Residential Tenancies Act 2010 and Amendment (Review) Bill 2018

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Introduction

This position paper examines the impact of current and proposed legislation under the *Residential Tenancies Act 2010* on residents of NSW; specifically in relation to s 89(5), No Grounds and Retaliatory Terminations, and s 10, Application of Act to occupants in shared households.

The paper sets out the current or proposed legislation, then discusses the impact and ramifications of the current or proposed legislation, followed by a proposed legal remedy. A case study has been included to demonstrate each issue in real terms of tenants' experience.

RLC is calling for a better balancing of renters' and landlords' rights by ending no grounds and retaliatory evictions, and ensuring that share housing tenants without written agreements can access the same legal protections under the Act as other renters.

Proposed legislation

RESIDENTIAL TENANCIES AMENDMENT (REVIEW) BILL 2018

Section 89 (5) and (5A)

Omit section 89 (5). Insert instead:

(5) The Tribunal may, on application by a landlord, make a termination order despite subsection (2) or (3) if it is satisfied that the tenant has frequently failed to pay either or both of the following amounts owing to the landlord for the residential premises:

1. *(a) rent, on or before the day set out in the residential tenancy agreement,*
2. *(b) water usage charges in accordance with section 39.*

(5A) The Tribunal may make a termination order under subsection (5) on the grounds set out in subsection (5) (b) only if the landlord has, on each relevant occasion, requested payment from the tenant within 3 months of the issue of the bill for those charges by the water supply authority.

Targeting of the most vulnerable

Generally, it is the most economically marginalised and financially vulnerable that find themselves facing NCAT termination proceedings for a 'non-payment termination'. These are tenants either on benefits or low incomes. As per the 2017 Anglicare and Catholic Care reports on rental affordability, these are the class of renters paying the highest percentages of their income towards rent.

Anglicare found that there was less than 1% of properties were affordable for anyone on benefits in the Greater Sydney and Illawarra Region, rising to just 4% of properties being affordable for minimum wage earners for two adults receiving Part A & B tax family tax benefits for two children.

These are renters that will typically have fallen behind from time to time in their rental ledger when bills have stacked up, or one parent is ill, etc. The consequence from these struggles to keep a roof over the family head, is that if they do fall into 14 days arrears, the landlord can force a termination regardless of the family rectifying their breach. (See NSW LAHC v Yonan (2017)).

ISTAAS has defended many vulnerable clients against s 89(5) terminations, including many social housing clients. The landlords push for s 89(5) termination will often leave the most vulnerable facing homelessness. A termination under s 89(5) removes these vulnerable clients from accessing any assistance, such as brokerage, as the requirements for such assistance is that the tenancy will remain on foot. This section prevents successful early intervention tenancy programs from keeping vulnerable clients from becoming homeless. Homelessness Australia shows that approximately 40% of Australia's homeless are in NSW, approximately 25% of homeless are Indigenous and approximately 17% of all homeless are under 12 years of age.

This addition to s 89(5), of finding another way to prevent 'pay to stay' provisions on s 89(1)-(4) to operate can only increase the pressure on already financially vulnerable renters, and ultimately lead to an increase of homelessness.

Real Impacts for a Tenants and Landlord

A tenant who has received orders under s 87 for a 'non-payment' termination and accesses s 89(1)-(4) to save the tenancy in no way prejudices the landlord. In fact, these tenants, by seeking help and remedying their breach have prevented the landlord from suffering a financial loss due to the termination and prevented their own homelessness.

A landlord will suffer a financial loss each time a tenancy is terminated, in that they will suffer a period of non-rent while reletting the property, releasing fees, advertising fees, etc. A tenant who complies with the 'pay to stay' provisions of s 89(1)-(4) will bring all rent up to date or have entered into a payment plan the landlord accepted. This prevents all of these unnecessary fees on the landlord and prevents the tenants from becoming homeless. Often tenants who have sought brokerage assistance for rental

arrears, will also be required to enter into financial counselling to avoid further arrears. This produces a more stable tenant, even if financially vulnerable.

Section 89(5) orders prevents tenants from accessing brokerage, as the tenancy cannot be 'saved' by paying all money owed. This will leave vulnerable tenants carrying a debt they are unlikely to be able to service, as they are now homeless, and landlords in a position that they will be unlikely to recover rental arrears beyond the value of the bond. This could be avoided if s 89(5) were not in place.

Section 89(5) prevents any of these remedies under the Residential Tenancies Act and ultimately increases homelessness.

Increasing the criteria that a finding of s 89(5) can be made will only add to the burdens of the most vulnerable and further increase homelessness.

Case Study

James is a social housing tenant whose income had become irregular, as he had some health issues that had affected his ability to work. James was a minimum wage worker. His son had also been suffering from severe mental health issues that had prevented him from working. The household was made up of James and his son.

The health issues James and his son had been experiencing had caused their income to become irregular and the rent had sometimes fallen slightly behind over a couple of months. The rent had always been recovered. Eventually, James faced NCAT termination proceedings for non-payment of rent and s89(5). At the time of the proceedings James only owed $119.30 and was able to commit to pay that amount off within a week.

Although James had been in and out of arrears over previous months, he had never been severely in arrears. He was terminated at NCAT and orders for frequently behind (s89(5)) were made also. This meant James and his son, social housing tenants that had been experiencing health issues were now unable to save their tenancy and facing homelessness.

Legal Remedy: Removing s 89(5) from the RTA 2010

Removing s 89(5) from the RTA 2010 would not impact negatively on the landlord. There are advantages raised above to the landlord when a terminated tenancy is exposed to the savings provisions in s 89(1)-(4) of the RTA 2010.

A landlord has no obligation to enter into a payment plan with the tenant, and in that instant a tenant would only be able to save the tenancy if they were able to pay all rent owing before the Warrant for Possession is executed by the Sheriff. If all rent owing is paid there is no longer any prejudice to the landlord as the breach has been fully remedied. The landlord has been restored to the position as though there had been no breach occur at all. There is no reason to further punish the tenant by now making them face homelessness.

Current legislation

RESIDENTIAL TENANCIES ACT 2010

No Grounds Terminations and Retaliatory Evictions – s 85 & 115

s 84 End of residential tenancy agreement at end of fixed term tenancy

(1) A landlord may, at any time before the end of the fixed term of a fixed term agreement, give a termination notice for the agreement that is to take effect on or after the end of the fixed term.

(2) The termination notice must specify a termination date that is on or after the end of the fixed term and not earlier than 30 days after the day on which the notice is given.

(3) The Tribunal must, on application by a landlord, make a termination order if it is satisfied that a termination notice was given in accordance with this section and the tenant has not vacated the premises as required by the notice.

(4) This section does not apply to a residential tenancy agreement if the tenant has been in continual possession of the same residential premises for a period of 20 years or more and the fixed term of the original fixed term agreement has ended.

s 115 Retaliatory evictions

(1) The Tribunal may, on application by a tenant or when considering an application for a termination order or in relation to a termination notice:

(a) declare that a termination notice has no effect, or
(b) refuse to make a termination order,
if it is satisfied that a termination notice given or application made by the landlord was a retaliatory notice or a retaliatory application.

(2) The Tribunal may find that a termination notice is a retaliatory notice or that an application is a retaliatory application if it is satisfied that the landlord was wholly or partly motivated to give the notice or make the application for any of the following reasons:

(a) the tenant had applied or proposed to apply to the Tribunal for an order,
(b) the tenant had taken or proposed to take any other action to enforce a right of the tenant under the residential tenancy agreement, this Act or any other law,
(c) an order of the Tribunal was in force in relation to the landlord and tenant.

(3) A tenant may make an application to the Tribunal for a declaration under this section before the termination date and within the period prescribed by the regulations after the termination notice is given to the tenant.

Better Balancing of Renters' and Landlords' Rights

Security of tenure for renters is a major issue and only growing with the increase in long term rental and decrease in home ownership. The 'Housing Tenure' statistics supplied by City of Sydney show that the total Sydney pool of renters in 2016 reached the enormous figure of 55.8%. On average, the bureau of statistics has the rental population Australia wide at approximately 30%.

It is the vulnerable that are most at risk with the landlords ability to terminate without reason. The tenant has effectively had their right to procedural fairness muted as the landlord does not declare the reason for termination and the tenant never has the opportunity to answer the case against them. The issue here is that there is always a threat of retaliation for a tenants behavior with a no grounds termination, and a tenant has no opportunity to respond. The power is solely in the hands of the landlord.

No Grounds terminations of social housing tenants would seem to highlight the issues most effectively. A tenant is given 90 days to vacate from a Government owned asset. This asset is not being made ready to sell but will in turn be re-tenanted by another social housing tenant. There have been subsidy issues in the past with this tenancy, but the current notice is under s 85 – no grounds. The tenant has no case to answer and faces homelessness at termination. (see *NSW LAHC v Khodrogha (2017)).*

Case Study

Jane was living in a community housing provider (CHP) premises that was owned by NSW LAHC. She had asked her client service officer (CSO) for repairs to be carried out on her premises. The CHP did not carry out the repairs. Jane escalated the repairs issue to a team leader at the CHP as she thought they were very serious and made a complaint about the lack of action by the CSO. When repairs were not satisfactorily carried out, Jane continued up the management line asking for the repairs to be completed. Eventually, the repairs were completed, however, jane received a no grounds termination only a matter of months after the repairs were completed. When Jane asked why she was being evicted she was told she had a good run and she should stop winging about everything. Jane believed that she was now facing homelessness because she had asked for necessary repairs to be carried out.

Legal Remedy Proposed

Section 85 of the RTA should be repealed. If section 85 is not repealed, an additional subsection should be inserted:

(5) This section does not apply if the agreement is a social housing tenancy agreement, as defined in s 136.

Recommendations: Retaliatory evictions

Section 115 of the RTA 2010 should be amended such that:

1. the landlord bears the onus of proof in establishing that a termination notice was *not* retaliatory.

2. the Tribunal *must* set aside a termination notice if it is found to be retaliatory.

3. the Tribunal is able to order a preclusion period during which a landlord is prevented from issuing further termination notices (other than termination notices under s 87) following the setting aside of a retaliatory notice.

Section 10 – Application of Act to occupants in shared households

A person who occupies residential premises that are subject to a written residential tenancy agreement, is not named as a tenant in the agreement and who occupies the premises together with a named tenant is a tenant for the purposes of this Act only if:

(a) a tenant under that agreement transfers the tenancy to the person or the person is recognised as a tenant (see Part 4), or

(b) the person is a sub-tenant of a tenant under a written residential tenancy agreement with that tenant.

Note: Boarders and lodgers are not covered by this Act (see section 8 (1) (c)). An occupier may be recognised as a tenant (see sections 77 and 79).

Share house occupants falling through the cracks

Sub-tenants, as we can see from s 10 above, are only those with a written agreement with their head tenant. This puts many share house occupants in a position of not being protected by the *Residential Tenancies Act 2010* (RTA 2010) and excluded from resolving their disputes at NCAT.

The main difference between being a boarder and a share house occupant, is that if you are a boarder, the landlord maintains mastery over the premises, including your bedroom and there are 5 or more beds occupied in the premises. The *Boarding Houses Act 2012* (BHA 2012) affords boarders the protection of occupancy agreements and the right to take their disputes to the NCAT.

Therefore, a whole class of share house occupants that look identical to sub-tenants, except they don't have a formal written agreement fall through the cracks with no

legislative protections under either the RTA 2010 or the BHA 2012 and are blocked from accessing the 'just, quick and cheap' dispute resolution offered by NCAT, that sub-tenants and boarders both enjoy.

Impact of s 10 of the RTA 2010

According to the 2016 City of Sydney 'Housing Tenure' Data, the number of renters in Sydney continues to grow, with 47.3% of people residing in private rental properties. As housing becomes more and more unaffordable, more Sydney residents are turning to long term rental. This same survey shows 26.3% of rental properties in Sydney are non-related groups. It is from this group that sub-tenants, share house occupants and boarders are most likely drawn. This is a much larger portion that what this group would traditionally fill, being mainly students.

The usual way for this group to find accommodation is to respond to an internet ad, such as on 'gum tree or flatemates.com'. It is unlikely that approaching accommodation this way will result in a formal signed agreement to be put in place for the protection of the share house occupant.

Problems arise when there are disputes between the head-tenant and the share house occupant. It is not unusual for the share house occupant to be given very short notice to vacate their room (see case study below). Unfortunately, as share house occupants without a written agreement, this group cannot apply to the NCAT for a resolution to their dispute and have very few rights and protections.

The most common issue for share house occupants contacting the Inner Sydney Tenants' Advice and Advocacy Service (ISTAAS) is the non-return of bond money paid. Again, without a written agreement, they cannot apply to the NCAT to have their bond returned, as any other sub-tenant or boarder could, under the RTA 2010 or the BHA 2012. Instead they have to file a claim with the local court, which can be expensive and makes no allowance for the common man to self-represent.

Tenants Advice Services are continually trying to educate and inform sub-tenants to enter into a written agreement with their head-tenant (see a sample agreement on RLC share housing website http://sharehousing.org/) However, most share house occupants have only verbal agreements with their head-tenants, therefore excluding them from the protection of the RTA 2010.

Case Study

Meili, an international student, rented a bedroom in a unit in the CBD, sharing the room with another international student. There was no written agreement with the head-tenant. Meili had paid a bond of two weeks' rent ($440) for which she had received a receipt. She paid her rent every Sunday for one week in advance.

Meili's room was unfurnished, and she had bought her own bed, mattress and other basic furniture. The head-tenant would not enter her room. Meili shared the cleaning of the

bathroom, kitchen and common areas on a rostered basis with her roommate and the head-tenant.

When the head-tenant's friends arrived unexpectedly from overseas, the head-tenant told Meili and her roommate that they would have to vacate the next day, so that the head-tenants friends could move into their room.

Meili protested, as she would not be able to find alternative accommodation at such short notice, nor would she be able to arrange storage for her furniture and goods. When Meili returned from university the next afternoon, she found that her electronic key had been cancelled, and she could not access the building.

Meili stayed the night in a hotel. She sought advice from a tenant advocate who negotiated a time with the head-tenant for Meili to pick up her furniture and belongings. However, Meili never received her overpaid rent and the bond that she had paid to the head-tenant. As Meili is excluded from the RTA 2010, she would have had to file a claim in the local court, a process that felt too overwhelming to her.

As the unit only had three beds, Meili also would not be covered by the occupancy provisions of the BHA 2012, once they come into operation.

Legal Remedy: Removing the word '*written*' from s 10(1)(b) of the RTA 2010

Removing the word '*written*' from s 10(b) of the RTA would bring share house occupants again within the jurisdiction of the NCAT and afford them the same tenancy rights under the RTA 2010 than any other tenants and sub-tenants. Currently a residential tenancy agreement between a landlord and tenant can be oral, part oral or written. There is no legal impediment to the same terms between head-tenants and sub-tenants.

There would be no detriment to property owners, nor to the NCAT, if the amendment was made. Landlords would still have a legally binding agreement with head-tenants, whether this agreement is in writing or oral, or part-writing and oral. There is no legal relationship between the sub-tenant and the owner of the premises, and it would have no legal or other ramification for the owner if sub-tenants are protected by the RTA 2010.

However, a head-tenant would still need to get permission from the landlord under s 75 of the Act if they would like to sub-let the premises. This amendment, would indeed benefit landlords as it would make it harder for head-tenants to exceed the number of occupants permitted under the lease without the landlord's knowledge or permission, if those occupants or sub-tenants were afforded the protection of the RTA 2010 and could take matters, such as breach of quiet enjoyment (through overcrowding) to the NCAT.