ILLAWARRA
LEGAL CENTRE

Submission to Improving NSW Rental laws

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Real Estate and Housing Policy

Regulatory Policy, NSW Fair Trading

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Submission on improving NSW rental laws

The Illawarra Legal Centre (ILC) welcomes the opportunity to make this submission on improving NSW rental laws. Where we share our clients' experiences, names and any identifying information has been changed to protect client confidentiality.

About the Illawarra Legal Centre

The ILC is a community legal centre providing free legal advice, casework and community legal education to clients in the Illawarra area. We have provided free legal services since 1985 across a range of areas including domestic violence, discrimination, victims' compensation, welfare rights, financial counselling, child support and tenant advice and casework. We assist approximately 5,000 clients per annum with direct advice, advocacy and casework.

As a part of the ILC's services, the Centre operates the Illawarra and South Coast Tenants Advocacy and Advice Service' as a part of NSW Fair Trading's Tenants Advice and Advocacy Program. The Service provides services from the Illawarra down to the NSW southern border, including the Wollongong, Shellharbour, Kiama, Wingecarribee, Shoalhaven, Eurobodalla, and Bega Valley areas. Our Service dealt with 1,204 cases in the 2022-23 financial year, providing advice, assistance and representation to over 1,000 clients. Our Service operates a free phone and in-person advice service to inform tenants of their rights, appears before the NSW Civil and Administrative Tribunal as a representative for disadvantaged tenants and also provides duty advocacy services at NCAT hearings in our catchment.

The Approach of this Submission

These submissions focus on enhancing the overall fairness and equity of the NSW rental system. This is in accordance with the Minister's announcement of this consultation and the election commitments made by the NSW Labour Party in the 2023 NSW election. Central to these recommendations is the recognition of housing as a human right and ensuring that the rights of both landlords and tenants are respected, balanced, upheld and considered with equal weight. This includes a move towards more stable housing for renters, reducing unnecessary costs to those who have less assets and allowing people to better save money and have access to adequate housing over their entire life.

Overview of Positions

Throughout this paper the ILC's positions can generally be summarised as follows:

1. 'No grounds' terminations should be abolished for both periodic and fixed-term leases. Without better protections against no-grounds evictions, including at the end of fixed-term leases, renters cannot enforce other rights without fear of reprisal. We recommend the prioritising of reforms to ensure landlords must provide renters with a valid reason for terminating a tenancy to provide better protection against arbitrary and unfair evictions.

2. The reasonable grounds for terminating a tenancy should be implemented with the removal of the grounds for preparing for sale and conducting repairs.

3. Tenants should be protected from landlords misusing the reasonable grounds. Landlords should be required to provide evidence for the termination reason and landlords should be temporarily banned from renting out a property with penalties and compensation payable for breaching the rules.

4. A standard Termination Information Statement should be supplied to tenants along with a Notice of Termination to rectify the information imbalance between tenants and landlords.

5. Landlords should be given 14 days to consider a tenant's pet application and should be required to make an application to the Tribunal if they want to stop a pet application unless one of the specific grounds for refusal exist. Landlords should only be permitted to refuse a request for a pet under exceptional limited circumstances and the Tribunal should take a focus on the animal's welfare.

6. The proposed model limiting the collection of tenant information should be implemented and made mandatory. Tenants should be able to view personal information and seek rectification if it is incorrect.

7. Automated decision making should be allowed, to a limited extent, with supervision and regulation to ensure fairness of the system.

8. The portable rental bond scheme should be implemented with a government loan system for bond top-ups similar to the current initial bond loan system offered by the Department of Communities and Justice. Landlords should not be required to consent to the scheme as their interests are protected and it could lead to discrimination.

9. The onus should be placed on the landlord to prove a rent increase is not excessive if the rent increase is more than 115% of CPI increase in Sydney over the rent increase period. Reforms are urgently needed to stabilise rent prices. Setting fair limits and stronger protections against excessive rent increases is a crucial, timely intervention that can help address the housing insecurity and financial stress the increased unaffordability of rents is creating.

10. The NSW Government should implement practices to collect initial rent and rent increase information which are factors which the Tribunal may consider when determining a rent increase.

11. A uniform system limiting rent increases to once every 12 months should be implemented.

12. The NSW Government should consider the additional recommendations as mechanisms for making renting fairer in NSW. Renters have a right to live in a safe, accessible and healthy home that meets a clearly articulated basic minimum standard. This must include basic energy efficiency standards to reduce the energy required to heat or cool a home, and ensure access to an affordable energy supply.

13. The current enforcement paradigm relies on renters to enforce the laws – despite having less power and being vulnerable to retaliation through eviction or rent increases. Government agencies should be better resourced to respond to and support tenant self-advocacy, while also pro-actively enforcing rental laws and applying penalties to deter non- compliance.

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1. Removing 'no grounds' terminations

1.1. Ending Fixed-Term Leases

Q1. What is your preferred model for ending fixed term leases and why?

We recommend that no-ground terminations be abolished for both periodic and fixed-term leases. We recommend that both sections 84 and 85 of the *Residential Tenancies Act* be repealed, and a new section be introduced for dealing with termination for reasonable grounds. We recommend that as a part of this new provision, a landlord should not be able to issue a reasonable-grounds notice of termination with a date for vacant possession before the end of any fixed-term agreement. The effect of this will be to allow terminations for reasonable grounds at any time in a periodic lease or at the end of a fixed-term agreement.

A significant portion of our resources go towards advising tenants in relation to the termination of tenancy agreements for no grounds. This can include advice given to tenants through our phone advice service, advice given in person to tenants, assisting tenants at the Tribunal while undertaking duty advocacy and representing tenants in their cases. While there are many reasons currently a part of the *Residential Tenancies Act* which permits for termination, in our experience the most common way a tenancy is terminated is with a no grounds termination notice.

Fair Trading's End of Tenancy survey provides a valuable insight into the nature of tenancy agreements (fixed term leases vs periodic leases) in NSW and why tenancies end. A majority (58%) of renters who filled out the End of Tenancy survey in NSW between August 2021 and September 2022 indicated they were on a fixed-term lease. The survey also indicates renters on fixed term leases are more likely to receive a no-grounds eviction notice. The majority of renters (71%) who indicated in the survey they had received a no-grounds eviction received these at the end of a fixed term tenancy (vs 29% on a periodic lease).

In the 2022-2023 financial year, a quarter of the ILC's tenancy cases involved issues of termination. More than half of our files recorded tenants as being on a fixed term agreement, which included 42% of our advices on termination of a tenancy. It is also likely that tenants in fixed term tenancies are underrepresented in our cases as tenants understand that there is currently very little that can be done when facing termination. In other areas, fixed term tenants made up 59% of our 340 cases dealing with repair issues and approximately half of our cases dealing with rent and other charges. Overall, the ILC observed that fixed-term tenants, especially those in their first terms, are more likely not to want to report repair issues for fear of termination as these tenants have less of a relationship with their landlord. We also saw that self-represented landlords were 26% more likely to have tenants in a periodic agreement than landlords who had agents. Given these statistics, it is important to provide equal protection to both periodic and fixed-term tenants. Failing to do so would leave a significant portion of tenants in NSW unprotected (and this portion would only grow, leaving more tenants without stability of housing).

The disappointing aspect of no-grounds evictions is that they are rarely issued for 'no reason'. Rather, there are reasons which do not satisfy the current provisions of the *Residential Tenancies Act* and thus a no-ground notice escapes the protections afforded to tenants. For example, the Tenant may have committed a minor breach or failed to do something at the

request of the real estate agent which was not required under the tenancy agreement. Furthermore, we has observed a trend of no-ground evictions, both for fixed-term and periodic tenancies occurring in response to requests for repair. The use of no-grounds termination also allows for the propagation of discrimination by allowing landlords to terminate tenancies for protected factors under the *Anti-discrimination Act* without giving the tenant any evidence or reason for termination. Often, the properties are relet shortly after the tenant vacates.

Case Study: The ILC represented Mary (name changed) in a tenancy matter where the landlord sought to end her tenancy after nearly 20 years as a tenant. Mary suffered from a number of medical conditions and had been a victim of domestic violence before she moved into the premises. The landlord issued a no ground notice of termination after the tenant had been asking for work to be done to the property. The Tenant had also been complaining about issues of the landlord interfering with her use the property. The Tenant was also charged for water that was not separately metered. Unfortunately, there was no case for the termination being retaliatory as there was insufficient evidence about the tenant's complaints (they were made in person or over the phone). Our initial call with the tenant went for over two hours to discuss the multiple complex issues the case presented. After 6 months of hearings before the Tribunal, Mary's tenancy was terminated as the Tribunal found it must terminate the agreement, and she was given 6 weeks to leave the house, after living there for 20 years.

Moving to a model where fixed-term tenancies may be terminated for no grounds will not address the issues with no-ground terminations of periodic tenancies. The issues such as the disincentive to report repair issues and seek remedies for breaches will continue for fixed-term agreements. The landlord will continue to have the ability to terminate a residential tenancy agreement on reasonable grounds, or for any other reason under the *Residential Tenancies Act*, offering the landlord the opportunity to terminate the tenancy for any valid reason. If the NSW Government undertakes further consultation with the intention of permitting no-grounds termination for fixed-term agreements, it is easily foreseeable that most periodic tenancies will be terminated unless the tenant agrees to enter into a fixed-term lease.

Looking around Australia we can see evidence of Australian states and territories removing their equivalent to no-ground evictions. In the ACT, no-ground evictions cannot be given for either fixed-term or periodic tenants (from 1 April 2023). South Australia has also recently announced that it will be ending no-ground evictions for both periodic and fixed-term tenancies.

The danger of retaining no-ground evictions can also be seen from a comparison to other states. In Queensland, the rental laws were recently amended to remove no-ground evictions for periodic agreements. Antonia Mercorella, the CEO of the Real Estate Institute of Queensland said 'This is a retrograde step and will almost certainly result in the demise of periodic tenancies in Queensland,' about the changes. Advocates in Queensland report

landlords and their agents have taken advantage of the ability to end fixed-term agreements for no reason and have shifted renters onto shorter term fixed-term tenancies – for instance, 6-month agreements – so they can continue to evict without grounds. Tasmania similarly limits 'no grounds' evictions to the end of fixed terms. Around 84% of renters in Tasmania are now on fixed-term agreements, preserving the ability of landlords to end agreements every 6 to 12 months.

Victoria's model may be seen as the more moderate approach. We submit that implementing a similar model would be preferable to outright allowing no-ground evictions for residential

tenancy agreements. However, we caution against the approach as still permitting a significant imbalance of power, essentially treating the first fixed term as a 'probation period'. Fixed-term agreements often proceed for a year or more, and to keep a tenant on a form of probation for that period, where the landlord has one opportunity to issue a termination notice, may increase the issuance of termination notices at the end of the first fixed term, leading to further uncertainty and issues for tenants, as well as landlords, who may have their property management expenses increase. Overall, the primary beneficiary of this system may become property managers, who would access advertisement and similar fees on a more regular basis.

The government must reflect upon its reasons for promising to end no-ground terminations for periodic tenancies. During the 2023 election, the Labor Party promised to end no-ground evictions, thus providing tenants with certainty and assisting to limit the short-term rental market. As Minister Anoulack Chanthivong said at the start of this consultation 'Renters are under extreme pressure in a tight market, but they're also saddled with unfair and outdated rules that make life even harder.' The purpose of the proposed changes would be made largely redundant if no-ground evictions for fixed-term tenancies were retained.

When introducing the reasonable grounds for termination, it must also be considered if these can be used during a fixed-term tenancy agreement. We recommend against this. A fixed-term agreement provides certainty for both the tenant and the landlord about the continuity of the tenancy. A tenant is unable to issue a termination notice for no-grounds or reasonable grounds during a fixed-term tenancy agreement. This gives the landlord certainty as far as future income to allow for planning in advance. The reasonable grounds proposed all represent potentially foreseeable and/or avoidable occurrences. Where unforeseeable events occur, other parts of the Residential Tenancies Act sufficiently provides for termination (for example, by frustration if the property is significantly damaged, or for undue hardship). For this reason, the certainty under fixed-term agreements should be retained, and only existing reasons under the Residential Tenancies Act should be applicable.

Recommendations:

A valid reason should be required to end a fixed-term lease.

A fixed-term tenancy should not be terminated during the fixed term.

1.2. Reasons for Ending a Lease

Q2. Are there any specific situations where the landlord should be able to end a lease?

The Consultation Paper proposes to add five reasonable grounds for termination of a residential tenancy agreement. Each ground is addressed individually below. Section 2.2 only deals with whether the reason should be a 'reasonable ground' and does not deal with the conditions of using that reason, which are addressed later in Section 2 of this submission.

Recommendations:

Reason	Recommendation	Notice Period
The property is being prepared for sale	We Centre recommend against the implementation of this ground as a reasonable ground. Instead, we recommend that Section 86 of the Residential Tenancies Act be amended.	90 days under the proposed amended Section 86 (or 120 days if implemented as a reasonable ground)
The property will go through reconstruction, repair or renovation that requires it to be vacant.	We recommend against the implementation of this ground including where the property will go through 'repair' (to return it to its standard at the start of the tenancy agreement). We agree that the property undergoing reconstruction or renovation that requires the property to be vacant for at least 2 months is a reasonable ground.	90 days
The property will change its use (e.g., change from a home to a shop or office).	We agree that the property undergoing a change of use is a reasonable ground providing that development consent has been obtained (i.e., it is insufficient for part of the premises to become used as a shop/home office without consent)	180 days
The property will be demolished	We agree that the property being demolished is a reasonable ground.	120 days
The landlord, or a member of their immediate family will move into the property	We agree that this is a reasonable ground. The ILC recommends a definition similar to that in Victoria be applied (being parents, siblings and children of the landlord and/or their partner).	90 days

1.2.1. The Property is Being Prepared for Sale

Section 86(1) of the Residential Tenancies Act 2010 (NSW) already permits a landlord to terminate a tenancy on the basis that the landlord has entered into a contract for the sale of the property under which they have agreed to give vacant possession of the property. However,

owing to the tight turnaround times in standard contracts for sale in NSW, tenants are only given 30 days' notice.

Victoria and Queensland both allow a landlord to terminate a tenancy on the basis that the property will soon be sold.[1]

Victoria mandates that in these circumstances appropriate documentary evidence be provided.[2] Additionally, the landlord may not lease out the premises to any new tenant for six months after serving the notice to vacate, with penalties being 150 penalty units for a person and 750 for a body corporate.[3] Similarly, Queensland provides that the landlord may not lease out the premises to any new tenant after serving the notice to vacate, with 50 penalty units for a breach of this provision.[4]

We concur that introducing property sale as a valid ground of termination offers tenants advanced notification of the termination of the tenancy, a vital aspect currently hindered by the constraints of cooling-off periods within contract frameworks. However, we foresee that this may lead to landlords 'intending' to sell the property, evicting the current tenants, 'changing their mind' and re-letting the property to new tenants. It is also the case that often properties may be sold while tenanted. Moving to a system where landlords will terminate tenancies prior to selling the property may unnecessarily displace tenants when the purchaser may wish to immediately re-tenant the property.

To combat these issues, we recommend amending section 86 to involve a process incorporating the following:

- The landlord may give notice for this reason, giving the tenant 90 days notice before vacant possession is required;
- The tenant is able to vacate the premises at any point after receiving the notice without penalty;
- The landlord must give to the Tenant, an executed copy of the contract for the sale of the property which requires vacant possession of the property (as opposed to allowing the property to be tenanted) at least 30 days before the date for vacant possession.
- If the contract for sale has not been signed before 30 days before the end of the termination notice, the landlord can issue another termination notice giving not less than 60 days notice until a contract for sale has been signed and served on the Tenant.

By adopting these measures, we aim to establish a balanced approach that provides ample notice to tenants whilst also discouraging misuse of this new ground of termination. It is also important to note that sellers wishing to refurbish the home may be able to rely on the reasonable ground for renovations or reconstruction and purchasers of properties may still

[1] See ss 286 Residential Tenancies and Rooming Accommodation Act 2008 (QLD) and s 91ZZB Residential Tenancies Act 1997 (VIC)

[2] See s 91ZZO(e) Residential Tenancies Act 1997 (VIC)

[3] See s 91ZZH Residential Tenancies Act 1997 (VIC)

[4] s 365(B) Residential Tenancies and Rooming Accommodation Act 2008 (QLD)

seek termination of the tenancy relying on the other reasonable grounds (such as wanting to live at the property) after taking ownership of the property.

1.2.2. The Property will be Reconstructed, Renovated or Repaired

We do not agree that the property being reconstructed, renovated or repaired generally should be considered as a reason to terminate a tenancy.

Presently, the landlord has a duty to repair the property under the Residential Tenancies Act and should not be permitted to evict a tenant in order to carry out general maintenance or small-scale repairs. In the event the premises have become severely damaged (for example due to extreme weather events), landlords can evict a tenant on the basis that the property is uninhabitable.[5]

This reason to terminate a tenancy should only be permitted where a significant renovation or reconstruction is necessary and is not due to the landlord's breach of the tenancy agreement. The landlord undertaking repairs (being restoration to the premises to a state similar to the start of the tenancy) is a duty under the tenancy agreement and should not be a reason to end a tenancy agreement. For example, this will prevent the landlord from failing to do repairs to the point where the property becomes significantly affected, and then issuing a notice of termination. Instead, as it is the landlord's breach of the agreement which led to the issues with the property, the tenant should have the ability to elect to either remain at the premises and require the landlord to repair it, or to leave the premises by terminating the agreement.[6]

Termination under the reasonable ground of reconstruction or renovation should also be limited to work that will render premises uninhabitable for a minimum period of time and that the work can only be undertaken if the property is vacant. We recommend the minimum period of vacant possession should be 2 months, with the landlord being required to prove it is more likely than not that vacant possession will be required for 2 months or more. Importantly, if the improvements can be done while the tenants live at the property, this section should not apply.

1.2.3. The Use of the Property will be Changed

The Consultation Paper has identified that this reason to evict a tenant may be necessary where the use of the property will be changed, for example from a home to a shop or office. This should require a change of use to be permitted under the relevant planning rules, and include that the whole of the premises will undergo a change of use. After terminating a tenancy on this ground, the property should not be lettable as a residential premises for at least six months after the landlord evicts a tenant for this reason.

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[5] S 109 Residential Tenancies Act 2010 (NSW)

[6] This would largely reflect the common law in relation to a breach of a contract/repudiation from the agreement by the landlord. In either case, the tenant may seek the proper amount of compensation.

1.2.4. The Property will be Demolished

We agree that the property being demolished is a valid reason to terminate a tenancy. However, the landlord should be required to demonstrate they have been granted the necessary permits for demolition, or produce a demolition order from a government authority.

As demolition orders are not granted nor served overnight, we believe it appropriate to give the tenant 120 days' notice that the property is going to be demolished and their tenancy must come to an end.

1.2.5. The landlord or a member of their immediate family is going to move into the property.

We appreciate there are circumstances where a landlord or a member of their immediate family needs to move into a property that is currently being tenanted. In these circumstances, a landlord should be able to terminate the tenancy agreement on this basis. However, the landlord must be able to demonstrate a genuine intention to use the property as their or their immediate family member's principal place of residence for at least 12 months after the date of termination.

To clarify the scope of the definition of 'immediate family,' we recommend adopting Victoria's comprehensive definition as below: -

In the case of a residential rental provider who is an individual—

(i) by the residential rental provider's partner, child, parent or partner's parent; or

(ii) by another person who normally lives with the residential rental provider and is

wholly or substantially dependent on the residential rental provider.[7]

By adopting this definition, we aim to establish transparent criteria, ensuring fair tenancy termination while safeguarding against misuse.

1.2.6. Frustration of agreement

The Residential Tenancies Act currently provides for termination of the residential tenancy agreement if the agreement becomes frustrated by the premises becoming wholly or partly uninhabitable, the premises ceases to become lawfully usable as a residence or the property will be acquired by compulsory acquisition. Section 107 of the *Residential Tenancies Act* allows for a termination notice for immediate vacant possession even in circumstances where the property may only have 1 room that has become uninhabitable.

The provision as it stands is of broad discretion, both towards the landlord and to the Tribunal. The primary protection for the tenant is that it cannot be relied upon if uninhabitability was caused by a breach of the landlord. However, this provision is often misused by landlords to seek short-notice terminations, especially when there is a significant repair issue that has gone un-rectified for a long time. The provision's clear purpose is where the tenancy agreement becomes frustrated due to a change of circumstances outside of the parties' control and

[7] S 91ZZA(1)b of the Victorian Residential Tenancies Act 1997

contemplation when entering into the agreement.[8] However, often both tenants and landlords do not properly understand the purpose of this section, where landlords issue improper notices of termination and tenants leave properties under those notices.

By modifying the provisions of s 107, the provision may be used more reasonably. We recommend that the provision be maintained as it is currently where the premises becomes wholly destroyed (for example, destroyed by a weather event), however, longer notice periods are required for situations where the landlord has more notice of a change or where the premises remain partly habitable. For example, when the landlord gets notice of compulsory acquisition or the premises cease to be lawfully usable as residential premises, the landlord should be required to give the tenant as much notice as possible, thus informing them as soon as reasonably practicable. In the case where the premises remains partly habitable (for example, 1 room has flooded), a sufficient notice period should be required before the landlord can seek termination of the agreement at the Tribunal, thus allowing the tenant to seek alternative properties and advice on their circumstances.

When the landlord requires significant unexpected repairs which require vacant possession, and where these do not fall under the reasonable ground of renovation or reconstruction, the landlord can issue a notice under section 107 and the Tribunal may terminate the tenancy if they decide the repairs required were outside the contemplation of the parties at the start of the tenancy (as required for frustration to occur).

Recommendation:

We propose that section 107 be amended to include the following provisions. Subsections (3A) and (3B) deals with the requirement of notice. Subsection (6) will allow for a tenant to bring a claim for compensation before the Tribunal without doubt as to the Tribunal's jurisdiction (which is unclear in circumstances where compensation may be claimed for a breach of the *Residential Tenancies Act* but not a breach of the agreement).

(3) The termination notice may end the residential tenancy agreement on the date that the notice is given.

- (3A) However, if the premises remains partially habitable, the landlord is required to give a minimum of 90 days' notice.
- (3B) If a landlord fails to give a notice in accordance with this section as soon as reasonably practicable after knowing the residential premises will cease to be lawfully usable as a residence or will be appropriated or acquired by any authority by compulsory process, the landlord is liable to pay compensation to the tenant including compensation for lost tenancy.

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

[8] Based upon the legal doctrine of frustration.

1.3. Evidence Requirements and Temporary Bans

Q4. What reasons should require evidence from the landlord? What should the evidence be?

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?

We recommend that the landlord should be required to provide evidence for the notice of termination as early as possible in the termination process. For this reason, we recommend they should be required to prove evidence complying with the rules when the notice of termination is issued for the notice of termination to be considered valid. This should apply to all of the reasonable grounds being added to the *Residential Tenancies Act*

Currently all notices of termination other than a no-ground notices deal with circumstances caused by the tenant, or circumstances regarding the property where the issues are reasonably clear (such as advertisements for sale or the premises being clearly uninhabitable). The proposed list of reasons includes reasons which focus on the landlord's use of the property and circumstances where the truthfulness of the claim is not evident from other facts.

There already exists an information imbalance between tenants and landlords, with landlords refusing to give any information they are not obliged to provide to the tenant (such as documents about repairs). Without a requirement to provide evidence with the notice of termination, the tenant will be left with an all-or-nothing approach, where they will be forced to seek alternative accommodation due to the risk of being evicted before the matter comes before the Tribunal when evidence will be required. This goes against the very reason for the removal of no-ground evictions, to reduce the short-term rental market and properly balance the scales of power between landlords and tenants.

Many of the proposed new reasons differ from the current reasons for termination in their nature. Most grounds for termination currently feature an assessment of events that have occurred, to determine if the tenancy should be terminated. However, most of the proposed new reasons deal with the intention of the landlord to do something. Intentions can often change after the first steps are taken, and the right measures should be put in place to recognise the seriousness of providing accurate information and the seriousness of the intention when ending a tenancy under the new reasonable grounds.

1.3.1. Evidence Requirements

In Victoria the Director of Consumer Affairs determines - approves and publishes – the appropriate documentary evidence that is required to support the reason for giving a notice to vacate for each 'no fault' reason available. In the ACT their RTA requires that a notice to vacate is accompanied by written evidence supporting the landlord's reason for the notice. They provide examples of appropriate written evidence that might be provided, including statutory declarations, development applications, and quotes from a tradesperson for renovations.

The Victorian model provides clarity and some flexibility to ensure all parties are aware of requirements, and that requirements can be updated as the relevant forms of evidence or documentation change over time.

For this reason, we would recommend an approach similar to that taken in Victoria be taken, that the evidence provided with the notice of termination for a reasonable ground must meet

the evidentiary document requirements approved by the Commissioner of Fair Trading. There should also be a requirement to consult the Rental Commissioner on the evidentiary requirements.

Recommendation:

We recommend the following documents be required to accompany the notice of termination for each ground:

Ground	**Document**
The property will go through reconstruction or renovation that requires it to be vacant.	Both of the following: - Building permit for repairs or reconstruction, or evidence that a permit is not required. - Contract with, or quotation from, a suitably qualified tradesperson for carrying out planned works, stating: 1. the nature of the renovations or reconstruction, 2. the reason why the premises need to be vacated by the renter in order to carry out the repairs, and 3. an estimate of the length of time it will take to complete the repairs.
The property will change its use (e.g., change from a home to a shop or office).	Both of the following: - A witnessed Statutory Declaration of intention to use the premises for a different purpose, including details of the particular purpose (and if relevant, details of the particular business), how the premises will be used and stating that the premises will not be re-let as a residence before the end of 12 months after the date the notice was given, and - The Council planning documents which show that the premises may lawfully be used for the purpose proposed.
The property will be demolished	Both of the following: - Building permit for demolition; and - Contract with a suitably qualified Builder-demolisher, stating the date that demolition will occur.

The landlord, or a member of their immediate family will move into the property	A Statutory Declaration signed by the landlord, stating the following: 1. They intend to reside in the rented premises and the reason for intending to reside in the residential premises, or 2. the name of the person who will occupy the rented premises, their relationship to the rental provider, a declaration whether the person is a dependent, and the reason for the person intends to move into the premises, and 3. that the rental provider understands that they must not re-let the premises to any person (other than the person named to be moving in to the rented premises in the statutory declaration) for use primarily as a residence before the end of 12 months after the date on which notice was given.

As set out in 2.2.1, we recommend that preparation for sale not be included as a ground for termination, instead a different approach should be taken where the landlord is required to give a 90-day notice of termination but provide evidence of an executed contract of sale which required vacant possession.

3.1.1. Temporary Bans

A renter being evicted from their home can be an extremely stressful and expensive experience, especially in the midst of a rental crisis. It is important that if a renter is going to be put through that experience, there is evidence that the eviction is necessary and genuine, and proper safeguards are in place for wrongful evictions.

This should include prohibiting the landlord from renting out the property for a set period of time when certain termination grounds are used.

There should be a ban on the property being rented out again when a renter is evicted for any of the reasonable grounds for eviction discussed above. This will help safeguard against landlords wrongfully issuing terminations for one of these grounds when their real intention is to have the property vacant to rent out again.

Recommendation

The temporary bans should be as follows:

Ground	Duration
The property will go through reconstruction or renovation that requires it to be vacant.	6 months from the date the notice of termination expired
The property will change its use (e.g., change from a home to a shop or office).	12 months from the date the notice of termination expired
The property will be demolished	6 months from the date the notice of termination expired
The landlord, or a member of their immediate family will move into the property	12 months from the date the notice of termination expired

Compliance and Enforcement

To ensure the effectiveness of the reforms, it is important to have strong compliance and enforcement provisions. It has been important in other jurisdictions to ensure there is a

jeopardy for falsely relying on 'reasonable grounds' terms. Temporary bans should be implemented but are not sufficient by themselves. For example, the Residential Tenancy Act provides that landlords and their agents cannot mislead a tenant when entering into a tenancy agreement, however the Act does not specifically allow the Tribunal to order compensation for misleading statements. The legislation must make it clear where previous tenants may seek compensation and where a landlord has falsely relied on one of the above grounds to terminate a tenancy, there should be penalties.

In 2022, the Tenants Union released their Special Report in Eviction, Hardship and the Housing Crisis. This report addressed the cost of moving tenancies for tenants and the difficulties it creates. The Tribunal has traditionally been hesitant to award moving costs even in the circumstances of the landlord improperly evicting them. The basis of this rested on the tenant's consent (even when being misled) and the fact the tenant would eventually be required to move anyway if a 90-day no grounds notice was issued. However, with the removal of no-ground evictions, this can no longer be justified where the costs of moving have been estimated as follows:

- Renting households in NSW face basic costs of $2,520 when they move, and generally are more likely to face costs of around $4,075 to move.
- The 'core cost' of a move for renting households in NSW ranges from $2,015 for a single person household in Greater Sydney through to $3245 for a family household in Regional NSW.

- The 'average cost' of a move for renting households in NSW ranges from $3,215 for a single person household in Greater Sydney through to $5,400 for a family household in Regional NSW.
- Landlords also face a number of costs when evicting a renter, including a reletting and advertising fee. We estimate costs for the landlord at between $1,100 - 1,400.

In the ACT where wrongful eviction has occurred, renters are able to seek compensation or alternatively request their reinstatement as tenants. The power to reinstate a tenancy is a difficult one, given the expensive nature of the move to a new property. Allowing reinstatement may also affect the assessment of compensation to tenants where the Tribunal suggests a tenant may move back in if they are unhappy. We recommend the focus be upon compensation for failure to comply with the temporary bans, and penalties in addition to compensation for intentionally or recklessly misusing the termination reasons.

In NSW, the 'break lease' fee has seen significant success in relation to tenants leaving a fixed-term tenancy before the end date of the lease. These break lease fees provide an estimation of the loss to the landlord, providing both parties with certainty and improving the quality of the process. For this reason, we recommend adopting a similar approach for non-malicious failures to comply with the temporary bans. We recommend the following framework be adopted as a whole:

Recommendation:

Breach / Offence	**Consequence**
Failure to comply with a temporary ban	The tenant is to be paid the sum of 8 weeks of the cost of rent at the end of the residential tenancy agreement.
Intentionally or recklessly misusing the termination reasons where the tenant gave vacant possession.	The tenant is to be paid the sum of 12 weeks of the cost of rent at the end of the residential tenancy agreement, or compensation for the cost of moving and for other breaches of the agreement pursuant to the notice (such as distress from harassment), whichever is more
Intentionally or recklessly misusing the termination reasons (whether or not the tenancy was terminated).	A criminal offence punishable by up to 50 penalty units.
Failing to provide the required documents without a good reason	A criminal offence punishable by up to 10 penalty units. The invalidity of the notice of termination (for failing to provide the documents)

3.2. The Process Following the Notice of Termination

While the consultation paper does not request specific feedback on the process after the notice of termination is given, it is necessary to address how the reasonable grounds framework should work in comparison to no-grounds terminations. The new system aims to promote fairness between parties in tenancies and to reduce the short-term nature of the tenancy market.

There are many current issues which create undue hardship on tenants. When a fixed term tenancy is ended, if the tenant moves out before the end of the fixed term after being given a notice of termination, they may still be required to pay a break lease fee. For example, a tenant may have a fixed-term lease that expires on 31 July and be given a notice of termination on 1 July 2023 which requires they vacate the premises by 31 July. If they vacate the property before 31 July 2023, they will either be required to pay rent until 31 July 2023 or pay the break lease fee. This means there is only one day that they can leave without penalty or overstaying past the date on the notice of termination. Even if the tenant is able to secure alternative accommodation, the likelihood that they can have it commence in the very short period of time this allows them to start their new tenancy without paying double rent for some time.

Recommendation

We recommend that subsection 110(3) of the *Residential Tenancies Act* be repealed.

3.3. NCAT Process

The legal process of obtaining a termination order if the tenant does not leave the residential premises should also be addressed. We recognise the value in having certainty in the effect of notice of termination, however it is also important to take into account the individual circumstances of a case in determining whether a reason for termination is sufficient to justify termination.

At present the Residential Tenancies Act provides discretion to the Tribunal in most termination proceedings with grounds. Where termination is for breach, for example, the Tribunal must consider the seriousness of the breach and whether it justifies termination.

It is appropriate that for any new reason introduced the Tribunal be provided with discretion to decline termination in some circumstances. The Tribunal must be allowed to consider other relevant factors and the circumstances of the case to determine whether it is satisfied it is appropriate to terminate the tenancy. However, given the value of certainty in termination, we recommend the following implementation:

- The landlord must apply to the NSW Civil and Administrative Tribunal after the expiry of the Notice of Termination.
- The landlord must prove, on the balance of probabilities, the following:
    - The notice of termination is valid (was served properly, meets the requirements and has the evidence and Termination Information Statement attached).
    - The reason alleged in the notice of termination (this may require more than just the documents provided in the evidence requirements, but are based upon the circumstances of the case.
    - The tenant has failed to vacate the residential premises in accordance with the notice of termination.

- If the Tribunal is satisfied of the above, the Tribunal must terminate the residential tenancy agreement unless:
    - Doing so would lead to undue hardship to the tenant based upon the special circumstances of the case, or
    - The landlord or their agent has unduly or unlawfully interfered with the tenant seeking alternative accommodation, or
    - The notice of termination was retaliatory in nature, or
    - The tenant is a long-term tenant (and has been in continuous occupation of the residual premises of at least 20 years at the time the notice of termination was given).
- If the tenant is a long-term tenant, the landlord must show that there are special circumstances to justify termination.
- If the landlord has interfered with seeking alternative accommodation, the Tribunal must not make an order for termination unless it is satisfied the landlord has remedied the issue and the issue has not resulted in any disadvantage to the tenant.
- If the tenancy is terminated, the Tribunal would retain discretion as to how long a tenant will have to leave the premises by suspending the order for vacant possession.

The above represents a striking of a balance between the certainty for landlords and the need to ensure tenants have adequate provision of housing. As demonstrated by cases where the landlord seeks to end a tenancy early on the basis of undue hardship, proving undue hardship requires showing something more than hardship. Meeting this test would require showing something out of the ordinary and that the extenuating circumstances are so severe that it would be unjust to make the tenant suffer the hardship. This strikes the right balance to allow the landlord to get the property back, but not allow for extreme consequences to tenants if they have done nothing wrong.

The ability to not make a termination order for undue or unlawful interference with the tenant seeking alternative accommodation assists to ensure landlords do not provide misleading statements in rental references. This would not prevent landlords giving honest and candid rental references, as it is not undue or unlawful to give an accurate rental reference. However, this provision assists to prevent unfair interference with the tenant seeking a new place to live.

In cases of retaliatory evictions, the Tribunal should not make an order terminating the tenancy. We have experience where the Tribunal has found a notice was retaliatory but refused to exercise its discretion on the basis that the landlord had a right to their property back. This is contrary to the purpose of the legislation, seeking to prevent retaliatory evictions. Furthermore, the possibility of this occurring has also been used against clients at the Tribunal when conciliating matters, which has resulted in agreements which were not possible even if the agreement was not retaliatory (as the tenant lodged an application to challenge the notice of termination before the notice of termination expired, and the date for termination by consent was given as only one week after the date on the notice of termination).

Long term tenancies are addressed below.

3.4. Long Term Tenancies

Currently under the *Residential Tenancies Act*, tenancies that have continued for over 20 years are separated from tenancies shorter than 20 years. No grounds notices cannot be given to long-term tenants. Instead, the landlord must apply to the Tribunal without a notice of termination and the Tribunal considers the circumstances of both parties.

This system introduces issues of the significant discretion imparted by the section. Whether a long-term tenancy is terminated can often depend on the individual opinions of an NCAT Member, with some leaning towards a presumption for terminating a tenancy, and others requiring the landlord to demonstrate good reasons for eviction, above and beyond merely wanting the property to be returned.

Given the removal of long-term tenancies, there is no reason to maintain a separate provision that allows for the termination of longer-term tenants without providing the required notice. Instead, we recommend that termination notices be required to include reasonable grounds, but the test to be applied by the Tribunal should be different than those in short-term tenancies. This is in recognition of the significant connection a long-term tenant has to a property, and the likely investments the tenant has put into the property over the years.

Recommendation:

Section 94 of the *Residential Tenancies Act* be repealed.

The framework for terminations with grounds includes a subsection setting out that NCAT should only terminate the tenancy on reasonable grounds if it is satisfied there are special circumstances to justify the termination.[9]

3.5. Termination Information Statement

Through our substantial work in tenant advice and advocacy, we have noticed that often tenants do not understand their rights. Many of our initial advices are with distraught tenants who after receiving a notice of termination are frightened the police will be called to kick them out of their home.

Casework: Every one of our tenant advocates can remember instances where we receive an urgent call from a tenant about a termination notice. The tenant is often crying, concerned that they and their family will be homeless in one day's time. More often than not this tenant has received a no ground termination notice which is just about to expire. They have spoken to their real estate agent and asked for more time but they refused, telling them that they have to be out. However, the *Residential Tenancies Act* does not allow a notice of termination to terminate a tenancy on its own, more is required. After explaining to the tenant that they are not required to leave because of the notice of termination, and that the landlord must go to NCAT who has discretion as to how much time to give, the tenant finds themself in feeling a

[9] Special circumstances are out of the ordinary, but do not have to be extraordinary or exceptional (*Megerditchian v Kurmond Homes Pty Ltd* (2014) NSWCATAP 120). This differs from Section 93 of the *Residential Tenancies Act* which requires 'undue hardship' to occur in addition to special circumstances. This will clarify the protection provided to long-term tenants.

lot more relieved. In most of these cases the tenant finds accommodation before the Tribunal requires them to leave, and sometimes this happens before it even gets to the Tribunal. However, the tenants often do not understand the effect of a notice of termination and the process going forward, and landlords and their agents often refrain from properly explaining the process as it is against their interests to do so.

A common issue we encounter is tenants misconstruing improper notices of termination as terminating their tenancy, especially when the notice pertains to seemingly minor infractions such as failing to take care of the property's garden or failing to employ persons recommended by the landlord for such tasks. This is on occasion exacerbated by misleading information supplied by real estate agents, who imply severe (but false) consequences for failing to vacate the property.

While landlords are currently required to provide new tenants the New South Wales Fair Trading Tenant Information Statement,[10] such information is often forgotten or lost by the time there is an issue with the tenancy. To address this issue, we propose that a comprehensive Termination Information Statement should be prepared by New South Wales Fair Trading encompassing the following points:

- Tenants are not obliged to vacate the premises prior to the expiry of a notice of termination;
- Staying past the expiry date listed on the notice of termination is not unlawful; landlords cannot involve law enforcement, change locks or summon sheriffs without a valid NCAT order otherwise their actions are considered a criminal offence;
- Rent payment is not mandatory after the tenant's departure unless the tenant is still within a fixed-term tenancy;
- If the tenant has been living at the property under a tenancy agreement for more than twenty years, the landlord must demonstrate special circumstances to justify termination;
- Tenants have access to free legal advice through the Tenants' Union.

Recommendation

We propose that notices of termination must be accompanied by this Tenant Information Statement in order to be valid. By implementing a Termination Information Statement, we aim to bridge the information gap between tenants, landlords and real estate agents.

[10] See s 26(4) Residential Tenancies Act 2010 (NSW)

4. A New Model for Keeping Pets

4.1. Seeking consent to have a pet

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?

Fourteen days is currently the standard across Australia; including in both Queensland[11] and Victoria.[12] Fourteen days is a reasonable amount of time for a landlord to consider a tenant's request to keep a pet.

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

The landlord should only be able to refuse a request to keep a pet for the following reasons:

- The pet is a restricted dog, or a dog declared to be dangerous or menacing;
- Keeping the animal breaks other laws (including but not limited to council zoning laws and ordinances) and no consent, permission or exemption may be sought to allow the pet to be kept; and/or
- The landlord has previously received an exclusion order from NCAT against the tenant for the specific pet (i.e., the particular case was already decided).

To ensure responsible pet ownership and animal welfare standards, landlords can look to dedicated animal legislation such as the Prevention of Cruelty to Animals Act 1979 (NSW) as this legislation is better suited to addressing animal abuse and cruelty than tenancy law.

The landlord should go to the Tribunal for all reasons where the tenant does not agree with their refusal to be granted a pet. This model would be similar to those in Victoria, the ACT and the NT. Given that the landlord is seeking to restrict the actions of the tenant, the responsibility to apply to the Tribunal should be placed on them.

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.

We do not agree that a previous NCAT order should allow for the exclusion of other animals at the premises (whether the same breed or different). This is because NCAT orders are dealt with on a case-by-case basis and are not of general application. If the landlord has previously been awarded an exclusion order for a specific pet at the Tribunal but circumstances have changed, the Tenant should be able to make a new request and if refused the matter should proceed to the Tribunal for a decision. The decision to put a property on the rental market entails a recognition of the needs and preferences of tenants, including to engage in pet ownership. Instead of implementing a rigid prohibition, landlords should adopt a more balanced approach by setting reasonable guidelines for pet ownership.

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[11] S 184D(2) Residential Tenancies and Rooming Accommodation Act 2008 (QLD)

[12] See note under s 71A Residential Tenancies Act 1997 (VIC)

Dealing with the refusal of consent

The model being proposed in the Discussion Paper puts the onus on the renter to go to the Tribunal if they believe the landlord has wrongly refused permission for a pet. Landlords have greater resources and ability to access the Tribunal. This is demonstrated by the fact they initiate Tribunal proceedings at a much higher level than renters – over three quarters (77.7%) of all Tribunal applications for tenancy matters in NSW are made by landlords. Renters face many barriers in accessing the Tribunal, such as financial and time constraints, a lack of confidence to navigate Tribunal processes, and concern about potential retaliation for accessing the Tribunal. More broadly, there is a significant power imbalance between landlords and renters.

If the landlord wishes to refuse consent for a reason other than the three proposed valid reasons submitted above, it is the landlord who is seeking to restrict the actions of the renter, and to limit the tenants' contractual rights to peace, comfort and privacy. As such it should be their responsibility to apply to the Tribunal. In the circumstances where the landlord has refused consent on any of the three grounds set out above, the onus can reasonably be put on the tenant to be the one required to apply to NCAT, however, there should also be a criminal penalty for refusing consent for one of those reasons when it is false or misleading to do so.

Once at the Tribunal, the onus should be on the landlord to demonstrate that it is unreasonable for the tenant to keep that specific pet at the property. There should be a presumption that the request to have a pet is reasonable, as most tenants wouldn't request to keep a pet that would be unreasonable as they are the ones that will need to live with the consequences. The primary focus of the Tribunal should be on the welfare of the animal when considering consent. We recommend that the following factors be provided in legislation as factors to be considered by the Tribunal when deciding the case:

- The size and nature of the residential premises;
- If consent/ an exclusion is required from another body and whether the tenant agrees to pay the reasonable costs of obtaining that approval (excluding any costs of the property agent);
- The characteristics of the type of animal and whether the animal's welfare can be maintained at the residential premises without cruelty;
- Whether modifications exceeding minor modifications are required to the residential premises and whether the tenant agrees to pay the costs of such modifications;
- The number of animals already approved for the residential premises; and
- Any other factor the Tribunal finds relevant, other than whether the pet may cause damage to the residential premises.

4.2. Imposing conditions on having pets

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 be permitted to add restrictive special conditions to a tenancy agreement for a pet in the property, for example where the pets are not allowed inside. Special conditions of this nature interfere with the tenant's quiet enjoyment of the property of which they have exclusive possession. However, there are some reasonable special concerns that the landlord may have, including evidence that the pet is up-to-date on vaccinations and legally

licensed and microchipped (if applicable). Other legislation such as the Companion Animals Act 1998 already provides rules based on welfare concerns for keeping pets. As such, it may be unnecessary to duplicate the regulation within tenancy law or the contract (agreement) as these already apply.

If the NSW Government believes additional terms are necessary, we submit these should be dealt with at the start of the tenancy as a part of the tenancy agreement instead of at a later time dealing with consent. When applying for a pet during a tenancy, the issue of consent should be left reasonably straight forward. The parties are already in a binding agreement which should deal with the keeping of a pet. As such, any additional reasonable terms should be included in the NSW Fair Trading standard residential tenancy agreement and be limited to such terms. The landlord should not have the ability to impose additional conditions at the time of a pet application, as this may introduce a new mechanism to effectively deny pets, by generating conditions which may make keeping the pet unrealistic.

The landlord should not be able to request additional bond or any similar extra money due to the fact the tenant has a pet. If any damage does occur inside a rental property (excluding fair wear and tear), the landlord is able to recover money from the tenant and/or the rental bond, whether the damage was caused by a pet or a human. Tenants are already often required to pay for carpet cleaning when they vacate the premises if they own a pet. Tenants are also already required to make a request about any changes they wish to make to the property and must pay for these (including, for example, installing a dog door). Additionally, tenants are required not to damage the premises or to interfere with their neighbours' peace and quiet enjoyment of their respective properties.

It is imperative to avoid imposing restrictive conditions that infringe on a tenant's right to the quiet enjoyment of the property. Reasonable conditions that align with animal companion laws can ensure responsible pet ownership without unduly burdening tenants and respects the interests of both tenants and landlords.

4.3. Discrimination for Pet Ownership

While changes proposed in the Consultation Paper if introduced will make it easier for renters to request to keep a pet, further consideration is needed in relation to minimising the discrimination pet owners face when applying for rental properties.

Presently renters are usually asked whether or not they have a pet during the application process. Landlords may simply reject all applications where prospective tenants have informed them, they own a pet, and proving that this rejection is solely due to pet ownership can be challenging. Furthermore, this form of discrimination is legal unless the pet is an assistance animal.

To address this issue, we recommend amending the Residential Tenancies Act to prohibit landlords from inquiring about pet ownership during the application stage. Instead, tenants will have the opportunity to request a pet after they have entered into a residential tenancy agreement with the landlord.

To ensure tenants are able to make a well-informed decision regarding the possibility of pet ownership prior to entering into a tenancy arrangement, landlords should disclose any characteristics of the property or other applicable laws that may make the property unsuitable

for certain types of pets in the property listing and at any inspections as well as in the tenancy agreement.

Furthermore, any reasonable conditions that will be imposed on pet owners should be made clear at the time of entering into the contract (the tenancy agreement), not at a later point in time. The question of consent for pets should be separate from the question of conditions of the pet ownership. The *Residential Tenancies Act* already imposes a number of conditions on tenants, such as additional cleaning, the requirement for consent for any alterations and the requirement to not interfere with neighbour's quiet enjoyment. These are sufficient to property manage the tenancy.

Recommendation

The NSW Government Amend the Residential Tenancies Act 2010 to prohibit landlords and agents from asking about pet ownership at the application stage.

5. Renters' personal information

5.1. The proposed new model

Q10. Do you support limiting the information that applicants can be asked for in a tenancy application? Why/why not?

Q11. Do you have any concerns with landlords or agents only being able to collect the information set out in the table above to assess a tenancy application? Please explain.

Q12. Do you support the use of a standard tenancy application form that limits the information that can be collected?

We support the model proposed in the consultation paper.

Regulation of the application process for private rental housing is required to provide greater protection against discriminatory and/or intrusive requests for information at application, as well as greater transparency regarding the decision-making process for applicants.

There has been ongoing creep in terms of the information requested at application, driven by the competitive nature of the application process and the failure to regulate it until now. The Tenants Union surveyed renters earlier this year about the kinds of information they had been asked to share when applying for a rental property. They found:

- 10.4% of respondents had been asked to provide details of their social media profiles (handles, accounts).
- 9.7% provided or were asked for evidence of household insurance.
- Almost half (48%) have been asked to undertake a tenancy database check, and 39.5% have been asked whether they have gone to Tribunal. Some renters noted they had been asked to pay a fee (e.g., $25 for a "professional reference check" to run a check).
- 7.3% of respondents said they had been asked for or had provided medical records when applying for a rental property.

Limits on the information that can be collected must be put into law This should be done through the introduction of a prescribed standard rental application form. This would provide greater protection against a landlord or agent from unlawfully discriminating against an applicant by ensuring they are not able to request any information about a renter that could be discriminatory, under the NSW Anti-Discrimination Act 1977.

We support a model that combines prescribing a standard rental application form, alongside specifying what additional information or documentation might reasonably be collected to support the application.

Is there sufficient information available to landlords?

We support the mechanism set out in the consultation paper, limiting the number of documents the landlord can obtain and implementing a standard application form. The arrangement between the tenant and landlord is a commercial one. Currently tenants are advantaged by providing significant amounts of information, meaning tenants with less information available are disadvantaged in the application process. This is despite the fact that many of the documents provided hold no real benefit to the landlord other than extreme risk

mitigation. This further perpetuates the cycle for disadvantaged groups within society (e.g., who may have to report going to the Tribunal to seek repairs, because they rented a lower value property which was in poor repair). Overall, the amount of information set out in the table sufficiently allows for landlords to assess the risk of applicants without placing an undue burden on tenants.

The types of information provided within the Table are broadly appropriate. However, some flexibility may need to be built into the model to ensure that within each category of information (Proof of identity; Ability to pay agreed rent; Suitability) renters are able to meet the requirements of the category without being limited by too restrictive a specification regarding the 'types' of information (or documents) that can be provided. We are particularly concerned for those renters who may find it difficult to obtain some of these specific types of information in a timely manner in order to provide them to secure housing, e.g., newly arrived migrants or temporary migrants, international students, Aboriginal and culturally and linguistically diverse communities, sex workers and other workers concerned about discrimination on the basis of their occupation.

Additionally, we note the following about the types of information in the Table (or similar information):

- **Whether the tenant has previously been to NCAT.** This information is not a reliable indicator of whether the tenant will meet their obligations. A tenant may have previously taken a landlord to NCAT after the landlord failed to repair the property for a long time (in our experience, often over a year). This question discourages tenants seeking timely NCAT support. Furthermore, landlords often make claims at NCAT which are dismissed. The question as to whether the tenant has previously been to NCAT is inappropriate and provides for too much speculation and disadvantages persons who stick up for their rights as tenants.
- **Information about refund of bonds.** Requests for information about the refund of bonds at previous properties is inappropriate. Whether a bond has been refunded in full or only partially at a previous tenancy is not a reliable indicator of a tenants' ability to meet the terms of the tenancy agreement, and may inadvertently screen out suitable applicants where explanations are misunderstood and/or not clarified with the applicant.
- **Redaction of personal information.** The redaction of sensitive personal information on bank statements and or other financial documents - including BSB and account numbers - would provide greater assurance to applicants given the cyber security risk in relation to this type of information.
- **Provision of information to tenant** .Where a reference is received directly, such as through an online portal, without the applicant viewing it this should be supplied to the applicant at the same time the agent receives it or as soon as possible after.

The utility of information gathered not through the direct application should also be included in the limitations on gathering information. In particular the use of oral reference checks, information held in tenancy databases and investigations on social media should be restricted.

These information sources should only be used in service of assessing the sustainability of the tenancy. Oral reference checks are inscrutable and inappropriate information easily shared without accountability. Social media information is often at least an incomplete and sometimes inaccurate picture of a person's life. We are aware of people posing with a photo of

a friend or family member's animal and an assumption of pet ownership being made to the tenant's detriment. The Department should consider on what basis the collection of external information is being used and investigate whether they are appropriate.

Additional Considerations

The *Residential Tenancies Act* must ensure the limitations go further than requiring landlords and agents not to request documents exceeding the prescribed limits. It is important to introduce a duty on landlords and agents not to accept documents in excess of the prescribed limits. If tenants remain able to provide more documents, they may still be advantaged by providing more than 2 documents in each category, and the system of providing extreme amounts of information may continue.

To better address and deter unlawful discrimination during the application process we recommend the adoption and resourcing of Fair Trading to undertake 'shadow shopping' auditing of agents and online platforms both to spot-check practice of individual agencies and/or platforms as well as broadly assess the standard of the industry in relation to adoption of any newly implemented model of information collection

While landlords and their agents may generally feel that it is always beneficial to have more information, in some instances more, poorly related information can add difficulties to the process, especially when using AI.

Furthermore, the current system features an extreme information bias in the favour of the landlord. Landlords operate a model where they obtain information almost akin to a government vetting process. Tenants however are given no information about landlords or the property they are moving in to other than the brief pre-tenancy inspection. This dichotomy was shown when comedian Tom Cashman requested a landlord reference from a previous tenant and the agent changed their application from being accepted to rejected.[13] The NSW Government should consider whether landlords are required to disclose if the property does not meet the minimum habitability standards, if there are urgent repairs outstanding or there are repairs or work currently scheduled to take place at the property, at the start of the tenancy agreement. This could be introduced into Regulation 8 of the *Residential Tenancies Regulation.*

5.2. Discrimination against renters

We routinely assist tenants who have been discriminated against at many stages in the rental process, from making an application for a tenancy, to seeking consent for a pet and even during the termination of a tenancy.

There are many examples of discrimination that we can identify. Some examples include discrimination based upon age, based upon previous receipt of government benefits, based on race, based on histories of domestic violence and simply because the previous landlord does not like the tenant. For example, we have been told by a real estate agent that they will advise

[13] Many news sources reported on the story, for example: https://7news.com.au/lifestyle/new-turmoil-for-prospective-tenant-in-sydney-whose-rental-application-was-rejected-after-he-asked-one-question-c-5741904

landlords against accepting a tenant who they can identify used a domestic violence termination notice, as they feel this adds risk to the landlord's continued income. Often younger and international renters are treated differently, with some agents not renting to these people and others not applying the same standards. For example, a couple of younger renters may be denied a pet, but their neighbours with the same landlord may be allowed a pet. Finally, there should be recognition of the difficulty of moving rentals when you have a private landlord, especially when they no longer like their tenant (but the tenant has not breached the lease). Landlords and their agents can simply not fill out a rental reference, removing the chance of the tenant getting another rental (especially if the tenant has lived at the property for some time), or the landlord or agent can give verbal references which cannot be confirmed as true and correct. All of these factors place tenants' livelihoods squarely in the hands of landlords and their agents.

Restricting the information available to landlords during the application process may mitigate this discrimination. By prohibiting landlords from collecting certain information such as the prospective tenant's race or age (and even information such as current postcode as this may be used to infer race), greater focus can be placed on the tenant's suitability to rent the property rather than preconceived biases. Furthermore, by limiting the amount of reference documents that can be obtained, the tenant is less likely to disadvantaged by a landlord or agent who refuses to complete a rental reference.

Housing is a fundamental human right and is essential for dignity and personal wellbeing. Equal access to housing opportunities and an application process free from discrimination ensures that all individuals, regardless of their background or personal characteristics, are afforded this right. For this reason, it is vital that protections be implemented to reduce discrimination in the sector.

5.3. The Use and Storage of Personal Information

Q14. Do you support new laws that set out how landlords and agents can use and disclose renters' personal information? Why/why not?

Q15. What should applicants be told about how their information will be used before they submit a tenancy application? Why?

Q16. Do you support new laws to require anyone holding renter personal information to secure it? Why/Why not?

Q17. How long should landlords, agents or proptechs be able to keep renter personal information? Please explain.

Stronger protections that provide specific guidance on how renters' information can be used and shared are required. These should apply not only to real estate agents, but also landlords, and property and rental technology (PropTech and RentTech) companies.

The Consultation Paper usefully seeks to develop a better articulation of the obligations and rights of landlords, agents and PropTech/RentTech and renters in relation to renters' personal information, and how it will be collected, stored and used.

Digital Rights Watch, an advocacy organisation focused on digital rights including in relation to information privacy, digital security and online safety, made a number of recommendations in relation to regulating use and disclosure of renters' personal information, and minimising

privacy and security risks in their recent Submission to the Inquiry into the Rental and Housing Affordability Crisis in Victoria. We encourage engagement with their submission and its eight key recommendations.

1. Ensure the regulatory framework for RentTech preserves renters' digital rights—in particular to privacy, non-discrimination and digital security.
2. Mandate data minimisation for landlords and real estate agents.
3. Ensure fee-free options, either directly or through third-party platforms, are made available and promoted to prospective and existing renters.
4. Ensure that renter use of third party property management or rent payment apps are strictly opt-in.
5. Prohibit technology designed to evade existing regulation, such as editable rental amount fields in third party application platforms which circumvent prohibitions on solicitation.
6. Implement robust safeguards regarding the use of any third party platforms and the use of automated decision-making in the management of tenancies.
7. Investigate public alternatives to private tenancy application processes that prioritise data minimisation and protect renters' privacy and rights.
8. Investigate developing a publicly accessible database of rental information to better inform policy making and correct the informational imbalance between renters and landlords.

Use of Personal Information

Tenants give their personal information over to these parties for the specific purpose of assessing the tenants' suitability for a rental property. This is the only way in which the data should be used, and there should be clear restrictions against using information collected for marketing purposes, or for it to be shared with or sold to other parties.

We are seeing companies profit from the collection and use of large amounts of renters' personal information, where there is no benefit to the renter – and in some cases where there is harm to the renter. Strict restrictions against the on selling of data to third parties should be implemented, with penalties to apply for non-compliance.

Other than for the clear purpose of use in relation to the tenancy, landlords and agents should not be permitted to share tenants' information without specific informed written consent, unless they are pursuing a legal claim or are otherwise required to do so by law. The landlord or agent should not be able to provide the information to third party tenancy products which are changing during the duration of the tenancy, without consent of the tenant. Importantly, this type of consent should go beyond a 2-line statement in the privacy policy. It should require the Tenant is informed of the specific sharing and usage, and consent to that specifically.

The *Residential Tenancies Act* should be amended to require all landlords and agents comply with the Australian Privacy Principles when collecting information. Currently large businesses (over $3,000,000 in revenue, for example the landlord's agent) or people/companies which purchase information from other businesses (for example, using a PropTech product) are

subject to the Principles. However, this does leave out some businesses and many landlords who may also be given a copy of the information. We recommend the *Residential Tenancies Act* place a duty on all landlords and their agents to deal with information in accordance with the Australian Privacy Principles, which would provide a limited but useful framework to support tenants' privacy.

How much and how long should personal information be collected and held?

No more data than is necessary to make an assessment of their application should be collected. Their data should not be stored for longer than is needed to assess an application. Rules clarifying what information can be collected, and for how long this can be stored, developed with a 'data minimisation' approach would not only benefit renters, but help reduce the risk profile of agents and landlords who currently may be 'over collecting' personal information because they are unsure of what their professional obligations require.

Tenants' information should be kept (or stored) securely, and there should be appropriate time limits on how long information about a renter can be kept. Time limits may appropriately vary for unsuccessful applicants and successful applicants (those who enter into a tenancy agreement). In both cases, data should not be held by a landlord, agent or proptech company for any longer than it is reasonably necessary.

Australians have recently seen the impact of improperly stored data, especially identifying information and identity documents, in the recent Optus and MediBank hacks. While some real estates may be less likely to be hacked due to size, many PropTech and RentTech companies may be targets. The *Residential Tenancies Act* should place a duty on landlords, their agents and contractors to ensure the safety of personal information when it is stored, and tenants should be given the ability to seek compensation if that is breached. Furthermore, there should be a duty on the storers of information to reports data breaches where the person who breached the system had access to the tenants' data or the provider does not know whether the person who breached the system had access to the tenants' data.

Recommendation

Landlords should have a duty to use information in a responsible manner. All landlords and agents should be required to comply with the Australian Privacy Principles.

The landlord, their agents and PropTech companies should have a duty to store information securely and inform tenants if the data is breached, and compensation should be available in the event of a data breach.

Stage	**Storing Documents**
In the application process	- Information should be retained for a maximum of 6 months with the consent of the tenant. The tenant must be able to choose for it to be deleted immediately after the application is rejected. - The tenant should have the right to request documents be deleted sooner.

During the tenancy	- Information related to the tenancy must be retained for the duration of the tenancy. - The application for the tenancy must be retained. - Supporting documents and personal identity documents with the application must be deleted 6 months after the start of the tenancy. - Documents stored on the application side (e.g., a PropTech company) must be deleted once they are transferred onto the tenancy file
After the tenancy has ended	- Personal identity documents must be deleted after 6 months. - Documents other than records which record tenancy payment or must be kept in accordance with another law must be kept for 6 months, and must be deleted after 12. - The documents recording payment of rent and other charges must be retained for a minimum of 6 years.

5.4. Right to View and Correct Personal Information

Q18. Do you support requiring landlords, agents or proptechs to:

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

(b) correct rental applicants' personal information?

Please explain your concerns (if any).

Where renters have provided information or become aware information has been collected about them, they should be able to request access to this. Landlords, agents and PropTech/RentTech companies should be required to correct rental applicants' personal information as necessary.

The Australian Privacy Principles mandate that personal information can be requested and entities subject to the Principles should give the personal information to the tenant. This would include any information which includes personal details or relates to the tenant. To create a uniform application throughout the tenancy space, we recommend all landlords be required to give personal and identifying information to the tenant when requested.

If the document contains personal information about another person and that person is not a landlord, another tenant or an occupant, the landlord may redact that person's identifying information. However, there is no requirement to do this. This allows flexibility for bodies like social housing providers, which may not wish to release the names of persons who complain about other tenants.

If the landlord or their agent does not want to provide documents containing personal information to a tenant, it should be the landlord or their agent that must apply to the Tribunal within a reasonable time to get an order excusing them from complying with their obligations.

This would streamline the process, especially as the tenant may not know the reason for refusing to disclose the document, and as such it would be difficult to make a claim to prove the document should be disclosed.

If the information is incorrect, the tenant (or previous tenant) should have the right to ask the real estate agent or their landlord to rectify the information within a reasonable time. If they fail to do this, the tenant should be able to seek an order from NCAT that the information be rectified by the landlord or their agent. If there has been a loss due to the use of incorrect information, and this was the fault of the landlord or their agent, the tenant should be able to seek compensation. An example of where seeking an information rectification order is useful is set out below.

Example: Over the past 6 months the landlord has been failing to fix repair issues with the property but has refused to provide a rent reduction. The tenant ended up reducing the rent they paid by $60 per week while their matter was before NCAT because they had to pay extra for food while the oven was not working. This meant that after 6 months, they were showing as $1,440 in arrears. NCAT decided to reduce the rent by $100 per week for the 6 months. The landlord's agent applied this as a credit, instead of rectifying the information. This meant it appears that the Tenant was in arrears for 6 months which will affect future property applications, however, as a rent reduction at NCAT can be retrospective, they had legally fully paid their rent each week of the tenancy.

Recommendation:

Tenants should be given access to personal information (including specifying this be free, reasonably accessible, and clear timeframes for response [14 days]).

If the landlord or their agent does not wish to provide the information, they should be required to apply to the Tribunal in the 14 days to ask to be excused from their obligation. The Tribunal should have a presumption that access to the information should be granted unless there are extenuating circumstances which make it unreasonable to do so and the document has little effect on the tenant (for example, the document is primarily about somebody else).

6. Automated Decision Making

6.1. Supporting fairness for applicants

Q19. Are you aware of automated decision making having unfair outcomes for rental applicants? Please explain.

Q20. What should we consider as we explore options to address the use of automated decision making to assess rental applications?

We support the fair and equitable use of automated decision making, however care must be taken when implementing artificial intelligence-based systems to avoid discrimination and ensure algorithms are fair. Currently, the information used by automated decision-making dealing with residential tenancies is very limited. Companies operating these systems operate on a 'black box' model, where data is input, and an output is reached with limited or no information about how this occurred. This is even more alarming when sometimes tenants cannot see the results being output to know if they are being unfairly disadvantaged.

Currently applicants may be disadvantaged when they apply for a large number of reasons. This can include having a name that has previously appeared on a court or NCAT list (with no information about the matter), following certain groups or being friends with certain people on social media and scores may be given based on what a tenant spends money on. However, at the moment it is very difficult to assess how unfair any outcome is, with limited or no information being provided to assess the fairness of any decision.

The right to adequate shelter is a human right. As such, the decision making in its provision should be treated with adequate caution. The Australian Government has developed an AI ethics framework to assist businesses and government design responsible AI. It is recommended that this is reviewed and rules similar to the AI Ethics Principles should be made a requirement for companies offering residential tenancy AI solutions.

We also recommend the following specific protections be introduced:

- Unsupervised AI be banned (i.e., while machine-based learning may be used, this should not include unsupervised learning which has a higher incidence of incidental bias). Schemes should be required to obtain an independent expert assessment of their fairness based on their AI model.
- The Rental Commissioner and advocacy groups should be given access to the algorithm to allow for testing of fairness.
- Individual consumers should be given the result of the AI framework, and be given the opportunity to request an explanation setting out what the AI considered when making a decision. An explanation of the AI should also be given to consumers.
- There should be an onus placed on residential tenancy AI providers to ensure their products to not lead to direct or unfair indirect discrimination, and failure to take appropriate steps should lead to penalties.
- Residential tenancy AI providers must clearly state all information collected about a tenant that is considered by an AI (whether by the tenant uploading documents or by web-scraping or similar practices).

Furthermore, we recommend guidelines should be developed for model AI implementation in this space. It is recommended this become a focus, using smaller scale implementations, before permitting larger scale implementation of AI in the sector. It is also important to ensure applications made in paper form remain available for those who do not use online forms, and applicants are not disadvantaged for using a paper application form.

6.2. The effectiveness of the rental 'blacklist' scheme

The *Residential Tenancies Act* currently exerts a tight control on the blacklisting of tenants, however it has led to another scheme of 'blacklist', where rental references are being used to provide opinions and personal assessments, instead of merely factual confirmations. These rental references are generally not accessible by tenants and there are no real consequences for giving false or misleading information when giving a rental reference. This becomes a real issue when a tenant may initiate legal action (e.g., seeking compensation for failing to repair), it can become almost impossible for a tenant to seek another tenancy. We have had several clients who were parties in Tribunal proceedings where they had not breached their tenancy agreements, however they found it almost impossible to secure a rental due to their rental reference. These were middle-class tenants, some of which had a number of children. In the end this led to tenants offering significant amount of money up front (e.g., 3 months worth of rent) to convince prospective landlords to rent to them, while also having to explain the situation to the new landlord and hoping they don't consider this a risk to them.

Furthermore, while the *Residential Tenancies Act* does allow tenants to challenge listings on a residential tenancy database after it is made, there is no opportunity to prevent a listing. After a listing is made, it could take months to successfully challenge that listing, where it is almost impossible for the tenant to obtain accommodation.

Example: We have advised a tenant where the landlord was attempting to get the tenant to pay a certain amount at the end of the tenancy. The landlord was asserting the tenant owed more than the bond amount; however, they were not taking into account depreciation of old carpet and other assets. Instead of pursuing the matter at NCAT, where the landlord would be unsuccessful, the landlord gave a notice of an intention to list the tenant on a tenancy database, saying that if the money wasn't paid, they would be listed. They attempted to use this as a threat, with unliquidated and unproven damages. The Residential Tenancies Act provides no ability to stop a listing once it is proposed and the tenant could only go to the Tribunal once she had been listed. The tenant is only able to make submissions to the landlord or their agent about the proposed entry, which only must be 'considered'.

Recommendations

A penalty and the ability to seek compensation for providing false and or misleading information in rental references should be introduced to the *Residential Tenancies Act*.

Section 213 of the *Residential Tenancies Act* introduce a requirement for the landlord or their agent to provide a response to any submissions, and to allow the tenant 14 days after that response to apply to the Tribunal to prevent a listing if the landlord will still proceed (or immediately after the initial copy of disclosure of listing is given).

6.3. Discrimination, machine bias and AI gone wrong

In the current system there are many differing AI-based systems used to judge renters and decide whether they would be good tenants. These all use AI to different degrees. For example, some may be simple rules-based programs designed by coders and others may involve either supervised or unsupervised learning. These programs use a substantial amount of information to generate score, with tenants being rewarded for providing access to accounts like social media to see the patterns of renters. Tenants are also compared to documents such as lists of previous NCAT hearing parties, with no further information. This means a tenant could end up punished for making a valid claim at NCAT or for simply having the same name as someone else.

Another commonly raised concern about AI is the potential for machine bias, also known as algorithmic bias. Using historical data to program an algorithm may result in a discriminatory system.[14] Although using AI may assist eliminate direct human bias of individual decision-makers, they can adopt the unconscious, or conscious, biases of programmers or the datasets from which the AI system learns.[15] Equality before the law is an important aspect of our legal system and the rule of law and when analysing AI's potential, a focus on bias must be maintained.

The best way to minimise these risks is to require proper guidelines for automated decision-making affecting renters, and require that information about systems be made available to the public. As it stands, the systems are essentially black boxes, where you put in information and they provide an output that the tenant may not be able to see. There is no way to know if the AI is applying some bias or discrimination (whether direct or indirect) as there is no access to either the process in that case, or even the information generally.

While the 'trade secrets' of corporations carrying out business should be respected, this must also be balanced up against the rights of tenants to know the information people have collected about them, and to know that they are not being unlawfully discriminated against. Using secret AI with a lack of explanation about the process has often led to disastrous consequences (see for example robodebt, where there was a lack of understanding of how the automated system was implemented). The correct balance of these rights is to implement regulations as to the use of automated decision-making, require companies using automated decision-making to explain how it is used, and also to give regulators, and people who request it, access to the rules that are applied in assessing applicants and information about the AI supervision.

Specifically, unsupervised AI should not be permitted as it can allow for indirect discrimination in many cases, without any human understanding and assessing the accuracy of the results of the AI as well as the potential implications of the results (ie is there a potential for indirect discrimination).

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[14] Myam Ashoori and Justin Weisz 'In AI We Trust? Factors That Influence Trustworthiness of AI-infused Decision-Making Processes' arXiv e-prints, 5 December 2019, 8

[15] Toon Calders and Indrė Žliobaitė, 'Why Unbiased Computational Processes Can Lead to Discriminative Decision Procedures' in Bart Custers et al (eds), *Discrimination and Privacy in the Information Society* (Springer, 2013) 43, 55-56.

The United States of America and COMPAS

Some states in the United States of America have introduced a tool that calculates a chance of reoffending to assist sentencing judges. The tool was originally used by parole boards and its use was expanded to courts after the Conference of Chief Justices adopted a resolution to 'Support of Sentencing Practices that Promote Public Safety and Reduce Recidivism'.[16] While the exact calculations behind COMPAS scores remain trade secrets, there is a published practitioner's guide which sheds some light on its algorithm.[17] The program was subject to a court challenge in *State v Loomis*[18] where it was argued there was a breach of due process. The Court held that due process was still afforded despite the secrecy of COMPAS' algorithm, but it was noted that a warning should be given to judges not to place too much importance on the results of the test. While judges are experts at weighing up many factors, the movement towards an overreliance on automated decision making to conduct the screening of applicants is alarming, as it is tending to become a major factor in tenancy application decisions. Due to its prominence, which is surely only to grow moving forwards, it is key to ensure the systems are well regulated and visible to all parties involved.

The subsequent response, while largely critical at first has later become more mixed. ProPublica reported that the software used was biased against persons of African American background. However, subsequent studies have demonstrated that this may not be the case.[19] The subsequent coverage of the ProPublica article demonstrates the necessity to ensure algorithmic bias does not lead to racist or discriminatory consequences, even if the algorithm is statistically sound in some manners. This cautions against 'black box' models of AI where private corporations may be able to directly or indirectly discriminate against classes of people without the appearance of such because the algorithm cannot be examined.

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[16] *State v Loomis*, 881 N.W.2d 749 (Wisconsin Supreme Court, 2016)

[17] Ibid [51]; See Northpointe, 'Practitioner's Guide to COMPAS Core' (Guide, 19 March 2015) <http://www.northpointeinc.com/downloads/compas/Practitioners-Guide-COMPAS-Core-_031915.pdf>.

[18] 881 N.W.2d 749, [1] (Ann Walsh Bradley) (Wisconsin Supreme Court, 2016)

[19] Northpointe study 13-25: 'Multiple studies that demonstrate COMPAS Core is reliable (test-retest and internal consistency), that its scales measuring needs have construct validity and behave consistently and that its risk scales have predictive validity'.

7. Portable Rental Bond Scheme

7.1. The design of the portable bond scheme

A rental bond is a surety against a tenant's potential, not actual liability, that is provided at the start of the tenancy. Where a renter is facing financial difficulty at the start of a tenancy, they should be offered appropriate support to sustain their tenancy rather than face a breach and risk losing their home and placed at an increased risk of homelessness.

We are in favour of the flexibility that the portable bond scheme will offer to tenants when changing tenancies, however, the scheme must be approached with some caution. Particularly, there should be a clear warning to tenants who seek to use the portable bond scheme, that if their bond refund is less than the full amount, they will be required to top up the bond. The position of landlord representative groups' position is that the portable bond scheme should only be available when the previous landlord consents to its use. We disagree with this, as such a broad discretionary consent power could lead to tenants feeling pressure to go above their contractual obligations, leading to pre-vacate inspections requiring cleared-out premises. It may also lead to the ability of landlords and their agents to punish tenants for their conduct during the tenancy (such as reporting repairs).

Furthermore, the tenant should not be required to identify if they will use the portable bond scheme on their applications or as a part of their tenancy agreement as this could detrimentally affect their chances of obtaining a tenancy compared to others who will pay their bond upfront, as it adds more risk for landlords. This may again have the effect of disadvantaging those with less money to afford upfront payments in rental applications. The portable bond should be implemented at the rental bonds online level, where the tenant can elect to use it when paying the bond on the rental bonds online system or by giving the new landlord a certificate when paying the bond.

Q21. How long should a renter have to top up the new bond if some or part of the bond has been claimed by the previous landlord?

Tenants should be given flexibility and an appropriate amount of time to pay the difference in the bond between properties. At a minimum renters should be given no less than 14 days to top up the new bond.

However, it should be noted of the potential for the previous landlord and agent to use this requirement to pressure the tenant to make an agreement for the pay-out part of the previous bond to the landlord. For example, the landlord could threaten to make an NCAT application or claim the entirety of the bond to pressure the tenant into settling the claim so that at least part of their previous bond can be used in the new premises. For this reason, we recommend that the 14-day timeframe to 'top up' the bond should commence from when the bond is released from the rental bonds board (which may be after NCAT proceedings), not after the tenancy commences or the landlord simply makes a claim at NCAT for the bond (importantly, currently if the landlord disputes a bond pay-out at NCAT for only half of the bond value, the whole bond is frozen until the matter is resolved)

Hypothetical: A tenant moves out into a new tenancy under the portable bond scheme. The tenant must have the bond paid within 14 days. There was some minor property damage at the old property the tenant was renting. The old property has a bond of $6,000. The new property

has a bond of $5,400. The damage to the old property cost $600 at most to repair, but most of the damage is fair wear and tear. The landlord also gets a cleaner to clean the property and is claiming $800, despite the tenant also paying a professional cleaner for an end-of-lease clean before leaving and giving the landlord the receipt. The landlord claims $1,200 for the damages without providing any quotes or invoices. The landlord pressures the tenant to accept $1,500 so that the bond is released otherwise the whole bond would be paused. As the tenant must pay the bond within 14 days, the tenant must either pay $6,000 and not make use of the scheme, or agree to the landlord's demands which exceed any reasonable estimate of what they would get if they went to the Tribunal. The tenant is low on cash at the moment as she lost her job a few weeks before. As such, she settles with the landlord so that she only has to pay $900 extra for the bond.

Recommendation

Renters should be provided a minimum of 14 days to top up the bond if there is a difference between the bond required at a new property and the bond refunded from their old property.

This timeframe should start after the bond is paid out from the rental bonds board, and should be paused if an NCAT application is made in the 14 days following the pay-out of the rental bond if the tenant challenges that pay-out at NCAT.

Q23. Should this scheme be available to all renters, or should it only be available to some? Please explain why.

Q24. Who should have a choice on whether to use the scheme?

Q25. What other (if any) things should we consider as we design and implement the

portable bond scheme? Please explain.

This scheme should be available to all renters, and should be optional for renters to use. Universality is significantly less complex to administer, reducing the costs to the government. It also reduces the already very low risk of default. The only caveat to this is that the scheme should not be available if the tenant has failed to top up their previous bond within twice the required time (e.g., 28 days) within the last 2 years, and that the tenant has failed to pay back the loan that was issued at the time of asking to use the portable bond scheme, if one was issued. This protects landlords from persons who have a history of not topping up their bond and promotes repayment of the proposed government guarantee to allow tenants to use the scheme in future.

Landlords should be informed only that a bond is in place. The landlord should not know about whether the tenant will use the rental bond scheme when assessing their initial tenancy application. Their interests are secured within the system and the involvement of the past landlord or new landlord in the process (for example, by requiring consent), is only likely to muddy the waters and significantly reduce the success of the scheme, which is most important for those with lower incomes. The ILC has seen that government support and other factors including being victims of crimes is used to discriminate against applicants. Involving landlords in the process will allow for punishment to be handed out by disgruntled landlords/agents of the old property, and for discrimination to be affected by the landlords/agents of the new property.

We understand the cost of implementation may be significant due to the required rebuilding of Rental Bond Board systems. This represents an opportunity to better deal with bonds between co-tenants and subtenants, especially in relation to people in instances of family and domestic violence whose bond can currently be used as a tool of further violence.

7.2. Consequences if the renter does not top up the second bond

Q22 What should happen if the renter does not top up the second bond on time? Please explain why.

Moving house can be very expensive for renters, an average of $4,000 per renting household. The proposed portable bond scheme is intended to reduce the financial disruption that moving often causes. Renters struggling to pay the difference in bond amounts should be supported to make the payment while they recover from the financial difficulties associated with moving house. Caution should also be taken when giving reasons to terminate a tenancy at the start of the tenancy, which could not only double the tenant's moving expenses but also double the landlord's costs of their agents.

If a renter is not able to pay the difference in bond within the time limit, the new landlord's bond should be guaranteed by government. Where the government guarantees the bond, they may then seek repayment of the difference in bond and offer appropriate support if the renter is facing financial hardship. Support could be provided through a NILS loan (i.e., a no or low interest loan scheme) or some form of payment plan arrangement. The Department of Communities and Justice already has a bond loan scheme with structures in place to facilitate repayment of the loan into the Bond Board, and statutory protection of interests. The loans are only available to low-income households eligible for social housing and the rate of default is reported to be almost non-existent. In the case of rare defaults on the loans these are best referred to government debt collection services.

We recommend the government guarantee be available for all tenants, provided each tenant in the agreement has an income of less than $100,000. While this is substantially above the low-income threshold used for the bond loan scheme, it recognises the current climate moving towards middle-income households finding it difficult to secure reasonably affordable housing. This recommendation is also made on the basis that allowing more tenants to access the scheme will promote its use and sentiments towards the portable bond scheme among landlords and their agents.

Recommendation:

Where a person meets the requirements of the rental bond top-up loan (as proposed), the rental bond is paid and the tenant has not breached the requirements to top up the bond payment. In these circumstances, the tenant should repay the debt but there are no adverse consequences to their tenancy.

Failure to top up the rental bond within the required time should be a breach dealt with under s 88 of the *Residential Tenancies Act*, requiring the rental bond loan, in combination with any rent arrears, to exceed two weeks of rent before a notice of termination can be issued. The

landlord may still go to NCAT to seek an order requiring the money be paid where it is less than 2 weeks, however the landlord should not be able to seek termination.

Tenants should only be barred from the portable bond scheme for 2 years if they have both:

- Failed to top up the bond within twice the required time (28 days), and
- (If a loan is given) failed to repay the rental bond top-up loan by the time of entering into the new tenancy.

7.3. Domestic Violence Scheme and Transfer of Co-Tenant Bonds

We deal with a wide variety of bond matters, including matters that have arisen after the issuance of a domestic violence termination notice, or after a tenancy may have been terminated because of domestic violence but not in accordance with the new scheme. In 2019 the changes for domestic violence victims came into effect. Since then, there have been a number of cases that deal with an issue seemingly not contemplated by the legislature when enacting those provisions.

The domestic violence termination provisions allow for the termination of a co-tenancy, but make no provision as to what is to occur with the bond. Section 174 provides the ability to seek the repayment of the bond from remaining co-tenants, however, the remaining co-tenants can deduct amounts from the bond at their discretion. Furthermore, Section 174 does not explicitly grant the Tribunal to deal with the issue if the bond is not repaid by the remaining co-tenants, and as such an application to a court may be required to resolve an issue.

This is an extremely difficult position for a victim of domestic violence to be in and often leads to the victim letting the bond go to the landlord on the basis that they do not want to pursue the perpetrator for the money. As such, we recommend that where a co-tenancy is terminated on the basis of domestic violence, rental bonds online should be able to pay out the co-tenant's portion of the bond, after which the remaining co-tenant will be required to top up the bond. If they fail to do this, a similar system to that in the portable rental bond scheme could be applied.

Recommendation

Allow for a streamlined system for victims of domestic violence to claim their portion of the bond through rental bonds online, and the remaining co-tenant(s) are then required to top up the bond.

Co-tenancies

In addition to this, the modern reality of tenancies is that many people (especially young people) are in shared tenancies, where tenants may transfer in and out of the agreement throughout its life. Having clear identification of the current tenants and who the bond belongs to is key. On the basis that other major changes to rental bonds online have been proposed, the we recommend the system be amended to allow newly incoming co-tenants to join the bond and departing co-tenants to leave the bond. We recommend the following process be applied.

We note that in our casework we have seen many occasions of the transfer of tenancy agreements go wrong. For example, the landlord may consent to the transfer, but later it is alleged the improper forms were filled out with the landlord and thus it was not effective. The landlord often exerts significant control over transfers, above and beyond simply 'consenting' to a transfer. On occasions, we have experienced landlords' agents trying to require tenants to move out all of their belongings from the house, allow for an inspection and then move back in on the same day in order to action a transfer. Importantly, while landlords are required to consent to a tenancy transfer, they are not a party to the transfer, as it is an assignment of a contractual and proprietary right between the two tenants. To simplify the process, we recommend that the transfer agreement (the agreement between the new co-tenant and departing co-tenant) be implemented within rental bonds online, or clearly made available to tenants when transferring a tenancy in rental bonds online.

Recommendation

Co-tenants be able to transfer on and off the bond with the landlord's consent by:

1. The departing tenant proposes the transfer.
2. The landlord consents to the transfer.
3. The departing co-tenant and new co-tenant sign a standard form transfer agreement online (or are given access to one).
4. The new co-tenant submits their portion of the bond (or it is submitted by the agent).
5. The departing co-tenant is refunded their portion of the bond (unless a claim is made against it within 14 days).

The opportunity to redesign rental bonds online be taken to allow co-tenant portions to be separately registered with different amounts on rental bonds online.

8. Challenging 'Excessive' Rent Increases and Rental Affordability

8.1. Information Available to Renters to Challenge an 'Excessive' Rent Increase

Tenants are able to challenge a rent increase issued by their landlord under the Residential Tenancies Act.[20] However, in our experience the majority of tenants are unaware of this mechanism and thus it is underutilised. In cases where tenants have sought orders that their rent increase is excessive and have supplied evidence of the price of comparable properties this is often rejected by NCAT in favour of the figure given by the landlord's real estate agent due to their 'professional experience' in the area of 'assessing properties'. Increasingly, NCAT has shown reluctance in considering larger-scale quantitative data (for example, the Tenants Union rent increase calculator which uses the data from lodged rental bonds), instead favouring less reliable small-scale data provided by the parties. NCAT's current reliance on advertised rates by real estate agents can distort the Tribunal's evaluation as real estate agents may advertise properties at a higher rate, even where they are not actually rented for the higher advertise price. This leads to inflated rental assessments that do not align with actual rental values.

Example: Many Australians have seen the TikTok sensation of Chantelle Schmidt taking her landlord to the Tribunal for an excessive rent increase. While every decision is complex and based on its own merits, there are elements of the decision which are alarming. The Tribunal acknowledged that assessing market rent is not an exact science and took strong regard to the agent's 'confident' assertions as to the appropriate market rent. This raises difficulty for tenants, where agents are incentivised to obtain higher rents for landlords but they are often the persons used as experts as to the appropriate market rent level. The Tribunal also appeared to place significant weight on the next-door property (which was managed by the same agent) was advertised at the price of the rent increase, leading to the conclusion that a rent increase from $950 per week to $1,250 per week was the appropriate level of increase to not be excessive. The actual weekly rent of newly and currently rented properties in the area is not available. However, the price of the rental next door was later dropped to $1,200 and still took over 4 weeks to become tenanted.

Challenges persist when members of the Tribunal lack the requisite expertise to assess cases involving excessive rent increases, particularly when limited information on comparable rental amounts are presented by the parties. The involvement of out-of-area Tribunal members further compounds this issue, as their unfamiliarity with local rental markets can make it more difficult for them to determine an accurate property value.

Incorporating the state of repair of residential premises into rent increase challenges is difficult as most rentals are advertised as being in reasonable condition. Additionally, tenants are often asked to provide an onerous amount of evidence on this issue. NCAT's emphasis on comparable market properties, while important, can at times be challenging to meet due to

[20] S 44(1)

the inherent uniqueness of each property. However, relying solely on the comparable market properties is insufficient to effectively curb excessive rent increases, which can accumulate extremely quickly. Addressing the issue of excessive rent requires a broader focus on other factors that contribute to reasonable rent assessments.

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.

Q27. What do you think is the best way to collect this information?

Currently the information that is available regarding rents and rent movements in NSW is based on the rental bond data held by NSW Fair Trading. NSW Fair Trading publishes data for recent rental bond lodgements and refunds, as well as data on the total rental bond holdings. This provides timely and accurate information about movements in the market rent for properties recently leased to a new tenant according to location, property type and number of bedrooms.

The Department of Communities and Justice publishes this data in an authoritative way in the Rent and Sales Reports and is able to clean the data. The Tenants' Union converts the open-source version of this data into a number of tools, in particular as part of our Rent Increase Negotiation Kit.

There is currently no equivalent reliable dataset to provide visibility over rent movements (an increase - or decrease - in rent within a tenancy) for properties with a sitting tenant. Recently published insights by the ABS and RBA have begun to give some visibility at a national level, but this source is unlikely to become available in a way that is available for renters.

We support collection of this type of information to provide greater transparency and visibility across the private rental market. Publishing data concerning increases will significantly increase the value of tools such as the Rent Increase Negotiation Kit to renters, owners and the Tribunal. We would be pleased to work with the Department to identify how to ensure this data is most usefully published.

A voluntary survey will be costly to administer if the intention is to proactively seek information from renters, landlords or real estate agents via regular correspondence. It is unlikely response rates would be high without considerable resourcing of the survey. Even with a very strong response rate, a survey would only provide broad or general guidance on rent movements. While this would still provide a useful new lens on what is occurring in the private rental market, it would not be a representative picture of rents across all locations or housing type or rent price. It would also not be possible to provide information in a timely manner - lag time would be considerable.

This may impact its overall trustworthiness as a tool and reliable measure for assessing excessive rent increases at the level of the individual tenancy for renters, landlords and the Tribunal. This should be seen in light of the Tribunal's current hesitancy to rely on the rental bond data obtained and calculated by the Tenants Union. As such, it would not achieve the objective outlined in the Consultation Paper of providing renters with the information they need to more easily assess if a rent increase is excessive, and allow comparison of rents across similar properties in similar locations.

A more effective way for the NSW Government to collect this information would be by requiring landlords or their agents to report rent increases. This could be achieved by requiring that the increase be registered (with the appropriate agency or using an online system) and confirmation of this provided to the renter before the increase is considered valid. Reporting an increase would occur after written notice had been served, and the required 60 days written notice would still apply.

In order to ensure that this information can be used by renters, the data should be published by the Commissioner of fair trading and it should be added to the list of considerations the Tribunal may have regard to when deciding if a rent increase is excessive. This will assist the Tribunal in knowing they can rely on the information without being appealed on such a decision for the potential unreliability of information.

Recommendation

To ensure the data is reliable and timely, landlords or their agents should be required to report a rent increase to the NSW Government using an online system (such as Rental Bonds Online). This could be stored alongside bond records which show the initial rent value for the property, allowing for records of nearly all current rent prices in an area.

8.2. Clarifying Limits on Rental Increases

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.

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?

We submit that a universal limitation to rental increases once every 12 months is an appropriate mechanism to reduce the misuse of swapping tenants between tenancies to increase rent more often than the legislature intended.

Rents have been increasing sharply for many renters in NSW. The limited protections currently available are not adequate for renters who face an excessive increase during a tenancy. At present the *Residential Tenancies Act* places a limit of one rent increase in 12 months for renters on a periodic lease. This is an appropriate, though limited, protection.

The ILC has given advice to many tenants who have faced more than one rental increase in a 12-month period as they are swapped between different types of tenancies. We are aware of some tenants who may end up with up to three increases, one in a fixed term, one just after the fixed term ends and one when the tenant goes back onto a new fixed term agreement. This enables landlords to make rent increases appear smaller, while actually increasing the rent an excessive amount over the time period.

Failing to limit rent increases may also have the consequence of shorter fixed term leases, where landlords raise the rent every 6 months on the renewal of each agreement. In these cases, an excessive rent increase is even more difficult to prove as there exists an argument that the increase is the agreement between the parties as a part of the new tenancy agreement, and as such the Tribunal should not interfere.

While it may be argued that for fixed term agreements under two years placing a limit on the number of times an increase can occur within a 12-month period is not as necessary, as all parties agree to the lease, the ILC recommends all leases be subject to the same limit. This will assist tenants to understand the system in a uniform manner, and still allow landlords to increase rent on a regular basis. Increases during shorter time frames have a larger probability of being excessive in nature, and the ILC can foresee that if no-ground terminations are removed for fixed term agreements, using rent increases may become a new mechanism to bring the tenancy to an end.

Recommendation

The ILC recommends the following simple framework:

1. A rent increase cannot commence in the first 12 months of the tenancy or if the rent has previously increased in the past 12 months, and is invalid if it attempts to do so.
2. In a fixed-term agreement of less than 2 years, a rent increase must be written into the lease.
3. For all leases, a tenant must be given at least 60 days' written notice of the rent increase. This is not required for a rent increase in a fixed term agreement of less than 2 years, if the rent is increased more than 60 days after the start of the agreement.

8.3. The Model for Challenging a Rent Increase as 'Excessive'

Q30. What do you think about the [below] options? Please provide detail.

Require a landlord to prove that a rent increase is not 'excessive' where, for example, a rent increase exceeds CPI over a certain period.

The ILC supports the proposal to require a landlord to prove that a rent increase is not excessive where the rent increase exceeds a prescribed limit. Placing the onus on the landlord in these circumstances will assist with negotiating rent increases and also limiting rent increases to an amount which is fair and reasonable.

Currently, the onus is on individual renters to challenge a rent increase, and the only basis to do this is if they believe it is excessive. Many renters do not feel confident challenging an excessive rent increase, and they may worry the landlord may retaliate in response. For renters it can also be very hard to access and provide the information and evidence required to demonstrate a rent increase is excessive to the Tribunal. This kind of information has generally been much more easily available to real estate agents and landlords.

The ILC has observed many occasions where claims for rent increases being excessive have failed (despite the increase being over 25%), because the Tenant was unable to prove their evidence was better than that of the landlord. This does not mean the Tribunal found the rent increase was fair, however both parties could point to some evidence in support of their case and the Tribunal couldn't say the tenant's case was better. It is especially difficult for tenants to prove their case when they must also provide evidence without expert support, while the landlords' agents are seen as experts despite their lack of independence as a case. At common law, having experts also act as representatives for parties should be considered strongly against any expert evidence they give (and would generally result in its exclusion).

If implemented well, the proposal set out in the Consultation Paper to collect more information about rent increases could improve accuracy and understanding of current

market rents across new and older tenancies and make it more directly accessible/available for renters. However, as we outlined above, our current reliance on market rents as the primary consideration for assessing whether an increase is excessive has failed to achieve reasonably stable or predictable rent pricing. The current financial pressure facing renting households, a large part of which is because of the steep increases in rents experienced over the last 12 months, suggests further reforms are required.

In the ACT, a landlord is required to prove that a rent increase is not 'excessive' where a rent increase exceeds 110% of the change in CPI since the last rent increase or since the tenancy agreement began. Unless the renter consents to the increase a landlord must apply to the Tribunal for the increase, and provide evidence for why an increase above the threshold is justified. If the increase is below that threshold (110% of change in CPI) the increase is considered reasonable. In this case, the renter who wants to challenge an increase must apply to the Tribunal and provide evidence as to why they feel it is excessive in the circumstances.

If a model of this kind was introduced in NSW, the landlord would still be able to increase rents above any threshold set (whether that be according to CPI, or some other measure determined appropriate). However, the responsibility to justify and provide evidence for the increase would be more fairly allocated to the landlord or their agent. A renter should not have to prove an increase is excessive in these circumstances.

This said, when implementing such a system, consideration should be given as to how to reduce overwhelming rental increases when a property becomes vacant.

Recommendation

If a rental increase exceeds 115% of the CPI (all groups - Sydney) increase compared to the previous increase, the onus is shifted to the landlord to prove the rent increase is not excessive.

8.4. Factors to be Taken into Account when Assessing Rental Levels

Q30. What do you think about the [below] options? Please provide detail.

Amend the criteria in the Act for when 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.

The ILC broadly agrees with the current factors listed under the *Residential Tenancies Act*, however the legislation should be amended to require the Tribunal to consider all factors with evidence put towards the Tribunal.

Other factors must be considered equally with, or even above, market rent when determining whether a rent increase is excessive. The failure of the rental housing system – with tight supply and little to no regulation of rents – has resulted in a current situation in which market rents for residential properties are not generally in line with what the community considers 'fair market value'. 'Fair market value' is generally considered to be a price both parties are willing to enter into, where both are acting in their own best interests and are free of undue pressure.

Under the current system, rents are being set at a price that renters are 'willing to pay', that

is – they accept the rent increase and may not move out – but this is only because they feel forced to. They are facing undue pressure given the current housing crisis. The system of determining whether a rent increase is excessive is a current driver for the increase in the market, as the market pressures are allowing landlords to ask well above the reasonable price for properties in disrepair. As the rent increases are generally only compared to properties advertised in the current market, and not all the current rents in the area, the market can become significantly inflated where tenants are struggling to find accommodation and often offering to pay significant rent upfront to secure a home for their family and themselves.

While the list of concerns allows the Tribunal to consider 'any other matter it considers relevant', the Act explicitly restricts consideration of the renter's ability to pay an increase and by inference the lack of any alternative affordable accommodation. The lack of any direct reference to motivating factors means landlords are also not minded to consider their reasons for increasing the rent before issuing a notice to their tenant. This is in comparison to the landlord, who may have their increased costs such as interest considered by the Tribunal. It would be more consistent with the human right to adequate housing to enable the Tribunal to consider the tenant's income and ability to afford the rent in deciding if a rent increase is excessive, although this would not be the determinative factor.

Other legislation, such as the *Residential (Land Lease) Communities Act* imposes a burden on the Tribunal to consider the increase in CPI (All groups- Sydney). This allows for the lessee to raise the general increase in the market in a broader fashion which may be rejected by the Tribunal in tenancy matters. As such, the *Residential Tenancies Act* should be amended to allow the Tribunal to consider CPI increases, as well as datasets approved by the Commissioner of Fair Trading about the current rental prices in the area.

The *Residential (Land Lease) Communities Act* also requires the park operator to provide a justification for the site fee increase. The justification does not need to be long, but needs to explain the basis of the increase so that the residents can better understand why the increase has occurred, to promote negotiation and to allow the Tribunal to point its attention to that reason during the hearing. Overall, while this may add a slight burden to the landlord, it promotes the better resolution of matters, instead of the tenant blindly approaching the Tribunal trying to specify the rent increase is excessive.

The legislation should also be made clearer that there is no general rule that one factor is more determinative than any other. This should be done in an attempt to bring the Tribunal's focus to all of the factors, instead of just the factor of market rent. This is important especially given the imbalance of evidentiary power of the parties, where landlords have 'market experts' represent them while tenants generally represent themselves. The ILC has previously observed the Tribunal exclude evidence provided by a tenant about similar properties and accept evidence of the agent on the basis that they are an expert on providing rental valuations. It would also be beneficial for the Tribunal to use its general powers to order parties to obtain specific information addressing these factors, instead of simply relying on parties to bring what they feel is relevant.

The ILC has also observed issues arising from the joint nature of s 44(1)(b) and s 44(1)(a) of the *Residential Tenancies Act*. This means that even in circumstances of a reduction in the quality of the property, the tenant is required to prove what the general market level of rents is in order to obtain a rent reduction. In these cases, there is already an agreed rental price between the parties when the withdrawal or reduction occurs. As such, there should be a

presumption that the contract price is the fair market rent for the residential premises in cases where a rent reduction is sought for the withdrawal or reduction of amenities, facilities or services.

Recommendation

The *Residential Tenancies Act* be amended to include consideration of CPI (All groups - Sydney) and datasets approved by the Commissioner of Fair Trading about the current rental prices in the area, as a factor for consideration.

The *Residential Tenancies Act* be amended to specify that there is no general rule that one factor is more important than the others. The *Act* should also be amended to specify that, for claims under s 44(1)(b), the rent at the time of the reduction or withdrawal is presumed to be the fair market rent unless proven otherwise.

The *Residential Tenancies Act* be amended to require the landlord to provide a reason for the rental increase. This reason should be taken into account when deciding if the rent increase is excessive.

8.5. Further Options to Address Rental Affordability

As addressed above, there is a significant power imbalance in the evidentiary value and availability of information available to parties in rent increase matters. Landlords and agents may also influence the rental market by changing the price of similar properties in their portfolio when advertising online, in order to obtain that evidence. In cases where the Tribunal finds it difficult to draw a conclusion about the fair market value, the Tribunal should be able to appoint an independent rental market valuer at no cost to either party. This service would assist parties to resolve the dispute by involving an independent expert. This would help balance the playing field for tenants, who would find it difficult, or possible even impossible, to obtain a valuation of how much the property could be rented out for, as they do not own the property.

8.6. Options Outside of the Residential Tenancies Act to Address Rental Affordability

The ILC also recognises that other steps are necessary to improve rental affordability. More broadly, the ILC supports the following measures (among others):

- Substantial investment in social housing to provide stable housing for those who cannot afford the market-cost.
- Additional taxation on vacant properties.
- Additional taxation on properties that are used for short term rentals.
- State planning to support the conversion of spaces from other uses to residential spaces, providing they will be suitable for use as residences.
- Supporting first home buyers.
- Better enforcement of tenancy rules and regulations to promote compliance with the existing legislation.

9. Other Changes to Improve Rental Laws

9.1. Embedded networks

Q31. Do you support new laws to require landlords or their agents to tell rental applicants if a rental property uses any embedded network? Why/why not?

Q32. When should a rental applicant be told that a property uses an embedded network?

Q33. What information should a renter be told about a rental property using an embedded network? Please explain.

Renters must be made aware of embedded network arrangements, and what this would mean for the supply of their essential services, when considering whether to view and then apply for a property so they can make an informed decision regarding the suitability of the tenancy for them.

An increasing number of renters – including many in the private rental market through strata schemes, and renters in residential land lease communities – find themselves renting properties that use an embedded network to supply energy utilities. This is where the contract for supply of electricity or other services is held by the owner or operator of a building, or the Owners' Corporation, and is then sold on to residents. In some cases, a renter may have a direct relationship with a retailer (rather than one mediated through their landlord or the Owners' Corporation), but they will be locked into the retailer as the only available provider.

The ILC has also provided advice to tenants in relation to the uncertainty around billing for embedded networks. As there is no obligation to provide evidence of the costs faced by the landlord to the tenant under the *Residential Tenancies Act*, the tenant cannot assess the truthfulness of the bills issued. Furthermore, the legislation does not provide for any maximum amount of time to give a bill to a tenant. The ILC has advised tenants who have previously received a bill of a year's worth of electricity charges in an embedded network, with 14 days to pay the bill, after believing the landlord would pay the charges. For this reason, as the landlord essentially carries out the billing in an embedded network, the ILC recommends provisions similar to those addressing water charges (also paid by the tenant to the landlord) be implemented into the Regulation.

While there can be some advantages for some consumers, there are a number of

disadvantages for those in embedded networks that renters should consider before

applying for a property. These may include:

- uncompetitive pricing arrangements; including methods of calculation of charges
- limited access to information about charges and supply
- inconsistent billing
- lack of access to hardship provisions and protections
- lack of equivalent safeguards in relation to safety and reliability of energy and other utility service supply through embedded networks

From March 2020, landlords and their agents have been required to disclose if electricity or gas is supplied to the rented property from an embedded network in the residential tenancy agreement. However, this is often done in the condition report of the property as a small checkbox with limited information as to the consequences of this. There is currently no requirement to disclose prior to the renter signing on to the tenancy agreement.

Disclosure of an embedded network must be accompanied by more information, in plain language, regarding what embedded networks mean for consumers in practical terms, including expected costs, reduced consumer protections, lack of choice and where to get further information. To this end, we recommend that the landlord be required to provide a disclosure in an approved form before the tenancy commences otherwise, they are unable to rely on Regulation 34 of the *Residential Tenancy Regulation*.

Furthermore, exempt retailers (operators of embedded networks) are generally required to apply for an exemption or be a deemed exempt retailer to operate an embedded network.[21] Applications to act as an exempt seller are made through the National Energy Regulator. While caravan parks providing short-term accommodation are deemed to be exempt, if a caravan park provides electricity to tenants, it must be approved. If outside of a caravan park, an embedded network needs to be registered if it deals with over 10 tenants. Exempt retailers are subject to conditions and breaching these conditions can involve penalties. These include conditions addressing pricing, the provision of information and billing/payment arrangements. For this reason, it is important that embedded network providers are exempt sellers to be able to charge for electricity.

Recommendation

Regulation 34 of the *Residential Tenancy Regulation* be amended to be as follows:

34 Electricity supply charges payable by tenant—ss 38(1)(e) and 40(1A) of Act

(1) For the purposes of section 40(1A) of the Act, a landlord is exempt from the operation of section 40(1)(c) of the Act, in relation to the payment of charges for the supply of electricity to the tenant at the residential premises that are not separately metered if the premises have a meter that—

(a) measures the supply of electricity that satisfies paragraphs (a)–(d) of the definition of separately metered, and

(b) does not have an NMI assigned for the purpose of paragraph (e) of the definition of separately metered because it is located in an embedded network, and

(c) the meter is not required to have an NMI assigned.

(d) the landlord has given the Tenant a copy of the approved embedded network information statement before the tenancy agreement was signed.

(e) the landlord is an exempt seller under the National Energy Law allowing them to own, operate or control a privately owned network.

[21] See the National Energy Regulator's guide.

(2) For the purposes of section 38(1)(e) of the Act, a tenant must pay any charges for the supply of electricity to the tenant at the residential premises that are not separately metered if the circumstances specified in subclause (1)(a)–(c) apply to the premises.

(3) A tenant is not required to pay the charges for the supply of electricity unless the landlord gives the tenant a copy of the part of the electricity supplier's bill setting out the charges and the method of calculating the rate of payment.

(4) A landlord must give the tenant not less than 21 days to pay the electricity supply charges.

(5) A tenant is not required to pay the electricity supply charges if the landlord fails to request payment from the tenant within 3 months of the issue of the bill for those charges by the electricity supplier's bill.

(6) Subsection (5) does not prevent a landlord from taking action to recover an amount of electricity supply charges later than 3 months after the issue of a bill for those charges, if the landlord first sought payment with of the amount, with the required evidence, within 3 months after the issue of the bill.

(7) A landlord must ensure that the tenant receives the benefit of, or an amount equivalent to, any rebate received by the landlord in respect of any electricity supply charges payable or paid by the tenant.

(8) A reference to a landlord in this section includes the embedded network provider if it is not the landlord.

9.2. Free ways to pay rent

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.**

Q35. Should the law require a landlord or agent to offer an electronic way to pay rent that is free to use? Why/why not?

The law currently sets out that renters must be offered at least one free way to pay rent. However, some renters are still being offered cash or cheque as their only 'free' option, and often as the alternative to an electronic third-party rent payment service that incurs fees for use.

According to the Australian Payments Network, only 5% of people still had chequing accounts as of 2021. Many banks no longer offer cheques for personal accounts, especially everyday personal accounts. At the Commonwealth Bank, most consumers are able to order a chequebook for free with most personal accounts, but will be charged $3 per cheque written. The law states that bank fees 'usually payable for the tenants' transactions' don't count when considering whether a given way to pay rent is 'free'. However, fees charged for cheques where the only transactions a renter is using a chequing account for is to pay rent, then in practice, all fees associated with that account are fees to pay rent.

Paying rent in cash also incurs various costs. For some renters, physically travelling to their real estate agent's office on a regular basis to pay their rent in cash is not possible due to work or carer commitments. For others, the time and money spent on travelling to pay rent in cash are costs that can grow quite significant.

Over the years between 2010 and 2022, tenants have largely enjoyed paying rent by direct debit transfer to their landlord or their real estate agent. However, recently the ILC has advised many clients about new 'rent payment apps. These apps are being imposed by landlords, requiring tenants to pay a fee to be able to pay their rent. They allow real estate agents to not take money into a trust account, and instead keep it within the app provider's accounts which may be differently regulated. However, they also seek to place the burden of payment for the app on the tenant by requiring them to pay for the service, instead of the landlord). These apps, and agents using these apps, have sought to comply with the letter of the law, instead of the spirit. This is done generally in one of two ways:

1. The App offers a free payment mechanism but only if you pay manually each week by entering your card details. If you want to pay with the same mechanism but wish to have it set up automatically, you are charged a fee (the 'convenience fee' method).
2. The real estate / landlord accepts payment via cheque that is mailed or hand delivered to their office (often only in one of these methods) (the 'cheque-mate' method).

Neither of these methods is justifiable given that the convenience fee method adds an additional cost where there is no additional cost to the landlord or the provider. If a tenant chooses not to take up the convenience fee, it can only possibly harm the landlord and their relationship with the tenant, as a forgot rental payment may give rise to rental arrears. The cheque-mate method represents a method that is often not reasonably available as banks move to close chequing facilities for non-business customers. In the end, both methods end with the tenant electing to pay the additional fee on the basis of convenience, despite the legislature previously looking to provide tenants with a fair method of payment that works for both landlord and tenant on an ongoing basis. For this reason, the ILC makes the following recommendations.

Recommendations

If a uniform method of free payment is required, the best method is to require the tenant be given bank account details for direct transfer as a condition of the lease.

Otherwise, the law should require the landlord to offer at least one electronic way to pay rent that is free to use and allows for regular payments to be setup without a fee.

9.3. Renters moving into strata schemes

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?

Strata renters face many of the same issues as other renters, but with the added complexity of an additional level of ownership structure. This comes out in three key forms.

- Resolution of repairs and maintenance issues in strata building suffers from lack of clarity around who bears responsibility for the maintenance.
- Tenants moving into the property are not routinely given a copy of the by-laws
- Unlike owner occupiers, renters can be evicted for breach of the by-laws. Also, unlike owner-occupiers, renters are generally unable to participate in the management structures that both set by-laws and decide the strategy for enforcement. Particularly where a dispute arises between neighbours, renters are at a disadvantage in resolving the dispute.

Much of strata scheme management is focused on creating harmonious relationships between people sharing a building. Renters can find themselves excluded from this process by not being treated as a part of the community.

Recommendation

That tenants be given information about the strata scheme they are entering before they sign the agreement, including the schemes by laws.

That the tenant be made aware if there is a tenant's representative on the owners' corporation because at least half of the number of lots in the scheme are tenanted (*Strata Schemes Management Act 2015* s 33).

That the duty to repair be clarified to include a duty to take reasonable steps to have the common property repaired, stated as follows:

> **63 Landlord's general obligation**
>
> (1A) In addition to any other obligations, where the residential premises is in a strata scheme, community land scheme or company title scheme the landlord must take all reasonable steps to ensure the owners' corporation, community association or other body corporate (such as a company) provides and maintains the common property in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the common property.

9.4. Retaliatory evictions

The ILC, in its practice, has noted difficulties with the retaliatory evictions framework. Often the Tribunal refuses to find a notice retaliatory on the basis it is not wholly retaliatory in nature (there is some other purpose in addition to it being retaliatory). Even where the Tribunal makes a finding that the notice is retaliatory, the Tribunal may often determine that the tenancy should still be terminated as the relationship has broken down. This is contrary to the purpose of the retaliatory evictions clause, which is meant to prevent evictions of a retaliatory nature, as the tenancy relationship is a commercial one.

The Tribunal will often find decide that requesting a repair, or refusing to comply with an unreasonable request of a landlord does not fall under the requirements of the Act, as no specific legal action was threatened (although this may have changed with a recent Appeal Panel decision).Furthermore, it is common that even if a notice of termination is found to be retaliatory, the landlord will simply re-issue a notice of termination in 3 months time for the same issue in the hope it will be determined differently. Overall, the protections provided by the retaliatory evictions clause fall short in practice and should be made stronger.

Case example: The ILC has observed that often when a tenant seeks for a termination notice to be dismissed on the basis it is retaliatory, the Tribunal will push tenants to settle for unreasonable time frames. For example, a tenant may lodge an application to have a 90 days notice be declared retaliatory. In conciliation, the Member convinces the tenant to agree to termination and vacant possession 14 days after the end of the 90 days, however even if the Tribunal decided the notice was not retaliatory, the tenancy would not have ended until at least 3 weeks after the 90 days (as the landlord would have had to apply to the Tribunal).

Tenants often also find it difficult to contend that termination notices are retaliatory. For example, on many occasions members are hesitant to assign a hearing to the issue of whether a termination notice is retaliatory, and may order termination when the notice of termination was a no-grounds notice issued the day after a request for repairs was made.

Recommendation

The factors the Tribunal can consider when determining retaliatory action should be broadened to include refusing to do things not required under the agreement and making requests for action under the tenancy agreement.

The legislation should remove the Tribunal's discretion where the termination notice is found to be retaliatory. In circumstances where the notice is wholly retaliatory, the Tribunal should be required to terminate.

After a finding that a termination notice (or proceedings) is retaliatory, the landlord should be precluded from commencing new termination proceedings for at least 6 months other than for a serious breach of the agreement (s 90 of the *Residential Tenancies Act*).

9.5. The duty to repair and the minimum habitability standards

Currently the *Residential Tenancies Act* provides that residential premise must be provided in a state that meet the minimum habitability standards set out in Section 52. However, these rules only apply at the start of the tenancy agreement. The ILC has been involved in cases where the tenant could not rely on the minimum habitability standards and failed to prove some of their claims for repair issue on the basis, they had no expert evidence to connect the non-habitability to a specific issue where something needed to be repaired.[22] It can be difficult to connect failures to repair with issues of non-habitability as often experts will refuse to provide tenants with reports as they are not the owners of the property. Owners will also generally refuse to give any report to the tenant unless it is favourable to them.

The requirement for a premises to be habitable is part of the human right to adequate housing. The premises must be more than a roof over the tenant's head, it must provide a home.[23] As such, the *Residential Tenancies Act* should impose an ongoing duty on a landlord to maintain the premises in a state fit for habitation, with reference to section 52 of the *Residential Tenancies Act*. The landlord currently has the ability to inspect a property 4 times a year, but will often not note down defects and repair them unless tenants make specific complaints about each issue. This should be changed to require ongoing maintenance of the property to ensure the residence is fit for habitation. This should sit beside the duty to repair specific defects when and if they arise.

[22] See e.g. Murauer v Andresson [2016] NSWCATAP 15.

[23] https://www.ohchr.org/en/special-procedures/sr-housing/human-right-adequate-housing

Recommendation

Section 63 of the *Residential Tenancies Act* be amended to include an ongoing duty on the landlord to maintain the premises in a state fit for habitation and ensure it remains fit for habitation.

Section 52 of the *Residential Tenancies Act* should be amended to allow for the Regulations to specify additional more specific minimum requirements similar to the Victorian requirements.

9.6. Access to property documents during the tenancy

During a tenancy there often exists a large information barrier between landlords and tenants. Often a tenant will report a repair issue and the landlord will employ a contractor to assess it. The contractor will tell the tenant some things about what is going on, but the tenant will not receive a copy of the report. The landlord may refuse to complete the repair and the tenant will not know if one is required without obtaining their own report. This is wholly unnecessary considering the landlord has a report. Eventually the tenant may go to the Tribunal as they do not know what the report says, however, if they knew the outcome of the expert report (other than what the real estate says it said), this may reduce the number of NCAT actions.

Furthermore, at NCAT, despite the Tribunal's power to require documents to be provided, the Tribunal will rarely order parties to provide copies of reports they have obtained. At the Tribunal the burden is always placed on the tenant to prove the repair issue, and landlords often sit back and provide little evidence. It can also often be difficult to make claims about repair issues existing at the start of tenancies which may be known about but not visible (for example, the issue was patched before the tenant moved in but not properly repaired).

Case Study: Sally (name changed) commenced an action at the NSW Civil and Administrative Tribunal for a rent reduction and compensation after she had a roof that leaked which caused damp walls and mould to fill multiple rooms in the house. The landlord agreed to fix the issues but refused to offer compensation or a rent reduction. Over the previous year contractors had attended on many occasions and there were notes left by the contractors that said they have reported the issue for urgent repair. However, once at the Tribunal the landlord contended that the roof wasn't leaking, there was just inadequate ventilation in the roof cavity. Only one report was given to the Tribunal by the landlord despite the many reports completed by contractors. The tenant had requested the documents but this refused by the landlord. The tenant then issued a summons however this was not complied with and no documents were provided. The landlord then made an offer at the hearing, as an all-or-nothing offer, significantly below what was claimed. The tenant felt pressured into taking it as she knew that the matter would carry on for longer and felt very stressed by the entire situation.

There is no principled reason, other than to avoid liability to the person being forced to live in the house, to not provide reports to the tenant. The tenant will have knowledge of the repair issues as they live in the residential premises. The tenant has a right to be able to seek the premises is in proper repair and know whether the premises may be unsafe (for example because there is unsafe mould in the property that has been identified). For this reason, the tenant should have able to make a request for documents and reports pertaining to repairs, maintenance and improvements done during the course of the tenancy and within the 6

months prior to the tenancy. This will assist in settling matters and ensuring all parties (and the Tribunal) are properly informed about history of issues.

Recommendation

The *Residential Tenancies Act* be amended to allow the tenant to request the landlord or their agent provide any documents or reports related to repairs, maintenance and/or improvements done during the course of the tenancy and in the 6 months prior to the tenancy. The landlord must provide these documents within 21 days.

9.7. Harassment or violence against a tenant

The Residential Tenancies Act currently allows the landlord to terminate a tenancy on the basis of harassment or violence by a tenant. However, there is no specific provision that allows a tenant to do so. While harassment or violence may be a breach of quiet enjoyment, if it occurs outside the property, it may not be. The *Residential Tenancies Act* should be amended to allow for a tenant to seek immediate termination at the Tribunal if the landlord has harassed them or been violent towards them. This further balances the rights between landlord and tenant.

Recommendation

A section similar to section 92 should be inserted to the *Residential Tenancies Act* to allow for termination of a tenancy pursuant to harassment, threats or violence by the landlord against the tenant or any occupant.

9.8. Clarifying the notice requirements

In matters before the Tribunal, the ILC has been involved in cases where the Tribunal suggested that giving notice to the landlord's agent may not be sufficient to prove that the landlord had knowledge of the issue.[24] The ILC recommend this be clarified in the *Residential Tenancies Act*. In residential tenancies, agents are given sole management capacity and tenants rarely have any details to directly contact a landlord. In these circumstances, giving notice to the agent should be considered as giving notice to the landlord, and thus the landlord should be considered to have knowledge of the issues. Where the landlord seeks to act pursuant to their rights under the *Residential Tenancies Act*, if they have given sole management responsibility to an agent, they should be required to speak to the agent to confirm that there are no issues with their proposed action. This is because the tenant has no ability to directly serve notices or documents on a represented landlord when no contact information is provided.

Recommendation

Clarify that notices and requests served or given to the landlord's agent are considered to be served or given to the landlord, and the landlord is taken to have knowledge of the document and their contents from the time of service.

[24] See *Evans v Charlesworth* [2023] NSWCATCD 50

9.9. Minimum energy efficiency standards

The minimum water efficiency standards saw strong success in improving tenancy fixtures to reduce the cost of water for tenants and improve state-wide sustainability goals. Unfortunately, without regulation there is little incentive for landlords to promote efficiency in buildings as it involves a cost to them while the tenant gets the main benefit (although rent could be potentially increased to mitigate this). Tenants on average pay 9% more in electricity per year compared to owner occupiers when controlling for appliances and socio-economic factors,[25] despite their personal circumstances indicating they should probably be paying significantly less than home-owners.

This higher cost most likely comes down to the fact landlords do not improve rental properties to make them more efficient. In 2019-2020 81% of NSW's energy still came from non-renewable sources and 11% of the entire state's energy was being used for residential purposes.[26] We have often seen occasions where a failure to repair a property has add significant burdens to tenants' electricity bills, with holes in floors meaning premises need significantly more heating and issues with water heaters resulting in large bills.

We recommend that the government promote the improvement of residential premises by requiring the landlord to meet minimum standards of energy efficiency. The approach should be flexible to account for the many different factors that can influence energy efficiency of a building, combined with the limited controls some owners may have over the property (such as in strata schemes). However, the approach should be one that is implemented going forward. One example of how this could be done would be to require a minimum green star rating, which could be met through adding solar, ensuring the home is properly insulated and providing efficient appliances.

Recommendation

Minimum standards of energy efficiency should be introduced, and the tenant should not be required to pay for electricity usage charges if these are not met. If the landlord fails to repair the residential premises within a reasonable time and this results in a higher electricity bill, this should mean the landlord should have to pay the bill.

9.10. Review of the Boarding Houses Act

We have noted that within the Illawarra and South Coast there appears to be an alarming trend of landlords using the *Boarding Houses Act* in an attempt to avoid the *Residential Tenancies Legislation*. Currently the *Residential Tenancies Act* provides an exemption from the Act where the person 'boards or lodges *with* another person'. However, we have noticed that landlords create shared households with little supervision and sometimes even rent out company titled units as boarding houses. This significantly affects the tenant's security of tenure and rights when living at the property. These agreements are generally used with

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[25] https://cama.crawford.anu.edu.au/sites/default/files/publication/cama_crawford_anu_edu_au/2020-09/82_2020_best_burke_nishitateno.pdf

[26] https://www.soe.epa.nsw.gov.au/all-themes/human-settlement/energy-consumption

disadvantaged people (e.g., persons with disabilities, injuries or with a foreign background) who will not understand their rights when entering into the agreement. As such, the applicability of the *Boarding Houses Act* should be significantly limited.

Case study: We assisted John (name changed) when his landlord tried to evict him last year under the *Boarding Houses Act*. He was given less than a week of notice to leave and was told the police would be called if he was not out. The ILC lodged an urgent application for John and were successful in having the Tribunal declare the agreement was a tenancy. This was because everything was dealt with like a tenancy. The tenant was given a tenant information statement, required to lodge 4 weeks worth of bond. Furthermore, the residence was a 1 / 2-bedroom unit with its own bathroom and kitchen. However, 1 year later the landlord has again sought to evict the tenant as an occupant of a boarding house because it is registered as a boarding house.

Recommendation

The NSW Government review the applicability of the boarders and lodgers exemption and make it clear this is only when the landlord has ongoing physical presence at the property (such as when they live there or have live-in managers).

The NSW Government review the *Boarding Houses Act*.