, 17 August 2023

Residential Tenancies
Policy & Strategy, NSW Fair Trading
Better Regulation Division,
12 Darcy Street, PARRAMATTA NSW 2150

By email only: residentialtenancy@customservice.nsw.gov.au

Dear Minister,

Submission from Marrickville Legal Centre on Improving Rental Laws Consultation Paper

Marrickville Legal Centre (MLC) is pleased to make a submission about the proposed tenancy law changes. We understand several Tenancy and Advice Program (TAAP) services including the Tenants Union of NSW has obtained an extension of the deadline for submission to 19 August 2023. We appreciate if you would consider our submission with this extended deadline.

Through our experience of advocating for the rights of tenants, boarders and marginal renters, MLC draws on this experience to provide feedback and experience from our clients.

We operate two tenants' advice and advocacy services, the Inner West Tenants' Advice & Advocacy Service (IWTAAS) and the Northern Sydney Area Tenants' Service (NSATS). The combined services (the Services) assist tenants across the Inner Western and Northern Suburbs of Sydney, from Strathfield to Berowra. The Services offer free legal services to private and social housing tenants, boarders, lodgers, and residential community residents. The Services work to improve the rights of tenants in NSW.

In the last year alone, we have assisted more that 2980 renters in NSW. During the peak COVID period of 2021-2022, both of our Tenancy Services assisted more than 2600 tenants. We continue to regularly represent tenants at hearings at the NSW Civil & Administrative Tribunal, and provide outreach services to vulnerable clients at various locations within our catchment.

The recommendations outlined in this Submission draw on our experiences in the community, and from feedback provided by the tenants we assist.

Vasili Maroulis
Chief Executive Office
MARRICKVILLE LEGAL CENTRE

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Summary of Recommendations

MLC supports any relevant recommendations made by the Tenants' Union of New South Wales (the **Tenants' Union**). In addition, MLC makes the following recommendations:

Removing 'no grounds' terminations

- Do not add 'property being prepared for sale' ground;
- Shift the onus away from tenants concerning all types of termination.

Ending a fixed term lease

- End to arbitrary termination upon expiry of a fixed term lease;
- Place the onus on landlords to establish grounds to end a fixed term lease;
- The notice period preceding termination should reflect the time a tenant reasonably requires securing new rental accommodation;
- New evidence requirements involving use of Rental Bonds Online, the NSW Property Register, or the Office of the Rental Commissioner;

A new model for keeping pets

- Tenants should not require the landlord's permission to keep a pet;
- Where more than one pet is concerned, the landlord has 14 to 21 days to consider the tenant's request;
- The Tribunal can order a tenant to remove a pet from a rental property in special circumstances only;
- Conditions on tenants for keeping pets should not be onerous or unreasonable, and should not extend beyond the standard form residential tenancy agreement.

Information to help renters know when a rent increase is 'excessive'

- De-couple and counterbalance 'market trends' concept from considerations of rental affordability;
- Include information of current rent amounts, as well as historical and prospective rent changes, for renters;
- Make rent reduction status of a rental property available to tenants;
- Publish household income trends for tenants;
- Utilise the Rental Bonds Online service and Office of the NSW Rental Commissioner to collect and manage information available to renters.

Other changes to improve rental affordability

- Limit owners to one rent increase in any 12-month period, carried across agreements within that period, where the fixed term is under 2 years;

- Landlords to give tenants 60 days' written notice of a rent increase;
- Defer adjusted rent payment while an 'excessive' rent increase matter is pending Tribunal determination;
- Consumer Price Index to be the standard for determining rent increases;
- Consumer Price Index plus 10% to be the uppermost limit for rent increases where rent value has not changed since start of agreement;
- Place onus on landlord to substantiate increases beyond the threshold;
- Tenant spending capacity to be considered by the Tribunal for determining reasonable rent increases.

Free ways to pay rent

- Legislation to provide direct electronic bank transfer and BPAY as required available payment methods for tenants;
- Prohibit cheques as a sole method of fee-free payment, with a view to phasing out cheques entirely.

Renters moving into strata schemes

- Inform strata corporations and tenants of the unlawful imposition of moving in/out bonds and fees in strata schemes;
- NSW Rental Commissioner to identify and pursue non-compliant bodies corporate.

Other Support

- Afford strata scheme tenants a right of reply where the Owners Corporation claims a breach of by-laws;
- Expand Section 106(5) to provide legal recourse for strata scheme tenants where there is a reasonably foreseeable loss due to a Section 106(1) breach by the Owners Corporation;
- Increase funding for legal services that assist tenants across NSW;
- Culturally appropriate and linguistically specific community options for clients of tenant legal services.

Note: The case studies contained within this submission use pseudonyms to protect the identity of the parties. All case studies describe matters handled by MLC.

Removing 'no grounds' terminations

[Consultation Paper Q1] What is your preferred model for ending fixed term leases and why?

Marrickville Legal Centre submits that a landlord should give a reason if they wish to terminate a tenancy, both at the end of a fixed term agreement and where the agreement has continued on a periodic basis. This would reflect the model used in the Australian Capital Territory.

In 2019, MLC and TUNSW released the 'Lives Turned Upside Down' Report. Key findings from the report include:

- Just over three quarters (77%) of renters have held back from asserting a right or reporting a problem because they worried about receiving a 'no grounds' eviction;
- Majority of renters (63.9%) said the possibility of a 'no grounds' eviction was a serious source of anxiety;
- Personal experience of a 'no grounds' eviction substantially increased the likelihood and seriousness of concern reported. 74.6% of renters with experience compared with 52.7% of renters with no experience of 'no grounds' evictions identified 'no grounds' evictions as a 'serious source of anxiety'.

The failure to require a valid reason to end a fixed term lease leaves a loophole in the current legislation, which allows for landlords and real estate agents to take advantage of tenants by shifting renters on to rolling shorter fixed-term contracts. Currently, approximately 70% of 'no grounds' terminations are at the end of a fixed term.

Furthermore, the presence of 'no grounds' terminations will undermine law reform in respect of tenants' rights and landlords' obligations. For example, should any limit be placed on the amount by which rent may be increased during a tenancy, the ability to terminate a tenancy agreement without grounds allows landlords and real estate agents to circumvent these protections by ending a tenancy and starting afresh with a new tenant paying a higher rent than may have otherwise been denied under 'fair rent' legislation. Renters in Queensland are now bearing the brunt of this strategy. The Guardian reports that landlords have opted to arbitrarily end tenancies so that a new, higher rent can be applied to the next set of tenants in a property. Penny Carr from Tenants Queensland describes it as a 'a no-negotiation, take-it-or-leave it scenario,' in which tenants are being forced to make 'very, very difficult decisions between unaffordable rents and the prospect of trying to find another property in time that's affordable.'[1] On 22 June 2023, the Guardian also published a similar story from a renter in Sydney's Inner West whose

[1] Renters worse off as landlords begin evictions to skirt new Queensland laws, tenants group says': <https://www.theguardian.com/australia-news/2023/jul/14/renters-worse-off-as-landlords-begin-evictions-to-skirt-new-queensland-laws-tenants-group-says>

eviction came by complete surprise. The renter expected an increase in her rent, she did not realise that landlord could evict her without reason.[2]

The only way to prevent this obvious and predictable negative consequence to positive law reform is to end no grounds terminations and, as discussed below, end arbitrary termination at the end of a fixed term.

Case Study – Chris

Chris received an email notification from the landlord's agent providing an option to increase the rent payable under his residential tenancy agreement or to vacate at the end of the lease. Prior to the email, Chris had been reporting a number of maintenance issues to the real estate agent. He followed up on whether the repairs would be carried out to match the proposed rent increase. There were approximately 40 email correspondences between the agent and Chris on this topic. The agent advised that the notice for repairs should be brought to the building manager's attention instead, given that Chris lived in a strata-managed property.

Chris could challenge the notice for being retaliatory, but his prospects of success would be slim, as the onus of satisfying the evidentiary requirements rests on him as a tenant. This would require him to obtain evidence about the landlord's motivations.

Chris was considering the option of commencing mediation at Fair Trading against the Owners Corporation for failure to repair. However as a tenant, MLC is aware he doesn't have standing to take the matter further if mediation does not result in a suitable outcome.

MLC has considered that proposal to replace the no grounds eviction with the following reasons:

- The property is being prepared for sale
- The property Will go through reconstruction, repair or renovation that requires it to be vacant
- The property Will change its use (e.g change from a home to a shop or office)
- The property Will be demolished
- The landlord will move into the property, or a member of their immediate family will move it.

To avoid redundancy, the proposal to include the *property is being prepared for sale* reason can should be omitted. Clause 21.1 of the standard form of the residential tenancy agreement (**the Agreement**) has already provided the regime for termination by the landlord. Additionally, it is already a legal requirement for landlords to provide disclosures of any proposal to sell the residential premises prior to the commencement of a tenancy. This disclosure requirement is expected to continue into the periodic lease upon expiry of the fixed term. The landlord can elect to terminate if the property is being prepared for sale provided that the elements prescribed under section 86 of the *Act* are established.

[2] 'Being evicted for no reason in Sydney is stressful, frightening and all too common': <https://www.theguardian.com/commentisfree/2023/jun/22/being-evicted-for-no-reason-in-sydney-is-stressful-frightening-and-all-too-common>

Respecting that this information is easily available to renters via the Tenants Union and tenant-oriented blogs, the current state of the rental market betrays their reasonable expectations. MLC recommends the termination notice period be extended accordingly.

Ending a Fixed Term Lease

[Consultation Paper Q2] Are there any other specific situations where a landlord should be able to end a lease?

In its present form, the *Residential Tenancies Act 2010* (**the Act**) already sufficiently provides for specific situations where either party can terminate the agreement, including but not limited to breach, repudiation, acquisition of the property, sale or abandonment. It is the 'no grounds' terminations that are the drivers of the unfairness experienced by tenants. For example, a landlord whose proposed rent increase was at risk of being considered 'unreasonable' if it were to be disputed at the Tribunal, can bypass the entire issue by issuing an end of fixed term notice of termination and then re-letting the premises at the desired higher rent. This is a common occurrence in NSW. It has also been documented in Queensland as landlords seek to avoid having to comply with changes to the law following recent law reform in the sector.[3] MLC submits that the capacity to end a fixed term tenancy on 'no grounds' at the end of the fixed term will always undermine improvements in tenancy law and renters' rights.

[Consultation Paper Q3] What would be an appropriate notice period for the five proposed reasons (and for any other reasons you have suggested)? Why is it reasonable?

MLC submits that this notice period can be extended up to 90 days if this ground were not going to be removed altogether as proposed. The current minimum noticed period under Section 84 of the Act is 30 days.

MLC has experienced a certain level of difficulty in getting more time before the possession date when assisting tenants in conciliation hearings at the Tribunal. Given that it is mandatory for the Tribunal to make an eviction order, there is very little room for negotiating longer time frames before the possession order takes effect. The experience also is that there is a general hesitance by the Tribunal to allow a time frame beyond two weeks premised on the assumption that the landlord is entitled to get back possession of the rental premises at the end of the fixed term.

Given the low availability and affordability of vacant rental properties in NSW, a landlord should give tenants at least six weeks' notice for any of the proposed reasons. In Australia, prospective renters are recommended to allocate four to six weeks for finding and securing a rental property, and more time is recommended during the beginning and end of year periods, as well as the time preceding new university semesters.[4] To protect tenants from undue stress, a 90-day notice period is not unreasonable

[3] 'Renters worse off as landlords begin evictions to skirt new Queensland laws, tenants group says': <https://www.theguardian.com/australia-news/2023/jul/14/renters-worse-off-as-landlords-begin-evictions-to-skirt-new-queensland-laws-tenants-group-says>
[4] 'How soon should I start searching for rentals?': <https://www.rent.com.au/blog/start-search>

as the minimum notice period. The market conditions impact the timeline for securing new rental accommodation.

Case Study - Zhang

MLC duty advocates assisted Zhang at tenant in Burwood to reach a settlement in conciliation at the NSW Civil and Administrative Tribunal early this year to extend the tenancy for a period of six weeks. The landlord filed for a termination order to enforce a 'no grounds' termination. The tenant had been living in the property for several years. The agent who appeared on behalf of the landlord said that their instructions were that a family member of the landlord will be attending university in Sydney. Despite the pleas from the tenant that he was a good tenant, pays his rent on time and never complains about the lack of maintenance in the property, he could not save the tenancy because it is mandatory for the Tribunal to make a termination order. The only compromise was a settlement to allow him some time to find another property.

[Consultation Paper Q4] What reasons should require evidence from the landlord? What should the evidence be?

MLC supports the proposal for legislation to require evidence to accompany eviction notices that rely on any such ground. The landlord's intention to terminate on a particular ground should be shown to be consistent based on correspondence and other relevant evidence. In view of the proposed new grounds to end the tenancy, MLC submits the following evidence requirements as follows:

Where the property:

- *will go through reconstruction, repair or renovation that requires it to be vacant:*
    - copy of a relevant professional assessment report justifying major repairs requiring vacant possession;
    - Service contract with a tradesperson and quotations for major repairs or renovations;
    - building permits or a development application;
    - Consent of the Owners Corporation for major renovations in compliance with the *Strata Schemes Management Act 2015* (**the SSMA**).
- *will change its use:*
    - relevant license or permits for change of use;
    - Consent of the Owners Corporation for change of use of if the property is in a strata scheme.

- *will be demolished:*
    - copy of demolition booking information; and
    - invoice for the completed demolition.

Where the landlord plans to occupy the property, or a member of their immediate family will move in:

- Documentary evidence that the property is not an investment property or owned by a company or a trust including a family trust.
- Documentary evidence such as certificate of admission in a local institution for specific reasons such education, medical care or confirmation of employment or business in the area.

MLC further submits that the evidence above should be registered with a service such as Rental Bonds Online (**RBO**), the NSW Property Register, or the Office of the NSW Rental Commissioner. Aside from effecting greater transparency for tenants, this will make any ongoing reporting requirements viable. Parties to a termination order can be notified by the service provider as new evidence is registered, creating an opportunity for tenants to challenge the 'genuine' quality of a landlord's reasons for termination.

Case Study – Ken

Ken's landlord filed an application at the Tribunal to terminate his lease at the end of the fixed term period. The landlord expressed their intention to sell the property. However, correspondence revealed that Ken was offered a new 12-month fixed term. As a result, Ken was surprised to learn of the landlord's change of heart. The landlord later terminated the Agreement for undue hardship and filed a Tribunal application to claim Ken's full rental bond and compensation of $200,000 for a renovation quote they obtained by the landlord.

Ken's case is an extreme example of how easily a landlord can manipulate the current provisions to terminate an Agreement, and demonstrates the importance of restraining landlords from evading the proposed legislative reform. To discourage abuse of the new provisions, MLC recommends penalties for providing false and misleading information. Accordingly, MLC proposes an amendment to Part 5 Division 2 of the Act, as follows:

1. ***A landlord or landlord's agent must not give to the Secretary [or the tenant, depending on whom is to be the recipient] any of the materials specified that the landlord or agent knows to be false, misleading or deceptive.***

2. ***A person who, without reasonable excuse, contravenes this section is guilty of an offence.***
3. ***Maximum penalty—50 penalty units.***
4. ***A court that finds an offence under this section proven may, in addition to any other penalty it may impose, order that compensation be paid to the person against whom the offence was committed by the person who committed the offence or on whose behalf the offence was committed.***

Case study – False and misleading information

MLC has received a number of enquiries from former tenants who had been informed that the reason behind the no grounds notice of termination they received was that the landlord or a family member of the landlord wanted to move into the property, but who after moving out discovered the residential property advertised to rent for a much higher price. Some of these former tenants had been living in the premises for a number of years and faced significant stress and fear of homelessness in finding a new place to live.

There is currently no legal remedy for a tenant who is evicted from their home in this way and no material consequence for a landlord or landlord's agent who provides false or misleading information in pursuit of such a termination.

[Consultation Paper Q5] Should any reasons have a temporary ban on renting again after using them? If so, which ones and how long should the ban be?

MLC submits that a minimum restriction of six months on listing of the property for rent should be applicable for all new proposed termination grounds, except where the landlord or a family member of the landlord is moving into the property. The restriction period should be not less than twelve months.

It is not uncommon for landlords to rely on this reason prior to the start of the academic year in Sydney. It is assumed that this reason is used to make properties available for international students moving to Sydney.

The restrictions on renting the premises because the landlord or their family members are moving back into the property under Queensland's *Residential Tenancy and Rooming Accommodation Act 2008* may be modelled in NSW.

A new model for keeping pets

[Consultation Paper Q6] 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?

Pets have consistently been shown to be of benefit to the mental, physical, and social health of owners. Pet ownership can have particular significance for older people and people with disability. Given the role pets often play in connecting people with community and place, especially where they otherwise may find themselves isolated. Social isolation because of COVID has driven home the social acceptance of the role pets play in people's lives.

Marrickville Legal Centre has considered the proposition to set an amount of time for the landlord to consider a request for the keeping of a pet and instead proposes that there should be no notice requirement for the keeping of a first pet on the premises. A tenant should be permitted to keep one indoor pet such as a fish, dog or cat under the residential tenancy agreement as of right. This right should be balanced by a mandatory obligation to professionally clean and fumigate the premises at the end of the tenancy. It may also be relevant for the landlord to establish that the property was professionally cleaned or fumigated upon commencement of the lease.

MLC submits that where a second pet is required the landlord may have fourteen to twenty-one days to carefully consider the request. The landlord must not unreasonably withhold consent if the keeping of more than one animal is reasonable in the circumstances.

[Consultation Paper Q7] What are valid reasons why a landlord should be able to refuse a pet without going to the Tribunal? Why?

With the exception of Section 19(3), the Act is silent on keeping pets in rental properties. By and large, it is up to parties to agree to the keeping of animals.

Marrickville Legal Centre recommends that the current additional terms regarding pets be removed from the standard form agreement and in their place, new additional terms be inserted to encourage responsible pet ownership and to make clear a tenants' responsibility when owning a pet for both landlord and tenants. In our clients' experiences, the current additional term is more often than not automatically crossed out before a discussion can take place with a landlord or their agent about the possibility of a pet.

As noted in the Victorian Second Reading Speech on 12 September 2019, Marrickville Legal Centre stresses that New South Wales tenancy laws requires "a measure that acknowledges the bond between humans and pets and the benefits (including to emotional health) flowing from human/pet interaction".[5]

Marrickville Legal Centre recommends the following as potential legislative reform:

(1) The tenant may keep an animal on the premises upon commencement of the tenancy.

(2) If the tenant intends to bring more than one animal on the premises, they must get the landlord's written consent. The landlord must not unreasonably withhold consent if the keeping of more than one animal is reasonable in the circumstances.

(3) If the tenant keeps an animal on the premises, the tenant agrees that:

> ***(a) they must keep the animal within the premises, or supervise the animal when exercising it outside neighbouring premises, and***
>
> ***(b) they must ensure the premises are returned in a similar condition to when the agreement was entered into, fair wear and tear excepted and***
>
> ***(c) they must ensure the animal does not cause a nuisance, or breach the reasonable peace, comfort or privacy of neighbours, and complies with any requirements under any other Act.***

(4) This section is a term of every residential tenancy agreement.

If a situation of alleged breach arises, the landlord has access to Section 87 of the Act and may seek appropriate remedies at Tribunal.

Marrickville Legal Centre submits that this proposed reform will contribute to strengthening the perception of residential rental accommodation as a home (rather than a short-term transitional place).

Rather than treating tenants less favourably than landlords, these proposed reforms will create a more neutral standpoint when it comes to renting with pets in New South Wales. Applying such reforms will also create greater consistency between tenancy laws and strata laws in relation to the keeping of pets.

While landlords are entitled to freedom of contract in control of their use of land, this notion must be balanced against the rights of tenants to have peace, comfort, enjoyment, and proper use of the residential premises they are leasing. For many people, having a pet provides comfort, companionship, and improvements to mental health and general wellbeing. Currently, it is common for landlords and real estate agents to refuse consent for a pet, regardless of the circumstances.

[5] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 2019, 3339 (Marlene Kairouz): <https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019-09-12.pdf>.

It is uncommon for pets to have an adverse impact on the use and enjoyment of others within a community, particularly where the pet is well-trained, quiet, and hygienic. In these circumstances, there is no rational connection between keeping a pet and a negative impact on other community members. In such a case, a complete ban on pets would constitute an unreasonable and unnecessary interference with the ordinary rights of tenants over their residential tenancy. Other obligations of tenants under the Act, including those pertaining to nuisance and cleanliness, are adequate to address situations where there is such an impact from having a pet approved within a residential tenancy.

MLC's tenancy and strata clients have expressed the importance of having freedom of choice when living within a residential tenancy, and that a blanket ban on pets is unduly harsh and unreasonable. In the context of a strata scheme, following the decision of the New South Wales Court of Appeal in 2020 in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250, an Owners Corporation is unable to have a by-law implementing a complete ban on pets in a strata scheme, as such a law would be invalid for being harsh, unconscionable and oppressive under the SSMA. It then appropriate to introduce provisions in the Act to carry over and reflect these principles, so that a landlord cannot have an additional term in a residential tenancy agreement completely banning pets.

Case Study – Ahmed

Ahmed approached Marrickville Legal Centre due to their landlord crossing out the additional terms dealing with pets. The client lived alone within a strata scheme and wanted some companionship. Despite the Owners Corporation having a new by-law which allowed pets, the landlord refused to consider amending the additional term to allow a pet. As a result, the client was unable to get a pet, despite many other tenants and owners within the strata scheme enjoying the companionship of their pets.

[Consultation Paper Q8] 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.

The Tribunal should not have the power to allow a landlord to 'refuse' the keeping of an animal at a specific rental property on an ongoing basis. Rather, the Tribunal should be given powers to make orders to remove a pet from a premises in a situation where there is unreasonable interference and/or substantial nuisance caused by the pet during the residential tenancy, to align with the intention of Section 137B of the *Strata Schemes Management Act 2015* (NSW) and Section 36A of the *Strata Schemes Management Regulations 2016* (NSW).

Under those strata legislative provisions, an Owners Corporation cannot unreasonably refuse consent to an animal being kept as a pet, except where there is an unreasonable interference with the use or enjoyment of the lot by other residents.

Case Study – Jane

In June 2022, Jane came to MLC for some legal advice. She lives in a strata scheme in Western Sydney. She owns a pet British bulldog. The dog provides companionship to her daughter with a neurological disability. The dog is not de-sexed and is not an assistance animal. Jane's owner's corporation declined her application to keep the pet in the apartment because of a strata by-law requirement for dogs to be de-sexed. Jane was forced to take the matter to the Tribunal. The Owners Corporation engaged solicitors who sent threatening letters to Jane to withdraw the application.

[Consultation Paper Q9] What other conditions could a landlord reasonably set for keeping a pet in the property? What conditions should not be allowed?

The landlord should not set onerous and unreasonable conditions on keeping a pet in a residential tenancy. The only conditions which should be allowed are that the tenant agrees that:

> ***(a) they must keep the animal within the premises, or supervise the animal when exercising it outside neighbouring premises, and***
>
> ***(b) they must ensure the premises are returned in a similar condition to when the agreement was entered into, fair wear and tear excepted, and***
>
> ***(c) they must ensure the animal does not cause a nuisance, or breach the reasonable peace, comfort or privacy of neighbours, and complies with any requirements under any other Act, and***
>
> ***(d) any relevant by-laws surrounding the keeping of pets are complied with.***

Case Study – Bernadette

Bernadette commenced their tenancy in a townhouse and sought permission to get a pet. The landlord claimed that strata by-laws prohibited them from keeping pets. Bernadette was unable to obtain a copy of the by-laws, nor were they provided with a copy upon signing the lease agreement. Later, the real estate agent informed them that there was no registered Owners Corporation for the property. Due to the lack of information available to them, Bernadette could not get clarity on their right to have a pet.

Information to help renters know when a rent increase is 'excessive'

[Consultation Paper Q26] 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.

MLC supports the proposition for publicly available data on rent increase and market trends that are independently collected.

Greater transparency around rent increases will allow both renters and landlords the ability to ensure that rents are made fair. Having information that is publicly available leads to better communication from both parties and a decrease in matters being litigated around the lack of information or non-specific references to "the market trends". The concept of the market rate for a rental property has come about due to agents setting benchmarks that other agencies are competing with for greater business, and not considering the actual value or market demand for the property itself. As a counterbalance, general trends of tenant income could be collected and made publicly available to renters. MLC expects this to lead to clearer and fairer rent standards.

While rental affordability benchmarking is not uniform for both social tenancies and private rentals, the 25%-30% of household income standard may become a relevant factor for determining rent parameters.[6] As social housing rents are primarily calculated based on market rent, which is currently a relevant consideration for private rentals, information on affordability standards should be made publicly available to manage expectations for tenants and landlords alike. Ultimately, the implications of such a change could help alleviate the current cost of living crisis, guarding the spending capacity of tenants.

[Consultation Paper Q27] What do you think is the best way to collect this information?

The RBO service currently collects data on the rental bond amount for all tenancies in NSW. Upon a tenancy agreement being signed, the weekly rent should also be recorded. Additionally, landlords should have a duty to register any increase in rent via RBO. Extra information regarding the basis for a given increase or reduction could be recorded too (e.g. by negotiation or Tribunal order). This data could then easily be stored by RBO, as well as being made publicly available to ensure that prospective and current renters alike are fully aware of the rental history of a property and can make informed decisions about where the actual market level of rent lies for a given property.

[6] 'Charging Rent Policy': <https://www.facs.nsw.gov.au/housing/policies/charging-rent-policy>

Alongside rent increases, rent reductions should similarly be registered with RBO or the Office of the NSW Rental Commissioner. This would ensure that data on rents is more accurate and up to date.

The precedent for this method of data collection comes from the *Landlords and Tenants (Amendment) Act 1948* (NSW). Under the legislation, the relevant Minister could create Fair Rents Boards to exercise powers and functions in relation to any prescribed premises, such as rental properties: see Sections 9 and 12. The Board made available information concerning the 'fair rent' of any shared accommodation, upon individual request. The Rent Controller – appointed under the *National Security (Landlord and Tenant) Regulations* – worked alongside the Board to promote fairness for tenants and could request the Board to act where required. This may in part inform the direction for the NSW Rental Commissioner.

Other changes to improve rental affordability

[Consultation Paper Q28] 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.

MLC supports reform to carry over the 'one increase per 12 months', regardless of the kind of tenancy (e.g. whether there is a fixed term, periodic agreement, or a combination of the two in that 12-month period).

Lately, MLC has seen a trend where landlords and managing agents have shifted from a series of fixed term agreements, to having mixed tenancy agreements, whereby a tenant alternates between fixed terms and periodic agreements rapidly. For example, a 6-month fixed term followed by a few weeks of periodic agreement and another 6-month fixed term. A rent increase notice can be given during the first fixed term for a date in the periodic period. Plus, rent increases may be included in either or both fixed terms. So, there can be up to three rent increases in twelve months.

Case Study – Boris and Pauline

Boris and Pauline entered into a 12-month lease, where there was a periodic agreement for three months after the fixed term expired. The landlord's agent issued a rent increase of $150 in the periodic agreement, which was payable due to the correct notice being given. After three months of the periodic lease, the landlord's agent contacted them about whether they wanted to take up a new fixed term lease for twelve months but at an increased rent. Boris and Pauline feared that if they did not accept the new fixed term agreement, they would be issued a notice of termination. Section 41 does not prevent the rent being increased on renewal of a fixed term agreement. The use of repeated fixed-terms to increase the rent with each new agreement, as well as increasing the rent once the tenancy entered a periodic phase, allowed the landlord and agent to act in a way that circumvented the intention of Section 41 of the Act in setting parameters on the frequency of rent increases and on notice periods.

[Consultation Paper Q29] Do you think fixed term agreements under two years should be limited to one increase within a 12-month period? Why or why not?

MLC submits that a fixed term agreement under two years should be limited to one increase within a 12-month period in circumstances where that rent increase is specified within the terms of the agreement. In addition to this limitation, we submit that if a rent increase is specified within a fixed term agreement under two years, the landlord should still be required to issue a reminder notice of rent increase sixty

days prior to the increase taking effect. It is important to note that any changes to a rental amount should be communicated to ensure that tenants pay the correct amount at any point in time, and there is no confusion from either party as to when a rent increase is due to commence. This would also remove the current ambiguity around this issue and ensure both parties to a tenancy agreement are fully aware of their obligations accordingly. These requirements will give rise to a logical point in the tenancy where a tenant can review the amount of rent that they will have to pay. This will allow a tenant to assess their financial circumstances to ensure that they are able to afford the previously agreed-upon rental increase.

[Consultation Paper Q30] There are other options the NSW Government could explore to improve rental affordability through limiting rent increases.

These other options include 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.**
- **Amend the criteria in the Act where a rent increase is 'excessive'. Currently, the list of factors that may be taken into account in considering if an increase is 'excessive' includes the market level of rent for comparable properties and the state of repair of the property.**

What do you think about the above options? Please provide detail.

MLC supports the proposal to put the onus on a landlord to justify a rent increase that exceeds the Consumer Price Index (**CPI**)**.** At present, a rent increase that meets the technical criteria in Section 41 (and Section 42 where applicable) is enforceable and payable until the Tribunal finds that it isn't or the parties agree on a different amount to be paid instead.

For the tenant who receives an excessive rent increase and takes that matter to the Tribunal for resolution, the dispute will be adjourned for a formal hearing at a later date if the matter is not settled at conciliation. This later date tends to be one to two months in the future, or up to three months depending on the caseload the Tribunal is experiencing at a given time. This leaves the tenant paying the excessive rent until the formal hearing and, if the decision is reserved, until the decision is released. In some cases, the parties may agree to hold off on the challenged rent increase being payable until a Tribunal decision is made, however there is no obligation on the parties to do this, and even where such an agreement is made, there is a risk that a lump sum amount of money would be payable upon Tribunal orders being made. For many, this is too great a financial burden, especially where the rent increase is exorbitant. At MLC, we have seen tenants receive rent increases as high as 50%**.** If the tenant should be successful in their application, the Tribunal has the power to order the difference between the new rent that is paid and whatever that might be set by the Tribunal. However, before that time, the tenant may

already be experiencing undue hardship as a result of this drawn-out process. Any reimbursement awarded for excess rent paid may come far too late for many.

The above reality and the uncertainty of whether the Tribunal would even make an order in a tenant's favour, especially given the factors currently considered in Section 44(5). This creates two possible outcomes, neither of which is satisfactory:

(1) The tenant moves rather than disputing the rent increase at all, incurring immediate costs, stress and upheaval;

(2) The tenant settles at conciliation for a lesser increase which is still arguably excessive but is slightly less of a burden than the alternative.

These are arguably not free 'choices' that the tenant makes but are rather the only possibilities available to them under the current legal framework. This will continue as long as the burden is placed on the tenant to dispute a rent increase.

Case Study – Ashley

Ashley was on a 12-month fixed term agreement, paying $770 per week. Two months after reporting plumbing issues, the landlord had a tradesperson carry out repairs. The issues were only partly fixed, meaning part of the bathroom was unusable. Ashley requested a rent reduction to compensate the lack of amenity but the landlord refused.

One month later, the landlord issued a notice of rent increase to $1300 per week. Despite attempts to negotiate, the landlord did not adjust the increase. Ashley's only option to challenge this was before the Tribunal, while simultaneously seeking compensation for their loss of amenity. Another week later, the landlord issued Ashley with a notice of termination.

Section 44(5)

(a) The general market level of rents for comparable premises in the locality or a similar locality

MLC has significant concerns with this criterion ('the market test') is fundamentally flawed in application, due to the nature of the real estate industry itself and power imbalances in legislation. It is not suitable in a rental market that is subject to inflation.

Gauging the state of the market for real estate is largely subjective. Data tends to be self-reported, there is little standardisation for quality of asset, little transparency or clarity in data, and not all participants have equal access to information. This inhibits a truly 'free' market and leaves it open for vested interests to make their own assessments, which are held forth and accepted as objective.

Although the Tenants' Union's Rent Tracker Postcode Tool uses verifiable data from NSW Fair Trading to record average rents according to property type and suburb over a given quarter, MLC notes the decision *Welch v Chabra* [2022] NSWCATCD 132, where advertisements showing the *asking prices* of residential tenancies in the rental market were preferred by the Tribunal over this data.

At present, where rents have risen across the board, this 'market test' is often used with success to justify excessive rent increases in circumstances where the quality and state of repair of the premises has not changed or may even have deteriorated.

Looking further, the market as a baseline for setting rents is one-way street only. Landlords and real estate agents may subjectively say the market has increased and the tenant must wear that cost, but when the market dips, there is no basis in legislation for the tenant to insist that the rent be reduced solely for that reason, and no power for the Tribunal to make such orders.

The power imbalance in the legislation only allows rent to move one way under the market test. This inhibits the market reaching equilibrium, which keeps it at an artificially high level, by which other rents are judged. Landlords and real estate agents frequently refer to 'the market' as forcing their hands in increasing the rent, as though they have little choice in the matter. However, in acting *en masse* in this way, their decisions, as part of the market itself, create a **cyclical market collusion effect** where the state of the market is a function of investor choice which sees an opportunity to significantly increase rents – and the market permits it. This then becomes the baseline against which other rents are assessed and increased on the basis of being 'below market.'

MLC has been told by tenants that this market test is a significant deterrent to making an application to the Tribunal for orders that their rent increase is excessive.

(b) the landlord's outgoings under the residential tenancy agreement or proposed agreement,

This consideration allows landlords to seek to pass the burden of interest rate rises on to their tenants. Tenants duty advocates at MLC have witnessed a trend of Tribunal members to consider evidence of increases in property management fees and strata levies incurred by the landlord.

MLC considers this to be an unfair situation and suggests that this provision was never intended to shield or indemnify landlords from the financial risks of their own investment choices. A landlord assumes the responsibility of paying their investment's costs including accepting the risks of such an investment, and the provisions under the Residential Tenancies Act are intended to be protections for tenants and landlords around the use of the property and responsibilities owed under the agreement between the parties.

This also creates an inconsistency where the landlord's capacity to afford the property is effectively taken into account in a rent increase dispute but not that of the tenant. MLC views this as prejudicial.

There should be some consideration given for an existing tenant in a property and their ability to afford a rent increase – with particular reference to household income – in the same way that the landlord's outgoings are able to form the basis of a rent increase.

Overall Recommendation

Overall, Marrickville Legal Centre recommends a framework for rent increases that sets a threshold for 'reasonable' increases of the CPI since the last rental increase, or CPI plus 10% if there has been no increase since the tenancy agreement began – similar to the ACT model. Any increase above these amounts should be precluded or ruled out on the basis that it is excessive. In the event it is not ruled out or precluded, the limit should act as a 'threshold' determining who bears the onus of proof to justify a rent increase – with the onus of proof following Section 44(5). Where a landlord wants to increase rent by more than the set limit (the threshold) they are required to seek the renter's consent for the increased amount. Where consent is not provided, the landlord must apply to the Tribunal for the increase and be able to demonstrate and provide sufficient evidence as to why the increase above the threshold is justified. An increase above the threshold should only be accepted by the Tribunal in exceptional circumstances. The Tribunal should have regard to general trends of rental household income as a relevant consideration in making a determination, including the 25-30% income benchmark used in the social housing scheme.[7]

[7] 'Charging Rent Policy': <https://www.facs.nsw.gov.au/housing/policies/charging-rent-policy>

Free Ways to Pay Rent

[Consultation Paper Q34] 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.

The best way would be for the Act and for residential tenancy agreements to contain a clause that is a modification of Section 35, specifically Section 35(2), which currently requires that:

> A landlord or landlord's agent must permit a tenant to pay the rent by at least one means for which the tenant does not incur a cost (other than bank fees or other account fees usually payable for the tenant's transactions) and that is reasonably available to the tenant.

This section is a term of every residential tenancy agreement.

MLC recommends this sub-section be modified to require a tenant to pay their rent by direct electronic bank transfer or BPay.

In the absence of such a requirement, a pattern of behaviour has emerged in which tenants are effectively being coerced into using third-party payment platforms or apps to pay their rent. This situation is brought about in the following way:

> Managing agents present tenants with a residential tenancy agreement that provide that the tenant may use a third-party platform to pay their rent or they can pay in person at the managing agent's office in cash or cheque or at the post office.
>
> The third-party platform generally passes the fees for transactions onto the tenant and therefore does not satisfy the criteria in Section 35(2). In addition, third-party platforms come with their own terms and conditions that the tenant is not able to refuse or negotiate. Tenants have raised valid concerns about the storage, use and safety of their personal information and what redress, if any, they would have in the event that their data were compromised.
>
> When challenged on this clause of the tenancy agreement, the managing agent maintains that payment in person at the managing agent's office in cash or cheque or payment at a post office is both free from additional costs and reasonably available to the tenant, and therefore represent viable and legally compliant alternatives to the third-party app for the tenant to use to pay their rent.
>
> Paying one's rent at the managing agent's office or at the Post Office might be 'fee free,' but given that these venues are only open during business hours or at limited times over the weekend, may not be local to the tenant, and in the case of Post Offices are no longer regular fixtures on every main road, this is very rarely something that is 'reasonably available for the tenant.' Nevertheless, MLC frequently encounters cases where managing agents have continued to insist that paying rent in person in this way is in fact 'reasonably available to the tenant.'

> This presents tenants with a situation where in practicality, the only way in which they can regularly pay rent without dedicating significant time and inconvenience to the prospect is via the third-party app, which charges them a premium for the privilege of paying their own rent.

The question of what is 'reasonably available to the tenant' is not expanded upon in the legislation and there is little reported case law to guide interpretation. This is in part due to the Tribunal's emphasis on pre-hearing conciliation and settlement and the fact that very few first-instance Tribunal orders are reported.

In the absence of clear legislation or settled law on the subject, tenants have reported to MLC that NSW Fair Trading is not able to enforce Section 35(2) against landlords and managing agents where residential tenancy agreements offer this arguably false choice between payment methodologies.

Finally, in relation to payment by cheque as an issue in and of itself, MLC notes that it is Commonwealth Government policy to phase out the use of cheques by 2030.[8] It follows that it should not be permissible for a landlord or real estate agent to require payment of rent by cheque, or present payment by cheque as an option, if there is no other truly fee-free means of paying rent that is reasonably available to the tenant permitted under the residential tenancy agreement.

[8] 'Cheques will be phased out by 2030 as mobile wallet use sky-rockets': <https://www.abc.net.au/news/2023-06-07/australian-government-to-phase-out-cheques-by-2030/102449560>

Renters moving into strata schemes

[Consultation Paper Q36] 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?

The SSMA only provides for the collection of levies, special levies and recovery of legal fees and fees and charges incurred from debt recovery actions by the Owners Corporation or recovery for costs for damages to common property. Any other charges or levies outside the SSMA provisions are deemed unlawful.

MLC has encountered differing views about whether by-laws requiring payment of money outside of the provisions of the SSMA is lawful. This includes the moving in/out bond, pet bond, parking fines to name a few. One view is that pet bonds cannot be disputed if it is tied carefully to the by-law on 'keeping of pets' provisions but argue against the moving in/moving out bond because there is no legal basis.

The other view is that if the Owners Corporation by-law on payment of moving in/out bond is validly passed and registered, it can be validly enforced. However, given the SSMA has already sufficiently provided for recovery for damage to common property caused by owners or occupiers, any by-laws on a moving in/moving out bond is void to the point of inconsistency. However, tenants do not have standing to challenge the validity of the by-law in Tribunal.

There are two options in the current case: (1) ask the Owners Corporation to exercise discretion and waive the bond given the disadvantage and hardship of the tenant, or (2) ask their landlord to challenge the by-law on the basis that it is invalid as it contracts out of the legislation. This is less ideal and impractical because of the lengthy NCAT process and potential legal costs involved in bringing such a legal case to NCAT.

MLC recommends Owners Corporations and strata tenants alike be advised of any inconsistencies between by-laws and the SSMA, and proposes the NSW Rental Commissioner pursues legal action where strata corporations continue to be non-compliant.

Other Support

Recommendation 1: The Act should be amended to introduce a document allowing tenants and occupiers within a strata scheme a right of reply in response to a Notice to Comply with a By-Law.

Where there has been a breach of a by-law, occupiers receive a Fair Trading Notice to Comply with a by-law document from the Owners Corporation. An additional form should be incorporated in this document providing tenants and occupiers with a right of reply, operating similarly to a Penalty Notice.

This is particularly important in circumstances where the requirement of landlords or agents to provide a copy of by-laws to new tenants is disregarded. Provisions for enforcement of by-laws and penalties for breach should be made clear to tenants, such as by providing a model covering letter from landlords or agents to new tenants. Where a landlord or agent fails to do so and a tenant breaches a by-law, it is important to provide the tenant an opportunity to disclaim responsibility, request a review on the grounds of hardship, or explain that a copy of the scheme's by-laws had not been provided at the start of the tenancy. A breach of a strata by-law can be utilised by a landlord to argue a tenant has breached their residential tenancy agreement and providing a tenant with a more direct mechanism to reply to the alleged breach is crucial.

This proposal would operate in conjunction with a reformation on the way in which by-laws are enforced, as there needs to be better clarity within the legislation as to the difference between warning letters to occupiers for breach of by-laws, and the more formal Notice to Comply with a specified by-law.

Recommendation 2: Section 106(5) of the SSMA should be expanded to allow tenants within a strata scheme to make an application to the Tribunal for reasonably foreseeable loss as a result of an Owners Corporation breach of Section 106(1).

The Tribunal is designed for the effective, quick, cheap and just resolution of strata proceedings. In providing the Tribunal with the jurisdiction to determine strata matters under the SSMA, there needs to be appropriate consideration of the suitable powers to be given in relation to decision-making. While the Act allows the Tribunal to make general orders to settle complaints and disputes, there is a lack of incentive for respondents to comply with the orders made. Providing the Tribunal with the power to order damages or compensation where appropriate, allows matters to be finalised within the one legal forum, which provides an effective and efficient resolution of the legal issue for the parties involved, as well as the courts and tribunals.

The Tribunal's Consumer and Commercial Division already has demonstrated adequate experience in ordering compensation and the making of money orders, including in the tenancy division, home building division, and consumer (general) division. The Tribunal's powers should be extended within the strata division to allow for compensation and damages for areas such as:

- Loss suffered by lot owners and tenants due to failures by an Owners Corporation to properly maintain common property (Section 106);
- Damages to an owner's lot caused by an Owner's Corporation accessing a lot and carrying out work within a lot (Section 122);
- Damages to an owner's property or personal belongings when work is carried out on common property by an Owners Corporation or its agents (Section 122(6)).

As clarified in the recent NSW Court of Appeal decision of *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284, the ability for the Tribunal to award damages saves time, costs and the stress of having to commence two different claims in two different jurisdictions with two different sets of rules. In addition, providing the Tribunal with such powers would avoid duplication of proceedings and remove any inconsistencies in decision making.

Case Study

A tenant living in a strata scheme approached SCSAS for advice on seeking compensation from the Owners Corporation. The tenant had parked in his car in his exclusive use garage space. The Owners Corporation had organised contractors to fix common property pipes in the basement garage but failed to inform any of the tenants within the scheme of the work before it commenced. When the tenant went to his garage space, his car roof was completely damaged by the contractors with damages amounting to $3,000. The landlord refused liability, the Owners Corporation refused liability, and the contractors refused liability. Whilst the matter did resolve through negotiation, the tenant had no avenue at the Tribunal to pursue the Owners Corporation for damages or compensation for their trespass and failure to notify of the works impacting on the exclusive use of his lot.

Recommendation 3: Increased funding for legal services assisting renters in New South Wales.

In our experience, tenants are often faced with insecure housing and the additional pressure of a dispute about a pet with a landlord or their agent causes undue stress and anxiety.

In our view, tenants will continue to face risks associated with their shelter unless additional funding is allocated to such specialised services. While this includes the need for generalised legal, health and social services, we acknowledge the need for specialised support for tenants with specific needs, specifically:

- Increased funding for Tenants' Advice and Advocacy Services part of the TAAP Program and;
- Culturally appropriate and language specific community options for Culturally and Linguistically Diverse clients.