Submission to the NSW Government's review of NSW rental laws

Date: 11 August 2023.

REMOVING 'NO GROUNDS' TERMINATIONS

acknowledges the NSW Government's commitment to ending 'no grounds' terminations. This is an important and monumental amendment to the law that will provide much needed housing security to many tenants.

New reasons to end a tenancy

The Consultation Paper proposes the introduction of the following new reasons for terminating a tenancy:

- 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 in.

does not consider a property being prepared for sale to be a reasonable new ground for the following reasons:

- If a property is sold to an investor, then the tenancy should simply continue. This is in the interests of both the tenant and the new landlord who will not have to source a new tenant for the property.
- If the property is sold to an owner occupier, then they may rely on s86 of the *Residential Tenancies Act 2010* (NSW) (**RTA**) if required.
- There are already sufficient provisions in the RTA to allow a landlord to prepare a property for sale whilst occupied by the tenant. For example, s53 of the RTA ensures tenants cannot unreasonably refuse to agree to days and times for the premises to be available for inspection by prospective buyers.

has had direct experience with many clients in other jurisdictions whose landlords have used the 'property being prepared for sale', or equivalent, as grounds to evict tenants only to then relet the property to new tenants shortly after recovering possession. By the time a tenant becomes aware of the issue they have usually already moved out of the premises, paid the costs associated with the move and entered a new lease (often with a higher rent due to current market conditions). We have also seen cases where tenants have become homeless, or entered unsafe or unstable housing, only to find out the property was relet to new tenants. In such circumstances, there are little to no options available to tenants to remedy the issue or to hold the landlord accountable.

In our experience, jurisdictions which require the landlord to provide evidence for the reason *and* imposed restrictions on reletting the property afterwards provide greater protections for tenants. In our view, such requirements do not disadvantage landlords who do the right thing but rather act to disincentivise the misuse of any new reasons for terminating a tenancy that may be implemented.

Recommendations

recommends the implementation of strict protections for tenants to accompany any new reasons for eviction that are included in the RTA.

> ***Recommendation 1:*** *appropriate notice periods, evidence and other restrictions should be applied to any new reason for termination included in the RTA.*

The below table sets out our specific recommendations.

Reason	Proposed notice period	Proposed evidence	Proposed restrictions
The property will go through reconstruction, repair or renovation that requires it to be vacant.	90 days	Photographic proof that repairs are required and a contract with, or quotation from, a suitably qualified tradesperson for carrying out planned repairs, stating: • the nature of the repairs required. • the reasons why the premises needs to be vacated by the tenant in order to carry out the repairs. • an estimate of the length of time it	Cannot relet property for 2 months after recovering possession, except with permission from NCAT.

		will take to complete the repairs.	
The property will change its use (e.g. change from a home to a shop or office).	90 days	Statutory declaration setting out the proposed use for the premises and proof of the ABN of the business, business registration or council planning permit.	Cannot relet property as a *residential premises* for 6 months after recovering possession.
The property will be demolished.	90 days	Building permit for demolition and a contract with a suitably qualified builder-demolisher, stating the date that demolition will occur.	Cannot relet property for 2 months after recovering possession, except with permission from NCAT.
The landlord will move into the property, or a member of their immediate family will move in.	90 days	Statutory declaration.	Cannot relet property for 6 months after recovering possession.

Recommendation 2: *there are appropriate penalties and recourse for tenants against landlords who breach restrictions.*

If a tenant becomes aware that a landlord has breached a restriction on reletting the property, there should be options available to ensure:

- the tenant can seek compensation for any losses caused by the breach (inclusive of both financial and non-financial loss); and
- penalties may be applied to landlords who are misleading or who breach such restrictions (for example, in QLD there are penalties for landlords who are false or misleading).

Recommendation 3: *landlords should be required to give a reason to end any type of tenancy agreement.*

Landlords should be required to give reasons for ending *any* type of tenancy. Allowing landlords to end a tenancy for no reason at the end of a fixed term tenancy but removing 'no grounds' evictions for periodic tenancies is an arbitrary distinction that serves no utility.

PET OWNERSHIP

Currently, NSW's rental market remains restrictive when it comes to allowing pets, causing distress and hardship for many tenants who wish to keep companion animals. In NSW, the current default position is that tenants need to seek the landlord's permission before keeping pets on the premises. Landlords have the right to include specific terms in the tenancy agreement either allowing or prohibiting pets. Thus, most landlords have a standard clause written into their tenancy agreements confirming pets are not allowed at their leased property, without regard to whether this clause is fair in the circumstances.

Rules are different for properties managed by a Body Corporate in NSW such as those subject to Strata Schemes. Section 36A of the *Strata Schemes Management Regulation 2005* (NSW) was recently amended to confirm that strata by-laws cannot prohibit pets unless it would unreasonably interfere with other occupants. Although this provides some positive movement in respect of pet-ownership, meaning landlords can no longer rely on a blanket ban of pets under Strata By-laws, tenants' rights are still governed by individual, enforceable laws set out by landlords in their tenancy agreements.

agrees with the position of the NSW Tenants' Union[1] that the above is potentially a breach of s50 of the RTA which covers a tenant's right to peace, comfort, and privacy within the premises, however, this position has not been tested at court. Instead, we believe a reasonable balance between the rights of tenants and landlords should be struck.

Recommendations

recommends the adoption of pet friendly rental laws and a presumption in favour of tenants. The below sets out our specific recommendations.

Recommendation 1: *the inclusion of a presumption in favour of tenants to keep pets, except in limited cases where there are reasonable grounds for refusal.*

Specifically, the model as set out in the *Residential Tenancies Act 1997* (ACT) (**ACT Model**) is a step in the right direction to improving the balance of the law. Under the ACT Model, a tenant who is renting, and wishes to apply for a pet, has a general right to seek consent to keep a pet in their property.

recommends that tenants be able to fill out a standard form and submit to their landlord to request permission to keep a pet. The landlord should then have 14 days to either consent to the request or file an application with the NSW Civil and Administrative Tribunal (**Tribunal**) to seek an order to refuse the application. If no response is received the landlord should be presumed to have consented. The landlord's approval to keep a pet should continue for the life of the approved pet and should not cease at expiry of the lease term.

Recommendation 2: *the inclusion of an exhaustive list of valid reasons for landlords to refuse a request to keep a pet (to be contained in the RTA or Regulations).*

[1] https://www.tenants.org.au/resource/guide-renting-pets-nsw

’s position is that the list set out in s71AF of the ACT Model is more than sufficient to protect the interests of landlords and could be replicated in NSW. It includes the following valid reasons for refusal:

- the premises are unsuitable to keep the animal;
- keeping the animal would result in unreasonable damage to the premises;
- keeping the animal would result in an unacceptable risk to public health or safety;
- the lessor would suffer significant hardship; or
- keeping the animal would be contrary to law, strata by-laws or a council order.

In our view, the other potential reasons as proposed in the Consultation Paper, such as ‘keeping the pet would exceed a reasonable number of animals’, are already adequately governed by other legislative frameworks (such as the *Local Government Act 1993* (NSW) (**LGA**)).

Recommendation 3: *the onus should be on a landlord to obtain an order from the Tribunal should they wish to refuse consent for a renter to keep a pet.*

’s view is that requiring tenants to make an application to the Tribunal to challenge a refusal by a landlord places an unfair burden on tenants.
recommends the ACT Model in this regard which requires a *landlord* to apply to the ACT Civil and Administrative Tribunal (**ACAT**) within 14 days to obtain an order should they wish to refuse to consent.

Recommendation 4: *landlords should not be able to impose extra conditions on pet owners.*

does not recommend landlords be able to put conditions on keeping a pet in the property, as it only causes unnecessary complexity for no real benefit to the parties. Tenants already pay a bond to cover any damage to the property, including damage made by a pet, and have obligations to keep the premises in a reasonable state of cleanliness. Furthermore, landlords have the additional option of seeking an order for compensation for any loss or damage caused, beyond what is covered by the bond.

Furthermore, other legislation such as the *Companion Animals Act 1998* (NSW) and the LGA already provide legal protections for the welfare of animals as well as allowing for restrictions in relation to the keeping of animals generally. Tenants should not be subjected to additional rules beyond what already apply to the rest of the community.

Recommendation 5: *landlords must state their position in respect of pets before an application is submitted by a tenant and cannot require tenants to disclose pet ownership at the application stage.*

proposes tighter regulation in NSW around the application process, so a tenant has a clear understanding of the landlord’s position as to pets *prior* to any application being submitted. We propose that all landlords and real estate agents advertising a property

for rent must be required to state their position on pet ownership up-front. If it is such that applications with pets will not be considered (for example, because there are Strata By-laws preventing it), we propose a landlord must state what reasonable ground of refusal they base their position on. We propose the list of reasonable grounds for refusal be the same for refusal of pets during a tenancy as those prior to commencement of a tenancy.

If a tenant wishes to obtain consent prior to entering into an agreement, they are free to disclose to the landlord or real estate at any stage and seek consent in writing. However, recommends that tenants not be *required* to disclose pet ownership upon application (to avoid landlords simply denying such applications in favour of a tenant without pets or using this as an excuse to deny an application for other reasons) and instead must disclose such ownership within 7 days of entering into the agreement. The relevant consent processes as described above can then be followed.

PRIVACY OF NSW TENANT INFORMATION

Privacy in NSW and Australia

Some Australian tenants' information is protected under the *Privacy Act 1988* (Cth) (**Privacy Act**), which governs the handling of personal information by certain private organisations. However, this is estimated to include only 45% of real estate agencies[2] and we assume (given the requirement to be an organisation with over $3 million in turnover) far fewer landlords.

The Privacy Act sets out the Australian Privacy Principles (**APPs**), which outline how personal information should be collected, used, disclosed, and stored. It includes protections such as:

- The requirement to obtain consent before collecting personal information and to inform the person of the purpose for which their information is being collected and used.
- The right to access and correct information that is incorrect, incomplete, or outdated to ensure the accuracy of their data.
- Limits on the use and disclose of personal information. It should only be used for the purposes for which it was collected.
- An obligation to take reasonable steps to ensure the security of personal information, protecting it from unauthorised access, use, or disclosure.

Whilst these protections apply to some tenants in NSW, many are not covered by the APPs which currently have very little protections for the collection, use and disclosure of their personal information.

The International Sphere

Data protection laws for tenants vary across countries, but many jurisdictions recognise the importance of safeguarding personal information and promoting fair practices in the rental market.

- **European Union (EU) - General Data Protection Regulation (GDPR):** the GDPR is one of the most comprehensive data protection regulations globally, applicable to

[2] 5 Kylie Dulhunty 'Are the proposed Privacy Act recommendations a regulatory overreach?', Elite Agent, 20 April 2023: https://eliteagent.com/are-the-proposed-privacy-act-recommendations-a-regulatory-overreach, Consultation Paper, page 9.

all EU member states. It covers personal data, including that of tenants, and imposes strict requirements on how data is collected, processed, and stored. Under the GDPR, individuals have the right to access their data, request corrections, and even request deletion (the "right to be forgotten"). Data controllers (landlords or property management companies) must obtain explicit consent from tenants before collecting and using their personal information and must ensure the data's security.

- **United States - Fair Housing Act (FHA) and Fair Credit Reporting Act (FCRA):** the FHA prohibits housing discrimination, which includes discriminatory practices based on race, colour, national origin, religion, sex, disability, and familial status. Landlords are required to treat all prospective tenants fairly and cannot collect or use personal information in a discriminatory manner. The FCRA regulates the use of consumer reports, including tenant screening reports, by requiring landlords to obtain tenant consent before accessing these reports and providing adverse action notices if they take adverse actions based on the information in the reports.

- **Canada - Personal Information Protection and Electronic Documents Act (PIPEDA):** PIPEDA governs the collection, use, and disclosure of personal information by private organisations, including landlords and property managers. It grants tenants the right to access their personal information and request corrections if necessary. Landlords must obtain tenants' consent before collecting and using their personal data and ensure the data's security.

- **United Kingdom - Data Protection Act (DPA) and Housing Act:** the DPA governs the processing of personal data, including tenant data, in the UK. It provides tenants with the right to access their information and request corrections. The Housing Act also includes provisions related to tenancy deposits and the protection of tenant data in this context.

Recommendations

recommends that the RTA be amended to include increased protections for the collection, use and disclosure of personal information. The below sets out our specific recommendations and comments.

Recommendation 1: *limiting the information that can be collected for the purposes of a rental application.*

supports limiting the information that can be collected for the purposes of a rental application. A landlord and/or real estate agent should *only* be able to collect information that is reasonably necessary to assess a tenancy application. The legislation should provide guidance on what is reasonably necessary. For example, sufficient information to confirm the applicant's identity and capacity to pay.

The 'possible approach' suggested on page 10 of the Consultation Paper is more than sufficient for a landlord to confirm the applicant's proof of identity, ability to pay the rent and suitability for the property. However, prospective tenants should not be *required* to provide at least two documents to demonstrate 'suitability' as this puts many community members at an unfair disadvantage when attempting to secure housing. For example, first time renters, people in unstable housing and/or people who are escaping family violence are likely to struggle to provide such documentation. Instead, if such an approach is adopted, we

recommend combining the documents listed under 'ability to pay agreed rent' and 'suitability' and limiting landlords to no more than 4 of those documents (with tenants required to provide at least 1 suitability document).

supports the use of a standard tenancy application form that limits the information that can be collected when applying for a rental property, as long as the form is accessible (for example, tenants must be able to request the use of a paper form).

Whilst agrees that limiting the information obtained at the application process will help reduce discrimination against tenants, we maintain that significant reforms to the *Anti-Discrimination Act 1977* (NSW) are still needed to provide adequate protections against discrimination for tenants.

> ***Recommendation 2:*** *limits should be placed on how landlords and real estate agents can use or disclose a tenant's personal information.*

supports the implementation of strict restrictions on how landlords and agents can use and disclose a tenant's personal information once obtained. For example:

- Imposing a general restriction on landlords and real estate to *only* use the information for the purposes of maintaining the tenancy, unless:
    - The tenant has consented to the release of their information; or
    - The real estate agent or landlord is required to do so by law.
- Mandating that landlords and real estate agents who seek further information from previous landlords or real estate agents in respect of a tenant must seek consent from the tenant prior to accessing or requesting access to this information.

> ***Recommendation 3****: tenants should be provided with the right to access, modify, and delete their personal data held by landlords and real estate agents.*

recommends an approach similar to that in the GDPR, whereby tenants have the right to access, modify and delete their personal information held by landlords and agents, granting them greater control over their information. If a landlord disputes the request made by the tenant, then the landlord can make an application to the Tribunal to seek an order.

In addition to being able to be deleted at request, also recommends that tenants' personal information be deleted once it is no longer required by the landlord or real estate agent to limit the potential impacts of data breaches. recommends the information be destroyed:

- For the successful applicant, seven years after a tenancy ends; and
- For unsuccessful applicants, three months after collecting the information (with the applicant's consent).

Requiring the retention of data for seven years for the successful applicant is consistent with other rules regarding document and record retention in NSW (for example, legal, tax and financial documents). This ensures such information is available if it is ever required for those purposes by either the landlord or tenant.

It is unlikely the information of unsuccessful tenants will be needed, except for the purposes of tenants applying for other properties. As such, unless a tenant consents to retention for that purpose, information should be deleted promptly.

***Recommendation 4**: tenants should be notified prior to making an application of how their personal information will be used, stored and disclosed so tenants can make informed decisions about the information they provide.*

As part of the application process, prior to submission of the application, tenants should be notified of the following:

- how the landlord or real estate agent may use, store, and disclose the tenants personal information;
- how long the landlord or real estate agent will keep the personal information before disposal;
- how tenants can access, modify, and delete their personal information (see recommendation 3 above); and
- what options are available to the tenant in the event a landlord or real estate breaches their obligations.

For example, such information could be included on any standard tenancy application.

***Recommendation 5:** Abolish Tenancy Databases.*

The Consultation Paper fails to make any mention of tenancy databases, nor proposes any amendments to the legislation to adequately deal with such databases and their use of personal information. However, recommends the abolition of such databases as tenancy databases have been a subject of significant concern due to their potential to perpetuate housing insecurity and discrimination. Issues with these databases include:

- **Lack of Transparency:** tenancy databases are privately run, and tenants often have little visibility into the information stored about them or how it affects their rental prospects.

- **Discrimination and Housing Insecurity:** listing tenants on databases for minor or disputed reasons can perpetuate housing insecurity and create barriers to accessing rental accommodation. This can disproportionately affect vulnerable and marginalised groups, leading to potential discrimination in the rental market. In today's competitive market and rising rates of homelessness, further discrimination of vulnerable people should be avoided at all costs.

- **Limited Recourse and Appeal:** tenants who find themselves listed on tenancy databases may have limited avenues for recourse or appeal, making it difficult to challenge inaccurate or unfair listings. Although avenues for correction and appeal exist, the onus is on the tenant, not the person who has put incorrect information up in the first place.

- **Impact on Rental Market Participation:** tenants who are unjustly listed on databases may face difficulties in securing new rental properties, limiting their ability to move or find suitable housing.

- **Incentive for Landlords to Act Fairly:** the existence of tenancy databases may lead some landlords to rely heavily on blacklisting tenants rather than engaging in fair and proper tenancy practices to understand the context and story behind a tenant's history.

- **Ineffectiveness in Risk Assessment:** there is debate about the effectiveness of tenancy databases in accurately assessing a tenant's rental risk. Factors leading to listings may not always be indicative of a tenant's ability to be a responsible renter.

It is essential to strike a balance between managing risks for landlords and ensuring fairness for tenants. While tenant screening is crucial for responsible property management, it is equally important to consider the individual circumstances of tenants and to provide opportunities for tenants to demonstrate their reliability and responsibility as renters.

believe tenancy databases do more harm than good in striking this balance. Focusing on comprehensive tenant screening practices that assess a tenant's rental history, references, and ability to pay rent, rather than relying on database listings is currently implemented, thus rendering the databases futile.

Ultimately, the goal should be to foster a fair and inclusive rental market in NSW, where both landlords and tenants can confidently engage in tenancy agreements without undue obstacles or discrimination. It is impossible to understand the crucial context of lease violations, or how one incident may be differentiated from others from a listing on a database.

Therefore, recommends the complete abolition of tenancy databases in NSW. A plethora of information is collected by landlords and real estate agents in the application process. There is simply no need for them to then have access to this information on a privately-owned database.

EXCESSIVE RENT AND RENTAL AFFORDABILITY

We understand the NSW Government proposes to collect and make available rent increase information to assist tenants to make informed decisions and exercise their rights.

Whilst this may assist tenants to understand how their rent compares with similar rentals throughout the market, we do not consider it to be an adequate mechanism to address excessive rent and rental affordability more generally. Furthermore, the current protections in relation to excessive rent and rent increases do not adequately protect tenants.

recommends that additional limits be placed on a landlord's ability to raise rent. Our specific recommendations are outlined below.

Recommendation 1: *rent increase caps should be applied.*

A rent increase cap should be imposed, limiting a landlord's ability to increase a tenants rent above a certain percentage of the total rent (our recommendation is increases should be

capped in line with CPI). If a tenant considers this to still be excessive, the current avenues should remain available pursuant to s44 of the RTA.

To ensure flexibility and to allow more significant rent increases where appropriate, landlords should be required to justify any increase beyond the rental increase cap. In such circumstances, the onus should be on the landlord to show why the increase is reasonable and to make an application to the Tribunal seeking an order allowing the rental increase.

Recommendation 2: *additional factors beyond market rent should be considered when determining if a rent increase is excessive.*

Pursuant to s44(5) of the RTA, the Tribunal may have regard to the following when determining if a rental increase is excessive:

- The general market level of rents for comparable premises in the locality or a similar locality.
- The landlord's outgoings under the residential tenancy agreement or proposed agreement.
- Any fittings, appliances or other goods, services or facilities provided with the residential premises.
- The state of repair of the residential premises.
- The accommodation and amenities provided in the residential premises.
- any work done to the residential premises by or on behalf of the tenant.
- When the last increase occurred.
- Any other matter it considers relevant (other than the income of the tenant or the tenant's ability to afford the rent increase or rent).

recommends that the previous rental amount also be considered with a view that an increase well above the previous rent is likely to be excessive. For example, we have seen tenants whose rent has increased by hundreds of dollars in the one increase, which often has the effect of forcing the tenant out of their home.

also recommends that a landlord's outgoings either be removed from the above list, or extra provisions be added to:

- make clear that a landlord's outgoings, in and of itself, is not a sufficient ground to say the rent in question is not excessive; and
- if a landlord's outgoings have been considered, to also allow the tenant's ability to afford the increase be considered (to ensure a fair balance is struck).

Whilst we appreciate that landlords have expenses, investing in the property market and being a landlord is inherently risky. It should not be the responsibility of tenants to ensure that landlords can meet their financial obligations – particularly if this simply passes any consequent financial hardship from landlords to their tenants (who are likely to be more vulnerable, less financially secure, and more significantly impacted).