

# **Submission to the Review of the *Residential Tenancies Act 2010 (NSW)***

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## Introduction

The City Futures Research Centre welcomes the opportunity to make this submission to the review of the *Residential Tenancies Act 2010* (NSW) (the RT Act) and the *Residential Tenancies Regulation 2010* (the RT Reg).

City Futures is Australia's leading urban research centre. Since 2012, we and our colleagues in the UNSW Faculty of Built Environment Planning Program have held a five-star rating ('well above world standard') from the Australian Research Council (ARC). One of our core research programs is City Housing and we are a major contributor to research into Australian rental housing through projects funded by the ARC, the Australian Housing and Urban Research Institute (AHURI), the NSW State Government, local governments and industry partners.

This short submission draws on recent research by City Futures and focuses on three aspects of the RT Act:

- Provisions for 'secure occupancy'
- Boarders and lodgers, and other classes excluded from coverage
- Strata scheme tenancies

It should be noted that we have not sought to address all matters raised in the discussion paper on the review circulated by NSW Fair Trading. For a comprehensive treatment of those matters, we recommend consideration of the submission of the Tenants' Union of NSW.

## Provisions for 'secure occupancy'

In a recent project for AHURI, researchers from City Futures and Swinburne University conducted a [comparative analysis of rental housing systems in Australia and other countries in terms of 'secure occupancy'](#): that is, the extent to which households in rental housing can make a home and stay there for reasonable periods, provided they meet their tenancy obligations (Hulse, et al, 2011). The concept of 'secure occupancy' was developed specifically to have a wider scope than 'security of tenure', which connotes legal rights and protections against termination and eviction, and to encompass the ways in which market conditions, government subsidies, ownership structures, management practices, support programs and cultural norms also affect the ability of households to make a home in rental housing. The research team investigated these factors in eight jurisdictions in Europe and North America, through reports of a panel of international housing experts, and in Australia, with a focus on New South Wales and Victoria.

The research shows that there is no one single model for ensuring secure occupancy: for example, Austria, The Netherlands and Germany provide well for secure occupancy, the first two through large social housing sectors, and the last through an almost entirely privately-owned rental sector. The research also shows that it is the combination and interaction of legal, economic, social policy and cultural factors that affect secure occupancy: for example, the relatively secure occupancy of German private rental housing is delivered not by long fixed terms, but by limited grounds for termination by landlords, permissive terms regarding tenants' use of their dwellings, a system of tenure-neutral housing subsidies that avoids speculative dealing, and a wide cultural acceptance of rental housing. Finally, the research shows that by comparison with other case study countries, Australia (particularly New South Wales and Victoria, which were the local focus of the research) did badly in many aspects of secure occupancy, especially as regards the termination

of tenancies and regulation of rents: New South Wales is an international outlier in its combination of short fixed terms, provision for 'no grounds' terminations by landlords and lack of limits on rent increases.

One implication of the research is that reforms for secure occupancy can and should be pursued in an integrated way across policy areas. Unfortunately, neither the Australian Government nor the NSW State Government has an overarching housing policy that sets out such an agenda. In its absence, we propose a number of reforms to the RT Act that advance secure occupancy in ways that work within the limitations of present market conditions, subsidies, ownership structures and those other factors. We submit that these reforms should be regarded as realistic, modest and necessary.

### ***Terminations by landlords***

We recommend that the RT Act be amended to provide a comprehensive set of prescribed grounds for termination by landlords, and to remove the current provisions for termination without grounds (both at the end of a fixed term (section 84), and during a period agreement (section 85; also section 94). Doing so would cause no disadvantage to landlords who seek possession for sound reasons; only those landlords who use or threaten no-grounds notices for bad reasons, such as retaliation or discrimination, would be disadvantaged. It would also give all tenants greater peace of mind and encouragement to assert the various contractual rights afforded them by the RT Act.

The RT already provides the following grounds for termination by landlords:

- sale (section 86);
- breach (section 87);
- serious injury or damage (section 90);
- use of premises for an illegal purpose (section 91);
- threats and harassment (section 92);
- hardship (section 93);
- death of tenant (section 108);
- frustration (section 109);
- certain grounds applicable only to social housing tenancies (ineligibility (section 143), offer of alternative social housing premises (section 148) and anti-social behaviour grounds (section 153)).

We recommend that the following grounds be added, with notice periods as indicated:

- the premises are required for housing the landlord or a member of the landlord's family (not less than 30 days' notice, and not during fixed term)
- the premises are to undergo renovation, demolition or change to a non-residential use such that vacant possession is required (not less than 90 days' notice, and not during fixed term)
- the tenancy is directly related to the tenant's employment, and the employment is terminated (not less than 14 days' notice).

We submit that this comprises a comprehensive set of reasonable grounds for termination by landlords. Alternatively, an additional 'catch-all' ground could also be inserted: 'any other ground specified by the landlord in the termination notice'. We do not prefer this alternative, and recommend that if it were adopted, it should have a long minimum notice period (say, not less than six months), to discourage its use.

We consider that the above set of grounds for termination is accommodative of present market structural factors in New South Wales, particularly the prevalence of landlords who own a single property, and of landlords whose investment strategy is to realise capital growth by selling, if necessary, with vacant possession in the owner-occupied housing market. These factors will still be a cause of insecurity to tenants, and should be addressed by other policy reforms (in particular, to increase institutional investment in rental housing, and to encourage strategies of investment focused on rent revenues over a long-term, rather than speculative capital gains).

Another alternative approach to providing greater security against termination is through the use of longer fixed terms. We note that there is currently nothing in the RT Act to discourage the use of long-fixed terms, and submit that the reasons why they are not much used in New South Wales lie in cultural norms (the expectation that renting is preliminary to owner-occupation in housing careers) and market structural factors (as indicated above, small holding landlords pursuing capital gains, potentially in the owner-occupier market). Without other reforms to change those factors, it appears to us that the surest way of legislatively achieving greater use of long fixed terms is to require their use, which is a less accommodative approach to tenancy law reform. It can, however, be done: of the jurisdictions in our research, Ireland has legislated for tenancies to commence with an initial term of six months followed (if the tenancy is not terminated) by a further term of three-and-a-half year (for a total term of four years from commencement); if the tenancy is not terminated at the end of the four-year term, it is followed by a further term of six months and the pattern repeats. We also note that Belgium provides for a standard fixed term of nine years, with provision for shorter terms (three years or less) in special circumstances; in fact, however, most agreements (52 per cent) are for shorter terms. We do not prefer this alternative, and consider that reforms for comprehensive grounds and proscription of no-ground terminations are simpler, fairer and better suited to New South Wales conditions.

Finally, we should add: in all events, a reformed legislative scheme for terminations by landlords should provide for independent oversight and determination by the NSW Civil and Administrative Tribunal. Where a tenant does not vacate according to a termination notice, whatever the ground, the RT Act should provide for the landlord to apply to the Tribunal and prove the ground; and for the Tribunal to decline to order termination where it is satisfied that, considering the circumstances of the case, termination would cause injustice or undue hardship.

## **Recommendation**

- Provide for a comprehensive set of grounds for termination by landlords, and proscribe terminations by landlords without grounds.

## ***Regulation of rent increases***

We recommend that the RT Act be amended to regulate rent increases to support market rent setting and give tenants greater certainty to their housing costs.

In particular, we recommend that the current provisions allowing tenants to dispute excessive rent increases in the Tribunal (section 44) should be enhanced by providing that where the rate of a rent increase is greater than the change in the Consumer Price Index for the relevant period, the increase is *prima facie* excessive, and the landlord bears the onus of proving that it is not excessive, considering all the usual factors (section 44 (5)). (On the other hand, where the rate of increase is less than the change in CPI,

the tenant would bear the onus of proving that it is excessive.) This change would make the provisions easier for tenants to use where there is a reasonable, objective indication that an increase may be excessive, and discourage landlords from abusing the special disadvantage that tenants face as consumers (ie the high cost of moving inhibits sitting tenants from ‘shopping around’) to extract above-market rents.

We also recommend that the frequency of rent increases should be limited to not more than once per year. This would accommodate the many landlords who currently, as a matter of practice, review their rents annually, but would give all tenants who receive a rent increase notice the assurance that their rent will not increase again for a year. We note that all of the other countries in our research provided for annual increases only.

These objectives – supporting market rent setting, and greater certainty as to the frequency of increases – are more modest than those of some other jurisdictions, which regulate rents and rent increases to achieve some measure of housing affordability. For example, both Austria and The Netherlands set maximum rents for new tenancies according to quality standards, and limit rent increases to the rate of inflation; in Germany, rent increases are limited to not more than 20 per cent over three years; in Ontario, rent increases are limited by guidelines set by the Ministry of Housing, subject to provisions for above-guideline increases by special application by the landlord.

Adopting such an objective in Australia might be viable if our other policy settings worked towards affordable rents. Unfortunately, they do not: the prevalence of speculative investment, referred to above, results from tax settings that preference capital gains over rental income and high leverage over low or no leverage; and in turn has resulted in more high-value, high-rent properties entering the rental market, while low-value properties have dropped out and become scarcer – and hence less cheap to rent. Reform of rent provisions in tenancy legislation will not address these settings, or the distorting effect they have on the shape of the rental market.

### **Recommendation**

- Provide that where the rate of a rent increase is greater than the change in CPI, the rent increase is prima facie excessive and the landlord bears the onus of proving that it is not.
- Limit the frequency of rent increases to not more than one per year.

### ***Use of premises – keeping companion animals***

An important aspect of ‘making a home’ is autonomy in the use of the premises in which one lives. In our research, whether tenants could choose to keep a companion animal was something of a touchstone for autonomy and secure occupancy; for many persons, keeping a companion animal is an important part of their home life, and restrictions on their ability to do so are felt keenly. We recommend that the RT Act be amended to allow tenants to keep a companion animal, subject to such restrictions as may apply under other laws, and to their general obligations under the RT Act.

Currently the RT Act does not prescribe a term about companion animals, but it does countenance that landlords may permit and, implicitly, not permit the tenant to keep an animal (section 19(3)), and in fact many, if not most, agreements include an additional term that prohibits tenants from keeping animals without the consent of the landlord. (The standard form of agreement published by the Real Estate

Institute of NSW contains such a term.) We submit that such a term is an unnecessary and offensive imposition, and should be proscribed. Instead, the RT Act should prescribe a term that allows the tenant to keep a companion animal, subject to any restrictions or prohibitions imposed by another law, including the by-laws of a strata scheme. This would mean that tenants would have the same freedoms and restrictions with respect to companion animals as other residents, and not face additional restrictions and prohibitions imposed by individual landlords. The particular construction we recommend also means that where a tenant keeps an animal in contravention of a restriction or prohibition from another law, this would be a breach of the prescribed term and the landlord would be able to take action under the RT Act.

Alternatively, the RT Act could be amended to provide that a tenant may keep a companion animal with the consent of the landlord, and that the landlord must not unreasonably refuse consent – and that where the tenant considers a refusal of consent to be unreasonable, the tenant may apply to the Tribunal for resolution of the dispute. This construction is similar to the current provisions of the RT Act with respect to tenants making alterations (section 66) and tenants subletting and transferring parts of tenancies (section 74 and 75). This alternative is less favourable to tenants than our preferred alternative, because a tenant may still face additional restrictions and prohibitions that other residents do not, but it would require landlords and agents to at least give some thought to tenants' requests to keep companion animals and not dismiss them out of hand, and it would allow tenants to seek an independent determination that their keeping of a companion animal should be permitted.

We note that under either of the above alternative reforms, tenants who keep companion animals would still be liable under the prescribed terms of the RT Act if the animal caused a nuisance (section 51(1)(b) and (c)) or damage (section 51(1)(d)).

### Recommendation

- Allow tenants to keep companion animals, subject to such restrictions as may apply under other laws.

## Boarders and lodgers and other classes exclusions from coverage

Secure occupancy is an even more distant prospect for those who live in rental housing but who are not covered by the RT Act or other legislation that more or less comprehensively addresses their rights and liabilities as consumers of housing.

The RT Act excludes numerous classes of person who live in rental housing, by reference to the class of premises they occupy (section 7) or the class of agreement under which they occupy (section 8 and section 10; also clauses 14-20 of the RT Reg). Some of those excluded are covered instead by other housing-specific legislation: in particular, home owners in residential parks covered by the *Residential (Land Lease) Communities Act 2013* (NSW); residents in retirement villages covered by the *Retirement Villages Act 1999* (NSW); protected tenants covered by the *Landlord and Tenant (Amendment) Act 1948* (NSW); residents of registrable boarding houses covered by the *Boarding Houses Act 2012* (NSW) (the BH Act). However, this still leave numerous classes of person uncovered any housing-specific legislation, such as:

- boarders and lodgers in small boarding premises (ie fewer than five residents and not an assisted boarding house);

- residents (as distinct from non-residential visitors) of hotels, motels, clubs, backpacker hostels and serviced apartments;
- residents of refuges and crisis accommodation;
- tenants of publicly-owned heritage properties;
- tenants under an agreement for the term of their life;
- most residents of share houses;
- most residents of students residential colleges and halls of residence.

We note that the Australian Consumer Law (ACL) contains a number of generally-stated provisions that may be relevant to housing arrangements (in particular, the prohibitions on misleading and deceptive conduct (clause 18) and unconscionable conduct (clause 20); voiding of unfair contract terms (clause 23); guarantees as to fitness for purposes (clause 61); and requirement of receipts (clause 100)). However, because the ACL applies only where the supplier (ie the landlord) is in 'trade or commerce', some persons may not be covered: in particular, share house residents, and possibly residents of refuges and crisis accommodation and boarders and lodgers in small boarding premises. And even where the ACL applies, it makes no provision in relation to some very important aspects of contracts for housing, such as notice periods for termination, increases in rents or fees and access by the landlord, and security deposits.

The classes excluded from the RT Act and from other housing-specific legislation represent a diverse range of housing arrangements, with some involving the provision of services beyond merely a right to occupy, and many involving the landlord having a degree of control over or presence at the premises that is neither desirable nor necessary in mainstream tenancies. This means that the agreements providing for these arrangements will necessarily differ from mainstream tenancy agreements, and differ from one another. However, to the extent that they afford a right to occupy for the purpose of a person's residence, we submit that they should be subject to legislation that upholds some basic principles about housing.

In our recent AHURI research project, ['Rooming House Futures'](#) (Pawson, et al, 2015; Dalton, et al, 2015) conducted with RMIT and Swinburne Universities, we considered the BH Act as part of a suite of recent reforms to the New South Wales boarding house sector. We believe that the provisions of the BH Act regarding occupancy principles and occupancy agreements (BH Act, Part 3 and Schedule 1) are amenable to wider application, as a catch-all regime for all classes that are otherwise excluded from tenancy or housing legislation.

We recommend that the RT Act be amended to provide that all agreements that provide a right to occupy premises for a residential purpose, for a term or period and for value, that are otherwise excluded from the RT Act and other specified legislation, are occupancy agreements subject to the occupancy principles and dispute resolution provisions per the BH Act. (We leave aside whether those provisions should remain in the BH Act, be made part of the RT Act, or be made a new Act to which both the RT Act and the BH Act would refer.)

This would realise the untapped strength of the occupancy principles model: these principles are constructed broadly enough to give accommodation providers scope to draft different agreements to suit the different types of accommodation they respectively provide. For example, an agreement with respect to accommodation in a refuge could have quite different terms from an agreement for a room in a college, but they would still be required to be consistent with the broad principles and parties could seek dispute resolution through the Tribunal in the event of inconsistency with the principles or breach of a term of an agreement. We also see this as opening up the prospect of stakeholders in the various subsectors collaborating on drafting standard forms of occupancy agreement appropriate to their respective

subsectors, with a view to these different standard forms being prescribed per the provisions at section 29 of the BH Act.

### Recommendation

- Provide that all persons who occupy premises for a residential purpose, for a term or period, for value, and who are not otherwise covered by the RT Act or other housing legislation, are covered by the occupancy principles, per the BH Act, and may apply to the Tribunal for a remedy in the event of a dispute.
- Provide that standard forms of occupancy agreement, consistent with the occupancy principles, may be prescribed for different classes of occupants.

## Strata scheme tenancies

Over the course of the law reform process leading to the *Strata Schemes Development Act 2015* (NSW) (the SD Act) and the *Strata Schemes Management Act 2015* (NSW) (the SM Act), City Futures conducted a major research project on the [‘Renewing the Compact City’](#) (Troy, et al, 2015). The research helped inform the strata law reform process; it also identifies issues that should be addressed in reforms to the RT Act.

Our research with tenants living in strata schemes found that while most accepted that they would get no say in whether a scheme was renewed, many had strong feelings about the fairness or otherwise of the renewal process – particularly in relation to their own ability to know about, prepare for and respond to the prospect of renewal.

In our report, we recommended that tenants should be able to give notice to terminate a fixed term tenancy on the ground that the owners corporation has approved a renewal plan per Part 10 of the SD Act. In terms of the RT Act, we recommend in particular that the new ground be included at section 100(1), with the same period of notice and exclusion of liability as the other grounds there.

We further recommend that strata renewal should be addressed in the provisions of the RT Act at section 26 regarding disclosures to prospective tenants. There are numerous events in the strata renewal process; we consider that the appropriate threshold event for disclosure is the decision of the owners corporation to establish a strata renewal committee (SD Act, section 160). We recommend that section 26(2) of the RT Act be amended to require a landlord or landlord’s agent to disclose that a strata renewal committee is currently established to consider a renewal plan for the scheme, if such a committee is in fact currently established. Alternatively, clause 7 of the RT Reg could be amended to prescribe that the current establishment of a strata renewal committee is a ‘material fact’ for the purposes of section 26(1).

### Recommendation

- Allow tenants to terminate a tenancy during the fixed term on the ground that the owners corporation has approved a strata renewal plan.
- Require landlords and agents to disclose to prospective tenants the fact that a strata renewal committee is currently established.



## Summary of recommendations

- Provide for a comprehensive set of grounds for termination by landlords, and proscribe terminations by landlords without grounds.
- Provide that where the rate of a rent increase is greater than the change in CPI, the rent increase is prima facie excessive and the landlord bears the onus of proving that it is not.
- Limit the frequency of rent increases to not more than one per year.
- Allow tenants to keep companion animals, subject to such restrictions as may apply under other laws.
- Provide that all persons who occupy premises for a residential purpose, for a term or period, for value, and who are not otherwise covered by the RT Act or other housing legislation, are covered by the occupancy principles, per the BH Act, and may apply to the Tribunal for a remedy in the event of a dispute.
- Provide that standard forms of occupancy agreement, consistent with the occupancy principles, may be prescribed for different classes of occupants.
- Allow tenants to terminate a tenancy during the fixed term on the ground that the owners corporation has approved a strata renewal plan.
- Require landlords and agents to disclose to prospective tenants the fact that a strata renewal committee is currently established.

## References

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