Submission No 45

RESIDENTIAL TENANCIES AMENDMENT (PROHIBITING NO GROUNDS EVICTIONS) BILL 2024

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Prohibiting No Grounds Evictions Bill 2024

This report reviews the *Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2024*. The bill is supported in principle however this report raises a range of concerns and makes relevant recommendations.

Most submissions to the current committee fall into two positions. Social welfare organisations rightly explain that the current provision for no-grounds eviction reduces stability in the lives of a large segment of the community, especially as rental market conditions have become less stable.

Some other submissions represent property investors or agents. These provide an economic justification for no-grounds eviction. The fundamentals they propound are correct and their concerns should not be treated lightly.

The position taken by this paper is to agree with the government and wider community call to end no-grounds evictions, but that some repercussions of the change are inadequately addressed. All regulation is a trade-off and the majority of tenants may be financially worse off. Additionally, increasing numbers of tenants could be blacklisted, risking greater homelessness.

The nature of this review

This review is a synthesis of economic, legal and sociological analysis. It is neutral to all economic actors. Some basic assumptions are:

1. The rental system operates as a regulated market in a society where homeownership is preferable, advantageous, but often unattainable
2. Renters and landlords are bound contractually, economically and socially
3. A transaction in the market is costly to the tenant, economically and socially
4. Enforcement of regulation should be fair and efficient, where parties usually resolve disputes without appearing before a tribunal — NCAT in NSW
5. The situations of people with social disadvantage are complex and the rental market must remain available to them, as far as possible.

the underlying issue is the trade-off between rental market flexibility and the transactional cost of displacement

Supply of dwellings

The underlying causes of increasing evictions and rental stress are economic factors, particularly the supply of dwellings being lower than demand. A declining percentage of houses and apartments are owner-occupied. Tenants pay higher rents and the market churns through them ever faster. A range of financial investments, such as stocks and bonds, competes with real estate. Private investors in real estate also financially compete with home owners.

The general consensus is that the current law allowing no-grounds eviction benefits landlords over tenants. For the landlord-tenant relationship itself, the economic reaction for the landlord will be to raise rent to offset the inconvenience and risk of a potentially fractious or defaulting tenant, even if that risk is only realised in a small minority of occupants. It only requires average rental values to rise to send a price signal across the market.

only more residential construction can relieve the ongoing rental market crisis

If the public attitude is that the new law makes renting easier, we should also find:

1. Renting seen as an attractive option compared to home ownership
2. Other investments becoming more attractive than real estate.

With less demand from property investors and aspiring home-owners alike, rental prices must increase further to attract investment, rising more than what a landlord would voluntarily demand to give tenants greater security. It follows that market conditions would become inflationary, making tenants less financially secure. A future government facing such an accommodation crisis would be pressed to reintroduce no-grounds eviction wholesale.

The following two recommendations are a buffer against these forces.

Recommendation 1: Regulate provisions flexibly

As far as possible, the eviction process should be inserted into regulation rather than statute to allow the government to adjust the risk faced by landlords and tenants, ensuring the rental market operates efficiently. To achieve this, the full list of valid reasons for a 90 day termination notice or ending a fixed term tenancy would be inserted into a regulatory schedule.

As a practical matter, the short list of eviction reasons is insufficient, plus there are many non-standard tenancy situations. A elderly landlord may decide to let her nearby apartment to a carer. A parent may ask their adult child to leave the family home due to domestic stress. Should these be permitted or not? Importantly, how would someone know?

If regulation was inflexible, landlords will deal with various situations via NCAT, such as using the hardship provision (s.93). Without the option of no-grounds eviction, NCAT would be likely to consider hardship applications more favourably. The rights and obligations of landlords and tenants would be obscure, requiring costly legal advice to resolve. There is no incentive for two lawyers to reach a compromise, further increasing average costs.

In contrast, there is already criticism of the proposed bill for 84(1)(d) and 85(1)(d) based on the notion that such rights and obligations should be subject to parliamentary scrutiny. In practice, special grounds for eviction would exist in case law, with many ordinary decisions going unpublished. That said, the greater risk would be a painful market adjustment, with the government unable to take desperately needed responsive action.

Could the market decide?

A quirk of the debate not raised is that individual landlords are not offered freedom to contract on the question of tenancy termination. Unlike a commercial lease, they cannot insert into a contract conditions that would offer a tenant stability. A landlord cannot voluntarily commit to providing valid reasons to discontinue a tenancy or allow a distribution of risks.

Under the *Residential Tenancies Act 2010,* there are two basic choices:

1. a fixed term contract with 30 days notice to not renew the tenancy
2. a periodic contract with 90 days notice

regulated stability will be offset with higher rent values

These same rules apply, whether the tenant is a young international student, a divorcee or a large family tied to the community. A tenant could be reliant on social security or a millionaire. Landlords themselves are in varying situations, from corporations to retirees. It follows that most of the required stability could be obtained by giving landlords and tenants sensible contracting options, such as having proper grounds for termination.

The underlying issue in the proposed bill is the allocation of risk, especially the risk of dispute. If landlords and tenants were given the opportunity to price risk, they may opt to do so differently and have valid reasons for doing so, such as a family tied to a community seeking long-term stability.

A low-income tenant may accept eviction risk to stay financially stable. If it were mandatory for the landlord to accept that risk, many tenants would retreat to boarding homes, emergency accommodation or become homeless. The former tenant may be effectively blacklisted in a tenancy database.

The bill need not confine itself to a one-size fits all approach.

Recommendation 2: Permit contract flexibility

Allow the following options in a Residential Tenancies Agreement:

1. Permit no-grounds eviction in return for a reduction in the marketed or deposit rent value by an agreed percentage of 5% or more.
2. Extend termination notice periods in lots of 15 days in return for a different agreed percentage, but not less than 2% net.

Mediation to reduce NCAT applications

No-grounds eviction has the advantage that there is less pressure on the tribunal system. In most cases, a landlord and tenant will part ways. The current bill does permit a tenant from leaving a bad tenancy, but under a regulated eviction process the landlord does not have a simple exit option when the tenant-landlord relationship becomes strained.

If there is reduced incentive for a tenant to be conciliatory, there is more likelihood that a troubled relationship will occur. An increased number of disputes will be felt in the tribunal system, especially under the provisions

of contract breach, hardship, harassment and being in arrears. Aside from being stressful to pursue, this will increase wait times. NCAT will come under pressure to accept claims of landlord hardship. If cases cannot be handled efficiently, parties in dispute may begin cross-claims, engage in aggrieved behaviours and/or bring suit for compensation.

mediation is vital to resolve basic disputes without relying on an overwhelmed NCAT

Some tenants require specific explanations to understand an issue. When a less expensive, less stressful method of resolving a dispute exists, then it should be made available.

Mediation or alternative dispute resolution works well as a mechanism to detail underlying issues and reduce tensions. Efforts to conciliate between the tenant and landlord should be rewarded.

NCAT has a mediation process, but it only occurs just prior to a hearing. In tenancy matters, the mediation will usually occur on the same day as the hearing. It does not function to avoid an NCAT application. In contrast, the *Retail Leases Act 1994* insists on meditation prior to starting proceedings.

A mediated solution could be a fraction of the total cost of tribunal action. It can take place on the premises. It can also resolve the tenant's problems or issues while still averting an eviction. Although not final, it may resolve most disputes efficiently. A mediation would not disadvantage conciliatory tenants who would co-operate to fix the discussed concern.

Recommendation 3: Mediation

The *Residential Tenancies Act* should recognise mediation and alternative dispute resolution as a mechanism to avoid tribunal proceedings. Specifically, a landlord should be able to engage an independent mediator, where they have a genuine issue of hardship, disruption or non-compliance. If the mediation process fails or the tenant refuses to participate, a landlord has grounds to issue a 90 day termination notice or end a fixed term tenancy. NCAT needs to only become involved where the mediation was claimed to be unfair, unreasonable or not independent.

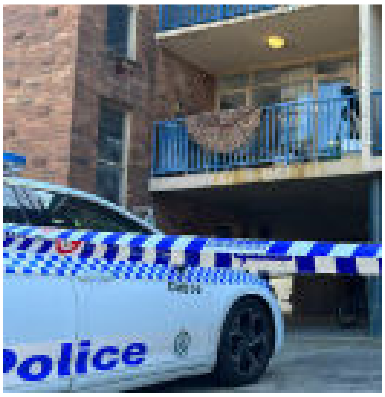
Warning notices to reduce NCAT applications

There are a number of provisions of the *Residential Tenancies Act* that deal with serious issues between a landlord and tenant. These are:

most evictions are due to financial issues

- Breach of agreement (s.87)
- Non-payment of rent (s.88)
- Serious damage or injury (s.90)
- Illegal purposes (s.91)
- Severe threat, abuse, intimidation or harassment (s.92)
- Hardship to the landlord (s.93)

Each of these require some action before NCAT. In some cases, the action will be successful only through an expensive and/or stressful process.



the law is a blunt instrument, only to be used as a last resort

Some litigants are less capable of presenting an argument at NCAT than others. In most cases, the ground is required to be "serious", but then gives rise to immediate termination. There is seemingly no provision in the bill for medium-level or repeating breaches that would currently be resolved via no-grounds or end of lease termination.

It is expedient to insert a process that offers eviction pathways for this level of breach without harsh disputation. In cases where such things were alleged, the landlord should be given the option of issuing multiple warnings and only then terminating with adequate notice periods, all without going to NCAT.

The possibility of receiving warnings could provide an incentive for most tenants to maintain good relations with the landlord. It is possible that some landlords may utilise this system excessively, however such landlords are ready to make exaggerated claims through NCAT regardless, where notice periods may be punitive. An NCAT costs application may need to be defended. As a public process, the tenant may become blacklisted, not able to apply for new residential lease and/or possibly made homeless.

Recommendation 4: Warning notices

A landlord should be permitted to issue either a warning notice for certain reasons that may be otherwise actionable at the NCAT tribunal:

- breaches of the tenancy agreement
- breaches of strata or community by-laws
- being in arrears by 15 days
  or 5 days on average over 10 weeks
- reckless damage to property
- illegal activities on the premises
- abuse, intimidation or harassment
- hardship to the landlord recognised under a legal precedent in an Australian court or tribunal, that would be applicable in NSW
- financial liability to the landlord or connected to the property

we all deserve a second chance

A warning notice form is provided in the regulations. If within a year, a landlord issues a second warning notice on a new or repeat problem, the second warning optionally represents grounds to end the fixed-term agreement or end a periodic tenancy with 90 days notice. If the tenant believes either warning is unfair, they may complain to NCAT.

Warding against retaliatory eviction

an uncivil dispute can turn home into

An effective regulatory regime requires that a tenant who complains about an issue is not subject to retaliation. If this were permitted a landlord could avoid dealing with the complaint, even if they were at fault, by evicting the tenant. This prohibition is expressed in s.115 of the *Residential Tenancies Act*.

Retaliatory eviction remains conceivable even with a regulated eviction process. If grounds for eviction are limited, landlords may resort to rent increases in lieu of a no-grounds eviction, after a tenant complains. Such retaliation may not properly fall under s.44 which restricts excessive rent, so this should be inserted into s.115.

In NSW, the retaliatory eviction provision remains a weak protection. A tenant is required to prove they formally complained to an authority. Just making a general complaint is rarely sufficient.

Furthermore, the complaint must be directly connected to the tenancy. Since the parliament incorporated anti-domestic violence provisions into the *Residential Tenancies Act 2010*, s.115 appears to apply broadly to retaliatory actions under "this Act or any other laws".

In practice, NCAT follows a decision from *Maksymiuk v Savage* (2015) from the Queensland Supreme Court. For example, if the complaint was sexual predation by a landlord, NCAT could dismiss the retaliatory eviction claim. This is detailed in *Hughes v Hume Community Housing Association Co Ltd* [2023] NSWCATAP 109, this case being another example of what can go wrong between tenant and landlord.

Even if the tenant is successful, the landlord can reissue the eviction notice at any time thereafter. Where a landlord acted capriciously in other ways, they could force a tenant eviction with little risk of penalty.

Recommendation 5:

That the RTA s.115 retaliation provision should be strengthened as follows:

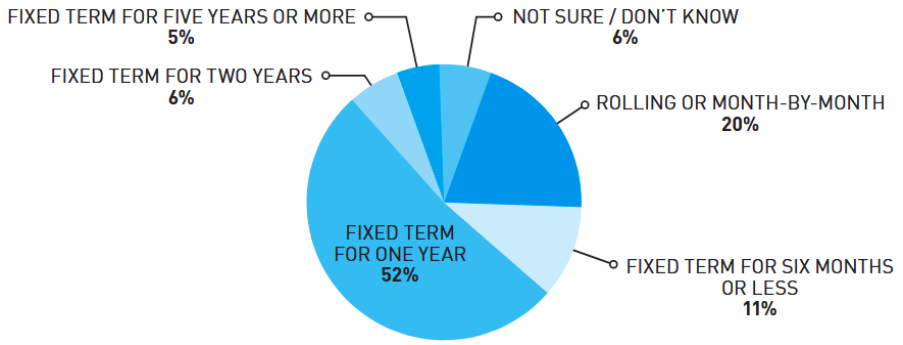
1. Permit an action for a retaliatory increase in rent.
2. Clarify that any valid tenancy complaint is covered by s.115
3. Clarify that a retaliatory eviction does extend to acts of retaliation indirectly linked to the tenancy, such as where the landlord was reported to police or the landlord was the tenant's manager in a work dispute. *Maksymiuk v Savage* should not override NSW law.
4. Empowering NCAT to set further conditions other than the dismissal of the termination notice, such as a compensation payment.
5. Incorporate a provision into s.115 permitting the compensation of a tenant subject to a constructive eviction – the harassment of a tenant to force their eviction.

Transitional mechanisms

The Standard Residential Tenancy Agreement is found in Schedule 1 of the regulations to the Act. The terms may end a tenancy without giving grounds.

Many landlords will be unaware that the law has changed and inadvertently follow the terms on their standard agreement. As strict liability is implied by the new law, landlords may be unknowingly subject to heavy fines.

In 2017, tenants across Australia were surveyed for the report *Unsettled: Life in Australia's Private Rental Market*. The survey found the distribution of residential leases by type was as follows:



This breakdown indicates how many agreements would not reflect the new law over time, based on various fixed-term and rolling agreements. It may be unconstitutional to impose a penalty or alter an agreement voluntarily entered into without notification. Given these considerations, it would be best to implement a transitional procedure that reduces confusion.

Recommendation 6:

In order to facilitate a smooth transition from the no-grounds regime to a regulated eviction process, the following transitional rules are proposed:

1. No-grounds eviction would be available in a fixed-term tenancy agreement using the previous standard form and signed prior the date of proclamation or within 4 weeks of proclamation.
2. No-grounds eviction would be available for up to 12 months from the date of proclamation, under a periodic tenancy agreement signed prior the date of proclamation or within 4 weeks of proclamation.
3. The regulations would provide a standard notice that,
    a. a tenant can optionally issue to a landlord,
    b. an agent can issue to the landlords and tenants of the all tenancy agreements they manage,

    stating the standard terms have been updated by the new law. After serving notice, the new law would apply to the tenancy or tenancies.
4. The new law would not apply to past notices or current proceedings.

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