



THE LAW SOCIETY
OF NEW SOUTH WALES

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Residential Tenancies Bill 2009
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Dear Sir,


Draft Residential Tenancies Bill 2009

The Law Society thanks you for the opportunity to comment on the draft Bill.

The Society's Property Law Committee (Committee) has considered the provisions of the draft Bill and the Committee's comments are set out in the table attached to this letter.

If you have any questions regarding the Committee's comments, please contact Ms Liza Booth, Executive Member of the Committee on telephone (02) 9926 0202 or by email to liza.booth@lawsociety.com.au.

Yours faithfully,


Joseph Catanzariti
President

New South Wales Law Society – Property Law Committee

COMMENTS ON DRAFT RESIDENTIAL TENANCIES BILL 2009

	Proposed Reform	Current Position	Comments
1.	Section 6 indicates that the Act will apply to all residential tenancy agreements whether made before OR after the commencement of the section	-	The savings, transitional and other provisions set out in Schedule 2 to the Bill need to be further considered particularly having regard to transitional issues regarding existing rental bonds and the impact of caps on rental bonds under this Bill and matters such as existing residential tenancy agreements that contain sections which are now deemed to be prohibited under this Bill.
2.	Section 8(1) (f) references "...an agreement for sale of land that confers a right to occupy residential premises on a party to the agreement".	Section 6(1) (a) of the existing Act using the words "...if the tenant is a party to an agreement made in good faith for the sale or purchase of residential premises".	The Committee is concerned at the replacement of an established definition (particularly the "good faith" element) with new wording which may have unintended consequences.
3.	Section 14 confers on obligation on the landlord to ensure that a residential tenancy agreement is in writing. There is a maximum of 20 penalty units applying for a contravention of this section. The Bill indicates even if the agreement is not signed by the landlord – it is enforceable	The current Act does not obligate the landlord to ensure the agreement is in writing; however the Act still addresses the enforceability of an unexecuted agreement.	Further clarification is required regarding the use of the words "must ensure that the agreement is in writing". Is it sufficient that the landlord has issued a written agreement to the tenant, or does the section intend to capture signed agreements? What if the tenant did not sign and return the agreement however continued in occupation and paid rent – would the landlord be in breach of section 14? In addition, the Committee has a concern regarding a penalty applying in this situation. Such concerns may be alleviated by clarifying the meaning / intention of the above words.

4.	<p>Section 19 provides for a number of prohibited terms in a residential tenancy agreement including the requirement for a tenant to have carpet professionally cleaned at the end of its tenancy, the requirement for the tenant to take out a specified, or any form of insurance or exempting the landlord from liability for any act or omissions.</p>	<p>The current Act does not expressly provide that any terms are prohibited.</p>	<p>The Committee has a concern regarding the possible unintended impact of section 19(2) (b) which prohibits a residential tenancy agreement from requiring a tenant to take out any form (whether specified or not) of insurance. The section is unduly prescriptive having regard to any possible circumstance where a tenant is obligated at law to have insurance. In such situations the landlord should be entitled to ensure the tenant complies with any such requirements (for example, workers compensation / contractors insurance for any internal cosmetic alterations or additions to be carried out by the tenant as allowed under this Bill).</p>
5.	<p>Section 22 stipulates that a landlord must ensure that a written residential tenancy agreement contains any terms required by this Bill and DOES NOT contain any terms prohibited by this Bill. A maximum of 20 penalty units apply to this section.</p>	<p>-</p>	<p>As noted above, the Committee has a concern over the transition of existing residential tenancy agreements that may be in breach of the Bill immediately upon its commencement. The savings, transitional and other provisions need to be considered further enabling a reasonable lead time for parties to make themselves aware of these changes.</p>
6.	<p>Section 26(1) states that a landlord or a landlord's agent must not induce a tenant to enter into a residential tenancy agreement by any statement, representation or promise that the landlord or agent knows to be false, misleading or deceptive or by knowingly concealing a material fact of a kind prescribed</p>		<p>The Committee is concerned about the use of the wording "concealing of material fact" and note that the details yet to be prescribed by the regulations will be critical in this regard. The Committee is particularly concerned regarding issues such as those considered in the <i>Gonzales</i> case.</p>

	by the regulations.		
7.	<p>Section 26(2) states that a landlord or a landlord's agent must disclose to the tenant before entering into a residential tenancy agreement :</p> <p>a) any proposal to sell the residential premises, if the landlord has prepared a contract for sale of the residential premises;</p> <p>b) that a mortgagee is taking action for possession of the residential premises, if the mortgagee has commenced proceedings in a court to enforce a mortgage over the premises.</p>	-	The Committee believes the language needs to be further clarified in section 26(2) (a). Is the intention of section 26(2) (a) that the property is being actively marketed?
8.	<p>Section 27(1) requires a landlord to give a tenant written notice of the name and address of the landlord's agent (if any) and the name and telephone number of the landlord and if there is no landlord's agent, the business or residential address of the landlord. It also provision for further details if the landlord</p>		<p>The Committee is of the opinion that if there is a landlord's agent, then only the agent's details should be provided. In respect of a landlord corporation, the title of the company office should be provided instead of a name (for example, Company Secretary or Facilities Manager).</p> <p>The timing under section 27(2) should be amended to 21 days.</p>

	<p>is a corporation.</p> <p>Section 27(2) requires a landlord to notify the tenant in writing within 14 days of any change of these details.</p>		
9.	<p>Section 33(2) prohibits a landlord from requiring more than 2 weeks rent in advance to be paid.</p>		<p>This section needs to have regard to the operation of section 24. Section 24 indicates that a holding deposit is to be applied towards the rent. The operation of the holding deposit may cause a breach of section 33(2). It is noted that a tenant can elect to pay more than 2 weeks rent, the issue will be in the expression of the residential tenancy agreement (may require an amendment to the standard form).</p>
10.	<p>Section 35(2) states that a landlord or landlord's agent must permit a tenant to pay rent by at least one means for which the tenant does not incur a cost and that is "reasonably available to the tenant".</p>	-	<p>Further clarification may be required of the words "reasonably available" (having regard to rural tenancies).</p>
11.	<p>Section 37(3) requires a landlord or landlord's agent to provide, within 7 days of a written request by the tenant, a written statement setting out the particulars of the rent record for a specified period.</p>	-	<p>The Committee believes that there should be a limit on the frequency of such requests, for example, no more than quarterly. If a tenant needs a written statement in addition to the quarterly statement, perhaps there can be a right to apply to the Tribunal.</p>

12.	Section 39(1) (b) states that a tenant is only obligated to pay water usage charges for the residential premises if the premises contain water efficiency measures prescribed by the regulations.	-	The Committee opposes this section, noting that it may impose a financial burden on a number of landlords to install these water efficiency devices. This Bill should not be a mechanism to enact these energy efficiency measures.
13.	Section 39(3) states that a landlord must give a tenant not less than 21 days to pay water usage charges.		The Committee believes that a shorter time period is necessary and notes that such charges are rarely for substantial amounts and should not require this longer timeframe.
14.	Section 42(2) states that rent payable under a fixed term agreement for a tenancy exceeding 2 years may be increased not more than once in any 12 period and whether or not the agreement sets out the amount of the increase or the method for determining the increase.	-	The Committee believes that a tenant should be able to take comfort from the agreed terms in a residential tenancy agreement. A landlord should only have the right to increase rent if the agreement contemplates such a right.
15.	Section 43(3) indicates that the landlord and tenant may agree to reduce the rent payable for premises during periods when access to the residential premises is required to be given to prospective purchasers of the premises.	Current section 53(2) requires the parties to use all reasonable efforts to agree dates and times for any such inspections.	The Committee is of the view that a tenant should not have the right to a rent reduction if the legislation obligates the parties to agreed times and dates. If additional protection of the tenant is required, perhaps the Bill could provide for no more than 2 inspections in a week.

16.	Section 53 details the obligations on a landlord in respect of its intention to sell residential premises. In particular, an obligation to provide written notice to the tenant before preparing a contract for sale of the premises.		A landlord should not be prohibited from instructing its lawyer / conveyancer to prepare a Contract for Sale and should only be obligated to notify the Tenant immediately before the commencement of any marketing of the residential premises. Given the <i>Conveyancing Act 1919</i> and the <i>Property, Stock and Business Agents Act 2002</i> prohibits the marketing of residential premises without a Contract for Sale – this should be sufficient.
17.	Section 55(1)(l) states that a landlord cannot enter the premises to show to prospective buyers or mortgagee if the tenant is given not less than 24 hours notice on each occasion.		The Committee believes that this timeframe is too short. It is noted that this section is essentially a “fall back” section in the event that parties have not agreed such times under section 53(2) of the Bill.
18.	Section 71(4) and section 72(3) detail the requirements for providing a replacement key for premises in the event the tenant changes the locks.		A timeframe should be inserted into this section by which the replacement keys are to be provided to the landlord and / or the landlord’s agent (within 7 days?).
19.	Section 76(2) states that “...the landlord must give the tenant a notice of sale” containing the details of the purchaser and the direction to whom rent is to be paid.	Section 34 of the current Act contemplates that the notice can be given “by or on behalf of the landlord”.	The wording of section 76(2) should be amended to contemplate the notice being provided “by or on behalf of the landlord” – given in practice such a notice is prepared by the landlord’s solicitor and handed to the purchaser’s solicitor on settlement.
20.	Section 88(3) states that a non-payment termination notice must inform the tenant that the tenant is not required to vacate the		The Committee has some concern in respect of the intention of this section and whether a landlord is obligated to offer a repayment plan option before seeking to terminate a lease for non-payment of rent.

	premises if the tenant pays all rent owing or enters into and fully complies with a repayment plan agreed with the landlord		
21.	Section 94 provides for the termination of a long term lease of over 20 years only by way of application to the Tribunal.	-	The Committee has a concern as to the rationale for these tenancies being protected and only terminable by application to the Tribunal. These tenancies should be able to be terminated in line with any other agreement.
22.	Section 98 specifies the amounts that can be charged for break fees under a fixed term agreement.		<p>The Committee is wary of the existence of parameters around the calculation of break fees and suggests that it is necessary to consider the relevant factual circumstances (for example if a fixed 6 year tenancy is being terminated in the first 6 months, regard should be had to the balance of the unexpired portion of the term).</p> <p>In any event, the use of the wording "an amount equal to not more than 6 weeks rent..." indicates that there may be negotiation between the parties – whereas the Committee is of the opinion that certainty needs to exist and therefore should be set at four or six weeks.</p>
23.	Section 103 provides a regime for the termination by a co-tenant of a tenancy arrangement.		The Committee is of the opinion that just because one tenant is seeking to terminate its arrangement, it should not give right for the Tribunal to terminate the arrangement. This can be dealt with under section 104.
24.	Section 108 states the right of the landlord or the legal personal representative of the tenant to serve a termination notice in the event of the death of a tenant.	-	The Committee believes further clarification around how one confirms the authority and identify of the legal personal representative of the deceased tenant.

25.	Section 110(2) indicates that if a termination notice is given by a landlord, the tenant is not liable to pay rent for the period commencing when vacant possession is given in the event this is earlier than the termination date.		The Committee does not agree that the tenant should not be liable for the payment of rent in these circumstances..
26.	Section 115(2) states that the Tribunal may find a termination notice as being retaliatory if it is wholly or partly motivated by a number of factors.		The Committee is of the opinion that reference to the word "partly" should be removed from this section. Consideration should be given to a "predominant factor" test.
27.	Section 126 details the requirements in respect of storage of goods and personal documents left in premises. Personal documents are defined to include (amongst other things) computer records.		Further clarification around what constitutes computer records is required. Should this be limited to hard copy computer generated documents only? This is to ensure that the section cannot be interpreted as requiring a landlord to access / remove any personal information stored on a computer which has been left in the premises.
28.	Section 131 requires a landlord to store any personal documents left in the premises for 90 days.		The Committee is of the opinion that this timeframe is too long.
29.	Section 132(4) indicates that a landlord or landlord's agent may require a former tenant to pay an		This section should be amended to align with the timing requirements in section 130 and 131. That is, the landlord should be entitled to recover an occupation fee for 90 days

	occupation fee not exceeding 14 days rent for each day that goods are left on the premises or stored by the landlord.		(if required) for the storage of personal documents. As an example, a tenant may have left a large volume of archives boxes full of personal information which the landlord is obligated to store for the 90 days.
30.	Section 159 states that a landlord cannot require a rental bond exceeding 4 weeks rent.	-	The provisions of the current Act which allows a landlord to hold 6 weeks bond for furnished premises need to be considered in terms of transitional issues. This is relevant given the penalty that applies for a breach of section 159.
31.	Section 190 details that a landlord or tenant may apply to the Tribunal for an order in relation to a breach of a residential tenancy agreement not later than 30 days after the landlord or tenant becomes aware of the breach.	-	The effect of this section is that the landlord and tenant lose the right to go to the Tribunal if no action has been taken within 30 days of the breach. This does not encourage alternative dispute resolution methods before recourse of the Tribunal. The concept should accordingly be removed or the time frame extended.
32.	Section 210-216 deal with use of tenancy database information.		The Committee believes reference should be made to the National Privacy Principles – noting the only reference appears in section 218.