

**Submission
No 2**

RESIDENTIAL TENANCIES AMENDMENT (RENTAL FAIRNESS) BILL 2023

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Legislative Assembly Select Committee on the Residential Tenancies Amendment (Rental Fairness) Bill 2023
NSW Parliament

To the Committee

Re: Residential Tenancies Amendment (Rental Fairness) Bill 2023

This is a submission in support of the *Residential Tenancies Amendment (Rental Fairness) Bill 2023* (the Bill), subject to two small suggested changes for consistency with the *Residential Tenancies Act 2010* (the Act).

The submission reflects my experience of working in residential tenancies law for more than 20 years, first as a tenants advocate, then as the lead officer for policy and law reform at the Tenants' Union of NSW, and now as a Senior Research Fellow, Housing Policy and Practice, at the City Futures Research Centre, UNSW Sydney. My research specialism is rental housing law and policy. Among other research publications, I am the lead author of the report 'Regulation of residential tenancies and impacts on investment', a major study of Australian residential tenancies laws, published recently by the Australian Housing and Urban Research Institute (AHURI).¹

The Bill relates to two sets of issues: 1) advertisements for rental premises and 'rental bidding'; and 2) provisions for 'bond roll-over scheme'. I address each in turn.

Advertisements and 'rental bidding'

The general practice of landlords and agents is to advertise premises stating the specific amount of rent sought. The Bill would make this general practice the required practice – as it already is of agents, per last year's amendments to the *Property Stock and Business Regulation*.

From time to time, some landlords and agents have advertised premises without a specific amount of rent stated – usually with a range of rents or 'offers from'. This is sharp practice, akin to underquoting: the land or agent is not interested in letting the premises at the lower rent amount, but it attracts a greater number of prospective applicants to the property, which gives the appearance of much interest in the property and so may induce applicants to bid up the rent. The late Mr David Pilling, a real estate entrepreneur, promoted 'rent ranging' to real estate agents in expressly these terms in the early 2000s, as part of a 'system' for marketing properties for sale

¹ Martin, C., Hulse, K., Ghasri, M., Ralston, L., Crommelin, L., Goodall, Z., Parkinson, S. and O'Brien Webb, E. (2022) *Regulation of residential tenancies and impacts on investment*, AHURI Final Report No. 391, Australian Housing and Urban Research Institute, Melbourne, <https://www.ahuri.edu.au/research/finalreports/391>, doi: 10.18408/ahuri7124801.

and rent. On action by the Australian Competition and Consumer Commission, the Federal Court in 2004 made declarations action against Mr Pilling for misleading conduct in relation to his system. It was around this time that Queensland became the first jurisdiction to legislate a requirement that advertisements state a fixed amount of rent.

More recently, some new digital applications and platforms for advertising properties and making applications have included features that facilitate or encourage applicants to make higher offers. And over the past year or so, with vacancy rates very low in rental markets across Australia, media have been reporting other signs of market pressure, such as queues for property inspections and rental bidding – including unsolicited higher offers from applicants.

On the available evidence, it is difficult to say whether rental bidding has become more prevalent. It might be possible to measure the prevalence of rental bidding by linking property-level data about asking rents (advertised by landlords and agents and recorded by CoreLogic and SQM) with property-level data about rents at the commencement of new tenancies (recorded in rental bond lodgements), and seeing how often the latter exceeds the former. In the absence of linked property-level data, the published aggregate data suggest that asking rents and new tenancy rents have moved approximately in line. CoreLogic reports that the median asking rent for Sydney in the March quarter 2023 was \$699 per week (up 12.6% over 12 months). SQM reports a median asking rent of \$735 per week (up 21% over 12 months).² According to rental bond data, the median rent for new tenancies commencing in Sydney in the March 2023 quarter, was \$639 per week (up 20.6% over 12 months). The ABS's recent report 'New insights into the rental market'³ shows similar trends nationally, with asking rents ('advertised rents') increasing steeply from late 2000, approximately tracked by new tenancy rents ('actual rents'), with both up more than 20% over the past two years (Figure 15). Notably, that figure shows the 'actual rents' line rising more steeply (from a lower base) and in the most recent couple of months passing the 'advertised rents' line. However, because both lines are indexed to 100 (in February 2020), it is not possible to say that it shows actual rents surpassing advertised rents in nominal dollar terms.

I think it is plausible that rental bidding has recently become more prevalent, particularly the unsolicited form. However, I doubt that the practice is driving the rising level of rents. The current highly pressured state of the market is the result of a combination of demand- and supply-side factors, and rental bidding is more of a symptom of the pressure than a cause. There is a good case for legislating with respect to advertisements and rental bidding for the purpose of eliminating sharp practice by landlords and agents; there is also a case for increased transparency of unsolicited higher offers. But we should not expect such action to result in significant improvements in affordability.

² SQM reports median rents biweekly, rather than quarterly, so the figures stated are for the midpoint of the March quarter (i.e. mid-February).

³ Hanmer, F. and Marcquardt, M. (2023) 'New insights into the rental market', ABS, Canberra.
<https://www.abs.gov.au/statistics/detailed-methodology-information/information-papers/new-insights-rental-market>

The Bill's requirement that advertisements state a 'fixed amount' of rent is an appropriate safeguard against the sharp practice of 'rent ranging' and induced rental bidding. Similarly, the requirement that landlords, agents and other persons not solicit higher offers from applicants is an appropriate complementary safeguard. It works against landlords and agents advertising at a low fixed amount, generating the appearance of much interest and then inducing higher offers. It would also guard against other intermediaries in the application process soliciting or inviting higher offers (proposed s 22A(3)).

If the Bill did this much, and not more, it would be a worthwhile reform targeted to a sharp practice.

Aside from this, the Bill also seeks, per the Minister's second reading speech, to 'remove secret rent bidding' by applicants making unsolicited higher offers, without sharp practice on the part of the landlord or agent. The Bill would require landlords and agents to disclose a higher offer from an 'acceptable applicant' to all other applicants and, if they are continuing to advertise the premises, to disclose the higher offer to prospective applicants and take reasonable steps to change the advertisement to reflect the higher offer. The Bill excludes the required disclosures from the prohibition on soliciting higher offers.

I understand that some advocates are concerned that the disclosure provisions undermine the prohibition on soliciting higher offers and may even facilitate the practice of rental bidding. I think these are valid concerns but that the Bill avoids having such effects. It seems to me that the circumstances in which disclosures are required are tightly drawn and appropriate (except for two minor inconsistencies with other provisions of the Act, which are noted below).

The obligation to disclose a higher offer would only kick in when an applicant becomes an 'acceptable applicant' – defined as 'an applicant with whom the landlord would be willing to enter into a residential tenancy agreement' (proposed s 22B(4)). I take this to mean that the landlord or agent has checked the applicant's bona fides and, but for the matter of agreeing on the amount of rent to be paid, is willing to offer the tenancy to the applicant. I also take it that, as a matter of practice, a landlord or agent may check several applications simultaneously, and that there may be several 'acceptable applicants' at once. At that point, the landlord or agent has one business day to disclose the higher offer in writing to other applicants. No holding fee may be taken, nor an offer of a tenancy agreement be made, prior to the disclosure of the higher offer (proposed s 22B(2)(a)(ii)(A-B)), but once the disclosure is made a holding fee may be taken and a tenancy offered without further delay. Once a holding fee is taken the disclosure requirements cease and the prohibition on soliciting higher offers applies as usual.

If another applicant responds with a yet higher offer, and their application is 'acceptable' in other respects, their yet higher offer must be disclosed to other applicants within one business day.

The disclosure requirements place on landlords and agents an obligation to disclose formally (in writing) and promptly (within one business day) and to keep records of all disclosures. The

requirements would also place on applicants some slight downsides to making higher offers: i.e. offers must be disclosed, they prevent a holding deposit being taken immediately, and they prevent a tenancy being offered immediately. It seems to me that this is not unduly encouraging of rental bidding. On the contrary, it may be that applicants will be less inclined to make higher offers; it might even be that landlords and agents will be less inclined to take them.

There are two inconsistencies that I think should be amended. First, the Bill refers to 'holding deposits', where the Act refers to 'holding fees' (s 24). Second, the Bill refers to where the landlord is considering 'another open house inspection' (proposed s 22B(2)(b)). Open house inspections are not expressly countenanced in the access provisions of the *Residential Tenancies Act 2010* (s 55). The provision should instead refer to landlords and agents showing the premises to prospective tenants, per s 55.

A bond roll-over scheme

The Bill makes provision for a 'bond roll-over scheme'. There are no details about the scheme in the Bill itself, but I understand that a proposal has been discussed with sector stakeholders. The proposed scheme would allow tenants to effectively lodge the bond for their new tenancy using a 'provisional certificate' backed by the bond for their previous tenancy (and if the new bond amount is higher, the tenant would pay the difference in cash). Then, when the previous tenancy ends, the bond pays out the provisional certificate – and if any of the bond is paid to the previous landlord, the tenant again has to make up the difference in cash. All this happens in the first few months of the new tenancy, when there is unlikely to be any cause for the new landlord to make a claim on the bond. This seems to me to be a neat fix for the cashflow problem tenants often experience between tenancies.

Yours sincerely

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