



29 January 2016

Statutory Review of Residential Tenancies Act 2010
Policy and Legislation
NSW Fair Trading
PO Box 972
PARRAMATTA NSW 2124
Via email

Dear Sir/Madam,

Re: Statutory Review of the Residential Tenancies Act 2010 - Submission from the Federation of Housing Associations

The NSW Federation of Housing Associations welcomes the opportunity to make a submission in response to the Statutory Review of the Residential Tenancies Act (RTA) 2010 Discussion Paper, published on 29th October 2015.

About the Federation and the community housing industry

The NSW Federation of Housing Associations (the Federation) is the industry peak body for community housing providers in NSW. Since 1993 the organisation has provided leadership, support and resources for the further development of the industry, and has represented the aspirations and interests of the industry to all other stakeholders – government, partners, business and the wider community.

The Federation's purpose is to support the development of a not-for-profit rental housing sector which compares favourably to any around the world, and which makes a difference to the lives of lower income and disadvantaged households across the state. The Federation seeks to ensure that community housing providers are active in all housing markets, providing a full range of housing products.

Community housing providers are viable, ethically run businesses driven by strong social missions and values. In 2015, community housing providers managed 38,000 tenancies across New South Wales and owned \$1.7 billion worth of community housing assets. Income sources include rent, subsidies, and fees from services. The demographic of tenants living in community housing is similar to those of living in public housing, as tenancy allocations by community housing providers and Family and Community Services (FACS) are made from the common Housing Register.

Community housing providers and the RTA

The Residential Tenancy Act (RTA) is an important regulatory framework that provides a balance between the interests and needs of landlords and tenants. This is becoming increasingly important in the rapidly changing private rental market in NSW, where almost a quarter of all NSW households now finds a home¹.

Community housing providers, as social housing landlords use the RTA to establish, manage and sustain social housing tenancies, as well as an important frame of reference that guide the relationships between community housing landlords and social housing tenants. In addition to the RTA, community housing providers are also guided by additional set of regulations such as the National Regulatory System for Community Housing Providers², policy settings and contractual obligations set by the NSW Government as well as internal policies and procedures that guide decision making, tenancy sustainment and transparency in community housing. As a point of difference with the private market landlords, community housing providers offer tenancies that are affordable, secure and long term.

As Part 7 of the Act (Social Housing Agreements) is out of scope of this Review, the Federation's submission is focused on three sections of the Act of importance to community housing providers: tenancy terminations; water charges and administration of these charges; frequent non-payment of rent; and the utilisation of the rental bond interest to support greater investment in increased provision of affordable housing.

Termination of tenancy and termination without grounds

The RTA provides a range of grounds upon which landlords can terminate a tenancy, including termination without grounds (Section 85). Arguably, the provisions for termination without grounds can become a cause of substantial anxiety among tenants in the private rental market as they have a little recourse if suddenly faced with eviction with a notice issued under Section 85.

As outlined above, the management of community housing tenancies are guided not only by the residential tenancy legislation but also by a range of additional regulatory requirements and standards, resulting in a greater degree of tenancy protection inherent in community housing when compared to private rental tenancies. This is no accident – community housing providers fulfil an important social mission as housing providers for households that have difficulties in the private rental market due to their low income. As outlined in the National Community Housing Standards: “Security of tenure means that community housing organisations should not evict without a just cause and organisations should take reasonable steps to ensure tenants are not evicted into homelessness”³.

Notwithstanding these principles, there are instances where a community housing provider may use Section 85 to terminate a tenancy in certain circumstances for which the current

¹ Hulse, K., Burke, T., Ralston, L., and Stone, W. (2012) The Australian Private Rental Sector; changes and challenges, Positioning paper no. 149, AHURI, Melbourne AHURI

² www.nrsch.gov.au

³ Standard 1.4 “Tenancy Management – Ending Tenancies” of the National Community Housing Standards, 2010. <http://www.hpw.qld.gov.au/SiteCollectionDocuments/CHStandardsManual.pdf>

provision of the Act do not provide a sufficient ground for termination. For example, in a headleasing situation, a private landlord issues a no grounds termination and a request for vacant possession to a community housing provider that has another tenancy agreement with a community housing tenant in situ. This requires a community housing provider to terminate the existing tenancy so that the private landlord obtains vacant possession⁴. Other instances when termination without grounds is used by community housing providers include:

- seeking a vacant possession for the purposes of redevelopment;
- terminating a National Rental Affordability scheme (NRAS) or an affordable housing tenancy when a tenant becomes ineligible for the NRAS or affordable housing subsidy due to their income being outside the eligibility criteria for the NRAS;
- when a provider, despite a considerable effort to sustain the tenancy, needs to terminate the tenancy to ensure their duty of care towards neighbours and other tenants.

Arguably the examples outlined here represent complex housing management situations and in practice there will be differences between providers on how and whether they use Section 85. At this point, there are divergent views in the community housing industry on the use of termination without grounds.

There is some support within the community housing industry for the position put forward by the Tenants' Union⁵ and others, namely to replace the current Section 85 provisions with an expanded list of prescribed grounds for termination by landlords, while removing the current provisions for termination without grounds. The additional grounds for termination by a landlord would include:

- where the landlord requires the property for use as their own residence, or for that of a family member;
- where the property is to be substantially renovated, such that a tenancy cannot be accommodated for the duration of the work;
- where the landlord requires the property for any purpose that is sufficient to displace an occupying household.

However, other community housing providers see termination without grounds by the landlord as a necessary option in housing management to be used only in exceptional circumstances when all other attempts at tenancy management have failed.

The future Residential Tenancies Act provisions for termination without grounds need to take into account these diverse views: the need for community housing providers to sustain safe and functioning tenancies and neighbourhoods on one side, and the rights of individual tenant to enjoy a secure tenancy, to know the reasons for the end of their tenancy and be allowed an opportunity to respond via NCAT.

The Federation considers that the current review of the Act in respect to the termination without grounds provisions are matters of considerable complexity as demonstrated by diverse views among social housing landlords, and undoubtedly, many stakeholders that will

⁴ In these instances, it is the obligation of community housing provider to source another property from the private rental market to house the 'displaced' tenant

⁵ Tenants' Union NSW (2015) Five Years of the Residential Tenancies Act in NSW: <http://intranet.tenants.org.au/print/policy-papers/TUNSW-Report-5-Years-RTA.pdf>

engage in the legislation review. As outlined in the Discussion Paper, these are perhaps the most contested provisions of the RTA.

The Federation recommends that in drafting new residential tenancy legislation Fair Trading give due regard to the diverse views of community housing providers and the interest of tenants in respect to termination without grounds to reach a balanced view.

Water usage charges and their administration

In consultations for this submission, many community housing providers pointed out inconsistencies between the Residential Tenancies Act and the standard Residential Tenancy Agreement form. This was most relevant in regards to the provisions of the Act dealing with water charging, including water efficiency measures (Section 39) and social housing water provisions (Section 139 of the Act).

Community housing providers can only charge for water usage as prescribed by Section 139 of the Act and the Ministerial Guidelines⁶. The Guidelines specify the conditions under which community housing landlords can issue charges for water usage, including also the prerogative to develop and implement community housing specific policies that in detail describe the process and method for issuing water usage charges.

However, there is quite considerable administrative complexity in implementing Section 139 and the Ministerial Guidelines in the standard Residential Tenancy Agreement form. The statement presented in the 2012 Ministerial Guidelines summarises this effectively:

“The Standard Form Tenancy Agreement used by community housing providers is Schedule 1 of the Residential Tenancies Regulation 2010. The references to water charging in the standard form agreement are based on s39 and will not be consistent with s139 of the Act. S137 of the Residential Tenancies Act 2010 states that Part 7 of the Act will prevail over any other provision of this Act or the regulations in the event of any inconsistency.”⁷

Community housing providers have observed that the water-related clauses in the standard residential tenancy agreement form may be misleading and confusing for new tenants as they state that tenants will be charged for water under Section 39 which is not true in community housing. The standard Tenancy Agreement form used by community housing providers only provides for the application of the Schedule 1 of the Residential Tenancies Regulation 2010. The references to water charging in the standard agreement form are based on Section 39 and will not be consistent with Section 139 of the Act. To overcome this obstacle, community housing providers have added an additional explanation to their Residential Tenancy Agreements explaining that the water charges are as per the Ministerial Guidelines.

The Review of the Act is an opportune time to revise the standard residential tenancy agreement so it corresponds with the intentions of the Act in respect to water charges in social housing. This could be done by amending the residential tenancy agreement to

⁶ Family and Community Services (2012), *Community Housing Water Charging Guidelines*, http://www.housing.nsw.gov.au/__data/assets/pdf_file/0020/333281/GuidelinesCommunityHousingWaterCharging.pdf

⁷ Page 3 of the Guidelines

specify how water will be charged in community housing or expanding the wording of Section 39 to explain that it does not apply to community housing.

Clearer definition of frequent non-payment of rent for purpose of termination

The RTA in Section 88 provides for a termination on the basis that the tenant failed to pay the rent frequently. However, the manner that this has been implemented in practice has been inconsistent. In the Federation's consultations for this submission, some community housing providers reported that, when attempting to end a tenancy under this provision of the Act they found that the standards applied by different NSW Administrative and Civil Tribunal (Tribunal) members to define a frequent non-payment often differ between different NSW locations. Some NCAT members accepted that missing the payment three times constitutes a sufficient pattern to allow a termination, whereas in other Tribunal hearings a different standard has been accepted as sufficient. There have been inconsistencies in the Tribunal decisions as to the period of time in which frequent non-payment of rent occurred as well as the amount of rent that have resulted in different outcomes at the Tribunal hearings in respect to either obtaining specific performance orders (SPO) or terminations under this section.

The Federation recommends that the Review adopts a clearer definition of what constitutes a frequent non-payment of rent or that the new Residential Tenancy Regulations further specify what is the frequency under which social housing landlords may be reasonably expect to be granted a termination or a SPO due to non-payment of rent. This would also help a greater consistency of Tribunal decisions across different Tribunal localities.

Better utilisation of the interest paid on tenants' bonds to support tenancy services and growth in affordable housing

The Federation supports the Tenants Union NSW position that a much greater proportion of interest earned on bonds held by the NSW Rental Bond Board should be used to fund advocacy and assistance services for tenants in NSW⁸. This is important for two reasons. First, there is now a far greater proportion of tenants living in the private rental market, often for a long period of time and increasingly, tenants with families and small children. The availability of services dedicated solely to assisting tenants to resolve disputes and maintain their tenancies should be increased in proportion with the growth in numbers of tenancies in the private rental market. Second, well-funded tenancy services that are able to assist a greater number of tenants will also have an effect of preventing terminations and will help reduce demand for social housing assistance, including long-term social housing.

The Federation also considers that a greater proportion of the interest earned on tenants' bonds should be directed towards increasing supply of affordable housing in NSW. This is not without a precedent. The NSW Rental Bond Board already directs \$2.5 million of the interest earned on tenants' bonds towards the National Rental Affordability Scheme (NRAS)⁹ payments. The Federation notes that this amount has not increased since 2013/14¹⁰. Furthermore, the NRAS as the only national scheme that encourages private investment in

⁸ The Campaign "More Bang for Your Bond" <http://yourbond.org/>

⁹ The NSW Rental Bond Board Annual Report 2014/15, and 2013/14

¹⁰ Since 2013/14, the number of applicants waiting for a social housing assistance on the Social Housing Register has climbed to 60,000 in 2014/2015.

the affordable housing market has been discontinued by the Commonwealth Government in 2014. This means that NSW Government must step in to fill the gap for affordable housing products through providing financial instruments that can help fund additional supply of affordable housing.

The Federation is encouraged by positive policy developments and the recent introduction of the Social and Affordable Housing Fund (SAHF). However, more needs to be done to meet the growing gap for low cost housing in the state. The Federation recommends that the Rental Bond Board increases the amount currently dedicated to the NRAS to help meet the need for affordable housing and in partnership with NSW Treasury and Family and Community Services transform these funds into innovative forms of affordable housing financing such as housing bonds and government guarantees. A greater contribution from the Rental Bond Board is an effective way of boosting finance for affordable housing, especially if it is coupled with financing available through the Social and Affordable Housing Fund in medium and long term.

Recommendations

The Federation recommends that NSW Fair Trading:

- In drafting new residential tenancy legislation give due regard to the diverse views of community housing providers and the interest of tenants in respect to termination without grounds to reach a balanced view;
- Revise and align the provisions of the Act, the Residential Tenancy Regulation and the standard Residential Tenancy Agreement form dealing with water charges in social housing;
- Revise the definition of 'frequent non-payment of rent' in the legislation and accompanying regulations to achieve greater clarity and consistent application of these provisions by tenants, landlords and Tribunal members;
- Adopts the Tenants Union NSW proposals for an increase in the proportion of the interest paid on rental bonds oriented towards funding the Tenancy and Advocacy Services;
- Increases the proportion of the Rental Bond Interest Account channelled into affordable housing programs in line with growing affordable housing demand; and in partnership with NSW Treasury and FACS dedicate these moneys to the development of innovative forms of social housing financing, such as housing bond and government guarantees within the Social and Affordable Housing Fund.

Thank you for the opportunity to provide a submission to the Residential Tenancies Act Review. The Federation looks forward to engaging further with NSW Fair Trading as the department embarks on the task of drafting new tenancy legislation.

For further information, please contact Wendy Hayhurst, on 02 9281 7144 or by email WendyH@communityhousing.org.au.

Yours sincerely,

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